

Articles

Documenting Gender

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INTRODUCTION

We are witnessing a period of great controversy and law reform about issues of identity documentation and identity verification. In the last few years, both the passage of the Real ID Act¹ and the implementation of new data comparison practices between administrative agencies such as departments of motor vehicles (DMVs) and the Social Security Administration (SSA) have emerged with the aims of enforcing immigration laws about work eligibility and bolstering national security.² Many different types of political groups have objected to these changes and innovations. While these new strategies of surveillance and governance impact everyone in the United States, certain populations have spoken up with particularized concerns about specific consequences and impacts. Several state governors and legislators have opposed the costs of making their DMVs “Real ID compliant.”³ Immigrant rights groups have identified dangers of denying

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1. Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

2. *New Rules on Licenses Pit States Against Feds*, CNN.COM, Jan. 11, 2008, <http://www.cnn.com/2008/US/01/11/real.id.ap/index.html> [hereinafter *New Rules on Licenses*].

3. See, e.g., An Act to Prohibit Maine from Participating in the Federal Real ID Act of 2005, ME. REV. STAT. ANN. tit. 29-A, § 1411 (Supp. 2007); Resolution Opposing Real ID Act, H.R. Res. 2, 56th Leg., Gen. Sess. (Utah 2007); ACLU, *Washington Becomes Fourth State to Oppose Real ID Act*, Apr. 5, 2007, <http://www.aclu.org/safefree/general/29291prs20070405.html>; *Gov Signs Law Rejecting Real ID Act*, BILLINGSGATE.COM, Apr. 17, 2007, <http://www.billingsgazette.net/articles/2007/04/17/news/>

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driver's licenses to the millions of undocumented immigrants living in the United States.⁴ Groups like the AARP⁵ have argued that older people, rural Americans, certain racial groups, and poor people will find the increasing levels of documentation required to get through new bureaucratic hurdles impossible, pointing out that about eleven million U.S. citizens have neither a birth certificate nor a passport in their home.⁶ These groups opposing identity documentation and verification reforms have won some victories. Some states have passed laws declining to follow the Real ID Act.⁷ A California federal court recently extended a temporary restraining order preventing the Department of Homeland Security from implementing a new rule that would require employers to fire workers within ninety days who could not resolve mismatches between SSA records and their employer's records of their identity.⁸ New York State recently made headlines when, after long term advocacy by a coalition of interested groups, it proposed a change in its DMV policy to allow undocumented immigrants access to driver's licenses, although the backlash prompted former Governor Spitzer to withdraw the proposal shortly after its introduction.⁹

These emerging events provide opportunities to ask interesting questions about administrative governance, data collection, identity verification, and surveillance. The recent push toward national standardization of identification (ID) policies is bringing into conflict the varied state and federal policies that govern identity registration and verification.

This Article uses the example of gender reclassification rules, an area of administrative governance in which the impacts of current trends

state/28-law.txt; *New Rules on Licenses*, *supra* note 2.

4. See, e.g., American Friends Serv. Comm., Immigrant Rights Project <http://www.afsc.org/central/ImmigrantRights/default.htm> (last visited Mar. 17, 2008); CAUSA, Video Released on New Driver's License Restrictions (Jan. 16, 2008), <http://causaoregon.blogspot.com/2008/01/bad-policy-danger-to-public-safety.html>; Farmworker Legal Servs. of Mich., Immigrant Rights, <http://farmworkerlaw.org/document.2005-05-30.1885295685> (last visited Mar. 17, 2008); N.Y. Civil Liberties Union, Real ID & Immigrants' Rights, <http://www.nyclu.org/node/1321> (last visited Mar. 17, 2008).

5. AARP, formerly the American Association of Retired Persons, is a "nonprofit, nonpartisan membership organization for people age 50 and over . . . dedicated to enhancing quality of life for all as we age." AARP, Overview: AARP Mission Statement, http://www.aarp.org/about_aarp/aarp_overview/a2002-12-18-aarpmission.html (last visited Mar. 17, 2008).

6. Letter from AARP to Eliot Spitzer, Governor of N.Y. (Sept. 11, 2007) (on file with author).

7. According to the ACLU, seventeen states have enacted legislation refusing compliance with the Real ID Act, eleven states have passed such legislation in one chamber of their legislature, and eight states have introduced such legislation. RealNightmare.org, Status of Anti-Real ID Legislation in the States, <http://realnightmare.org/news/105/> (last visited Mar. 17, 2008).

8. *Am. Fed'n of Labor v. Chertoff*, No. C 07-04472 CRB, 2007 WL 2972952, at *1 (N.D. Cal. Oct. 10, 2007) (granting motion for preliminary injunction).

9. Nicholas Confessore, *Spitzer Drops Bid to Offer Licenses More Widely*, N.Y. TIMES, Nov. 14, 2007, <http://www.nytimes.com/2007/11/14/nyregion/14cnd-spitzer.html>.

toward national standardization of local practices is significant, to look at this trend of standardization of ID policies and what it reveals about administrative governance. Gender reclassification policies are policies that govern the recognition of a change in a person's gender by a state or federal administrative agency.¹⁰ This rule matrix, which includes hundreds of formal and informal policies at the federal, state, and local levels, is rarely discussed, and no scholarship thus far has attempted to lay out the complex set of policies side by side so that they can be examined as a group and analyzed with regard to their significance in understanding administrative governance. The policies and practices in this area are multiple and conflicting, creating seriously problematic binds for those directly affected and bureaucratic confusion for the agencies operating under these policies.

A brief glimpse of gender reclassification policies, with a few key examples to demonstrate the conflicts that have arisen—even within the same jurisdiction—is helpful here. Over the past forty years, increasing numbers of identity document issuing agencies, such as departments of health, DMVs, and the SSA, have created policies or practices allowing individuals to change the gender marker on their documents and records from “M” to “F” (male to female) or “F” to “M” (female to male).¹¹ These policies emerged from a growing awareness of the existence of a population of people, currently labeled “transgender,”¹² who live their

10. Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 931–32 (2002).

11. See *infra* Part III.A–C.

12. “Transgender” is a term that emerged in the 1990s to describe people who experience discrimination or bias because they identify or express gender differently than what is traditionally associated with the sex they were assigned at birth. See generally LISA MOTTET & JOHN M. OHLE, *TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE* 7–10 (2003), available at <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf>; DEAN SPADE & JODY MARKSAMER, *GROUP HOMES GUIDE* (forthcoming 2008); Greenberg, *supra* note 10; Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 (2005). As with all communities facing marginalization and discrimination, the terms used to identify the transgender population have changed over time. Prior to the emergence of the term “transgender,” a variety of terms, including “transvestite,” “transsexual,” “drag queen,” and several others were used popularly to identify various parts of the transgender population. MOTTET & OHLE, *supra*, at 10 (describing these terms). “Transgender” emerged to serve as an umbrella term, broadly describing people facing gender identity and expression discrimination. This term has come to be the preferred term of the moment, although other terms are still commonly used and misused in media and by individuals. The terms “transgender” and “gender identity discrimination” have both become increasingly significant in the last two decades as this population has become more visible. This increased visibility is reflected in popular culture representations of transgender themes and characters, as well as in an emergence of new legal protections prohibiting gender identity discrimination in various states and cities across the United States. See NAT’L GAY & LESBIAN TASK FORCE, *STATE NONDISCRIMINATION LAWS IN THE U.S.* (2008), http://thetaskforce.org/reports_and_research/nondiscrimination_laws (follow “Click to download a color version of this map” hyperlink). These changes have been significant and rapid, yet transgender identity is still popularly misunderstood and transgender activism is relatively minimal

lives identifying as and expressing a different gender than the one assigned to them at birth. Recognizing the social and economic difficulties faced by those whose lived expression of gender does not match their identity documentation, state and federal agencies have over time created a variety of policies aimed at allowing gender marker change on documents commonly used to verify identity.¹³

Many people are under the impression that everyone has a clear “legal gender” on record with the government, and that changing “legal gender” involves presenting some kind of evidence to a specific agency or institution in order to make a decisive and clear change to the new category. Because of the long history linking transgender identity with medical authority and popular cultural beliefs that changing gender involves surgical procedures, some may assume that achieving gender reclassification requires presenting medical evidence to an appropriate administrative or judicial decisionmaker.¹⁴ As it turns out, the reality of the rules that govern gender reclassification in the United States is far more complex.

The rules of gender reclassification, which will be described in detail in Part III, differ across jurisdictions and “expert” agencies responsible for creating and enforcing these policies, producing bureaucratic confusion and serious consequences for those directly regulated. Figure I below is a continuum on which some sample policies have been placed to show different approaches to gender reclassification. The continuum represents the point at which the given agency or institution will allow a person to be recognized in a gender different than the one assigned at birth. On the extreme right side, I have placed policies that refuse reclassification, explicitly indicating that for the purposes of the agency or institution, gender may never be changed. The middle range represents a variety of policies that use medical authority to assess reclassification. These policies vary extensively regarding the type of medical intervention considered sufficient to grant reclassification. On

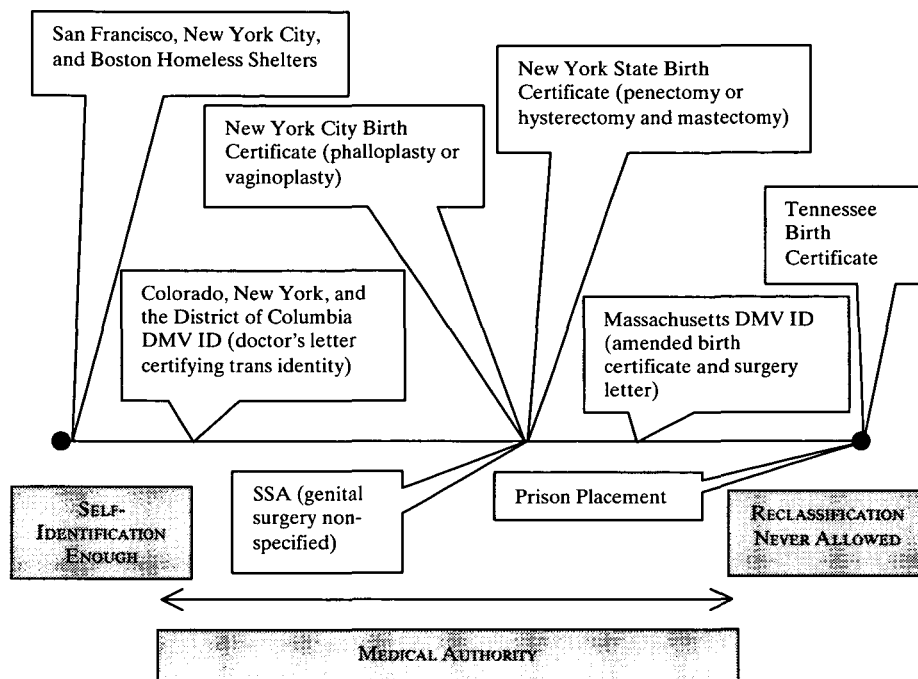
and underresourced. A common comparison suggests that the transgender rights movement is about thirty or forty years behind the lesbian and gay rights movement with regard to visibility, resources, and political power. Discrimination is still pervasive and severe. Much of this discrimination is directly connected to the ability or inability of transgender people to achieve recognition by the government in their new gender identity. Currently thirteen states (California, Colorado, Hawaii, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington), the District of Columbia, and ninety-three other jurisdictions have antidiscrimination ordinances that include gender identity discrimination protection. *Id.*; Transgender Law and Pol’y Inst., Non-Discrimination Laws That Include Gender Identity and Expression: U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, <http://transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last visited Mar. 17, 2008).

13. See *infra* Part III.A–C.

14. See generally Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15 (2003), reprinted in *SEXUALITY, GENDER, AND THE LAW* 1457 (William N. Eskridge & Nan D. Hunter eds., Foundation Press 2d ed. 2004) (discussing how medical authority is tied to trans identity).

the far left reside policies that allow recognition of the new gender based solely on self-identification of the applicant, requiring no medical evidence.

FIGURE I: REQUIREMENTS FOR STATES ALLOWING GENDER RECLASSIFICATION: A CONTINUUM WITH EXAMPLES TO ILLUSTRATE



Two examples where gender can never be changed from birth-assigned gender are Tennessee’s birth certificate policy and prison placement policies across the United States. Tennessee has a statute explicitly forbidding the changing of gender markers on birth certificates, so that transgender people born in that state can never obtain a certificate indicating a gender other than that assigned at birth.¹⁵ Similarly, placement policies in prisons across the United States generally use a “never” rule. Transgender women are placed in men’s prisons and transgender men are placed in women’s prisons. Of the nine jurisdictions that have written policies regarding treatment of transgender prisoners, none allow placement of transgender prisoners according to current gender identity.¹⁶

15. TENN. CODE ANN. § 68-3-203(d) (2006). Tennessee is the only state that has a statute explicitly forbidding recognition of gender reclassification on birth certificates, though it is not the only state that denies reclassification. For a full description of birth certificate policies, see *infra* Part III.A.1.

16. Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State*

In contrast to those policies, a large subset of gender reclassification policies require medical intervention for reclassification. The type of medical intervention, however, differs significantly from policy to policy. Three different birth certificate policies can be used as examples to show a range of requirements. California's birth certificate gender change policy requires the applicant show that he or she has undergone any of a variety of gender confirmation surgeries, which could include chest surgery (breast enhancement for transwomen or mastectomy and reconstruction for trans men), tracheal shave ("Adam's Apple" reduction), penectomy (removal of the penis), orchiectomy (removal of the testicles), vaginoplasty (creation of a vagina), phalloplasty (creation of a penis), hysterectomy (removal of internal pelvic organs), or any one of a range of other gender-related surgeries. New York City and New York State, however, each require genital surgery, and, interestingly, have differing requirements. People born in New York City are required to provide evidence that they have undergone phalloplasty or vaginoplasty, while people born in New York State must provide evidence that they have undergone penectomy or hysterectomy and mastectomy.¹⁷ The fact that two jurisdictions issuing birth certificates in the same state have come up with entirely different requirements for recognition of gender change, alone, attests to the inconsistency in this area. The Massachusetts DMV gender reclassification policy requires that an applicant prove that he or she has undergone some kind of surgery, which is not specified, as well as provide a birth certificate that indicates the new gender.¹⁸ Further, as will be discussed in greater depth later, gender reclassification policies often include requirements of recognition by other agencies or institutions.

The SSA's policy requires genital surgery but is non-specific as to which surgeries will be accepted.¹⁹ Some DMV gender reclassification policies, such as those of Colorado, New York, and the District of Columbia do not require evidence of surgery, but still require medical documentation in the form of a doctor's letter attesting that the person is transgender and is living in the new gender.²⁰

Still other policies require no medical evidence at all. The homeless shelter placement policies of Boston, San Francisco, and New York City are examples of policies that allow individuals to be recognized according to their current gender identity based solely on self-identity. These policies require that homeless transgender people be placed in the

Prison Policies and Practices for the Management of Transgender Prisoners, 38 COLUM. HUM. RTS. L. REV. 167, 177, 197–209 (2006).

17. See *infra* notes 188–90 and accompanying text.

18. See *infra* note 415.

19. See *infra* note 141 and accompanying text.

20. See *infra* Appendix 1.

shelter associated with their gender identity without being required to provide any medical documentation or ID as verification of that identity.²¹

Is this variation in policies simply a manifestation of federalism, perhaps even one that should be encouraged because local experimentation and the creation of new model policies may allow for the development of beneficial policies? That might be the case, except that the complex and contradictory nature of this rule matrix has several troubling results. Because multiple policies with conflicting criteria for gender reclassification operate within single jurisdictions and upon individuals, the conflicts cause a number of problems. For one, similarly situated people are often treated differently under these policies, because of the ways the differing criteria for gender reclassification interrelate. One brief example will illustrate. Two transgender men living in Massachusetts, one born in California and the other in New York City, seek to obtain drivers' licenses indicating their male gender. Both have undergone mastectomy and no other surgical procedures. The California-born man will be able to obtain the reclassification he seeks, because California will amend his birth certificate and Massachusetts will accept this, and evidence of his surgery, as sufficient to change the document.²² The New York City-born man will be unable to obtain a corrected document, because he will not be able to provide an amended birth certificate. This man will have to carry an ID with a gender marker that does not match his identity, possibly leading to difficulty and exposure to discrimination in every context in which he might have to present ID, such as police interactions, employment, and travel.

Additionally, as new initiatives from the Department of Homeland Security, primarily focused on the enforcement of immigration laws, have increasingly led to comparisons of records between agencies with differing gender reclassification policies, the conflicts between these policies has created a new range of problems. For example, in New York, Maryland, and other states, DMV records were compared with Social Security records in order to find mismatching information that might indicate the misuse of a Social Security Number (SSN) to falsely obtain a DMV ID.²³ People whose identities came up with "no match" information were sent letters warning that their licenses would be revoked, and hundreds of thousands of people lost their licenses.²⁴ Many transgender people came up as "no matches" because the gender designation on their DMV records did not match that on their SSA

21. See *infra* notes 236–38 and accompanying text.

22. See *infra* Appendix 1 and accompanying notes.

23. See Sylvia Rivera Law Project, Stop the Suspensions!, <http://srp.org/index.php?sec=03H&page=nycirdl> (last visited Mar. 17, 2008).

24. *Id.*

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24. *Id.*

individualize oppression and obscure the broader context not remedied by antidiscrimination laws; and that the administrative aspects of the War on Terror and changes to identity surveillance be thought of as a state-building project. Doing so, I hope, will allow for a skepticism about the caretaking/surveillance functions of the administrative state, without reducing the discussion to fantasies of privacy or category-blindness (i.e., color-blindness, gender-blindness) that often emerge to rearticulate individualist notions of freedom.

I. CARETAKING AND SURVEILLANCE: STATE FORMATION THROUGH THE ADMINISTRATION OF STANDARDS

To fully understand the recent impact of the War on Terror on the administration of gender reclassification policies, a broader look at the role of administrative governance in state formation and the use of classification is required. The work of James C. Scott is useful here.²⁷ Scott describes the emergence of the modern nation state as a process of standardization.²⁸ In Scott's view, the creation of national standards and the replacement of local practices with consistent practices imposed by the state are the processes by which the state is formed.²⁹ Scott provides several examples, such as the creation of standard weights and measures, the creation of a standard national language in which all legal documents must be written, and the elimination of local land-sharing practices replaced by a system of freehold estate.³⁰ Scott describes each of these moments of standardization, in which a national government requires that local practices be replaced by nationally mandated and consistent practices, as processes of "state-building."³¹ Through these changes, the

27. See generally JAMES C. SCOTT, *SEEING LIKE A STATE* (1998). Others have described the developments Scott tracks in a number of contexts and using various methods and theories. See, e.g., PATRICIA C. COHEN, *A CALCULATING PEOPLE: THE SPREAD OF NUMERACY IN EARLY AMERICA* (1999) (tracing how the turn toward data collection marked a shift in U.S. governance from the colonial period to the modern state); MITCHELL DEAN, *GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY* (1999) (describing "bio-politics" as "a fundamental dimension . . . of government from the eighteenth century" that "constitutes as its objects and targets such entities as the population"); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION VOLUME I* (1990) [hereinafter *HISTORY OF SEXUALITY*]; IAN HACKING, *THE TAMING OF CHANCE* (1990); Talal Asad, *Ethnographic Representation: Statistics and Modern Power*, 61 *SOC. RES.* 55 (1994); Michel Foucault, *Governmentality*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY WITH TWO LECTURES BY AND AN INTERVIEW WITH MICHEL FOUCAULT* 87-104 (Graham Burchell et al. eds., 1991); Ian Hacking, *Biopower and the Avalanche of Printed Numbers*, 5 *HUMAN. SOC'Y* 279 (1982).

28. SCOTT, *supra* note 27, at 76-77.

29. *Id.* at 77. Also, Hunt and Wickham describe Foucault's notion of governmentality in the context of the mid-eighteenth century creation and growth of bureaucracies: "[G]overnmentality is the dramatic expansion in the scope of government, featuring an increase in the number and size of the governmental calculation mechanisms." ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 76 (1994).

30. SCOTT, *supra* note 27, at 29-33, 72-73.

31. See, e.g., *id.* at 67.

state increases the relationship of towns and individuals to itself, erasing local systems of recognition and legitimacy in favor of requirements that such systems be mediated through the state.³² Where before each town determined how to measure out grain for sale and trade, now the state's measure is used, enabling more accurate assessment by the state of local agricultural production, improved ability to tax, and increased opportunities to direct long-distance trade.³³ Where before recognition of ownership of property was based on local customs including documents in local dialects or other methods, now ownership can only be proven through documentation in the state's preferred language.³⁴ Where before local communities utilized shared land for agricultural purposes using any number of schemes for division and allotment, now the state requires all land to be held in freehold estate according to a standardized system.³⁵ These shifts allowed each person or family to be taxed individually, rather than as part of a town (which usually required clergy or state officials to act as middlemen who had a self-interest in underreporting town assets), and increased the state's relationship to and information about people at the individual level.³⁶ These changes increased the ability of a government to comprehend what resources existed within its borders, generate revenue, regulate trade, and intervene significantly in myriad other ways, what Scott describes as "a move from tribute and indirect rule to taxation and direct rule."³⁷ Standardization is vitally important because of the information it generates, increasing the transparency of the contents of the territory to the government and allowing for stronger national rule, and replacing local systems of rule, both secular and religious, while often meeting significant resistance.³⁸

The process of standardization of the collection of data is not limited to property, language, and agriculture, of course, but includes the standardized collection of data about people. According to Scott, the modern state requires at least two forms of legibility: the capacity to locate citizens uniquely and unambiguously, and standardized information that will allow it to create aggregate statistics about property, income, health, demography, and productivity.³⁹ Collecting

32. *Id.* at 29–33, 72–73.

33. *Id.* at 30–32.

34. *Id.* at 33–36.

35. *Id.*

36. *Id.*

37. *Id.* at 77 ("Indirect rule required only a minimal state apparatus but rested on local elites and communities who had an interest in withholding resources and knowledge from the center. Direct rule sparked widespread resistance and necessitated negotiations that often limited the center's power, but for the first time, it allowed state officials direct knowledge of and access to a previously opaque society.").

38. *See id.* at 29–33, 63–77.

39. *Id.* at 65.

data about people to create population-level information and intervention, a map of social and economic conditions relevant to the state's purposes, is necessary to modern forms of governance.⁴⁰ These standardization processes allow for the basic activities essential to the modern state, creating an understanding of the population that makes it possible to tax people, engage in military conscription, do police work, create programs focused on obtaining certain kinds of population-wide health outcomes, promote specific norms of family structure, and other typical areas of population-level intervention.⁴¹

One illustration of standardization and the elimination of local practices discussed by Scott is the creation of last names.⁴² Scott explains how prior to the fourteenth century in Europe, permanent last names were very much the exception. People used names that related more to occupation or a personal characteristic, and those names did not survive their bearer. The rise of the permanent patronym, Scott argues, is inextricably linked to those aspects of state-making that made it desirable to be able to distinguish individual male subjects: tax collection, conscription, land revenue, court judgments, witness records, and police work.⁴³

The creation of last names, of course, like other forms of standardization, often includes resistance, either because people specifically oppose the practice or are simply not used to it and fail to abide by it out of custom.⁴⁴ Scott describes the process of getting people to use patronyms as a matter of making it impossible to get by without them.⁴⁵ Where local practices that did not require patronyms were replaced with new practices that included state mediation, the use of the patronym became increasingly essential to getting by.⁴⁶

As encounters grow with the extra local world, the world of official documents and lists (e.g., tax receipts; military eligibility lists; school documents; property deeds and inventories; birth, marriage, and death certificates; internal passports; court decisions; legal contracts) so also does the social circumference of official patronyms. Large segments of social life that might previously have been successfully navigated without

40. James C. Scott et al., *Government Surnames and Legal Identities*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 11, 18 (Carl Watner & Wendy McElroy eds., 2004). Scott also writes: "Where the premodern state was content with a level of intelligence sufficient to allow it to keep order, extract taxes, and raise armies, the modern state increasingly aspired to 'take in charge' the physical and human resources of the nation and make them more productive." SCOTT, *supra* note 27, at 51.

41. SCOTT, *supra* note 27, at 71.

42. *Id.* at 64-67.

43. *Id.* at 64-71.

44. *Id.* at 66-67.

45. *Id.* at 67-69.

46. *Id.*

documents, and according to customary practice, are now impossible without the paper trail, stamps, signatures, and forms on which the authorities insist. The state creates irresistible incentives for calling oneself after its fashion.⁴⁷

As we will see in Part III, when the invention and growing use of each U.S. identity document is discussed, the pattern of ever-widening uses of standardized documents, sometimes including resistance that is overcome by requiring individuals to obtain and use documentation for basic economic and social participation, is familiar.⁴⁸ Scott explains that these processes of standardization of identity documentation tend to radiate out from the administrative center, starting in the capital, with the top of the status ladder, first in modern institutions like schools, last in marginal areas like mountains and swamps, among the lower classes, and among the marginalized and stigmatized.⁴⁹

This two-part dynamic of collecting standardized data about the population and then engaging in population-level interventions characterizes the modern state and is undertaken in the United States, for the most part, in the administrative realm. Population-level interventions, or administrative governance, from the collection of birth and death data to public education to the provision of old age benefits and occupational safety standards, are functions of what I will call here the “caretaker state.”⁵⁰ These caretaking activities are focused on ensuring the health and well-being of the population through the creation of national standardized programs. These caretaking functions, of course, include a data-gathering element as well. Demographic and economic information gathering is central to population-level

47. Scott’s work discusses how these standardization processes are often a part of land struggles in the colonial process, where the colonizer can institute new requirements to show documentation such as deeds or to prove identity through use of last names or other mechanisms that cannot be provided by the colonized people. SCOTT, *supra* note 27, at 82. Thus, through new bureaucratic norms it becomes impossible to prove ownership of land that has belonged to a group for generations. *Id.* at 43. Scott specifically examines the relationship between the push to make Native Americans use standardized first and last names and native land rights in the United States. See Scott et al., *supra* note 40, at 28–32. He has also compared the standardization processes in England and Ireland, noting how certain processes take longer and face more successful resistance in the home territory than in the colonized country where greater force is used to quell resistance. SCOTT, *supra* note 27, at 49.

48. Scott describes how it becomes convenient, or in the best interest of citizens to comply with mechanisms of surveillance like the patronym, that they might have resisted before. “While the subject might normally prefer the safety of anonymity, once he was forced to pay the tax, it was then in his interest to be accurately identified in order to avoid paying the same tax twice.” SCOTT, *supra* note 27, at 68.

49. Scott et al., *supra* note 40, at 23.

50. Michel Foucault describes this idea as “bio-politics,” where the state becomes concerned with the promotion of human life. HISTORY OF SEXUALITY, *supra* note 27, at 139. Mitchell Dean, describing Foucault’s notion, writes that, “all ‘modern’ forms of government of the state need to be understood as attempting to articulate a bio-politics aimed at enhancing the lives of a population through the application of the norm.” DEAN, *supra* note 27, at 102.

intervention. In this way, caretaking and surveillance are married.⁵¹

One example of the caretaker-state/surveillance-state pairing will illustrate the marriage of the two. In the United States, the collection of birth data arose as a response to public health concerns and other interests related to monitoring the well-being of the population based on birth rates and infant mortality.⁵² The process of creating standardized birth registration met with consistent resistance across the country, in both overt ways, such as doctors refusing to register births because of the extra work, and passive ways, such as people neglecting to register home births (which constituted the majority of births until relatively recently) out of habit or custom. A variety of interventions from federal and state governments encouraged birth registration (these interventions are further explained in Part II), but what finally pushed birth registration into ubiquity was new requirements that emerged during and after WWII that families present birth certificates to collect increased rations when a new child entered the family or to register children for school. After that, birth certificates came to be required for an ever-increasing number of activities, and took on the role of certifying identity and immigration status for important areas of civic and economic participation. This shift—from gathering standardized data in order to achieve caretaking population-level interventions related to public health, to having such data become part of identity-verification for purposes of law enforcement and other uses that can be classified as surveillance—can be seen across programs that issue identity documentation such as the SSA and DMVs.⁵³

51. Mitchell Dean summarizes this aspect of Foucault's notion of biopolitics by describing how the population is enframed in "apparatuses of security." DEAN, *supra* note 27, at 20.

These apparatuses of security include the use of standing armies, police forces, diplomatic corps, intelligence services and spies . . . [but] also includes health, education and social welfare systems It thus encompasses those institutions and practices concerned to defend, maintain and secure a national population and those that secure the economic, demographic and social processes that are found to exist within that population [centralizing] this concern for the population and its optimization (in terms of wealth, health, happiness, prosperity, efficiency), and the forms of knowledge and technical means appropriate to it.

Id. This framing of caretaking population-level interventions as part of the same practices we might call "national security" helps in understanding the simultaneous and dual nature of the caretaker/surveillance state.

52. See *infra* Part III.A.1.

53. Foucauldian scholars have called this dynamic "regulating through freedom." DEAN, *supra* note 27, at 14. Rather than the state using punishment to force people to register births, governance occurs through the distribution of rights and privileges, like the right to drive or to free education for children or public benefits like rations, where people "choose" to comply with requirements like birth registration in order to claim their rights and freedoms. Certain administrative structures are installed in order to bring our ways of conducting ourselves (self-governing) into alignment with certain political goals of the state. See generally NIKOLAS ROSE, *INVENTING OUR SELVES* (1996); NIKOLAS ROSE, *POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT* (1999); Thomas Lemke, *The Birth of Bio-Politics: Michel Foucault's Lecture at the College de France on Neo-Liberal Governmentality*, 2 *ECON. &*

The collection of standardized data, of course, requires the creation of common units of measurement or coding that are often areas of significant contestation and difficulty.⁵⁴ Geoffrey Bowker and Susan Leigh Star have offered helpful contributions to theories of classification in their book, *Sorting Things Out*.⁵⁵ Bowker and Star argue that the work of classification systems is simultaneously ubiquitous and invisible.⁵⁶ Classification systems underlie every aspect of the human world, from grocery store layout, to systems delivering water and electricity, to our homes, to how we determine what constitutes criminal behavior. At the same time, most classification systems remain unnoticed or invisible until they break down in some way or are contested.⁵⁷ Bowker and Star assert that examining how classification operates and how decisions about classification come to impact the world is essential because of the enormous impact that classification systems have.⁵⁸ Looking at examples including enforcement of race classifications in apartheid South Africa and health classifications made by medical professionals impacting access to care for patients, Bowker and Star expose the underlying normative content of classification systems that, in their time and context, may seem “neutral” or “natural” to some, while pernicious and dangerous to others.⁵⁹ Bowker and Star suggest that while not all classification systems need to be evaluated from an ethical perspective, ethics-minded analysis of the creation and impact of some systems of classification and categories is vitally needed.⁶⁰ While we are “used to viewing moral choices as individual, as dilemmas, and as rational choices,” collective forms of choice, like the creation of norms through classification decisions, should also be understood as having moral implications.⁶¹

In the realm of administrative population-focused data collection and intervention by the caretaker/surveillance state, the terms of classification can have very high stakes in the lives of individuals and communities, and often represent the imposition of ideological norms that the classification system masks as neutral and purely administrative.⁶² Scott writes, “categories that may have begun as the artificial inventions of cadastral surveyors, census takers, judges, or police officers can end by becoming categories that organize people’s

Soc’y 190, 201–07 (2001).

54. Scott, *supra* note 27, at 80.

55. See GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 3 (1999).

56. *Id.* at 2.

57. *Id.* at 3.

58. *Id.*

59. *Id.* at 195–225.

60. *Id.* at 5.

61. *Id.* at 6.

62. See *id.* at 30.

daily experience precisely because they are embedded in state-created institutions that structure that experience.”⁶³ This passage suggests how the terms and categories used in the classification of data gathered by the state do not merely collect information about pre-existing types of things, but rather shape the world into those categories, often to the point where those categories are taken for granted by most people and appear ahistorical and apolitical. Indeed, many such categorizations are assumed as basic truths about distinctions existing in the world.⁶⁴

Examples of instances where terms are contested often offer rich terrain for understanding the ideological norms that underlie classification systems.⁶⁵ Many studies in the area of race and disability have examined how categories of classification have changed over time in these areas, and many of these studies, the cases of those who challenge their classification, or who are difficult to classify, expose the underlying norms and assumptions of the classification system and reveal its fault lines.

Bowker and Star utilize the concept of “convergence” to help understand the operation of classification systems.⁶⁶ Convergence refers to the ways in which classification systems, and the things they classify, mutually constitute each other.⁶⁷ The work of classification, and its ethical and political dimensions specifically, are obscured when we assume that all classification systems do is name and sort things along obvious or natural lines of difference. Instead, Bowker and Star argue that classification systems create reality, grouping and sorting things such that certain distinctions become essential while others are ignored.⁶⁸ Every classification system could involve other, different criteria for sorting than the ones it does, and in some cases, the determinations of what criteria are used have ethical implications because they significantly

63. SCOTT, *supra* note 27, at 82–83. Dean describes this aspect of Foucault’s notion of governmentality in terms of a mentality of government whereby a collective way of thinking, based in bodies of knowledge, belief, and opinion become normalized such that those subject to being governed by a particular way of thinking may not even be aware of it. DEAN, *supra* note 27, at 16. He notes that these norms often derive from bodies of knowledge produced in the human sciences (such as psychology, economics, or medicine), as can clearly be seen in the relationship between gender reclassification policies and medical authority. *Id.*

64. See DEAN, *supra* note 27, at 18 (“On the one hand, we govern others and ourselves according to what we take to be true about who we are, what aspects of our existence should be worked upon, how, with what means and to what ends. . . . On the other hand, the ways in which we govern and conduct ourselves give rise to different ways of producing truth.”).

65. BOWKER & STAR, *supra* note 55, at 222 (“Those who live in the borderlands . . . illuminate a larger architecture of social order.” (citing Sandy Stone, *The Empire Strikes Back: A Posttransexual Manifesto*, in BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 280 (Julia Epstein & Kristina Straub eds., 1992))).

66. *Id.* at 49.

67. *Id.*

68. *Id.* at 47–48.

impact the social and political realities of individuals and groups.⁶⁹ Understanding Bowker and Star's notion of convergence allows us to view identity category classifications used by the government in terms of their significance in shaping reality, and to question terms of classification that may appear "neutral" in an administrative context.

The matrix of conflicting policies detailed in Part III exposes the messy result of a classification system based both too much and too little on "common sense." These policies, with their diverse understandings of what evidence is sufficient for proving someone is "male" or "female" for administrative purposes, demonstrate two key "common sense" problems: (1) the "common sense" assumption that classifying people as "M" or "F" is obvious and clear, performs meaningful labor in identity verification and other administrative purposes, and should be an ongoing feature of administrative classification; and (2) the problem that varying rulemakers adopt different "common sense" rules about what evidence is sufficient to prove maleness or femaleness. These classification problems reveal the limits of the assumptions about gender that underlie systems of government data collection and identification. These assumptions, in turn, match cultural assumptions about gender that most people understand as non-controversial, obvious, or natural.

As will be further discussed in Part II, these assumptions have a significant impact on the lives of people who are difficult to classify or contest their classification under this rule system. This is especially true in the current moment as systems of identity documentation become increasingly nationally standardized as part of immigration law enforcement efforts mobilized by the War on Terror.⁷⁰ Scott's description of the process whereby local practices are replaced with national standards is useful here. Such a process is active in the context of gender reclassification, where varying and conflicting policies utilized by each agency and institution are suddenly being pushed toward a nationally consistent standard as records are being compared across agencies and "no matches" are generating intervention.⁷¹ In this moment, when a new level of standardization is being applied to common mechanisms of surveillance that exist in various "caretaking" efforts of the state and federal governments (driver safety, old age and disability benefits, birth

69. *Id.* at 48.

70. Nan Hunter has observed that administrative regulation is simultaneously moving towards decentralization and localization in many realms and centralization in areas related to security. See Nan D. Hunter, "Public-Private" Health Law: Multiple Directions in Public Health, 10 J. HEALTH CARE L. & POL'Y 89, 93-99 (2007). Her article focuses on a new slough of federal regulations related to "health security" that emerged in the wake of post-September 11, 2001, anthrax scares and the SARS quarantining that came later. See *id.* These new, far-reaching regulations have the centralizing and standardizing components of the War on Terror identity document standardization developments discussed here.

71. See *infra* notes 342-43 and accompanying text.

data collection, etc.), the effects of that standardization are becoming clear even in areas of policy to which little attention is generally paid. What is revealed is an elaborate matrix of policies that significantly and directly concern the classification of a set of people whose economic participation, and consequently, political power, is curtailed by those very policies.

Using this understanding, I argue that rules related to government gender classification do not simply discover and describe maleness and femaleness, but instead *produce* two populations marked with maleness and femaleness as effects and objects of governance. The inconsistency with which they do this is a testament to the fact that these categories are neither obvious, uncontested, nor simple. The production of these categories produces gendered conditions of existence that distribute various chances at health, security, insecurity, life and death unequally. The result of gender classification, moreover, is the creation of subpopulations that become mired in this rule matrix, subject to arbitrary “double binds.”⁷² The norms and assumptions that underlie gender classification operate to the significant detriment of people who are difficult to classify, who are inconsistently classified in the rule matrix, or whose classification is contrary to their self-understanding. The ubiquity of the assumption that gender classification is a proper category of administrative governance, combined with the economic and political impairment that results from being improperly classified, allows us to analyze disparities in life chances across administratively constructed populations. This provides a way of thinking about inequality and oppression outside of individualizing discrimination frameworks and instead through a biopolitical understanding of the management of populations and the distribution of life chances. Such a framework can contribute to how we analyze questions of gender inequality and law, transgender law, and the impact of the War on Terror.

Thinking through the administration of gender classification as a method of population management that distributes life chances redirects inquiries about domination and subordination from what Critical Race Theorists have named “the perpetrator perspective,”⁷³ which grounds understandings of inequality in individualist frameworks in which bad people discriminate against individual victims based on “irrelevant” qualities (race, gender, disability, age, etc).⁷⁴ Instead, oppression can be

72. See *infra* note 271 and accompanying text.

73. Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 29 (Crenshaw et al. eds., 1995).

74. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 27–28 (1995) (“When social ‘hurt’ is conveyed to the law for resolution, political ground is ceded to moral and juridical ground. Social injury such as that conveyed through derogatory speech becomes that which is

considered systemically, and the role of the law can be recognized not just as a neutral arbiter of justice in scenarios of discrimination but rather as a force delineating categories of identity as centrally relevant and producing structured security and insecurity at the population level.⁷⁵ This way of thinking allows us to conceptualize power and domination as decentralized, as is born out by the case of the gender reclassification policies examined here. The mobilization of medical-legal discourses of gender described in detail in Part III expose not a single-vector, intentional instance of discrimination but numerous, overlapping, and contradictory administrative classifications operating in ways that make people who are difficult to classify highly vulnerable.

This example offers an opportunity to think about gender inequality questions beyond the discrimination framework, asking what administrative classifications of gender mean to the production of gender inequality. Controversies about the “realness” of gender difference are central to discussions of sexism, patriarchy and law, and an analysis of the incoherent administration of standards of “maleness” and “femaleness” can bring new light to those questions. This type of analysis is influenced by the robust body of scholarship that has already explored these questions with regard to race, examining how race classification controversies and the administration of race classifications have structured white supremacy in the United States.⁷⁶

The emerging field of transgender law can also benefit significantly from a deeper inquiry into the administrative classification of gender. Legal scholarship about transgender law has frequently focused on the ways that courts resolve the question of how a transgender person should be classified, usually for purposes such as recognizing a marriage or parental rights, and has sometimes examined an individual area of

‘unacceptable’ and ‘individually culpable’ rather than that which symptomizes deep political distress in a culture; *injury is thereby rendered intentional and individual, politics is reduced to punishment, and justice is equated with such punishment on the one hand and with protection by the courts on the other.*” (emphasis added)).

75. Geographer Ruth Wilson Gilmore uses a definition of racism that captures this population-level distribution of life chances; it upends the idea that racism is primarily or exclusively a matter of intention or individual discrimination. She defines racism as “state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death.” RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 28 (Earl Lewis et al. eds., 2007).

76. See LAURA GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 14–144 (2007) (providing an analysis of how the use of certain racial classifications, specifically the “one drop rule” for determining black racial identity and the “reverse one drop rule” for determining the white racial identity of Mexicans was essential to U.S. nation-building during the nineteenth century). The debate over the multi-racial category on the U.S. Census also produced a rich analysis of the administration of racial categories in the United States. See, e.g., Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans and the U.S. Census*, 95 MICH. L. REV. 1161, 1261 (1997).

administrative rulemaking regarding gender classification.⁷⁷ Some articles have addressed issues of gender classification of transgender people for purposes of placement in sex-segregated institutions such as prisons.⁷⁸ However, the literature thus far has failed to look at the range of administrative gender reclassification policies and practices—including birth certificates, DMV policies, policies of sex-segregated facilities, and federal identity document policies—side by side, which has meant that the significance of the incoherence of these policies as a group has been obscured. Disputes about individual classification rules have missed the broader analytical opportunities provided by examining the rules as a group. Further, the overwhelming focus on judicial decisionmaking regarding gender classification has neglected administrative rules and policies that arguably affect far more people every day than individual litigation, impacting employment, commercial interactions, health care access, housing and other key areas of economic and social participation. This Article is the first place where such policies are collected from all fifty states and analyzed together, creating a more comprehensive understanding of gender reclassification in the United States, providing a rich illustration of administrative state operation that has been under-theorized, and posing challenging questions to administrative law scholarship.

This way of thinking about power and administrative governance provides a window, moreover, into thinking about why we might be concerned about the policy developments of the War on Terror. Legal scholars, judges, advocates, and others have critiqued the War on Terror in that it utilizes U.S. administrative agencies in new ways for which they are ill-suited.⁷⁹ This critique often cites concerns about accuracy, worrying that using data collected for a given purpose such as distribution of public benefits for another purpose such as immigration enforcement creates such a high danger of inaccuracy as to engender more unfair results for innocent victims of administrative mistake than is

77. See generally SHANNON MINTER & CHRISTOPHER DALEY, *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO'S TRANSGENDER COMMUNITIES* (2003), available at <http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf>.

78. See, e.g., Alexander L. Lee, *Nowhere to Go but Out: The Collision Between Transgender and Gender-Variant Prisoners and the Gender Binary in America's Prisons* 15–16 (Spring 2003) (unpublished note, University of Berkeley School of Law), available at http://www.srlp.org/documents/alex_lees_paper2.pdf.

79. See, e.g., David T. Zaring & Elena A. Baylis, *Sending the Bureaucracy to War*, 92 *IOWA L. REV.* 1359 (2007); see also Posting of Soulskill to Slashdot, <http://it.slashdot.org/article.pl?sid=08/03/02/1344217> (Mar. 2, 2008) (“[A]n average of 35 data input errors per day by the Social Security Administration [result in consequences for a variety of agencies relying on SSA data.]” (citing Alex Johnson & Nancy Amons, *‘Resurrected,’ but Still Wallowing in Red Tape: Government Records Incorrectly Kill Off Thousands, and There’s No Easy Fix*, *MSNBC.COM*, Feb. 29, 2008, <http://www.msnbc.msn.com/id/23378093>)).

worthwhile for achieving its ends.⁸⁰ Another element of the critique is that the use of administrative agencies to fight the War on Terror has inappropriate scale, utilizing broad administrative programs that affect all Americans (DMV ID programs, Social Security) to try to weed out potential terrorists, who no doubt constitute a very small population.⁸¹ A third element of the critique is that such use of the agencies endangers individual privacy.⁸² While each of those elements has its political utility in various current debates, this Article's discussion of the caretaker/surveillance state, and the role of national standardized collection of data, allows us to think differently about the War on Terror. Thus, the surveillance discussion that often occurs in the realm of "civil liberties" is considered in a broader framework that includes both population-based equality concerns and an articulation of how state-building incorporates the mobilization of identity classifications.

To reach these analytical goals, this Article provides an account of how the gender reclassification rule matrix is impacting people directly regulated; a detailed account of the current rules of gender reclassification as well as background information on the administrative agencies that are utilizing them; how they came to exist and gather data, and how the uses of that data have expanded over time; and the impact that the incoherence of the rule system has had and is having as the new War on Terror standardization occurs. Examining these problems of incoherence, I then provide an analysis of the failures of gender to operate as a stable category of identity verification despite the assumptions of stability underlying the many administrative policies that rely on gathering gender data. Looking narrowly at the stated goals of the administrative agencies utilizing these policies, I argue that reliance on gender as a point of data and classification in these systems has less value than is assumed and should be reduced. Performing that narrow analysis provides a chance to widen the inquiry to ask questions about the role of data collection and surveillance in state caretaking and to seek a nuanced skepticism of surveillance that acknowledges its role in systemic domination but does not simplistically seek the elimination of data collection by the state or reinvest individualist notions of privacy.

II. GENDER RECLASSIFICATION AND TRANSGENDER POPULATIONS

Over the past forty years, increasing numbers of identity document issuing agencies, such as departments of health, DMVs, and the SSA, have created policies or practices allowing individuals to change the gender marker on their documents and records from "M" to "F" or "F"

80. Lee, *supra* note 78, at 17–20.

81. *See id.* at 15–16.

82. *Id.*

to “M.”⁸³ These policies emerged from a growing awareness of the existence of a group of people, currently called “transgender” people,⁸⁴ who live their lives identifying as and expressing a different gender than the one assigned to them at birth. Recognizing the social and economic difficulties faced by those whose lived expressions of gender do not match their identity documentation, state and federal agencies have, over time, created a wide variety of policies aimed at allowing gender marker change on documents commonly used to verify identity.⁸⁵

This section provides a brief overview of social science data about the transgender population that helps to expose the obstacles faced by those directly effected by the matrix of policies described in Part III. Government policies focused on classifying people in terms of gender significantly impact transgender people in at least three interconnected areas: access to identity verifying documentation, placement in sex-segregated facilities, and access to gender-confirming health care. In each of these contexts, determinations of gender by state agencies and institutions condition access to key resources and opportunities, and rules regarding reclassification of gender have a significant impact on those who seek to gain access in accordance with a gender classification different than the one they were assigned at birth. The data reviewed in this section suggest a general economic and social marginalization of the transgender population in part due to significant obstacles resulting from the operation and administration of government gender classification policies.

A. IDENTITY DOCUMENTS AND ECONOMIC MARGINALIZATION

Because their identity or expression breaks with the “common sense” assumption of gender—that everyone will identify as the sex they were assigned at birth and express their gender in a way that comports with norms of masculinity and femininity—transgender people often experience stigmatization, discrimination, and sometimes, violence.⁸⁶ While statistical information about the transgender population is lacking, what data has been gathered suggests economic marginalization. One study found a 70% unemployment rate in the transgender population

83. See *infra* Part III.A–C.

84. See *supra* note 12.

85. See *infra* Part III.A–C.

86. Romeo, *supra* note 12, at 722; see also Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37–38 (2000) (“Transgender people face severe discrimination in virtually every aspect of social life—in employment, housing, public accommodations, credit, marriage, parenting and law enforcement.”); Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 466–67 (2001) (describing discrimination based on gender non-conformance in housing, employment, marriage, and other contexts).

nationwide.⁸⁷

Employment discrimination is a contributing factor to high rates of poverty and unemployment. One study found that nearly one in every two transgender respondents reported had experienced employment discrimination based on gender identity.⁸⁸ This discrimination can lead to downward mobility for transgender people who have previously been employed and can keep others out of the job market. Lack of ID that matches a person's current gender is a significant factor contributing to employment discrimination.⁸⁹ For many transgender people, being unable to produce the basic ID that employers require, such as a DMV ID and a Social Security card or birth certificate, showing their current name and gender means being "outed" in the job application process. Because refusing to hire someone based on transgender identity is only explicitly prohibited by law in a small number of jurisdictions, and even in those places employers may not be aware of the state of the law or what it means, lack of accurate ID becomes a major barrier to employment for many.⁹⁰ Joblessness, combined with housing discrimination, leads to high rates of homelessness among transgender people.⁹¹ In one study, one third of transgender respondents reported having experienced housing discrimination based on gender identity.⁹² This housing discrimination, again, often occurs when a housing provider recognizes that the identity documents included in an application for housing record a gender different from that being expressed by the applicant.⁹³

B. PLACEMENT IN SEX-SEGREGATED FACILITIES

For transgender people who are unemployed or homeless and

87. PATRICK LETELLIER & YOSEÑIO V. LEWIS, ECONOMIC EMPOWERMENT FOR THE LESBIAN GAY BISEXUAL TRANSGENDER COMMUNITIES: A REPORT BY THE HUMAN RIGHTS COMMISSION CITY AND COUNTY OF SAN FRANCISCO 10 (2000), available at <http://www.sfgov.org/site/uploadedfiles/sfhumanrights/docs/econ.pdf>. Another study found that only 58% of transgender residents of Washington, D.C. were employed in paid positions, 29% reported no source of income, and another 31% reported annual incomes under \$10,000. Jessica M. Xavier, *The Washington Transgender Needs Assessment Survey*, GLAA.ORG (2000), <http://www.glaa.org/archive/2000/tgneedsassessment1112.shtml>. In another study, based in San Francisco, 64% of participants reported annual incomes in the range of \$0-\$25,000. MINTER & DALEY, *supra* note 77, § II.A.4.

88. MINTER & DALEY, *supra* note 77, § II.A.4.

89. *Id.*; MOTTET & OHLE, *supra* note 12, at 18; Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 217, 229 (Paisley Currah et al. eds., 2006).

90. MOTTET & OHLE, *supra* note 12, at 18.

91. *Id.*

92. MINTER & DALEY, *supra* note 77, § II.C.1. Another study, examining the reasons for transgender homelessness, found that the most common barriers to housing were economic situation (38%), housing staff insensitivity or hostility to transgender people (29%), estrangement from birth family (27%), and lack of employment (23%). Xavier, *supra* note 87.

93. MOTTET & OHLE, *supra* note 12, at 18.

turning to social service agencies and shelters for assistance, a new realm of difficulty with gender classification awaits.⁹⁴ Transgender people have a difficult time with institutions that exist to assist the poor because so many of these institutions are sex-segregated.⁹⁵ Homeless shelters, drug treatment centers, foster care group homes, domestic violence shelters and other social service programs are typically single-sex or house people according to sex in separate areas or buildings.⁹⁶ The majority of these facilities house people according to birth-assigned gender, leading transgender people to be the only person of their gender in a facility.⁹⁷ The result of being the only woman in a men's homeless shelter, for example, is often harassment and violence. This leads many transgender people to avoid these facilities even if they are in need of the social services they offer.⁹⁸ These barriers to using services provided to poor people are a factor in the ongoing economic marginalization of the transgender population.

C. HEALTH CARE EXCLUSION POLICIES AND NEGATIVE HEALTH OUTCOMES

Concerns about accessing health care affect transgender populations at two primary levels. First, lack of access to general health care leads to negative health consequences. Second, and more specifically, lack of access to gender-confirming health care⁹⁹ is connected to both negative health consequences and difficulty navigating administrative requirements for gender reclassification. Many administrative processes related to gender reclassification, especially rules related to changing gender on ID, require transgender applicants to submit evidence of having undergone gender-confirming health care, for example surgery.¹⁰⁰ Lack of access to this care has ramifications for legal recognition.

Discrimination and poverty also negatively affect health outcomes for transgender people. One aspect of this is discrimination in health

94. One study found that one in five transgender people reported having experienced discrimination from a social service provider. MINTER & DALEY, *supra* note 77, § II.A.2. This discrimination can come in the overt form of being denied services altogether because of trans identity, as in the case of homeless shelters and drug treatment programs that have explicit policies of excluding transgender people. There are incidents of shelters in Atlanta posting "no transvestites" signs. Similarly, intake coordinators at drug treatment and other residential programs have told me, when I sought to refer clients of mine at the Sylvia Rivera Law Project, that they did not "take transgenders." See also MOTTET & OHLE, *supra* note 12, at 12–14.

95. MOTTET & OHLE, *supra* note 12, at 12–14; Alexander L. Lee, *Gendered Crime & Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America's Prisons* (pts 1 & 2), GIC TIP J. (Summer 2004), GIC TIP J. (Fall 2004); Spade, *supra* note 89, at 219.

96. MOTTET & OHLE, *supra* note 12, at 11–12.

97. *Id.*

98. *Id.*; Sylvia Rivera Law Project, *Systems of Inequality: Poverty & Homelessness*, http://www.srlp.org/documents/disproportionate_poverty.pdf (last visited Mar. 17, 2008).

99. See *infra* Part III.C.

100. MOTTET & OHLE, *supra* note 12, at 17–18.

services. One study found that over 30% of transgender respondents had experienced discrimination in health services.¹⁰¹ Lack of insurance, no doubt corresponding to lack of employment and financial means for obtaining insurance related to employment discrimination, is another factor that may lead to poor health outcomes.¹⁰²

In addition to lack of access to health care in general, transgender populations have been found to experience specific harms related to the denial of gender-confirming health care. Gender-confirming health care for transgender people is widely misunderstood, and some of the most popular misunderstandings, as will be discussed in Part III, are reflected in administrative regulations. Perhaps the most common misunderstanding is the belief that all transgender people undergo genital surgery (phalloplasty or vaginoplasty—the creation of a penis or vagina) as the primary medical treatment for changing gender. In fact, gender-confirming health care is individualized treatment that differs according to the medical needs and pre-existing conditions of individual transgender people.¹⁰³ Some transgender people undergo no medical care related to their expression of a gender identity that differs from their birth-assigned sex.¹⁰⁴ Others undergo only hormone therapy treatment or any of a number of surgical procedures.

There are several reasons that the majority of transgender people do not undergo surgeries. Most obviously, people have different aims and desires for their bodies and express gendered characteristics in the ways that make the most sense to those needs and desires.¹⁰⁵ For those who wish to enhance the masculinization or feminization of their appearance, changing external gender expressions such as hairstyle, clothing, and accessories is often an effective, affordable, non-invasive way to alter how they are perceived in day-to-day life. For those who seek medical treatment, the most common medical treatment is not surgery but

101. MINTER & DALEY, *supra* note 77, § II.A.5.

102. One survey found that 47% of respondents did not have insurance. Xavier, *supra* note 87. This same study found that “[t]he most common barriers to accessing regular medical care reported [by participants were] lack of insurance (64%), inability to pay (46%), provider insensitivity or hostility to transgendered people (32%), and fear of transgender status being revealed (32%).” *Id.* Others reported lack of insurance as a major barrier to health care as well. MINTER & DALEY, *supra* note 77, § II.A.5.

103. Sylvia Rivera Law Project, *The Fight for Fair Access to Birth Certificates Continues*, http://srlp.org/index.php?sec=03H&page=nycbc_newpolicy (last visited Mar. 17, 2008).

104. See Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 260–61 (2005).

105. Elsewhere I have discussed more fully the overreliance on medical authority in legal determinations of the gender of transgender people, as well as the intense scrutiny that transgender people face in general and at the hands of medical providers regarding choices to express gender that match or do not match stereotypical understandings of masculinity and femininity. See Spade, *supra* note 14, at 25–26.

masculinizing or feminizing hormone therapy, which is an effective step for enhancing feminine or masculine secondary sex characteristics (e.g., voice, facial hair, breast tissue, muscle mass).¹⁰⁶ For surviving daily life—work, school, street interactions—these external markers of gender are far more important than genital status, which is usually only known to one's closest intimates. Additionally, genital surgeries are not recommended medical treatment for all transgender people. Many do not want to undergo such procedures, or because of other medical issues, are not eligible. Finally, genital surgeries are more expensive procedures than other options, and are still not covered by a majority of private insurance or Medicaid programs in the United States.¹⁰⁷ For that reason, they remain inaccessible to most transgender people.¹⁰⁸ As will be discussed further in Part II.C, many institutions that become responsible for the health needs of people in their custody, such as foster care, juvenile justice, and adult criminal justice systems, prohibit provision of gender-confirming health care for transgender people, which results in the lack of access to or termination of such care that a person may have been receiving prior to entering the institution.¹⁰⁹

The denial of gender-confirming health care, along with the popular belief that most transgender people *do* undergo surgery, results in several negative consequences for the population. First, the inability to receive this care has negative health consequences for those who need it. Depression, anxiety, and suicidality are conditions commonly tied to the unmet need for gender-confirming medical care.¹¹⁰ According to the few

106. See Sylvia Rivera Law Project, *supra* note 103.

107. Interestingly, there is evidence that coverage of gender-confirming health care for transgender people is both on the rise and on the decline. See Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care*, 4 SEXUALITY RES. & SOC. POL'Y 7, 11 (2007); R. Nick Gorton, *Transgender Health Benefits: Collateral Damage in the Resolution of the National Health Care Financing Dilemma*, 4 SEXUALITY RES. & SOC. POL'Y 81 (2007). In recent years, several major public systems have added coverage of this care to their employee benefits packages. *Id.* This includes the City of San Francisco, the University of California, and the University of Michigan. *Id.* At the same time, these benefits have come under attack in certain states that have included them in Medicaid coverage, such as Washington State and Minnesota, and benefits have been reduced as a result. The medical necessity of this type of care, and questions about whether excluding it constitutes discrimination, are being actively debated in both private and public insurance contexts. WORKPLACE TRANSITIONS: EFFECTIVE ADVOCACY FOR TRANSGENDER-INCLUSIVE EMPLOYEE HEALTH BENEFIT PLANS (Kay Whitlock ed., 2005) [hereinafter WORKPLACE TRANSITIONS], available at <http://www.afsc.org/lgbt/trans-health-care.htm>; Gorton, *supra*, at 85–89.

108. WORKPLACE TRANSITIONS, *supra* note 107.

109. Serious physical and mental withdrawal symptoms, including nausea, vomiting, cramps, dizziness, weakness, bruising, depression, suicidal feelings, hot flashes, and reversal of some of the effects of hormones, can result if hormone therapy is discontinued abruptly. See, e.g., Wolfe v. Horn, 130 F. Supp. 2d 648, 651 (D. Pa. 2001); Phillips v. Mich. Dep't of Corr., 731 F. Supp. 792, 794 (W.D. Mich. 1990).

110. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576–82 (4th ed. text rev. 2000); MARIO MARTINO, EMERGENCE: A TRANSEXUAL AUTOBIOGRAPHY 168–69, 190 (1977); JAN MORRIS, CONUNDRUM 40–135 (Harcourt Brace Jovanovich 1974) (1926); Karen M.

studies that have been done on the issue, HIV rates are also extremely high among transgender people.¹¹¹ One study found seroprevalence of 63% among African-American trans women.¹¹² A contributing factor to this may be the fact that many people seek treatments through the “black market” and receive care without medical supervision because it is not available through more legitimate means. This avenue to care may result in inappropriate dosage, nerve damage and HIV and hepatitis infection resulting from injecting without medical supervision or clean needles.¹¹³

In addition to these health consequences, the lack of access to ID that reflects a transgender person’s current gender is a consequence of popular misunderstandings about gender-confirming health care. Many ID-issuing agencies have rules that reflect the popular myth that all transgender people undergo genital surgery to confirm their gender.¹¹⁴ Because many ID-issuing agencies will not change gender markers on ID for transgender people without evidence that the person has undergone surgery,¹¹⁵ and most people do not or cannot undergo surgery, the employment consequences related to lack of accurate ID are directly connected to health care access issues. These policies result in many transgender people being unable to obtain an ID that indicates their current gender.

Additionally, research has shown that the inability to receive this type of health care may be a contributing factor to the high rates of

Goulart, *Trans 101: Trans Communities Face Myriad Issues*, PHILA. GAY NEWS, Sept. 17–23, 1999, at 1, available at http://www.queertheory.com/articles/articles_goulart_trans101.htm; Jamil Rehman et al., *The Reported Sex and Surgery Satisfaction of 28 Postoperative Male-to-Female Transsexual Patients*, 28 ARCHIVES SEXUAL BEHAV. 71 (1999); FRIEDEMANN PFÄFFLIN & ASTRID JUNGE, *SEX REASSIGNMENT: THIRTY YEARS OF INTERNATIONAL FOLLOW-UP STUDIES AFTER SEX REASSIGNMENT SURGERY: A COMPREHENSIVE REVIEW, 1961–1991* (Roberta B. Jacobson & Alf B. Meier trans., 1992), <http://www.symposion.com/ijt/pfaefflin/6003.htm>. One study found suicide attempts among 12% of trans women and 21% of trans men who had not begun treatment and no suicide attempts among the same patients after having begun treatment. Collier M. Cole et al., *Comorbidity of Gender Dysphoria and Other Major Psychiatric Diagnoses*, 26 ARCHIVES SEXUAL BEHAV. 13, 18–19 (1997).

111. Kristen Clements et al., *HIV Prevention and Health Service Needs of the Transgender Community in San Francisco*, INT’L J. TRANSGENDERISM (1999), http://www.symposion.com/ijt/hiv_risk/clements.htm.

112. Kristen Clements-Nolle et al., *HIV Prevalence, Risk Behaviors, Health Care Use, and Mental Health Status of Transgender Persons: Implications for Public Health Intervention*, 91 AM. J. PUB. HEALTH 915, 917 (2001).

113. Nina Kammerer et al., *Transgender Health and Social Service Needs in the Context of HIV Risk*, in TRANSGENDER AND HIV: RISKS, PREVENTION, AND CARE 39, 41 (Walter Bockting & Sheila Kirk eds., 2001); Michael Rodger & Lindsey King, *Drawing Up and Administering Intramuscular Injections: A Review of the Literature*, 31 J. ADVANCED NURSING 574, 577 (2000); HCH Clinicians’ Network, *Crossing to Safety: Transgender Health and Homelessness*, HEALING HANDS, June 2002, at 1, available at <http://www.nhchc.org/Network/HealingHands/2002/June2002HealingHands.pdf>; Joe Lunievicz, *Transgender Positive*, THEBODY.COM, Nov. 1996, <http://www.thebody.com/content/whatis/art30598.html>.

114. See *supra* Part II.A.

115. These policies vary widely and are discussed, in depth, in Part II.A.

incarceration of transgender youth and adults.¹¹⁶ Because they are marginalized in employment, and may experience the need for this care as urgent, many transgender people engage in criminalized activities such as sex work in order to raise money to purchase hormones from illegal sources.¹¹⁷

Overrepresentation in the juvenile and adult criminal justice systems is an ongoing issue for the transgender population. Factors contributing to this overrepresentation include participation in “black market” access to transgender health care, and, more broadly, participation in criminalized activity to survive. This occurs for several reasons. Most centrally, many transgender people turn to informal or illegal economies to get by due to high levels of unemployment, homelessness, and poverty in the population stemming from discrimination and economic marginalization. Transgender imprisonment may also be elevated because of a widespread trend of police profiling that has been documented in the United States.¹¹⁸ The cultural stereotype that transgender women are prostitutes may contribute to this profiling and to the arrest of transgender women who are not engaged in prostitution.¹¹⁹ Finally, transgender imprisonment is also bolstered by lack of access to alternatives to incarceration. For example, many non-profit drug treatment programs refuse transgender applicants, sometimes based on an assertion that they lack the experience or expertise to serve transgender people.¹²⁰ In the majority of the United States, such policies of exclusion are not forbidden by antidiscrimination law.¹²¹ Even those programs that admit transgender defendants are typically sex-segregated, and typically use gender reclassification policies that prevent transgender people from being placed in gender-appropriate settings. Transgender people are at a disadvantage for succeeding in such therapeutic programs when their gender identities are denied, and birth-assigned gender-based rules such as dress codes are applied to them.¹²² The result is that these

116. SPADE & MARKSAMER, *supra* note 12; Gehi & Arkles, *supra* note 107, at 11; Lee, *supra* note 95 pt. 1, at 4; Romeo, *supra* note 12, at 714.

117. Gehi & Arkles, *supra* note 107, at 13; Spade, *supra* note 89, at 226.

118. Lee, *supra* note 95 pt. 1, at 4; AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY AND TRANSGENDER PEOPLE IN THE U.S. 12–19 (2005), http://www.amnestyusa.org/LGBT_Human_Rights/Stonewalled_A_Report/page.do?id=1106610&n1=3&n2=36&n3=1121.

119. CHRIS DALEY ET AL., WALKING WHILE TRANSGENDER: LAW ENFORCEMENT HARASSMENT OF SAN FRANCISCO'S TRANSGENDER/TRANSSEXUAL COMMUNITY (2000).

120. Interview with Gabriel Arkles, Staff Att'y, Sylvia Rivera Law Project, in N.Y., N.Y. (Jan. 10, 2007); Interview with Alexander Lee, Founder, TGI Justice Project, in Oakland, Cal. (Apr. 3, 2007).

121. See *supra* note 12.

122. Interview with Arkles, *supra* note 120; Interviews with Carrie Davis, Coordinator, Gender Identity Project, in N.Y., N.Y. (May 15, 2004 & June 10, 2004); Interview with Alexander Lee, Founder, TGI Justice Project, in Oakland, Cal. (Apr. 3, 2007).

alternative programs are less accessible to the transgender population and imprisonment is bolstered.

Once imprisoned according to birth-assigned gender, transgender people face high levels of harassment and violence in both men's and women's facilities.¹²³ Men's prisons are characterized by highly hierarchized structures of power often influenced by violence. Violence targeted at people perceived as weak or feminine in prisons is common.¹²⁴ Violence against transgender women in men's prisons is consistently reported by prisoners themselves as well as researchers.¹²⁵ Court cases and stories from advocates and former prisoners reveal trends of forced prostitution, sexual slavery, sexual assault and other violence against transgender women in men's prisons.¹²⁶ Transgender people in women's prisons are also targets of gender-based violence, including sexual assault, most frequently at the hands of correctional staff.¹²⁷ Having masculine characteristics can make prisoners in women's facilities targets of homophobic slurs, punishment for alleged violations of rules against homosexual contact, and sexual harassment and assault motivated by a reaction to gender nonconformity.¹²⁸

Overall, the conditions described above suggest a population that remains marginalized in certain key aspects of social and economic participation. That marginalization, it appears, is caused not only by private bias and discrimination, but also by problems related to legal recognition of gender reclassification in three central areas: (1) problems related to getting ID that accurately reflects current gender, which impacts employability; (2) gender misclassification in sex-segregated facilities, which impacts the ability to access social services and increases vulnerability to violence when in mandatory institutions; and (3) lack of recognition of the legitimacy of gender-confirming health care for

123. Lee, *supra* note 95 pt. 1, at 6 (citing Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. L. & CRIMINOLOGY 127, 150 (2002)).

124. *Id.*

125. *Id.*

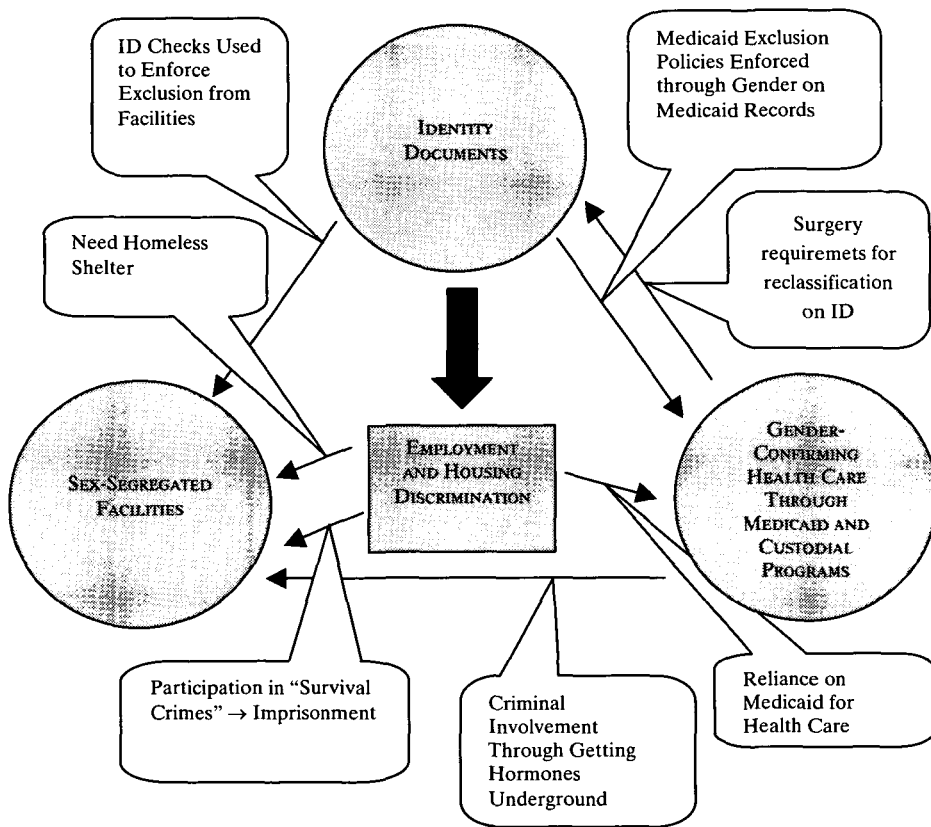
126. See generally *Farmer v. Brennan*, 511 U.S. 825 (1994) (detailing lawsuit alleging rape of transgender prisoner in the federal prison system); STOP PRISONER RAPE & ACLU NAT'L PRISON PROJECT, *STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS* (2005), available at <http://www.spr.org/en/Reports.asp> (describing various threats and statistics concerning sexual violence and transgender prisoners); Lee, *supra* note 95 pt. 1, at 9–10 (recounting a variety of conditions and dangers faced by transgender prisoners); DANIEL BASSICHIS, "IT'S WAR IN HERE": A REPORT ON THE TREATMENT OF TRANSGENDER & INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS (Dean Spade ed., forthcoming 2008); CRUEL AND UNUSUAL (Reid Productions 2006) (on file with the Sylvia Rivera Law Project) (featuring interviews of several male to female transgender prisoners about their experiences with sexual assault and rape in prison). More information about the video, "Cruel and Unusual," is available at www.cruelandunusualfilm.com.

127. Lee, *supra* note 95 pt. 1, at 7; BASSICHIS, *supra* note 126.

128. Lee, *supra* note 95 pt. 1, at 7; BASSICHIS, *supra* note 126.

transgender people impacts health outcomes, ability to get accurate ID, and criminal involvement. These three areas of administrative policy, their differing standards of gender reclassification criteria, and their mutual interaction are the focus of Part III. Figure II visualizes the interconnectedness of these three areas of regulation:

FIGURE 2: CONNECTIONS BETWEEN GENDER RECLASSIFICATION POLICIES IN ID, HEALTH CARE, AND SEX-SEGREGATION



III. GENDER RECLASSIFICATION POLICIES: THE RULES

There may be a big difference between the ‘law in books,’ meaning legal rules about the conduct we are concerned with, and the ‘law in action,’ meaning the impact of the system as a whole on that conduct.¹²⁹

Legal theorists, have provided a method for understanding the rules

129. DUNCAN KENNEDY, *SEXY DRESSING ETC.: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 134 (1995).

of law not as strictly prohibitive of certain behaviors, but rather as context-setting incentives that structure entire fields of behavior and relations.¹³⁰ To fully understand the impact of a rule system, we must look not only at the rules as written, but also at the ways the rules are applied in practice and the broader ways that the rules establish differential bargaining power for people affected by the rules, thereby providing incentives and disincentives for various behaviors and expressions. Using this broad lens is appropriate for examining how rules of gender reclassification operate, how their conflicting standards impact those petitioning for reclassification, and how they comprise an infrastructure of gender classification. Analyzing these various angles is the only way to get a comprehensive view of how gender classification operates, the normative assumptions gender classification relies on, and where the fault lines of gender classification lie.

In this Part, I will look at the three broad areas where rules related to gender classification are found, focusing on specific agencies and institutions in each area. For each institution or agency, I will describe how each is formally constructed (where written rules exist), how the rules are enforced (including inconsistencies with the written rules where they exist), and the context in which each of these gender classification policies emerged. Examining these rules in detail and in relation to each other creates a context for evaluating the criteria used for gender reclassification and the role that gender classification plays in these institutions. Taking a detailed inventory of the rules of gender classification and their histories in the various administrative contexts in which they operate allows for a close examination of both the normative assumption underlying reliance on gender as required data for government programs, and the specific conflicting assumptions made by each policy regarding gender.

A. GENDER CHANGE ON IDENTIFICATION RECORDS

Mass use of personal documentation in the United States is a relatively recent phenomenon. Most of the identity documents relied on by Americans to engage with essential institutions, such as driver's licenses, Social Security Cards, and credit cards did not exist at the beginning of the twentieth Century.¹³¹ Birth certificates and passports, which have existed longer, were until very recently restricted to a much smaller portion of the population than they are today.¹³² These

130. *Id.* (advising us to look at law as a "system of incentives rather than . . . a source of values").

131. James B. Rule et al., *Documentary Identification and Mass Surveillance in the United States*, 31 *SOC. PROBLEMS* 222, 224 (1983).

132. *Id.*

documents were not expected to be used by all in a variety of contexts as a requirement for proving identity.¹³³

As the significance of personal documentation has grown, so has the social significance of the transgender demographic. With more people identifying as transgender and receiving support from medical authority to live in a gender different than the one assigned at birth, new types of encounters with identity documentation systems emerged.¹³⁴ The need for such documentation to match the current identity of a transgender person has become increasingly central to the social and economic participation of transgender people.¹³⁵ Administrative agencies have recognized this shift by making a variety of rules that allow for gender change.

This section examines these policies, pointing out the significant degree of inconsistency amongst the most important ID regimes of state and federal agencies. As is more fully discussed below, these inconsistencies are not the reasonable result of various states coming to their own policies, such that we might expect transgender people to choose to live in states that favor their needs. Instead, these policies vary even within states, contradict federal policies, and are often tied to factors that cannot be chosen or controlled, such as state of birth. The full implications of these contradictions will be further explored after a description of the policies in question.

I. *Social Security Administration*

The SSA was created in 1935 to administer a new program aimed at providing income support to elderly Americans.¹³⁶ The advent of the SSN was met with significant protest in the United States, where no unique identifier system had yet been applied to the population.¹³⁷ Many Americans feared the surveillance potential of having a unique identifier system, and spoke out against the dangers of assigning a number to each person as the method of administering these benefits.¹³⁸ Public officials,

^{133.} *Id.*

^{134.} *Id.* at 224–26.

^{135.} *Id.*

^{136.} *Id.* at 226.

^{137.} CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA* 85 (2003) (“When the necessary identification requirements of the law became apparent, both the left and right attacked. GOP heavyweight John D.M. Hamilton attacked Roosevelt’s Social Security system as crypto-fascist, claiming that all Americans would be forced to wear metal ID tags. William Randolph Hearst’s *New York Journal-American* declared the new pension system a form of ‘snooping and tagging’ that would require workers to wear dog tags ‘for the privilege of suffering a pay cut.’ . . . The United Mine Workers and the United Steelworkers unions worried that SSNs would be hijacked by bosses to track and blacklist organizers. . . . And the *Boston American* warned that ‘your personal life will be laid bare, your religion and the church you attend will be listed. Your physical defects will go down in black and white . . . your union affiliation will be stated. . . . [E]ven your divorce, if you have one, will be included.’”) (footnotes omitted).

^{138.} *Id.*

intent on increasing support for the new program, made broad-sweeping promises that the SSN would never be used for any governmental purpose besides distributing old age benefits.¹³⁹ In only a matter of decades, however, SSNs increasingly began to be used for an enormous variety of purposes both governmental and commercial, and the information gathered by the SSA about each American grew to be more significant to more areas of life.¹⁴⁰ The rules about gender reclassification have also undergone change, and, due to new uses of SSA records by other governmental agencies, as discussed in Part IV, are creating new obstacles for transgender people.

The formal rule of the SSA regarding gender reclassification is that individuals “provide clinic or medical records or other combination of documents showing the sex change surgery has been completed.”¹⁴¹ The impact of the SSA rule was not as significant to transgender people as other rules governing gender reclassification by identity document-issuing agencies prior to the War on Terror. This is for several reasons. First, most people do not use an SSA card as a day-to-day piece of identification. It is usually presented to employers at the beginning of employment, or as part of an application for another piece of ID like a driver’s license, but it is not commonly used for daily ID needs. Second, the SSA card does not include a gender marker. It shows only the cardholder’s name and SSN. For this reason, transgender people have frequently changed their name on their SSA card, but not bothered to alter their registered gender. Because most transgender people do not undergo genital surgery, and genital surgery is required to change gender with SSA, changing only the name on the SSA card is often the more

139. *Id.* at 86. By 1939, J. Edgar Hoover had convinced Roosevelt to allow the FBI access to Social Security files in federal criminal investigations. Disclosure policies continued to evolve throughout the 1940s and 1950s to allow increased access for a growing number of government purposes. *Id.* In 1961, the Internal Revenue Service (IRS) began using the SSN as the individual taxpayer identification number, and in 1966 and 1967 respectively, the Veterans Administration and Pentagon began using them to identify veterans and military personnel. Robert Ellis Smith, *The Social Security Number in America: 1935–2000*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION, *supra* note 40, at 203, 203. A new banking law passed in 1970 required all banks to get SSNs for all customers. *Id.* at 210.

140. Rule et al., *supra* note 131, at 223. The steady creep of SSN usage is not a phenomenon of the new millennium. *Id.* In 1983, critics were already writing about how use of SSA records had expanded to include state welfare departments and food stamp programs, the FBI and Secret Service, the Immigration and Naturalization Service, the Parent Locator Service (for finding parents who desert spouses with dependent children), and the IRS. *Id.*

141. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS) RM 00203.215(B) (2006), available at <https://so44a90.ssa.gov/apps10/poms.nsf/lrx/0100203215#b>. Interestingly, this rule underwent a recent change. In 2002, the SSA changed from a prior rule that allowed applicants to show that sex change surgery had either been completed or started to the current rule, making the surgery requirement clearer. Press Release, Nat’l Transgender Advocacy Coalition, Social Security Administration Changes Policy on Transsexuals and Intersexed (Nov. 7, 2002), available at <http://www.tgcrossroads.org/news/archive.asp?aid=468>.

realistic option.¹⁴² As will be described later in Part IV, the significance of SSA gender classifications has sharply increased due to new uses of SSA records in the War on Terror.

Interestingly, advocates report that the SSA rules are enforced inconsistently. Some transgender people are able to get their gender changed on their SSA records by simply showing a court decree of name change and a generally worded doctor's letter indicating that transition is complete.¹⁴³ These generally worded letters typically state something like: "My patient, Jane Doe, has undergone all necessary treatment to be considered female."¹⁴⁴ Advocates suggest that because most SSA workers are neither familiar with transgender health care nor the specific SSA gender reclassification policy, many see a court order and a general doctor's letter and assume that genital surgery is complete.¹⁴⁵ Conversely, some SSA workers will fail to provide a gender reclassification even

142. See *supra* notes 103–09 and accompanying text. Name change decrees, available through the courts, do not change gender. Many transgender people informally or legally change their names to a name traditionally associated with their new gender. Name change itself has been an interesting area of controversy in transgender law because some judges have refused to grant name changes to transgender people. See, e.g., *In re Guido*, 771 N.Y.S.2d 789 (N.Y. City Civ. Ct. 2003); Press Release, Sylvia Rivera Law Project, Manhattan Judge Obstructs the Right of Four Transgender Women to Change Their Names (2006), available at <http://www.srlp.org/index.php?sec=03H&page=namechange-obstruction.release> [hereinafter *Manhattan Judge Obstructs*]. While name changes are generally granted to anyone who is not using the name change to defraud creditors or escape debt or criminal liability, many judges have gone beyond these limitations to deny transgender name changes based on a perception that they are somehow fraudulent or inappropriate. In a well known case in New York City in 2003, *In re Guido*, Judge Deborah Samuels reversed her own prior ruling denying a name change to a transgender woman because the transgender person was still legally married and such a name change might create the appearance of a same-sex marriage. *In re Guido*, 771 N.Y.S.2d at 789. After Judge Samuels wrote a lengthy opinion explaining her mistake and reviewing that name changes do not constitute a change of gender, she arranged a training for Manhattan Civil Court judges and personnel, which I conducted, to assist other judges in learning the law applied to transgender name change cases. Nonetheless, transgender applicants have continued to face obstacles. In 2006, the Sylvia Rivera Law Project, a transgender law organization, reported that three clients had all been denied name changes by a civil court judge who stated that he "would not adjudicate gender." *Manhattan Judge Obstructs*, *supra*.

143. In the four years that I worked as an attorney providing free legal assistance to transgender people, I had several clients who visited the SSA office and were asked for no documentation at all to change the gender marker on their SSA records. These clients generally report that it was their appearance that seemed to convince the worker to make the change. Most recently, one person reported to me that at an SSA office in Colorado they were asked for no medical evidence at all when they requested and were granted a gender change. Interview with N.H., in Boulder, Colo. (Nov. 29, 2006).

144. R. NICK GORTON, JAMIE BUTH & DEAN SPADE, *MEDICAL THERAPY AND HEALTH MAINTENANCE FOR TRANSGENDER MEN: A GUIDE FOR HEALTH CARE PROVIDERS* 80 (2005), available at <http://www.nickgorton.org>.

145. *Id.*; Interview with Gabriel Arkles, Staff Att'y, Sylvia Rivera Law Project, in N.Y., N.Y. (Mar. 20, 2007); Interview with Pooja Gehi, Staff Att'y, Sylvia Rivera Law Project, in N.Y., N.Y. (Mar. 20, 2007); Interview with Jody Marksamer, Staff Att'y, Nat'l Ctr. for Lesbian Rights, in L.A., Cal. (Feb. 15, 2007).

when all relevant required evidence is provided based simply on bias or unfamiliarity with the relevant rules.¹⁴⁶

2. *Birth Certificates*

The consistent maintenance of birth and death records in the United States is a surprisingly recent phenomenon, and the use of birth certificates as identifying documents is even more recent. Efforts to collect vital statistics first began in the United States when Virginia enacted a registration law in 1632 that was later modified and adopted by Massachusetts in 1639.¹⁴⁷ Later, the U.S. Constitution was written to include a provision for a decennial census, but did not create a national vital registration system of any kind.¹⁴⁸ The states were left with this task.¹⁴⁹ The censuses obtained national data by including questions about vital events, but the results were insufficient to produce quality data.¹⁵⁰ The U.S. Bureau of the Census was made a federal agency in 1902.¹⁵¹ The legislation creating the Bureau of the Census included a directive that the new agency annually obtain copies of records filed in the states and cities that had adequate death registration systems and publish this data.¹⁵² The Bureau of the Census still did not have the power to create a national vital registration system, but instead sought to gather what statistics had been collected by states and cities, and to encourage the collection of vital statistics through standardized forms.¹⁵³ The Bureau created a "U.S. Standard Certificate of Death" that it urged each jurisdiction to adopt by January 1, 1900.¹⁵⁴ The standardization of vital statistics progressed and state agencies increasingly received direction from the federal government regarding establishing and following particular practices of recordkeeping. In 1915, the national birth registration area was established.¹⁵⁵ A registration "area" was all or part of a state that complied with the federal guidelines by collecting data in a standardized way.¹⁵⁶ More and more jurisdictions joined the area over time. By 1933, all states were registering live births and deaths and providing the required data to the Bureau for the production of national

146. GORTON ET AL., *supra* note 144.

147. Rule et al., *supra* note 131; James A. Weed, *Vital Statistics in the United States: Preparing for the Next Century*, 61 *POPULATION INDEX* 527, 528 (1995).

148. See U.S. CONST. art. I, § 2. The Constitution includes the phrase: "The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." *Id.*

149. U.S. CONST. amend. X.

150. Weed, *supra* note 147.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Carl Watner, *The Compulsory Birth and Death Certificate in the United States*, in *NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION*, *supra* note 40, at 70, 74.

birth and death statistics.¹⁵⁷ After that, responsibility for collecting and publishing national vital statistics shifted between various agencies, and now resides with the U.S. Department of Health and Human Services.¹⁵⁸ States continued to maintain their own practices, following certain federal standards for collection and reporting of statistics.¹⁵⁹ The responsibility for registering births and deaths and maintaining records, however, remained with states or local jurisdictions with the federal government acting primarily to encourage accurate and complete registration.¹⁶⁰

Like SSNs, birth registration was resisted by different sectors of the American population for various reasons, and incentives to encourage birth registration were important to making it the norm. When a birth registration law passed in South Carolina in the mid-1800s, many citizens refused to comply.¹⁶¹ It was the creation of Social Security benefits in 1935 that stimulated birth registration: "Many people had never considered a birth certificate to be of any importance until old age assistance, unemployment insurance, and other ramifications of the Social Security Act demonstrated to them that it was necessary to have this official proof of their existence."¹⁶² Physicians, the most important functionaries in the system of collecting vital statistics, resisted the new duties imposed.¹⁶³ States responded by passing laws that fined physicians who failed to register births and deaths.¹⁶⁴ In Pennsylvania there were hundreds of prosecutions for failure to register births.¹⁶⁵ These measures were necessary to combat the resistance to birth registration that impaired the collection of vital statistics across the country.¹⁶⁶

As states were encouraged by the federal government to register births and deaths accurately, and the practices for doing so became increasingly standardized, the certificates themselves began to take on new meaning. With growing attention to adequate birth registration, promoted in part by increased interest in reducing infant mortality in the early 1900s, some places began using birth records as the primary document for verifying the age of minors entering school and obtaining

157. Weed, *supra* note 147.

158. *Id.*

159. Rule et al., *supra* note 131, at 224–25.

160. *Id.* at 224.

161. Watner, *supra* note 156, at 76.

162. *Id.* (quoting WILSON G. SMILLIE, PUBLIC HEALTH ADMINISTRATION IN THE UNITED STATES 191 (3d ed. 1947)).

163. *Id.* at 79.

164. *Id.* at 77 (discussing an 1803 New York City law fining physicians \$50 who failed to register deaths).

165. *Id.* at 78.

166. *Id.*

work permits.¹⁶⁷ Expanded efforts to measure the accuracy with which states were registering births across the nation in 1940 further increased the cultural significance and uses of birth certificates. These efforts took the form of detailed tracking, promotion campaigns aimed at hospital workers and others relevant to registration, and postcard campaigns requesting every household register births.¹⁶⁸ Whereas at one time only the wealthy people concerned with legal inheritance had been interested in public records of birth and death, these documents now became necessary for everyone.¹⁶⁹ Birth certificates began to be used to verify identity for a variety of wartime specific programs including the verification of citizenship for defense industry jobs, applications for increased food ration books upon the birth of a new child, and family allowances for new children of service members.¹⁷⁰ By 1950, Census Bureau officials estimated that 97.9% of births in the United States were being registered.¹⁷¹

Today, birth certificates have taken on even greater importance, as they have become essential for access to schooling, insurance, pensions, and much more.¹⁷² States continue to differ in their policies and practices regarding birth registration, with the federal government continuing to press for centralization and coordination, particularly in matters related to federal surveillance.¹⁷³ It has been estimated that federal requirements, such as providing documents to prove identity when applying for a Social Security card, “account . . . for about half the demand for birth certificates in the United States.”¹⁷⁴ The connection between personal documentation provided by the federal government and documentation practices taking place in states and local jurisdictions remains decentralized yet interdependent. The changes in use of these documents, from campaigns to learn the national birth rate and track infant mortality to the current incarnation of documents as essential for access to institutions central to everyday life, expose the connection between data collection devised in population-level caretaking programs and systems of surveillance.

Since the Bureau of the Census’ first attempts to standardize birth

167. In 1912, in response to increasing pressure to monitor and reduce infant mortality in the United States, the U.S. Children’s Bureau was created; one of its major responsibilities being to investigate the issue. The Bureau became a part of the effort, already underway by the Bureau of the Census, to improve state registration of births. S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 *POPULATION STUDIES* 86, 92 (1950).

168. Watner, *supra* note 156, at 76–79.

169. Watner, *supra* note 156, at 72, 80–81.

170. *Id.* at 103.

171. Rule et al., *supra* note 131.

172. *Id.*

173. *Id.* at 224–25.

174. *Id.*

and death certificates in the early 1900s, the federal government has created updated Model Vital Statistics acts on several occasions, most recently in 1992.¹⁷⁵ Model Vital Statistics statutes are an important component in the standardization of vital statistics practices across the states. Interestingly, section 21(e) of the 1977 version included a provision allowing that, where a petitioner provides a court order establishing sex change by an unspecified surgical procedure¹⁷⁶ and change of name, the birth certificate should be amended to reflect the new name and sex designation.¹⁷⁷ This Model Vital Statistics Act can be credited with encouraging a majority of states to create policies allowing for sex to be amended on birth certificates. There is no written history of the addition of the gender reclassification section to the 1977 Model Vital Statistics Act. However, its addition suggests a recognition by Vital Statistics experts at the time that allowing for gender reclassification was the appropriate way to meet the multiple goals of this type of recordkeeping, including accuracy, availability of vitally needed certificates of birth for access to institutions important in everyday life, and administrative ease. Perhaps the success of jurisdictions like New York City, which had already created a policy allowing for reclassification, was instructive. Nonetheless, not all jurisdictions followed the Model Act's suggestion, and the policies remain varied throughout the country.

We have, in the fifty United States, fifty-two birth certificate-issuing agencies: the fifty states, New York City, and the District of Columbia.¹⁷⁸ In every state but New York, the state issues vital records including birth and death certificates.¹⁷⁹ In New York, there are two vital records jurisdictions, New York State and New York City, so that people seeking gender reclassification on birth certificates born in New York State must petition the State Department of Health or the City Department of Health depending upon the location of their birth. Forty-seven states and

175. CTRS. FOR DISEASE CONTROL & PREVENTION/NAT'L CTR. FOR HEALTH STATISTICS, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS (rev. 1995) (1992), available at <http://www.cdc.gov/nchs/data/misc/mvsact92aacc.pdf>.

176. NAT'L CTR. FOR HEALTH STATISTICS, MODEL STATE VITAL STATISTICS ACT AND MODEL STATE VITAL STATISTICS REGULATIONS 17 (rev. 1978) (1977). As will be discussed below, different jurisdictions have chosen to require different surgeries, resulting in one type of inconsistency seen in these policies across the country. See *infra* Appendix 3.

177. *In re Heilig*, 816 A.2d 68, 83 (Md. 2003). Some jurisdictions amended their vital statistics acts to allow gender change prior to the federal recommendation to do so in 1977. *Id.* Illinois amended its act to do so in 1951, and New York City in 1971. *Id.*

178. U.S. territories also issue birth certificates. Interestingly, in 2005, in *Ex parte Delgado Hernández*, No. CC-2004-708, 2005 WL 1593435, at *10 (P.R. 2005), Puerto Rico's Tribunal Supremo reversed its prior practice of providing amended birth certificates to transgender people seeking gender reclassification, stating that sex designation change will no longer be available on Puerto Rican birth certificates. See also Weed, *supra* note 147.

179. Weed, *supra* note 147, at 527.

New York City allow gender reclassification on birth certificates.¹⁸⁰ Idaho, Ohio, and Tennessee will not change gender on a birth certificate.¹⁸¹ Twenty-eight states plus the District of Columbia and New York City specifically authorize gender reclassification by statute or administrative ruling, while the other nineteen have no written rule stating that they allow sex designation change, but in practice do provide sex designation change upon application.¹⁸²

Every state allowing change of sex on a birth certificate requires evidence of surgery to warrant a gender reclassification, though they vary in what proof is required and in the specificity of the evidentiary requirements.¹⁸³ In California and Virginia, surgeries other than genital surgeries can be used as proof of gender change for birth certificate gender reclassification purposes.¹⁸⁴ In Virginia, this resulted from a challenge to Virginia's denial of birth certificate gender reclassification to a transgender man who had undergone chest surgery (mastectomy) and hysterectomy.¹⁸⁵ His advocates successfully argued that he should be allowed reclassification even though he had not undergone phalloplasty because he had clearly undergone permanent gender-related medical care.¹⁸⁶ While that individual negotiation did achieve some reduction in the rigidity of the Virginia standard, it is unclear how it will be applied in other cases, or exactly what Virginia now requires. Some states, such as Iowa, have generally worded statutes that would appear to not require any particular surgery, but are applied using a genital surgery standard.¹⁸⁷

180. Every state except Tennessee (which bans gender reclassification on birth certificates through a specific statute, TENN. CODE ANN. § 68-3-203(d) (2006)), Ohio, and Idaho allow gender reclassification on birth certificates. Rhonda Smith, *Changing Birth Certificate Gender Varies State to State: Only Ohio, Tennessee and Idaho Prohibit Switch*, WASH. BLADE, Dec. 6, 2002, available at <http://www.tgcrossroads.org/news/archive.asp?aid=524>.

181. TENN. CODE ANN. § 68-3-203(d) (2006); *In re Ladrach*, 32 Ohio Misc. 2d 6, 8 (Ohio Prob. Ct. 1987) (interpreting Ohio's birth certificate statute to be only a correction statute that does not encompass correction of sex on birth certificates of individuals who have changed their sex by surgical procedure); IDAHO ADMIN. CODE r. 16.02.08.201 (2006).

182. See Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 838 (2005).

183. See *infra* Appendix 3 and accompanying notes.

184. See *infra* Appendix 3 and accompanying notes.

185. Lambda Legal, *Amending Birth Certificates to Reflect Your Correct Sex: In Re Birth Certificate Amendment of John Doe*, Nov. 12, 2002, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31991108>. This did not occur in court, but rather was a negotiation between the administrative agency and the petitioner's lawyers. *Id.*

186. *Id.*

187. The Iowa statute authorizes the registrar to issue a new birth certificate upon receipt of a "notarized affidavit by a licensed physician and surgeon or osteopathic physician and surgeon stating that by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed." IOWA CODE § 144.23(3) (2002); see also UTAH CODE ANN. § 26-2-11 (West 2007); VA. CODE ANN. § 32.1-269(E) (West 2007). I learned about the enforcement of Iowa's statute in 2002, when I initiated negotiation with the New York City Department of Health to change their birth certificate gender reclassification policy. I used Iowa's statute as an example to show them that, if New

Some jurisdictions' requirements are highly specific—if not in writing, then in practice. New York City and New York State are excellent examples, because their conflicting standards seem particularly arbitrary when viewed side by side in light of their existence within the same state.¹⁸⁸ Neither the State of New York nor New York City has formal written rules requiring a specific surgical procedure.¹⁸⁹ In practice each jurisdiction has a strictly enforced requirement. New York City requires proof that the applicant has undergone one of two very specific surgeries: vaginoplasty or phalloplasty. Evidence of other procedures will not suffice. New York State requires that the applicant has undergone penectomy (surgical removal of the penis) or hysterectomy and mastectomy. These rules do not appear in the relevant written laws or policies of the jurisdictions, but instead appear to have emerged from the “common sense” of the bureaucrats charged with administering vital records changes.¹⁹⁰ It is easy to imagine that, using “common sense” (mis)understandings of transgender health, some people would think a transgender person has succeeded in surgically altering their gender by obtaining the genitalia associated with the new gender, while others would think of success as removing the genitalia and secondary sex characteristics associated with the old gender. As a result of the conflicting standards, two similarly situated transgender people, who had both undergone the same gender-confirming surgery (such as two transgender women who have undergone penectomy, and no other procedures, or two transgender men who have undergone phalloplasty, and no other procedures) would have different results seeking gender

York City adopted a standard that did not require surgery, as I was advocating, they would not be the only jurisdiction to do so. Dr. Steven Schwartz, Registrar and Assistant Commissioner of Vital Statistics, came to our next meeting reporting that he had spoken to the Commissioner of Vital Records in Iowa and was told that they do, indeed, require genital surgery. Interview with Dr. Stephen Schwartz, Registrar and Assistant Comm'r of Vital Statistics, N.Y. City, in N.Y., N.Y. (Feb. 2003).

188. These two jurisdictions are also worthy of note because they have been the target of concerted efforts to change gender reclassification policies by activists over the last four years. Sylvia Rivera Law Project, *The Fight for Fair Access to Birth Certificates Continues*, http://srp.org/index.php?sec=03H&page=nycbc_newpolicy (last visited Mar. 17, 2008). In New York City, these negotiations culminated in the rejection of recommendations for policy change. Negotiations with New York State's Board of Health continue. *Id.*

189. The State of New York's statute requires “a letter from the surgeon specifying date, place, and type of sex reassignment surgery performed,” but does not specify which type of surgery is required. N.Y. COMP. CODES R. & REGS. tit. 10, § 35.2 (2005). New York City's policy asks that “proof satisfactory to the Department has been submitted that such person has undergone convertive surgery.” N.Y., N.Y., HEALTH CODE tit. 24, § 207.05(a)(5) (2005).

190. The enforcement of these unwritten rules is applied by the City and the State. I became aware of these rules through my work with clients of the Sylvia Rivera Law Project, a transgender legal services non-profit in New York, who were applying for sex designation change. I became further familiar with the practices of New York State and New York City birth certificate issuing agencies through ongoing negotiations, initiated in 2002 with the New York City Department of Health and in 2005 with the New York Department of Health, where advocates and health professionals advocated for a policy change to eliminate these surgery requirements.

reclassification on their birth certificates if one person was born in Westchester and the other was born in Queens. The transgender woman born in New York City would be denied a new birth certificate. The transgender man born in New York City would be granted one. The transgender woman born in Westchester would be granted a new birth certificate, but the transgender man would be denied. Although all four of these people may share the need for this documentation to participate in work and other essential activities in the gender in which they live and to avoid discrimination, their ability to get that documentation will be dependent on the unchangeable fact of their place of birth.

The jurisdictions that have gender reclassification policies for birth certificates also differ in their treatment of reclassified birth certificates. Some jurisdictions provide a new certificate with the changed information in place of the original information,¹⁹¹ others provide a certificate where the old information is visible but crossed out,¹⁹² and others leave it up to the discretion of a judge whether the certificate will be amended or a new one will be issued to replace it.¹⁹³ Because birth certificates are often used as part of application for other ID, in employment contexts to verify legal work status, and sometimes as evidence of gender in the context of placement in sex-segregated facilities like shelters or drug treatment programs, the difference between having a “clean” birth certificate versus a birth certificate that exposes a transgender history or that leaves someone without a birth-certificate gender *tout court*, can have sharp effects for transgender people.¹⁹⁴

Detailed information about the rules in each jurisdiction can be found in Appendix 3 and its footnotes, which tracks the varying criteria for sex designation change on birth certificates across the fifty-two jurisdictions.

3. *Departments of Motor Vehicles*

“Licensing drivers has always been a state responsibility, and, as with birth” registration, there have been considerable state differences in

191. Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, New Mexico, New York (state), North Carolina, Pennsylvania, Texas, Virginia, and Washington. *See infra* Appendix 3.

192. Alabama, Alaska, Kansas, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, and West Virginia. *See infra* Appendix 3.

193. Arkansas, Maryland, Minnesota, New Hampshire, South Dakota, Vermont, Wisconsin, and Wyoming. *See infra* Appendix 3.

194. As was discussed in Part I, vulnerability to discrimination is a significant factor, considering that job discrimination against transgender people is only legally prohibited in a small portion of jurisdictions. Even for those living in protected jurisdictions, lacking resources to obtain legal assistance, or lacking “smoking gun” evidence of the discriminatory behavior often precludes enforcement of these laws, and the damage of being “outed” is irreversible.

policy and practice for doing so.¹⁹⁵ Massachusetts was the first state to issue driver's licenses beginning in 1907; South Dakota became the last state to do so in 1957.¹⁹⁶ Initially licenses were primarily a way of generating state revenue.¹⁹⁷ They did not include driving exams or other safety-focused measures.¹⁹⁸ Driver's licenses have since taken on a much larger role in identity verification in the United States, becoming central to everything from cashing a check to applying for a job.¹⁹⁹ Their significance grew so quickly, in fact, that in the twenty years after South Dakota joined the ranks of license-issuing states, forty states had begun providing non-drivers ID through their DMVs as well, because of the need for non-driving citizens to have something like a driver's license to verify their identities in multiplying contexts where they were now required. Driver's licenses are now the most commonly used "everyday" piece of ID in the United States.²⁰⁰

Department of Motor Vehicle policies regarding gender reclassification for driver's licenses and non-driver ID cards also vary state-to-state. Generally, states require any of four types of evidence to change a gender marker.²⁰¹ First, some states do not have surgery requirements to change the gender marker, but instead ask for some other kind of medical evidence.²⁰² New York State, for example, requires that the applicant provide a letter from a physician declaring that one gender predominates over another.²⁰³ While this unusual language does not track any specific medical protocol used by health providers, most standard doctor's letters stating that the applicant is transgender and needs ID verifying the new gender are accepted.²⁰⁴ A second category of evidence required by some states is medical confirmation that the applicant has undergone gender-confirming surgery.²⁰⁵ A third category is a court order confirming gender change.²⁰⁶ Requiring applicants to obtain a court order changing gender will mean that it is up to an individual

195. Rule et al., *supra* note 131, at 225.

196. *Id.*

197. *Id.*

198. Carl Watner, *Drivers Licenses and Vehicle Registration in Historical Perspective*, in NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION, *supra* note 40, at 101, 103.

199. *Id.* at 111.

200. *Id.*

201. See *infra* Appendix 1 and accompanying notes.

202. See *infra* Appendix 1 and accompanying notes.

203. N.Y. State Dep't of Motor Vehicles, Change of Sex or Gender on a DMV Photo Document, <http://nysdmv.custhelp.com/> (search "All" for "gender") (last visited Mar. 17, 2008). The policy requires "a written statement from a physician, a psychologist, or a psychiatrist that is printed on letterhead. The statement must certify that one gender is your main gender." For a full list of states using this evidentiary requirement and the specific language of their policies, see *infra*, Appendices 1, 2 and accompanying notes.

204. Change of Sex or Gender on a DMV Photo Document, *supra* note 203.

205. See, e.g., *infra* Appendices 1, 2 and accompanying notes.

206. See, e.g., *infra* Appendices 1, 2 and accompanying notes.

judge to determine what type of evidence is sufficient, which may vary significantly amongst judges.²⁰⁷ A fourth category is an amended birth certificate indicating the new gender.²⁰⁸ No state entirely bars people from changing the gender marker on their DMV ID, although some states have no written policy regarding the issue at all.²⁰⁹

Some states' DMV policies include provisions for temporary gender change pending evidence of surgery.²¹⁰ These policies allow a transgender person to get gender-accurate ID for a period during which they are supposed to be seeking treatment. Upon providing proof of completed surgery, the gender change on the license becomes permanent. If the person fails to provide such proof, the DMV may change the gender on the ID back to the birth-assigned gender at a future point of renewing the ID.

Appendices 1 and 2 allow comparison of the varying evidentiary requirements for gender reclassification in the DMVs of each state. In Appendix 1, every type of evidence each state's DMV will accept is indicated by an asterisk and the exact language of the policy is in the footnotes so that a reader can understand whether the applicant needs to submit one or more than one of the pieces of evidence checked off. Appendix 2 provides a simpler snapshot of the minimum requirements in each state by putting the state names in bold where the given piece of evidence is required for gender reclassification.

Of course, it is not hard for most people who have ever been to a DMV to imagine how inconsistently these rules can be applied.²¹¹ One commonly heard story in transgender communities concerns people who are consistently perceived as the new gender. They visit the DMV and complain that the gender on their license, which does not match their current appearance, is a mistake. Frequently, workers have "fixed" these mistakes, never considering that the cardholder is transgender. Such strategies may be increasingly difficult with computerized DMV records that show the DMV worker that the applicant has a history of name

207. Judicial opinions vary broadly in this arena, sometimes using chromosomes, sometimes birth status, sometimes surgery. *See, e.g.*, *M.T. v. J.T.*, 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976) (surgery); *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (1977) (rejecting chromosome test as the only way to decide gender); *Littleton v. Prange*, 9 S.W.3d 223 (Ct. App. Tex. 1999) (birth status).

208. *See, e.g.*, *infra* Appendices 1, 2 and accompanying notes.

209. *See infra* Appendices 1, 2 and accompanying notes.

210. *See infra* Appendices 1, 2 and accompanying notes.

211. Scholars have discussed at length, especially in the realm of welfare policy, the issues that relate to discretion of low-level bureaucrats enforcing the policies of complex bureaucracies. Frequently, misinformation and bias can result in misapplication of agency policies and unjust exclusions or denials for applicants. *See* JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 55–58 (1986); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 13–25 (1980); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 61–65 (1983). Clearly, these issues are relevant to the concerns of transgender people making gender reclassification requests at administrative agencies.

change when the records are called up.²¹² Of course, this strategy for record change, even where it still works, is available only to transgender people who are easily perceived in the new gender and happen to meet a DMV worker who is not trans-savvy. The more common inconsistencies involve denial of gender reclassification to transgender people, even those who do meet the given policy's requirements, due to unfamiliarity with the policy or bias. Advocates report that they frequently send clients to the DMV with printouts of the relevant policy so that the client can better advocate for the change with unfamiliar or hostile DMV workers.²¹³ One story that illustrates this type of inconsistency well comes from prominent transgender legal scholar, Professor Paisley Currah.²¹⁴ Currah visited the New York DMV seeking a changed gender marker on his ID. As noted above, New York requires only a letter from a physician stating that the applicant is transgender. Currah brought a letter from his surgeon stating that he had undergone chest surgery for sex reassignment purposes and should be understood to be male for all relevant purposes. The DMV worker refused to make the change, arguing that a surgeon is not a physician. This story is humorous and was resolved, but reflects the role of discretion of low-level bureaucrats in enforcing a set of policies that are often associated with an unpopular group.

DMV ID is certainly the most commonly used ID in the United States, essential for driving, applying for employment, dealing with police, entering age-barred venues, traveling on planes, purchasing age-barred products, using checks and credit cards, etc. The patchwork of policies and the inconsistent application of those policies results in differing levels of access to accurate ID for various transgender people. Depending on the state where a person lives, sometimes in combination with their birthplace if an amended birth certificate is required, they may or may not be able to access ID that indicates their current gender. Two individuals living in the same state, having undergone similar medical treatment, may face different results depending upon the DMV worker they are faced with, the rules of the birth certificate issuing agency in their birth state, or the standards for gender applied by the judge from whom they seek a court order. For others, although the rules may be applied consistently, the surgery requirement itself, which reflects a mythical "one-size-fits-all" understanding of transgender health care,

212. See *infra* note 336 and accompanying text (discussing the Real ID Act draft regulation's requirements that all former names be kept on record).

213. Interview with Arkles, *supra* note 145; Interview with Jody Marksamer, Staff Att'y, Nat'l Ctr. for Lesbian Rights, in L.A., Cal. (Feb. 28, 2007).

214. E-mail from Paisley Currah, Assoc. Professor, Brooklyn College, to author (Mar. 23, 2007) (on file with author).

may prevent them from obtaining ID that accurately represents their current gender.²¹⁵

4. *Passports*

Passports were already being issued in North America before the Revolutionary War.²¹⁶ They were issued by local officials, state officials and federal officials until 1856 when the federal government first claimed exclusive jurisdiction for passport issuance.²¹⁷ In general, they were rarely applied for or used by Americans until relatively recently.²¹⁸ The increase in international travel, in addition to the development of the modern state, has created new conditions leading to increased use of passports. Throughout the nineteenth Century, most countries did not require the use of passports except during wartime.²¹⁹ The United States began to require U.S. nationals to travel with a passport during peacetime only in 1952.²²⁰ Even today, only about 25% of U.S. citizens hold a current passport.²²¹ The use of passports continues to increase, however, with requirements for travel steadily changing. While until recently a U.S. birth certificate was sufficient to reenter the United States from Canada, passports are now required.²²²

There are two routes to gender reclassification on passports. The formal rule for obtaining a gender marker change on the ten-year passport requires proof of genital surgery.²²³ The type of genital surgery required is not specified. Transgender people can also apply for a one-year temporary passport by submitting a letter from a doctor verifying that they will be undergoing genital surgery within the year.²²⁴ As with all amendments to passports, the change will be recorded in type in the back pages of the passport. Thus, the front page of the passport remains the same, with the old name and gender and photo presented, and in the

215. See *supra* Part I.

216. Rule et al., *supra* note 131, at 225

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. Press Release, U.S. Dep't of State, New U.S. Passport Requirement for Air Travel to Take Effect Jan. 2007 (Nov. 22, 2006), available at http://nassau.usembassy.gov/pr_22112006.html ("Approximately 70 million citizens hold U.S. Passports, an estimated 25 percent of the population overall.").

222. U.S. Dep't of State, Western Hemisphere Travel Initiative, http://travel.state.gov/travel/cbpmc/cbpmc_2223.html (last visited Mar. 17, 2008); see also Jane McLean, *Do Americans Need a Passport to Visit Canada?*, ABOUT.COM: CANADA TRAVEL, Dec. 2007, <http://gocanada.about.com/od/canadatraveloverview/qt/uscitizenborder.htm>.

223. NAT'L CTR. FOR LESBIAN RIGHTS, FLORIDA'S NAME CHANGE KIT: A GUIDE FOR TRANSGENDER INDIVIDUALS SEEKING TO AMEND THEIR IDENTITY DOCUMENTS TO CONFORM TO THEIR NEW LEGAL NAME AND GENDER DESIGNATION 9-10 (2006), available at http://www.nclrights.org/site/DocServer/fl_namechg_kit.pdf?docID=1281; Passport for Transgender People, <http://www.tsroadmap.com/reality/passport.html> (last visited Mar. 17, 2008).

224. Rule et al., *supra* note 131.

back, typed vertically along the crease of a page, the State Department will type “The bearer of this passport is now known as John Doe” for a name change and “The bearer of this passport is now male” for a gender change. The applicant may pay a fee to have a new passport issued with a front page changed to reflect the new information and a new photo.

As with changing gender on SSA records, some transgender people have traditionally been able to change their passport gender either by being perceived by a clerk to be the current gender and convincing the person to correct the “mistake,” or by providing a generally worded letter and letting the person assume this means the applicant has undergone surgery.²²⁵ Recently, however, these methods have been less successful, and increasing numbers of transgender people are reporting that when they submit a generally worded letter, they receive a return request for more detailed information about their medical treatment rather than a corrected passport.²²⁶

B. SEX-SEGREGATED FACILITIES

A second and interconnected area of gender reclassification policy regards placement of transgender people in sex-segregated facilities. In sex-segregated facilities and institutions, a variety of criteria are used to determine a person’s sex. In a majority of institutions, no formal policies exist to indicate what criteria must be met for a person to successfully reclassify their gender for purposes of placement from their birth-assigned gender to a new gender. Such determinations about what constitutes “male” or “female” for purposes of placement are more frequently made through on-the-spot judgments or assessments of low-level decisionmakers such as intake personnel with respect to shelters and drug treatment programs; retail or food clerks with respect to bathrooms and changing rooms in restaurants or stores; police with respect to public bathrooms or facilities in parks; medical or court personnel with respect to prisons/jails and mandated drug treatment programs serving as alternatives to incarceration; and administrative personnel with respect to foster care or juvenile justice facilities.²²⁷ Those

225. During my practice, I heard these stories repeatedly, and have confirmed them with other lawyers serving transgender clients who report that their clients have successfully changed the gender on their passports despite not having undergone surgery through these two methods. Interview with Arkles, *supra* note 145; Interview with Gehi, *supra* note 145.

226. Interview with Arkles, *supra* note 145; Interview with Gehi, *supra* note 145; Telephone Interview with Lisa Mottet, Director, Transgender Civil Rights Project, in Wash., D.C. (Apr. 2, 2007).

227. Bowker and Star’s examination of the administration of race classification in apartheid South Africa demonstrates some interesting parallels in the administrative operation of that identity classification scheme that may be useful in thinking, generally, about the ways that administrative governance and identity classification do their work. BOWKER & STAR, *supra* note 55. They describe how the attempts to create clear racial categories to underpin the apartheid system were fruitless in their attempts to create clear, rational classification for a system that was socially and politically

on-the-spot judgments frequently include assessment of a person's appearance and/or request to see ID in order to view the gender marker. The few clear written policies that exist often contradict one another and clash as various institutions converge in the lives of individuals who are subject to conflicting rules.

Because many sex-segregated facilities are necessary to daily survival (bathrooms, domestic violence shelters, foster care group homes, homeless shelters) or are mandatory (prisons, mandated drug treatment, juvenile justice group homes), and because being placed in a facility inappropriate to the gender identity of a person can be dangerous, the rules regarding gender classification for purposes of sex-segregation are very significant.²²⁸ Rules about gender classification for purposes of sex-segregation have a significant impact on the lives of people seeking reclassification, and have been at the heart of many controversies regarding the rights of transgender people to access employment, housing, public accommodations, education, and government services.²²⁹ Anxieties about transgender people, especially stereotypes about

determined. *Id.* at 195. The result was that many people ended up classified in a way that undermined their own identity, and prevented them from accessing institutions, residential areas, schools, employment, and other necessities. *Id.* at 203. Many people were living on race borderlands, either because their appearance was interpreted differently by different people, or because their appearance differed from the classification given to them by the state, or because their classification differed from that of their family or close associates (which meant barriers to shared institutional or residential space). *Id.* These people's experiences demonstrated that apartheid, in practice, was enforced through a combination of formal legal apparatus (the paperwork everyone was required to carry demonstrating their classification and history) and informal on-the-spot judgments of everyone from police and tram drivers to judges. *Id.* at 201. This combination consistently redounded to the detriment of people who were not classified as "white" (either officially or informally). It was those people whose race was consistently questioned, who had to be sure to carry the correct paperwork at all times. The inherent ambiguity of the definitions of race shifted the burden of proof to the individual, who then had to plead their case to the state or the decision maker they were faced with. *Id.* at 203. The "formal-informal mixture itself produced organizational conditions that favored both structural and face-to-face ad hoc discrimination, the one reinforcing the other . . . [B]iases became deeply embedded in both practice and infrastructure. The conflation gives a terrible power of ownership of both the formal and informal to those in power." *Id.* at 204. While the racism supported by the apartheid system in South Africa and the gender classification system operating in the United States are significantly different in content and context, it is interesting to observe how the mechanisms of administration of identity documentation, relying on a combination of written rules, unwritten rules, and inconsistent daily enforcement of norms to the detriment of those with culturally disfavored classifications have some shared characteristics.

228. See BASSICHIS, *supra* note 126; MINTER & DALEY, *supra* note 77, § II.A.2; Simone Chess et al., *Calling All Restroom Revolutionaries!*, in THAT'S REVOLTING: QUEER STRATEGIES FOR RESISTING ASSIMILATION 189, 189 (Mattilda aka Matt Sycamore ed., 2004); Gabriel Arkles, Chris Daley, Jody Marksammer & Dean Spade, *Testimony to the National Prison Rape Elimination Commission* (Aug. 15, 2005), available at <http://www.srlp.org/index.php?sec=03N&page=criminaljust:CRUELANDUNUSUAL>, *supra* note 126; DVD: Toilet Training (Sylvia Rivera Law Project 2003); Video: Wrong Bathroom (Shani Heckman 2005), available at <http://cms.pridedepot.com/modules/news/article.php?storyid=204>.

229. Spade, *supra* note 89.

transgender people as imposters or as sexual predators, frequently emerge in controversies over sex-segregated facilities like bathrooms.²³⁰ Courts have ruled in at least two cases that transgender persons were required to use restrooms according to birth-assigned gender despite the presence of a law prohibiting discrimination on the basis of gender identity.²³¹ Attorneys, arguing that prohibiting discrimination must include prohibiting institutions from forcing transgender people to use facilities that do not comport with their current genders, met both of these rulings with concern.²³²

As a result, in some jurisdictions where such laws have passed, further regulatory guidance has been provided, clarifying that the law means that transgender people cannot be prevented from accessing facilities appropriate to their current gender. In San Francisco and New York, after the passage of such laws, Commissions on Human Rights issued compliance guidelines clarifying this point.²³³ However, advocates report that these compliance guidelines are generally under-enforced in practice, because most people are not aware of these rules and even city agencies fail to comply with them.²³⁴ In other jurisdictions, such as Ann Arbor, MI, the gender identity-inclusive antidiscrimination ordinance was only passed once advocates agreed to a clause explicitly excluding coverage of sex-segregated facilities such as bathrooms.²³⁵ Of course, most jurisdictions lack gender identity-inclusive antidiscrimination laws altogether, so there is no guidance regarding these issues.

230. For example, an organization called Citizens for a Responsible Government created a website (<http://www.notmyshower.net>) in response to Montgomery County, Maryland's proposed passage of a bill prohibiting gender identity discrimination.

231. *Goins v. West Group*, 635 N.W.2d 717, 723 (Minn. 2001); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 43 (N.Y. App. Div. 2005).

232. Spade, *supra* note 14, at 34.

233. S.F. HUMAN RIGHTS COMM'N, COMPLIANCE GUIDELINES TO PROHIBIT GENDER IDENTITY DISCRIMINATION (2003), http://www.sfgov.org/site/sfhumanrights_page.asp?id=6274; N.Y. CITY COMM'N ON HUMAN RIGHTS, GUIDELINES REGARDING "GENDER IDENTITY" DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY NEW YORK CITY HUMAN RIGHTS LAW 7, available at www.nyc.gov/html/cchr/pdf/trans_guide.pdf (last visited Mar. 17, 2008).

234. See *supra* notes 226–31 and accompanying text (discussing difficulties in N.Y. City shelter placements for transgender women); see also Duncan Osborne, *City Holds Gender Law Hearings: Activists Argue That New York Drags Feet on Enforcing 2002 Anti-Bias Measure*, GAY CITY NEWS, May 27, 2004, http://gaycitynews.com/site/index.cfm?newsid=17005564&BRD=2729&PAG=461&dept_id=568864&rfti=8; Duncan Osborne, *Trans Advocates Allege Foot Dragging: Questions Center on Enforcement of Two-Year-Old Law to Protect Transgendered New Yorkers*, GAY CITY NEWS, June 17, 2004, http://gaycitynews.com/site/index.cfm?newsid=17005691&BRD=2729&PAG=461&dept_id=568864&rfti=8.

235. Exception 12 to the Ann Arbor ordinance banning discrimination on the basis of gender identity reads: "To restrict use of lavatories and locker room facilities on the basis of sex." ANN ARBOR, MICH. CITY CODE ch. 112, § 9:160 (2007), available at <http://www.municode.com/resources/gateway.asp?pid=11782&sid=22>.

1. Homeless Shelters

Homeless shelters across the United States are typically segregated by sex, either housing men and women separately or operating as all-male or all-female facilities. For the most part, homeless shelters place people according to birth-assigned gender. This practice assumes what remains the “common sense” of gender, despite the presence of gender reclassification policies elsewhere in the law for at least the last forty years. This “common sense” is that gender is assigned at birth and remains the same permanently. The campaigns waged in various cities to create written policies that allow transgender people to be placed in shelters according to gender identity attest to this common practice, since such campaigns would not be the focus of intensive reform efforts unless they were necessary to avoid birth-assigned gender-based placements. Such campaigns have been successfully waged in Boston,²³⁶ San Francisco,²³⁷ and New York,²³⁸ and are underway in other cities, including Detroit²³⁹ and Denver.²⁴⁰ In every jurisdiction that has created a policy to allow placement of transgender people according to current gender identity in homeless shelters, there was no previous written policy regarding transgender placement. Rather, there was in each case a known practice of placing transgender women in men’s shelters and transgender men in women’s shelters.

Even in jurisdictions that have created explicit shelter placement policies to contravene this “common sense” gender assumption, enforcement of the new policies is a challenge. Birth-assigned gender placement still operates frequently as an informal rule. For example, New York City’s January 2006 policy requiring gender identity-based placement for transgender homeless shelter residents remains unenforced. Transgender women are still typically placed in male

236. In Boston, the quest for appropriate classification of transgender purposes for placement in sex-segregated facilities such as shelters coincided with the campaign to pass a law to include “gender identity and expression” as a protected category in the local antidiscrimination ordinance. *See, e.g.*, Boston, Mass., Ordinance Regarding Discrimination Based on Gender Identity and Expression (2002), available at http://www.masstpc.org/pubs/Boston_TG_Ordinance.pdf. The result was that the law was passed with clear language indicating that forcing a person to use a facility that did not comport with their gender identity was unlawful discrimination. *Id.* In other cities, such clarification has come after the passage of the law and a separate struggle ensues when city agencies continue to place transgender people in facilities based on birth gender. *Id.*

237. S.F. COMM’N ON HUMAN RIGHTS, TRANSGENER POLICY FOR CITY FUNDED SHELTERS I (2003) (on file with author) (“Clients must be sheltered according to their expressed gender identity, regardless of surgical or hormonal status or conformity to gender stereotypes. Transgender women must not be singled-out or treated differently than other women.”).

238. N.Y. CITY DEP’T OF HOMELESS SERVS., PROCEDURE NO. 06-1-31 (Jan. 31, 2006), available at http://www.srlp.org/documents/DHS_trans_policy.pdf.

239. Transgender Policy Strategy Meeting, Detroit, Mich. (Nov. 2007) (notes on file with author).

240. Transgender Policy Strategy Meeting, Denver, Colo. (Nov. 2007) (notes on file with author).

shelters, and shelter staff remain inadequately trained.²⁴¹ As is the case with all the gender reclassification rules examined in this Article, the administrative reality does not mirror written policy, although policy does provide an important basis for gender reclassification demands.

2. Congregate Care Facilities for Youth

At any one time over 350,000 children are in foster care and juvenile justice systems nationwide.²⁴² Because of the many obstacles that transgender youth face in home life, particularly rejection by families of origin, it should not be surprising that transgender youth are over-represented in this population.²⁴³ Most congregate care facilities that house foster youth and youth in the juvenile justice system are segregated by sex.²⁴⁴ These group homes, like adult shelters, are either divided into boys and girls sections, or are all-boys or all-girls facilities. As with other sex-segregated facilities, “common sense” about gender usually leads child welfare workers and juvenile justice workers to place transgender youth in these facilities according to birth-assigned gender. Because transgender youth may lack access to gender-confirming clothing, accessories, and medical treatments at even greater rates than adults, it is even less likely that youth entering sex-segregated facilities can convince staff to place them appropriately or respect their gender identities.

Indeed, in many instances, gender non-conformity itself is forbidden or punished in these facilities. Some youth are subjected to “reparative therapies” aimed at eliminating nontraditional gender identities or gender-related behavior.²⁴⁵ Even those who are not given specific involuntary psychiatric treatment to “cure” their gender identity may be forced to wear clothing that does not conform to their gender identity, be

241. Interview with Arkles, *supra* note 145; Telephone Interview with Samuel Lurie, Founder, Transgender Training and Advocacy, in Burlington, Vt. (Mar. 31, 2007).

242. On September 30, 2003, there were 523,000 kids in foster care in the United States. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT (2006), http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/tar/report10.htm. The median age for these kids was 10.9 years old. *Id.* Approximately 50%, or 258,470, were over the age of 11. *Id.* The Office of Juvenile Justice and Delinquency Prevention reports that on census day in 2003 there were 96,655 juvenile offenders in residential placements in the United States. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, CENSUS ON JUVENILES IN RESIDENTIAL PLACEMENT DATABASE, http://ojjdp.ncjrs.org/ojstatbb/cjrp/asp/Age_Sex.asp (last visited Mar. 17, 2008).

243. SHANNON WILBER ET AL., CWLA BEST PRACTICES GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 58 (2006).

244. ROB WORONOFF ET AL., OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE 80–101 (2006), available at <http://www.cwla.org/programs/culture/outofthemargins.pdf>.

245. DAPHNE SCHOLINSKI, THE LAST TIME I WORE A DRESS (1997); Michael G. Gelder & Isaac M. Marks, *Aversion Treatment in Transvestism and Transsexualism*, in TRANSSEXUALISM AND SEX REASSIGNMENT 383 (Richard Green & J. Money eds., 1969); Gerald P. Mallon & Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Perspective*, 85 CHILD. WELFARE J. 215 (2006).

forbidden from going by their chosen name and pronouns, and/or be punished for specific gender-related behaviors.²⁴⁶

Few alternative policies have emerged nationwide, and those that do exist tend to be informal and inconsistently applied. Covenant House, the largest shelter for out-of-home youth in New York City has at times allowed transgender girls to live in their girls' dorms, but such treatment is inconsistent.²⁴⁷ They are sometimes harassed about their identities by staff, threatened with expulsion due to their identities, and inadequately protected from harassment and violence by other youth.²⁴⁸ As the result of lawsuits alleging discrimination against transgender youth in congregate care facilities, some foster care and juvenile justice systems have begun to consider policy changes related to these youth, but no system has yet created a clear and firm policy that transgender youth cannot be placed according to birth gender in sex-segregated facilities.²⁴⁹

3. *Jails and Prisons*

Before 1830, prisons in the United States were not segregated by sex.²⁵⁰ Women, men and children cohabited within penal institutions, although the fact that social control of deviant women primarily occurred in the home or church meant that women were incarcerated in penal institutions at a very low rate.²⁵¹ Quaker reformists, identifying the extreme violence faced by women in penal facilities, led the charge for

246. *Doe v. Bell*, 754 N.Y.S.2d 846, 847–48 (N.Y. Sup. Ct. 2002). In 2005, the ACLU settled a case with the Hawaii juvenile justice authority establishing reforms of the Hawaii Youth Correctional Facility's (HYCF) programs and policies to end discrimination and harassment that lesbian, bisexual, gay, and transgender youth were facing there. See Am. Civil Liberties Union, *Hawai'i—R.G., et al. v. Koller, et al. Case Profile*, <http://www.aclu.org/lgbt/youth/25796res20050902.html> (last visited Mar. 17, 2008). In 2007, the Sylvia Rivera Law Project settled a case with the New York Office of Children and Family Services (OCFS) regarding a transgender girl who had experienced extensive discrimination while in OCFS custody. One element of that discrimination was that she was continually sanctioned, while in an OCFS facility, for feminine behaviors, including having long hair and crossing her legs. Telephone Interview with Pooja Gehi, Staff Att'y, Sylvia Rivera Law Project, in N.Y., N.Y. (Apr. 24, 2007) (regarding *Rodriguez v. Johns*, No. 06 cv. 2001 (S.D.N.Y.), a case settled by the Sylvia Rivera Law Project).

247. Interview with Arkles, *supra* note 145.

248. I conducted a series of trainings on transgender antidiscrimination for Covenant House in 2003 and 2004, forming a relationship with the organization and learning about its continual difficulties with staff discrimination against transgender youth and placement of transgender youth. I also maintained contact with several other service providers who reported to me when their clients had difficulties at Covenant House. See, e.g., Interview with Arkles, *supra* note 145; Interviews with Davis, *supra* note 122.

249. New York City's Administration for Children's Services has been working with advocates on a proposed policy that only addresses health care access for transgender youth. See *infra* note 309 and accompanying text.

250. Lee, *supra* note 95 pt. 2, at 6.

251. *Id.* (citing KATHRYN WATTERSON, *WOMEN IN PRISON: INSIDE THE CONCRETE WOMB* (rev. ed. 1996)); ADRIAN HOWE, *PUNISH AND CRITIQUE: TOWARDS A FEMINIST ANALYSIS OF PENALTY* 129, 137 (1994).

the creation of separate penal facilities for women.²⁵² Mount Pleasant Female Prison began operating in 1839 on the grounds of Sing Sing prison for men in New York. It was the first penal facility where women were separated from men and supervised by female correctional staff.²⁵³ In 1873, the Indiana Reformatory Institution for Women and Girls became the first all-female prison in the United States.²⁵⁴ From there, the nationwide trend shifted toward segregating prisoners by sex, and more and more states opened all-female prisons and jails. According to historians, although the post-Civil War women's prison reform movement lost steam by the 1930s, the trend toward building women's correctional facilities continued.²⁵⁵ The focus and methods of this trend changed as it became less driven by women prison reformers focused on the unique problems faced by women in penal facilities and became more driven by trends in the criminal justice system as a whole.²⁵⁶

The boom has continued, and the population of women imprisoned in the United States has skyrocketed. Between 1972 and 1995, the percentage of federal prisoners who were female more than doubled.²⁵⁷ In the early 1970s, approximately 22,000 women were incarcerated in the United States.²⁵⁸ By 1995 that number had grown to 108,000, an increase of 390%.²⁵⁹ In the 1980s, the imprisonment of women increased by 256%, while the imprisonment of men increased 140%.²⁶⁰ Women's imprisonment has continued to increase at a higher rate than men's every year since 1981.²⁶¹ Interestingly, statistics about crime in the United States show that it is not increased law-breaking by women that accounts for these growing rates of incarceration.²⁶² Instead, the rising rate of incarceration of women is attributable to increased punishments for non-violent crimes, especially drug-related crimes, under mandatory minimum sentencing laws and "three strikes" laws.²⁶³ Changing understandings of the appropriateness of incarceration for women on the

252. WATTERSON, *supra* note 251, at 196.

253. Lee, *supra* note 95 pt. 2, at 6.

254. WATTERSON, *supra* note 251, at 198.

255. Lee, *supra* note 95 pt. 2, at 6-7.

256. *Id.*

257. HOWE, *supra* note 251, at 159 (from 3% to 6-7%).

258. *Id.* at xv.

259. *Id.*

260. *Id.*

261. Nancy Kurshan, *Behind the Walls: The History and Current Reality of Women's Imprisonment*, in CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 136, 155 (Elihu Rosenblatt ed., 1996).

262. Violent crimes by women have remained at a constant rate over the past several decades. Lee, *supra* note 95 pt. 1, at 9 (citing Kurshan, *supra* note 261, at 150).

263. *Id.* (citing HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 17 (1996)). Drug-related offenses represented 55% of the increase in women's prison populations between 1986 and 1991. *Id.*

part of judges and prosecutors also made a significant impact, no doubt an effect of the creation of and boom in women's prisons and jails.²⁶⁴

Sex segregation is now ubiquitous in U.S. correctional facilities of all kinds. Within this context, birth-assigned gender is generally the rule for placing transgender people.²⁶⁵ Some anecdotes exist of genitalia-based rules being applied in a few cases where transgender women who had undergone genital surgeries were housed in women's facilities, but anecdotes also exist of transgender women without penises or testicles being placed in men's facilities.²⁶⁶ Of the seven states that have written policies about the management of transgender prisoners, none include placement based on current gender.²⁶⁷ Overall, since the majority of transgender people cannot or do not access genital surgery, genital or birth-assigned gender rules result in the majority of transgender people being placed in prisons inappropriate to their current gender.²⁶⁸

The result of these policies, in the context of the inaccessibility of gender-confirming health care and the overrepresentation of transgender people in the criminal justice system discussed in Part I, is significant. For these prisoners, the application of birth-gender or genital-based policies creates an urgent issue of personal safety.²⁶⁹

C. GENDER-CONFIRMING HEALTH CARE COVERAGE

Access to gender-confirming health care for transgender people who rely on the state for care is a third area of state policy where gender reclassification enters administrative regulations and procedure. This

264. Lee notes that in the 1970s, nearly 66% of women convicted of federal felonies were given probation, while in 1991 that number had shrunk to 28%. *Id.*

265. *Id.*

266. Lee cites the story of one transgender woman who had undergone genital surgery and was placed in a women's penal facility. *Id.* Stories of transgender women who have no male genitalia but are still placed in men's facilities, however, have also been reported. See CRUEL AND UNUSUAL, *supra* note 126.

267. See *infra* Part III.C.2.a.

268. Lee, *supra* note 95 pt. 1, at 9.

269. See Christine Peek, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 SANTA CLARA L. REV. 1211, 1220 (2004); Lee, *supra* note 95 pt. 1, at 6 (discussing widespread rape and assault of transgender women in men's prisons). On April 8, 2008, the Sylvia Rivera Law Project announced that after several years of advocacy, a coalition of organizations and individuals had won a written policy from the New York State Office of Children and Family Services regarding the care of LGBT youth in the state's juvenile justice system. E-mail from Gabriel Arkles, Staff Att'y, Sylvia Rivera Law Project, to author (Apr. 8, 2008) (referring to N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., POLICY & PROCEDURES MANUAL, LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH (PPM 3442.00) (2008)). The policy does not specify that transgender youth must be placed according to gender identity, but does create a decision-making process for such determinations of placement. "Requests by youth for placement at or transfer to a facility based upon sexual orientation, gender identity, or gender expression can be made during the reception/intake process or at any other time and are to be forwarded to the Bureau of Behavioral Health Services for consideration by the LGBTQ Decision-making Committee." *Id.*

area is significant with regard to gender reclassification for three reasons. First, for trans people who need medical care as part of their transition, the denial of such care can create health risks and, as we have seen, impede access to other key areas including employment, education, and safety from violence. Second, the specific denial to trans people of drugs, services, and procedures that are provided to non-trans people solely on the basis of the diagnosed condition creating the need indicates a specific, and possibly federally prohibited, state intention regarding gender reclassification. Finally, because the majority of gender reclassification policies, especially in the realm of identity documentation, include medical care requirements for reclassification,²⁷⁰ denial of this care in government medical programs means that many people whose health care comes from these programs cannot meet requirements to be recognized in their current gender.

The relationship between these two policy areas creates what some scholars have called a “double bind” for trans people.²⁷¹ Individual states may simultaneously take the position that this type of health care is “cosmetic” and “experimental” when they deny coverage through their Medicaid programs or for people in state custody, while their ID policies use that very care as the only legitimate evidence of gender change. In other words, for some purposes the state says gender-confirming health care is not legitimate, while for others it uses such health care as the standard of legitimacy. For transgender people getting health care through the state, this means being unable to get health care that is marginalized and dismissed, and then being unable to access ID because they cannot provide proof of this legitimizing health care. Given the connection between getting accurate ID and finding employment, a feedback loop is created, where lack of access to ID leads to unemployment and poverty which leads to a need to get health care through Medicaid which denies the health care coverage needed to access ID.

This section will discuss, first, the policies that exclude this coverage from some states’ Medicaid programs, and then look at policies within institutions that deny this care to people in their custody.

I. Medicaid

Federal Medicaid regulations provide no guidance as to whether gender-confirming health care for transgender people should be covered or not. States, in their own programs, differ in how they approach this question. No state’s Medicaid regulations explicitly include this care. Instead, twenty-eight states have no explicit regulations regarding this care, and either accept or reject claims for reimbursement on a case-by-

270. See *supra* Part III.A.

271. Gehi & Arkles, *supra* note 107, at 23.

case basis, while twenty-two states have explicit regulations excluding coverage of this care.²⁷² States without explicit exclusions of gender-confirming health care for transgender people frequently have exclusions of “cosmetic” or “experimental” care that are used, on a case-by-case basis, to deny claims for reimbursement by transgender people seeking certain therapies or procedures.²⁷³

Two central arguments have consistently been advanced for coverage of this care, with varying success in courts.²⁷⁴ The first argument

272. Twenty-two states explicitly exclude coverage for gender-confirming health care for transgender people. ALASKA ADMIN. CODE tit. 7, § 43.010(11) (2006); ARIZ. ADMIN. CODE § 9-27-203(A)(7) (2007); CONN. AGENCIES REGS. §§ 17b-262-442(a), -456(c)(4), -612(k) (2006); 40-800-113 DEL. CODE REGS. § 1.8.2 (Weil 2008); HAW. CODE R. §§ 17-1728-19, -1737-84(22)(a) (Weil 2006); ILL. ADMIN. CODE tit. 89, § 140.6(11) (2007); IOWA ADMIN. CODE r. 441-78.1(249A)(4) (2007); 10-144-101 ME. CODE R. § 90.07(C)(8) (Weil 2006); MD. CODE ANN. HEALTH-GEN. § 10.09.02.05(A)(21) (2006); 130 MASS. CODE REGS. 405.418(A) (2006); MINN. STAT. § 256B.0625 (2006); MO. CODE REGS. ANN. tit. 22, §§ 10-2.060(46), -2.067 (2007); MONT. ADMIN. R. 37-79-303(I)(q) (2006); 471 NEB. ADMIN. CODE § 18-003.03 (2006); N.H. CODE ADMIN. R. ANN. He-W 530.05(b)(5), 531.06(g) (2006); N.M. CODE R. § 8.306.7.13(f) (Weil 2006); N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l) (2006); OHIO ADMIN. CODE 5101:3-13-05(c) (2006); OR. ADMIN. R. 410-120-1200(2)(z) (2006); 55 PA. CODE §§ 1121.54(16), 1126.54(a)(7), 1141.59(11), 1163.59(a)(1), 1221.59(a) (2007); TENN. COMP. R. & REGS. 1200-13-13-.10(3)(b)(63), 1200-13-14-.10 (2007); WIS. ADMIN. CODE HFS § 107.03(23)–(24) (2006); 048-130-026 WYO. CODE R. § 6(i)(xix) (2006); *Rush v. Johnson*, 565 F. Supp. 856, 869 (N.D. Ga. 1983) (holding that gender-confirming health care surgeries are not medically necessary or proven effective and the state can exclude them from coverage); *see also* Gehi & Arkles, *supra* note 107, at 9–10. The language in the regulations excluding this coverage varies. For example, Arizona’s administrative code states: “An HCG Plan shall not cover the following: . . . Treatment of gender dysphoria including gender reassignment surgeries and reversal of voluntarily induced infertility (sterilization).” ARIZ. ADMIN. CODE § 9-27-203(A)(7) (2007). On the other hand, Connecticut’s regulations read: “The department shall not pay for the following: . . . transsexual surgery or for a procedure which is performed as part of the process of preparing an individual for transsexual surgery, such as hormone therapy and electrolysis.” CONN. AGENCIES REGS. § 17b-262-442(a) (2006).

273. *See, e.g.*, ALA. ADMIN. CODE r. 560-X-6.13 (2006); 016-06-024 ARK. CODE R. § 217 (Weil 2008); CAL. CODE REGS. tit. 22 §§ 51303(g), 51305(i) (2007); FLA. ADMIN. CODE ANN. r. 59G-1.010 (2006); IDAHO ADMIN. CODE r. 16.03.09.390(02)(g) (2006); 405 IND. ADMIN. CODE 5-29-1 (2007); KAN. ADMIN. REGS. § 30-5-88 (2006); 907 KY. ADMIN. REGS. 3:005 (2006); 13-000-011 MISS. CODE R. § 2 (Weil 2008); N.J. ADMIN. CODE § 10:49-5.7(c)(2) (2007); 10A N.C. ADMIN. CODE 39A.1104(b)(3) (2006); N.D. ADMIN. CODE 75-02-02-03.2 (2006); OKLA. ADMIN. CODE § 317:30-3-59 (2007); 15-040-004 R.I. CODE R. § (III)(A)(1) (Weil 2007); S.C. CODE ANN. REGS. 126-315 (2008); S.D. ADMIN. R. 67:16:14:05 (2006); I TEX. ADMIN. CODE § 354.1149 (2006); UTAH ADMIN. CODE r. 414-1A-1 to -3, 414-3A-6(4) (2006); 13-170-008 VT. CODE R. § M615 (2007); 12 VA. ADMIN. CODE § 30-50-140 (2006); WASH. ADMIN. CODE § 388-501-0050 (2006).

274. *See Pinneke v. Preisser*, 623 F.2d 546, 549–50 (8th Cir. 1980) (“We find that a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the ‘diagnosis, type of illness, or condition.’”); *J.D. v. Lackner*, 80 Cal. App. 3d 90, 95 (Cal. Ct. App. 1978) (“J.S. has an illness and that as far as her illness affects her, the proposed surgery is medically reasonable and necessary and that there is no other effective treatment method.”); *Beger v. Div. of Med. Assistance*, 11 Mass. L. Rep. 745 (2000) (finding that a transsexual woman who had undergone sex reassignment over twenty-five years earlier could not be denied medically necessary breast reconstruction surgery simply because she is transsexual); *Doe v. State*, 257 N.W.2d 816, 820 (Minn. 1977) (noting that sex reassignment surgery was “the only surgical treatment which, if recommended by a physician and related to a patient’s health is not covered by the [Minnesota Medicaid] program”). *But see* *Smith v.*

is that gender-confirming health care for transgender people is medically necessary, non-experimental treatment, proven to be safe and effective. This health care has successfully been used to treat people who experience a persistent desire to live in a gender different from that they were assigned at birth for more than sixty years.²⁷⁵ Further, lack of access to this care results in serious physical and mental health consequences as discussed in Part I. The argument goes, then, that because this care has been used effectively to treat transgender people, is medically necessary, and creates severe risks if denied, Medicaid should cover the care.

The second argument asserts that denial of this care is diagnosis discrimination that violates Federal Medicaid regulations. The Federal Medicaid regulations make it clear that once a state has decided to provide coverage through a Medicaid program, it cannot pick and choose amongst groups of people to give coverage based on diagnosis.²⁷⁶ It can make a variety of other types of decisions regarding what to cover and not cover, but it cannot forgo coverage of a group based solely on diagnosis. For example, a state could not decide to treat diabetics while refusing care to people with HIV just because the legislature or state administrators had animus towards people with HIV. The argument follows that Medicaid already provides all of these procedures and medications, and only denies them to people who seek them based on a transgender diagnostic profile. For example, testosterone and estrogens are frequently prescribed to non-transgender people for a variety of conditions including hypogonadism, menopause, late onset of puberty, vulvular atrophy, atrophic vaginitis, ovary problems (including lack of ovaries), intersex conditions, breast cancer or prostate cancer, and to help prevent osteoporosis.²⁷⁷ Similarly, the chest surgery that transgender men often seek, removing breast tissue to create a flat chest, is regularly provided and insured for non-trans men who develop the common condition gynecomastia, where breast tissue grows in abnormal amounts.

Rasmussen, 249 F.3d 755, 761 (8th Cir. 2001) (reversing district court's ruling and holding that Iowa's rule denying coverage for sex reassignment surgery was not arbitrary or inconsistent with the Medicaid Act); *Rush v. Parham*, 625 F.2d 1150, 1156 (5th Cir. 1980) (reversing district court's ruling that Georgia's Medicaid program could not categorically deny coverage for sex reassignment surgery).

275. Courts in a variety of contexts have found that transgender health care is medically necessary. *See, e.g.*, *De'Lonta v. Angelone*, 330 F.3d 630 (4th Cir. 2003); *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001); *South v. Gomez*, 211 F.2d 1275 (9th Cir. 2000); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002); *Wolfe v. Horn*, 130 F. Supp. 2d 648 (E.D. Pa. 2001); *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *Brian L., aka Mariah L. v. Admin. for Children's Servs.*, No. K-11554/96 (N.Y. Fam. Ct., Feb. 21, 2007). *But see* *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980).

276. "The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type or illness, or condition." 42 C.F.R. § 440.230(c) (2002).

277. Medline Plus, *Estrogen*, Apr. 1, 2006, <http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a682922.html>. This is also cited by Gehi & Arkles, *supra* note 107, at 24.

Non-transgender women who are diagnosed with hirsutism—where facial or body hair grows in abnormal amounts—are frequently treated for this condition with Medicaid coverage. In addition, reconstruction of breasts, testicles, penises, or other tissues lost to illness or accident is routinely performed and covered. Further, treatments designed to help create genitals that meet social norms of appearance are frequently provided and covered for children born with intersex conditions.²⁷⁸

Advocates point out that every type of care that a transgender Medicaid recipient might seek is already provided by Medicaid, except to transgender people seeking the care to confirm gender.²⁷⁹ This is particularly significant considering that much of the care provided has the sole purpose of confirming the gender of non-transgender patients. Reconstruction of breasts or testicles lost to cancer, hormone treatment to eliminate hair that is considered gender-inappropriate, chest surgery for gynecomastia, and other treatments are provided solely because of the mental health and social consequences faced by people who have physical attributes that do not comport with their self-identity and social gender.²⁸⁰ Thus, the distinction made in refusing this care to transgender people appears to be based solely on diagnosis. Denying care to a politically unpopular group that is provided to others in need of such care appears to violate the letter and spirit of the federal Medicaid regulations.²⁸¹

The history of state policy changes relating to these exclusions of coverage reveals the assumptions that underlie them. Three recent examples are illustrative. First, New York State's exclusion was created

278. These treatments have become increasingly controversial in recent years, as intersex advocacy organizations have brought attention to the fact that when performed on infants and young children, patients cannot meaningfully consent, and these treatments often lead to loss of sexual and reproductive function. Intersex advocacy organizations have advocated that these treatments not be performed on young children, and that children be allowed to grow and develop and determine their desire for such treatments at a later age. Intersex Soc'y of N. Am., Our Mission, <http://isna.org> (last visited Mar. 17, 2008). The eagerness of the medical profession to bring intersex bodies into line with gendered body norms, including providing payment for such care, while marginalizing and refusing treatment for adults whose medical needs are viewed as bringing their bodies away from gendered norms, indicates that Medicaid funding decisions are frequently made based on gender politics more than questions of legitimate medical necessity. See Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51 (2006).

279. E-mail from Arkles, *supra* note 269.

280. See, e.g., *Schulman v. Group Health Inc.*, 833 N.Y.S.2d 62, 62 (N.Y. App. Div. 2007) (ruling against an insurance company that had denied coverage to remove breast tissue from a boy with gynecomastia based on the assertion that “elective cosmetic surgery or treatment which is primarily intended to improve the [insured’s] appearance” is not covered, and finding that “particularly in the case of a 17-year-old male, [having excess breast tissue is] clearly a devastating condition with ‘psycho-social’ consequences”); see also Jose Martinez, *Bye-Bye Breasts, Hello Wonderful New Life*, NYDAILYNEWS.COM, Apr. 7, 2007, http://www.nydailynews.com/news/2007/04/07/2007-04-07_byebye-breasts_hello_wonderful_new_life-2.html.

281. Gehi & Arkles, *supra* note 107, at 25–26.

in 1998. In 1997, the New York State Department of Health (DOH) announced a proposed amendment to the regulations implementing the state Medicaid program that would exclude coverage for health care related to “sex reassignment.” Its stated justification for the rule was a lack of evidence about the long-term safety and effectiveness of this care.²⁸² The department held no hearing regarding the issue, and the only source cited for any of the statements was “the Department’s knowledge.”²⁸³

Two comments about the proposed regulation were received from physicians. Both opposed its adoption, stating that “gender reassignment is an appropriate, effective and safe treatment for persons with gender dysphoria.”²⁸⁴ DOH adopted the amendment, and dismissed the comments stating, “there are equally compelling arguments indicating that gender reassignment, involving the ablation of normal organs for which there is no medical necessity because of underlying disease or pathology in the organ, remains an experimental treatment, associated with serious complications.”²⁸⁵ The “ablation of normal organs” language is noteworthy, considering that many aspects of this care do not involve surgery, nor the removal of organs, and suggests that the authors of the exclusion were specifically thinking about very particular treatments, specifically penectomy, which is often the treatment stereotypically associated with transgender people, despite its actual rarity among transgender populations. Further, it is interesting that the state continued to pay for intersex surgeries that remove otherwise healthy organs strictly because their presence on a body of a given sex is considered abnormal, though not a health risk in the strict sense.

More recently, both Washington and Minnesota have been motivated to change their Medicaid regulations to reduce coverage of gender-confirming health care for transgender people. Since at least the 1970s, Minnesota’s State-funded medical programs covered a range of gender confirmation health care services for transgender people, including counseling, hormones, and surgery.²⁸⁶ Beginning in 1994, the legislature began working to narrow the scope of coverage.²⁸⁷ In 1998, the Legislature restricted coverage to those who had begun receiving gender-reassignment services prior to July 1, 1998.²⁸⁸ In 2005, legislators moved to further narrow the scope of coverage. On July 14, 2005, Gov. Tim

282. 19 N.Y. Reg. 26 (July 16, 1997).

283. 20 N.Y. Reg. 11 (Jan. 7, 1998).

284. 20 N.Y. Reg. 5 (Mar. 25, 1998).

285. *Id.*; see also N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l) (2005) (adopting the exclusion).

286. OutFront Minn., Minnesota Public Benefits and Gender Reassignment, <http://www.outfront.org/library/pubbenefits.html> (last visited Mar. 17, 2008).

287. *Id.*

288. *Id.*

Pawlenty signed into law an omnibus health and human services bill that included provisions stating “sex reassignment surgery is not a covered service.”²⁸⁹ The law came into effect August 1, 2005.²⁹⁰ Under the new law, the State will cover gender-related counseling services and hormone therapy. However, as of August 1, 2005 the State will no longer accept requests for gender-reassignment surgery.²⁹¹

In Washington, coverage of gender-confirming health care for transgender people recently came under attack when Senator Grassley, a Congressman from Iowa who had previously made headlines opposing Medicaid coverage of Viagra, learned that Washington provided some coverage to transgender people.²⁹² Grassley wrote to officials in Washington demanding a change in policy, and ultimately, Washington’s Department of Social and Health Services proposed new regulations excluding coverage of transgender health care from its Medicaid program.²⁹³

The trend appears to be toward explicitly excluding gender-confirming health care, despite the mixed case law regarding the legality of such exclusions and a concurrent trend toward increasing coverage of this care by employers and private insurance companies.²⁹⁴ At least one lawsuit regarding such exclusion is currently being developed,²⁹⁵ but overall these policies remain in place and enforced in a majority of states, with significant impact.²⁹⁶ Even in states where Medicaid programs cover gender-confirming health care, transgender recipients have difficulty accessing such care. In California, for example, despite the fact that gender-confirming health care is covered through MediCal, most surgeons will not take MediCal, complaining that the rates of reimbursement are too low.²⁹⁷ As a result, despite existing coverage, transgender people in California on MediCal often cannot get gender-confirming surgeries even though they are covered by MediCal.

289. *Id.*

290. *Id.*

291. *Id.*

292. See Ralph Thomas, *State Tries to Rule Out Aid for Sex Change Surgery*, SEATTLE TIMES, Aug. 7, 2006, http://seattletimes.nwsourc.com/html/localnews/2003180336_sexchange07m.html.

293. Telephone Interview with Cole Thaler, Staff Att’y, Lambda Legal Defense and Educ. Fund, in Atlanta, Ga. (Jan. 23, 2007); Lambda Legal Def. & Educ. Fund, Comment in Opposition to Proposed WAC 388-501-0070(4)(h) (Nov. 7, 2006) (on file with author).

294. Gorton, *supra* note 107.

295. Interview with Arkles, *supra* note 145.

296. Gehi and Arkles discuss, in depth, how the prevalence of these policies results in long-term negative health consequences for transgender people, as well as consequences related to employability and criminalization. Gehi & Arkles, *supra* note 107, at 9–10.

297. Nick Gorton & Gabriel Arkles, Comments at the Transgender Access to Health Care Panel at the Williams Institute Annual Sexual Orientation Law Update, UCLA School of Law (Feb. 23, 2007).

2. Care for People in State Custody

The final area of administrative policy and practice I will examine is the provision of gender-confirming health care to transgender people who rely on the state for their care because they are in state custody. People who are in state custody, such as prisoners, foster youth, and youth in the juvenile justice system, receive health care through the state, which is required to provide it.²⁹⁸ The policies governing provision of gender-confirming health care for transgender people, like Medicaid policies, are significantly interconnected with policies governing gender reclassification on ID.

a. Prisoners

Seven states have explicit, written policies about transgender people in their corrections systems.²⁹⁹ All seven policies state that they provide hormones to transgender prisoners. Six of them explicitly state, however, that hormone therapy will be provided to only prisoners who were already receiving such care before incarceration and can prove as much.³⁰⁰ This denies hormones to transgender people who cannot document having undergone care prior to imprisonment because the care was obtained without medical supervision. At least one court has found that requiring pre-incarceration verified treatment only in the case of gender-confirming health care is unreasonable.³⁰¹

Even in states where court decisions or written policies require hormone treatment to be provided, advocates report that many prisoners are denied treatment or given low doses or inconsistent treatment, as is typical with prison medical care in general.³⁰² Model policies created by

298. *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that the Eighth Amendment guarantees healthcare to all prisoners).

299. See ALA. DEP'T OF CORR., ADMIN. REGULATION No. 637 (2005), available at <http://www.doc.state.al.us/docs/AdminRegs/AR637.pdf>; COLO. DEP'T OF CORR., ADMIN. REGULATION No. 700-14 (2005), available at http://www.doc.state.co.us/admin_reg/PDFs/0700_14.pdf; IDAHO DEP'T OF CORR., DIRECTIVE No. 303.02.01.002 (2003), available at <http://www.corrections.state.id.us/policy/int3030201002.pdf>; IDAHO DEP'T OF CORR., DIRECTIVE No. 401.06.03.501 (2003), available at <http://www.corrections.state.id.us/policy/int4010603501.pdf>; ILL. DEP'T OF CORR., ADMIN. DIRECTIVE No. 04.03.104 (2003); MICH. DEP'T OF CORR., POLICY DIRECTIVE No. 04.06.184 (1993); MINN. DEP'T OF CORR., POLICY No. 202.045 (2006), available at <http://www.doc.state.mn.us/DocPolicy2/Document/202.045.htm>; see also Tarzwell, *supra* note 16.

300. Illinois' policy does not specifically speak to whether or not evidence of prior treatment is required, but instead states that "[t]he department shall not perform or allow the performance of any surgery for the specific purpose of gender change, except in extraordinary circumstances as determined by the Director," and that "hormone therapy shall only be provided after consultation with and approval by the Agency Medical Director." ILL. DEP'T OF CORR. ADMIN. DIRECTIVE No. 04.03.104, § (II)(G)(3)(b) (2003).

301. *Brooks v. Berg*, 289 F. Supp. 2d 286, 289 (N.D.N.Y. 2003).

302. Lee, *supra* note 95 pt. 1, at 9; Cal. Coalition for Women Prisoners, Health Care Receivership Update, <http://www.womenprisoners.org/fire/000575.html> (last visited Mar. 17, 2008) ("In June 2005, Judge Thelton Henderson declared that the California state prison medical system was 'terribly broken' and placed it in federal receivership. Henderson wrote 'The harm already done in this case to

the National Lawyer's Guild and the San Francisco Commission on Human Rights recommend that hormone treatment be available both to prisoners who have already commenced such treatment prior to incarceration and to prisoners who are evaluated and found to need to initiate such treatment while incarcerated.³⁰³ Currently no prison system provides gender confirmation-related surgical treatment to transgender prisoners.³⁰⁴

b. Youth in State Custody

Only one written policy regarding the provision of gender confirming health care to youth in foster care or the juvenile justice system exists in the United States.³⁰⁵ Of the jurisdictions without policies, some currently work to provide such care for eligible transgender youth on an individual basis, but denial of such care is the norm.³⁰⁶ Legal battles about allowing transgender youth to dress according to current identity and the provision of transgender health care continue, with some recent winning cases being reported.³⁰⁷ Policy recommendations on this issue have been developed. The National Center for Lesbian Rights and the

California's prison inmate population could not be more grave, and the threat of future injury and death is virtually guaranteed in the absence of drastic action.' A receiver has now been appointed and is developing proposals for reforming the system.")

303. MURRAY D. SCHEEL & CLAIRE EUSTACE, MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS IN COUNTY JAILS (2002) (on file with author).

304. Interestingly, Canadian law differs from U.S. law in this regard. In 2001, a Canadian judge ordered a federal prison to pay for the gender confirmation-related surgery of a prisoner. *Kavanagh v. Att'y Gen. of Canada*, Tribunal File No. T505/2298 (Can. Human Rights Trib. 2001), http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=264&lg=_e&isruling=0, *aff'd* Canada (Att'y General) v. Canada (Human Rights Comm'n), [2003] F.C. 89 (Fed. Ct.); *see also* Life Site, *Canadian Court Orders Prisons to Pay for Sex Change Operations*, Feb. 7, 2003, <http://www.lifesite.net/ldn/2003/feb/03020707.html>; Janice Tibbetts, *Canada: Federal Prisons Ordered to Pay for Sex Changes*, NAT'L POST, Feb. 7, 2003, available at <http://www.freerepublic.com/focus/f-news/838017/posts>.

305. *See* N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERVS., POLICY & PROCEDURES MANUAL, LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH (PPM 3442.00) (2008).

If, during the course of [the initial health] screening, the continuation of hormone therapy is identified as an issue for the youth, staff should follow OCFS policy and practice for the continuation of medication upon admission. . . . OCFS will make a determination regarding the initiation of hormone therapy based on accepted standards of care . . . and the youth's best interest.

Id. These guidelines suggest the possibility of hormone therapy being available to youth in OCFS custody, although their provision of discretion to OCFS staff regarding the continuation or initiation of hormone therapy make it unclear what effect this policy will have upon implementation.

306. Telephone Interview with Jody Marksamer, Staff Att'y, Nat'l Ctr. for Lesbian Rights, in L.A., Cal. (Feb. 28, 2007).

307. *See* *Rodriguez v. Johns*, No. 06 cv. 2001 (S.D.N.Y. 2001) (involving a suit brought by a transgender girl who had been denied hormone treatment while in its custody against the NYS Juvenile Justice system, which was settled by the Sylvia Rivera Law Project); *Jean Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (determining that denying a transgender girl the right to wear skirts and dresses violated New York's Human Rights Law); *Brian L., aka Mariah L. v. Admin. for Children's Servs.*, No. K-11554/96 (N.Y. Family Court, Feb. 21, 2007) (finding that the foster care system was responsible for providing sex reassignment surgery to a twenty-one year old girl in its care).

Child Welfare League of America developed Best Practices Guidelines in 2006 that explicitly instruct child welfare workers to provide gender transition-related health care to youth when recommended by health care professionals.³⁰⁸ In 2005, a committee of the New York City Administration of Children's Services developed recommendations for the treatment of transgender foster youth that similarly recommended making hormone treatment and other gender-confirming health care available to youth in care.³⁰⁹ These recommendations have not yet been adopted as policy.

IV. THE IMPACT OF GENDER RECLASSIFICATION POLICY INCONSISTENCIES

In theory, varying approaches to gender reclassification in different jurisdictions and administrative systems could represent a benign variation in law and policy. We might expect different policies to apply to different people, depending on the jurisdiction they live in, for example, and suggest that people have some ability to identify jurisdictions friendly to their concerns and live there if they so choose.³¹⁰ However, because these varying policies operate within single jurisdictions and upon individual people simultaneously, and because some of these policies are tied to factors that cannot be changed, such as place of birth, the conflicts between the policies are unavoidable. These conflicts arise in numerous, complex ways that have not been discussed or accounted for in legal scholarship, and that are changing constantly with new practices of collection and comparison of identity data emerging in the War on Terror. This section provides a few key examples of the interaction of these conflicting policies and the confusion they are causing in certain administrative contexts.

Before providing an analysis of the specific impacts of the inconsistencies discussed above, a story that illustrates many of the themes discussed in this section will be useful. This story provides a glimpse of the way the areas of administrative regulation discussed above interact with one another and with new War on Terror approaches to identity surveillance standardization, and the impact of these interactions on gender reclassification rulemaking. Through this story, we can begin to question the normative ideas about the role of gender in identification

308. WILBER ET AL., *supra* note 243, at 58.

309. Recommendations on file with author.

310. This argument has been made, for example, with issues such as same-sex marriage rights, suggesting that persons seeking to access such rights could choose to live in jurisdictions with appropriate laws. In addition to the reasons this does not apply to gender reclassification policies described in the text, I would further argue that this logic fails to consider the significant social and economic factors that prevent people from moving residence such as poverty, family support obligations, employment, housing costs, cultural factors, and mobility limitations placed by criminal justice systems (i.e., parole, probation).

and data gathering that are assumed in the process of establishing gender reclassification policies, and the emergent concerns about national security that have bolstered the logic upholding gender classification as a key element of identity verification.

On December 5, 2006, the New York City Department of Health announced that it was withdrawing the recommendation it had recently made to the New York City Board of Health regarding its gender reclassification policy for New York City birth certificates.³¹¹ Since 1971 the City had accepted applications for gender reclassification from transgender women who had undergone vaginoplasty and transgender men who had undergone phalloplasty. Upon showing proper evidence of such a procedure, the applicant would receive a new birth certificate with no gender marker at all.³¹² In 2002, the Department of Health, aware that New York City was the only jurisdiction in the United States to provide post-reclassification birth certificates with no gender marker, began reconsidering its policy.³¹³ Attorneys and medical experts rallied to urge the city to also reconsider its phalloplasty/vaginoplasty rule. Over the course of four years, medical and legal experts provided recommendations and evidence, urging the Department to eliminate the surgery standard and instead allow applicants to change gender from “M” to “F” or “F” to “M” upon showing documentation from both a medical and mental health provider that they had completed gender transition.³¹⁴ The key point argued during the four years of negotiations was that gender-confirming health care was not “one size fits all” but was instead individualized, and therefore the Department’s records would be more accurate if gender change was based on documentation from treating health care providers that an applicant had completed all procedures necessary for their individual gender transition rather than a requirement for one of two specific and rare surgeries.³¹⁵

After convening an expert panel, the Department created a set of recommendations that included two key elements: 1) that applicants who had proven gender change could now get a new gender marker, rather

311. Press Release, N.Y. City Dep’t of Health & Mental Hygiene, Board of Health Makes NYC Consistent with New York State and Most of the United States by Allowing Sex-Specific Transgender Birth Certificates (Dec. 5, 2006), available at <http://www.nyc.gov/html/doh/html/pr2006/pr115-06.shtml> [hereinafter Board of Health].

312. David B. Caruso, *New York to Ease Rules so Transgender Residents Can Update Birth Certificates*, WASHINGTON POST, Nov. 9, 2006, at A9; Damien Cave, *New York Plans to Make Gender a Personal Choice*, N.Y. TIMES, Nov. 7, 2006, <http://travel.nytimes.com/2006/11/07/nyregion/07gender.html>.

313. Interview with Chris Daley, Executive Dir., Transgender Law Center, in S.F., Cal. (Oct. 24, 2002).

314. See Sylvia Rivera Law Project, *New York City Birth Certificate Policy*, <http://srjp.org/index.php?sec=03H&page=nycbc> (last visited Mar. 17, 2008) (discussing a history of advocacy on the issues).

315. *Id.*

than a certificate with no gender marker; and 2) that documentation from treating health care providers, rather than documentation specific surgical procedures, would be accepted as criteria for gender reclassification.³¹⁶

In September 2006, the Board of Health received the recommendations, with some slight changes, from the Department of Health, and agreed to hear testimony on the recommendations. Written and oral testimony were received on October 25.³¹⁷ The content of these hearings, again, focused on the individual nature of gender-confirming health care, and the need for accurate birth certificates for social and economic participation of the transgender population.³¹⁸ On December 5, the Board of Health announced that it would not be changing the surgery requirement.³¹⁹ The announcement did not address any of the medical arguments that had been the focus of the four years of negotiations and the hearing. Instead, the reasons given for refusing the recommendations focused on sex-segregated facilities and terrorism prevention—specifically the Real ID Act.³²⁰ In the written press release issued after the meeting, the Board of Health also cited “forthcoming federal regulations which are anticipated in 2007 and which are anticipated to include provisions on birth-certificate security, death-birth matching, and verification of driver’s license applications with birth certificates.”³²¹ The press release further explained that the recommendations were not moving forward because the new policy would have “broader societal ramifications than expected,” stating “gender has important implications for many societal institutions that need to segregate people by sex. These include hospitals, schools and jails, as well as some workplaces.”³²²

Interestingly, the stated reasons for changing the policy were based on the speculative interaction of such a reformed policy with other administrative policies, specifically gender classification policies used by institutions that segregate people based on sex and policies aimed at preventing terrorism through a variety of identity-verification programs emerging in the War on Terror. This story reveals something both about the intersection between these areas of regulation and the disparate, though incoherently interconnected approaches to gender reclassification, as well about how the identity standardization aims of

316. Caruso, *supra* note 312; Cave, *supra* note 312.

317. Caruso, *supra* note 312; Cave, *supra* note 312.

318. Cave, *supra* note 312; Heather Cassell, *NYC Proposes New Gender Birth Certificate Policy*, BAY AREA REPORTER, NOV. 16, 2006, available at <http://www.law.ucla.edu/williamsinstitute/press/NYCProposesNewGenderBirthCertificatePolicy.html>.

319. Board of Health, *supra* note 311; Damien Cave, *City Drops Plan to Change Definition of Gender*, N.Y. TIMES, Dec. 6, 2006, <http://www.nytimes.com/2006/12/06/nyregion/06gender.html>.

320. Board of Health, *supra* note 311.

321. *Id.*

322. *Id.*

the War on Terror are surfacing new tensions regarding the stability of gender as a category of identity verification. This section will outline some of the areas where the conflicts amongst gender reclassification policies are emerging with new urgency. These areas, where the instability of gender classification becomes visible, are instructive for understanding not only the problems with the current matrix of gender reclassification policies, but with the underlying assumptions about the role of gender as a category of classification in government data collection and identity documentation. This section will examine these conflicts, looking at the impact of inconsistencies between gender reclassification policies on both the populations effected by them and the institutions administering them. While administrative confusion resulting from inconsistent gender reclassification policies is not entirely new, the “War on Terror’s” increased efforts to standardize identity verification are causing a sufficient level of new problems to suggest that the patchwork of inconsistent polices described in Part III cannot persist indefinitely.

To begin, we will examine examples not emerging directly out of War on Terror innovations.³²³ Differences between gender reclassification policies already cause problems when systems that have different rules and therefore classify individuals differently interact. For example, questions regarding disparate measures of gender classification came up in 2006 in New York City when the Department of Homeless Services created a new policy³²⁴ clarifying that transgender people should be placed according to self-identity, not birth-assigned gender, in the shelter system, in order to comply with the City’s Compliance Guidelines for its antidiscrimination law.³²⁵ This meant that transgender clients would need to be identified with their current gender in the Department’s computer system so that the placement would be correct. Frequently, clients who enter the City’s shelter system also have a public benefits case (open or closed), and may also have a history in the foster

323. Looking at explicitly “national security” focused surveillance measures alongside other surveillance techniques in welfare state caretaking programs that also operate as “apparatuses of security” follows Mitchell Dean’s argument that the forms of governance discussed here, which rely on the collection of standardized data and the implementation of norms across the population to create health and security population-wide, should be analyzed together. DEAN, *supra* note 27. Understanding these different types of surveillance as co-constitutive governance technologies throws the surveillance required by welfare state caretaking programs into a different light, allowing us to understand the identity and eligibility verification procedures of those systems as methods of social control just as much as more overtly law-enforcement focused uses of surveillance are.

324. N.Y. CITY DEP’T OF HOMELESS SERVS., PROCEDURE No. 06-1-31, at 2 (Jan. 31, 2006) (“[I]ndividuals who identify as men are to be housed in men’s shelters . . . individuals who identify as women are to be housed in women’s shelters . . .”).

325. N.Y. CITY COMM’N ON HUMAN RIGHTS, GUIDELINES REGARDING “GENDER IDENTITY” DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY NEW YORK CITY HUMAN RIGHTS LAW 6, available at www.nyc.gov/html/cchr/pdf/trans_guide.pdf (last visited Mar. 17, 2008).

care system. To the extent that these computer systems cross-reference or import data from one another, the conflicting gender reclassification policies of the different systems can come into conflict. The extent of disruption that this might cause is hard to determine because emerging policies recognizing the self-identity of transgender people who have not had surgery are just beginning to infiltrate a broad variety of local agencies as the slough of antidiscrimination policies that have been passed in the ten years are implemented through pressure from advocates. This situation of newer, less medically-focused policies conflicting with older surgery-focused policies is likely to cause disruption as these policies become updated.

This scenario can be especially complex when the rules of local agencies potentially conflict with the rules or practices of state agencies. One example comes from recent advocacy focused on creating best practices in New York City's public benefits programs regarding transgender clients. At the request of the Commissioner, an advisory committee to the Human Resources Administration (HRA)—New York City's welfare authority—created a best practices document that would help HRA employees work respectfully with transgender clients.³²⁶ The recommendations included basic education and transgender awareness etiquette, and a clear policy of recognition of transgender people's identities, regardless of surgical status. The authors reasoned that it is inappropriate to expect transgender people who are homeless or in such dire poverty that they qualify for public assistance and Medicaid to produce medical evidence of gender-confirming health care. Further, accessing benefits under the correct gender is essential not only to avoid humiliation, but also to avoid potential difficulty using a benefits card in a retail environment (benefits cards often work like ATM cards) if the card indicates an identity that does not match the appearance of the cardholder.

If this policy is accepted by HRA (replacing their current lack of policy that results in ad hoc caseworker decisions about what gender is entered for a given client),³²⁷ there is a potential for conflict with the

326. I was an organizer of the advisory committee and was one of the authors of the guidelines.

327. My research found no written policies in any jurisdiction in the United States regarding gender reclassification on public benefits cards. Gehi recently reported that the confusion amongst caseworkers about what standard to apply when a gender change on Medicaid records is requested has reached a new level with recent news coverage of the New York City Board of Health's refusal to change the surgery requirement for birth certificate gender change. *See supra* notes 311–22 and accompanying text. According to Pooja Gehi, an attorney at Sylvia Rivera Law Project, several of her clients have reported having their requests to change their gender on their Medicaid cases refused by caseworkers who referenced the recent birth certificate events. Interview with Gehi, *supra* note 145. One client even brought Gehi a copy of a *New York Times* article about the Board of Health decision that her caseworker had given her as proof that she could not change her records. *Id.* Of course, the Board of Health decision is about birth certificates, not Medicaid cards. Also, the Board of Health

State's Medicaid exclusion of gender-confirming health care for transgender people. Currently, the way that the exclusion is enforced with regard to hormones is that people with "Male" gender on their case are denied coverage for feminizing hormones through the computer system, and people with "Female" on their case are denied coverage for masculinizing hormones.³²⁸ This enforcement method emerged in 2002, prior to which there was no significant enforcement on the ban on coverage for hormones, allowing transgender people to regularly fill prescriptions without difficulty. In 2002, transgender clients began reporting to health providers and advocates that their coverage was being blocked by pharmacies. A significant health crisis emerged in the community as people lost access to care they had been receiving consistently through Medicaid.³²⁹ This new method of enforcing the exclusion of coverage of hormone therapy, directly tied to gender recorded on the case records of transgender Medicaid recipients, means that the creation of a gender reclassification policy in New York City's Human Resources Administration would allow more transgender people to go back under the radar and receive hormones. Advocates already report that some caseworkers deny requests to change gender on Welfare and Medicaid cases outright, some ask for evidence that gender has been changed at Social Security, some will make the change when a doctor's letter and a name change order are presented, some will make the change without documentation, and some require a birth certificate reflecting the new gender.³³⁰ In each scenario where the willingness to change is tied to another identity document, the conflicting standards of gender reclassification come into play. Further, due to the current absence of any written policy and the inconsistent approach of

decision, which was merely a decision to not change the rules about birth certificates, does not change any existing requirements that would have previously allowed caseworkers to change gender markers on Medicaid records. *Id.* Gehi's clients had previously succeeded with these requests primarily because a caseworker was convinced by their showing a name change order and sometimes a generally worded letter from a doctor. However, because Medicaid has no clear policy, the misunderstanding arising from recent press coverage of an unrelated policy decision is enough to reduce access of Gehi's clients to reclassification, and, therefore, hormone coverage. *Id.*

328. I previously worked as a staff attorney at the Sylvia Rivera Law Project. In my capacity there, New York health care providers who served trans individuals contacted me because clients who had "M" on their Medicaid records were suddenly being rejected in the pharmacy for estrogens they had been receiving through Medicaid for months or years. I worked with clients to try to change the gender on their Medicaid records, and upon success, Medicaid covered the hormones again.

329. I learned about these developments firsthand through clients of the Sylvia Rivera Law Project and through medical providers at Callen-Lorde Community Health Center, an LGBT health clinic in New York, who were in consistent contact with Sylvia Rivera Law Project beginning in 2002 to discuss the issues emerging due to these changes in enforcement of the New York ban on Medicaid coverage of hormone therapy for transgender people.

330. Interview with Arkles, *supra* note 145; Interviews with Davis, *supra* note 122; Interview with Gehi, *supra* note 145.

caseworkers, similarly situated individuals frequently receive different treatment.

Beyond the range of results that may already routinely occur as a result of inconsistencies within sex reclassification policies, emerging policies and practices of the War on Terror further highlight these inconsistencies and contribute to unreasonable results. With many of these policies and practices still in development, some of the potential ramifications of the War on Terror with regard to gender reclassification are still speculative. However, a few key changes and proposed changes demonstrate the emerging conflicts. Overall, the changes emerging in the realm of identity documentation and surveillance as a result of the War on Terror increased comparison of records between agencies that issue identity documentation and collect identifying data about individuals, and contributed to a more sophisticated national surveillance of identity. The passage of the Real ID Act of 2005³³¹ and new practices of “batch checking” are two such examples.

The Real ID Act creates minimum standards for federal recognition of state-issued ID. Currently, states make up their own rules and practices regarding issuing driver’s licenses and non-driver IDs. Areas of variation include length of time a license is valid before requiring renewal, use of fraud prevention techniques such as holograms on the ID, use of magnetic strips on an ID to store data, types of information printed on an ID, types of documentation required to obtain an ID, storage of documents used to obtain an ID, and more. The Real ID Act establishes minimum standards regarding IDs and legislates that by 2008, an ID that does not comply with such standards will not be valid for boarding airplanes, opening bank accounts, entering government buildings and all other arenas where valid federal ID is required.³³² Thus, the law requires each state to adjust DMV practices to meet the standards laid out in the Act in order for its ID to be useable by its citizens for the purposes listed above. These standards include, among other things, clear rules about what documents will be required to obtain ID; a requirement that the ID display full legal name, gender, date of birth, a digital photograph, an identification card number, an address, and a signature; machine-readable technology with minimum data elements defined by the Act’s regulations; and anti-fraud elements designed to prevent counterfeit.³³³ At the time of writing, the Department of Homeland Security has released a draft of the implementing

331. Pub. L. No. 109-13, § 202(b), 119 Stat. 231, 311 (2005).

332. *Id.*; see also Declan McCullagh, *Maine Rejects Real ID*, CNET, Jan. 25, 2007, http://news.com.com/Maine+rejects+Real+ID/2100-7348_3-6153532.html.

333. Real ID Act of 2005 § 202(b).

regulations, which remain to be adapted and finalized pending comments.³³⁴

The Real ID Act is significant to gender reclassification policy because of its attempt to standardize disparate ID-issuing practices across the states. Since its passage, transgender advocates and scholars have raised the possibility that the regulations would create a specific policy regarding gender reclassification which would functionally eclipse all existing gender reclassifications policies in DMVs across the country when they comply with the Act.³³⁵ Under the current administration, there is reason to believe that whatever gender reclassification standard emerged in this process might reflect the more strenuous medical evidence requirements present in some states rather than the more accessible policies present in a few states, or worse yet, would bar gender reclassification altogether. Overall, it appears that any policy change would mean at least some of the most liberal policies will be eclipsed. Also noteworthy is the possibility that the requirements regarding machine-readable technology and storage of documents used to apply for ID would result in private information, such as name change orders or copies of surgery letters, being accessible to any person swiping the ID.

However, the draft regulations issued on March 1, 2007, created no further guidance on the issue of gender than what already existed in the statute; namely, that gender must appear on the ID and that the ID must provide for a low storage capacity magnetic strip that makes the storage of lengthy detailed documentary evidence unlikely. Of course, these are merely draft regulations, and concerns regarding alternate rules cannot be put aside until the final regulations are issued. Further, even if the draft regulations remain unchanged on these two points, the regulations will likely have an impact on transgender people's access to and use of ID in small, but still significant ways. For example, the draft regulations require that all name changes be verified by court order, marriage

334. The final regulations for the Real ID Act were issued in January 2008. Interestingly, the regulations included specific mention of transgender ID issues in the Comments section:

Comment: Two States raised issues about how gender is determined for transgender individuals and whether gender will be included as a verifiable identifier through EVVE.

Response: DHS will leave the determination of gender up to the States since different States have different requirements concerning when, and under what circumstances, a transgendered individual should be identified as another gender. Data fields in EVVE are outside the scope of this rulemaking.

Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5,272 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37), available at <http://a257.g.akamaitech.net/7/257/2422/29jan0081800/edocket.access.gpo.gov/2008/08-140.htm>.

335. ANDREW COHEN, LICENSE TO DEPRIVE (OF GENDER IDENTITY): A SURVEY OF STATE DRIVER'S LICENSE SEX-CHANGE GUIDELINES (2007) (draft on file with author); NAT'L CTR. FOR TRANSGENDER EQUAL., REAL ID: BAD LAW FOR OUR COMMUNITY (2005), available at <http://www.realnightmare.org/images/File/NCTE%20realid.pdf>; Joanne Herman, *Forced Out: A Real ID Problem for Trans People*, ADVOCATE.COM, Aug. 29, 2006, http://www.advocate.com/exclusive_detail_ektid36069.asp.

certificate or divorce decree, that the verifying document include the date of birth or age of the applicant, and that all former names be retained permanently on record in the motor vehicles record database.³³⁶ Because many transgender people change their names to a name associated with their current gender, these requirements may be significant. First, in states where common law name changes are still possible, this regulation further reduces the functionality of such name changes if the name change cannot be translated onto ID without documentation. Second, having all former names available in the database means that many transgender people will be “outed” as transgender to whoever has access to the database. Given the tendency of identity data to be eventually used for broader purposes than its initial collection intended, there is reason to believe that use of these databases may be expanded in the future, and have additional ramifications for people whose gender identity is revealed by these records. As advocates for transgender communities provide comments on the draft regulations and the regulations become finalized and implemented, the consequences of many of these less-obviously gender-reclassification related aspects will become clearer.

In addition to the Real ID Act, another new War on Terror practice affecting identity documentation and gender reclassification is “batch checking.” Batch checking is a term commonly used to describe the practice of verifying identification documents and seeking out fraudulently obtained documents. It occurs when different data-gathering agencies compare records to find individuals with non-matching information in various administrative systems. For example, in 2004, several states, including New York began to compare their DMV records with Social Security records to identify individuals with mismatching information. Within the first few months, the practice identified over 300,000 people in the state with information on their DMV IDs that was somehow different from what the SSA had in its records associated with that SSN.³³⁷ These people received letters warning them that their licenses would be suspended, and many ultimately lost their state driving privileges.³³⁸ However, batch checking has also created a significant problem for transgender people due to the inconsistency of gender reclassification policies. New York’s DMV/SSA

336. Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. at 5,272.

337. Letter from the New York Coalition for Immigrants’ Rights to Drivers’ Licenses to Friends (Jan. 2005), available at <http://srtp.org/index.php?sec=03H&page=nycirdl> (select “Invitation to join the NY Coalition for Immigrants’ Rights to Drivers’ Licenses” hyperlink).

338. Press Release, Chung-Wha Hong, Immigrant Workers Protest NY’s Holiday Gift—Suspended Licenses (Dec. 15, 2004), available at <http://www.thenyic.org/templates/documentFinder.asp?did=334> (last visited Mar. 17, 2008).

batch checking is a good example. New York's DMV gender reclassification policy differs significantly from that of the SSA. New York requires a letter from a doctor stating that "one gender predominates over the other" to obtain a license with the current gender reflected.³³⁹ The SSA requires proof of genital surgery.³⁴⁰ The result is that many people who are able to get their new gender reflected on their New York DMV ID cannot do so on their SSA records. For most people, this is not a significant concern because SSA cards do not have gender written on them, so no inconsistency appears when showing DMV ID and an SSA card when, for example, applying for employment. However, when the state began batch checking, many transgender people received the same driver's license suspension letters that were sent to everyone who came up with "no match" data, because their gender marker was inconsistent in the two systems being compared.³⁴¹

Social Security also sends "no match" letters to employers when it conducts routine comparisons between earnings reports submitted by employers and SSA data. Since this new data-comparing process began, transgender people have been outed to their employers as transgender when such "no match" letters are sent because of the difference between the gender the employee is living and working in and the recorded gender in SSA records.³⁴² Recently proposed regulations would increase pressure on employers to take action when receiving a "no match" letter about an employee, and may increase the likelihood of these letters leading to firing.³⁴³

Batch checking practices represent perhaps the most significant problem with the inconsistency of gender reclassification policies in the United States. As the War on Terror leads to increasingly liberal use of existing databases to compare and verify data on individuals, policies that result in inconsistent data across agencies and create "no matches." These "no matches" in turn threaten the livelihood of transgender individuals. The War on Terror has prompted many proposals for a variety of new databases, and new uses of existing data sets collected by federal and state agencies, usually aimed at identifying undocumented immigrants and bolstering military recruitment.³⁴⁴ As the disparate

339. See *supra* Part III.A.

340. See *supra* Part III.A.

341. Sylvia Rivera Law Project, *supra* note 23.

342. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 114 (June 14, 2006) (to be codified at 8 C.F.R. 274a); Nat'l Ctr. for Transgender Equal., *New Homeland Security Rule Would Out Transgender People at Work*, <http://www.nctequality.org/Issues/nomatch.asp> (last visited Mar. 17, 2008).

343. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. at 114; Nat'l Ctr. for Transgender Equal., *supra* note 342.

344. The currently proposed regulations for the Real ID Act discuss data comparison between state agencies to determine whether an applicant has applied for a license in more than one state, as

identity documentation practices of various agencies become linked and the data is routinely compared, the variations amongst gender reclassification policies are becoming increasingly noticeable. These developments expose the incoherency of gender classification in government recordkeeping in the United States. As these standardization practices proceed and local practices of defining categories for identity documentation classification systems are replaced, the current incoherent gender reclassification rule matrix may reach enough of a crisis point of bureaucratic confusion that total standardization will be required. These circumstances provide an opportunity to analyze the underlying assumptions of existing uses of gender in various classification schemes, which in turn provides insight into mechanisms of rulemaking and classification that define administrative governance.

V. GENDER, WHAT IS IT GOOD FOR?

With regard to ID and sex-segregation, the newest, most progressive policies have promoted the view that reducing reliance on medical evidence and increasing the ability of transgender people to be recognized in their current gender based on self-identity is desirable. Further, recent litigation and policy reform efforts have supported the view that birth-assigned gender should not determine the availability of various treatments to Medicaid recipients or people in state custody, so that exclusions of gender-confirming health care limited to transgender people should be eliminated. Some have looked to the United Kingdom, where the 2004 passage of the Gender Recognition Act (GRA) established a new standard for gender reclassification.³⁴⁵ The GRA enables United Kingdom citizens to register a gender change with the state that can be used for all purposes including ID documentation, sex-segregation, and marriage.³⁴⁶ Further, the GRA includes no requirement

well as comparisons with federal agency data. There have also been proposals for new databases, such as a database that would track information related to military recruitment for all Americans under a certain age. A new FBI database is being planned that will be the world's largest collection of biometric data, such as palm prints, images of faces, and iris patterns. Ellen Nakashima, *FBI Prepares Vast Database of Biometrics, \$1 Billion Project to Include Images of Faces*, WASH. POST, Dec. 22, 2007, at A01.

345. See, e.g., Ralph Sandland, *Feminism and the Gender Recognition Act 2004*, 13 FEMINIST LEGAL STUD. 43, 43–66 (2005).

346. In a recent article, Andrew Sharpe explains how even though the GRA appears to offer trans people, regardless of surgical status, full recognition in their current gender, certain elements of the legislation expose ongoing anxieties about trans identities and undermine the promise of the law. Andrew Sharpe, *Endless Sex: The Gender Recognition Act of 2004 and the Persistence of a Legal Category*, 15 FEMINIST LEGAL STUD. 57 (2007). Specifically, he notes, a new element was added to the law of annulment in the United Kingdom when the GRA was passed, allowing persons to seek annulment if they find out that their partner is a transgender person who had previously registered their new gender with the state and married without their partner's knowledge of their transgender

that the applicant have undergone any medical treatment, so that regardless of surgical or hormonal status, gender reclassification is possible.³⁴⁷ The GRA, then, might be a model for standardizing gender reclassification policies in the United States to recognize the individualized nature of transgender health care and bring conflicting policies across agencies and jurisdictions into agreement. In this way, the current mess of policies would be simplified in favor of one single gender reclassification rule and administrative process that would be recognized by all administrative agencies.

Certainly, the proposal to reduce medical evidentiary requirements in gender reclassification policies in favor of self-identity and/or to create a standard policy nationally would do a great deal to eliminate some of the worst consequences of the incoherence of the current policy matrix. The negative impacts on transgender people, as well as the confusion caused in administrative contexts would be reduced. However, to imagine only these reforms is to miss the greater insight that this matrix of policies allows, and the larger questions it invites.

These policies expose the instability of gender as a category of identity verification and open up questions about its effectiveness as a category of identity classification and its necessity. Under the current regime, there is no agreement amongst the hundreds of agencies and institutions that classify people according to gender about what criteria should be used for determining gender. Many individuals possess multiple identity documents, some that say “M” and some that say “F.” Some agencies and institutions do not use gender on their identity documents, while others do. There seems to be widespread assumption that gender should be a category of government classification, but that assumption appears to be based on a belief that gender is more stable and obvious a classification than these policies demonstrate it to be. Despite the fact that “common sense” suggests that gender is a stable,

history. *Id.* at 76. Sharpe argues that this new exception to the usually very rarely granted law of annulment suggests an underlying belief that transgender people’s birth gender status can never truly be left behind and that full recognition in the new gender is not actually provided by the GRA. *Id.* at 77. While people who find out that their spouse hid infertility, prior marriages, children, disease, financial problems or any other potentially important characteristic are required to divorce and cannot seek annulment, annulment is granted for a hidden transgender history. *Id.* Sharpe contends that this proves that the GRA does not fully eliminate birth gender from the state’s understanding of a transgender person. *Id.* at 80–81. It is also worth noting that while the GRA explicitly eliminates a requirement of medical treatment, some transgender people and allies in the United Kingdom have suggested that people who do not have documentation of medical treatment may be facing difficulties when applying for recognition. Because the government has not provided any data regarding rejections of applications, only community anecdotes exist to suggest that the law is being enforced with some kind of medical requirement. Interview with Louis Bailey, in Manchester, Eng. (July 2, 2007); E-mail from Sarah Lamble, Sessional Teacher, University of Kent, to author (Jan. 18, 2008) (on file with author).

347. Sharpe, *supra* note 346.

obvious, clear indicator of human difference, rulemakers using “common sense” definitions of gender have come up with dozens of different rules about what indicates that difference and those rules are enforced inconsistently because the “common sense” assumptions about gender in the minds of front line workers often differ from the assumptions of the rule. Further, even within a particular agency or institution, the assumptions of the gender reclassification rules are not upheld across the whole population being classified. For example, in jurisdictions where it has been decided that to be reclassified from “F” to “M” a person must prove they have a penis (through documentation of phalloplasty), “M” on an ID cannot really be used as evidence of a penis, because when non-trans men lose their penises their “M”-marked IDs are not taken away. The anatomy-based gender reclassification rules, which seem to rest on the assumption that body parts correspond to gender markers, are only applied in some cases. So where the rules appear to suggest that “M’s” mean penises, in fact that is not true.

Looking at the whole universe of people classified by these markers, there is no physical or psychological characteristic we can say are shared by people with “M’s” or “F’s” marked on their IDs. The rules are written based on a set of assumptions that are not only more shifting and diverse than we might expect—one jurisdiction thinks you need a penis to be reclassified as male, one jurisdiction thinks you need to remove your uterus and ovaries and breasts to be reclassified as male but you do not have to get a penis, another jurisdiction thinks you need a letter about your psychological identity to be reclassified as male—but that do not adhere to the ways the rules are enforced. Thus, the gender marker, when looked at closely, provides little or no concrete identifying information consistently across the entire population of people being classified.

Gender, then, is not just unstable on the documents of transgender people who are directly impacted by the inconsistent policies described in Part III, but is unstable and unreliable as an indicator of any particular “truth” across the entire system. Is it, then, a useful tool of identity verification? Do its benefits to various systems of governmental recordkeeping outweigh its costs? Does it do the work that “common sense” tells us it is doing? Looking at each agency and institutional use and observing the history of how the use of identity documents in institutions shifts over time and how gender operates in these contexts over time, we can see the limited value of gender in these recordkeeping schemes. From this vantage point, we can ask what normative notions underlie a classification scheme that is taken for granted in administrative rulemaking. Clearly, gender is not irrelevant in people’s lives, but it also frequently operates in contexts where it is an ineffective proxy for determining some other piece of information. Examining the

use of gender in classification, the false assumptions about its stability as a category and the consequences of its use on a subpopulation who face misclassification provides insight into the invisible work of classification systems in administrative governance. Before coming back to the broader questions this Article asks about administrative governance, I will first provide a more detailed analysis of the question raised by the proposal to replicate the United Kingdom's GRA model to fundamentally question the use of gender as a category of classification.

Instead of proposing standardization of gender reclassification policies and elimination of their reliance on common misunderstandings about transgender health care, I recommend that we take the opportunity provided by the crisis of conflicts emerging from "batch checking" and other new practices of identity verification to question the use of gender classification overall. The matrix of conflicting policies outlined in Part III is a testament to the instability of gender classification and the failure of attempts to stabilize the gender binary through reference to medical authority. Understanding this, we can begin to question the use of gender in government recordkeeping and imagine a future in which the fictions about gender that support the failed attempts to create coherent classification and reclassification policies are not codified in administrative policy and practice.

The failure of gender classification to live up to the assumptions of stability and reliability for identity verification, and an entry point for imagining a reduced reliance on gender, can be seen by asking two key questions: (1) What role does the tracking of gender have in achieving the purposes of each of the institutions described in Part III? (2) What role does tracking gender have in the national security purportedly sought by the War on Terror? In this section, I look at these questions, and propose that perhaps rather than seeking to create a standardized rule and restabilize gender we consider reducing the use of gender data in administrative systems.

For purposes of this section's analysis, I will focus on the institutional goals of the various agencies collecting gender data, asking the narrow question of whether and how gender data does or does not support their stated goals. This narrow inquiry provides an opportunity to see the operation of this gender classification in terms of the work it is assumed to do—and fails to do—regarding identity verification. My argument does not aim to adopt the institutional goals of these agencies, but rather to reserve my broader critique of data collection and identity verification for a moment while first looking at how, even if we take agencies' institutional goals as givens, gender does not do the work that it is assumed to do. Such a narrow inquiry will open up space for a broader

analysis about the role of data collection and administration of classification systems more generally.³⁴⁸

A. DO WE NEED GENDER ON ID?

Categories of data on ID cards and in the data records that identification-issuing agencies maintain have changed over time. In the case of gender, alone, it is clear that variations exist. Just as the use of each form of ID has shifted over time from its original purpose, so has the data recorded on ID. The information on ID changed significantly with the advent of the photograph, digital signatures, and other relatively recent technologies. At one time, some states included race on their driver's licenses, which has now been removed in all states. The Real ID Act's attempt to standardize the information marked on ID indicates that this is an emerging area of policy where debate about the presence of gender markers on ID is appropriate. It is useful to examine both the original and contemporary primary usage of each type of ID discussed in Part III. At the end of this section, I will look at a question that cannot be ignored in the current context of identity document policymaking: How do gender markers function as part of national security?³⁴⁹

The original purpose of Social Security registration and Social Security cards was the distribution of disability and old age benefits to Americans. That purpose continues, but the SSN is now also used to identify an individual for a variety of other purposes, from banking and commercial purposes, to tax identification and identification for government programs (ranging from school registration to the administration of military benefits). SSNs are also increasingly used to enforce immigration laws through the batch checking described in Part IV. For these purposes, is the tracking of gender a necessity? The Social Security card, unlike the other forms of ID discussed here, already has no gender marker. Gender markers, however, exist on the records maintained by Social Security and are used in the data-comparing that yields "no match" letters discussed in Part IV. Maintenance of gender

348. Such an inquiry is dangerous to take up at all, because any discussion that takes institutional purposes such as "national security" and "terrorism prevention" or even "identity verification" as givens may unintentionally reify those as being stable, transparent aims. This Article seeks to contextualize War on Terror policies such that they can be understood as part and parcel of larger caretaking/surveillance state strategies that preceded the events of 2001, and in fact are integral to the very formation of modern governance. However, there is some value in demonstrating that, even if we do not believe that the stated aims of various institutional policies are transparent and stable, demonstrating the inadequacy of gender to do assumed work within those aims is a useful step in exposing the limitations of gender as a technology of identity verification.

349. A recent book by Jasbir K. Puar takes up the broader question of sexual and gender symbolics of the current discourse about terrorism and national security in the United States, demonstrating the gendered nature of the panic about terrorism and the construction of safety and patriotism sought by the War on Terror. JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007).

markers on these records does not appear to have a specific advantage beyond functioning as one more indication of identity that can be compared across records. Certainly, the more data fields that exist in any set of records being compared, the more opportunities exist to find a “no match” and determine whether a SSN is being used fraudulently. However, “no matches” in the gender field also occur due to the inability of transgender people to change gender on Social Security records when they have succeeded in doing so in other identity tracking systems. The specific use of gender, as opposed to another, more accurate indicator that could operate as a field of comparison—such as eye color, city of birth, or blood type—has no specific benefits that outweigh its costs.

Including a gender marker on birth records is, perhaps, more complex. The process of registering births in the United States emerged from a desire to measure public health outcomes and have reliable vital statistics. The creation of the birth certificate as part of this registration process led to a variety of corollary purposes now served by this system that are related to identity verification. Birth certificates are now used to verify identity for everything from employment to school registration to the acquisition of other forms of ID. It might be argued that recording gender as one of the vital statistics collected at birth—allowing the government to know what sex is being assigned at birth in the population as a whole—could yield significant data for tracking health issues. However, even if that information is useful at the population level, does it still need to be applied at the individual level? Perhaps birth gender could be reported with statewide vital statistics but not marked on birth certificates that stay with the individual for life as an identity verification document. As I argued above with regard to Social Security records, the added benefit of including this field for verifying identity, given the other information contained on the birth certificate and its uses, does not outweigh its costs. The fact that some jurisdictions, including New York State, already offer “short form” birth certificates that show no gender marker indicates that this category is not essential. Similarly, for the past three decades, New York City has provided birth certificates with no gender marker to transgender applicants who meet their criteria. The existence of such certificates suggests that policymakers have already considered removing gender as an acceptable strategy in certain situations. If gender is not a necessity for identity verification, as these examples suggest, it could be left off identity verification materials even while vital statistics that include numbers of births and sex data are reported to the state for public health purposes.

Driver’s licenses originally emerged as a method of generating revenue for states. Over time, states added competency examinations to the licensing process, adding public safety as a purpose of licensing drivers. Today, however, driver’s licenses are used for a wide variety of

purposes related to identity verification. DMVs accordingly issue IDs to non-drivers and drivers alike. For purposes of generating state revenue and maintaining safe roads, gender tracking is unnecessary. Although there may be aggregate differences along gender lines related to frequency of licensing or driver safety, there are no current state policies derived from DMV records that pursue gender-based programs related to licensing revenues or road safety, nor would such programs survive constitutional scrutiny. Therefore, it is difficult to understand the necessity of tracking such information. In terms of identity verification, I would argue that the advent of digital photographs on DMV IDs makes obsolete any purpose that the gender marker may have initially served, particularly in terms of linking the ID to the individual carrying it. Like hair color and eye color, gender as a supposed indicator of appearance may be less important given both its limited value as a predictor of appearance and the presence of a digital photo as a more reliable indicator of appearance. Given the other information on DMV ID, using gender as a method of identity verification does not provide benefits that outweigh its limitations.

The same argument can be made for the use of gender on passports. Passports have narrower use than some of the documents listed above, and far fewer Americans have or use passports compared to the other documents listed here. The primary purpose of passports is verification of citizenship for purposes of international border crossing. Passports can also be used to verify identity in domestic contexts, such as boarding a domestic flight, entering age-barred venues, or buying age-barred products, but here they are relied on far less frequently than DMV IDs. For this reason, the argument for eliminating the gender marker on passports parallels the argument for eliminating it from DMV IDs. Both have inadequate value for verifying identity given the other data present.

Despite the above analyses, it is important to contend with the question of whether retaining gender markers on ID assists with national security because this reasoning is such a prevalent counterargument to reducing any aspect of data collection related to identity verification right now. Certainly, the new policies and practices stemming from the War on Terror that are discussed in Part IV demonstrate that gender data are one type of data being compared across agencies and yielding “no matches.” This raises the question: does the presence of gender data, and the comparison of gender data across agencies, assist in identifying individuals who are threats to national security? Even if we assumed that data-comparing to find people fraudulently using SSNs to work or obtain ID had some connection to identifying dangerous individuals, it is difficult to see the added value of collecting and comparing gender marker data. Given the high levels of police profiling of transgender people, is it believable that gender change would be a likely strategy for

covert terrorist activity?³⁵⁰ More broadly, the connection between finding disparate gender information between DMV and SSA or employer and SSA records and terrorism prevention does not seem believably strong enough to outweigh the risks to livelihood faced by those who are being identified as “no matches.”

The question in this narrow inquiry, then, is whether gender an item of information that significantly forwards the goals of the given data collection process. Such an inquiry leads to varying answers depending on the purpose of data collection, as explored above, and it is useful to turn these questions more broadly on government data collection practices. Perhaps it is important that the Center for Disease Control collects data about cancer rates that includes indicia of gender, among other classifications, to determine risk and causality. However, gender data may not be necessary for data regarding tax collection, or for marking on ID cards and certificates used to access employment, government services, and public accommodations. Variation already exists. For example, some cities color code bus passes based on gender and others do not. This variation indicates a space to question how and why this information is used, and whether the benefits of its use outweigh the costs. If we eliminate the assumption that gender is a category of classification that should always be included in government data collection, and we recognize that in at least some instances the maintenance of records regarding gender classification invites discrimination against individuals, questions of when and how data about gender should be collected can be examined from a new perspective. It becomes clear that gender is not doing the labor it is expected to do in these institutional contexts.

B. DO WE NEED SEX SEGREGATION?

In the area of sex segregation, the question requires a significant departure from traditional notions of propriety and an analysis of what the “common sense” purposes of sex segregation, including whether or not these purposes are actually served by sex segregation. The most common reasons provided for sex segregation of bathrooms, shelters, group homes, jails and prisons³⁵¹ are prevention of sexual activity, safety

350. In 2002, the U.S. Department of Transportation issued a warning to airport security to look out for “men in dresses” as potential terror threats. This warning suggested to some that in the security state imaginary, gender transgression may be linked to terrorism. Mara Keisling, Remarks at Trans Politics, Social Change and Justice Conference, Center for Lesbian and Gay Studies, City University of New York (May 7, 2005). However, in most cases reviewed in this Article, it is clear that the consequences of War on Terror policies experienced by transgender individuals are not a product of intention on the part of policymakers, but rather an effect of the standardization of identity documentation in an effort at immigration enforcement that has many unintended consequences.

351. While these reasons are rarely cited now, Rosemary Herbert has discussed how the original motivations for segregating prisons by sex developed from “inaccurate, paternalistic assumptions”

(particularly of non-transgender women), and comfort (again, particularly of non-transgender women).³⁵² The prevention of sexual activity, I believe, we can set aside, recognizing that sexual activity occurs in every one of these contexts regardless of sex segregation, and that because same-sex sexual activity exists, sex segregation cannot eliminate the possibility of sexual activity.³⁵³ However, some of the assumptions stemming from the cultural notion that sex segregation prevents sexual activity underlie the other two arguments—about safety and comfort—and can be dealt with in the context of those considerations.

First, the safety and comfort arguments generally read through one another. The comfort arguments are most often about whether non-transgender women will feel threatened if they have to share bathroom

about gender,

based, in part, on a belief in the malleability of the female character. This trait meant that women were morally weaker than men, but, at the same time, they possessed a greater potential for rehabilitation. The reform effort considered separation of women from men essential to the rehabilitation of women, who could be salvaged only through physical isolation from corrupting moral influences and through the example of the 'virtuous' women who staffed these new prisons. Traditional women's roles were the model for rehabilitative efforts; to this end the reformatories taught domestic skills and emphasized the duties to family.

Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1192 (1985). Herbert argues that courts have been mistaken, when evaluating sex discrimination in prisons, because they have failed to evaluate the practice of sex-segregation itself. *Id.*

352. Concerns about the safety and comfort of non-trans women in sex-segregated facilities shared with trans people have been central to every policy negotiation I have engaged in, including negotiations with the Department of Homeless Services in New York City, negotiations with the New York City and New York State Departments of Health, negotiations with the New York City Commission on Human Rights, and have been vocalized in every training on these issues that I have conducted, including with the New York City Department of Environmental Protection, youth shelters, domestic violence shelters, schools, health care providers, advocacy coalitions, public defenders' offices, judges, legal aid offices, and social justice groups. A recent example of this response comes from Montgomery County, Maryland, where a group called Citizens for a Responsible Government has responded to a proposed gender identity non-discrimination bill by creating a website called "notmyshower.net." Citizens for a Responsible Gov't, <http://www.notmyshower.net> (last visited Mar. 17, 2008). The site warns, "County Executive Ike Leggett signed Bill 23-07, the outrageous legislation that *may* result in forcing even religious schools to hire transgender teachers; and *then also* allow *cross-dressing* but biological *males* in your daughter's school locker room." *Id.* (bold emphasis omitted).

353. Discussion about the prevalence of sexual activity in prisons has been elevated as concerns about HIV infection have emerged in recent decades. Proposals that condoms be made available in men's facilities in recognition of the fact that sex occurs between prisoners have been rejected by most prison systems, but embraced by others. This conversation, about whether acknowledging such activity condones it, and conversely whether denying its existence is justified given the dangers of HIV infection, has increased awareness that sexual activity is commonplace in sex-segregated settings. See generally Rebecca Nerenberg, *Spotlight: Condoms in Correctional Settings*, HEPP NEWS (Brown Med. Sch., Providence, R.I.), Jan. 2002, at 6, available at <http://www.thebody.com/content/art13017.html>; *L.A. Jail to Distribute Condoms to Inmates* (NPR radio broadcast May 23, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4662471> (select "listen now"); *California Gov. Schwarzenegger's Veto of Prison Condom Distribution Bill Politically Motivated, Editorial Says*, MED. NEWS TODAY, Oct. 9, 2006, <http://www.medicalnewstoday.com/medicalnews.php?newsid=53494>.

or residential facilities with transgender women, or, when a proposal suggests creating gender-neutral facilities, with non-transgender men. While there is sometimes reference to propriety or modesty, the more strenuously made arguments are usually about feelings of vulnerability to violence, or actual vulnerability to violence. These hang on an overall assumption that non-transgender women are safer from sexual violence in spaces that exclude men and transgender people. Some examples of these arguments will help illustrate. In the negotiations that led to the 2006 New York City Department of Homeless Services (DHS) shelter policy discussed above, DHS staff repeatedly argued against the recommendation of advocates that transgender women be allowed placement in women's shelters by citing concerns about the comfort of non-transgender women in the facilities.³⁵⁴ The fact that many women using the shelters may be survivors of sexual or other violence at the hands of men was a common stated reason for such discomfort, suggesting that sharing a shelter with a transgender woman (who the other residents may see as "really a man") might trigger memories of violence. Similarly, in negotiations with institutions discussing the possibility of making bathrooms gender-neutral to increase accessibility, concerns about non-transgender women's safety and comfort consistently emerge.

In these contexts the question becomes, does sex segregation make people safe? In the bathroom context, some commentators point out that "women's" signs on bathroom doors do not function as locks, and may, in fact, create a false sense of safe space, without providing any actual meaningful security.³⁵⁵ Because women's bathrooms are a non-secure gender-specific environment, they may even lead to an opportunity to target women for violence.³⁵⁶ In residential contexts, such as foster care group homes, jails and prisons, and homeless shelters, the question again becomes whether sex segregation makes a meaningful difference in safety and prevention of sexual assault. No doubt, sexual violence occurs in these contexts despite sex segregation. Moreover, at least some evidence suggests that because of the ways that gender norms operate, sex segregation may in fact enhance violent behavior and hierarchies within institutions.³⁵⁷ What are the limits of the safety offered by sex-segregation, and what other approaches to preventing sexual violence might be even more effective? Imagining alternatives to sex segregation,

354. Chess et al., *supra* note 228; DVD: Toilet Training, *supra* note 228; Video: Wrong Bathroom, *supra* note 228.

355. Chess et al., *supra* note 228; DVD: Toilet Training, *supra* note 228; Video: Wrong Bathroom, *supra* note 228.

356. Chess et al., *supra* note 228; DVD: Toilet Training, *supra* note 228; Video: Wrong Bathroom, *supra* note 228.

357. See Lee, *supra* note 78, at 11.

and looking at existing models, helps to assess what other possibilities might exist.

Prisons are, perhaps, the most controversial context in which to question sex-segregation. In 1971, an experimental gender integrated prison was established in Fort Worth, Texas.³⁵⁸ After the integration of FCI Fort Worth, the Bureau of Prisons experimented with coed prisons in Lexington, Pleasanton, and Terminal Island.³⁵⁹ Massachusetts Correctional Institution in Framingham became a co-correctional facility in 1973.³⁶⁰ As of 1985, there were also coed prisons in Kansas, Alaska, and New York.³⁶¹ The motivation for these projects and the general push toward “co-corrections” in the 1970s was inequality between men’s and women’s prisons. Because the male prisoner population far outnumbers the female prison population, fewer women’s prisons exist, and women prisoners have less access to programs, facilities, and services than men.³⁶² They are also frequently imprisoned farther from their home and families, because fewer facilities exist, so the closest one may be much farther away.³⁶³ They also frequently end up in higher security facilities, because less facilities exist overall to house women prisoners so each prison may have a mix of prisoners requiring different security levels, meaning that a woman who would be eligible to be in a lower-security facility, were one in existence in the jurisdiction, will end up in a higher security facility because the women’s prison in her jurisdiction is such a facility.³⁶⁴ These concerns led to the emergence of the co-corrections movement, which established facilities housing men and women. The Fort Worth facility housed men and women in separate cottages, but permitted formal and informal co-ed time.

The results of the experiment, according to researchers, were successful.³⁶⁵ Recidivism rates of prisoners at Fort Worth were remarkably low.³⁶⁶ Violence within the facility, especially amongst men and including sexual assault, was significantly reduced. Pregnancy rates amongst women at the facility were also lower than at all-women’s institutions.³⁶⁷

358. See Herbert, *supra* note 351, at 1184 n.10.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 1182–84, 1193–94.

363. *Id.* at 1182–84, 1193–94 & n.66.

364. *See id.*

365. The NARA units (created under the Narcotics Addicts Rehabilitation Act), which traditionally had the highest recidivist population in any federal prison, had 69.6% of former inmates still in the community, which was 14% higher than any other NARA unit in the federal system. JOHN ORTIZ SMYKLA, COCORRECTIONS: A CASE STUDY OF A COED FEDERAL PRISON 42–43 (1981).

366. *Id.*

367. *Id.* at 46.

Researchers studying the co-correctional model suggest that gender-integrated environments, because they more closely mirror the outside social world, were beneficial, resulting in prisoners leaving co-corrections facilities having an easier time adjusting to life outside.³⁶⁸ As the pregnancy data shows, sexual activity is not eliminated in sex-segregated environments, and certainly sexual assault is rampant in sex-segregated correctional facilities. The co-correctional model only offers a limited viewpoint on what alternatives might exist to sex-segregation as an approach to safety of women in residential environments. The experiment of co-corrections also invites us to consider what measures beyond sex-segregation might result in better security for people in residential facilities.³⁶⁹ As Rosemary Herbert has argued, “Personal security is a function primarily of supervision, not segregation. Women can be more vulnerable in poorly supervised single-sex prisons than they are in co-correctional ones that are properly supervised.”³⁷⁰ Acknowledging that current policies of sex-segregation do not prevent sexual assault in bathrooms, shelters, group homes or correctional facilities, we might begin to ask, for each of these institutions, what policies might create more meaningful safety measures.

Additionally, we might acknowledge that sex-segregation itself is a source of vulnerability for harassment and violence to some people. For gay men, lesbians, feminine men, masculine women, and transgender people, targeting for sexual violence is common in sex-segregated residential facilities.³⁷¹ More broadly, sex-segregation is an obstacle to transgender people accessing facilities like drug treatment centers,

368. *Id.* at 44; see also *Texas Warden Calls Coed Prison Successful*, 65 A.B.A. J. 533, 533–34 (1979).

369. I do not offer the co-corrections model to suggest that the manifold problems with the criminal justice system in the United States could be resolved with such a strategy. The problems of mass incarceration have been well-documented by scholars such as Angela Davis, Ruth Wilson Gilmore, Joy James, Christian Parenti, Dylan Rodriguez, and Jonathan Simon. See generally ANGELA DAVIS, *ARE PRISONS OBSOLETE?* (Seven Stories Press 2003); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2006); CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* (1999); DYLAN RODRIGUEZ, *FORCED PASSAGES: IMPRISONED RADICAL INTELLECTUALS AND THE U.S. PRISON REGIME* (2006); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); *WARFARE IN THE AMERICAN HOMELAND: POLICING AND PRISON IN A PENAL DEMOCRACY* (Joy James ed., 2007). The analysis offered by those scholars suggests that systemic reforms will not be sufficient to address the significant political, racial, and economic factors motivating imprisonment in the United States. As Angela Davis points out in her argument for the abolition of prisons altogether, the entire history of imprisonment is a history of reforms that continually expand prison systems and imprison more and more people. DAVIS, *supra*, at 40–59. Nonetheless, the co-corrections model gives us a basic entryway into seeing that questioning sex-segregation is not new, and that the assumption that sex-segregation is justified by safety concerns is based on cultural assumptions about gender.

370. Herbert, *supra* note 351, at 1202.

371. See *supra* Part II.B.

shelters, and group homes at all.³⁷² Recent advocacy and policy reform on these issues has primarily focused on making bathrooms and, in some cases, school dormitories gender neutral,³⁷³ but this conversation could extend to shelters, group homes and prisons as well. An exploration of the ways in which sex-segregation is a part of social control strategies utilized by residential facilities housing low-income people, out-of-home youth, and people convicted of crimes, would aid in the discussion of alternatives. Overall, these inquiries raise the question, perhaps for the future, of what functions sex-segregation actually achieves, and to what degree reduction of the significance of sex classification could be embraced if safety goals were achieved through other means.

C. HOW SHOULD GENDER CLASSIFICATION BE USED IN STATE HEALTH CARE PROVISION PROGRAMS?

Finally, in the realm of state health care programs, it is not impossible to imagine the reduction of the use of gender classification. Certainly, keeping track of gender may be useful to studying health outcomes, and it may be in the interest of public health to maintain records that include such information. However, it is conceivable that this data would be only as significant as other data kept in medical records and useful for tracking health outcomes, such as history of heart disease, status as a smoker or non-smoker, or genetic predisposition to cancer. Perhaps, rather than being written on the front of a Medicaid card and used as a bar to receiving certain medications or procedures, gender could be an individual aspect of medical history like heart disease. The reduction of significance of gender in the administration of health benefits to Medicaid recipients and people in state custody would remove obstacles that currently block equal health care access to people with non-traditional gender identities, and perhaps have no negative impact on the goals of those programs to provide adequate health care. Moreover, many negative health consequences that stem from not being able to access this care, such as suicidality, mental illness, and HIV infection, which can cause long-term disabilities and incur high health

372. See *supra* Part II.B.

373. See, e.g., Ryan Kelly, *Gender-Neutral Bathrooms Introduced in MUB*, NEW HAMPSHIRE, Dec. 7, 2004, available at <http://media.www.tnholonline.com/media/storage/paper674/news/2004/12/07/News/GenderNeutral.Bathrooms.Introduced.In.Mub-823286.shtml>; Brett-Genny Janiczek Beemyn, *Ways That Colleges and Universities Meet the Needs of Transgender Students*, TRANSGENDER L. & POL'Y INST., <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Mar. 17, 2008); Coal. for Queer Action, *Queer Action Campaign: Gender Neutral Bathrooms*, <http://queeraction.uchicago.edu/bathroomindex.html> (last visited Mar. 17, 2008); Chase Gilbert, *UA Considers Gender-Neutral Bathroom Stalls*, WILDCAT ONLINE, Nov. 15, 2006, <http://media.wildcat.arizona.edu/media/storage/paper997/news/2006/11/15/News/Ua.Considers.GenderNeutral.Bathroom.Stalls-2460652.shtml>; Marian O'Connor, *Gender Bending and Bathroom Safety*, <http://cityonahillpress.com/article.php?id=442> (last visited Mar. 17, 2008).

care costs, could be reduced by eliminating gender-based bars on health care.

D. GENDER ON A NEED-TO-KNOW BASIS

This attempt to separate out the different aims of programs currently using gender classification in order to determine where it is necessary and where it might be eliminated only provides an initial inquiry. The questions it raises, however, might be further developed into useful criteria for given institutions and agencies. Where gender is being used based on incorrect assumptions that it indicates something more specific, such as genitalia, examining these questions could lead to more accurate recordkeeping that would be more useful for institutional purposes. For example, asking whether gender data is actually a good proxy for genitalia in the way the data is currently being gathered, whether the goal of gathering data about genitalia is useful and important to the articulated administrative aims, and what assumptions about gender and genitalia underlie the collection of this data may lead to better policies.

An area that would be likely to retain the use of gender data to some degree is public health. As I mentioned in the discussion of vital statistics data and state medical programs, gathering certain data related to gender and body parts may be relevant for tracking health issues at the population level. However, even in these instances, engaging in a careful analysis of how gender is being used and what is being assumed about the work that gender does may result in a more nuanced approach to gathering data. For example, if a government program is interested in tracking uterine cancer rates, perhaps more accurate information will result from tracking the rates of this cancer in people with uteruses than in people who are socially classified as “female,” since those two categories are not identically matched. Or, in tracking HIV rates, perhaps “male” and “female” are not the gender categories that will result in the best data about the vulnerability of certain populations. For years, health advocates have battled with the Centers for Disease Control (CDC) to change the gender classifications used when tracking HIV rates. The CDC classifies transgender women as “men who have sex with men” (MSM).³⁷⁴ The result is that no nationwide information about rates of HIV among transgender women is available. Because local studies have shown exceptionally high rates of HIV among transgender women, the demand for this information to be collected as part of national studies is high, because directing prevention resources toward

³⁷⁴ E-mail from Carrie Davis, Coordinator, Gender Identity Project, to author (June 11, 2007) (on file with author); E-mail from Carrie Davis, Coordinator, Gender Identity Project, to “E,” LGBT Community Center (May 21, 2002) (on file with author); E-mail from Samuel Lurie, Founder, Transgender Training and Advocacy, to author (June 11, 2007) (on file with author).

highly vulnerable populations is one goal of such data collection. The current classification system erases the existence of one highly vulnerable population. This example suggests that the assumption of “M/F” gender may actually prevent the collection of important health data. If this assumption were changed, we might see different health programs designing their data collection in a variety of ways based on their institutional aims, and obtaining more accurate data because of that. We could imagine different programs deciding to collect different types of gender data, with some collecting data about birth-assigned sex, others collecting data about gender in a context with more than two categories, others collecting data about specific anatomical features, and others collecting data about current gender identification.

Another area where compelling reasons for the continued use of gender classification exists is with respect to affirmative action and other programs focused on remedying the long-term effects of oppression of women and transgender people. Here, again, we can see parallels to controversies that have occurred regarding the use of other contested identity categories. In the context of race, the debates that occurred regarding putting a “multiracial” category on the U.S. Census are instructive.³⁷⁵ Those discussions focused on the proposal that a “multiracial” category would lead to more accurate data, because the Census requirement that people pick a single racial category obscured the fact that many people are multi-racial.³⁷⁶ Opponents of the proposal argued that while it is true that many people are multi-racial, certain groups would be undercounted if their identity categories were emptied by more people choosing “multi-racial” rather than the race category they would have previously chosen.³⁷⁷ This argument was especially made with regard to people of African ancestry in the United States³⁷⁸ While requiring multi-racial people with African heritage to only identify that heritage in their identification on the Census mirrored the racist rule of hypodescent also known as the “one drop rule,” establishing a “multi-racial” category would likely drastically reduce the number of people identifying as African-American.³⁷⁹ Opponents argued that because much discrimination and exclusion has occurred and continues to occur through the rule of hypodescent, with historical and present day racism regarding people through the one-drop lens, eliminating the ability to identify people of African descent specifically would impede the ability to use Census data to understand the conditions in that population and formulate appropriate policies related to redistribution and

375. See Hickman, *supra* note 76.

376. See *id.* at 1205.

377. *Id.* at 1261.

378. *Id.*

379. *Id.*

remediation.³⁸⁰ Thus, even though the racial categories formulated by the rule of hypodescent do not reflect a scientifically verifiable classification that would be desirable in many other areas of government identity classification, they still operate on individuals and communities impacted by racism. Tools like Census data that are used to evaluate policies aimed at remedying discrimination and exclusion and redistributing government services and support, therefore, need to measure race in ways that do not obscure the existence of communities and issues constituted around those categories. Similarly, we might suggest that in programs collecting data for purposes of evaluating efforts to remedy the impact of long-term discrimination and exclusion of women and transgender people collecting data about gender might be useful. Such data collection could be undertaken with an understanding that what is being measured is the impact of social processes of gender production that result in discrimination and exclusion in contexts where systemic sexism and transphobia exist. Again, as in the health context, the gender categories used in such collection might not simply be “male” and “female” depending on the kind of problems being assessed.

If a deeper question were asked, one that addressed whether gender data was really necessary, and if so what aspect of gender data should be collected and how, more nuanced and effective policymaking might result. This is not an argument for a simplistically “gender-blind” government, but rather for a shift toward a more critical view of the use of gender data in government recordkeeping. If collecting data on gender had to be justified by a close connection to institutional purposes, and false assumptions about the use of gender data to verify identity fell by the wayside, the use of this data could have less unintended negative consequences for both individuals and institutions. The confusion currently being caused by batch checking procedures aimed at immigration enforcement and terrorism prevention exposes the incoherency of gender classification, allowing us to consider putting an end to the administrative attempts to make gender a stable marker of identity verification and a logical way of dividing and managing the population when it clearly does not achieve either purpose consistently.

It is worth noting that this underlying question about the significance of gender classification has also played an important role in discrimination law. The use of intermediate scrutiny rather than strict scrutiny for laws and policies distinguishing people on the basis of gender,³⁸¹ controversies about sex as a bona fide occupational qualification,³⁸² and debates about whether pregnancy discrimination is a

380. *Id.*

381. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

382. *See Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 200–07 (1991) (construing 42

form of sex discrimination³⁸³ all bear a relation to the fundamental concern over what kind of classification sex represents. Does it relate to a meaningful difference among humans that can be used as a legitimate basis for differential treatment in some instances?³⁸⁴ Or is it a classification arising from a system of dominance, such that differential treatment on this basis should be viewed under serious suspicion of discrimination? The jurisprudence related to gendered dress codes also relates to these questions,³⁸⁵ asking courts to determine whether cultural expectations about gendered appearances in certain industries are reasonable professional standards or illegal limitations on the lives of individuals based on discriminatory stereotypes. Similarly, the Title VII cases where courts have wrestled with whether discrimination against transgender people is prohibited by Title VII require a determination of basic understandings of how the law views gender classification.³⁸⁶ Are transgender people who are fired being impermissibly discriminated against because of failure to live up to a stereotype about masculinity or femininity,³⁸⁷ or is their gender expression so far outside cultural norms that it is beyond the ambit of what Title VII exists to protect? Many of the fundamental tensions in sex discrimination law have related to these questions about how the law views sex as a category—whether it is “real” enough to be a legitimate basis of differential treatment or whether we see it primarily as a set of social norms arising out of a system of domination. While these issues are too numerous to treat here, the insight into the instability of gender provided by the examination of the gender reclassification rule matrix might also be a helpful consideration in the resolution of these questions.

Overall, a detailed examination of the gender classification rules of the United States exposes the internal contradictions and assumptions that are for the most part ignored or unrecognized in the numerous administrative contexts where these rules operate day-to-day. This Article makes the initial intervention of exposing the under-discussed policy matrix that messily and incoherently defines gender categories in

U.S.C. § 2000e-2(e)(1)); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); *Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987).

383. See Pregnancy Discrimination Act, 42 U.S.C. § 2000(e) (1978); *Geduldig v. Aiello*, 417 U.S. 484 (1974).

384. See *U.S. v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

385. See *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006); Devon Carbado et al., *The Story of Jespersen v. Harrah's: Makeup and Women at Work*, in *EMPLOYMENT DISCRIMINATION STORIES* 105, 127–28 (Joel William Friedman ed., 2006).

386. See *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

387. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

the United States. The analytical insight provided by examining that rule matrix creates an opportunity to critique its problems and consequences and question the assumption that gender has more benefits than costs as a category of classification in administrative governance.

Further, it allows us to see at work the production of insecurity and vulnerability for certain populations in the creation of systems of classification that administer caretaking programs. Because the administration of population caretaking interventions aimed at creating a healthy population and national security mobilizes and relies upon ideas of the characteristics of that population, subsequently naturalizing those characteristics such that they appear as “common sense” truths rather than political choices, the production of unhealth and insecurity for some subpopulations is obscured. Antidiscrimination discourses that rely on the perpetrator perspective individualize difference like transgender identity to the victim and individualize invidious intentions to the perpetrator, making invisible the systemic conditions producing identity categories from multiple locations.

Finally, recognizing the high stakes of administrative governance—identifying it as a key location of legal production of equality/inequality and distribution of chances at security and insecurity, health and sickness, life and death—also enables us to understand the significance of the administrative nature of the War on Terror as more than a set of concerns over the accuracy of records and the privacy of individuals. Instead, it might be an opportunity to understand the key role of administrative governance in forms of domination that have often been conceptualized through individual discrimination. Further, it offers a chance to re-imagine political responses to surveillance and to question whether caretaking functions of the state, such as the redistribution of wealth through taxes and public benefits, national security, disease control, and even the remediation of long histories of oppression and exploitation, require the kinds of data collection that are increasing at a rapid pace in the United States, or whether they could be better accomplished through other means.

CONCLUSION

As the work of Bowker and Star shows us, classification systems operate on the basis of norms that often appear non-controversial to most people but have significant ethical consequences. The operation of administrative governance in the United States, specifically the “caretaking” programs that intervene with the aim of health, safety and well-being for the population, require data collection that forms a basis of identity surveillance. This identity data, gathered by disparate agencies for varying purposes, is being mobilized in new ways by War on Terror innovations aimed at increasing immigration enforcement. The

categories of classification used in this data collection are so ubiquitous in culture and law that rulemakers, judges, scholars, and advocates often fail to question their use and frequently presume their coherence and stability. Only those whose lives are subject to the conflicts between these rules and to the social and economic exclusion that results from not being legible in a ubiquitous classification system tend to be aware of the issues.

Looking at the role of administrative governance in the modern state, the history of population-level intervention, and the creation of sub-populations that necessarily results from classification processes central to standardization provides space to ask key questions. Even as we watch the ongoing process of privatization and deregulation in many realms advocated as reducing government intervention, we can see that a moment of steady expansion of state powers, often under the “law and order” or “anti-terrorism” rubric, is at hand.³⁸⁸ In this moment, it is useful to broadly and critically examine administrative governance as a productive process where the conditions of existence of individuals and groups are determined by fundamental assumptions and norms of the administrative state. It is imperative to neither uncritically embrace state caretaking projects as requiring growing levels of surveillance for purposes of security and health, nor to turn to individual privacy rhetoric wholeheartedly and valorize an end to government data collection. Recent political debates show that the pro-surveillance or anti-surveillance position can be mobilized on either side of equality struggles articulated by marginalized groups. In some instances we see a push for “colorblind” governance opposed by groups interested in remedying racial inequality.³⁸⁹ In others we see the “privacy” argument articulated to stop race-based data collection and aggregation motivated by concerning theories of racial difference.³⁹⁰ In some instances we see

388. Wendy Brown describes this contradiction as emerging in the 1980s in the United States and the United Kingdom under Reagan and Thatcher, with “expanded state domination shrouded in a discourse of anti-statism.” BROWN, *supra* note 74, at 18.

389. In 1996 and 2006, California saw legislative measures that brought up precisely these arguments. In both cases, Prop. 209, which abolished affirmative action in the University of California, and Prop. 54, dubbed the “racial privacy act,” which would have eliminated the collection of race data by the state, the argument for “color blindness” or “racial privacy” was opposed by advocates arguing that these measures would further marginalize communities of color. See League of Women Voters of Cal. Educ. Fund, Proposition 54: Classification by Race, Ethnicity, Color, or National Origin, <http://www.ca.lwv.org/lwvc/edfund/elections/2003/id/prop54.html>.

390. In 2007, some of the same advocates who opposed Prop. 209 and Prop. 54 mobilized the “privacy” arguments themselves when opposing a request by University of California, Los Angeles Professor Richard Sanders for data, including race data, regarding California Bar Exam scores. *Race Data for Bar Admissions Research Stays Under Wraps*, CAL. BAR J., Dec. 2007, http://www.calbar.ca.gov/state/calbar/calbar_home.jsp (follow “California Bar Journal” hyperlink; then follow “Archived Issues” hyperlink, then follow “December 2007” hyperlink; then follow “Race data for bar admissions research stays under wraps” hyperlink). Sanders’ controversial research has been opposed by many as seeking to establish that law students of color admitted to high-ranking schools do poorly on the Bar

advocates seeking reduced data collection about HIV status because of surveillance concerns.³⁹¹ In others, advocates push for increased data collection seeking the distribution of resources to communities severely impacted by HIV.³⁹² In these examples and many others, we can see “privacy” arguments and the demand for data articulated on both sides of a political divide about domination.³⁹³ This dilemma points to a need to develop analysis about the intertwined surveillance and caretaking roles of the state that can account for our frequently conflicting beliefs about data collection.

Can we imagine a state that meets demands for caretaking without surveillance, for example by providing public benefits without a recordkeeping system to determine who has received a distribution of benefits? Can we imagine public health programs that collect health data without any link to individual identities? Would this resolve surveillance issues or could regional surveillance or other markers on data expose the same concerns? How might entire notions of property, criminality, individuality and collectivity have to be restructured in order to conceptualize a reduced reliance on data collection and identity verification? Exploring these questions may be initial steps in analyzing the complex role of data collection in state formation and assessing the political possibilities at hand for rethinking current data collection and standardization practices. Reaching out to these more distant visions of relations between caretaking and surveillance makes possible new understandings of the

Exam. *Id.* Opponents of his request in an impressive mobilization successfully utilized privacy arguments to prevent the release of data. *Id.*

391. HIV “names reporting” has been a controversial topic for decades. See Anna Forbes, *The Myths of Name Reporting: Myths and Facts About HIV Case Reporting by Name Versus by Unique Identifier*, Sept. 1997, <http://actupny.org/reports/myths-names.html>; Nicholas Forge, *HIV Names Reporting in Georgia: The First Year*, Mar./Apr. 2005, <http://www.thebody.com/content/art32337.html>; Ed Zold & Jeff Getty, *Mandatory HIV Name Reporting: The Right Wing’s Hidden Agenda*, BAY AREA REP., May 8, 1995, <http://www.aegis.org/news/BAR/1995/BR950502.html>. Many advocates for people with HIV argue that state governments should not collect lists of names of people who test positive for HIV, but instead should only collect general data, not linked to individual identity, about positive tests. This is a good illustration of a question of how caretaking and surveillance interact. Those against names reporting still want states to collect data sufficient to aid in directing funds toward highly impacted communities, but want to reduce one aspect of the surveillance by eliminating a connection to individual identity. *Id.* It is interesting to consider whether other caretaking programs could collect generalized data without linking it to individual identities, and to what degree this would alleviate surveillance concerns in a given program.

392. See sources cited *supra* note 374.

393. Craig Willse raises the interesting idea that to the extent that questions about privacy center on individuals at the level of rights discourse while biopolitical frameworks think about governance of populations, privacy is the wrong question to ask about data. See Craig Willse, *Universal Data Elements, or the Biopolitical Life of Homeless Populations*, SURVEILLANCE & SOC’Y (forthcoming 2008), available at <http://www.surveillance-and-society.org/>. Further, to the extent that surveillance technologies produce populations as objects of governance they do not need to be tied to individuals to be effective.

politics of current controversies about data collection and classification, and may enhance the potential to envision strategic approaches to change.

**APPENDIX I: DMV REQUIREMENTS FOR GENDER RECLASSIFICATION
(DETAILED)**

Specific requirements of each state's DMVs for changing gender on
IDs are as follows:

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
ALABAMA ³⁹⁴			*	
ALASKA ³⁹⁵			*	
ARIZONA ³⁹⁶			*	
ARKANSAS ³⁹⁷		*		
CALIFORNIA ³⁹⁸				*
COLORADO ³⁹⁹			*	

394. Letter from Michael W. Robinson, Assistant Att'y Gen., Ala. Dep't of Pub. Safety, to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Sept. 9, 2004) (on file with author) (allowing sex on driver's license to be changed "upon successful completion of surgery and with corresponding documentation from the attending physician who has knowledge of the success of the surgery").

395. Memorandum from Alaska DMV on Standard Operating Procedure D-24: Change of Info. on License, Approved by Charles R. Hosack (Apr. 12, 2000) (on file with author) ("For change of sex, other than an error, a medical certification, signed by the performing surgeon, is required. This medical certification must specify that the sex change is surgically complete" (explaining ALASKA STAT. §§ 28.15.061, 28.05.071 (2000) (effective Jan. 1, 2003))).

396. ARIZ. DEP'T OF TRANSP., MOTOR VEHICLE DIV., DL 400.15(3)(b): REVIEW OF OTHER APPLICATION INFORMATION & FORMS (1995) (on file with author) ("A doctor's letter is required to change sex and must state that the applicant is irrevocably committed to the sex change procedure.").

397. Letter from Anita Gottsponer, Manager of Driver Control, Ark. Dep't of Fin. & Admin., to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Sept. 7, 2004) (on file with author) (requiring "documented proof of sex reassignment surgery in order to change the gender on a driver's license"). There is no mention in this letter about the form in which the documented proof should be offered. An Issuance Manager later suggested that the gender-change policy is similar to the name-change policy of ARK. CODE ANN. § 27-16-506(b) (2005). E-mail from James P. Elliott, Manager of Driver License Issuance, Ariz. Dep't of Revenue, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 9, 2005) (on file with author). The statute affords name changes only upon presentation of a marriage license, divorce decree, or court order. ARK. CODE ANN. § 27-16-506(b) (2005). Since marriage licenses and divorce decrees would not indicate the information Gottsponer says is required, of these three types of documentation, Arkansas would probably accept only a court order for gender reclassification.

398. LISA SEDANO & EMILY DOSKOW, HOW TO CHANGE YOUR NAME IN CALIFORNIA 75 (Nolo 12th ed. 2008) ("[T]he DMV will change the gender designation on your driver's license or California ID card if you file form DL-328 signed by a physician or psychologist, stating that your gender has changed. . . . [F]or purposes of the DMV form it appears that not only can you get a gender change on your license without having had any surgery, but you also do not even need to have received any medical treatment as part of your transition.").

399. Letter from Jan Welling, Field Operations Manager, Driver License Section, Colo. Motor Vehicle Div., to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Aug. 27, 2004) (on file with author) (explaining the sex change policy in the *Colorado Driver License Procedure Manual*). "Colorado requires the customer has undergone sex change surgery." *Id.* The excerpt enclosed from the *Colorado*

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
CONNECTICUT ⁴⁰⁰			*	*
DELAWARE ⁴⁰¹			*	*
DISTRICT OF COLUMBIA ⁴⁰²				*
FLORIDA ⁴⁰³			*	
GEORGIA ⁴⁰⁴		*	*	
HAWAII ⁴⁰⁵	*		*	

Driver License Procedure Manual states: "The customer must present documentation from a physician or clinic stating they underwent sex change surgery."

400. E-mail from Elaine McDougal, Div. Chief I, Conn. Dep't of Motor Vehicles Branch Operations Div., to Diana Brazzell, Nat'l Gay and Lesbian Task Force (July 29, 2004) (on file with author) ("[T]he applicant must present a letter from either a medical doctor stating that the gender change surgery has been completed; or, a letter from a health care provider attesting that the applicant is in active treatment and is living full time according to the requirements mandated by the Standards of Care for Sexual Reassignment.").

401. Letter from Arthur G. Ericson, Chief of Driver Servs., Del. Dep't of Transp., to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Sept. 2, 2004) (on file with author) (requiring "a letter from the driver's physician stating that, from a medical stand point, the driver's gender should be changed from one gender to another"). The letter specifically disclaims a surgery requirement, mentions hormone therapy, and claims the Delaware DMV prefers to allow physicians to determine when a gender change is "valid." *Id.* *But see* E-mail from Rhonda West, CDL Program Dir., Del. DMV, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 5, 2005) (on file with author) ("We have had individuals request that their license be changed prior to actual physical/medical changes, the Delaware DMV has refused those requests.").

402. D.C. DEP'T OF MOTOR VEHICLES, PROCEDURE FOR CHANGING GENDER DESIGNATION ON DRIVER'S LICENSE OR IDENTIFICATION CARD (2006) (on file with author). The District of Columbia requires the applicant and a "medical or social service authority" to fill out a "Gender Designation Form," where the applicant avows the desire for a change in gender designation and the authority certifies the following: "In my professional opinion, the applicant's gender identity is (circle one) Male Female and can reasonably be expected to continue as such in the foreseeable future." *Id.* The "[m]edical or social service authority" part of the form can be completed by a physician, licensed therapist, counselor, case worker, or social worker, but the list is not exhaustive; authorities can also check "other." D.C. DEP'T OF MOTOR VEHICLES, GENDER DESIGNATION FORM (2006) (on file with author).

403. FLA. DEP'T OF HIGHWAY SAFETY AND MOTOR VEHICLES, IDENTIFICATION REQUIREMENTS: SEX/GENDER CHANGE (on file with author) ("Customers who have had sexual reassignment surgery need to provide documentation from their physician affirming the surgery has been completed."); *see also* Letter from Sandra C. Lambert, Director, Fla. Div. of Driver Licenses, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 6, 2005) (on file with author) (requiring "an original statement from a physician regarding the completion of gender reassignment surgery").

404. GA. DEP'T OF MOTOR VEHICLES, POLICY 570-3-.19: SEX CHANGE ON LICENSE, (on file with author) (explaining that sex designation on the license may be "changed after a sex change operation upon presentation to a driver examiner of either a court order reflecting such change or a physician's letter certifying such change").

405. E-mail from David Mau, Assistant Licensing Adm'r, Haw. Div. of Motor Vehicles & Licensing, to Diana Brazzell, Nat'l Gay and Lesbian Task Force (July 26, 2004) (on file with author) (referencing "Rules and Regulations of the Director of Finance pertaining to Driver's Licenses and Learner's Instruction Permit: Rule 30.6 'Acceptable Identification to obtain the following: 2.k. Certified physician's certificate'"). The rule requires a "certified certificate of sex change." *Id.* However, in an e-mail to Andrew Cohen, Peggy Umetsu suggests that a certified copy of an amended

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
IDAHO ⁴⁰⁶			*	
ILLINOIS ⁴⁰⁷		*	*	*
INDIANA ⁴⁰⁸		*	*	*
IOWA ⁴⁰⁹	*	*		
KANSAS ⁴¹⁰				
KENTUCKY ⁴¹¹			*	
LOUISIANA ⁴¹²			*	

birth certificate or "doctor's letter certifying surgery was completed" would satisfy this requirement. E-mail from Peggy Umetsu, Haw. Div. of Motor Vehicles, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 15, 2005) (on file with author). This e-mail specifically notes that the letter must attest to "physical, not psychological change." *Id.*

406. Letter from Edward R. Pemble, Driver Servs. Manager, Idaho Transp. Dep't, to Diana Brazzell, Nat'l Gay and Lesbian Task Force (July 30, 2004) (on file with author) (requiring "acceptable documentation from a medical doctor that states a gender change has taken place through surgical procedures and that for all purposes the person named should be considered female/male"); see also E-mail from Lynn Rhodes, Driver's License Program Supervisor, Idaho Transp. Dep't, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 5, 2005) (on file with author) (cautioning that "[p]artial surgeries, living the life of the opposite gender, or letters from a psychotherapist are not sufficient documentation to allow gender changes on an Idaho driver's license").

407. Letter from Gary Lazzarini, Dir. of Driver Servs. Dep't, Office of the Sec'y of State of Ill., to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Sept. 10, 2004) (on file with author) ("[Applicant] must provide at least one of the following: 1) Medical Report form, 2) Psychiatric Report form, 3) Physician's statement [or] 4) Other acceptable documentation to indicate that a change has taken place or the applicant is in the process of undergoing the change."). Lazzarini suggests that although court orders are not required, "such a court order shall be considered as best evidence to process the name/gender change." *Id.*

408. Letter from Dan Hankel, Executive Dir. of Comm'n, Ind. Bureau of Motor Vehicles, to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Sept. 8, 2004) (on file with author) (requiring "either [1.] A court order commanding the BMV to issue a license in the new name and/or gender, or [2.] A physician's official written statement that the person is either [a.] Physically of the gender requested to be designated, or [b.] Living and presenting full-time as of the gender requested to be designated"). *But see* E-mail from Driver Servs. Dep't, Ind. Bureau of Motor Vehicles, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 7, 2005) (on file with author) (suggesting that the physician's statement must indicate that "the individual has not only made the change socially but has been altered physically as well").

409. E-mail from David Stutz, Executive Officer, Iowa Dep't of Transp., Office of Driver Servs., to Diana Brazzell, Nat'l Gay and Lesbian Task Force (July 29, 2004) (on file with author) (requiring either a "certified copy of an amended birth certificate" or a "copy of a court order").

410. Kansas "does not have a formal written policy on gender designation changes on driver licenses." E-mail from Terry Mitchell, Kan. Bureau of Motor Vehicles, to Laura Langley, Nat'l Gay and Lesbian Task Force (Feb. 3, 2005) (on file with author) ("[W]e go with the documents that the person provides.").

411. E-mail from Dana Fugazzi, Office of Legal Servs., Ky. Transp. Cabinet, to Diana Brazzell, Nat'l Gay and Lesbian Task Force (July 28, 2004) (on file with author) (requiring "medical certification that they have had the operation" and further stating that "[t]here are no provisions for those persons who live as the opposite sex but have not undergone a sex change operation").

412. LA. DEP'T OF PUB. SAFETY, OFFICE OF MOTOR VEHICLES, NO. 22.01 GENDER CHANGE (2002),

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
MAINE ⁴¹³			*	
MARYLAND ⁴¹⁴				*
MASSACHUSETTS ⁴¹⁵	*		*	
MICHIGAN ⁴¹⁶			*	
MINNESOTA ⁴¹⁷				*
MISSISSIPPI ⁴¹⁸		*		
MISSOURI ⁴¹⁹			*	

available at <https://web01.dps.louisiana.gov/omvi.nsf/58c968bd569b099986256cdc000806eb/bf53b205455ad9d0862564ae0058feab?OpenDocument> (requiring “a medical statement signed by a physician stating that this person has undergone an operation for a sex change from _____ to _____ and that the sex or gender change has been successfully made”).

413. ME. BUREAU OF MOTOR VEHICLES, LICENSE/ID MANUAL 24 (on file with author) (requiring a doctor’s letter “stating that a sex change has been completed”).

414. MD. MOTOR VEHICLE ADMIN., DRIVER AND VEHICLE POLICY MANUAL, POLICY No. 26300-001, at 3 (eff. Feb. 9, 2000) (on file with author). Upon request, applicant must provide “physician’s/psychologist’s report to confirm applicant is under supervision for gender change.” *Id.* The Administration decides whether to authorize the change, and requires annual re-evaluations until “applicant meets requirements for permanent gender change.” *Id.*

415. MASS. REGISTRY OF MOTOR VEHICLES, SEX CHANGE POLICY (2004) (on file with author) (“‘Required Documentation’ includes both an amended birth certificate and a notarized physician’s affidavit stating that ‘in the opinion of the physician, sex reassignment surgery has been completed.’”).

416. E-mail from Andre Wilson, to author (Feb. 23, 2007) (on file with author) (“A surgery letter is now theoretically required. Whether in practice this is always true, I do not know.”). Wilson sheds light on some of the politics behind the evolution of the rule:

There was a relatively fuzzy situation for years, then advocates . . . tried to get a hard policy that . . . just a simple letter from a therapist [would suffice] . . . They apparently got agreement on that, it was announced, and a week later the agreement fell apart and a very hard surgery rules was established.

Id. The flexibility of the prior policy is captured by earlier internal procedural guidelines for reclassifying gender: “Have the applicant complete a TR-34 Certification form stating their wish to change gender on their driver license. DO NOT ASK THE APPLICANT TO SPECIFY THE REASON FOR THE REQUEST. The following statement is adequate: ‘I (name) wish to change the gender (or sex) on my Michigan driver license.’” MICH. DEP’T OF STATE, CHANGING GENDER (2003) (on file with author). *But see* E-mail from Rex A. Barker, Admin. Law Exam’r, Mich. Dep’t of State Bureau of Regulatory Servs., to Andrew Cohen, Law Student, Columbia Univ. (Dec. 10, 2005) (on file with author) (“The individual must provide an original doctor’s statement or court order [which] must certify that the applicant has completed the medical treatments necessary to change their gender.”).

417. *Gender Change Request for DL/ID Card Applications*, MINN. DRIVER’S LICENSE BULL., Oct. 30, 2004 (on file with author) (instructing agents to provide those asking to change gender on their licenses with a “Variance Request” form (citing MINN. R. 7410.0600 (2006))). An e-mail from Phil Duran clarifies that they will take “a letter from someone who looks medical (therapist, surgeon, whatever, but surgery is NOT a prerequisite under the policy as it’s been for several years).” E-mail from Phil Duran, Staff Att’y, OutFront Minn., to author (Feb. 23, 2007) (on file with author).

418. Letter from Tyrone Lockwood, Captain of Driver Servs. Bureau, Miss. Dep’t of Pub. Safety, to Lisa Mottet, Nat’l Gay and Lesbian Task Force (Aug. 5, 2004) (on file with author) (“They must provide a Court Order to have it changed on their Mississippi License.”).

419. E-mail from Ruth Redel, Manager Customer Assistance Bureau, Mo. Dep’t of Revenue, to

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
MONTANA ⁴²⁰			*	*
NEBRASKA ⁴²¹				*
NEVADA ⁴²²			*	
NEW HAMPSHIRE ⁴²³			*	
NEW JERSEY ⁴²⁴	*	*		
NEW MEXICO ⁴²⁵		*		
NEW YORK ⁴²⁶			*	*

Diana Brazzell, Nat'l Gay and Lesbian Task Force (Aug. 23, 2004) (on file with author) (requiring "medical documentation showing the sex change"). An e-mail from another Missouri DOR official clarifies that applicants must "provide an acceptable statement from their physician, confirming that their gender has been physically altered from male to female, (or female to male)." E-mail from Matt Connor, Mo. Dep't of Revenue, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 5, 2005) (on file with author).

420. Letter enclosure from Patrick McJannet, Program Supervisor, Mont. DOJ/MVD Field Operation Bureau, to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Aug. 9, 2004) (on file with author) ("Any individual who presents a letter from their physician stating that they are in the process of a gender change may have a driver license issued with the proposed gender change (it will not be necessary for the individual to present a statement showing the process is completed)." (citing MONT. DEP'T OF MOTOR VEHICLES, POLICY 300.6.1 GENDER CHANGE (2004))). This policy, though, requires follow-up documentation at renewal "to see that transition has been completed." *Id.* (citing MONT. DEP'T OF MOTOR VEHICLES, POLICY 600.6.2.1 (2004)).

421. Letter from Noelle Ackermann Sheldon, Legal Counsel, Neb. Dep't of Motor Vehicles, to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Aug. 30, 2004) (on file with author) (stating the applicant must "provide written documentation of the change from a health care professional indicating that the gender change has occurred" (citing NEB. DEP'T OF MOTOR VEHICLES, EXAMINING POLICY AND PROCEDURE MANUAL)). A phone call for clarification suggests that the department is deferential to the doctor writing the letter and does not ask about surgery. Telephone Interview with Neb. Dep't of Motor Vehicles (Mar. 7, 2007).

422. NEV. ADMIN. CODE § 483.070(1)-(2) (2000).

A person who wishes to change the gender indicated on their driver's license . . . must include documentation prepared by a physician or an osteopathic physician indicating that the gender of the person has been changed. . . . A statement by a physician who practices in the area of psychiatry that the gender of the person will be changed or is in the process of being changed is not sufficient documentation.

Id.

423. N.H. DEP'T OF SAFETY, DRIVER LICENSING RULES: CHANGE OF GENDER, SAF-C 1010.03 (2004), available at <http://www.gencourt.state.nh.us/rules/saf-c1000.html> (requiring "a letter from a treating physician confirming the sex-change operation").

424. N.J. DRIVER MANUAL 11 (2006), available at http://www.state.nj.us/mvc/pdf/Licenses/Driver%20Manual/Chapter_11.pdf (requiring amended birth certificate and certified court papers).

425. Telephone Interview with N.M. Motor Vehicle Div., Driver Servs. (Mar. 7, 2007) (verifying that the New Mexico DMV requires a court order).

426. N.Y. State Dep't of Motor Vehicles, Change of Sex or Gender on a DMV Photo Document, http://nysdmv.custhelp.com/cgi-bin/nysdmv.cfg/php/enduser/std_alp.php (enter "gender" in "Search Text" field) (last visited Mar. 17, 2008) ("[Requiring] a written statement from a physician, a psychologist, or a psychiatrist that is printed on letterhead. The statement must certify that one gender is your main gender.").

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
NORTH CAROLINA ⁴²⁷			*	
NORTH DAKOTA ⁴²⁸			*	
OHIO ⁴²⁹		*	*	
OKLAHOMA ⁴³⁰			*	
OREGON ⁴³¹			*	*
PENNSYLVANIA ⁴³²		*	*	
RHODE ISLAND ⁴³³			*	
SOUTH CAROLINA ⁴³⁴		*		
SOUTH DAKOTA ⁴³⁵			*	

427. Letter from Don Ferrier, Deputy Dir., Driver License Section, N.C. Dep't of Transp., to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Aug. 10, 2004) (on file with author) ("To change the sex on our driving records, the applicant must have completed sex reassignment surgery" (citing N.C. GEN. STAT. § 20-7(n)(5))).

428. Letter from Syndi Worrel, Chief Exam'r, N.D. Dep't of Transp., to Diana Brazzell, Nat'l Gay and Lesbian Task Force (Aug. 5, 2004) (on file with author) (requiring "medical papers signed by the physician" and that "[t]he physician must indicate that the gender reassignment procedure has been completed").

429. OHIO DEPUTY REGISTRAR MANUAL, at C-14.H (rev. 2004) (on file with author) (requiring applicants to submit "statement from their physician or the court" attesting to surgical changes, including "language specific to gender transformation being 'anatomically correct'").

430. E-mail from Teri Ward, Driver License Exam'r, Driver License Examining Div., Okla. Dep't of Pub. Safety, to Emily J. Wood (Mar. 9, 2007) (on file with author) ("Sex Change: The applicant . . . must show . . . a notarized statement on letterhead from the physician who performed the sex change operation indicating the applicant . . . has undergone a complete physical sex change. The letter must state the sex change is irreversible and permanent." (citing OKLA. DRIVER LICENSE EXAMINER, POLICY & PROCEDURE MANUAL 4.3.3)).

431. OR. DRIVER LICENSE POLICY AND PROCEDURE MANUAL: NAME/GENDER CHANGE ON DRIVER'S LICENSE (rev. 1999) (on file with author) ("Applicant must present documentation from any physician stating the applicant underwent sex change surgery or a letter from a qualified therapist stating the applicant is living full-time as the desired gender as part of gender reassignment therapy.").

432. Letter from Rebecca L. Bickley, Dir. of Bureau of Driver Licensing, Pa. Dep't of Transp., to Lisa Mottet, Nat'l Gay and Lesbian Task Force (Sept. 23, 2004) (on file with author) ("[Requiring] either a letter from a physician who can attest to the completion of the transsexual surgery or a court order. We do not change the gender for transgender individuals that have not chosen to have sex-reassignment surgery.").

433. Letter from Kathleen M. Hagerty, Legal Counsel for Motor Vehicles, R.I. Dep't of Motor Vehicles, to Diana Brazzell, Nat'l Gay and Lesbian Task Force (July 29, 2004) (on file with author) (stating that the Rhode Island DMV requires "a physician's statement attesting to the gender reassignment of any person seeking to amend or change their gender" on DMV documents). A later phone interview clarified that the statement must attest to surgery. Telephone Interview with R.I. DMV Licensing Dep't (Mar. 7, 2007).

434. E-mail from Beth Parks, Comm'n & Constituent Servs., S.C. Dep't of Motor Vehicles, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 6, 2005) (on file with author) ("[W]e require a court order to change the gender on a licensing credential.").

435. Memorandum from Cindy Gerber, Dir. of S.D. Dep't of Pub. Safety, to All Driver Licensing Staff and County/City Issue Offices (Sept. 7, 2004) (on file with author) (requiring a "signed affidavit

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
TENNESSEE ⁴³⁶			*	
TEXAS ⁴³⁷	*	*		
UTAH ⁴³⁸		*	*	
VERMONT ⁴³⁹			*	*
VIRGINIA ⁴⁴⁰	*	*	*	*
WASHINGTON ⁴⁴¹			*	*

from a licensed physician certifying that the applicant's gender has been medically altered"). It is unclear from the language of the Memorandum what sorts of medical alterations to gender would qualify, and attempts to clarify the policy resulted in recitations of the policy language. *See* E-mail from Jane Schrank, Program Assistant, S.D. Driver Licensing, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 6, 2005) (on file with author). Since surgery comports with common sense notions of what constitutes a "medical alteration" of gender, South Dakota would likely accept a letter verifying surgery, but it is unclear whether a general physician's letter would meet the Department of Safety's gender reclassification requirements.

436. TENN. COMP. R. & REGS. 1340-1-13-.12(6)(a) (2008), available at <http://state.tn.us/sos/rules/1340/1340-01/1340-01-13.pdf> (requiring "[a] statement from the attending physician that necessary medical procedures to accomplish the change in gender are complete"). A later e-mail from an agency representative clarifies that the applicant "can't still be in the 'hormone therapy stage, etc.' and must be at the point where the doctor can say that the process is completed." E-mail from T. Edward Stringfield, Tenn. Driver License Issuance Manager, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 20, 2005) (on file with author).

437. E-mail from Rebecca Blewett, Tex. Dep't of Pub. Safety, Driver License Div., to Diana Brazell, Nat'l Gay and Lesbian Task Force (July 29, 2004) (on file with author) ("Change of sex. Any applicant . . . request[ing] a change of sex on the license, should be required to show court records or an amended birth certificate which specifically grants the change of sex." (quoting TEX. DRIVER LICENSE MANUAL 02.12.04.4.a.)).

438. Telephone Interview with Utah DMV, Driver's License Div. (Mar. 7, 2007) (requiring a court order and doctor's letter to verify that sex change surgery has been completed).

439. VT. DEP'T OF MOTOR VEHICLES, DRIVER LICENSING GENDER CHANGE POLICY (rev. 2002) (on file with author) (stating that a request for gender change must be "accompanied by a letter from a physician stating the gender change is complete and the date of completion [or] a statement from a physician, psychologist or psychiatrist stating the applicant is irrevocably committed to the gender change and one gender predominates over the other").

440. E-mail from Va. Dep't of Motor Vehicles, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 8, 2005) (on file with author). Virginia actually has two policies, one for "transitional" and one for "permanent" gender changes. *Id.* Customer requirements for "Transitional Gender Change" include submitting "a letter pertaining to pending surgery signed by attending physician and [a] Court order . . . authorizing change of gender [and] a medical report (MED 2) indicating that you are under supervision for transgender change." *Id.* The requirements for "Permanent Gender Change" include submitting "an original or certified copy of an amended birth certificate . . . [and either] a court order specifying that the sex of the individual has changed or a physician certification that the gender change surgical procedure has been completed." *Id.*

441. E-mail from Kristen Partain, Executive Assistant, Driver Servs., Wash. State Dep't of Licensing, to Diana Brazzell, Nat'l Gay and Lesbian Task Force (Dec. 10, 2004) (listing requirements for changing gender on a Washington driver's license, including "a letter from their counselor/therapist/physician, stating they are supporting them in this decision"). In another e-mail, Partain says the Washington State Department of Licensing has no formal policy in place for changing gender designations. E-mail from Kristen Partain, Executive Assistant, Driver Servs., State of Wash.

JURISDICTION	AMENDED BIRTH CERTIFICATE	COURT ORDER	DOCTOR'S LETTER: SURGERY	DOCTOR'S LETTER: NO SURGERY
WEST VIRGINIA ⁴⁴²		*		
WISCONSIN ⁴⁴³		*	*	*
WYOMING ⁴⁴⁴			*	

Dep't of Licensing, to Laura Langley, Legal Intern, Nat'l Gay and Lesbian Task Force (Dec. 10, 2004) (on file with author). A later e-mail from another executive assistant suggests that applicants "must be under the care of a physician or licensed mental health care provider for at least one year . . . [and] submit . . . a letter from their physician/counselor with the status of their treatment." E-mail from Belinda Gasperecz, Executive Assistant, Driver Servs., State of Wash. Dep't of Licensing, to Andrew Cohen, Law Student, Columbia Univ. (Dec. 5, 2005) (on file with author).

442. W. VA. DIV. OF MOTOR VEHICLES, DIV. OF MOTOR VEHICLES DRIVER LICENSING HANDBOOK 8-9 (rev. 2007), available at http://www.wvdot.com/6_motorists/dmv/downloads/drivershandbook.pdf ("Any change of gender requires a court order specifically indicating that the gender change is complete.").

443. Letter from Compliance & Restoration Section, Wis. Dep't of Transp., to Diana Brazzell, Nat'l Gay and Lesbian Task Force (Jul. 23, 2004) (on file with author) ("[G]ender change] requires an affidavit or statement from a medical doctor or director of a facility specializing in gender change. A court order is acceptable but not required . . . [Change] may be done prior to surgery providing the customer is enrolled in a program leading to gender change."); see also Wis. Dep't of Transp., Duplicate Driver License, Instruction Permit or ID Card, <http://www.dot.wisconsin.gov/drivers/drivers/apply/dlreplace.htm> (last visited Mar. 17, 2008) ("A duplicate license . . . is required when . . . [y]ou have changed gender, (you will need to show proof by court order or physician's report).").

444. Wyo. Dep't of Transp., Gender Change, <http://dot.state.wy.us/Default.jsp?sCode=drvgc> (stating that "you must present a medical statement from a physician indicating that you have completed the surgery necessary to effect a gender change").

**APPENDIX 2: DMV REQUIREMENTS FOR GENDER RECLASSIFICATION
(SUMMARIZED)**

States requirements as to which types of evidence are needed to change the gender designation on their DMV ID are set out below. State names with (*) indicate that the given piece of evidence is absolutely required, whereas state names without (*) indicate that such evidence is one in a set of possible submissions for fulfilling the evidentiary requirement. For a full description of each state's requirements, see Appendix 1 and accompanying notes.

AMENDED BIRTH CERTIFICATE	HAWAII IOWA MASSACHUSETTS* NEW JERSEY* TEXAS VIRGINIA
COURT ORDER	ARKANSAS* GEORGIA ILLINOIS INDIANA IOWA MISSISSIPPI* NEW JERSEY* OHIO PENNSYLVANIA SOUTH CAROLINA* TEXAS UTAH* VIRGINIA WEST VIRGINIA* WISCONSIN
DOCTOR'S LETTER: SURGERY	ALABAMA* ALASKA* ARIZONA* COLORADO* CONNECTICUT DELAWARE FLORIDA* GEORGIA HAWAII IDAHO* ILLINOIS INDIANA KENTUCKY* LOUISIANA* MAINE* MASSACHUSETTS*

	<p>MISSOURI* MONTANA NEVADA* NEW HAMPSHIRE* NORTH CAROLINA* NORTH DAKOTA* OHIO OKLAHOMA* OREGON PENNSYLVANIA RHODE ISLAND* SOUTH DAKOTA TENNESSEE* UTAH* VERMONT VIRGINIA WASHINGTON WISCONSIN WYOMING*</p>
<p>DOCTOR'S LETTER: NO SURGERY</p>	<p>CALIFORNIA CONNECTICUT DELAWARE DISTRICT OF COLUMBIA* ILLINOIS INDIANA MARYLAND* MINNESOTA* MONTANA NEBRASKA* NEW YORK* OREGON VERMONT VIRGINIA WASHINGTON WISCONSIN</p>

**APPENDIX 3: BIRTH CERTIFICATE REQUIREMENTS FOR GENDER
RECLASSIFICATION**

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
ALABAMA ⁴⁴⁵	*		
ALASKA ⁴⁴⁶	*		
ARIZONA ⁴⁴⁷		*	
ARKANSAS ⁴⁴⁸	*		
CALIFORNIA ⁴⁴⁹	*		
COLORADO ⁴⁵⁰	*		

445. ALA. CODE § 22-9A-19(d) (1997).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed, the certificate of birth of the individual shall be amended as prescribed by rules to reflect the changes.

Id. The fact that the sex designation on the birth certificate has been changed by court order is noted on the document. SJ Cohen, *Trans Birth Certificate Research Notes 1* (2005) (on file with author) (documenting information gathered by Cohen, while working for Cole Thaler at the Lambda Legal Defense and Education Fund, after making various phone calls to jurisdictions throughout the United States regarding these issues).

446. ALASKA STAT. § 18.50.290 (2003) (governing change of information on birth certificates). “[C]hanges of sex will be recognized with a court order.” Lambda Legal, *Sources of Authority to Amend Sex Designation on Birth Certificates*, <http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html> (last visited Mar. 17, 2008) [hereinafter *Sources of Authority*].

447. ARIZ. REV. STAT. ANN. § 36-337(A)(3)(b) (2003 & Supp. 2007) (requiring “a written statement by a physician that verifies the sex change operation or chromosomal count”). According to Diane Steen, “Arizona . . . will issue a new birth certificate rather than amend the old one.” DIANE STEEN, *US STATES & CANADIAN PROVINCES: CHANGING NAME AND GENDER ON BIRTH CERTIFICATE 2*, <http://www.sagatucson.org/downloads/BirthCertificateChanges.pdf> (last visited Mar. 17, 2008).

448. ARK. CODE ANN. § 20-18-307(d) (2005).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the individual’s name has been changed, the certificate of birth of the individual shall be amended accordingly.

Id. Whether the old information or the fact that an amendment has taken place is readily apparent from the new certificate is a matter of judicial discretion. Cohen, *supra* note 445.

449. CAL. HEALTH & SAFETY CODE § 103425 (Deering 1997).

Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for the person reflecting the change of gender and any change of name accomplished by an order of a court of this state, another state, the District of Columbia, or any territory of the United States. A petition for the issuance of a new birth certificate in those cases shall be filed with the superior court of the county where the petitioner resides.

Id.; see also CAL. DEP’T OF HEALTH SERVS., *OBTAINING A NEW BIRTH CERTIFICATE AFTER GENDER REASSIGNMENT* (2008), available at <http://www.dhs.ca.gov/hisp/chs/OVR/amendments/GENDER%20REASSIGNMENT.pdf>.

450. COLO. REV. STAT. § 25-2-115(4) (2001).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
CONNECTICUT ⁴⁵¹	*		
DELAWARE ⁴⁵²	*		
DISTRICT OF COLUMBIA ⁴⁵³	*		
FLORIDA ⁴⁵⁴		*	

that the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation.

Id. "Colorado will . . . issue a new birth certificate rather than amend the old one." STEEN, *supra* note 447, at 4.

451. "Connecticut has 2 separate standards, one for court orders for people born out of state and one for people born in CT." E-mail from Cole Thaler, Staff Att'y, Lambda Legal Defense and Educ. Fund, to author & Emily J. Wood (July 12, 2007) (on file with author). The standard for people born in Connecticut is: "Amendments related to parentage or gender change shall result in the creation of a replacement certificate that supersedes the original, and shall in no way reveal the original language changed by the amendment." CONN. GEN. STAT. § 19A-42(a) (2003 & Supp. 2007); *see also* CONN. AGENCIES REGS. § 19A-41-9(e) (containing out-of-state-standard). Connecticut employs language that seems to suggest that one could have the gender marker changed on a birth certificate without undergoing surgery:

(a) In the case of a person who is a resident of this state and was born in another state or in a foreign jurisdiction, if such other state or foreign jurisdiction requires a court decree in order to amend a birth certificate to reflect a change in gender, the probate courts in this state shall have jurisdiction to issue such a decree. When a person has completed treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, such person may apply to the probate court for the district in which such person resides for a decree that such person's birth certificate be amended to reflect the change in gender. The application to the probate court shall be accompanied by an affidavit from a physician attesting that the applicant has physically changed gender and an affidavit from a psychologist, psychiatrist or a licensed clinical social worker attesting that the applicant has socially and psychologically changed gender. Upon issuance, such probate court decree shall be transmitted to the registration authority of such person's place of birth.

E-mail from Cole Thaler, Staff Att'y, Lambda Legal Defense and Educ. Fund, to author & Emily J. Wood (July 13, 2007) (on file with author) (citing CONN. GEN. STAT. § 19a-42b (2006)). It is unclear whether in practice this operates as a surgery standard.

452. DEL. CODE ANN. tit. 16, § 3131(a) (2003).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in Delaware has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended by preparing a new certificate. The item numbers of the entries that were amended shall not, however, be identified on the new certificate or on any certified copies that may be issued of that certificate.

Id.

453. D.C. CODE ANN. § 7-217(d) (2001). "Upon receipt of a certified copy of a court order indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation." *Id.*

454. According to Lambda Legal:

Florida Office of Vital Statistics policy allows for the change of sex designation on birth certificates upon the provision of: a completed Application for Amended Birth Certificate and notarized Affidavit of Amendment to Certificate of Live Birth; a certified copy of a court order of name change; a sworn affidavit from the physician who performed sex reassignment surgery, containing the medical license number, stating that you have completed sex reassignment in accordance with appropriate medical procedures and that you are now considered to be a member of the reassigned gender; and the required fee.

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
GEORGIA ⁴⁵⁵	*		
HAWAII ⁴⁵⁶		*	
IDAHO ⁴⁵⁷			*
ILLINOIS ⁴⁵⁸		*	
INDIANA ⁴⁵⁹	*		
IOWA ⁴⁶⁰		*	

Sources of Authority, *supra* note 446. Florida will issue a new birth certificate, bearing no indication that a change has taken place. Cohen, *supra* note 445, at 4.

455. GA. CODE ANN. § 31-10-23(e) (2005). "Upon receipt of a certified copy of a court order indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation." *Id.* "Georgia . . . will issue a new birth certificate rather than amend the old one." STEEN, *supra* note 447, at 6.

456. HAW. REV. STAT. § 338-17.7(a)(4)(B) (1993). Hawaii will issue a new certificate

[u]pon receipt of an affidavit of a physician that the physician has examined the birth registrant and has determined the following: . . . (B) The birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct; provided that the director of health may further investigate and require additional information that the director deems necessary . . .

Id. "Hawaii will change both name and sex, and will issue a new birth certificate rather than amend the old one." STEEN, *supra* note 447, at 6.

457. IDAHO CODE ANN. § 39-250 (2002) (governing the amendment of birth certificates in Idaho). "Although Idaho generally permits amendment of birth records upon an appropriate evidentiary showing, the Idaho Office of Vital Statistics reports that Idaho does not currently amend birth records to reflect the correct sex of individuals who have changed their sex by surgical procedure." Sources of Authority, *supra* note 446.

458. 410 ILL. COMP. STAT. 535/17(1)(d) (2006).

An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed. The State Registrar of Vital Records may make any investigation or require any further information he deems necessary.

Id. However:

[t]he Division of Vital Records' current policy requires that individuals seeking to change the sex designation on their birth certificate have undergone sex reassignment surgery with a surgeon licensed to practice in the United States. Its policy also requires "completion of the entire gender reassignment" before the birth certificate will be changed.

Sources of Authority, *supra* note 446. The original record is then sealed, and a new certificate is issued. Cohen, *supra* note 445, at 5.

459. IND. CODE § 16-37-2-10(b) (2006) (governing the amendment of birth certificates in Indiana). "The Vital Statistics Division will issue an amended birth certificate upon showing of a court order." Sources of Authority, *supra* note 446. Some sources have incorrectly reported that Indiana birth certificates do not feature a gender marker. *See, e.g.,* STEEN, *supra* note 447, at 8. However, a phone call to the Indiana Department of Health Division of Vital Records revealed that this is not the case; Indiana's certificate features a gender marker amendable by court order. Telephone Interview with Ind. State Dep't of Health Vital Records Div. (Aug. 13, 2007). The court order cannot simply be one generally decreeing the fact of a gender change, but must specifically order the Vital Records Office to amend the gender on the birth certificate. *Id.* The operator assured me that the old record is sealed and the new record does not reveal the fact that amendments have taken place. *Id.*

460. IOWA CODE § 144.23(3) (2004).

A notarized affidavit by a licensed physician and surgeon or osteopathic physician and

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
KANSAS ⁴⁶¹		*	
KENTUCKY ⁴⁶²		*	
LOUISIANA ⁴⁶³	*		
MAINE ⁴⁶⁴	*		
MARYLAND ⁴⁶⁵	*		

surgeon stating that by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed. The state registrar may make a further investigation or require further information necessary to determine whether a sex change has occurred.

Id. “Iowa will change both name and sex, and will issue a new birth certificate rather than amend the old one.” STEEN, *supra* note 447, at 8.

461. KAN. ADMIN. REGS. § 27-17-20(b)(1)(A)(i) (2007).

The items recording the registrant’s sex may be amended if the amendment is substantiated with the applicant’s affidavit, or a parent’s affidavit if the registrant is under the age of 18, that the sex was incorrectly recorded or with a medical certificate substantiating that a physiological or anatomical change occurred.

Id. “Amended certificates will be marked ‘Amended,’ though the amended sections will not be specified.” Sources of Authority, *supra* note 446.

462. KY. REV. STAT. ANN. § 213.121(5) (LexisNexis 1998).

Upon receipt of a sworn statement by a licensed physician indicating that the gender of an individual born in the Commonwealth has been changed by surgical procedure and a certified copy of an order of a court of competent jurisdiction changing that individual’s name, the certificate of birth of the individual shall be amended as prescribed by regulation to reflect the change.

Id. “Kentucky . . . will issue[] a new birth certificate rather than amend the old one.” STEEN, *supra* note 447, at 9.

463. LA. REV. STAT. ANN. § 40:62 (2001).

Any person born in Louisiana who has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual, may petition a court of competent jurisdiction as provided in this Section to obtain a new certificate of birth.

Id. The new birth certificate should not bear any indication that the amendment(s) have taken place. Cohen, *supra* note 445, at 6.

464. ME. REV. STAT. ANN. tit. 22, § 2705 (2004 & Supp. 2007).

Amended certificate. A certificate that has been altered or amended after its filing must be marked “amended,” and the date on which the certificate or record was amended and a summary description of the evidence submitted in support of the correction must be endorsed on the record or permanently attached to it. Any certified copies of certificates or records amended under this section must be marked “amended.”

Id. Maine’s “Office of Vital Records will issue an amended birth certificate upon the order of the local probate court and the payment of a fee. Applicants must submit to the court an Application for Correction and a letter from the treating physician verifying that the surgery/treatment has been ‘completed.’” Sources of Authority, *supra* note 446.

465. MD. CODE ANN. HEALTH—GEN. § 4-214(b)(5) (LexisNexis 2000).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual’s name has been changed, the Secretary shall amend the certificate of birth of the individual as prescribed by regulation.

Id. Maryland’s policy is to mark the new certificate as having been amended, unless the court order specifies that the original record is to be sealed. Cohen, *supra* note 445, at 7.

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
MASSACHUSETTS ⁴⁶⁶		*	
MICHIGAN ⁴⁶⁷		*	
MINNESOTA ⁴⁶⁸	*		
MISSISSIPPI ⁴⁶⁹		*	
MISSOURI ⁴⁷⁰	*		
MONTANA ⁴⁷¹	*		

466. MASS. GEN. LAWS ANN. ch. 46, § 13(e) (2006).

If a person has completed sex reassignment surgery, so-called, and has had his name legally changed by a court of competent jurisdiction, the birth record of said person shall be amended to reflect the newly acquired sex and name, provided that an affidavit is received by the town clerk, executed by the person to whom the record relates, and accompanied by a physician's notarized statement that the person named on the birth record has completed sex reassignment surgery, so-called, and is not of the sex recorded on said record.

Id. There is no indication that a change has been made on the new certificate. Cohen, *supra* note 445, at 7.

467. MICH. COMP. LAWS § 333.2831(c) (2006) ("A request that a new certificate be established to show a sex designation other than that designated at birth. The request shall be accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed."). "Michigan . . . will issue a new birth certificate rather than amend the old one." STEEN, *supra* note 447, at 12.

468. MINN. STAT. § 144.218 (2006); MINN. R. 4601.1100 (2007). "The Minnesota Office of the State Registrar requires a court order in order to amend the sex designation on birth certificates. The court order must specify whether the original certificate is to be amended or a new certificate is to be issued." Sources of Authority, *supra* note 446.

469. MISS. CODE ANN. § 41-57-21 (2006).

Where there has been a bona fide effort to register a birth and the certificate thereof on file with the office of vital records does not divulge all of the information required by said certificate, or such certificate contains an incorrect first name, middle name, or sex, then the state registrar of vital records may, in his discretion, correct such certificate upon affidavit of at least two (2) reputable persons having personal knowledge of the facts in relation thereto. All other alterations shall be made as provided in Section 41-57-23.

Id. Since a doctor or treating surgeon is more likely to have "personal knowledge" of the gender of the person petitioning for a change, I have classified Mississippi as a "Doctor's Letter" state. "Mississippi will issue an amended birth certificate with the new name and gender typed in the margin, but the old name and gender remains unchanged." STEEN, *supra* note 447, at 12.

470. MO. REV. STAT. § 193.215(9) (2006) ("Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended."). "Amended birth certificates will be marked 'Amended.'" Sources of Authority, *supra* note 446.

471. MONT. CODE ANN. § 50-15-204 (2007); MONT. ADMIN. R. 37.8.106(6) (2005).

The sex of a registrant as cited on a certificate may be amended only if the department receives a certified copy of the order of a court of competent jurisdiction indicating that the sex of an individual born in Montana has been changed by surgical procedure. The order must contain sufficient information for the department to locate the record. If the registrant's name is also to be changed, the court order must indicate the full name of the registrant as it appears on the birth certificate and the full name to which it is to be altered. Any certified copy issued after the amendment must indicate it was altered.

Id.

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
NEBRASKA ⁴⁷²		*	
NEVADA ⁴⁷³	*		
NEW HAMPSHIRE ⁴⁷⁴	*		
NEW JERSEY ⁴⁷⁵		*	
NEW MEXICO ⁴⁷⁶		*	
NEW YORK STATE ⁴⁷⁷		*	

472. NEB. REV. STAT. § 71-604.01 (2003).

Upon receipt of a notarized affidavit from the physician that performed sex reassignment surgery on an individual born in this state and a certified copy of an order of a court of competent jurisdiction changing the name of such person, the Department of Health and Human Services Finance and Support shall prepare a new certificate of birth in the new name and sex of such person in *substantially the same form* as that used for other live births. The evidence from which the new certificate is prepared and the original certificate of birth shall be available for inspection only upon the order of a court of competent jurisdiction.

Id. (emphasis added). It is unclear what it means for one document to be in “substantially the same form” as another. A representative from Nebraska’s Vital Records Office told SJ Cohen that only someone who worked in the office would be able to tell that the document was amended. Cohen, *supra* note 445, at 9.

473. NEV. ADMIN. CODE. § 440.130 (2007).

The state registrar may prepare a new certificate of birth for a person having a sexual transformation only upon order of a court of competent jurisdiction. . . . The court order must specify those facts to be changed on the new certificate. All other items must remain as on the original certificate.

Id. “Nevada . . . will issue a new birth certificate rather than amend the old one.” STEEN, *supra* note 447, at 14.

474. N.H. CODE ADMIN. R. ANN. HE-P 7007.03(e) (2007) (“Upon receipt of a court order advising that such individual born in the state of New Hampshire has had a sex change, a new birth record shall be prepared in accordance with He-P 7007.02 to reflect such change.”). The new New Hampshire birth certificate will reflect the specific amendments that have been made, bearing the phrase “gender changed per court order,” and adding “AKA” to the text between the old and new names. Cohen, *supra* note 445, at 9–10. Theoretically, one could get a court order to specifically require that these changes not be noted on the document itself, although State Registrar William Bolton suggested to SJ Cohen that this has never actually occurred. *Id.*

475. N.J. STAT. ANN. § 26:8-40.12 (West 2007) (“The State registrar shall issue an amended certificate of birth to a person born in this State who undergoes sex reassignment surgery and requests an amended certificate of birth which shows the sex and name of the person as it has been changed.”); E-mail from Thaler, *supra* note 451 (stating that New Jersey requires a surgeon’s letter). “New Jersey . . . will issue[] a new birth certificate rather than amend the old one.” STEEN, *supra* note 447, at 15.

476. N.M. STAT. § 24-14-25(D) (2006).

Upon receipt of a duly notarized statement from the person in charge of an institution or from the attending physician indicating that the sex of an individual born in this state has been changed by surgical procedure, together with a certified copy of an order changing the name of the person, the certificate of birth of the individual shall be amended as prescribed by regulation.

Id. “New Mexico . . . will issue a new birth certificate rather than amend the old one. The old information will be ‘sealed’ and cannot be opened without a court order.” STEEN, *supra* note 447, at 16.

477. N.Y. COMP. CODES R. & REGS. tit 10, § 35.2 (2005).

The New York State Department of Health, Vital Records Division has a policy providing for the change of sex designation on birth certificates upon the receipt of a completed

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
NEW YORK CITY ⁴⁷⁸		*	
NORTH CAROLINA ⁴⁷⁹		*	
NORTH DAKOTA ⁴⁸⁰		*	
OHIO ⁴⁸¹			*
OKLAHOMA ⁴⁸²	*	*	

application; a letter from the surgeon specifying date, place, and type of sex reassignment surgery performed; an operative report from the sex reassignment surgery; and some additional medical documentation. More detailed information can be obtained from the Department of Health, Vital Records Division in Albany, NY.

Sources of Authority, *supra* note 446. "New York State . . . will issue a new birth certificate." STEEN, *supra* note 447, at 17.

478. N.Y., N.Y., HEALTH CODE tit. 24, § 207.05(a)(5) (2005) ("A new birth certificate shall be filed when . . . The name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery."). Although New York City's policy has been undergoing a revision process, the policy currently issues a new birth certificate with no gender marker. *See* STEEN, *supra* note 447, at 16. Because this new certificate does not feature a gender marker, it is noticeably different from unamended certificates. Steen also reports that New York City is a "doctor's letter" jurisdiction. *Id.*

479. N.C. GEN. STAT. § 130A-118(b)(4) (2005).

A new certificate of birth shall be made by the State Registrar when . . . A written request from an individual is received by the State Registrar to change the sex on that individual's birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.

Id.; *see also* N.C. GEN. STAT. § 130A-118(e) (2005). North Carolina "will issue a new birth certificate rather than amend the old one." STEEN, *supra* note 447, at 18.

480. N.D. CENT. CODE § 23-02.1-25 (2002); N.D. ADMIN. CODE § 33-04-12-02 (2006).

Amendments as a result of gender identity change

1. Evidence and documents required. The birth certificate of a person born in this state who has undergone a sex conversion operation may be amended as follows: a. Upon written request of the person who has undergone the operation; and b. An affidavit by a physician that the physician has performed an operation on the person, and that by reason of the operation, the sex designation of such person's birth certificate should be changed; and c. An order of a court of competent jurisdiction decreeing a legal change in name.

2. New certificate. Pursuant to such amendment, a new certificate of birth will be created by the state registrar showing original data as transcribed from the original certificate excepting those items that have been amended. The new certificate will be clearly marked in the upper margin with the word "amended."

3. Sealing of original certificate. The original certificate shall be then placed in a special file and shall not be open to inspection except by order of a court of competent jurisdiction or by the state registrar for purpose of carrying out the provisions of North Dakota Century Code chapter 23-02.1 and properly administering the vital records registration program.

Id.

481. *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (interpreting Ohio's birth certificate statute as a correction statute not encompassing correction of sex on birth certificates of individuals who have changed their sex by surgical procedure).

482. OKLA. STAT. tit. 63, § 1-321 (2004 & Supp. 2008); OKLA. ADMIN. CODE § 310:105-3-3 (2006). "While not specifically provided for by statute or regulation, it is the policy of the Vital Records Bureau to issue new birth certificates for applicants who have undergone sex reassignment, pursuant to the generally applicable procedures." Sources of Authority, *supra* note 446. Diane Steen suggests

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
OREGON ⁴⁸³	*		
PENNSYLVANIA ⁴⁸⁴	*	*	
RHODE ISLAND ⁴⁸⁵		*	
SOUTH CAROLINA ⁴⁸⁶		*	
SOUTH DAKOTA ⁴⁸⁷	*		
TENNESSEE ⁴⁸⁸			*
TEXAS ⁴⁸⁹	*		

that both a court order and a doctor's letter are required, and that the amendment will be noted on the birth certificate. STEEN, *supra* note 447, at 19.

483. OR. REV. STAT. § 432.235(4) (2005).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by rule of the state registrar.

Id. The Oregon Center for Health Statistics explains their rationale behind making such amendments as follows:

To prevent fraud, changes to names on birth records are documented. The original birth certificate filed by the hospital will have the name lined out and the new name typed in above with a footnote referencing the court order and the date of the change. The short form birth certificate from computer data will have a footnote stating which name had been amended and the date of the change but will not show the previous name. If you have a sealed name change order, or a court order specifying a new birth certificate, please call for additional information.

Center for Health Statistics, Changing Vital Records, <http://www.oregon.gov/DHS/ph/chs/change/chngrec.shtml> (last visited Mar. 17, 2008). It has been noted that the birth certificates do not indicate *what* has been changed, only that a change has occurred. STEEN, *supra* note 447, at 20.

484. 35 PA. CONS. STAT. § 450.603 (2005). "Although not specifically mentioned in the statute, the Division of Vital Records will issue a revised birth certificate upon court order. If the applicant has only obtained a court order for name change, a statement from the treating surgeon is also necessary, stating that reassignment surgery has been performed." Sources of Authority, *supra* note 446. "Pennsylvania . . . will issue a new birth certificate with no mention of being amended." STEEN, *supra* note 447, at 20.

485. R.I. GEN. LAWS § 23-3-21 (1996); 14-170-001 R.I. CODE R. §§ 35-37 (Weil 2004).

For changes to the sex designation on birth certificates, the Office of Vital Records has a policy requiring a notarized statement from the hospital or clinic where surgery was performed, signed by the physician in charge of the surgery. The amended certificate will state only that the name has been amended; it will not show the former name.

Sources of Authority, *supra* note 446.

486. S.C. CODE ANN. § 44-63-150 (2002); S.C. CODE ANN. REGS. 61-19 (1992). "Although not explicitly addressed by statute or administrative code, South Carolina will issue an amendment as an *attachment* to the original birth certificate." Sources of Authority, *supra* note 446. South Carolina requires "a letter from the SRS [sex reassignment surgery] surgeon." STEEN, *supra* note 447, at 22.

487. S.D. ADMIN. R. 44:09:05:02 (2006). "Although not specifically mentioned in the statute, the State Registrar does provide amended certificates to reflect sex reassignment. Although the Registrar will follow any specific instructions in a court order, their general policy is to issue a new certificate with no indication of amendment." Sources of Authority, *supra* note 446.

488. TENN. CODE ANN. § 68-3-203(d) (2006) ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.")

489. TEX. HEALTH & SAFETY CODE ANN. § 192.011 (2001); *Littleton v. Prange*, 9 S.W.3d 223 (Tex.

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
UTAH ⁴⁹⁰	*		
VERMONT ⁴⁹¹	*		
VIRGINIA ⁴⁹²	*		
WASHINGTON ⁴⁹³	*	*	

Civ. App. 1999) (holding that a postoperative male-to-female transsexual is male as a matter of law).

Anecdotal reports indicate that some Texas officials do not permit postoperative transsexuals to correct the sex designation on their birth certificate. . . . Prior to *Littleton v. Prange*, Texas issued new birth certificates. Anecdotal reports now indicate that some officials refuse to correct the sex designation on transgender people's birth certificates, although judges may order such a change.

Sources of Authority, *supra* note 446.

490. UTAH CODE ANN. § 26-2-11 (2007). The code states:

Name or sex change—Registration of court order and amendment of birth certificate

(1) When a person born in this state has a name change or sex change approved by an order of a Utah district court or a court of competent jurisdiction of another state or a province of Canada, a certified copy of the order may be filed with the state registrar with an application form provided by the registrar.

(2) (a) Upon receipt of the application, a certified copy of the order, and payment of the required fee, the state registrar shall review the application, and if complete, register it and note the fact of the amendment on the otherwise unaltered original certificate. (b) The amendment shall be registered with and become a part of the original certificate and a certified copy shall be issued to the applicant without additional cost.

Id. "Utah will issue an amended certificate, changing both name and sex, and the certificate will not reveal which items were changed." STEEN, *supra* note 447, at 23.

491. VT. STAT. tit. 18, §§ 5075-76 (2000). "Vermont has a general statute providing for the change of information on birth certificates via court order. Unless specified by the court order, the amended certificate will show all changes that have been made." Sources of Authority, *supra* note 446.

492. VA. CODE ANN. § 32.1-269(E) (2004).

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure and upon request of such person, the State Registrar shall amend such person's certificate of birth to show the change of sex and, if a certified copy of a court order changing the person's name is submitted, to show a new name.

Id.; 12 VA. ADMIN. CODE § 5-550-320 (2006).

Change of Sex. Except as provided in subdivision 3 of 12 VAC 5-550-450 [concerning intersex conditions], upon presentation of acceptable evidence (preoperative diagnosis, postoperative diagnosis and description of procedure) and a notarized affidavit from the physician performing the surgery, a new certificate of birth may be prepared by the State Registrar for a person born in this Commonwealth whose sex has been changed by surgical gender reassignment procedure. A certified copy of the court order changing the name of the registrant as well as designating the sex of the registrant must be in the possession of the State Registrar together with a request that a new certificate be prepared.

Id. "Virginia will issue a new birth certificate as of 2005." STEEN, *supra* note 447, at 24.

493. "Washington's statutes and administrative code are silent about amending vital records. The Department of Health's policy is to issue an amended certificate upon submission of either a court order or a letter from the treating surgeon attesting to the change of sex." Sources of Authority, *supra* note 446. Although she does not mention the possibility of using a court order when changing gender on a Washington birth certificate, Steen writes: "Washington State will issue a new birth certificate for name and/or gender changes (after sex reassignment surgery has been completed). The old record is deleted." STEEN, *supra* note 447, at 24.

JURISDICTION	COURT ORDER	DOCTOR'S LETTER	WILL NOT AMEND
WEST VIRGINIA ⁴⁹⁴	*	*	
WISCONSIN ⁴⁹⁵	*		
WYOMING ⁴⁹⁶	*		

494. W. VA. CODE ANN. § 16-5-25 (2006); W. VA. CODE R. § 64-32-6 (2006). “The practice of the State Registrar is to issue an amended birth certificate upon submission of either a court order or a notarized statement from the treating physician that reassignment surgery has been completed.” Sources of Authority, *supra* note 446. When SJ Cohen spoke with State Registrar Gary Thompson regarding the question of whether amendments would be visible on the new documentation, he discovered that

[i]f you change your sex first, and then apply for a name change, the old name will show on the birth certificate—it will be stricken through but still visible, and the new name will be typed above or beside it. However, if you change your name first and then your sex, or change them both concurrently, then there will be no way to tell and the old name won’t show—they’ll retype the birth certificate entirely. Hence, they recommend a legal name change first or simultaneously with the request for gender change.

Cohen, *supra* note 445, at 19. For those who go about the process the other way around, the risks are the same as for those whose name change amendments are always noted.

495. WIS. STAT. ANN. § 69.15 (2003). The statute provides:

The state registrar may change information on a birth certificate registered in this state which was correct at the time the birth certificate was filed under a court or administrative order issued in this state, in another state or in Canada or under the valid order of a court of any federally recognized Indian tribe, band or nation if: The order provides for an adoption, name change or name change with sex change or establishes paternity; and [a] clerk of court or, for a paternity action, a clerk of court or county child support agency under s. 59.53 (5), sends the state registrar a certified report of an order of a court in this state on a form supplied by the state registrar or, in the case of any other order, the state registrar receives a certified copy of the order and the proper fee under s. 69.22.

Id. Whether the new document reflects the changes made is a matter of judicial discretion in Wisconsin. Cohen, *supra* note 445, at 19–20.

496. WYO. STAT. ANN. § 35-1-424 (2007); 048-135-010 WYO. CODE R. § 4(e)(iii) (2004) (“When the sex of an individual has been changed, a court order shall be required to amend the birth certificate.”). Whether the new document reflects the changes made is a matter of judicial discretion in Wyoming. Cohen, *supra* note 445, at 20.
