3

LEGALLY SEXED

Birth Certificates and Transgender Citizens

LISA JEAN MOORE AND PAISLEY CURRAH

The story of birth certificate corrections begins, for our purposes, in 1965, when a transsexual woman (a woman born male who transitions to female) asked the City of New York to issue her a new birth certificate identifying her as female. "Anonymous," as described in court documents, did everything she thought was needed to function socially as a woman: her gender identity was affirmed by a medical professional; she passed the "real life" test of living as a woman; she underwent sex reassignment surgery; she began a lifelong course of feminizing hormones (*Anonymous v. Weiner* 1966). But state-issued identity documents still designated Anonymous as male. The "M" gender marker, revealing her history as a transsexual person, opened up the possibility for her identity as a woman to be challenged, undermining her ability to function legally and socially as a woman. The director of the Bureau of Records and Statistics denied her request to have her gender marker changed. The rationale for the denial in the 1965 report—often cited by policymakers and judicial authorities—was a need to protect "the public interest . . . against fraud" (New York Academy of Medicine Committee on Public Health 1966). In 1971 the policy of denying such petitions outright was reformed, to a degree: transsexual men and women born in New York City who could show they had completed full "convertive surgery" were reissued birth certifi-

cates that eliminated the box for sex entirely (New York City Health Code 1971), thus still effectively outing an individual as "other" and inviting further opportunities for scrutiny and surveillance.

This story demonstrates the concerns with fraud and the attachment of physical, anatomical appearance to gender stability, indicating the cultural and political urgency to produce a body that matches a "stable" gender identity. Our analysis of the regulatory changes in the birth certificate since 1965 reveals the gendered surveillance apparatuses and administrative systems put in place to ensure that someone *is* who they say they are. Birth certificates link the body to the gendered identity of a sexed individual. In this context, the body is imagined as pristine, biologically coherent, legible, and untainted by culture; the birth certificate, conventional wisdom suggests, simply records the facts, the baby's sex being a permanent and indisputable one. This document, unchanged, is supposed to accompany an individual for life. We suggest that the amended birth certificate to change one's sex and the controversies about this process are indicative of cultural concerns about the truth and permanence of sex and gender (Currah and Moore 2009).

Every day it is apparent how surveillance—the tacit or obvious collection and processing of data about human bodies—has grown in intensity and precision. Electronic monitors of speed recorded through algorithms on the New Jersey Turnpike, targeted marketing through the sidebars on social-media sites, and the ubiquitous security cameras trained on our every move track and aggregate our embodied movements through space and time. As the sociologist David Lyon has written, from modernity onward "the body achieved new prominence as a site of surveillance. Bodies could be rationally ordered through classification in order to socialize them within the emerging nation-state. Bodies were distrusted as sensual, irrational, and thus in need of taming, subject to disciplinary shaping toward new purposes" (2001a, 292). We argue that surveillance is not universally and uniformly applied to all human bodies and, furthermore, that monitoring occurs with different degrees of specificity and intention depending on the presumed coherence of gender and sex (see also Casper and Moore 2009).

Both scholars and transgender-rights advocates have pointed to the many contradictions in state-formulated constructions of gender. Advocates highlight these contradictions to persuade state agencies to adopt more consistent or uniform standards. However, among advocates, there is disagreement about what those gender standards should be. Some ar-

gue that self-avowed gender identity should be the only standard in state recognition of gender or sex (International Bill of Gender Rights 1990; The Yogyakarta Principles 2007). Others promote standards in which professionals make the determination based on particular medicalized metrics. Still others argue that since the gender binary reflects hegemonic and increasingly outmoded gendered social and legal structures, rather than any fundamental truths of bodies and identities, gender should not be an element of any official identifying document (Vade 2005). Some scholars, on the other hand, use the contradictions around state recognition of the legal sex of transgender people to demonstrate the radical instability of gender (Butler 1993). Regardless of the contradictions, surveillance apparatuses, such as the birth certificate, are indispensable to our ability to function as sexed and gendered individuals.

It is taken for granted that one needs identity documents in order to move through the world. As Craig Robertson points out, "In our contemporary world, there is a general acceptance that identity can be documented, that someone can be known and recognized through a document" (2010, 250). Robertson's work traces the American passport from its birth and through its hundred-year history, and identifies the ways that connecting an individual human body with a piece of state-sanctioned paper transformed regimes of surveillance. Our work builds on that of Robertson through the examination of the birth certificate. In a departure from much scholarship on identity documents, we argue that gender can never be disentangled from surveillance. In this essay we make a feminist intervention by examining shifts in the legal, medical, and commonsense logics governing the designation of sex on birth certificates issued by the City of New York between 1965 and 2006.[1] We explore the different narratives at work during two moments when transgender-rights advocates, medical authorities, and government officials came together to negotiate legal definitions of sex.

Using participant observation, ethnography, in-depth interviews, and content analysis, we examine the negotiation of gender in the process of trying to obtain state-issued identity documents. Paisley Currah, coauthor of this essay, served as an "expert advocate" on the Transgender Law and Policy Institute on the Transgender Advisory Committee (TAC), which met four times between February and April 2012.[2] Data for this essay were collected from Currah's fieldnotes on earlier meetings and the official committee meetings, from official meeting minutes of the TAC, from Currah's autoethnographic account, and from his records on advo-

cacy on this issue in New York City between February 2002 and December 2006. As well, we drew from legal documents, archival research, and interviews with other advocates: Dean Spade, a lawyer with the Sylvia Rivera Law Project; Chris Daley, executive director of the Transgender Law Center; and Mara Keisling, Executive Director of the National Center for Transgender Equality.

Before 9/11, transgender people whose gender identity differed from their legal sex at birth found themselves in a paradoxical situation whereby, for instance, a person's legal sex might change simply by crossing a state line, or one's sex designation on a driver's license might differ from that on file with the Social Security Administration (Currah forthcoming; Greenberg 1999). The modern regulatory project of sex classification has been in crisis for decades, caused by increasing divergence between individual gender definition (or identity) and legal sex designation. Post-9/11 the norms for identity documents have been regulated more stringently. Consequently, mismatching identity documents create significant difficulties for transpeople because systems of surveillance are triggered by mismatching documents. In this era of heightened scrutiny of individuals' bodies and histories, transgender people find themselves under increased surveillance (Currah and Mulqueen 2011). As with other subaltern groups positioned as not members of the imagined normative majority—undocumented workers, immigrants, "aliens" (non-U.S. citizens), and other "suspicious persons"—transgender people are constantly forced to account for themselves by documenting belonging (S. Ahmed 2000) via identity documents and often also via legitimating letters from their physicians (National Center for Transgender Equality 2004).

Birth of a Citizen(ry)

Birth certificates establish the earliest relationship between an individual and the state. The advent of larger, centralized modern state formations puts greater distances between magistrates and citizens, and thus requires standardized systems for identifying and individuating its population (J. C. Scott 1998). Alongside death and marriage certificates, birth certificates are among the "vital statistics" that states use to count, study, and manage their populations (Lunde 1975; Shapiro 1950). These documents are essential for demography—that is, birth rate, mortality rates, fertility, migration—for municipalities and nation-states. Birth certificates aim to make an individual uniquely identifiable, recognizable, and

classifiable (Rule et al. 1983; Stevens 1999). In attempting to codify the relationship between an individual and the state, birth certificates constitute one of the technologies of control of modern systems of biopower (Foucault 1976; Foucault 1978).

Birth certificates provide benefits and confer responsibilities. They create recognition for the distribution of rights and resources from the state to individuals, such as voting, social security, Medicaid, and welfare benefits. Birth certificates are inscribed with cultural norms and values exercised through legally certified social relations that are expressed through bureaucratically mandated classifications of the parents' age, marital status, and racial identification. These categories highlight social desires for the organization of human populations based on beliefs about sex, gender, race, and class: binary sexed, biologically driven, heterosexual, racially homogeneous, married families. For example, "legitimacy" is the legal certification of the status of offspring born to parents who are legally married at the time of the infant's birth.[3] Marital status and legitimacy on birth certificates are linked to marriage laws, functioning as disciplinary mechanisms that certify that some births are legitimate while others are not.

Racial and ethnic categories have gone through many permutations on the U.S. Census, on marriage licenses, and on birth certificates. Since the early 2000s, many municipalities used the vital statistics categories recognized by the National Center for Health Statistics. The ten categories for race are White, Black, Indian, Chinese, Japanese, Hawaiian, Filipino, Other Asian or Pacific Islander, Other Entries, and Not Reported. In 1864 politicians coined the term *miscegenation* to refer to the illegal mixing of two or more races as a means to ensure and regulate human reproduction and racial "purity" (Pascoe 2009, 1). As the feminist historian Peggy Pascoe has shown, as late as 1999 antimiscegenation laws included in state constitutions made marriage illegal between a white person and someone with one-eighth or more "negro blood" (ibid., 307). While antimiscegenation laws have been eradicated, racial correlates are used to make arguments about certain types of human births. Case in point: the birth certificate of the president of the United States, Barack Obama, has been dissected and inspected from multiple angles to dispute the legitimacy of his claim to the presidency. Clearly motivated by racist beliefs, the demands of birthers (those who insist on President Obama's alien status) have revealed their incredulity and discomfort with the fact that an African American man resides in the White House. The birther phenomenon

clearly illustrates that birth certificates are rife with politics. In a broader epistemological sense, identity documents do not so much confirm identity as produce and authorize it legally.

Breeding Grounds

In the lexicon of vital statistics discourse, the birth certificate is referred to as a "breeder document." That is, it is a primary authenticating identity paper used when applying for other identity documents (New York City Department of Health and Mental Hygiene 2005). Birth certificates contain descriptions of the sex and birth history of the infant, both of which are understood as fixed pieces of data. Unlike aspects of identity that are recognizably mutable—such as one's name, appearance, and ability—sex is assumed to be immutable, like place of birth and biological parentage, and is a fundamental characteristic for identifying citizens. Documenting birth through the birth certificate is an attempt to ground with certainty the material embodiment of the baby's flesh as a gendered legal entity. That is, the state can study, track, educate, tax, and distribute resources to these imagined coherent selves, selves that flow from the entity described in biological terms and affirmed in state documentation. This is also a document that regulates social status, gender roles, and related performances. The dual function of the birth certificate—as documentary record of a historical fact and as a primary identity document—reveals the complex relation between identity documents and shifting identities, and between biological sex and legal gender identity.

The more the science of sex advances, the less unitary and the more troubled the notion of sex as a binary concept becomes (Rosario 2002). For instance, according to Gerard Noriel, in 1829 a French doctor petitioned the state to allow doctors, instead of officials, to determine the sex of infants, because "the municipal officials were unable to determine the sex of a child in doubtful cases" (2001, 53). In an article on the issue of transsexuals and birth certificates, L. O. Schroeder points out, "Legally, a definition of male or female does not exist. The presumption that gender is so well understood as not to need defining does not survive examination" (1973, 239). Gender is shaped by the interplay between a number of distinct and often historically shifting factors—sex chromosomes, gonadal sex, sex hormone pattern, internal nongonadal sex organs, genitalia, secondary sex characteristics, gender of rearing, and gender identity.[4] These characteristics are assumed to align themselves into a

simple, unitary, uncontested form, defined as male *or* female. However, even these apparently biological elements are not always in alignment: people with intersexed conditions are born with different constellations of sex characteristics; many transgender individuals make surgical interventions on their bodies or take hormones to alter them. State actors, then, are forced to choose and monitor a particular criterion for defining sex when assigning legal gender identity. Compounding the confusion, in the United States there are state entities with jurisdictional power to define sex. For example, states, territories, and the federal government each issue all sorts of identification documents—from passports to birth certificates to drivers' licenses to pilots' licenses to Social Security cards. Even state entities that do not issue identity documents but do segregate on the basis of gender make their own rules for gender classification—prisons, hospitals, schools, drug rehabilitation centers, youth service providers, social services. To add yet one more layer of complexity, judges have added to the chaos by finding that one's legal gender for one social function may not hold for others (Currah forthcoming).

First Iteration: Attempts by Transsexuals to "Conceal" Their Sex

The phenomenon of transsexualism was introduced to the U.S. public with the news coverage surrounding Christine Jorgensen's transition in 1951—fourteen years before Anonymous's 1965 petition[5] requesting the New York City Department of Health (DOH) change the gender on her birth certificate. However, the first known "sex change" involving genital surgery had taken place twenty years earlier (Meyerowitz 2002, 19). The historian Joanne Meyerowitz recounts in her comprehensive history of transsexuality in the United States that the DOH had previously granted similar requests for surgery to three others (ibid., 243), but with Anonymous's request, the New York City Commissioner of Health, George James, sought guidance. He formally requested that the New York Academy of Medicine's Committee on Public Health "convene a group, including neurologists, gynecologists, endocrinologists, and psychiatrists" to consider the "enormous psychological, legal, and biological implications" of granting these petitions and to advise the DOH on whether or not it should revise its policy.[6] James noted in his letter that, at the time, nine other birth-registration areas in the United States had accepted requests to change the sex on a birth certificate. After three meetings,

some legal research, and the impassioned pleas of the transsexual medical advocate Harry Benjamin, the committee concluded that it was nevertheless "opposed to a change of sex on birth certificates on transsexualism." Their report, which was reprinted in the *Bulletin of the New York Academy of Medicine* and often cited in legal cases in the ensuing years, concludes: "The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud" (New York Academy of Medicine Committee on Public Health 1966, 724).

The official minutes of the meetings illustrate committee members' concerns about fraud: that one would hold oneself out to be a gender one was not. One doctor paraphrased the New York Penal Code at the time—"Nobody is allowed to dress in such a way as to hide his true identity"—and pointed out that a number of "transvestites" had been jailed for this reason. Such statutes were ubiquitous at the time (Hunter, Joslin, and McGowan 2004). The first draft of the committee's report listed as a public interest "the protection of a prospective spouse against fraud."[7] New birth certificates, a federal official informed the committee, could be used to get benefits reserved for one gender or to escape obligations for the other (Council 1965). At the committee's second meeting, the chairperson invited an attorney to brief the committee. While the attorney suggested that a transsexual woman might be able to use an amended birth certificate in a ceremonial marriage (to a non-transsexual man, presumably), he "doubted whether it could be considered a marriage," because she was originally a man. The committee considered adoptions as a method by which to legally recognize the "new sex" of these people—for instance, adding a codicil to the birth certificate stating, "Now known as female." (There was no discussion of the existence of female-to-male transsexuals.) In the end, however, they decided there was no mechanism "not injurious to the public" that would also "make the transsexual happy," so they concluded that "for the protection of the general public, [one's status as a transsexual] should be known." As an illustration of this public interest, one doctor cited the case of "a man who marries one of these persons with the expectation of having a family."[8]

The fear of fraud makes obvious the entrenched belief, held by medical experts, government officials, and the non-transsexual public, that one cannot change one's sex, only its "outward appearance." While the birth sex of infants is almost always assigned based on a visual check of external genitalia, the criterion, according to the committee, should be different for those who change their genitals later in life: while "ostensibly

female," "male-to-female transsexuals are still chromosomally males" (New York Academy of Medicine 1966). Of course, it is precisely *because* some transsexual women and men can pass in their new gender, can *become* "the other sex," that authorities believe "the public" must be protected. Indeed, the public was protected by ensuring that the state would "out" transsexual people by listing their birth sex on the birth certificate.

The sociologist Erving Goffman describes the presentation of self to others as having a "promissory character" (1959, 2): "The impressions that the others give tend to be treated as claims and promises they have implicitly made, and claims and promises tend to have a moral character" (249). Humans, in Goffman's estimation, present themselves to one another within a taken-for-granted relationship of trust. We are who we present ourselves to be, with evidence—a biography—to back it up. In this sense, birth certificates function as a sort of promissory document not only about an individual's body, but about the particular history of that body. What is in fact social gender is assumed to guarantee a correspondence between one's present body, its past, and the gender presentation one puts out into the world. The accusation of fraud is made coherent by the belief that the body cannot become the other "sex" physically, and therefore any suggestion or performance of the opposite sex/gender is a lie. The apparently endless articulation of concern about enabling fraud in the committee minutes—producing what one committee member referred to as an "illegal document"—reflects anxiety about transsexuals concealing their "true identity" from the public. The infant's body as described by the medical declaration of sex at birth and represented in the birth certificate stands as a singular, objective, and original truth to be represented throughout the life-course. An amended document is therefore not a correction but a fraudulent document concealing the original truth.

Second Iteration: The No-Gender Alternative

In 1971, six years after the New York Academy of Medicine presented its report to the commissioner of health, the New York City policy was reformed. Instead of denying the petitions of transsexual men and women, the city would issue new birth certificates with *no* sex designation: the box for sex was eliminated. It was, for its time, one of the more liberal policies regarding the sex designation of transsexuals in the United States. To be eligible for this "no gender" certificate, transsexual men and women had to prove they had undergone "convertive" genital surgery, in-

terpreted by the Department of Vital Statistics as phalloplasty or vaginoplasty. Petitioners had to supply a physician's "detailed surgical operative record" detailing a postoperative exam and a psychiatric exam. The reissued certificates included the statement: "This certificate is filed pursuant to subsection 5 of subsection (a) of Section 207.05 of the Health Code of the City of New York." The certificates had two markers that revealed the individual's status as transsexual: (1) no box for a gender designation, omitting a fundamental vital statistic that reviewers of birth certificates—potential employers, the Social Security Administration, drivers' license bureaus, other government agencies, and social-service providers—might have looked for, especially when confronted with someone who was unable to completely pass in their new gender; (2) if one looked up the particular subsection of the Health Code referred to on the amended certificates, one would learn that "the name of the person has been changed pursuant to a court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery" (New York City Health Code 1971). While laypeople might not have seen these as markers of a transsexual history, those in the business of document verification, of *re-cognizing* citizens, would have. Ironically, deleting the gender box made sex more visible through its highly marked absence.

Third Iteration: Mandating Gender Permanence

By 2002, a new social movement of transgender activists and legal advocates emerged with activist groups, legal services, and community-based organizations dedicated to trans issues. Annual conferences, newsletters, magazines, and the Internet have done much to create and solidify trans communities in the United States and beyond (Denny 2006). Most gay, lesbian, and bisexual groups had amended their mission statements to include transgender people in their constituency. Media representations of transgender people were beginning to shift from depictions of shock, revulsion, and horror in films such as the *Crying Game* to more sympathetic and respectful renderings, such as the films *Boys Don't Cry* or *Transamerica*. The movement was also becoming institutionalized. Medical professionals specializing in transgender health formed an organization to recommend standards of care. Cases involving transgender issues were beginning to have positive outcomes in the courts. A handful of states and dozens of municipalities banned discrimination against transgender

people, including New York City in 2002 (Transgender Law and Policy Institute 2007).

In November 2002 a coalition of fourteen organizations "concerned with the civil rights of transgender New Yorkers" sent a letter to the commissioner of the New York City Department of Health and Mental Hygiene (DOHMH) requesting that the no-sex birth certificate policy be reformed and that the "voices of those individuals and organizations who are most concerned with this issue" be involved with the policy revision process.[9] Allies for this cause in 2002 included the Center for Constitutional Rights, the American Civil Liberties Union, national gay organizations such as Lambda Legal and the National Center for Lesbian Rights, and local gay and transgender organizations. After two years of preliminary meetings, in December 2004 the DOHMH formed the Transgender Advisory Committee, which met four times between February and May 2005. Unlike in the committee in 1965, this committee included members of the transgender community, and all the member medical professionals had experience in treating transgender people—some were strong allies to the transgender community.

While the prevailing view during the 1965 negotiations was that transsexual people were gender frauds per se as one could never change one's essential sex, during the 2002–2006 gender negotiations, discussions centered on developing criteria to distinguish those who were temporarily living in the other gender from those whose transition was "permanent and irreversible" (New York City Department of Health and Mental Hygiene 2005). The crux of the struggle between transgender advocates and public officials turned on which criteria would be appropriate indicia of permanence. Officials initially advocated for particular types of genital surgery—vaginoplasty for transgender women, phalloplasty for transgender men—as testament to the permanence of a transsexual person's gender identity. The requirement for genital surgery would mean most transgender people would not be eligible for an amended birth certificate. As well, requiring surgery to validate gender permanence, thus implying that gender is determined by the body and that surgical body modifications guarantee permanence, belied current models in both transgender health care and in transgender communities' understanding of gender identity; for the advocates, in line with transgender communities' views, gender was determined by one's gender identity—that is, how an individual intrasubjectively and relationally produces their self-concept of gender—rather than through physiological interventions. As expressed

in the International Bill of Gender Rights (1990), a foundational document for transgender activism in the U.S. before the first meeting of the Transgender Advisory Committee, transgender community advocates on the committee strategized ideal and realistic outcomes. Their ideal policy was to extend the current (1971) policy—no gender marker—to everyone's birth certificates, as an initial step to get the state out of the business of defining and regulating gender. They decided not to introduce this idea, however, since it could have been read as naïve, radical, or even unintelligible, and risked putting transgender advocates outside the realm of pragmatic policy reform.[10] Moreover, the charge of the committee was to revise the "change of sex" policy, and the advocates understood that gender would remain in use as a biometric identifier. In addition, at the time, New York State courts were hearing challenges to the ban on same-sex marriage. Officials perhaps understood, though they never stated it outright, that the ban on same-sex marriage depended on the state's power to make gender classifications and hence determine who is heterosexual.

From the advocates' perspective, the next best policy would be to allow individuals to change their birth certificates by simply informing the DOHMH that their gender had changed and requesting that the new gender be indicated on their birth certificate. Officials' preoccupation with gender permanence, however, made it unlikely that an individual could change their sex designation without the involvement of specialized experts to "attest" to the permanence of the transition. The most realistic outcome, advocates decided, would be to eliminate the requirement for "convertive" surgery and any requirements for body modification. Advocates understood, but did not emphasize to officials, that many transgender health-care specialists would define, for some individuals, "*appropriate* medical treatment" as not including hormones or surgery. As advocates argued in a memo to the DOHMH during initial negotiations over the policy, "Perhaps the single most erroneous misconception is that sex reassignment consists of a single 'sex-change' operation'" (Sylvia Rivera Law Project 2003). Most people who transition do not undergo either of the genital surgeries required by the 1971 policy. Even for those who would like to have genital surgery, making it a prerequisite for a birth-certificate change imposes a daunting financial burden. Significantly, requiring genital surgery before allowing a legal change in sex on the birth certificate would exclude all but those who wanted and could afford genital surgery, making sex—for transgender people, at least—a privileged category legally mediated by one's class status.

The public officials' anxiety about gender permanence was severe and clearly outweighed other concerns. The narrative that the body's anatomical markers (sexed genitals) define, legitimate, and authorize gender (identity) and make it permanent is crucial to the gender ideological system. In this way of thinking, the "common sense" importance of anatomy is so strongly established that it is immune to arguments that reveal that the criteria are social and structural. Because anatomical changes are expensive and also require the cultural capital to navigate a complicated biomedical-industrial complex, those who can attain this type of physiological change most often rank higher in systems of social stratification. The distinction between those who can afford surgery and those who cannot becomes the arbiter of who can legitimately be a man or a woman: the difference between a transgender woman who has had surgery and one who hasn't is $30,000. Yet the former would have the right "breeder" identity document as a result of being able to purchase anatomical markers.

The idea that the new requirements should ensure that the gender change was permanent dominated preliminary meetings of the official Transgender Advisory Committee. For example, Stephen Schwartz said the commissioner of health wanted assurances of permanence and that there would be "no further changes" to the individual. Schwartz stated he was "concerned about people changing their minds about their transitions" and asked, "How do we make sure it is really permanent?" The DOHMH bureaucrats summed up their concern in the committee's first official meeting: "What is a reasonable minimum standard an individual should have to meet to make a permanent change in one's gender?" A permanent transition, for the officials, was one marked by genital surgery. One urologist pointed out that "on the issue of permanence, it can only be met if the source of the opposite hormone were removed, with an orchidectomy or hysterectomy." Another urologist said that one could only demonstrate their "commitment to their new gender role" with an "anatomical change." Advocates thus began the process of renegotiating the birth-certificate policy with two goals: first, that reissued birth certificates list the reassigned gender; second, that the requirement for "convertive surgery" be eliminated (New York City Department of Health and Mental Hygiene 2005).

The fundamental strategy of advocates, based on our analysis, was to "de-medicalize" the policy, and ironically, rely on the authority of medical experts to do so. They marshaled transgender health care authorities to acknowledge the myriad procedures and varying rates of success for sur-

gical operations. At one point, they submitted a memo from a transgender medical doctor listing 31 surgical procedures to dispel the "one surgery" myth. Transgender health care advocates on the committee argued repeatedly that transgender health care is highly individualized, that there are many routes to transition, and that a requirement for genital surgery was "excessive" since the majority of transgender people do not have it (New York City Department of Health and Mental Hygiene 2005). The lone psychiatrist on the committee, for example, argued that the committee would never be able to agree on "what degree of surgery, hormones, and/or anatomical changes would serve as a standard." He stressed that "gender reassignment is not simply based on anatomical changes, but how that person views him/herself and asserts him or herself publicly."

Advocates invoked medical authorities to show that "permanence" could be attained in social relationships without medical intervention. They pointed to recent trends in nondiscrimination laws to define gender as much broader than anatomical sex. In Boston, for example, women's facilities, such as bathrooms, showers, and locker rooms, are open to anyone whose "gender identity publicly and exclusively expressed" was female, and vice versa for men (Transgender Law and Policy Institute 2007). Schwartz countered that one could not compare standards for access to public restrooms with standards for changes to vital records. "It's a very big deal to change a fact of birth," the DOHMH's counsel added (New York City Department of Health and Mental Hygiene 2005). Advocates also pointed to the New York State policy on changing gender on driver's licenses, which requires a statement from the physician, psychologist, or psychiatrist certifying that "one gender predominates over the other and the licensee in question is either a male or female." Schwartz countered that "predominates [was] not enough," that he wanted something that established once and for all a permanent dominant sex: certification that the change of gender was permanent and irreversible.

With the exception of the two urologists on the committee, whose medical practices included gender-reassignment surgeries, all the other medical people pointed out that "permanence" and "irreversibility" were concepts that didn't make sense medically (ibid.). Most types of body modification can be reversed: individuals can begin a course of feminizing or masculinizing hormones, stop taking them, and perhaps restart taking them later. In very rare cases, individuals can have a second set of gender-reassignment surgeries.

Permanence as Security Measure

The officials' concern with permanence and irreversibility reflected their perception of the government's need for identity fixity. At the first meeting of the Transgender Advisory Committee, Schwartz enunciated his concern that, with regard to transgender individuals' identity document changes, "we won't know who you are." Changing the designation of sex could loosen the link between an individual and the administrative identity document. This bureaucratic fear of "not knowing" a citizen evokes a central problem of modern statehood, exacerbated in a post-9/11 era, but described as early as 1796 by J. G. Fichte in the *Science of Rights*: "The chief principle of a well-regulated police state is this: That each citizen shall be at all times and places . . . recognized as this or that particular person" (cited in Caplan 2001, 50). The concern about making identity fraud easier was explicitly connected to fears about security and to the need to prevent individuals intent on attacking the United States from obtaining identity documents that would mask their true identity.

Short-Lived Victory

Eventually, the medical arguments—that the surgery standard was arbitrary, an unreliable guarantor of permanence, and did not reflect the current state of transgender health care—convinced officials on the committee to change the criteria. In July 2005 the committee recommended that the DOHMH "recognize . . . [that] medical and mental health providers most knowledgeable about an individual's transgender health should determine whether an individual is living fully in the acquired gender." The proposed policy would require affidavits from two medical experts, one from a U.S.-based, state-licensed, board-certified medical doctor and one from a mental-health professional, also licensed in the United States, attesting to the "intended" permanence of the transition. Overall, the policy proposal was viewed as a victory by transgender advocates because it marked a shift from the discursive and legal regime of forty years before, in which transsexual people were cast inescapably as "frauds," to one in which the new gender of individuals could be listed on their birth certificates, even without surgery.

When Schwartz presented this policy proposal to the Board of Health—the appointed body that writes the health code for New York City—in September 2006, members appeared to generally support the measure.

Their questions and comments were innocuous. The chair of the Board of Health, in fact, suggested that the name-change requirement was unnecessary and should be eliminated from the proposal. Schwartz also proposed removing the specific reference to a "change of sex" from the health code on the proposed form. The new form would read "pursuant to section 207.05" only, indicating that the birth certificate had been changed, but not why. A hearing for public comments was scheduled for October 2006, and a vote would be taken at the December meeting of the Board of Health. It was, by all accounts, expected to pass.

Aftermath: Public Reaction to a No-Surgery Standard

Press coverage following the announcement of the proposed policy generated what could fairly be described as a media firestorm. The *New York Times* published a front-page story titled "New York Plans to Make Gender a Personal Choice" (Cave 2006, A1). Numerous wire services covered the policy. An editorial titled "Transgender Folly" railed against dropping the surgery standard (Editorial Board of the Jewish Press 2006). An essay in *Slate*, "New York City Bungles Transgender Equality," by Kenji Yoshino, an oft-quoted New York University law professor who writes on gay rights, described the New York Board of Health as "carried away" by advocates' arguments and invoked national security as one justification for rejecting the proposal (Yoshino 2006).

While the public testimony submitted on the proposal contained predominantly well-reasoned formal arguments from public-interest groups, elected officials, and LGBT institutions in favor of the changes, media coverage generated less formal emails to the Board of Health that were vociferously against it. "Are you people out of your minds????" asked one member of the public. "How enlightened is a person that refuses to accept that there is a biological difference between a man and a woman? If I wish to call myself a dog, I suppose you people would allow that too?" Another wrote, "I am befuddled and wonder if the inmates are now running the asylum. 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. . . . Transgender does not mean transsexual in my book" (New York City Board of Health 2006).

Three months after the policy was formally presented, the DOHMH summarily withdrew most of the changes from consideration. Instead,

the only change to the 1971 policy would be to indicate the reassigned gender of the applicants on reissued birth certificates. The requirement for convertive surgery remained. DOHMH officials cited two main concerns: first, the policy's impact on sex-segregated institutions such as schools, workplaces, hospitals, and prisons; second, the impact of post-9/11 federal legislation concerning identity documents. The United States Congress had recognized the importance of birth certificates in the "Intelligence Reform and Terrorism Prevention Act of 2004. . . . We [DOHMH officials] anticipate that automated verification of birth certificate data by federal agencies and state motor vehicle agencies will be a central component of the regulations. . . . Given the anticipated federal regulations and the importance of sex as a key element of identity, it is important to wait for their promulgation" (New York City Department of Health and Mental Hygiene 2006b). Advocates were not privy to the internal DOHMH discussions that led to the withdrawal of the policy. However, both justifications seemed weak. For instance, New York State's drivers' license policy was already significantly looser in that it required a letter from a health-care provider, so under the 1971 (and now current) policy, transgendered New Yorkers born in the City would be likely to have a different gender listed on their birth certificate than on their driver's license.

Legally Sexed

Using the surveillance mechanisms of identity documents, the state implies that it must protect its citizens from would-be imposters. As "sex change" was made possible and acknowledged by the general population as well as policymakers, medical professionals, and bureaucrats, the state wanted to create a metric that ensured that the identity, once changed, would not change again. While cultural representations might allow for the flexibility of gender displays beyond traditional ideological binaries, state actors, often in the service of their constituents, have difficulty accommodating subjects whose gender identity does not "match" their legal sex. Even though, in the most recent period, state officials did acknowledge the possibility of identity changing and the necessity of individuals having identity documents that match, they fought to ensure that this change of sex be one-time, enduring, measurable, and "irreversible." This anxiety about the possible inability of an identity document to maintain a correspondence with an individual throughout their life-span is summed up by a leading bureaucrat on the issue: "But we won't know who you are."

In the end, the barrier put in place in New York City to ensure permanence—requiring genital surgery before an M or an F will appear on the reissued document—cannot in fact guarantee the permanence of gender identity or the genitals. While it is unlikely, it is possible for an individual to have gender-reassignment surgery more than once. This policy does not prevent that from occurring, nor does it mandate that individuals born in New York City who *have* undergone genital sex-reassignment surgery change their identity documents to match their new body. It does, however, prevent the vast majority of individuals whose gender identity does not match their legal sex from having their gender recognized by the state. At the time of this writing, the Transgender Legal Defense and Education Fund has filed a lawsuit challenging the birth-certificate policy as "arbitrary" and "capricious." Other groups are working to have city legislators pass legislation to mandate criteria for sex reclassification that does not require body modification.

Whether it is the fraud iteration of the 1960s or the current policy, state officials are left upholding a standard that is only possible within a legal framework—that the "essential" nature of identity must be grounded in the body itself. Within the legal framework, the only way to change one's legal sex is to change the body, specifically the genitals. Outside the legal framework, advocates, gender theorists, and transgender people certainly understand the mutability of sex and gender. While these documents may seem benign, they create pain and suffering at local levels (Cover 1986; J. C. Scott 1998). Gendered surveillance accomplished through birth certificates (and all identity documents that rely on this original paper) means that bodies must reinforce the socially and culturally mandated binary sex characteristics.

Notes

1. When discussing legal designation as male or female, we use the word *sex*. When discussing other classifications, we use *gender*. We understand *sex* to be subsumed under *gender*. *Transgender* is used to describe those whose gender identity or gender expression does not conform to social expectations for their birth sex.

2. The New York City Department of Health and Mental Hygiene (DOHMH) convened "an expert Transgender Advisory Committee" in January 2005. The committee's task was to "advise the Department and make recommendations on updated policies and procedures. The group was composed of DOHMH staff from Vital Records, Vital Statistics, and the General Counsel's office, plus eight outside members representing transgender expertise in medical, surgical, mental health, legal

and academic fields" (New York City Department of Health and Mental Hygiene 2005).

3. Nonmarital birth rates by race and of Hispanic origin generally changed little between 2007 and 2008. The rate for non-Hispanic white women (33.7 per 1,000) rose 1 percent, and the rate for black women (72.5) was essentially unchanged. The rate for Hispanic women declined 3 percent, to 105.1. The rate for API (Asian or Pacific Islander) women was 28.2 per 1,000. Trends by maternal age since 2002 were similar across population groups (National Vital Statistics Report 2010).

4. See Greenberg 1999; Haraway 1989; Lorber 1993; Lucal 1999; Oudshoorn 1994; West and Zimmerman 1987.

5. This was the fifth petition made to the New York City Department of Health.

6. Letter from George James, Commissioner of Health, the City of New York Department of Health to Dr. Harry Kruse, Executive Secretary, Committee on Public Health, New York Academy of Medicine, April 2, 1965, p. 2.

7. H. D. Kruse, MD, Executive Secretary, Committee on Public Health, New York Academy of Medicine to Subcommittee on Change of Sex on Birth Certificates for Transsexuals.

8. Subcommittee on Birth Certificates, New York Academy of Medicine, minutes of the meeting of June 14, 1965.

9. Letter to Dr. Weisfuse, City of New York Department of Health, November 18, 2002.

10. Paisley Currah's field notes, 2006.