



Project
MUSE[®]

Today's Research. Tomorrow's Inspiration.

EXPECTING BODIES: THE PREGNANT MAN AND TRANSGENDER EXCLUSION FROM THE
EMPLOYMENT NON-DISCRIMINATION ACT

PAISLEY CURRAH

In April 2008, news about an Oregon man's impending parenthood spawned a media tsunami across the United States and even internationally. "Man Is Six Months Pregnant," reported CBS news. "The Pregnant Man Speaks Out," announced *People* magazine as it hyped the first published show-all pictures. "Pregnant Man Is Feeling Swell," punned the *New York Post*. ABC news highlighted his television debut in its story "'It's My Right to Have Kid,' Pregnant Man Tells Oprah." "She's Pregnant, but She's a Man," headlined the *Sydney Morning Herald*. "Pregnant, yes—but not a man," huffed an editorialist in the *International Herald Tribune*.

The riveting "pregnant man" lead drew readers and viewers further into the story. It was usually in the second paragraph that audiences were provided with an explanation. The pregnant man was Thomas Beatie, a transgender man who had had "top" surgery and been on hormone therapy but had stopped taking testosterone in anticipation of getting pregnant. A quick and unscientific survey of the blogosphere indicates that the news was met with disbelief, curiosity, revulsion, annoyance, indifference, and, less often, celebration. Some bloggers felt that "she" was still a woman; others thought transitioning should mean Beatie had forfeited his right to give birth; still others (usually women) expressed annoyance at all the attention the first "pregnant man" was getting. A small proportion seemed to have no problem getting their mind around the idea.

The story originally came to light at the end of March, when Beatie published a first-person account in the *Advocate*, a *Time*-like weekly magazine marketed to the U.S. gay community. In that essay, Beatie describes the travails he and his wife went through as they tried to find medical professionals who would work with them. Some refused to treat Beatie because of their religious beliefs; one physician told Beatie he

would have to shave his beard; a third consulted with his hospital's ethics board and then turned him away (Beatie 2008).

For trans people in the United States, much of Beatie's narrative resonated with their own experience. While it is rare, but not unheard of in trans communities, for people who have transitioned to give birth, his larger story of discrimination in the health care industry is depressingly familiar. T. Benjamin Singer has studied the inability of many medical professionals to provide appropriate care to people whose bodies somehow exceed conventional expectations. He examines the "terror" engendered by the unknown through a frame he labels the "transgender sublime," which he describes as the "conceptual limit to a service-provider's ability to recognize the legibility and meanings of trans identities and bodies" (2006, 616). The "common sense" of gender says that birth sex, gender identity, and the secondary sex characteristics that later develop will all be in alignment.

But the histories, spatial arrangements, and physical terrains of trans people's bodies can confound conventional expectations. Some bodies are modified through hormones, various types of gender reassignment surgeries, or both, to produce bodies culturally commensurate with gender identities. In those cases, the perceived incongruence comes only from knowing the *history* of that individual's body. Other bodies, however, have unexpected configurations in their particular *geographies*—for example, breasts with penises for some, male chests with vaginas in others—that produce a dissonance. (This dissonance, to be clear, belongs not to the trans body but to those gazers who have conventional gender expectations.) The more easily read and specific physical terrains of bodies, such as the presence or absence of facial hair, baldness, or patterns of musculature, can add a third layer of potential contradiction. (Ironically, these configurations of geography and terrain often are determined by one's lack of access to medical care. Medicaid and almost all private insurance plans specifically exclude hormones and gender reassignment surgeries for trans people. From personal choice or because of the great expense, the vast majority of transgender men and most transgender women forego genital surgery (Pooja and Arkles 2007). Hormones, whether attained through prescriptions or bought on the street, are cheaper.)

The stupefied resistance to bodies that confound gender expectations isn't limited to ob-gyn offices or maternity wards. The presence of someone whose gender identity or gender expression is not traditionally

associated with the sex assigned to them at birth can bring people to very brink of cognition, and beyond it, in any setting customarily segregated by gender: bathrooms and locker rooms, homeless shelters, and correctional facilities, among others.

Judging (unscientifically, again) from informal conversations I've had with acquaintances, that a man can get pregnant may be the central, and for many the only, fact that most people in the United States now know about transgender issues. But among trans people, Beatie's story was of interest primarily because it generated so much scrutiny in the mainstream media. What really roiled trans communities in 2007–8 was the decision by Representative Barney Frank and House Speaker Nancy Pelosi to exclude transgender people from the federal Employment Non-Discrimination Act (ENDA). While so many people now know that a man can get pregnant, relatively few people outside queer communities are aware of the ENDA debacle, even though it is of much greater significance to the lives of transgender people.

ENDA, a bill that has been floating around Congress since the 1970s in some form or another, would prohibit workplace discrimination on the basis of sexual orientation. After decades of lobbying, in 2003 transgender rights advocates and their allies thought they had succeeded in persuading key gay rights advocacy players in Washington, including the Human Rights Campaign, to support only "transgender-inclusive" legislation (National Center 2003; Minter 2006). As with nondiscrimination bills at the state and municipal levels, the bill's statutory language would have defined gender identity as "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." That language would work to protect transgender people (Employment Non-Discrimination Act of 2007).

An alert reader might ask, Aren't transgender people already protected in federal law through the ban on "sex" discrimination in Title VII of the Federal Civil Rights Act of 1964? In earlier decades, advocates certainly had hoped that federal courts would view discrimination against transgender people as a type of sex discrimination. But that did not happen. In a 1984 decision, for example, a federal appellate court ruled against a transsexual woman who had lost her job as an airline pilot after transitioning, with the court deciding that she had not made a viable claim of sex discrimination. According to the decision:

After the surgery, hormones, appearance changes, and a new Illinois birth certificate, it may be that society...considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide the case.... If Eastern [Airlines] did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female. (*Ulane v. Eastern Airlines* 1984)

In recent years, courts in a few jurisdictions have begun find that “sex” discrimination encompasses bias against individuals whose gender identity doesn’t conform to cultural expectations based on their birth sex (*Schroer v. Billington* 2008). But most courts still do not. That’s why transgender rights advocates turned to federal and state legislatures for redress (Currah and Minter 2004).

The beginning of 2007 brought in the first Democratic majority in the House of Representatives since 1993. That meant ENDA had a real opportunity to pass in the House and possibly in the Senate. For Representative Frank, an out gay representative and the chief sponsor of ENDA, a realistic chance of passing meant that transgender people, generously included when the bill was pie in the sky, would now have to be cut from the bill before it was introduced. Over the vociferous objections of a united coalition of three hundred gay, lesbian, bisexual, and transgender groups (but not including the coffer-rich Human Rights Campaign), Frank and House Democratic leadership cut “gender identity” from the bill.

Representative Frank’s opposition to including transgender people evokes the “transgender sublime” response to unexpected bodies showing up in gender-segregated spaces. But in the case of the ENDA debate, it’s not the very rare situation of people with beards in maternity wards that incites terror, it’s a different body part appearing unexpectedly in another type of gender-segregated space. “Transgendered people want a law that mandates a person with a penis be allowed to shower with women. They can’t get that in ENDA,” Frank told the *Advocate* in 1999 (Dahir 1999). Like some of Beatie’s detractors, Frank appears to subscribe to a system of naturalized gender logics in which a transgender woman who retains her penis is not really a woman.

Throughout the years, Frank has remained remarkably loyal to that position. For example, even when he toyed with the idea of including gender identity, he insisted on adding statutory language that would prevent a transgender woman who had been barred from a women's shared shower or dressing facilities from making an actionable discrimination claim (and vice versa for transgender men). But by 2007, even that exemption didn't meet his objections, and gender identity was entirely cut out.

As a result, we now have two Employment Non-Discrimination Acts. HR 3685, referred to as the "bad ENDA" in GLBT rights circles, includes only sexual orientation and is being pushed by Frank and House Democratic leadership. The "good ENDA," HR 2015, also includes gender identity. The "bad ENDA" passed the House by a vote of 235 to 184 and its correlate in the Senate stands a good chance of being passed there. The "good ENDA" languishes in the House. But since President George W. Bush has promised to veto any version of ENDA that reaches his desk, GLBT advocates in D.C. say the battle to pass the good ENDA is far from over. There will be other opportunities to convince House leadership to push for a transgender-inclusive bill.

It's not just in gender-segregated physical locations like locker rooms or maternity wards where the sex binary is policed. State processes of sex classification also rely on the idea that the body must cohere in predictable ways with gender identity. For example, in 2005–6, advocates attempted to get New York City to amend its rules for sex classification on birth certificates. They argued that requiring transgender people to have genital surgery before changing their sex on their birth certificate was unfair and did not reflect current state of transgender health care (Currah and Moore 2009). The public response to the proposal is summed up by this comment: "How might it be possible for someone with male genitals to now be listed as being female? Is everyone expected to be blind? I can understand if one had a sex change but simply dressing in the clothing of the opposite sex does not qualify a person of that sex" (New York City Board of Health and Mental Hygiene 2006). The effort failed. In New York City, to have the "M" on their birth certificate replaced with an "F," transgender women must prove they have had a vaginoplasty; to have an "M" on the birth certificate, transgender men must prove they have had a phalloplasty, although less than 3 percent of trans men have had one, according to one study (Newfield, Hart, Dibble, and Kohler 2006).

In the past three decades, feminist theory and activism has had

great success in dislodging the notion that gender is the same as sex. Many of the social imperatives that used to be explained through the biologicistic prism of sex difference are now framed as gender norms. For example, even conservatives have accepted the gradual expansion of sex discrimination laws to include discrimination based on gender stereotyping. As Justice Antonin Scalia points out, “The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes” (*J.E.B. v. Alabama* 1994).

Despite the inroads made in divorcing sex from gender *norms* and gender *expression*, however, we haven’t yet succeeded in disentangling gender identity from sex. In much of the legislation, case law, and administrative rules that discipline the identities of transgender people, it’s still the sexed characteristics of bodies that matter. And notions of sex are still governed by logics demanding coherence. Bodies that disrupt those expectations aren’t always welcome.

For a biography of PAISLEY CURRAH, please see the guest editors’ introduction to this issue.

WORKS CITED

- Beatie, Thomas. 2008. “Labor of Love.” *Advocate*, March 26, 2008. http://www.advocate.com/exclusive_detail_ektid52947.asp.
- Currah, Paisley, and Shannon Minter. 2004. “Unprincipled Exclusions: The Struggle for Legislative and Judicial Protections for Transgendered People.” In *Regulating Sex: The Politics of Intimacy and Identity*, ed. Elizabeth Bernstein and Laurie Schnaffer. New York: Routledge.
- Currah, Paisley, and Lisa Jean Moore. 2008. “‘We Won’t Know Who You Are’: Contesting Sex Designations on New York City Birth Certificates.” *Hypatia: Journal of Feminist Philosophy* 24(3).
- Dahir, Mubarak. 1999. “Whose Movement Is It?” *Advocate*, May 26, 50–55.
- Employment Non-Discrimination Act of 2007. 2007. U.S. Congress. House. HR 2015 and HR 3685. 110th Cong., 1st session.
- Gehi, Pooja S., and Gabriel Arkles. 2007. “Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People.” *Sexuality Research and Social Policy: Journal of NSRC* 4(4):7–35.
- J.E.B. v. Alabama Ex Rel. T.B.* 1994. 511 U.S. 127 (1994).

- Minter, Shannon Price. 2006. "Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion." In *Transgender Rights*, ed. Paisley Currah, Richard M. Juang, and Shannon Price Minter. Minneapolis: University of Minnesota Press.
- National Center for Transgender Equality and the Transgender Law and Policy Institute. 2003. "Transgender Leaders Laud Unified Voice of GLBT Community in Federal Legislative Efforts." News release, June 17. <http://www.transgenderlaw.org/release.htm>.
- Newfield, Emily, Stacey Hart, Suzanne Dibble, and Lori Kohler. 2006. "Female-to-Male Transgender Quality of Life." *Quality of Life Research*, 15(9): 1447-57.
- New York City Board of Health and Mental Hygiene. 2006. "Resolution Comments—NYC Birth Certificate for Transgender People."
- Schroer v. Billington, N.05-1090(JR)*, 2008 U.S. Dist. 2008 U.S. LEXIS 71358, (D.D.C. September 19, 2008).
- Singer, T. Benjamin. 2006. "From the Medical Gaze to *Sublime Mutations*: The Ethics of (Re)Viewing Non-normative Body Images." In *The Transgender Studies Reader*, ed. Susan Stryker and Stephen Whittle. New York: Routledge.
- Ulane v. Eastern Airlines, Inc.* 1984. 742 F.2d 1081 (7th Cir. 1984).