

**NEVER QUITE THE WOMAN THAT SHE WANTED TO BE:
HOW STATE POLICIES TRANSFORM GENDER MARKER
IDENTIFICATION INTO A SCARLET LETTER**

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INTRODUCTION

The day was February 28, 2014, and it was the spring semester of my first year in law school. I worked hard during the fall semester, and I positioned myself well for the summer job hunt. That day, I had a meeting with a clerk at the Carl B. Stokes Courthouse to work as a judicial extern. The meeting was largely a formality to sort out some clerical issues. Nonetheless, I was terrified: In our email exchange, the law clerk had asked me to bring my birth certificate.

I arrived at the courthouse and was awestruck. I had not yet visited downtown Cleveland, and coming from rural Virginia, I had never seen so many thirty and forty-story buildings. I found the courthouse, went through security, and then arrived at the courtroom. I met the clerk, and she showed me chambers. I was fascinated: I was a few weeks away from working for a federal judge in an office with an amazing view of a big city. I felt like I had finally made it. The clerk and I made small talk about school and Cleveland before getting to business. I sat down in her office and she began filling out paperwork. She asked me to hand her my driver's license and I did. She jotted some notes on a piece of paper. Then she asked for my birth certificate and I handed it to her folded up. I looked at the ground, my heart pounding. She opened it, stopped writing, and said, perplexed, "No, I need to see *your* birth certificate." I responded meekly, "That is my birth certificate." I did not look up to see her reaction, but I heard her resume her writing.

My birth certificate confused her because she saw a female named Kayla, yet my birth certificate listed me as John and my gender as male. This discrepancy exists because I am transgender, and my birth state refuses to amend names or gender markers on a transgender person's birth certificate absent sex reassignment surgery (reassignment surgery).¹ Before I could work for the court, I had to disclose to the clerk the most private aspect of my life. My experience at the courthouse is the norm: An overwhelming 76 percent of transgender individuals do not possess gender-conforming birth certificates,² and another 41 percent do not possess gender-conforming driver's licenses or state identification cards.³ I was lucky that the courthouse still accepted me as an extern; many others are not so fortunate.⁴

This Note argues that a transgender person has a substantive due process right to change gender markers on state documents without undergoing reassignment surgery. Today, both the World Professional Association for Transgender Health (WPATH) and the American Medical Association (AMA) recognize that a person's gender transition is individualized and variable.⁵ Thus,

1. See *infra* Appendix A.

2. JAIME GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 139 (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

3. *Id.*

4. *Id.* at 54 (44% of transgender individuals report being discriminated against in hiring); see also *Schroer v. Billington*, 525 F. Supp. 2d 58, 60–61 (D.D.C. 2007) (stating that the Library of Congress rescinded a job offer to an individual after learning that she planned to transition from male to female).

5. ELI COLEMAN ET AL., WORLD PROF. ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 2 (7th ed. 2012), http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf; see also *AMA Calls for Modernizing Birth Certificate Policies*, AM. MED. ASS'N. (June 10 2014, 2: 11 PM).

they do not believe that states should require reassignment surgery as a precondition to amending documentation.⁶ In spite of this medical consensus, the majority of states continue to require reassignment surgery to amend birth certificates,⁷ and many states require reassignment surgery to amend driver's licenses.⁸ Due to financial hardship or bodily autonomy, however, many transgender people cannot or do not undergo reassignment surgery.⁹

State policies that ignore this medical consensus harm transgender individuals by imposing the state's view of gender validity upon them. Highlighting this is the fact that many state courts refer to transgender people using the pronouns associated with their birth sex,¹⁰ or worse, in Frankensteinian terms that imply that the person is an oddity if not a monster.¹¹ In addition, many legislatures are slow to change policies pertaining to state documents and may excessively burden transgender people who try to change gender markers on identification documents.

For two reasons, this Note proposes substantive due process as a constitutional basis for transgender individuals' right to obtain gender-conforming state documents. First, gay and lesbian advocates have had recent success invoking substantive due process to invalidate laws banning same-sex marriage under both the U.S. Constitution and state constitutions.¹² Given these gains, substantive due process might also be a source to strengthen existing protections for transgender people. Second, even if courts find that federal substantive due process does not invalidate the surgery requirement for amending gender on state documents, state constitutions may still hold promise. This is because many state courts interpret their constitution to provide greater substantive due process protections than the minimum afforded by the U.S. Constitution.¹³

This Note proceeds as follows. Part I describes the differing state approaches to defining and amending gender on state documents. Part II summarizes substantive due process doctrine. Part III details why courts should interpret substantive due process as requiring states to permit gender marker

CET), <http://news.cision.com/american-medical-association/r/ama-calls-for-modernizing-birth-certificate-policies%2Cc9598921>.

6. See *id.*; see also JACK BYRNE, LICENSE TO BE YOURSELF 9 (David Seamell & Sebastian Krueger eds., 2014), http://www.wpath.org/uploaded_files/140/files/license-to-be-yourself-20140501.pdf.

7. See generally *infra* Appendix A.

8. See generally *infra* Appendix B.

9. Anne E. Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 COLUM. J. GENDER & L. 488, 500 (2014).

10. See, e.g., *Oiler v. Winn-Dixie La. Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *1 (E.D. La. Sept. 16, 2002); *In re Declaratory Relief for Ladrach*, N.E.2d 828, 829 (Ohio Prob. Ct. 1987); *In re Harris*, 707 A.2d 225, 226 (Pa. Super. Ct. 1997).

11. *In re Harris*, 707 A.2d at 226; see also *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (stating "even if one believes that a woman can be so easily created from what remains of a man"); *In re Estate of Gardiner*, 42 P.3d 120, 129 (Kan. 2002) (stating "her female anatomy however is all man-made"). For a more thorough discussion, see Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 159-74 (2005).

12. See generally Ronald Turner, *Same-Sex Marriage and Due Process Traditionalism*, 49 U. RICH. L. REV. 579 (2015).

13. *K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012) (finding that the plaintiff had a due process right to privacy under the Alaskan constitution, which the court stated is more stringent than the federal constitution, that allowed her to amend her driver's license).

amendments on state documents without the necessity of sex reassignment surgery. It analyzes the issue by providing both a fundamental rights analysis and a *Cruzan* balancing test analysis. Finally, Part IV proposes an ideal policy solution that is consistent with constitutional doctrine. Specifically, this Note proposes that states allow transgender people to amend gender markers on state documents with a therapist's recommendation.

I. STATE APPROACHES TO DEFINING AND AMENDING GENDER ON STATE DOCUMENTS

People create their legal identities vis-à-vis the government by obtaining different identification documents from a hodge-podge network of agencies. Each agency sets its own policies for amending personal identification information, such as gender marker.¹⁴ As a result, many states allow a transgender person to obtain a gender-conforming driver's license, but not a gender-conforming birth certificate.¹⁵ Complicating matters is the fact that transgender people can only amend their birth certificates in the state where they were born.¹⁶

Federal agencies differ from state agencies in issuing identity documents. Notably, federal agency policies uniformly allow amendments to gender markers with a therapist's approval.¹⁷ These policies enable transgender people to use federal documents to circumvent forced disclosure in some contexts. For instance, a transgender person can prove citizenship to an employer by presenting a gender-conforming passport rather than a gender-nonconforming, state-issued birth certificate. Nonetheless, these federal agency policies are far from sufficient. There might be some instances that require a transgender person to present a gender-nonconforming state document, such as a traffic stop during which the person must present a driver's license to law enforcement. Moreover, many people do not possess federal documentation with visible gender markers.¹⁸

Additionally, requiring reassignment surgery to amend state documents places a huge burden on many transgender individuals. The cost of reassignment surgery can range from \$18,000 to \$150,000.¹⁹ Furthermore, not all transgender individuals are appropriate candidates for reassignment surgery due to health complications, weight, or age. Finally, not every transgender person desires to undergo reassignment surgery; many find the social recognition of their gender

14. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 734 (2008).

15. Compare *infra* Appendix A, with *infra* Appendix B.

16. *Id.*

17. Passports, social security administration, and Foreign Consular Birth records only need therapist approval to amend gender markers. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 383; 404 n.133 (2013); *Changing Numident Date for Reasons Other Than Name Change*, SOCIAL SECURITY ADMINISTRATION (Sept. 30, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0110212200> [hereinafter SOCIAL SECURITY ADMINISTRATION].

18. Spade, *supra* note 14, at 749.

19. Silver, *supra* note 9, at 498 n.51 (noting that reassignment surgery for Male-to-Female transsexuals ranges from about \$18,000-\$35,000 and for Female-to-Male transsexuals can range from \$50,000-\$150,000; the cost discrepancy is largely due to surgeons having a more difficult time creating external genitalia from internal genitalia than *vice versa*).

identity sufficient for their emotional well-being.²⁰ Thus, it is not surprising that fewer than one in four transgender people have a gender-conforming birth certificate, and a little over half possess a conforming driver's license.²¹

Accordingly, state-issued documents are important to consider. This Part focuses on two examples of such documents: driver's licenses and birth certificates.²² These documents are the most commonly used documents for proving identity and seeking employment. Moreover, the policies governing gender marker amendments on these documents vary widely across states.²³

A. *Birth Certificates*

Forty-seven states and the District of Columbia allow gender marker amendments to birth certificates.²⁴ Thirty-one of these states specifically require reassignment surgery as a prerequisite to amending birth certificates.²⁵ Another sixteen states and the District of Columbia allow amendments without reassignment surgery. In these states, a person must still provide either a therapist's approval or a doctor's affidavit that the patient has undergone surgical or hormonal change.²⁶ In contrast, three states (Tennessee, Ohio, and Idaho) refuse to amend birth certificates for transgender people under any circumstances.²⁷

This policy terrain is shaped largely by the Model State Vital Statistics Act (MSVSA)²⁸ proposed in 1977 by the Department of Health and Human Services (HHS).²⁹ The MSVSA is a model format for state documents issued periodically to "promote uniformity among States in definitions, registration practices, disclosure and issuance procedures, and in many other functions that comprise a State system of vital statistics."³⁰ The MSVSA encouraged states to amend gender markers on birth certificates when "the sex of an individual . . . has been changed by surgical procedure."³¹ Although HHS's recommendation was only advisory,³² most states followed it and created policies allowing transgender people to amend birth certificates only after reassignment surgery.³³

20. Grant, *supra* note 2, at 79 (stating that 14% of MtFs and 44% of FtMs do not desire reassignment surgery).

21. *Id.* at 139.

22. While there are other forms of identification that are common, such as social security cards, many of these do not contain explicit gender markers. SOCIAL SECURITY ADMINISTRATION, *supra* note 17.

23. See generally *infra* Appendix A; Appendix B.

24. See generally *infra* Appendix A. Additionally, New York City and New York State have separate agencies responsible for issuing birth certificates and differ in their requirements before issuing gender-conforming documentation. Mottet, *supra* note 17, at 378 n.5.

25. See *infra* Appendix A.

26. *Id.* This language is loosely taken from the District of Columbia's and Vermont's statutes.

27. *Id.* The three state are Idaho, Ohio, and Tennessee.

28. NAT'L CTR. FOR HEALTH STATISTICS, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS §21(e) (rev. 1992).

29. Prior to 1979, HHS was called the Department of Health, Education, and Welfare.

30. Mottet, *supra* note 17, at 380 (quoting *Preface* to NAT'L CTR. FOR HEALTH STATISTICS, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS (rev. 1992)).

31. *Id.* at 400 (emphasis omitted).

32. The MSVSA is a model bill proposed by the HHS and not a binding law passed by Congress.

33. See generally *infra* Appendix A

The MSVSA further proposed that an individual obtain a court order verifying that the individual underwent reassignment surgery. Thus, fifteen states have statutes that require a court order to amend birth certificates.³⁴ To obtain a court order, the individual must petition the court with a signed affidavit from a surgeon verifying that she had reassignment surgery; this process can be both tedious and embarrassing. In some states, these court orders become part of the public record, thus disclosing to society the individual's transgender status and medical history.³⁵ Another seven states deviate slightly from the MSVSA framework and allow amendments after reassignment surgery, but do not require a court order.³⁶ Nonetheless, these states still require that the individual file a surgeon's affidavit with the record-issuing agency verifying that the individual has undergone reassignment surgery.³⁷

Many states do not uniformly enforce the surgery requirement.³⁸ For example, Virginia requires reassignment surgeries for transgender women (who seek to change their gender markers from male to female), but not for transgender men (who seek to change their gender markers from female to male).³⁹ Instead, Virginia allows transgender men to amend their birth certificates after a mastectomy, reasoning that a mastectomy constitutes a permanent gender-related medical surgery.⁴⁰ Virginia does not treat transgender women who undergo breast augmentation as favorably, which is an arbitrary distinction that creates a double standard.⁴¹

In contrast to the MSVSA standards, six states require a court order to amend birth certificates without mentioning reassignment surgery.⁴² While this policy better respects individual autonomy, it leaves full discretion to the courts and creates disparities between individual judges and individual courts within a state.⁴³ Furthermore, transgender issues are not well understood, and most courts still require reassignment surgery before issuing an order to amend.⁴⁴

Some states are silent as to amending gender markers on birth certificates.⁴⁵ Absent binding authority of law, state courts and agencies have more power to create policy. In eight states, the administrative agencies issuing birth certificates require that a patient undergo reassignment surgery before amending her birth

34. See *infra* Appendix A. The states are Alabama, Arkansas, Colorado, Georgia, Illinois, Kansas, Kentucky, Louisiana, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, and Virginia.

35. Mottet, *supra* note 17, at 437.

36. Arizona, Hawaii, Massachusetts, Michigan, Missouri, New Jersey, and North Carolina. See *infra* Appendix A.

37. See, e.g., N.C. GEN. STAT. ANN. §§ 130A-118(b)(4) (West 2015).

38. Spade, *supra* note 14, at 768.

39. *Id.*

40. *Id.*

41. *Id.*

42. Indiana, Rhode Island, South Dakota, Utah, Wisconsin, and Wyoming. See *infra* Appendix A.

43. Mottet, *supra* note 17, at 428.

44. *Id.* at 400-01.

45. Alaska, Delaware, Florida, Idaho, Maine, Oklahoma, Pennsylvania, South Carolina, Texas, Washington, and West Virginia. See *infra* Appendix A.

certificate.⁴⁶ Another eight states and the District of Columbia allow amendments with a therapist's approval.⁴⁷ Five states require the individual to present a therapist's affidavit to the state agency issuing birth certificates, while three require the individual to present a therapist's affidavit to the court and obtain a court order first.⁴⁸ Ohio, Idaho, and Tennessee do not amend birth certificates under any circumstances.⁴⁹ Each of these states' policies are established in different ways: Ohio through case law, Idaho through administrative law, and Tennessee through statute.⁵⁰

B. Driver's Licenses

Driver's licenses are generally easier to amend than birth certificates. All state agencies issuing driver's licenses allow amendments to gender markers.⁵¹ The reason for this is that unlike birth certificates, which document the circumstances surrounding one's birth, driver's licenses serve a more temporary state purpose of identifying individuals whom the state permits to drive.⁵²

The majority approach taken by twenty-six states and the District of Columbia allows gender marker amendments to driver's licenses with only a therapist's recommendation.⁵³ Some of these states, however, issue amended driver's licenses with the expectation that the individual undergo reassignment surgery in the future.⁵⁴ In some of these states, the amendment is only temporary, and the individual must get another therapist's approval letter before renewing a license or have the re-issued driver's license display a nonconforming gender marker.

Fourteen states require reassignment surgery before amending driver's licenses.⁵⁵ The remaining ten states take differing approaches. Five states require court orders to amend driver's licenses. As previously stated, court orders leave discretion to individual judges who typically, though not always, require reassignment surgery.⁵⁶ Additionally, the order might become part of the public

46. Alaska, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina, and Texas. *See infra* Appendix A.

47. California, Connecticut, District of Columbia, Minnesota, Mississippi, New York State, Oregon and Vermont. *See infra* Appendix A.

48. California, Connecticut, District of Columbia, Mississippi, and New York State require only therapist approval, while Minnesota, Oregon, and Vermont require a court order. *See infra* Appendix A.

49. *See infra* Appendix A.

50. In Idaho, the courts leave absolute discretion to the Department of Vital Statistics, which refuses to amend birth certificates. *Id.*

51. *See infra* Appendix B.

52. Mottet, *supra* note 17, at 391.

53. Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Vermont, Virginia, Washington, and Wisconsin. *See infra* Appendix B.

54. *See* Spade, *supra* note 14, at 772.

55. Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, North Carolina, Oklahoma, Tennessee, Texas, and Wyoming. Noteworthy, when compared to Appendix A, these states have differing requirements for amending birth certificates. *See infra* Appendix B.

56. Pennsylvania, South Carolina, and West Virginia. *Id.*

record and may contain sensitive information regarding name change, medical history, and the individual's home address.⁵⁷

The other five states condition driver's license amendments upon obtaining conforming documentation from other administrative agencies. Alaska and Utah accept any conforming documentation, including state birth certificates and federal passports,⁵⁸ while Iowa, Kentucky, and Montana require that the individual obtain a conforming birth certificate.⁵⁹ Thus, these policies create an interconnected web composed of various agencies from different states. For example, an individual wishing to amend a driver's license in Kentucky is subject to both the Kentucky law and his birth state's law regarding birth certificate amendments. When state policies are as fragmented as gender marker amendments, individuals inevitably fall through the cracks. Indeed, an individual born in Tennessee or Ohio who moves to Kentucky can amend neither her birth certificate nor her driver's license.⁶⁰ If she wants conforming documentation, then she has no option but to move to another state that does not condition driver's license amendments on birth certificate amendments.

Further complicating the amendment process is a phenomenon known as "desk-clerk law."⁶¹ Desk-clerk law "is what the person at the desk tells you the law is."⁶² In some cases, a clerk at a desk has more control than the actual policy over whether an individual obtains conforming documentation.⁶³ Many transgender people may not know the laws and regulations that dictate gender marker amendments, and many clerks may be equally unaware.⁶⁴ In many instances, a person can obtain conforming documentation against the state's policies because the clerk believes the old license to be a clerical error.⁶⁵ In other instances, a vaguely worded affidavit by a physician can have the same effect.⁶⁶ Nonetheless, the law is not enforced uniformly with regard to transgender people.

57. Mottet, *supra* note 17, at 437.

58. *See infra* Appendix B.

59. *Id.*

60. This is because the laws of Kentucky require an amended birth certificate to amend a driver's license, but certain states do not allow for birth certificate amendment, leaving the individual without options.

61. *See generally* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

62. *Id.* at 765. This phenomenon is more likely to occur with driver's license as they are photo identification subject to periodic renewal with less guiding legislation.

63. *Id.*; *see also* Spade, *supra* note 14, at 775.

64. *See* Emens, *supra* note 62, at 764–65. While Emens writes about how desk-clerk law acts to dissuade women from adopting unconventional last names upon marriage, the reasoning is applicable to transsexual gender marker amendments as desk-clerks have less specialized knowledge of transsexual policies, interaction with transsexuals is rare due to transsexuals constituting a small minority, and transsexual gender marker amendments are so variable between state and federal governments.

65. Spade, *supra* note 14, at 775.

66. *Id.*

II. OVERVIEW OF SUBSTANTIVE DUE PROCESS

Individuals have due process rights (both procedural⁶⁷ and substantive⁶⁸) under the U.S. Constitution and state constitutions.⁶⁹ The U.S. Supreme Court has interpreted substantive due process to protect many different rights, including bodily autonomy, privacy, and same-sex intimacy.⁷⁰ This Part summarizes two tests that courts might apply to conclude that requiring reassignment surgery to amend gender markers on state documents violates a person's substantive due process rights: (1) the fundamental rights test, and (2) the *Cruzan* balancing test.

A. The Fundamental Rights Test

The Supreme Court's fundamental rights test can be broken into a four-part analysis. The first part analyzes whether the right at issue is fundamental.⁷¹ The Court finds the right fundamental if it is either "deeply rooted in this Nation's history and tradition"⁷² or if the right is stated or implied in the Constitution.⁷³ Importantly, how the court frames the right may determine whether it is fundamental.⁷⁴ Indeed, a court may dispute which liberty interest is before it, and how the court interprets the right affects its decision.⁷⁵ Nonetheless, the Court articulates that advocates should provide a "careful description" of the liberty interest in dispute.⁷⁶

The second part of the Court's fundamental rights analysis asks whether the right is burdened.⁷⁷ The right may be burdened either directly or incidentally.⁷⁸ A

67. Procedural due process protects certain rights to legal proceedings and evidentiary burdens. See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

68. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

69. U.S. CONST. amend. XIV, § 1 (saying that no state shall "deprive a citizen of life, liberty, or property without due process of the law"); see also, e.g., ARK. CONST. art. 2, § 8 (stating that "nor [shall any person] be deprived of life, liberty, or property without due process of law"); FL. CONST. art. 1, § 9 ("No person shall be deprived of life, liberty or property without due process of law."); ILL. CONST. art. 1, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.").

70. See generally, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that due process protects the right to same-sex intimacy); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that due process protects a woman's right to terminate her pregnancy); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that due process protects one's right to interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that due process protects the right to birth control); *id.* at 479 (holding that due process protects one's right to privacy); *Rochin v. California*, 342 U.S. 165 (1952) (holding that due process protects one's right to bodily autonomy); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that due process protects one's right to control the education of his/her children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that due process protects one's right to control the education of his/her children).

71. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

72. *Id.* at 721; see also *id.* at 710–19.

73. See generally *Griswold*, 381 U.S. at 479.

74. See *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

75. Compare *id.* at 125 (rejecting and framing the right as whether a man has a right to be involved with his biological child if the mother is married to another man), with *id.* at 158–59 (Brennan, J., dissenting) (framing the right in question more broadly as whether a man has a right to be involved in the life of his biological child).

76. *Glucksberg*, 521 U.S. at 721.

77. See generally Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

law directly burdens a right if the government “singles out protected activity for disadvantageous treatment.”⁷⁹ In contrast, a burden is incidental if the law “does not, on its face, regulate protected conduct, but . . . has the incidental effect of burdening a right . . . under some circumstances.”⁸⁰ When the Court determines that the right singled out is directly burdened, then it generally applies strict scrutiny.⁸¹ If the burden is incidental, then the Court appears to apply rational basis review, although it may not outright specify a standard of review.⁸²

The third part of the analysis asks whether the government action is justified by a sufficient government purpose. This prong largely turns on whether the Court finds the right fundamental. If the Court finds the right fundamental, then it applies strict scrutiny, and the policy must be narrowly tailored to achieve a compelling government interest.⁸³ Otherwise, the Court applies rational basis review, and the policy only needs to be rationally related to achieving a legitimate government interest.⁸⁴

In addition, courts may afford a higher level of scrutiny to liberty interests which are not fundamental rights themselves, but which implicate fundamental rights. While few courts have applied a fundamental rights analysis to gender marker amendments on state documents, one case, *Darnell v. Lloyd*,⁸⁵ held that birth certificates implicate certain fundamental rights.⁸⁶

In *Darnell*, a post-operative transgender woman brought a claim against the Connecticut Commissioner of Health after he denied her petition to amend the gender marker on her birth certificate. The court denied the commissioner’s motion to dismiss, reasoning that the plaintiff had standing to sue based on the fact that the defendant had amended some birth certificates but not others.⁸⁷ The court stressed that since the commissioner had amended some birth certificates, and since birth certificates touched on certain fundamental rights, the commissioner was required to show a substantial government interest to justify denying Darnell’s

78. *Id.* at 1176–77.

79. *See id.* at 1176.

80. *See id.* at 1177–78.

81. *Id.* For example, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court reviewed a Wisconsin statute that prevented marriage for individuals paying child support absent a court order. Subsequently, a court would not grant the marriage order unless the petitioner was up-to-date on his child support payments. The Court struck the Wisconsin statute, reasoning that the law interfered “directly and substantially” on a fundamental right by prohibiting marriage for some men lacking the financial means to pay child support.

82. *Id.* at 1177–78. For example, in *Califano v. Jobst*, 434 U.S. 47 (1977), the Court examined a provision of the Social Security Act that terminated child’s insurance benefits upon marriage. The Court upheld the law, reasoning that Congress was justified in tying the benefits to marriage, since a married person generally no longer relies on his parents for financial support. The petitioner argued that the law discouraged marriage for the disabled, but the Court disagreed finding that while the law may discourage marriage for some, the policy simply touched upon marriage and still served a valid and reasonable purpose.

83. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

84. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

85. 395 F. Supp. 1210 (D. Conn. 1975).

86. *Id.* at 1214. Notably, *Darnell* occurred in 1975, before the MSVSA or the original WPATH standards of care, when courts’ and psychologists’ understanding of gender non-conformity was considerably more limited.

87. *Id.* at 1213.

request to amend her birth certificate.⁸⁸ The court further reasoned that her nonconforming birth certificate affected her fundamental rights to marry, to obtain a conforming passport to travel, and to privacy, as her birth certificate disclosed her transgender status to society.⁸⁹ While the court did not specify the level of scrutiny that it applied, its language suggests that it applied heightened, if not intermediate, scrutiny.⁹⁰

Similarly, in *Lawrence*, the Court struck down a Texas anti-sodomy statute without declaring a fundamental right to same-sex intimacy.⁹¹ Instead, the Court determined that the law did not seek to advance a legitimate government interest⁹² and only sought to harm the dignity of gay people living in Texas.⁹³ The Court wrote that “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”⁹⁴ and that “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁹⁵ The Court found that individuals have a certain autonomy in their existence that the state could not criminalize or stigmatize due to moral concerns.⁹⁶

Finally, the fourth prong of the fundamental rights analysis examines whether the state’s means justifiably relate to the ends sought. Under rational basis review, the state policy need only reasonably relate to the state’s interest.⁹⁷ Intermediate scrutiny requires a substantial relationship between the means and the state’s interest.⁹⁸ And finally, strict scrutiny requires a “narrowly tailored” policy that is “the least restrictive means” of attaining the state’s interest.⁹⁹ However, there are minor exceptions to the rule. Indeed, in *Lawrence v. Texas*, the Court never declared same-sex intimacy a fundamental right, but appeared to use a higher standard than rational basis review to strike a Texas law banning same-sex sodomy.¹⁰⁰

88. *Id.* at 1214.

89. *See id.*

90. *Id.* (stating that the commissioner must “show some substantial state interest” to justify his refusal to amend Darnell’s birth certificate).

91. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

92. *Id.* at 577.

93. *Id.* at 575, 579.

94. *Id.* at 562.

95. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

96. *Id.* at 577.

97. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

98. *Id.*

99. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (“In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.”).

100. *See* *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“Most significant, however, is the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds, holding that it ‘furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual’” (quoting *Lawrence*, 539 U.S. at 560)). *See generally* *Lawrence*, 539 U.S. at 558.

B. Individual-State Balancing Test

In substantive due process cases involving a right to refuse medical care, the Court has applied a balancing test separate from the fundamental rights analysis detailed above. In certain instances, a state policy may serve a valid state purpose but encroach upon individual liberty interests nonetheless. When this occurs, courts may weigh the competing interests to determine whether the state policy is constitutional.¹⁰¹ When applying this test, the Court has generally avoided naming an exact standard of review and has instead focused on the utility of the state's action relative to the individual's liberty interests.¹⁰²

The Court used this balancing test to reach its decision in *Cruzan*, a case dealing with a woman in a persistent vegetative state.¹⁰³ Nancy Cruzan's friends and family sought an order removing her from life support, allowing her to die according to her wishes. The state required Cruzan's family to present clear and convincing evidence that she would wish to refuse treatment.¹⁰⁴ The Court acknowledged that both Cruzan and the state had important interests at stake:¹⁰⁵ Cruzan had a right to be free of unwanted medical care and to decide her treatment,¹⁰⁶ while the state had an interest in protecting the lives of its citizens and in preventing errors when the stakes are life and death.¹⁰⁷ The Court ruled for the state, finding that the clear and convincing evidence standard adequately balanced the state's interest in protecting life with the individual's right to refuse unwanted treatment.¹⁰⁸ In the case of gender marker amendments, the state has an interest in maintaining accurate documentation while the individual has a liberty interest both in obtaining conforming documentation and in refusing unwanted medical procedures.¹⁰⁹ Therefore, the balancing test set forth in *Cruzan* provides an appropriate alternative to the fundamental rights analysis for purposes of evaluating the constitutionality of the surgery requirement.

III. ANALYSIS

A. Fundamental Rights Analysis

As discussed previously, the Court's fundamental rights analysis proceeds in four parts: (1) Is there a fundamental right involved? (2) Is the right infringed upon? (3) Is the infringement justified by a sufficient purpose? and (4) Are the government's means justifiably related to the ends sought?¹¹⁰

101. *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) ("But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" (quoting *Youngberg v. Romero*, 457 U.S. 307, 321 (1982))).

102. *See Vitek v. Jones*, 445 U.S. 480, 494 (1980). *See generally Cruzan*, 497 U.S. at 283.

103. *Cruzan*, 497 U.S. at 266.

104. *Id.* at 275.

105. *Id.* at 279.

106. *Id.* at 278.

107. *See id.* at 280.

108. *See id.* at 284.

109. *See infra* Part IV.4

110. *See supra* Part II.A.

1. *Is There a Fundamental Right Involved?*

A court should apply strict scrutiny to state restriction of gender marker amendments on state documents if the court finds that an individual possesses a fundamental right to amend those documents.¹¹¹ The Court defines fundamental rights as those “deeply rooted in this Nation’s history and tradition.”¹¹² Since gender marker amendments are a relatively new phenomenon,¹¹³ the individual liberty interest is likely not a fundamental right under this standard.

Nonetheless, state restrictions on gender marker amendments may still burden other fundamental rights. Indeed, several states recognize a fundamental right to medical privacy.¹¹⁴ Additionally, the U.S. Supreme Court has recognized a liberty interest in medical privacy that the state may not infringe upon.¹¹⁵ Today, several states’ amendment policies force many transgender people to disclose their transgender status.¹¹⁶ Nonconforming documentation can disclose several medical statuses: a diagnosis of gender dysphoria,¹¹⁷ treatment involving hormone-replacement therapy, and an absence of reassignment surgery.¹¹⁸ In fact, the Second Circuit, the Third Circuit, and several lower district courts have found that certain medical conditions—including transgender status—warrant additional privacy protections.¹¹⁹

For example, *Powell v. Schriver*¹²⁰ involved a claim brought by a prison inmate against a prison guard and the prison’s supervisor after the guard disclosed to other inmates that the plaintiff was HIV-positive and transgender.¹²¹ The court found for the plaintiff, noting that transgender status is highly stigmatizing and that

111. See *supra* Part II.A.

112. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

113. See Brittany Ems, *Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity*, 54 ST. LOUIS U. L.J. 1329, 1329 (2009–10) (stating that Christine Jorgensen was the first transsexual woman in America to have reassignment surgery in 1953, thus the phenomenon is at most 60 years old).

114. *Guardado v. State*, 61 So. 3d 1210, 1212–13 (Fla. Dist. Ct. App. 2011) (stating that patients had a “fundamental privacy right” in their medical privacy that a state may not intrude upon absent a compelling state interest); *King v. State*, 535 S.E.2d 492 (Ga. 2000) (stating about the defendant’s medical records, “In [Georgia], privacy is considered a fundamental constitutional right and is ‘recognized as having a value so essential to individual liberty in our society that [its] infringement merits careful scrutiny by the courts.’” (quoting *Ambles v. State*, 383 S.E.2d 555 (Ga. 1989))). See also *K.L. v. State, Dep’t of Admin., Div. of Motor Vehicles*, 2012 WL 2685183, at *4 (Super. Ct. Alaska Mar. 12, 2012) (“Because this right to privacy is explicit [in the Alaskan Constitution], its protections are necessarily more robust and ‘broader in scope’ than those of the implied federal right to privacy.”).

115. *Whalen v. Roe*, 429 U.S. 589 (1977).

116. *Infra* Part III.A.2.

117. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013).

118. See *infra* Appendix A (assuming the state allows individuals to amend their birth certificates).

119. *Doe v. Se. Pa. Transit Auth.*, 72 F.3d 1133, 1140 (3rd Cir. 1995); see also *Powell v. Schriver*, 175 F.3d 107, 110–11 (2nd Cir. 1999); *Walker v. Gerald*, 2006 WL 1997635, at *5 (E.D. La. June 27, 2006).

120. 175 F.3d 107 (2d Cir. 1999).

121. *Powell*, 175 F.3d at 108–09.

disclosure exposes the individual “to discrimination and intolerance.”¹²² The Second Circuit applied a heightened (or intermediate) level of scrutiny and found that the plaintiff had something less than a fundamental right to privacy in certain information, and that the state may not disclose such information.¹²³

In addition, nonconforming documentation implicates another not-quite-fundamental right: the right to define one’s own existence, protected by the U.S. Supreme Court in both *Lawrence* and *Casey*. The *Lawrence* Court stated, “Liberty presumes an autonomy of self that includes freedom of thought, belief, [and] expression,” and, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, [and] of the universe.”¹²⁴ *Lawrence* focused on the law’s dignitary harms. Anti-sodomy laws generated further animosity toward an already misunderstood group by reinforcing existing negative attitudes and societal stigmas—that gay people were criminals and sexual deviants.¹²⁵ State laws restricting gender marker amendments have the same effect: transgender identities are not valid, and thus transgender people are viewed as confused or mentally ill.¹²⁶ Through nonconforming documentation, states delegitimize and invalidate transgender identities, paternalistically dictating transgender persons’ “true” gender to themselves and to society.

Finally, conditioning gender marker amendment upon reassignment surgery burdens a number of other fundamental rights. First, the surgery requirement is coercive¹²⁷ and infringes on the fundamental right to bodily autonomy and the fundamental right to refuse unwanted medical procedures.¹²⁸ Essentially, the state puts the transgender individual between a rock and a hard place, deciding between disclosing transgender status on documentation or receiving an unwanted and invasive medical procedure. Second, the result of reassignment surgery is permanent sterilization, infringing upon the fundamental right to reproductive autonomy¹²⁹ and family planning.¹³⁰

2. Does the State Policy Infringe on the Right?

A right is burdened if a state law or policy makes its exercise more difficult.¹³¹ The U.S. Supreme Court recognizes two types of burdens: (1) direct burdens, where the state policy intentionally regulates the right, and (2) incidental burdens, where the state policy does not seek specifically to infringe the right, but effectively hampers it nonetheless.¹³² The Court grants more deference to state

122. *Id.*

123. *Id.* at 112 n. 2.

124. *Lawrence*, 539 U.S. at 573.

125. Lawrence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1896 (2004).

126. Julie A. Greenburg & Marybeth Herald, *You Can’t Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 868 (2005).

127. See generally Silver, *supra* note 9.

128. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990).

129. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

130. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

131. Dorf, *supra* note 77, at 1176–77.

132. *Id.*

policies that produce incidental rather than direct burdens.¹³³ Furthermore, the Court is more likely to uphold policies that produce insubstantial burdens rather than substantial burdens.¹³⁴ To clarify, indirect burdens may be substantial, such as the burden placed on abortion access by a general law stating that two surgeons must agree before allowing a patient to undergo any surgical procedure.¹³⁵ And a direct burden may be insubstantial, such as the burden placed on the freedom of the press by a one-cent newspaper tax.¹³⁶

Restrictions on gender marker amendments impose substantial burdens on the rights of transgender people. The Court determines a burden's substantiality by examining its overall effect on those trying to exercise the right in question.¹³⁷ *Zablocki* concerned a Wisconsin law forbidding men who were late on child-support payments from marrying.¹³⁸ Similarly, the surgery requirement conditions the availability of conforming documentation upon the completion of reassignment surgery, which the individual may not desire. The *Zablocki* Court noted that some indigent men may never be able to marry due to an inability to pay alimony,¹³⁹ which directly parallels the prohibitively expensive requirement of reassignment surgery.¹⁴⁰ Due to costs and personal reasons, the vast majority of transgender people do not undergo reassignment surgery,¹⁴¹ and even those who do may be unable to obtain conforming documentation in states that prohibit birth certificate amendments altogether.¹⁴²

While a single-letter marker on a driver's license or a birth certificate may seem insignificant, it can drastically impact an individual's life. Indeed, these state policies directly burden transgender rights by limiting the ability of transgender people to obtain conforming documentation, infringing upon both the liberty interests of medical privacy and self-determination as articulated in *Lawrence*.¹⁴³ Additionally, these state laws indirectly burden other rights, including the right to bodily autonomy and even the right to vote.¹⁴⁴

133. *Id.* at 1177–78.

134. *Id.* at 1221.

135. *Id.*

136. *Id.* Both examples are from Professor Dorf, and the author utilized them only for their clarity.

137. Compare *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (stating that Wisconsin's marriage ban for people not paying alimony "substantially" interfered with the right to marry), with *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (stating that the federal law may deter only "some people" as the individual could still marry).

138. *Zablocki*, 434 U.S. at 374.

139. *Id.* at 387.

140. Silver, *supra* note 9, at 498 n.51.

141. Grant, *supra* note 2, at 79 (stating that 23% of MtFs and less than 5% of FtMs have had reassignment surgery).

142. See *infra* Appendix A (Idaho, Tennessee, and Ohio).

143. *Lawrence*, 539 U.S. at 579 (stating "petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'").

144. As an aside, these lists are not intended to be comprehensive, and many more rights may be directly or indirectly affected.

i. Direct Burdens

State policies restricting gender marker amendments impose a direct burden on transgender rights. First, the infringement is direct because the laws do not expand, but rather limit, one's ability to obtain gender-conforming documentation.¹⁴⁵ Indeed, the Maryland Court of Appeals noted in *Heilig* that courts routinely utilized equitable jurisdiction to issue declaratory actions to update and amend state documents.¹⁴⁶ In fact, the court recognized it could grant *any* order to amend a state document—including gender markers—under the common law.¹⁴⁷ The court presumed the Maryland legislature knew the common law prior to passing the statute, interpreting the law not as a limitation, but as legislative recognition of an individual's ability to change their sex.¹⁴⁸ However, *Heilig* remains a minority opinion, and most state courts do not read their state's statute through this lens.¹⁴⁹ Nevertheless, these restrictions directly single out gender amendments on state documents and limit the court's jurisdiction relative to the common law, creating a direct burden on transgender people's ability to obtain conforming documentation vis-à-vis cissexuals.

Further, these restrictions on courts' equitable jurisdiction create additional problems with immigration policies instituted by the Department of Homeland Security ("DHS").¹⁵⁰ To verify random identities, the department cross-references identities between the state DMV database and the Social Security Administration.¹⁵¹ However, because each agency sets their own standards for amending name and gender, an individual, through no fault of their own, may have conflicting identities between different agencies.¹⁵² Nevertheless, the DHS' protocol, upon finding a mismatch between the agencies, is to notify the individual's employer that its employee has "no match" between agencies.¹⁵³ Upon notification, employers often investigate the discrepancy and discover the employee is transgender.¹⁵⁴ Indeed, transgender people disproportionately show up in DHS cross-references due to being able to update gender markers with one agency but not another.¹⁵⁵

Second, the state's non-recognition of a transgender person's gender identity creates a social precedent that others follow. In *Lawrence*, the Court struck down Texas' sodomy ban for infringing upon the liberty interest of gay and lesbian couples to define their concept of existence without the state's moral judgment.¹⁵⁶

145. *In re Heilig*, 816 A.2d 68, 80–81 (Md. 2003).

146. *Id.*

147. *Id.*

148. *Id.*; see also Jeffery L. Friesen, *When Common Law Courts Interpret Civil Codes*, 15 WIS. INT'L L. J. 1, 10–11 (1996) (stating that absent a legislative intent, a court will not overturn the common law, but interpret statutory and common law in such a way that is consistent).

149. See *infra* Appendix A; see also *supra* Part I.A.

150. Spade, *supra* note 14, at 737.

151. *Id.*

152. *Id.* at 734.

153. *Id.* at 738.

154. *Id.*

155. *Id.*

156. Tribe, *supra* note 125, at 1896.

Essentially, the law in *Lawrence* was an attempt to stigmatize same-sex intimacy and reinforce negative perceptions of gay and lesbian people.¹⁵⁷ Similarly, states' refusal to amend gender markers on documents serves as a message that a transgender person's gender identity is incorrect; this directly burdens the liberty interest of self-determination.

In addition, when states send these messages, they create societal precedent. Forty percent of transgender people who present nonconforming documentation report harassment.¹⁵⁸ One of the most common forms of harassment is "misgendering," or identifying a transgender person with incorrect pronouns. This behavior stems from a disrespectful belief that a transgender person's gender identity is misguided and the person is confused.¹⁵⁹ The state, by invalidating a transgender person's gender identity, tacitly endorses this type of social harassment. Similar to a person referring to a homosexual as a "criminal" or a "sex offender" pre-*Lawrence*, a person misgendering a transgender person is not saying anything the state, acting as a proxy for society, does not recognize as true.

Further, many non-state actors will follow the state's social precedent, often resulting in the exclusion of transgender people from social benefits and protections; indeed, most homeless and abuse shelters segregate on the basis of birth gender.¹⁶⁰ Since shelters segregate on this basis, transgender men are housed with women and transgender women are housed with men, outing transgender people utilizing these services. Thus, it is not surprising that fifty-five percent of transgender people in homeless shelters report harassment, twenty-two percent report sexual assault, and twenty-nine percent report a complete inability to enter homeless shelters.¹⁶¹ Indeed, Dr. Kerith Conron stated it is impossible to get an accurate estimate of homeless transgender people because shelter policies constructively force so many of them to leave.¹⁶² Further, prisons segregate on the basis of genitals, housing pre-operative transgender women with men.¹⁶³ One study found almost two-thirds of transgender women in male prison report sexual abuse, which is well above the four percent reported among the general prison population.¹⁶⁴

Finally, these policies directly burden transgender people's liberty interest in medical privacy. While the right to medical privacy is not sacrosanct, there is a noticeable divide between cases upholding or invalidating state policies. If the information is collected, stored, and kept private, then the state is more likely to

157. *Id.*

158. Grant, *supra* note 2, at 139.

159. Jules Vilmur, *The Honey and Vinegar of Pronouns*, THE DAILY KOS (Feb. 3, 2013, 11:00 AM), <http://www.dailykos.com/story/2013/02/03/1184355/-The-Honey-And-Vinegar-of-Pronouns>.

160. Grant, *supra* note 2, at 106.

161. *Id.* at 4.

162. Mona Chalabi, *Why We Don't Know the Size of the Transgender Population*, FIVETHIRTYEIGHT (Jul. 29, 2014, 4:31 PM), <http://fivethirtyeight.com/features/why-we-dont-know-the-size-of-the-transgender-population/>.

163. Spade, *supra* note 14, at 782. It is also worth noting that some prisons segregate on the basis of birth sex, meaning that some post-op transwomen are imprisoned with men. *Id.*

164. JUST DETENTION INT'L, *Targets for Abuse: Transgender Inmates and Prison Rape* 1 (2015), <http://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf>.

prevail.¹⁶⁵ If the information is made public without serving a legitimate government interest then a court is less likely to uphold the state action.¹⁶⁶ Essentially, the government may collect, but not distribute, an individual's medical information. However, state policies inhibit transgender people from obtaining conforming documentation, forcing them to disclose their sensitive medical histories. In essence, the state transforms a person's means of identification—a necessity in today's society—into a *de facto* scarlet letter, disclosing their stigmatized status to society.

Since documentation is necessary and ubiquitous, forced disclosure of medical status occurs in several areas. For example, identity documentation is necessary for employment. Due to the Immigration Reform Control Act, employers must verify the citizenship of prospective employees.¹⁶⁷ While the statute allows several documents to prove citizenship,¹⁶⁸ employers most often rely on birth certificates and driver's licenses.¹⁶⁹ Possessing nonconforming documentation forces the individual to either explain the discrepancy and disclose their transgender status or forego employment to avoid the inevitably embarrassing situation. Indeed, one study found as many as seventy percent of transgender people in the United States are unemployed.¹⁷⁰ Almost fifty percent of transgender employees report experiencing an adverse employment action, and just over one in four individuals specifically report losing a job due to being transgender.¹⁷¹ With such bleak employment figures, it is no surprise that seventy-one percent of transgender employees hide their transgender status from their employers because they fear an adverse action.¹⁷²

Most jurisdictions lack gender identity protections in employment, further complicating employment matters.¹⁷³ In fact, of the twenty-four states requiring reassignment surgery to amend birth certificates, only seven have laws protecting transgender people in the workplace.¹⁷⁴ While some federal courts interpret Title VII to include a prohibition of gender identity and expression discrimination within the definition of "sex" discrimination, the circuits are split.¹⁷⁵ Indeed, most circuits

165. See also *In re Search Warrant* (sealed), 810 F.2d 67 (3rd Cir. 1987) (allowing a state to examine medical records regarding a patient's alleged insurance fraud). See generally *Whalen v. Roe*, 429 U.S. 589 (1977) (upholding New York's medical record collections for painkiller prescriptions to a secret database that only the state may access).

166. See generally *State ex Rel Callahan v. Kinder*, 879 S.W.2d 677 (Mo. App. 1994) (preventing an inmate's forcible HIV disclosure to a courthouse, which would then become part of the public record). See also *Jane Doe v. Borough of Barrington*, 729 F.Supp 376 (D.N.J. 1990).

167. 8 U.S.C.A. § 1324a(1)(B) (West 2015).

168. 8 U.S.C.A. § 1324a(b)(1)(C)(ii) (West 2015).

169. Spade, *supra* note 14, at 751–52.

170. *Id.*

171. Grant, *supra* note 2, at 53.

172. *Id.*

173. ACLU, Non-Discrimination Laws: State by State Information Map, ACLU, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>. Only 16 or 17 states have employment protections for gender identity. The three states that do not allow birth certificate amendments have no employment protections.

174. New Mexico, Colorado, Nevada, Illinois, New Jersey, Maine, and Massachusetts.

175. There is a circuit split on transsexualism falling under Title VII sex discrimination. Two courts find that it is *per se* sex discrimination. *Glenn v. Bumbry*, 663 F.3d 1312, 1316–18 (11th Cir. 2011); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008). Another court states that transsexual status does not spoil a valid title VII claim. *Smith v. City of Salem*, 378 F.3d 566, 571–75 (6th Cir. 2004).

have not ruled on whether Title VII protection applies to transgender employees.¹⁷⁶ Essentially, the lack of adequate legal protections puts many transgender employees in a winless situation because most transgender people must disclose their gender identity via birth certificates during the employment process, after which employers can openly discriminate against them, while prospective employees have no legal recourse. The situation is further complicated by the fact that even when legal protections exist, they are *ad hoc* and the evidentiary burdens can be difficult to prove.¹⁷⁷

This forced disclosure and subsequent discrimination is an issue outside of just employment. In housing, nineteen percent of transgender people report discrimination, and eleven percent report eviction due to their landlords discovering their gender identity.¹⁷⁸ Regarding police, twenty-two percent of transgender individuals report harassment from law enforcement, six percent report physical assault, and two percent report sexual assault.¹⁷⁹ Additionally, in New York City, fifty-nine percent of transgender women report being detained by police and profiled as sex workers due to being transgender.¹⁸⁰

ii. Incidental Burdens

In addition, the policies incidentally burden the rights of transgender people. Typically, incidental burdens arise when a policy seeks to regulate one phenomenon but collaterally inhibits the practice of a right. Generally, courts grant more deference to burdens that are incidental as opposed to direct. In the area of gender marker amendments, state policies condition conforming documentation on reassignment surgery, which incidentally burdens the right to bodily autonomy and even the right to vote.

The surgical requirement incidentally burdens the right to bodily autonomy as it coerces the individual to undergo unwanted and unnecessary surgery if they wish to change their gender marker and obtain conforming documentation that would allow one to enjoy the full benefits of society.¹⁸¹ Most concerning, the surgical requirement turns invasively and voyeuristically on whether the individual has undergone reassignment surgery rather than the validity of gender dysphoria, which compels the individual's cross-gender identification. Thus, the state focuses less on the individual and more on the medical procedure, violating the individual's bodily autonomy and their right to define their gender identity absent unwanted surgeries.¹⁸²

Finally, the third view holds that Title VII protects "males and females" and not transsexuals. *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007).

176. *Id.*

177. Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 452 (2012).

178. Grant, *supra* note 2, at 4.

179. Grant, *supra* note 2, at 158.

180. MAKE THE ROAD NEW YORK, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights* 4 (Oct. 23, 2012), http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf.

181. Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, TRANSGENDER RIGHTS, 217, 228 (Paisley Currah et al. eds., 2006), <http://www.deanspade.net/wp-content/uploads/2010/07/complianceisgendered1.pdf>.

182. Silver, *supra* note 9, at 504.

Additionally, nonconforming documentation burdens transgender people's voting rights. The Supreme Court held voting is a fundamental right.¹⁸³ However, since 2010, thirty-four states have passed voter identification laws requiring voters to present photo-identification to poll-workers before voting.¹⁸⁴ People lacking adequate identification cannot vote.¹⁸⁵ Adequate identification is a photographic ID or a driver's license lacking anomalies.¹⁸⁶ Many transgender voters do not update their driver's licenses.¹⁸⁷ Indeed thirty-three percent of transgender people do not possess any conforming identification.¹⁸⁸ Thus, a person appearing to be a male may present a female driver's license at a poll location only to be turned away, unable to vote. As a result, many transgender voters are disenfranchised.¹⁸⁹ A recent report out of the Williams Institute estimated 24,000 transgender voters in ten states may have been disenfranchised in 2014 as a result of voter identification laws and an inability to obtain conforming documentation.¹⁹⁰ This number is likely an underestimate because an additional twenty-four states have similar voter identification laws.¹⁹¹ Finally, since the Court upheld the validity of voter ID laws,¹⁹² states with these laws have a stronger obligation to provide individuals with the conforming documentation necessary to exercise the right to vote.

3. *Is the Government Action Justified by Sufficient Purpose?*

The third prong examines the state interests behind the policy in dispute. The Court classifies the state interest as (from most to least significant) compelling, important, legitimate, or none of the above.¹⁹³ States generally raise three interests to justify their policies regarding gender marker amendments: (1) accurate records and government efficiency, (2) prevent fraud, and (3) national security.¹⁹⁴

The first state interest is keeping and maintaining accurate records for government purposes.¹⁹⁵ The argument posits that, until surgery, a transgender woman is male, and the record should reflect that. However, various agencies are enhanced by allowing these amendments, as public identification is easier with a

183. See U.S. CONST., art. II; U.S. CONST. amend. XV, XIX, XXIV, and XXVI; see generally *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (holding that New York's policy of allowing only people living in the school zone or parents sending children to the school to vote on school board elections was not narrowly tailored).

184. Jody Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2014 General Elections*, THE WILLIAMS INSTITUTE 1 (Sept. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/voter-id-laws-september-2014.pdf>.

185. *Id.* at 2.

186. *Id.*

187. *Id.*

188. Grant, *supra* note 2, at 139.

189. Herman, *supra* note 184, at 2.

190. *Id.* at 4.

191. *Id.* at 1.

192. See generally *Veasey v. Perry*, 135 S.Ct. 9 (2014).

193. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

194. Mottet, *supra* note 17, at 413–16.

195. Kristin Wenstrom, "What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificates Amendment Policies, 17 LAW & SEXUALITY REV. LESBIAN GAY BISEXUAL & LEGAL ISSUES 131, 146 (2008).

state record that conforms to the individual.¹⁹⁶ Additionally, conforming documentation makes cross-referencing more efficient because the individual would have one and not two identities between government agencies. The Supreme Court has stated the government has a legitimate interest in “promoting efficiency and integrity in the discharge of official duties.”¹⁹⁷

Another interest states often raise is that people may abuse an amendment system, so the state should not grant amendments until the person has undergone permanent alterations.¹⁹⁸ The fear is people may pretend to transition to commit fraud, and the state should not burden itself unless the individual can show their cross-gender identification is real. However, as noted in *Heilig*, reassignment surgery is not the only permanent procedure an individual can undergo.¹⁹⁹ Indeed, a number of other medical surgeries are equally permanent.²⁰⁰ Contrary to *Heilig*, even hormone-replacement therapy causes permanent changes.²⁰¹ Along this line, many states argue that allowing amendments may incentivize same-sex couples to abuse the process to get married.²⁰² However, such an interest is moot as same-sex marriage bans were declared unconstitutional in the case of *Obergefell v. Hodges*.²⁰³ While the Supreme Court has noted that preventing fraud is a legitimate government interest, if the Court believes the state is invoking fraud as a pretext to harm an unpopular minority, then it will deem the interest as neither compelling, important, nor legitimate.²⁰⁴ Further, while the state has interests in preventing fraud and maintaining accurate records, these interests are similarly protected by policies that do not require reassignment surgery.

The third interest states typically propose for the surgical requirement is national security. Indeed, the belief terrorists may pretend to be transgender in order to elide security measures is not rare.²⁰⁵ National security concerns and federal standardization of state documents ultimately led New York to retain the surgical requirement in 2006.²⁰⁶ Additionally, some proposed amendments to the 2005 REAL ID Act would require magnetic strips on driver’s licenses to contain information related to previous names and gender.²⁰⁷ Most national security concerns focus not on intentional regulation of transgender documents, but rather

196. Mottet, *supra* note 17, at 415.

197. Connick v. Myers, 461 U.S. 138, 150–51 (1983).

198. Mottet, *supra* note 17, at 416 n. 181 (quoting New York City’s health commissioner as saying “surgery versus nonsurgery can be arbitrary. . . . Somebody with a beard may have had breast-implant surgery. It’s the permanence of the transition that matters most”).

199. *In re Heilig*, 816 A.2d 68, 85–87 (Md. 2003).

200. *See id.*

201. *See* Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE. W. RES. J. INT’L L. 393, 396 n. 12 (2007).

202. Littleton v. Prange 9 S.W.3d 223 (Tex. App. 1999) (stating about gender “There are some things we cannot will into being. They just are” to deny the validity of a marriage between a cissexual male and a post-operative transgender female); *see generally In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *In Re Nash*, Nos. 2002-T-0149 & 2002-T-0179, WL 23097095 (Ohio Ct. App. 2003) (voiding a marriage between a woman and a post-op transsexual male due to the state’s ban on same sex marriage).

203. 135 S. Ct. 2584 (2015).

204. *See* Department of Agriculture v. Moreno, 413 U.S. 528, 535 (1973).

205. *See* Spade, *supra* note 14, at 808–09 n. 350 (noting that in 2002, “the Department of Transportation issued a warning to airport security to look out for ‘men in dresses’ as potential threats”).

206. *Id.* at 793.

207. *Id.* at 798.

on the process of standardizing these documents throughout the state.²⁰⁸ Still, advocates remain skeptical that terrorists may pretend to be transgender to evade security measures, stating “the last thing a person who is trying to blend in and escape notice should do is dress in the opposite gender.”²⁰⁹ In the past, the Supreme Court has held that national security is a compelling government interest.²¹⁰

4. *Are the Government’s Means Justifiably Related to the Ends Sought?*

The final prong of the fundamental rights analysis examines the means-ends fit between the state’s and individual’s interests. If the court determines that a right is fundamental, then it should apply strict scrutiny and require the state’s policy be “narrowly tailored” to achieving a “compelling government interest.”²¹¹ If the court determines a right is not fundamental, then it should apply rational basis review, which only requires that the state policy be “reasonably related” to achieving a “legitimate interest.”²¹² Finally, if the individual’s liberty interest is something less than a fundamental right but should be reviewed under a more stringent standard than rational basis review, then the court should apply intermediate scrutiny requiring the state policy to “substantially relate” to achieving an “important interest.”²¹³

Here, the proper level of review is likely intermediate scrutiny. The right to medical privacy is “something less than fundamental,” and often receives intermediate scrutiny.²¹⁴ Further, one of the few cases to hear the issue of transgender marker amendments used language implying the application of intermediate scrutiny.²¹⁵ In addition, the Eastern District of Michigan recently heard a case dealing with the issue of gender marker amendments to driver’s licenses, and it applied strict scrutiny, noting the plaintiffs’ interest in privacy.²¹⁶

Should a court apply intermediate scrutiny, these policies would not suffice. National security aside, state interests behind the surgical requirement are at most legitimate and not important interests according to prior Supreme Court cases.²¹⁷ Even if we assume these interests are important, they still fail because they do not substantially relate to the ends sought. Indeed, each of these interests, including national security, suffers from a fatal flaw that attenuates the relation between the policy and the state’s interest.²¹⁸

208. *Id.* at 808 n. 350.

209. Mottet, *supra* note 17, at 414.

210. *See generally* *Snepp v. U.S.*, 444 U.S. 507 (1980).

211. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

212. *Id.*

213. *Id.*

214. *Powell v. Schriver*, 175 F.3d 107, 112 (2d Cir. 1999) n.2.

215. *Darnell v. Lloyd*, 395 F.Supp. 1210, 1214 (D. Conn. 1975).

216. *Love v. Johnson*, 2015 WL 7180471, *5 (Nov. 16, 2015 E.D. Mich.) (applying strict scrutiny to deny Michigan’s motion to dismiss the plaintiffs’ 42 U.S.C. § 1983 suit brought by six transgender individuals against Michigan for requiring an amended birth certificate to amend their driver’s licenses).

217. *See Moreno*, 413 U.S. at 535 (finding that preventing fraud is a legitimate interest); *see also Connick v. Myers*, 461 U.S., 150–51 (finding government efficiency and accurate records is a legitimate interest).

218. *See supra* Part III.A.3.

Nevertheless, even were a court to apply rational basis these policies would still fail because they do not serve a legitimate interest. As noted in *Department of Agriculture v. Moreno*,²¹⁹ a bare desire to harm an unpopular minority cannot suffice for a legitimate government interest.²²⁰ In contrast, states did not craft policies requiring reassignment surgery to stigmatize transgender people. Instead, states adopted these policies to allow transgender people to obtain conforming documents, fashioning their laws after the MSVSA, which adopted the medical consensus of its time.²²¹ However, the medical community's view of gender non-conformity during this period was rigid and paternalistic.²²² Since then, the medical community abandoned requiring reassignment surgery.²²³ Thus, these laws were adopted due to a simplistic and outdated view of gender non-conformity and not a bare desire to harm or stigmatize.

Nevertheless, today states cannot insist they retain the surgical requirement to accommodate transgender people. The field of transgender health care is evolving and the law should depend on the medical science.²²⁴ When states ignore the current medical view and retain outdated policies, they do not serve the best interest of their people. Indeed, both WPATH²²⁵ and the AMA²²⁶ removed the surgical requirement finding that it caused the patient more harm than good.

B. *Cruzan Balancing Analysis*

An alternative test courts might apply in evaluating whether gender amendment restrictions violate a transgender person's substantive due process rights is the *Cruzan* balancing test. In cases where both the state and the individual have vital interests, a court may weigh the interests of the two to determine whether the state policy is justified.²²⁷ The Court considers several factors under this test.²²⁸ Because of this, the test sometimes appears similar to rational basis and other times more similar to strict scrutiny.²²⁹ States most often prevail when invoking their police powers to protect the public's "general comfort, health, and prosperity,"²³⁰ as well as safety.²³¹ As previously stated, the surgical requirement does little to achieve these interests, while requiring a highly intrusive

219. 413 U.S. 528 (1973).

220. *Id.* at 534–35.

221. *See supra* Part I.

222. WPATH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 8 (1st ed. 1979) (stating "The patient must demonstrate that the sense of discomfort with the self and urge to rid the self of the genitalia and wish to live in the genetically oppose sex role existed for at least 2 years.").

223. *See* Coleman et al. and Am. Med. Ass'n, *supra* note 5.

224. *In Re Heilig*, 372 Md. 692, 710 (2002).

225. Coleman et al., *supra* note 5, at 2.

226. Am. Med. Ass'n., *supra* note 5.

227. *See generally* Caitlin Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059 (2014).

228. *Id.* at 1067.

229. *Id.* at 1069.

230. *Id.* at 1077.

231. *Id.* at 1092.

burden from the individual. Thus courts should not apply deferential review to laws requiring reassignment surgery to amend documents.

To illustrate the balancing approach, it might be helpful to view various stages of transition as a continuum from left to right: facial hair removal, therapist recognition of gender dysphoria, hormone replacement therapy, breast augmentation, hysterectomy, and reassignment surgery. If the policy is further to the left, it is easier for both cisgender and transgender individuals to amend documents. The further right the state goes, the harder it is for an individual to obtain conforming documentation.²³² The illustration highlights that transgender people generally desire to go further right. Conversely, cisgender people trying to abuse the system want to stay to the left to avoid permanent and costly procedures. Thus, beyond a certain point, there are diminishing returns to the policies: each step to the right prevents a larger number of transgender people from obtaining conforming documents while preventing fewer instances of abuse. Ideally, public policy should strike a balance that both deters the most amount of fraud while allowing the greatest number of transgender people to obtain conforming documents.

As stated in Part III.A.3, states present three interests for requiring reassignment surgery to amend state documents: (1) accurate records and government efficiency, (2) fraud, and (3) national security.

Similarly, transgender people have several interests in obtaining conforming documentation. The first interest is social recognition. As stated, government recognition of sex serves as a proxy for society.²³³ This interest is two-fold. First, it tells society that it is wrong to invasively question a transgender person's gender identity.²³⁴ Second, it tells transgender people that their gender identities are valid and they are accepted to participate in society.²³⁵

Additionally, transgender people have an interest in forgoing a surgical procedure they may not feel is necessary for their happiness.²³⁶ Much like *Cruzan* recognized, people have a common law right to be free of an unwanted medical procedures.²³⁷ Indeed, "the inviolability of the human body is the most important aspect of privacy,"²³⁸ and the right is "as old as the common law."²³⁹ However, states condition the first interest (social acceptance) on obtaining reassignment surgery, unfairly coercing transgender people into the unwanted medical procedures *Cruzan* was meant to protect against.²⁴⁰ The individual also has an interest in documentation that does not disclose their sensitive medical

232. Grant, *supra* note 2, at 139 (noting that only 24% of transsexuals have a conforming birth certificate).

233. Wenstrom, *supra* note 195, at 136.

234. *Id.*

235. *Id.*

236. Grant, *supra* note 2, at 85 (stating that about one half of transsexual males have no interest in reassignment surgery).

237. Borgmann, *supra* note 227, at 1063.

238. *Id.*

239. *Id.* at 1106.

240. Silver, *supra* note 9, at 489–90.

information.²⁴¹ Additionally, nonconforming documentation most often “outs” transgender people to society, often resulting in harassment, violence, or death.²⁴²

Finally, transgender people have an interest in possessing identical cross-agency identification. As the war on terror continues and an increasing number of government agencies cross-reference identities, more rights and privileges may inevitably become conditioned on conforming documentation and records.²⁴³ Federal policies cause state DMVs and the Social Security Administration to cross-reference records with other agencies.²⁴⁴ When a cross-reference results in a “no match,” either the SSA notifies the employer of the discrepancy or the DMV revokes the individual’s driving privileges.²⁴⁵ As technology improves and these processes become cheaper, it is intuitive they will become more prevalent. With increased reliance on cross-referencing to deter fraud, more rights and privileges may depend upon various agencies having identical records. Thus, it is imperative for transgender people to obtain conforming documents.²⁴⁶

IV. IDEAL POLICY PROPOSAL

The ideal policy balances the state’s interests in accurate documentation with the transgender person’s interest in privacy, dignity, and autonomy. As stated in *Lawrence*, there is a “realm of personal liberty that the government may not enter.”²⁴⁷ The state has an interest it may safeguard, however, beyond a certain point, it cannot justify its intrusion into the individual’s life.

Primarily, the surgical requirement to amend state documents should be struck as violating substantive due process. While states implemented the surgical requirement to accommodate transgender people who wished to obtain conforming documentation, it now reflects an outdated view of gender transition. Early views believed all transgender people had similar formative experiences and thus desired similar experiences from their transitions. Today, this belief coerces transgender people into undergoing surgeries they may not desire thereby violating both their dignity and bodily autonomy. Additionally, rejecting the surgical requirements represents a growing consensus among states and the global community.²⁴⁸ Indeed, the United Nations recently stated surgical requirements for transgender and intersex people are a violation of basic human rights.²⁴⁹

More so, the surgical requirement is untenable with the current medical needs of transgender people. Transgender individuals largely seek to “pass” as their identified gender and blend-in among society,²⁵⁰ which the surgical requirement

241. See *supra* Part III.A.2.i.

242. Wenstrom, *supra* note 195, at 136.

243. Spade, *supra* note 14, at 791.

244. *Id.* at 797.

245. *Id.* at 797–801; see also Wenstrom, *supra* note 195, at 146.

246. See generally Spade, *supra* note 181, at 228.

247. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

248. Coleman et al. and Am. Med. Ass’n, *supra* note 5.

249. WORLD HEALTH ORGANIZATION ET AL., ELIMINATING FORCED, COERCED AND OTHERWISE INVOLUNTARY STERILIZATION 7–8 (2014), http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1.

250. See Abigail W. Lloyd, Note, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 151 n. 2 (2005).

inhibits via nonconforming documentation disclosing a private medical status. Indeed, the only way the individual may obtain conforming documentation while minimizing disclosures and discrimination is to undergo costly and invasive surgery they may not wish to have. In essence, the requirement places surgical and financial burdens on an otherwise marginalized group should they wish to blend into society.

States may require court orders to amend state documents, but this only occurs under limited situations. Much like *Casey*, requiring an individual to petition a court and present affidavits from therapists is not so intrusive to the individual. However, court orders should be kept under seal and not become part of the public record. As several HIV cases noted, forced disclosures to the court violated the petitioners' right to privacy as the disclosures became viewable by the public.²⁵¹ Gender nonconformity is similarly situated because it is socially stigmatized and an intimate medical diagnosis.

Therefore, the ideal policy allows transgender people to amend gender markers with a therapist's recommendation. First, this policy grants the individual acceptance and recognition in their gender transition, which can be a tumultuous time. Second, it allows transgender people to keep intimate medical history private, minimizing discrimination that they might face. Third, requiring a therapist's support acts as a gate-keeper against people who may abuse the system to commit fraud.

Finally, this ideal proposal is also endorsed by the AMA²⁵² and WPATH.²⁵³ Therefore, it represents the current medical consensus. Speaking for the AMA, its President Ardis Dee Hoven said, "For many transgender people, a needless operation should not be a government requirement to amend a sex designation on a birth certificate." Additionally, WPATH stated gender identity documents should depend on "self-defined gender," and the process should be "simple, timely, [and] low cost or free."²⁵⁴

CONCLUSION

In conclusion, most transgender people generally cannot obtain conforming documents. Possessing nonconforming documentation forces the individual to disclose sensitive medical history, prevents the individual from enjoying the full rights and privileges of society, and acts as a moral judgment invalidating the individual's gender identity. More so, the surgical requirement infringes the fundamental rights of bodily autonomy, forgoing unwanted medical treatment, and procreation through sterilization of the individual. Additionally, these laws cannot stand under an individual-state balancing test. The individual is subject to excessive and invasive burdens that do nothing to benefit public health, welfare, or safety. In sum, nonconforming documentation and the surgical requirement raise substantive due process concerns.

Finally, courts should require states to allow document amendments absent reassignment surgery. States may require medical proof before amending

251. See generally *Doe v. Se. Pennsylvania Transp. Auth.*, 72 F.3d 1133 (3d Cir. 1995); see also Mottet, *supra* note 17, at 437.

252. Am. Med. Ass'n., *supra* note 5.

253. Coleman et al., *supra* note 5, at 2.

254. *Id.* at 9.

documents, but such proof should be limited to a therapist's affidavit indicating the patient is undergoing treatment for gender dysphoria. This proposal adequately balances the state interests with those of the individual because therapists can act as gate-keepers and prevent potential abuses of the system, and transgender people can more easily obtain conforming documentation. Moreover, therapists are in a better position to know what is best for transgender patients than the state is. As medical knowledge of gender non-conformity continues to expand, the surgical requirement now stands as an unnecessary and cruel violation of transgender people's substantive due process rights and dignity.

APPENDIX A - BIRTH CERTIFICATE AMENDMENTS LAWS

State	SRS ²⁵⁵ required	Court Order Required	Therapist Approval	Additional Information
Alabama ²⁵⁶	X	X		
Alaska ²⁵⁷	X	X		SRS is not required by statute, but is required by the state Office of Vital Statistics (“OVS”). ²⁵⁸
Arizona ²⁵⁹	X			Will also amend a birth certificate if a chromosome test shows a nontraditional set.
Arkansas ²⁶⁰	X	X		
California ²⁶¹			X	
Colorado ²⁶²	X	X		
Connecticut ²⁶³			X	Will issue amended birth certificates for Connecticut residents born in other states. ²⁶⁴
Delaware ²⁶⁵				
District of Columbia ²⁶⁶			X	

255. Sexual Reassignment Surgery

256. ALA. CODE §22-9a-19(d) (1997) (stating “[u]pon 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” [hereinafter MSVSA policy]).

257. ALASKA STAT. §18.50.290 (2005) (stating “[u]pon receipt of a certified copy of a court order...”).

258. See Diana Steen, *US States & Canadian Provinces: Changing Name and Gender on Birth Certificate*, SOUTHERN ARIZONA GENDER ALLIANCE (2003), <http://sagatucson.org/downloads/BirthCertificateChanges.pdf>.

259. ARIZ. REV. STAT. ANN. § 36-337 (A)(3) (2006) (stating “[t]he state registrar shall amend birth certificates... [f]or a person who has undergone a sex change operation or has a chromosomal count that establishes the sex of the person different than in the registered birth certificate”).

260. ARK. CODE ANN. § 20-18-307(d) (2005) (requiring MSVSA Policy).

261. CAL. HEALTH & SAFETY CODE § 103426 (2014).

262. COLO. REV. STAT. § 25-2-115(4) (2006) (requiring MSVSA Policy).

263. CONN. AGENCIES REGS. §19a-41-9(e).

264. CONN. GEN. STAT. § 19a-42b (stating “[i]n the case of a person who is a resident of this state and was born in another state. . . the probate courts in this state shall have jurisdiction to issue such a decree of a change of sex”).

265. 16-4000-4200 DEL. ADMIN. CODE § 4205(10.9.4) (requiring MSVSA Policy).

266. D.C. CODE ANN. § 7-217(d) (West 2013), *amended by* JAPARKER DEONI JONES BIRTH CERTIFICATE EQUALITY AMENDMENT ACT OF 2013, D.C. Law 20-37 §(11a)(a)(2)(A) (effective Nov. 5, 2013) (2013) (requiring physician’s affidavit indicating that “individual has undergone surgical, hormonal, or other treatment. . . for the purpose of gender transition”).

Florida ²⁶⁷	X	X		State OVS interprets statute to require SRS. ²⁶⁸
Georgia ²⁶⁹	X	X		
Hawaii ²⁷⁰	X			
Idaho ²⁷¹				Statute is silent on transsexual amendments, but the State OVS does not allow. ²⁷²
Illinois ²⁷³	X			State OVS interprets statute to require SRS. ²⁷⁴
Indiana ²⁷⁵		X		
Iowa ²⁷⁶			X	While code requires surgery, SRS is not required and a surgeon's approval suffices. ²⁷⁷
Kansas ²⁷⁸	X	X		
Kentucky ²⁷⁹	X	X		
Louisiana ²⁸⁰	X	X		
Maine ²⁸¹			X	Statute does not mention SRS, state OVS requires transition be completed. ²⁸²

267. FLA. ADMIN. CODE ANN. R. 64V-1.003(1)(f) (2006).

268. Steen, *supra* note 258.

269. GA. CODE ANN. § 31-10-23(e) (2005) (requiring MSVSA Policy).

270. HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (2005) (requiring that a surgeon verify that “[t]he birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct”).

271. IDAHO ADMIN. CODE § 16.02.08.201 (2006).

272. Steen, *supra* note 258.

273. 410 ILL. COMP. STAT. 535/17(1)(d) (2006) (requiring “[a]n 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”).

274. Steen, *supra* note 258.

275. IND. CODE ANN. § 16-37-2-10(b) (2006) (requiring only “adequate documentary evidence” to amend birth certificates).

276. IOWA CODE ANN. § 144.23(3) (2004) (requiring “[a] notarized affidavit by a licensed [physician]. . . stating that by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed”).

277. Lambda Legal, *Changing Birth Certificate Sex Designations: State-by-State Guidelines* (Feb. 3, 2015), <http://www.lambdalegal.org/publications/changing-birth-certificate-sex-designations-state-by-state-guidelines>.

278. KAN. ADMIN. REGS. § 28-17-20(b)(1)(A)(i) (2006).

279. KY. REV. STAT. ANN. § 213.121(5) (2005) (requiring MSVSA Policy).

280. LA. REV. STAT. ANN. § 40:62.A (2006).

281. ME. REV. STAT. ANN. tit 22, § 2705 (2005).

282. Lambda Legal, *supra* note 277.

Maryland ²⁸³		X	X	State has generic MSVSA statute, but it is interpreted by the court to only require “permanent” change under <i>In re Heilig</i> . ²⁸⁴
Massachusetts ²⁸⁵	X			
Michigan ²⁸⁶	X			
Minnesota ²⁸⁷		X	X	Statute does not mention amendments for gender markers, state OVS requires two therapists’ approvals and a court order. ²⁸⁸
Mississippi ²⁸⁹			X	
Missouri ²⁹⁰	X	X		
Montana ²⁹¹	X	X		
Nebraska ²⁹²	X	X		
Nevada ²⁹³	X	X		
New Hampshire ²⁹⁴	X	X		
New Jersey ²⁹⁵	X	X		House Bill No. 2659 was proposed in Feb. 2014. If passed, it only requires therapist approval. ²⁹⁶
New Mexico ²⁹⁷	X	X		
New York City ²⁹⁸	X	X		
New York State ²⁹⁹			X	

283. MD. CODE ANN, [HEALTH-GEN.] § 4-214(b)(5) (2006) (requiring MSVSA Policy).

284. 816 A.2d 68, 87 (Md. 2003).

285. MASS GEN. LAWS ANN. CH. 46, § 13(e) (2006) (“If a person has completed sex reassignment surgery, ... the birth record of said person shall be amended to reflect the newly acquired sex and name.”).

286. MICH. COMP. LAWS ANN. § 333.2831(c) (2006).

287. MINN. R. 4601.1100(7) (2006).

288. Lambda Legal, *supra* note 277.

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

290. MO. ANN. STAT. § 193.215(9) (2006) (requiring MSVSA Policy).

291. MONT. ADMIN. R. 37.8.311(5) (requiring MSVSA Policy).

292. NEB. REV. STAT. § 71-604.01 (2005).

293. NEV. ADMIN. CODE. Ch. 440, § 130 (2006) (requiring patient undergo a “sexual transformation”).

294. N.H. REV. STAT. ANN. § 5-C:87 (requiring MSVSA Policy).

295. N.J. STAT. ANN. § 26:8-40.12(a) (2006).

296. Assemb. B. 2659, 216th Leg., Reg. Sess. (N.J. 2014).

297. N.M. STAT. ANN. § 24-14-25(D) (2006) (requiring MSVSA Policy).

298. N.Y. COMP. CODES R. & REGS. Tit. 24, § 207.05 (requiring “convertive surgery”); *see also* Birney v. New York City Dept. of Health and Mental Hygiene, 950 N.Y.S.2d 607 (N.Y. Sup. Ct. 2012) (interpreting “convertive surgery” to require SRS).

299. N.Y. COMP. CODES R. & REGS. Tit 10, § 35.2 (2014).

North Carolina ³⁰⁰	X			
North Dakota ³⁰¹	X	X		
Ohio ³⁰²				
Oklahoma ³⁰³	X			State OVS interprets statute to require SRS. ³⁰⁴
Oregon ³⁰⁵		X	X	
Pennsylvania ³⁰⁶	X	X		State OVS interprets statute to require SRS. ³⁰⁷
Rhode Island ³⁰⁸		X	X	
South Carolina ³⁰⁹	X			State OVS interprets statute to require SRS. ³¹⁰
South Dakota ³¹¹	X			State OVS interprets statute to not require SRS. ³¹²
Tennessee ³¹³				
Texas ³¹⁴	X			State OVS interprets statute to require SRS. ³¹⁵
Utah ³¹⁶		X	X	
Vermont ³¹⁷		X	X	
Virginia ³¹⁸	X	X		

300. N.C. GEN. STAT. §§ 130A-118(b)(4), (e) (2005).

301. N.D. ADMIN. CODE § 33-04-12-02 (2006).

302. *In Re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (finding that the purpose of Ohio Revised Code 3705.22 is to amend clerical errors on birth certificates and not to allow transsexuals to update gender markers).

303. 63 OKL. STAT. ANN. § 1-321 (2006).

304. Lambda Legal, *supra* note 277.

305. OR. ADMIN. R. 333-011-0275(1)(e) (2014) (requiring patient “completed sexual reassignment”).

306. 35 PENN. STAT. § 450.603 (2005).

307. Lambda Legal, *supra* note 277.

308. RI ADC 31-1-29:35.0.

309. S.C. CODE ANN. § 44-63-150 (2005).

310. Steen, *supra* note 258, at 22.

311. ARSD 44:09:05:02 (2006).

312. Lambda Legal, *supra* note 277.

313. TENN. CODE ANN. § 68-3-203(d) (2006).

314. TEX. HEALTH & SAFETY CODE § 191.028 (2009).

315. Lambda Legal, *supra* note 277.

316. UTAH CODE ANN. 1953 § 26-2-11 (West 1995).

317. 18 VT. STAT. § 5112 (2011).

318. 12 VA. ADMIN. CODE § 5-550-320 (2006).

Washington		X	X	Washington state does not have a statute regarding birth certificate amendments, though the OVS issues amended birth certificates upon a therapist's approval. ³¹⁹
West Virginia ³²⁰	X	X		Statute does not mention amendments for transsexuals, though the state OVS interprets statute to require SRS and a court order. ³²¹
Wisconsin ³²²		X	X	
Wyoming ³²³		X		

319. Lambda Legal, *supra* note 277.

320. W. VA. CODE § 16-5-25 (2006).

321. Lambda Legal, *supra* note 277.

322. WIS. STAT. ANN. § 69.15 (2006).

323. WY RULES AND REGULATIONS HLTH VR CH. 10 s 4(e)(iii) (2004).

APPENDIX B - DRIVER'S LICENSE AMENDMENT POLICIES

State ³²⁴	SRS required	Therapist Approval	Court Order	Any other conforming documentation	Conforming Birth Certificate
Alabama	X				
Alaska				X	
Arizona		X			
Arkansas	X				
California		X			
Colorado		X			
Connecticut		X			
Delaware		X			
District of Columbia		X			
Florida		X			
Georgia	X				
Hawaii		X			
Idaho		X			
Illinois		X			
Indiana					X
Iowa					X
Kansas	X				
Kentucky					X
Louisiana	X				
Maine		X			
Maryland		X			
Massachusetts		X			
Michigan					X
Minnesota		X			
Mississippi					X
Missouri	X				
Montana					X
Nebraska		X			
Nevada		X			
New Hampshire		X			
New Jersey		X			
New Mexico		X			
New York		X			
North Carolina	X				
North Dakota		X			
Ohio		X			
Oklahoma	X				
Oregon		X			
Pennsylvania			X		

324. ID Documents Center, NATIONAL CENTER FOR TRANSGENDER EQUALITY, (last updated Feb. 1, 2016) <http://www.transequality.org/documents>.

Rhode Island		X			
South Carolina			X		
South Dakota		X			
Tennessee	X				
Texas	X				
Utah				X	
Vermont		X			
Virginia		X			
Washington		X			
West Virginia			X		
Wisconsin		X			
Wyoming	X				