

# COMMENT

## “What the Birth Certificate Shows”<sup>1</sup>: An Argument To Remove Surgical Requirements from Birth Certificate Amendment Policies

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Most jurisdictions in the United States have laws and policies that exclude a majority of transgender<sup>1</sup> people from amending the gender

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\* This comes from a statement made by the New York City Health Commissioner, Dr. Thomas R. Frieden, when it was announced that the Board of Health had withdrawn the nonsurgical birth certificate amendment proposal. See Kenji Yoshino, *Sex and the City, New York City Bungles Transgender Equality*, SLATE, Dec. 11, 2006, <http://www.slate.com/id/2155278>.

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1.

“Transgender” is an umbrella term that includes anyone whose gender identity and/or gender expression does not match society’s expectations of how an individual who was assigned a particular sex at birth should behave in relation to their gender. The term includes, but is not limited to:

- pre-operative, post-operative and non-operative transsexuals who may or may not use hormones;
- intersex individuals;
- persons exhibiting gender characteristics and identities that are perceived to be inconsistent with their gender at birth;

designation on their birth certificate.<sup>2</sup> This exclusion prevents these transgender people from acquiring congruent identity documents that are necessary for obtaining employment, benefits, and services.<sup>3</sup> Almost all birth certificate amendment policies require medical evidence that the applicant has undergone genital sex-reassignment surgery in order for a revised certificate to be issued.<sup>4</sup> This requirement does not comport with current understandings of transgender health care that recognize that gender transition is a personal and individualized process.<sup>5</sup> Because the

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- persons perceived to be androgynous;
  - transvestites;
  - cross-dressers; or,
  - drag queens or kings.

NEW YORK CITY COMM'N ON HUMAN RIGHTS, GUIDELINES REGARDING "GENDER IDENTITY" DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW (TITLE 8 OF THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK) 2, [www.nyc.gov/html/cchr/pdf/trans\\_guide.pdf](http://www.nyc.gov/html/cchr/pdf/trans_guide.pdf) (last visited Jan. 15, 2008). The author of this Comment uses the phrases "lived gender" and "self-identified gender" to refer to "the gender with which a person identifies, which may differ from the gender that person was assigned at birth." Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 713 n.1 (2005). The author of this Comment uses the term "transsexual" to refer to people who identify as such or who are referred to in that manner in court opinions. This term fits under the "transgender umbrella" and is frequently used to describe people who have pursued, or desire to pursue, gender-affirming medical care including, but not limited to, hormone therapy and/or gender-related surgeries. *See id.* Despite these generally accepted terms and definitions, the author recognizes that gender and gender identity are very personal and individualized and that both labels and definitions can legitimate while at the same time fail to capture the diversity of people's lived gender experiences.

2. Forty-eight states allow for amendment of the gender designation on the birth certificate, however only two of those states allow for correction without specific genital surgery. *See* Lambda Legal, *Amending Birth Certificates To Reflect Your Correct Sex*, <http://web.archive.org/web/20070619051823/http://www.lamdalegal.org/our-work/issues/rights-of-transgender-people/amending-birth-certificates.html> (last visited June 19, 2007); *see also* Sylvia Rivera Law Project, *The Fight for Fair Access to Birth Certificates Continues*, [http://srlp.org/index.php?sec=03H&page=nycbc\\_newpolicy](http://srlp.org/index.php?sec=03H&page=nycbc_newpolicy) (last visited Jan. 15, 2008). Because a majority of transsexuals do not undergo such surgeries (notably, less than ten percent of female-to-male transsexuals undergo genital surgery) they are ineligible for correction of the gender marker on their birth certificate. *See* Sylvia Rivera Law Project, *supra*.

3. Dean Spade, *Initial Letter to the Department of Vital Statistics*, [http://www.srlp.org/documents/bc\\_firstletter.html](http://www.srlp.org/documents/bc_firstletter.html) (last visited Jan. 15, 2008).

4. Of the forty-eight states that allow amendment of the gender designation on the birth certificate, all but one require that the applicant have undergone specific genital surgery, usually vaginoplasty or phalloplasty. *See* Lambda Legal, *supra* note 2.

5. *See* Sylvia Rivera Law Project, *FAQ for New Transgender Birth Certificate Regulations Proposed in New York City*, [http://srlp.org/index.php?sec=03H&page=nycbc\\_faq](http://srlp.org/index.php?sec=03H&page=nycbc_faq) (last visited Jan. 15, 2008). The most well-known medical study of "transsexualism" was completed in 1966 by Dr. Harry Benjamin. This study then led to the development of standards of care for transgender people in 1980. These standards offer criteria that doctors may use to determine how and when to recommend certain procedures such as hormone therapy or surgery. Collier M. Cole & Walter J. Meyer III, *Transgender Behavior and DSM IV*, in *CURRENT CONCEPTS IN TRANSGENDER IDENTITY* 227, 227 (Dallas Denny ed., 1998). These standards,

process is unique for each person, a requirement that is so intrusive (because it requires a surgical alteration of the person's body) and so specific (because it specifically requires *genital* surgery) excludes a majority of transgender people from accessing the benefits associated with having congruent identity documents. A person without identity documents that match their<sup>6</sup> lived gender is subject to humiliation, harassment, and discrimination.<sup>7</sup>

A birth certificate amendment policy that requires evidence that a person has completed the procedures and treatments necessary for their *personal* transition (rather than dictating specific procedures) would enable many more transgender people to acquire a birth certificate and

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however offered a cramped conception of what it means to be transgender. The standards required that the individual show specific characteristics and behaviors in order to be diagnosed with Gender Identity Disorder, and therefore to be eligible for certain treatments. By the early 1990s the transgender community began developing a new model. The "Transgender Model" reinforced the idea that transgender people are whole and healthy, not broke and sick. Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in *TRANSGENDER RIGHTS* 171, 180-81 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006). This model provided room for people to express their gender (variance) in the manner that they please.

Gender-variant people were no longer forced to choose restrictive transsexual or cross-dresser or drag queen/king roles, each with its own behavioral script. Suddenly it was possible to transition gender roles without a goal of genital surgery, to acknowledge one's gender dysphoria and yet remain in one's original gender role, to take hormones for a while and then stop, to be a woman with breasts and a penis or a man with a vagina, to blend genders as if from a palette. It was possible, and even preferable, to be out and proud, rather than fearful and closeted.

*Id.* at 182.

6. Whenever possible the author will refer to a person by their chosen gender and pronoun. When a person's gender identity is unknown or a person is referred to generally, the author will use the pronouns "they," "their," and "them" rather than "he," "she," "ze," "sie," "his," "hers," "him," "her," or "hir" in an effort to universalize the writing, acknowledge the complicated nature of gender identity, and to respect individuals' chosen pronouns.

7. For example, Lucas Rosa, a transgender woman, visited a bank in order to make a loan application. When she requested a loan application form from a bank employee, the employee asked for identification. When the employee saw that Rosa's identification listed her as male, she told Rosa she would not give her an application until Rosa "went home and changed." *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (5th Cir. 2000). Kate Bornstein, a transgender woman, describes an experience before she was able to amend her identity documents, "Prior to my full gender change, I'd been pulled over once already dressed as a woman, yet holding my male driver's license—it wasn't something I cared to repeat." *KATE BORNSTEIN, GENDER OUTLAW* 28 (1994). Leslie Feinberg, a trans masculine cross-dresser, feared what would happen if she were pulled over by a police officer and had to give them a license that said "female," so she chose to break the law, and "marked down 'M' on [hir] driver's license application for [hir] own safety." *LESLIE FEINBERG, TRANS LIBERATION* 20 (1998). Many transgender people forego higher education because they fear that the documents they submit with the application would reveal their birth name and assigned sex. Dean Spade, *Compliance Is Gendered*, in *TRANSGENDER RIGHTS*, *supra* note 5, at 217, 219. Trans people are routinely fired when their gender identity is discovered by their employer. *Id.*

other identity documents that reflect their lived gender. Recently, in New York City such a policy was proposed and accepted, but then later withdrawn by the Department of Health.<sup>8</sup>

This Comment explains why birth certificate amendment policies that require specific surgeries should be revised so that a person who has completed their own, individualized transition (that may or may not include surgery) will be eligible for a new certificate. This argument will be put in context by reviewing the campaign made in New York City to change its birth certificate amendment policy. Part I provides an overview of transgender identity, and transgender legal and policy issues related to identity documents. Part II examines the origins and development of the birth certificate amendment policy in New York City. Part III discusses the recent campaign to revise New York City's Department of Health policy. Part IV reviews the outcome of the New York City campaign and the reasons the proposal was withdrawn and responds to the concerns raised by the Department and Board of Health of New York City. This Comment concludes that the criticisms raised by the proposal's detractors are based not on legitimate concerns, but rather on ignorance of and prejudice against transgender people. Therefore, these "problems" should not discourage a jurisdiction from implementing a nonsurgical birth certificate amendment policy.

#### I. AN OVERVIEW OF TRANSGENDER IDENTITY, AND TRANSGENDER LEGAL AND POLICY ISSUES RELATED TO IDENTITY DOCUMENTS

When news arrives that a child is born, the first question asked is, "Is it a boy or a girl?" Gender is the first designation that we receive when we enter this world. The announcement made by the birth attendant as to an infant's gender is then entered onto a birth certificate. Most of us will grow up and be satisfied with the assignment that we received moments after our birth and many will take this assignment for granted. However, people who are uncomfortable with their assigned gender (and the behavioral expectations associated with it) will bear the full force of our society's binary and mutually exclusive view of gender.<sup>9</sup>

Transgender people are discriminated against because they challenge the definition of personhood and therefore are viewed as less than human. That first question, "Is *it* a boy or a girl?" illustrates this—a

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8. Damien Cave, *No Change in Definition of Gender*, N.Y. TIMES, Dec. 6, 2006, at B1.

9. The term "binary," refers to our society's idea that there are only two genders—male and female; and "mutually exclusive," refers to the common belief that a person may only be male or female; a person cannot be any combination of the two, transition from one gender to another gender, or live outside those genders all together.

person is not a person until they are labeled male or female. Until then or when their gender is ambiguous, the word “it” is used to describe them. “[T]he very notion of ‘the person’ is called into question by the cultural emergence of those ‘incoherent’ or ‘discontinuous’ gendered beings who appear to be persons but who fail to conform to the gendered norms of cultural intelligibility by which persons are defined.”<sup>10</sup> Transgender people living outside their birth assigned gender are vulnerable to harassment, violence, and discrimination when their gender identity is revealed.<sup>11</sup> A common way in which their status is revealed is through incongruent identity documents.<sup>12</sup> This occurs when a transgender person uses identity documents that indicate that they are one gender, but the person presents as another gender, or when the gender designation on a person’s identity documents varies from document to document.<sup>13</sup> Furthermore, when a transgender person’s status is revealed by other means, often the discrimination they suffer will be justified by referencing the incongruent gender designation on their identity document. In those cases, the perpetrator is forcing the transgender person to conform to behavior traditionally associated with

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10. JUDITH BUTLER, *GENDER TROUBLE, FEMINISM AND THE SUBVERSION OF IDENTITY* 17 (1990)

The cultural matrix through which gender identity has become intelligible requires that certain kinds of ‘identities’ cannot ‘exist’—that is, those in which gender does not follow from sex and those in which the practices of desire do not ‘follow’ from either sex or gender. . . . [P]recisely because certain kinds of ‘gender identities’ fail to conform to those norms of cultural intelligibility, they appear only as developmental failures or logical impossibilities from within that domain.

11. For example, Leslie Feinberg was denied treatment for endocarditis at a hospital emergency room when hir transgender identity was revealed. The doctor told hir, “You have a fever because you are a very troubled person.” FEINBERG, *supra* note 7, at 2. Trans people often avoid going to the police when confronted with violence because of their fear about the police officers’ reaction to their gender identity. In addition, trans women are rejected from shelters for battered women because they are not recognized as women. See Spade, *supra* note 7, at 226. Crystal Schwenk, a preoperative male-to-female transsexual inmate was sexually abused by a prison guard. See *Schwenk v. Hartford*, 204 F.3d 1187, 1193-94 (9th Cir. 2000). It is estimated that the murder rate for transgender people is seven to ten times above the national average. See Sylvia Rivera Law Project, *supra* note 2.

12. Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco’s Transgender Communities* 34 (2003), [www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf](http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf).

13. The policies for changing the gender designation on identity documents varies, so a person may have a license and passport that match their lived gender, but their birth certificate and social security account may indicate their birth assigned gender. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 308-17 (1999); see also Cole Krawitz, Impending “Realness:” Transgender Communities Dealt a Blow by REAL ID (June 27, 2006), <http://www.demos.org/democracy/dispatches/article.cfm?type=2&id=16BC0BB3-3FF4-6C82-5E896A6D91D04334>.

the gender they were assigned at birth. In other words, the transgender person is humiliated, harassed, and discriminated against because they are perceived to be insufficiently masculine or feminine, depending on their assigned gender.<sup>14</sup> Unamended identity documents are used to defend this discrimination. For example, because the trans man's birth certificate says he is female, the implication is that the authority figure did nothing wrong by requiring him to conform to behavior traditionally associated with women.

An inability to obtain legal recognition of their new gender has a devastating impact on transgender people. In a practical sense, their inability to obtain a birth certificate that matches their lived gender not only prevents them from obtaining other forms of identification, but also subjects them to a looming threat of detection and potential invasion of privacy.<sup>15</sup> When a trans person presents a birth certificate with a gender designation that does not match their lived gender they "are often accused of fraud, turned away, or harassed, attacked, humiliated, or discriminated against because of [their] gender. Even in the best of cases [they] face embarrassment, confusion and delays."<sup>16</sup> In a psychological sense, the impacts may be even more damaging and may cancel out the benefits gained from undergoing sex-reassignment which may result in serious depression.<sup>17</sup> For these reasons it is important that as many transgender people as possible are able to amend their birth certificate so that the gender designation correlates to their lived gender. And, therefore, amendment policies should not exclude the majority of trans people by requiring applicants to undergo surgery in order to be eligible to amend the documents.

## II. THE ORIGINS AND DEVELOPMENT OF THE BIRTH CERTIFICATE AMENDMENT POLICY IN NEW YORK CITY

The Department of Health and Mental Hygiene (the Department) is responsible for the registration of births and issuance of birth certificates

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14. See, e.g., *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at \*3-4 (N.D. Ohio Nov. 9, 2001) (discussing an incident where an employer asked the postoperative male-to-female transsexual employee during a meeting, "Are you a man or a woman?"); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Penn. 1993) (describing an incident where a male-to-female transsexual employee was denied access to the women's restroom); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ. CV-02-1531PHX-SRB, slip op. at 1 (D. Ariz. June 3, 2004) (describing a situation where a male-to-female transsexual employee was denied access to the women's restroom).

15. See Dean Spade, *Leave Behind for Department of Vital Statistics*, [http://srlp.org/documents/bc\\_leave\\_behind.html](http://srlp.org/documents/bc_leave_behind.html) (last visited Jan. 15, 2008).

16. See Sylvia Rivera Law Project, *supra* note 5.

17. See *id.*

for the City of New York.<sup>18</sup> The birth certificate amendment policy for the City of New York was developed between 1965 and 1977 in a series of cases in which transgender plaintiffs sought to change their name and/or gender designation on their New York City-issued birth certificates.<sup>19</sup> The first case to challenge the Board of Health's refusal to alter the name and sex designation on the birth certificate of a postoperative transsexual person was *Anonymous v. Weiner* in 1966.<sup>20</sup> The court chose to defer to the decision of the Board of Health. In making its decision, the Board of Health consulted with the New York Academy of Medicine. The Academy concluded that (1) a postoperative transsexual's chromosomes remain in accord with the gender they were assigned at birth, (2) laws should not be changed for the purpose of "help[ing] psychologically ill persons in their social adaptation,"<sup>21</sup> and (3) the public interest in preventing fraud outweighs a transsexual's desire to conceal their change of sex.<sup>22</sup>

In 1968, another postoperative transsexual sought to change their name and the sex marker on their birth certification. The court in *In re Anonymous* held that it did not have jurisdiction to order the Board of Health to amend a birth certificate.<sup>23</sup> It did, however, grant the request to change the plaintiff's name. Furthermore, the court rejected in part the reasoning of the *Weiner* court, finding that "the possibility of 'so-called fraud' exists to a much greater extent if a post-operative transsexual who presents as a female is classified as a male."<sup>24</sup> The court adopted a formula for sex determination that said that if "disharmony exists between the psychological sex and the anatomical sex, sex will be determined by anatomy. If the psychological sex and the anatomical sex are harmonized, then the sex should reflect the harmonized status of the individual. In other words, if a transsexual undergoes modification surgery, official sex should change as well."<sup>25</sup>

A third case was litigated in 1973 challenging the newly codified section 207.05(a) of Title 24 of the New York City Health Code which stated that "[a] new birth certificate shall be filed when: . . . (5) The

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18. See N.Y. City Dep't of Health & Mental Hygiene Bd. of Health, *Notice of Intention To Amend Section 207 of the New York City Health Code 2*, [www.transgenderlaw.org/207publichearing.pdf](http://www.transgenderlaw.org/207publichearing.pdf) (last visited Jan. 15, 2008).

19. See Greenberg, *supra* note 13, at 311-13.

20. 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

21. *Id.* at 322.

22. See Greenberg, *supra* note 13, at 311; see also *Weiner*, 270 N.Y.S.2d at 322.

23. See 293 N.Y.S.2d 834, 835 (N.Y. Civ. Ct. 1968).

24. Greenberg, *supra* note 13, at 312 (quoting *In re Anonymous*, 293 N.Y.S.2d at 838).

25. *Id.*

name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery.<sup>26</sup> The plaintiff in *Hartin v. Director of the Bureau of Records* was a postoperative male to female transsexual who applied to amend her birth certificate to indicate her chosen name and female gender.<sup>27</sup> The new certificate issued by the Department of Health in accordance with section 207.05(a) of the New York City Health Code showed her new name but the gender designation was left blank.<sup>28</sup> The plaintiff brought suit against the Department for its refusal to change the sex marker on the new birth certificate.<sup>29</sup> The court considered the history of the Health Code provision reviewing its basis on the 1965 findings of the Academy of Medicine and the minutes from the Board of Health that indicated that they specifically intended to omit the sex designation on the new certificate.<sup>30</sup> The court found that the Department did not act arbitrarily or capriciously and therefore upheld the decision of the Board of Health to omit the gender designation on the reissued birth certificate.<sup>31</sup>

Again, four years later in *Anonymous v. Mellon*, the Supreme Court of New York County upheld the Department's decision to leave blank the sex indicator on the postoperative transsexual applicant's reissued birth certificate finding that the decision was neither arbitrary nor capricious.<sup>32</sup>

Since then, the policy in New York City has remained consistent. Section 207.05(a) of the New York City Health Code (the "1971 policy") required transgender individuals to undergo "convertive" surgery in order to be eligible to change the gender designation on their birth certificates.<sup>33</sup> The Department has generally, but not exclusively, interpreted "convertive surgery" to mean genital surgery.<sup>34</sup> This was likely consistent with the medical community's understanding of transsexuality at the time the policy was codified in 1971.<sup>35</sup> Under the

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26. 24 R.C.N.Y. HEALTH CODE § 207.05(a)(5) (2007); *see also* *Hartin v. Dir. of the Bureau of Records*, 347 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1973) (describing a situation where a male-to-female transsexual petitioner sought judgment directing Bureau of Records and Statistics of New York City Department of Health to furnish hir a new birth certificate designating hir as female).

27. 347 N.Y. S.2d at 516.

28. *See id.*

29. *See id.*

30. *See id.* at 517-18.

31. *See id.* at 518.

32. 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1977).

33. *See* N.Y. City Dep't of Health & Mental Hygiene Bd. of Health, *supra* note 18, at 2.

34. *See id.*

35. *See* Spade, *supra* note 15.



1971 policy the applicant had to provide a detailed surgical report that included the date of the operation; attestation by a physician after the surgery that the surgical change had occurred; and a postoperative evaluation by a psychiatrist or clinical psychologist.<sup>36</sup> In addition, the applicant must also change their name pursuant to court order.<sup>37</sup> If the application was approved under this policy, the individual was issued a new birth certificate that reflected the name change but omitted any gender designation.<sup>38</sup> The new certificate was not marked “amended,” and the original record was placed under seal.<sup>39</sup>

Although the genital surgery requirement was relatively typical of policies across the nation,<sup>40</sup> New York City was exceptional in its issuance of amended birth certificates with blank gender designations. It was the uniqueness of this practice that prompted activists to challenge the policy and urge the adoption of a new amendment policy that would follow current understandings of trans health care and provide more equitable access to identity documents that reflect a person’s lived gender.

### III. THE CAMPAIGN TO REVISE THE NEW YORK CITY DEPARTMENT OF HEALTH’S BIRTH CERTIFICATE AMENDMENT POLICY

In 2002 trans advocates contacted the New York City Department of Health and requested that the Department rethink the 1971 policy.<sup>41</sup> These advocates argued that the city needed to revise the birth certificate gender change policy in two aspects. A policy requiring “convertive surgery” is based on misunderstandings about health care for trans people, and therefore must be changed to allow for amendment without the surgical requirement. In addition, because the practice of issuing new certificates without a sex designation is out of step with the rest of the nation, such a certificate is of limited value to a transgender person, and so the city must change its policy to issue amended certificates that include a sex marker.

The requirement that a transgender applicant have undergone genital surgery is based on a mistaken belief that there is a discrete set of

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36. See N.Y. City Dep’t of Health & Mental Hygiene Bd. of Health, *supra* note 18, at 2.

37. See *id.*

38. See *id.*

39. See *id.*

40. See Spade, *supra* note 7, at 227-28.

41. See Sylvia Rivera Law Project, Talking Points in Support of Proposed NYC Transgender Birth Certificate Regulations, [http://srp.org/index.php?sec=03H&page=nycbc\\_talkingpts](http://srp.org/index.php?sec=03H&page=nycbc_talkingpts) (last visited Feb. 11, 2008).

procedures that constitute a “sex change.”<sup>42</sup> In fact there are numerous treatments that may be pursued by an individual seeking sex reassignment such as “bilateral mastectomy, orchiectomy, phalloplasty, hysterectomy, vaginoplasty, hormone therapy treatment, brow reduction, facial implants, vaginal closure, voice surgery, metaodioplasty, augmentation mamaplasty, tracheal shave, liposuction, hormone therapy, group or individual counseling, [and] psychotherapy.”<sup>43</sup> Whether or not a person pursues any such treatment depends on various factors. These surgeries may be prohibitively expensive, some cost over \$70,000 and very few medical insurance providers cover such surgeries in their plans.<sup>44</sup> Certain medical reasons such as age, weight, preexisting medical conditions, or HIV status may make some treatments unavailable.<sup>45</sup> Some transgender people do not feel that it is necessary for them to undergo surgery because they are comfortable in their body, or may feel it necessary to change certain parts of their body, but not others.<sup>46</sup> Many chose not to have surgery due to the risks of complications, the painful and extended recovery period, and the reduction of erotic sensation.<sup>47</sup> In addition, there are many personal reasons that someone may not undergo surgery such as not being able to take time off work, not having support people who would be available to help them through the recovery period, or having a fear of doctors, hospitals, and/or surgery.<sup>48</sup> A requirement that an applicant have undergone *genital* surgery is especially burdensome for transgender men. The most common procedure for

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42. See Spade, *supra* note 15.

43. *Id.*

44. Lisa Mottet & John M. Ohle, *Transitioning Our Shelters, A Guide To Making Homeless Shelters Safe for Transgender People* 12 (2003), <http://thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf>

45. See *id.*

46. See *id.*

47. See Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393, 401 (2006-07). Complications for all genital sex reassignment surgeries include: postoperative bleeding/hematoma, infection, wound healing problems, partial or complete flap necrosis (loss of clitoris or phallus), and hypertrophic scarring. See *id.* at 13-14, 25-26. Additional complications associated with male-to-female (MTF) genital surgeries include: Recto-vaginal fistula, vaginal stricture or stenosis, urethral stricture or stenosis, swelling/irregularities of urethral meatus, prolapse of the neovagina, and intravaginal hair growth. See *id.* at 13-14. Additional complications associated with female-to-male (FTM) genital surgeries include (some vary depending on which type of surgery the person is having): seroma; compromised sensation/function of hand and wrist (donor arm); urethral fistula; urethral stricture; implant infection, extrusion, or failure; and mechanical failure of hydraulic erectile prosthesis. Cameron Bowman & Joshua Goldberg, *Care of the Patient Undergoing Sex Reassignment Surgery (SRS)* 25-26 (2006), [www.vch.ca/transhealth/resources/library/tcpdocs/guidelines-surgery.pdf](http://www.vch.ca/transhealth/resources/library/tcpdocs/guidelines-surgery.pdf).

48. See Mottet & Ohle, *supra* note 44, at 12.

female-to-male (FTM) transsexuals is chest surgery.<sup>49</sup> A recent study found that only three percent of FTMs pursue genital surgery due to the costs, limitations of the procedure, as well as the medical risks associated with it.<sup>50</sup> This means that only three percent of the trans male population would be eligible for an amended birth certificate. For these reasons, “[t]here is no medical rationale for linking legal recognition of a transsexual person’s new gender to genital reconstructive surgery or any other specific treatment that is not medically appropriate or possible for all transsexual people.”<sup>51</sup>

Even for those individuals who were able to obtain a new birth certificate under the 1971 policy, many found the omission of the gender designation on the certificate to be humiliating.<sup>52</sup> The certificate is of limited value without a gender designation. In some cases the lack of the gender listing raises concerns about the validity of the amended certificate.<sup>53</sup> Likewise, without a gender specified on the certificate it is difficult to use it to obtain other identity documents with a correct gender designation.

When the amendment policy was introduced in 1971, New York City was one of the first jurisdictions to permit transgender people to change their birth certificate to reflect their transition.<sup>54</sup> Since then, a vast majority of jurisdictions have changed their statutes or administrative policies to allow transgender people to amend their birth certificates.<sup>55</sup> Only three states, Tennessee, Ohio, and Idaho, do not permit correction of the gender designation on birth certificates.<sup>56</sup> Tennessee is the only state that *statutorily* forbids amendment.<sup>57</sup> In 1987 an Ohio court, following the reasoning in the 1966 New York case *Anonymous v. Weiner*, interpreted the Ohio birth certificate statute not to permit amendments for transsexuals.<sup>58</sup> Although Idaho has a provision for amending birth certificates generally,<sup>59</sup> individual reports indicate that

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49. See Spade, *supra* note 15.

50. See Sylvia Rivera Law Project, *supra* note 41.

51. Spade, *supra* note 15.

52. See Letter from Z Gabriel Arkles, Staff Attorney, Sylvia Rivera Law Project, to Rena Bryant, Secretary to the Board of Health, N.Y. City Dep’t of Health & Human Hygiene Bd. of Health (Oct. 31, 2006), [http://srlp.org/documents/nycbc\\_comment.html](http://srlp.org/documents/nycbc_comment.html).

53. See *id.*

54. See Sylvia Rivera Law Project, *supra* note 41.

55. See Spade, *supra* note 15; see also Lambda Legal, *supra* note 2.

56. See Lambda Legal, *supra* note 2.

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

58. See *In re Ladrach*, 513 N.E.2d 828, 830-31 (Ohio Prob. Ct. 1987).

59. See IDAHO ADMIN. CODE 16.02.08 § 201.06 (2001).

the state will not amend certificates for transsexuals.<sup>60</sup> Despite having been at the forefront of reform in the Seventies, by 2002 New York City's policy was an anomaly—it was the only jurisdiction in the nation that would leave blank the gender designation on the newly issued birth certificate.<sup>61</sup>

Virginia is the only state with an amendment policy that does not specifically require genital surgery.<sup>62</sup> In 2002 Virginia changed its requirements making genital reconstructive surgery no longer mandatory for a transsexual person to obtain a new birth certificate. This change occurred after Lambda Legal worked with the Virginia Office of Vital Records to better understand the various treatments that transgender people undergo in order to transition to another gender.<sup>63</sup> The Office of Vital Statistics thereafter issued a trans man a new birth certificate even though he had not undergone phalloplasty,<sup>64</sup> but nevertheless had completed the treatments his doctor had determined were necessary for him to permanently change his sex to male.<sup>65</sup>

By 2002, New York City was long overdue for an update of its trans birth certificate amendment policy.<sup>66</sup> Dean Spade of the Sylvia Rivera Law project along with other trans advocates (including the LGBT Community Center, Callen-Lorde Community Health Center, and Transgender Law and Policy Institute)<sup>67</sup> contacted the City's Department of Health to jump-start the change. After much discussion, finally, in 2005 the Department of Health organized an advisory committee of experts in the field of transgender health including doctors, surgeons, psychologists, lawyers, and policy experts.<sup>68</sup> The committee met with representatives from the Department of Health four times to discuss the policy and focused closely on the Department's concerns about the significance of altering a vital record.<sup>69</sup> The committee reached a

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60. See Lambda Legal, *supra* note 2.

61. See Spade, *supra* note 15.

62. See Letter from Dean Spade, Esq., to Dr. Steven Schwartz, Ph.D., City of New York Dep't of Health (Feb. 25, 2003), available at [http://srtp.org/documents/bc\\_followup.html](http://srtp.org/documents/bc_followup.html); see also Lambda Legal, Amending Birth Certificates To Reflect Your Correct Sex: In re Birth Certificate Amendment of John Doe (Nov. 12, 2002), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31991108>.

63. See Spade, *supra* note 62.

64. Phalloplasty is "surgical construction of a phallus." Taylor Flynn, *The Ties That [Don't] Bind: Transgender Family Law and the Unmaking of Families*, in TRANSGENDER RIGHTS, *supra* note 5, at 39.

65. See Spade, *supra* note 62; see also Lambda Legal, *supra* note 62.

66. See Sylvia Rivera Law Project, *supra* note 5.

67. See *id.*

68. See *id.*

69. See *id.*

consensus with the Department of Health on recommendations for a new policy and on September 26, 2006, the Department of Health made a proposal to the Board of Health for a new regulation.<sup>70</sup>

With a few exceptions the proposed regulation was based on the recommendations made by the expert advisory committee.<sup>71</sup> The proposal allowed for issuance of a new birth certificate with a gender designation to those who had provided medical evidence that they had completed their transition (regardless of whether or not they had undergone any specific surgical procedure) and intended to remain in their gender permanently.<sup>72</sup> Upon review of the Department of Health's proposal, the Board of Health unanimously approved the revision for notice and comment.<sup>73</sup>

The public responses received during the notice and comment period were overwhelmingly in support of the proposal, although some suggested that additional unnecessary barriers to an amended birth certificate be removed from the provision.<sup>74</sup> Despite the show of support from those most familiar with and dependent on this regulation, on December 5, 2006, the Department and Board of Health withdrew the proposed amendment.<sup>75</sup> Instead, the Department chose to maintain the requirement for genital surgery and only changed the policy to issue new certificates with a gender designation (rather than deleting the sex marker all together).<sup>76</sup>

#### IV. REASONS FOR THE WITHDRAWAL OF THE PROPOSED POLICY AND RESPONSES TO THOSE CONCERNS

In explaining its decision to withdraw the proposal, the Department of Health did not express any doubt as to the findings by the advisory committee. Instead, the Department cited concerns about how the proposed regulation would interact with forthcoming federal regulations under the Real ID Act<sup>77</sup> and that it may conflict with New York state

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70. *See id.*

71. *See id.*; *see also supra* Appendix.

72. *See* Sylvia Rivera Law Project, *supra* note 2.

73. *See* Sylvia Rivera Law Project, *supra* note 5.

74. *See* Sylvia Rivera Law Project, *supra* note 2.

75. *See id.*

76. *See* N.Y. City Dep't of Health & Mental Hygiene Bd. of Health, Board of Health Makes NYC Consistent with New York State and Most of the United States by Allowing Sex-Specific Transgender Birth Certificates (Dec. 5, 2006), <http://www.nyc.gov/html/doh/html/pr2006/pr115-06.shtml>.

77. *See id.*; *see also* Yoshino, *supra* note \*.

rules.<sup>78</sup> The Department was also unsure of its implications for sex-segregated facilities such as prisons, hospitals, and schools.<sup>79</sup> Prison officials asked if female inmates with birth certificates amended under this policy would be jailed with female prisoners even if they still had “male” genitalia.<sup>80</sup> Hospital administrators wondered to which ward they would assign patients whose anatomies did not “match” the designation on their birth certificate.<sup>81</sup> New York City Health Commissioner Dr. Thomas Frieden admitted: “This is something [the Department] hadn’t thought through, frankly. What the birth certificate shows does have implications beyond just what the birth certificate shows.”<sup>82</sup>

In addition to the issues cited by the Department of Health at the time of the withdrawal, other concerns have been advanced for refusing to change individuals’ birth certificates to reflect their self-identified gender. These concerns include: prevention of fraud; worry that the amended certificate could be used to circumvent bans on gay and lesbian marriage; and a belief that the birth certificate should be maintained as a historical document that reflects “the true facts as they existed at the time of the birth.”<sup>83</sup> And finally, the Department of Health has feared that without a surgical requirement an individual may “change back” to their original gender.<sup>84</sup>

The Department of Health’s concern about how the new policy would interact with the impending implementation of the Real ID Act (the Act) was based on a misdirected fear of fraudulent abuse of the proposed amendment policy. The Act was aimed at controlling the issuance of identity documents to foreign nationals,<sup>85</sup> not the standards of amending birth certificates for U.S. citizens.<sup>86</sup> More importantly, if the underlying purpose of the Act is to ensure the validity of state-issued

78. The New York State policy on changing birth certificates requires different surgeries than those for a New York City-issued certificate. For a female-to-male transsexual, they must have undergone a hysterectomy and mastectomy, and male-to-female transsexuals must have had a penectomy. See Sylvia Rivera Law Project, *supra* note 2.

79. See N.Y. City Dep’t of Health & Mental Hygiene Bd. of Health, *supra* note 76.

80. See Cave, *supra* note 8.

81. See *id.*

82. Yoshino, *supra* note \*.

83. See Greenberg, *supra* note 13, at 316 (internal citations omitted). “State Senator Ruben Diaz slammed the policy as the work of ‘radical gay rights activists’ who will use it to ‘circumvent New York State marriage laws.’” Lisa L. Colangelo, *Dogs, Transgenders Also Key Issues*, N.Y. DAILY NEWS, Dec. 6, 2006, at 4.

84. See Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 31 (2003).

85. See N.Y. City Dep’t of Health & Mental Hygiene Bd. of Health, *supra* note 76.

86. See Raquel Aldana & Sylvia R. Lazos Vargas, “Aliens” in our Midst Post-9/11: *Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1688-89 (2005).

identity documents, the proposed amendment would, in fact further this goal by allowing more people to obtain documents that uniformly match their lived gender.<sup>87</sup>

Under the guise of national security, the Act was passed in order to tighten up immigration laws in order to prevent “terrorists” from being eligible for asylum and to set national standards for issuance of drivers’ licenses.<sup>88</sup> The license provisions of the Act are set to be implemented in May 2008.<sup>89</sup> In order for the federal government to accept a state-issued identification document, the state must comply with the Act’s “proof of identity standards as well as verifiability of that proof” and must require proof of the applicant’s social security number as well as their legal residency.<sup>90</sup> Clearly, these provisions are aimed at controlling foreign nationals’ ability to access government-issued photo identity documents. Given its purpose, this Act should not detrimentally affect U.S.-born U.S. citizens, and therefore, should not be relevant to birth certificate issuance in the United States.

The Act requires that a state-issued identification card include:

- (1) The person’s full legal name.
- (2) The person’s date of birth.
- (3) The person’s gender.
- (4) The person’s driver’s license or identification card number.
- (5) A digital photograph of the person.
- (6) The person’s address of principle [sic] residence.
- (7) The person’s signature.
- (8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.
- (9) A common machine-readable technology, with defined minimum data elements.<sup>91</sup>

In addition, the state must require presentation and verification of the following before issuing the new identity document:

- (A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person’s full legal name and date of birth.
- (B) Documentation showing the person’s date of birth.
- (C) Proof of the person’s social security account number or verification that the person is not eligible for a social security account number.
- (D) Documentation showing the person’s name and address of principal residence.<sup>92</sup>

The state must also require evidence of the individual’s lawful immigration or citizenship status.<sup>93</sup>

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87. See Sylvia Rivera Law Project, *supra* note 2.

88. See Aldana & Lazos Vargas, *supra* note 86, at 1688-89.

89. See *id.* at 1711.

90. *Id.* at 1713.

91. 49 U.S.C.A. 30301 § 202(b) (2007).

92. *Id.*

93. *Id.*

The Act is aimed at preventing issuance of fraudulent identification documents. Although the gender of the individual must be on the identification card, the Real ID Act does not explicitly require “verification” of that designation. The fact that the Act itself requires a nonphoto identity document that includes only name and date of birth indicates that gender is not of great significance for the purpose of tracking and identifying people. Furthermore, the goal of the policy amendment proposed by the Department of Health and the expert committee was not to relax standards in order to allow for fraud. Rather the proposal had many safeguards that would prevent someone from using the provision to obtain a fraudulent birth certificate for the purpose of breaking the law.<sup>94</sup> In fact, the purpose of the amendment was to provide means by which a transgender person could obtain a birth certificate that *accurately* documented the person’s gender.<sup>95</sup> Furthermore, the proposed provision would have allowed many more transgender people to obtain identity documents that were congruent with their lived gender and their gender presentation than was possible under the 1971 policy. Without the proposed revision many transgender people are left with identity documents that do not seem to “match” the gender presentation of its bearer. This mismatch confuses government officials, contravening the purpose of the Real ID Act.<sup>96</sup>

It is true that the proposed City policy would conflict with the New York State birth certificate amendment practice. However, the two policies have always differed and there is no reason to think that the inconsistencies between the proposed City policy and the State policy would be any more problematic than the differences between the City’s 1971 policy and the State policy. The New York State policy requires the applicant to show proof of penectomy (for male-to-female transsexuals), or hysterectomy and mastectomy (for female-to-male transsexuals).<sup>97</sup> If approved, the State issues a birth certificate with the “new” gender designation.<sup>98</sup> In contrast, under the City’s 1971 policy, applicants had to show proof of “convertive surgery” (interpreted as vaginoplasty or phalloplasty) and would be issued a birth certificate with the gender designation deleted.<sup>99</sup> Likewise, under the approved policy the City maintained its “convertive surgery” standard, but agreed to issue new

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94. See Sylvia Rivera Law Project, *supra* note 2.

95. See *id.*

96. See *id.*

97. See *id.*

98. See N.Y. City Dep’t of Health & Mental Hygiene Bd. of Health, *supra* note 76.

99. See Sylvia Rivera Law Project, *supra* note 2.



birth certificates with the amended gender designation.<sup>100</sup> Both the 1971 and recently updated City policies differed from that of the State. Likewise, the *proposed* City policy also would have differed from the State policy. However, had the proposed policy been passed, the City rather than the State would have had the more flexible standard for birth certificate amendment. Although any surgical requirements are overly burdensome, the State's surgical requirements are less onerous than those required by the City under the 1971 policy. Presumably, the reason New York City has its own free-standing policy is because the City desired autonomy from the State in its birth certificate-related practices. If the Department of Health for the City of New York were truly concerned about conflicts with the State policy, they would have changed the City policy to match that of the State in order to create a uniform rule. As it stands, transgender people born in New York City are arbitrarily held to a higher standard (and therefore their access to amended certificates is more limited) than those New Yorkers born outside of the City who are governed solely by New York state law.

The Department of Health's decision to withdraw the proposed amendment was based in part on concerns about its implications on sex-segregated facilities. Hospital and prison officials expressed uncertainty about which facility they would assign the transgender people under their care and supervision.<sup>101</sup> Specifically what seemed to concern them is that the new policy would compel them to place transgender people in accordance with their lived gender, not the status of their genitalia. This would mean that there would be instances in which a person who has a penis may be placed with women, and a person without a penis would be housed with men. These officials' uneasiness with this idea is based on our society's belief that gender is closely tied to a person's genitalia, as well as our deeply rooted heterosexism.

Our conception of gender is best illustrated when we consider how the "sex" of an intersex<sup>102</sup> person is determined at birth. If the genitalia of a newborn appears ambiguous, then their sex is determined based on heterosexist stereotypes.<sup>103</sup> For example, if a genetically male (XY) infant has a penis that is considered "adequate," in other words, one that the doctor believes will be capable of penetrating a female's vagina when

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100. See N.Y. City Dep't of Health & Mental Hygiene Bd. of Health, *supra* note 76.

101. See Cave, *supra* note 8.

102. Intersex people are those with noncongruent or ambiguous sex features. See Greenberg, *supra* note 13, at 267.

103. See Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSSEXUAL RIGHTS*, *supra* note 5, at 52.

the child reaches adulthood, then the child is labeled male.<sup>104</sup> If the XY infant is born with an “inadequate” penis, then their genitalia is surgically altered to make a vagina and the child is labeled female.<sup>105</sup> If a genetically female (XX) infant is believed to be capable of reproduction, then their phallus is altered so that the child has an acceptable sized clitoris.<sup>106</sup> “In other words, men are defined based on their ability to penetrate females, and females are defined based on their ability to procreate. Sex, therefore, can be viewed as a social construct rather than a biological fact.”<sup>107</sup>

Although the above explanation is related to intersex individuals, it illustrates how we as a society not only assign gender based on genitalia, but also how we view genitalia from a gendered and heterosexist perspective. A phallus is expected to penetrate a vagina and a person without an “adequate” phallus is therefore to be penetrated, fertilized, and reproduce. This assumption underlies the fears of placing transgender people who have not undergone genital surgery with nontransgender individuals who have the same gender identity. Because we view genitalia as an indicator of a person’s gender, if a transgender person’s genitalia has not been altered, then they are not perceived to be “real” women or “real” men. Furthermore, it is also assumed that a person with a penis is a threat to the safety of a person without a penis.

A common fear among gender-segregated facility administrators seems to be that women who have a penis will sexually or physically attack nontransgender women if they are placed in a women’s facility.<sup>108</sup> The fact is transgender women are no more dangerous than nontransgender women.<sup>109</sup> Rather than incorrectly and unfairly presuming that trans women or women with “male” genitalia are dangerous, facility administrators should focus on enforcing rules prohibiting inappropriate behavior.<sup>110</sup> By focusing on the behavior, the administrator will make the facility safer for *everyone*—trans and nontrans women alike.<sup>111</sup>

Another common fear of placing transgender women in women’s facilities is that their presence will make women who have been abused

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104. *See id.*

105. *See id.*

106. *See id.*

107. *Id.*

108. *See Mottet & Ohle, supra* note 44, at 13.

109. *See id.* With regards to violence in gender-segregated facilities it is the transgender people who are at risk of violence. *See id.* at 14.

110. *See id.* at 13.

111. *See id.* at 14.

or attacked by men feel unsafe.<sup>112</sup> Of course their reactions are valid and deserve to be respected, but they should not be an excuse to discriminate against trans people. This sort of problem can be avoided or dealt with in a variety of ways. In any gender-segregated facility each person should go through some kind of intake process.<sup>113</sup> During the intake procedure, not only should staff make sure to make transgender people feel comfortable, but also make clear to nontransgender women that transgender women are housed in that facility.<sup>114</sup> Everyone should be made aware of the strict enforcement of the rules against inappropriate behavior. And finally, the facility should make private facilities available, specifically restrooms, showers, and changing rooms (and preferably sleeping quarters).<sup>115</sup> When these procedures are in practice, experience has shown that nontransgender women respect the transgender residents and understand that they pose no additional risk to their safety.<sup>116</sup>

Placement of transgender men, especially non or preoperative transgender men, is problematic because they are at risk of being attacked in male facilities<sup>117</sup> but would have to compromise their male identity in a female facility. In certain circumstances, such as in homeless shelters, where violence is relatively prevalent, it may be best for trans men to be housed in women's facilities.<sup>118</sup> However, in places like hospitals and schools, trans men may be more safely housed with other men.<sup>119</sup>

Ideally, in all of these circumstances people should have the option of being housed privately. When that is not possible the next best option would be to provide transgender people the choice of being placed with other transgender people, or with people who self-identify as allies to transgender people. It is important to note that these nondiscriminatory suggestions should be applied *regardless* of what a person's birth certificate or other identity documents indicate.

The bottom line is that transgender people should not be discriminated against, regardless of what their birth certificate says.

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112. *See id.* at 37.

113. For suggestions on a trans-inclusive intake procedure that could be adjusted to fit almost all gender-segregated facilities, see generally *id.*

114. *See id.*

115. *See id.* at 28-31.

116. *See id.* at 27.

117. *See, e.g., id.* at 3.

118. *See id.* at 33. Of course, ideally, these facilities will be made safer for everyone so that transgender women are safe in women's facilities, transgender men are safe in men's facilities, and facilities are provided for those who do not identify as either male or female. *See id.*

119. *Cf. id.*

Gender-segregated facilities and schools must treat transgender people with utmost respect. They can begin doing this by placing them in accordance with their lived gender, their preference, and/or where they would be most safe. Furthermore, once inside, fair and equitable measures must be taken to ensure their safety within the facility or school. These steps should be taken regardless of whether or not a transgender person has undergone surgery and what a person's birth certificate says.

A birth certificate amendment policy that is based on genitalia serves the transphobic practices and procedures currently in place at many gender-segregated facilities and schools. The practice of many of these facilities is to place a person in accordance with their birth assigned gender.<sup>120</sup> Often this determination is made without any reference to a person's birth certificate.<sup>121</sup> Then, if their practice is challenged, the administrators will use the designation on the birth certificate as proof of the trans person's "true" gender.<sup>122</sup> Under the proposed policy, the administrators would no longer be able to use the birth certificate as a means to defend their transphobic practices. Rather, the birth certificate could be used as a means to enforce trans-inclusive policies. Under the proposed policy the trans person would be able to use their birth certificate to defend their demand to be placed in accordance with their lived gender.

Prison officials expressed concerns about how the policy would affect their placement of transgender prisoners. The simple answer is that if they have a nondiscriminatory transgender management procedure in place the birth certificate amendment policy would have no effect on their placement practices. As discussed above, regardless of what their birth certificate says, a transgender person should be placed in a facility in which they would be safe to continue to live in their chosen gender. The officials' concern, then, is that their current (discriminatory) procedures could no longer be supported and legitimated by referring to transgender prisoners' unaltered birth certificates.

As a practical matter, most people who are arrested are not carrying their birth certificates. In addition, no prison system in the United States bases their placement decisions on birth certificates.<sup>123</sup> Most prison systems do not have written policies on management of transgender

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120. See Spade, *supra* note 7, at 227.

121. See Sylvia Rivera Law Project, *supra* note 2.

122. See Spade, *supra* note 7, at 227.

123. See Sylvia Rivera Law Project, *supra* note 2.

prisoners, and those that do, fail to provide placement options that are safe or sensitive to the needs of transgender prisoners.<sup>124</sup>

States without written transgender management policies leave the placement and care decisions to correctional personnel.<sup>125</sup> This means that housing assignments are often determined by prison officials' assessments of the person's assigned sex at birth and/or examination of their genitalia.<sup>126</sup> Generally, this means that a transgender person who has not undergone genital surgery is placed according to their assigned sex at birth, and those who have had genital surgery are placed according to their reassigned gender.<sup>127</sup>

The reason most often cited for placing prisoners according to their genitalia and not their self-identified gender is the safety of the female prisoners from the female transgender prisoner who has a penis. As discussed above, this argument is based on a sexist and heterosexist assumption that a prisoner with a penis will inevitably attack and rape a female inmate while it is less likely that a prisoner without a penis would attack a female inmate in the same manner. This policy results in preoperative or nonoperative transgender women being placed in the male prison where they are at a high risk of sexual violence.<sup>128</sup>

The answer to the prison officials' question about where they would place transgender inmates under the proposed birth certificate policy is as follows: Transgender people should be placed in accordance with their lived gender, their preference, and/or where they would be most safe. The prison should have written policies for management of transgender prisoners. These policies should be developed with the input of trans advocates, lawyers, and medical professionals. The answer to

124. See Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 192 (2006). "Many of the written policies currently in existence, however, simply codify the mistakes made in the absence of such policies." *Id.* at 197.

125. See *id.*

126. See *id.* at 207.

127. See Transgender Law & Policy Inst. & Nat'l Ctr. for Lesbian Rights, Resources on Transsexual Prisoners, <http://www.transgenderlaw.org/resources/prisoners.htm> (last visited Jan. 27, 2008). "The practice of the federal prison authorities, we were told at argument, is to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender." *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir. 1993).

128. See Transgender Law & Policy Inst. & Nat'l Ctr. for Lesbian Rights, *supra* note 127. A common method to protect a transsexual woman placed in a male prison is to separate them from the other prisoners using a practice called administrative segregation. See *id.* This mechanism may provide safety from the general population, but it is often no different from punitive segregation or solitary confinement. See *id.* This means that in order to remain physically safe these prisoners are forced to give up many of the opportunities and rights available to otherwise similarly situated prisoners. See Tarzwell, *supra* note 124, at 180.

this question is the same regardless of what a person's birth certificate says and what the birth certificate amendment policy is in the jurisdiction of the inmate's birth.

As for placement of transgender patients in hospital wards, the answer is simple, and unrelated to a birth certificate amendment policy. Like intake in a prison, rarely is a birth certificate used to place a person in a ward of a hospital. If a hospital administrator expressed concern about how the proposed policy would affect their placement of transgender patients, then presumably, their current practice is to place pre- or nonoperative (and maybe even postoperative) transgender patients according to their gender assigned at birth. Their concern is that under the proposed policy they will be *legally* obligated to place pre- or nonoperative transgender patients in accordance with their lived gender.

Again, the problem is not the proposed birth certificate amendment policy, but rather the administrators' ignorance about transgender people and their healthcare needs. When a transgender person is placed in a hospital ward according to their birth assigned gender rather than their lived gender, the focus shifts from their illness to their gender-identity/presentation. For example, when Leslie Feinberg, "a masculine, lesbian, female-to-male cross-dresser and transgenderist,"<sup>129</sup> was placed in the female ward of a hospital his masculinity "created an immediate furor."<sup>130</sup> Feinberg proposes that hospitals should have wards based on the patients' illness, injury, or degree of care, and the wards could place females and males in separate rooms within a mixed-gender ward.<sup>131</sup> This way a transgender person's gender expression and sex would not be so conspicuous, and the focus could remain on healing. As discussed above, regardless of what a person's birth certificate says or the amendment policy in the jurisdiction where it was issued, hospitals that insist on having gender-segregated wards should place a patient according to their lived gender and their preference.

Gender segregation within housing and restroom facilities at coeducational colleges poses a problem for transgender students regardless of what their birth certificate says. Traditionally students are housed according to their gender and many are required to use multistall, gender-specific restrooms, and change in gender-specific locker rooms at the gym. This means that transgender students have been left without safe or comfortable on-campus housing, bathroom, and locker facilities. Colleges across the nation have already begun to adopt nondiscrimina-

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129. FEINBERG, *supra* note 7, at 19.

130. *Id.* at 82.

131. *See id.* at 83.

tion policies that include gender identity and expression.<sup>132</sup> In addition, campuses are working to meet the needs of transgender students in health care, residence halls, bathrooms, locker rooms, as well as gender-related portions of forms, records, and documents.<sup>133</sup> Regardless of any jurisdiction's birth certificate amendment policy, colleges and universities must adopt these trans-inclusive policies in order to accommodate their transgender student body. The concern expressed by the Department of Health about the effect the proposed birth certificate policy would have on these institutions again seems to be based on the idea that preoperative or nonoperative transwomen are not "really" women and preoperative or nonoperative transmen are not "really" men and, therefore, others are not obligated to respect their gender identity. It is true that the proposed policy that would allow pre- or nonoperative transgender people to amend their birth certificates would result in colleges and universities being legally obligated to treat these people in accordance with their lived gender. Again, however, the bottom line is that these institutions should not discriminate against transgender students and should make adjustments to their policies in order to accommodate these students regardless of what their birth certificates say or the amendment policy in the jurisdiction where it was issued.

An additional concern about the proposed amendment policy was how it would affect single-gender schools. The proposal specifically stated that a person must be at least eighteen years old in order to apply to change their gender on their birth certificate. This means that the proposal would not affect the vast majority of high school students. So, the primary issue is how the proposed policy would affect women's colleges. The debate about transgender students at women's colleges has focused on students who transition to male while attending the school. A number of women's colleges currently have transmen enrolled.<sup>134</sup> The proposed policy would allow more of these students to amend their birth certificates, but it would not change the fact that transmen attend the

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132. See Transgender Law & Policy Inst., Colleges/Universities and K-12 Schools, <http://www.transgenderlaw.org/college/index.htm> (last visited Jan. 15, 2008). As of this writing, 114 colleges and college systems in 28 states plus the District of Columbia have adopted nondiscrimination policies that cover gender identity and expression. See *id.*

133. See *id.*

134. See, e.g., Adrian Brune, *When She Graduates as He*, BOSTON GLOBE, Apr. 8, 2007, [http://www.boston.com/news/globe/magazine/articles/2007/04/08/when\\_she\\_graduates\\_as\\_he?](http://www.boston.com/news/globe/magazine/articles/2007/04/08/when_she_graduates_as_he?); Craig Offman, *A Class Apart: Transgender Students at Smith College*, FINANCIAL TIMES, Apr. 16, 2005, <http://www.ft.com/cms/s/14a5a0d4-aca8-11d9-ad92-00000e2511c8.html>; Allison Metz, *Do Transgender Students Adhere to the Mission of a Women's College?* (May 3, 2007), <http://media.www.themhnews.com/media/storage/paper999/news/2007/05/03/News/Do.Transgender.Students.Adhere.To.The.Mission.Of.A.Womens.College-2895355.shtml>.

schools. A less discussed issue is transwomen at women's colleges. It is unclear whether the colleges rely on an applicant's self-identified gender or if they refer to other documentation of their gender to determine if they are eligible to attend a *women's* college. Mount Holyoke has stated that their policy is to admit and enroll students "whose legal status is female."<sup>135</sup> However, this response begs the question because there is no settled answer as to what determines a person's "legal" gender.<sup>136</sup> Presumably, a birth certificate that says "female" and other identity documents that say the applicant is female would make the transgender woman eligible to attend the women's college. So, if women's colleges require the applicants to have identity documents that say "female," then the proposed policy would make more transgender women eligible to apply to attend a women's college and, hence, to share their unique experience as a woman with the rest of the student body.

Another justification advanced by critics as to why transgender people should be prevented from amending their birth certificates is that the mechanism may be used for fraudulent purposes.<sup>137</sup> However, as mentioned above in the discussion of the Real ID Act, the safeguards included in the proposed policy, such as the requirements that the individual have been living in their gender for two years before they make the application and that the applicant provide affidavits from both a physician and a mental health professional, prevent anyone with fraudulent intentions from abusing the policy in order to change their identity to evade law enforcement.<sup>138</sup> Furthermore, fraud may be prevented most effectively if a person's self-identified gender is reflected on their identity documents. In addition, "the status of one's gonads, chromosomes, or genitalia are not inspected to determine identity," rather "[p]hysical appearance, which is generally a reflection of self-identified sex, is the fact that should match the sex indicated on the official document."<sup>139</sup>

Some critics claim that allowing people to change their gender on their birth certificate will lead to gay and lesbian marriages.<sup>140</sup> This argument implies that queer people would use this policy for fraudulent

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135. Metz, *supra* note 134. The author of this Comment inquired with the admissions offices of other women's colleges about their policies on admitting transgender women, however none of the schools responded.

136. See generally Greenberg, *supra* note 13.

137. See *id.* at 316.

138. See N.Y. City Board of Health & Mental Hygiene, Bd. of Health, *supra* note 18, at 4-5.

139. Greenberg, *supra* note 13, at 316.

140. See Colangelo, *supra* note 83, at 4.



purposes. For example, the argument suggests that a lesbian might “pretend” to be a transgender man in order to get an amended birth certificate that says she is a man so that she can legally marry her female partner. As discussed above, this is simply unrealistic given the measures required by the policy before the certificate is amended. If a state refuses to allow gay and lesbian couples to marry, the proposed birth certificate amendment policy would not change that fact. One would expect that in those states, transgender people in straight relationships would be permitted to marry, and transgender people in gay or lesbian relationships would not be permitted to marry. And therefore, the fact that more transgender people would be able to obtain a birth certificate reflecting their lived gender would have no effect on the marriage laws of a state. However, state legislatures and courts have made a mess of transgender marriage.

The courts are split as to whether a person will be treated according to their birth assigned sex or their self-identified sex for the purpose of marriage. Most courts use a “multifactor and interdisciplinary approach to determining legal sex.”<sup>141</sup> Some courts have ruled that sex is determined at birth and this cannot be changed by medical treatment or surgical alterations.<sup>142</sup> On the other hand, a majority of courts have held that for the purposes of marriage, a person’s legal sex should be determined at the time that the marriage license is issued rather than at birth.<sup>143</sup> In these cases, the fact that the person had or had not altered their birth certificate was a *factor* for determining their sex for the purpose of marriage, but the gender designation on the certificate was not dispositive.<sup>144</sup> Regardless of the state of the common law on this issue, this is an issue that has been and will continue to be resolved by state courts and legislatures and, therefore, should not be used as an excuse to prevent transgender people from obtaining accurate birth certificates.

Another justification for preventing amendments to birth certificates is the purported value of maintaining the integrity of the document as a historical record.<sup>145</sup> If legislators intended a birth certificate to be a historical document reflecting the facts known at the time of birth, then they would not allow certificates to be amended at all. However, that is not the case—there are various circumstances in which

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141. Greenberg, *supra* note 103, at 66-67.

142. *See id.* (citing *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999)).

143. *See id.* (citing *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001)).

144. *See id.*

145. *Id.* at 316.

birth certificates are typically amended and reissued.<sup>146</sup> For instance, in New York City a new birth certificate may be issued under several circumstances: if previously unmarried parents of a child remarry after the birth; if the parentage of the individual is discovered; if the person is adopted; or if a putative father admits to being the child's parent subsequent to the birth.<sup>147</sup> Amendments to the parentage information result in greater accuracy in tracking familial relationships. Likewise, allowing a person who intends to live permanently in their gender to amend their birth certificate results in greater accuracy of the document so that it can more easily be used to identify and track the registrant.

The final reason that jurisdictions give as a reason to require surgery as a prerequisite for amendment of the birth certificate is the fear that without some form of permanent physical change, the individual may “change back” to the gender they were assigned at birth.<sup>148</sup> As discussed above, gender may be very fluid, it is not necessarily a fixed identity, and therefore, room should be made for a person to “change back.”

If a person were to “change back” under the proposed policy they would have the option to “reverse” their birth certificate in order to reflect that change. If they did not desire that change, then they would be in the same situation that they were before they changed their birth certificate (the way the majority of trans people live today)—they would have to navigate the system with a birth certificate that did not match their lived gender. If someone with an amended birth certificate did seek to change their certificate again (it is likely that this is what the officials fear), it would not be nearly as dire a situation as the proposal's critics may think. Presumably, the applicant would still be subject to the same rules and requirements as they were for the first change, so it is not a decision that could be made lightly. In addition, because it would happen so infrequently,<sup>149</sup> this would not become any sort of bureaucratic or administrative nightmare. As a point of comparison, people change their names fairly often. It is also very common for a divorced woman to return to her maiden name. These changes occur more frequently than

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146. *Id.* at 317.

147. *See* 24 R.C.N.Y. HEALTH CODE § 207.05 (2006).

148. *See* Spade, *supra* note 84, at 33.

149. Although there are no statistics about the frequency of people who at one time were transgender and then subsequently identified as their birth assigned gender, an indicator of the infrequency that a transgender person may want to “change back” is how often transgender people regret having undergone sex-reassignment surgeries. Less than 1% of female-to-male transsexuals and 1-1.5% of male-to-female transsexuals experienced regret following their surgeries. Bowman & Goldberg, *supra* note 47, at 4.

gender changes ever would; yet there has not been a significant demand from vital statistics offices to stop allowing people to change their names. There is no reason to think that these offices would be unable to do the same for the handful of people who may choose to “change back” to their birth-assigned gender.

## VI. CONCLUSION

A transgender person’s incongruity with our society’s definition of personhood fosters the idea that such a being is somehow less than human and may be treated accordingly. A transgender person’s incongruity may be evidenced by a birth certificate that reveals their assigned sex at birth. This evidence is then used to justify an unwillingness to respect a trans person’s gender identity and hence to discriminate against them. One step in reducing discrimination against transgender people is to make more available the option of amending one’s birth certificate to reflect the individual’s lived gender. The current policy in most jurisdictions requires that the transgender applicant have undergone extensive, intrusive, and expensive genital reconstruction surgery. Because this is not consistent with current understandings of trans health care, most transgender people do not undergo these types of surgeries and hence are ineligible for birth certificate amendment.

A solution to this problem is to remove the surgical requirement from birth certificate amendment policies. A policy that allows transgender people to amend their birth certificates after they have completed the procedures necessary and appropriate for their personal transition is consistent with current standards of transgender healthcare.<sup>150</sup> Furthermore, the concerns raised about birth certificate amendment policies illustrate a general ignorance and misunderstanding about transgender identity, healthcare, and rights. A birth certificate policy that requires genital surgery reinforces our society’s false belief that one’s gender is dictated entirely by one’s genitalia. When a transgender person is discriminated against, the perpetrator can justify their actions by referencing the birth assigned gender designation on the transgender person’s unamended birth certificate. Under a policy that does not require genital surgery, a birth certificate could no longer be used as a pretext to harass or discriminate against transgender people.

Dr. Thomas Frieden was objectively correct, but contextually wrong when he said, “What the birth certificate shows does have implications

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150. See Sylvia Rivera Law Project, *supra* note 2.

beyond just what the birth certificate shows.”<sup>151</sup> He was contextually wrong, because he was using this as an explanation as to why the New York City Board of Health withdrew the proposed nonsurgical birth certificate amendment policy. He was objectively correct because what a birth certificate shows has a profound effect on the lives of transgender people. Not only can it be used to dictate the gender designation on other identity documents, but it can also be wielded as a weapon or a tool. It can be a weapon brandished against transgender people or a tool that transgender people can use to achieve the recognition they deserve in their current gender.

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151. Yoshino, *supra* note \*.

APPENDIX

The proposed amendment reads as follows:

§ 207.05 Correction of records; filing of new birth certificates.

- (b) Upon application, a new birth certificate shall be filed when:
  - (1) The name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has completed the transition from one gender to the other and intends to permanently remain in such acquired gender. The acquired gender shall be entered on the new certificate. No application shall be approved unless the applicant is over 18 years of age and has lived in the acquired gender for at least two years ending with the date on which the application is made. Applications shall include two affidavits, demonstrating the applicant's full transition to and intended permanence in his or her acquired gender, as follows:
    - i. A notarized affidavit from a physician licensed in the United States, practicing in the field of gender identity disorder or qualified through board certification in one of the following specialties: endocrinology, adolescent medicine, urology, plastic surgery, gynecology, family medicine, general medicine or internal medicine, attesting to the transition of the applicant's gender. The notarized affidavit shall state:
      - A. The physician's credentials, including:
        - a. Information about licensure and specialties, including license number, name of issuing body, and name of school from which highest degree was awarded; and
        - b. Information demonstrating at least two years experience in the last five years related to transgender treatment, including listing relevant specialized courses taken by the physician and information about the number of transgender patients the physician has treated;
      - B. The length of time and approximate dates the applicant has lived in the acquired gender;
      - C. The length of time the physician has been treating the applicant;

- D. A detailed diagnosis and case history of the applicant, including results from physical examinations and a description of all medical treatments received by the applicant for the purpose of modifying sexual characteristics;
- E. The affiant's professional opinion regarding the applicant's full transition to and intended permanence in his or her acquired gender; and
- F. If the affiant had not previously treated the applicant, the affiant shall:
  - a. Conduct a detailed physical examination of the applicant;
  - b. Review of the applicant's case history and records concerning the applicant's medical history related to gender transition; and
  - c. Include affiant's findings in the affidavit.
    - ii. A notarized affidavit from a mental health professional licensed in the United States, practicing in the field of gender identity disorders. Minimum acceptable credentials include: master's degree or its equivalent in a clinical behavioral science and specialized training and competence in gender identity disorders. The notarized affidavit shall state:
      - A. The mental health professional's credentials, including:
        - a. Information about licensure and specialties, including license number, name of issuing body, and name of school from which highest degree was awarded; and
        - b. Information demonstrating at least two years experience in the last five years related to transgender treatment, including listing relevant specialized courses taken by the mental health professional and information about the number of transgender patients treated;
      - B. The length of time and approximate dates the applicant has lived in the acquired gender;
      - C. The length of time the mental health professional has been treating the applicant;

- D. A detailed diagnosis and case history of the applicant including the applicant's psychological treatments related to his or her gender transition;
  - E. The affiant's professional opinion regarding the applicant's psycho-social adjustment and support network, and full transition to and intended permanence in his or her acquired gender;
  - F. If the affiant had not previously treated the applicant, the affiant shall:
    - a. Physically meet and interview the applicant;
    - b. Review the applicant's case history and records concerning applicant's psychological history related to gender transition; and
    - c. Include affiant's findings in the affidavit.
- (2) A person who previously obtained a birth certificate based on convertive surgery may submit a request to the Department for the issuance of a new birth certificate indicating the person's gender. In such case, the individual shall not be required to submit the affidavits set forth in subparagraphs (i) and (ii) of § 207.05(b)(1).
- (c) When an application for a new birth certificate is filed pursuant to § 207.05(b)(1), the Department may request the applicant to provide other information or evidence demonstrating the applicant's transition to his or her acquired gender.<sup>152</sup>

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152. For the language of the proposal, see N.Y. City Dep't of Health & Mental Hygiene Bd. of Health, *supra* note 18, at 4-6.