“We Won’t Know Who You Are”: Contesting Sex Designations in New York City Birth Certificates

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This article examines shifts in the legal, medical, and common-sense logics governing the designation of sex on birth certificates issued by the City of New York between 1965 and 2006. In the initial iteration, the stabilization of legal sex categories was organized around the notion of ‘‘fraud’’; in the most recent iteration, ‘‘permanence’’ became the measure of authenticity. We frame these legal constructions of sex with theories about the ‘‘natural attitude’’ toward gender.

Documenting Sex

How do state agencies link citizens with their birth certificates? If the state is produced through attempting to “render things . . . immobile” (Foucault 2007, 256), how is a mutating, trans-sexed body to be fixed, kept in place, and securely moored to the document that purports to describe its subject? What happens when state actors, insisting on the immutability of sexed bodies and their stable alignment to gender identities, are confronted with those whose bodies and gender identities fail to conform to gender expectations? What recurring tropes of sex/gender get invoked to re-anchor these troublesomely sexed subjects? This article examines the regulatory responses of one state actor—the City of New York—to individuals who petition to change the sex classification on their birth certificates.[1]

The identification of citizens or subjects is as vital a function of modern statehood as establishing and policing territorial borders. Indeed, for J. G. Fichte, ensuring “each citizen shall be at all times and places . . . recognized as this or that particular person” constitutes “the chief principle of a well-regulated police state” (Caplan 2001, 49). The advent of larger, centralized, modern state

formations puts greater distances between magistrates and citizens, creating the need for standardized systems for identifying and individuating populations, making citizens legible (Scott 1998). On the birth certificate, sex designation, along with date and location of birth and parentage (when known), functions as an essential classificatory aspect of the "accurate description" meant to establish a permanent correspondence "between a person and a set of signs" (Caplan 2001, 50). This link could be dismissed as a fiction without foundation were it not maintained through the force of law. Although the taxonomies used to classify individuals as of *this* or *that* type (race, sex, national origin, for example) may shift as newer accounts of social difference displace earlier reigning disciplinary knowledges and ontological cartographies, the legitimacy of the traditional "police powers" of the state to establish classifications remains intact.[2]

The ideas associated with what ethnomethodologist Harold Garfinkel labeled the "natural attitude" about sex give sex its cultural credibility as a biometric identifier on identity documents (Garfinkel 2006). For Garfinkel, and for most theorists of gender who have built on his work in the forty years since it first appeared, what we now call gender (but what he referred to as "sex status") is a "managed achievement"—for everyone, not just for transsexuals—produced through social interactions (Garfinkel 2006, 59; West and Zimmerman 1987). In the worldview of "the normals" (those who hold the natural attitude), "there are only natural males and natural females" (Garfinkel 2006, 62). In the common sense of the natural attitude, everyone is either a man or a woman, dichotomously defined by "the possession of a penis by the male and a vagina by the female" (62). The natural attitude, in short, is a constellation of beliefs and practices that cements a link between genitals and gender. As feminist scholars Suzanne Kessler and Wendy McKenna emphasize in their rendition of Garfinkel's contribution, "genitals are the essential sign of gender" (Kessler and McKenna 1978, 113). Finally, for Garfinkel, "this naturalness carries along with it, as a constituent part of its meaning, the sense of its being right and correct, i.e., morally proper that it be that way" (Garfinkel 2006, 62). Just as the notion of embodied genitals is deployed to ground social gender, the descriptive account of dichotomous sexed persons provides a foundation for moral and disciplinary imperatives from normals, professionals, and, most significantly for our purposes here, state actors.

The debates that took place between 1965 and 2006 in New York City about the appropriate sex designation on the birth certificates of transsexual people reprise larger assumptions about state administration of the link between genitals and gender identities, and, analogously, between individuals and identity documents. These negotiations over sex definition exemplify the hegemony of the "natural attitude" in the area of sex classification on birth certificates. In the first iteration, in 1965, a transsexual woman attempted to

displace the notion that to be classified as female, one must have been *born* female (and *vice versa*) by arguing that that sexual reassignment surgery should justify a new sex marker. Policymakers were not at all receptive to that position—at the time. Four decades later, transgender rights' advocates attempted again to displace the natural attitude. This time, however, they pushed the argument even further: they suggested that gender identity, rather than (surgically modified) genitals, be the basis for sex re-classification. Unsurprisingly, this argument ultimately failed.

Importantly, in the New York City case, transgender individuals who tried to change the criteria for sex designation on birth certificates were not resisting the imposition of a binary sex/gender frame onto their bodies and identities, which is one aspect of the natural attitude. They were simply attempting to argue that the criteria on which the classification is based should be changed, that they did not reflect current "expert" knowledges, that a misidentification had taken place. The challenge was not articulated as, "By what right does this state agency tell me I am a man or a woman?" Or, "The relationship between what you think is the body's biological sex and gender is not fixed, it's imposed through social norms." Instead, the claim deployed arguments that seem to renaturalize gender as a legal category—albeit one based on gender identity rather than the body: "I was assigned male at birth but I am now a woman. Get it right." Or, "I was born female but now I am a man. Fix that on my ID, please." The attempt by trans advocates to amend the criteria for legal sex designations resonates with the inescapably liberal quest to be recognized as possessors of the personal attributes we deem central to our selves. For transgender women, recognition means being "Ma'amed" instead of "Sir'ed," having an "F" rather than an "M" on identity papers, and being housed in women's wings in hospitals, residential homes, and prisons.

The pursuit of recognition within a system governed by the logic of the sex binary is disappointing to some in women's, gender, and queer studies (Hausman 1995; Irving 2008). Indeed, as Cressida Heyes points out, "Whether appropriated to bolster queer theoretical claims, represented as the acid test of constructionism, or attacked for suspect political commitments, transgender has been colonized as a feminist theoretical testing ground" (Heyes 2003, 1098). In the last twenty years, as most of the transgender movement in the United States moved toward a politics of recognition, in the academy much of gender and sexuality studies tacked toward a different horizon, producing trenchant critiques of gender essentialist moves of any sort, mappings of historical formations of disciplinary knowledge regimes across a range of institutions, and close examinations of the processes of normalization and subjectification through which neoliberal institutions create consumers, workers, and citizens (Fraser 1997). For example, Lisa Duggan has defined "homonormativity" as a gay and lesbian politics that "upholds, sustains, and seeks inclusion" within

"heterosexist institutions and values" (Duggan 2003, 50). A transgender rights framework demanding inclusion and recognition within the institutions, norms, and arrangements structured around gender could be described, if it has not been already, as "trans-normative." Conversely, transgender people fighting "back against the disciplining of their lives" are celebrated as gender revolutionaries who, by implication, might shake and crack the foundations of the disciplinary edifices that structure everyone's legal and normative genders (Irving 2008, 38).

In the introduction to *The Transgender Studies Reader*, Susan Stryker makes a distinction between "the study of transgender phenomena" and the new critical project of "transgender studies." The latter approach ensures that "no voice in the dialog should have the privilege of masking the particularities and specificities of its own speaking position, through which it may claim a false universality or authority" (Stryker 2006, 12). We suggest that evaluating transgender political engagements only *vis-à-vis* feminist or queer commitments can inadvertently normalize existing gender arrangements. One effect of positioning "trans" as the revolutionary subject occupying the liminal spaces at the extremes of gender is the implication that there *is* a class of non-revolutionary, gender-conforming subjects who *are* correctly interpellated by the gender regime. Hailing *trans*-gender individuals for resisting the classifications of M or F implies that there is no need for non-trans people to oppose the classifications, to protest the imposition of these classifications on their identity documents by burning them. In this process, trans as "revolutionary" slips back into trans as a "special case." Ironically, this trans "exceptionalism" mirrors the approach of state bureaucrats who, when presented with the anomaly of "sex changes," work to come up with a response to a problem they see as limited to a very small class of people. Receding into the background and left largely unexamined, once again, is the attempt to secure the relationship among any bodies, identities, and documents—even those of the unmarked class of the gender normative—through anything but the force of law.

A transgender studies framework also considers the positionality and experiential knowledge of those who occupy subaltern locations of gender nonconformity (Stryker 2006, 12). Instead of asking what transgender activism does to/for gender, we invert the usual litmus test and center the effects of the current gender regime on trans people. For trans people, having one's legal sex misclassified carries with it material effects. Birth certificates, for example, are not simply mechanisms for managing populations and the state enforcement of obligations, like taxation or conscription, on individuals; they also create recognition for the distribution of resources from the state to individuals, such as voting, social security, Medicaid, marriage rights, and welfare benefits. As Paisley Currah and Dean Spade explain, when one takes "transgender lives as the starting point, the research question is no longer the riddle of gender or the

particular gender configurations of transgender individuals; instead, the problem to be solved becomes the social and legal arrangements that structure gender non-conformity as problematic in the first place" (Currah and Spade 2007, 5). Certainly, the birth certificate negotiations showcase fascinating moments of incommensurability among popular, medical, bureaucratic, and advocacy notions about the etiology of sex, its relation to gender identity, the appropriate criteria to use to authenticate gender identity, and so on. But, from the perspective of transgender subjects and others interested in problems of documenting identity, the arguments of officials opposing the notion of gender transitivity are at least of equal importance to the narratives about sex and gender deployed. Paying attention to the governing logics, the changing administrative mandates, the specific configurations of the resistance to changes of sex classification—in this case, the shift from viewing transsexuals as "frauds" in 1965 to basing official recognition of gender transition around the notion of "permanence" in 2005—helps us to understand more about the specific processes of "bioregulation by the state" (Foucault 2003, 250). This sort of research, we hope, can inform researchers and advocates working to find other points of fissure in the micro powers of modern regulatory apparatuses.

In the sections that follow, we examine the negotiations over the legal definition of sex on birth certificates in New York City that took place in 1965–66 and 2002–06. (New York City, for historical reasons, is a "birth registration area" separate from New York State.) During this process, city officials, medical professionals from various fields, and, eventually, transgender advocates produced divergent narratives about the biological basis and measurement of sex, the social and legal consequences of maintaining the status quo, and the perceived risks of changing the sex designation on birth certificates. Our analysis is based on participant observation, ethnography, field notes, in-depth interviews, and content analysis. By triangulating data sources about birth certificates, including scientific texts, health and social policy recommendations, interviews, official meeting minutes, fieldwork, case law, and historical documents, we established various points of analytic comparison to explore multiple concepts about sex classification on birth certificates in different social, medical, and legal contexts (Glaser and Strauss 1967; Strauss and Corbin 1994).

One of the co-authors of this article, Paisley Currah, has been involved in this advocacy since November of 2002, and participated in the most recent round of policy negotations in the role of an "expert advocate." In co-authoring this article, he is also situated as a researcher of the larger norms at play in the policy reform process. His role as an advocate in the policy reform process enables us to examine these questions not just from the outsider perspective of researchers, but also from the insider perspective of a community member. Our observations are based on Currah's notes from earlier meetings and the official

committee meetings, official meeting minutes of the Transgender Advisory Committee (TAC), his retrospective auto-ethnography, interviews with advocates, legal documents, and archival research.[3]

Protecting the Public from "Fraud"

In 1965, a transsexual woman asked the City of New York to issue her a new birth certificate identifying her as female. "Anonymous," as she was later described in court documents, had done everything she thought was needed to function socially as a woman: she had had her gender identity affirmed by a medical professional, she had passed the "real-life" test of living as a woman, she had undergone sex reassignment surgery, and she had begun a lifelong course of feminizing hormones (*Anonymous v. Weiner* 1966). But state-issued identity documents still designated Anonymous as male. The "M" gender marker, which revealed her history as a transsexual person to anyone who attempted to authenticate her identity using the description in the document, opened up the possibility that her identity as a woman would be challenged, and thus undermined her ability to function legally and socially as a woman. As historian Joanne Meyerowitz recounts in her comprehensive history of transsexuality in the United States, the Department of Health had previously granted similar requests to three others (Meyerowitz 2002, 243). With Anonymous's request, however, the New York City Commissioner of Health, Dr. George James, decided to look for some guidance. He formally requested the New York Academy of Medicine's Committee on Public Health to "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 (James 1965). After three meetings, some legal research, and the impassioned pleas of transsexual medical advocate Dr. Harry Benjamin, the committee concluded in its 1965 report that "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 1966).

The official minutes of the meetings are replete with examples of committee members' concerns about fraud. 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 noted that a number of "transvestites" had been jailed under that status. Indeed, such statutes were still ubiquitous at the time (Hunter, Joslin, and McGowan 2004; Sears 2008.) In addition, the issue of marriage was often raised during these discussions of fraud. The first draft of the committee's report listed as one public interest "the protection of a prospective spouse against fraud." New birth certificates, the committee was told by a federal

official, could be used to get benefits reserved for one gender, or escape obligations for the other (Council 1965).

The committee did consider options to legally recognize the "new sex" of these people—for example, adding a codicil to the birth certificate stating "Now known as female." (There was no discussion of the existence of female-to-male transsexual people.) But, in the end, they concluded that there was no mechanism "not injurious to the public" that would also "make the transsexual happy." The committee members concluded, "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" (New York Academy of Medicine Subcommittee on Birth Certificates 1965).

The fear of fraud makes obvious the entrenched belief on the parts of the 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 have their genitalia surgically altered later in life: they decided that 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 traverse many social, economic, even intimate landscapes as "the other sex," that authorities believe "the public" must be protected from fraud. And the public was safeguarded when the city held that the birth sex of transsexual men and women born in New York City remain on the birth certificate.

The recurring worry in these committee minutes about enabling fraud—producing what one committee member referred to as an "illegal document"—reflects anxiety about aiding transsexuals in concealing their "true identity" from the public. Sociologist Erving Goffman describes the presentation of self to others as having a "promissory character" (Goffman 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). In this sense, birth certificates function as a sort of promissory document not only about an individual's body, but also 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 in the world. The accusation of fraud is made coherent by the "natural attitude" notion, dominant at the time, that framed the body's sexed status as fixed at birth: because the body can't actually ever become the other "sex" physically, any suggestion or performance of the opposite gender is a lie. As Garfinkel pointed out in 1967, "no legitimate path exists between the statuses of male and female" (Garfinkel 2006, 59). Garfinkel's writing suggests that at

least since the 1960s, there was already suspicion from the general public ("normals") surrounding changing the birth certificate because of the assumption that sex status is natural, original, and immutable.

While notions of "permanence" rise to the fore in contemporary discussions of sex or gender designation, fraud never entirely disappears from the list of articulated concerns. The 1965 committee report, published in the New York Academy of Medicine's Bulletin in 1966, was cited many times, at least until 2002, by judges in New York State and elsewhere in cases rejecting transgender people's claims for legal sex reclassification. Indeed, as recently as 2000, the highest court in Texas asked, in a sex designation case, "can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?" The court concluded that "there are some things we cannot will into being. They just are" (*Littleton v. Prange* 1999, 222, 224, 231). Similarly, the "transsexual panic" defense invoked in cases where transsexual people are attacked or murdered plays on the same logic of fraud: defense lawyers ask juries to identify with their clients, who were shocked to discover the person they were with was transsexual at the moment of sexual intimacy, or perhaps later (Bettcher 2007; Craig 2007). For example, in her article about the 2002 murder of Gwen Araujo, Talie Mae Bettcher shows how the logic of "fraud," made coherent by the "natural attitude," is deployed in trans-panic defenses. For "normals," genitalia play the role of "concealed truth" about a person's sex: in contrast to gender presentation, "the sexed body constitutes the hidden, sexual reality" (Bettcher 2007, 48).

The 1971 Interregnum: Certificates without Sex

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 somewhat reformed. Instead of denying the petitions of transsexual men and women and leaving them with a key identity document that listed their birth sex, the city would issue new birth certificates with *no* sex designation: the box for sex was simply eliminated. To be eligible for this "no-sex" certificate, transsexual men and women had to prove they had undergone "convertive" genital surgery, interpreted by the Department of Vital Statistics as phalloplasty or vaginoplasty. Petitioners had to supply a "detailed surgical operative record," a report from a physician detailing a post-operative exam, and a psychiatric exam. The reissued certificates included the following reference: "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 new certificates thus had two markers revealing the individual's status as transsexual. First, having no box for a sex designation omits 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 be looking for, especially when confronted with someone whose appearance or other characteristics might already suggest some kind of gender non-conformity. Second, 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 many laypeople might not understand the significance of these markers of a transsexual history, those in the business of document verification, of *re-cognizing* citizens, would. Ironically, deleting this box in some ways makes legal sex more visible through its highly marked absence.

The Third Iteration: Mandating Permanence

The next phase of these negotiations over the legal definition of sex began in 2002 and ended in 2006. This iteration is marked by a significant shift: from the outset, state officials most directly involved in policy-making and all of the medical authorities asked to lend their expertise during negotiations agreed that individuals should be able to change the sex designation on the birth certificate.

Much had changed since the policy iterations of 1965 and 1971. By 2002, a new social movement coalescing under the rubric "transgender" had emerged (Valentine 2007). Annual conferences, newsletters, magazines, advocacy groups, and the Internet had 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" or "gender identity." 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 renderings, such as the films *Normal* and *Boys Don't Cry*. Medical professionals specializing in transgender health had 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 had banned discrimination against transgender people, including New York City in 2002 (Transgender Law and Policy Institute 2008).

In the area of identity documents, the State Department, the Social Security Administration, and other federal agencies had procedures in place for changing sex designation. By 2002, most states, including New York, had made it possible for transgender people to change their sex on driver's licenses. Although New York City's 1971 policy of issuing new birth certificates with no

sex designation had been one of the most liberal in the United States at the time, by 2002 it was very much out of date. With the exception of Idaho, Ohio, and Tennessee, all other jurisdictions in the United States allowed change of sex on the birth certificate. New York City officials, who envisioned the city as a model of progressive social policies in other areas, indicated they were embarrassed that the city was now an outlier on the repressive end of the identity-document spectrum.

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 (NYC DHMH). The coalition requested 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. Eventually, after two years of preliminary meetings, in December 2004, the NYC DHMH formed the TAC, which met four times between February and May of 2005. Unlike the 1965 subcommittee that was convened by the New York Academy of Medicine, this committee included members of the transgender community. In addition, all of the medical professionals enlisted to serve had experience in treating transgender people, and some were seen as strong allies of the transgender community.

The prevailing view during the 1965 negotiations had been that transsexual people were gender frauds *per se*, that one could never change one's legal sex designation. During the 2002–06 negotiations, the discussions centered on establishing criteria to distinguish those who were temporarily living in the other gender from those whose transition was "permanent and irreversible" (NYC DHMH 2005). The crux of the struggle between transgender advocates and public officials turned on which particular criteria would be appropriate indicia of permanence. Officials initially indicated that the permanence of a transsexual individual's gender identity could be guaranteed only by particular types of genital surgery—vaginoplasty for transgender women, phalloplasty for transgender men. A central component of Garfinkel's "natural attitude" was the belief that individuals "always have been, and always will be" either male or female (Garfinkel 2006, 62). The particular bureaucratic imperative to ensure a permanent change that characterized these negotiations reflects the continued hegemony of this constellation of beliefs—that one "always will be" either male or female. But the notion that one's sex could be re-classified and the permanence of that change assured by genital surgery also shows the evolution and elasticity of the concept: as the "always has been" requisite (pointing to the past) drops out of the bureaucratic mandate for sex classification, but the "always will be" (guaranteeing the future) remains.

For transgender advocates, however, requiring surgery to guarantee permanence belied current models in both transgender health care and in transgender

communities' understanding of gender identity. For the officials, sex is determined by the body, and particular surgical body modifications guarantee permanence; for the advocates, in line with transgender communities' views, gender is determined by one's gender identity, and one's legal sex designation should be based on gender identity. As expressed in the International Bill of Gender Rights, one of the foundational documents of transgender activism in the United States, it "is fundamental that individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role" (International Bill of Gender Rights 2006, 328).

Before the first meeting of the committee, the transgender community advocates on the committee, met to strategize ideal and realistic outcomes. Their ideal policy would be to extend the current (1971) policy—no sex marker—to everyone's birth certificates, as an initial step toward getting the state out of the business of defining sex. They decided not to raise this idea since it could have been read by others as naïve, radical, or even unintelligible, and risk leaving the transgender advocates outside the realm of pragmatic policy reform. Two of the advocates were attorneys from a transgender legal service organization, which had many clients who desperately needed birth certificates authenticating their new gender. Moreover, the charge of the committee was to revise the "change-of-sex" policy; the advocates understood that sex would remain in use as a biometric identifier in the near future. In addition, at the time, New York State courts were hearing challenges to the effective 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 sex classifications.[4]

From the advocates' perspective, the next best policy would be to allow individuals to change their birth certificates by affirming their new gender identity in a statement. Officials' preoccupation with permanence, however, made it seem unlikely that individuals could change their legal sex designation without the involvement of specialized experts to "attest" to the permanence of the transition. The most realistic best outcome, advocates decided, would be to eliminate the requirement for "convertive" surgery—to have, in fact, no requirements for body modification of any kind but to have the petition supported by medical experts. Thus, the advocates came to the table with the proposal that "individuals seeking change of sex designation provide a letter from a medical doctor stating that appropriate medical treatment, as medically determined for the individual patient, has been undertaken to ensure that the transition is permanent" (Sylvia Rivera Law Project and Transgender Law and Policy Institute 2003). Advocates understood, but did not emphasize to officials, that many transgender health care specialists would define "*appropriate* medical treatment" to include no hormones or surgery for some individuals.

The idea that the new requirements should ensure that the sex reclassification was permanent dominated preliminary meetings and every meeting of the official TAC. For example, Dr. 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 wanted to know "how do we make sure it is really permanent?" The NYC DHMH bureaucrats summed up their concern in the committee's first official meeting by stating, "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, initially and ultimately, was one marked by genital surgery. One urologist pointed out, "on the issue of permanence, it can only be met if the source of the opposite hormone were removed, with an orchidectomy or hysterectomy." (Suggesting that these two surgeries could be comparable; however, led to some discomfort in the room on the part of at least one official. The NYC DHMH attorney on the committee stridently pointed out that "having a hysterectomy is not the same thing as having your testicles removed.") Another urologist said that individuals could demonstrate their "commitment to their new gender role" only with an "anatomical change."

The lack of a monolithic approach to the problem on the part of those representing different medical disciplines should not be surprising. As Jacob Hale suggests, expert discourses "do not agree entirely with the 'natural attitude' toward gender, nor with one another" (Hale 1996, 103). Still, he notes, "specialized discourses about gender are by no means immune from the influence of the 'natural attitude' either. Rather, they are shaped by the desire to hold as much, or the most crucial elements, of the 'natural attitude' in place, insofar as this is consistent with their specialized aims; indeed, their specialized aims may, sometimes, take less precedence than upholding some aspect of the 'natural attitude'" (103). While the totality of medical disciplinary knowledges about the sexed and gendered body lacks perfect coherence—the body in some sense becomes a contested terrain of meaning-making between disciplines—traditional beliefs about sexual dimorphism and permanence ultimately continue to hold sway in all these fields.

Establishing a surgical standard would effectively ban the majority of people who wanted to change their legal sex classification from doing so. Most people who transition do not have either of the genital surgeries required by the 1971 policy. One recent study found that 97% of transgender men do not have phalloplasty (Newfield et al. 2006); the number of transgender women who have vaginoplasty is unclear, but reports from social-service providers suggest that the majority of transgender women have not had vaginoplasties. As advocates argued in a memo sent to the NYC DHMH 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 and Transgender Law and Policy Institute 2003). While transgender people who have phalloplasty or vaginoplasty are also likely to modify their bodies through hormones (testosterone for transgender men, estrogen/progesterone for transgender women), many people transition using only hormones and/or non-genital surgeries (such as double mastectomies for transgender men, breast implants for transgender women). Others transition and live full time in their new genders without any body modification at all. Even for those who would like to have genital surgery, making it a prerequisite for a birth-certificate change imposes an impossible barrier for many.

The surgery requirement would make legal sex—for transgender people, at least—a privileged category legally mediated by one's class status. And for much of the negotiations, the common-sense notion that the body's visual anatomical markers (sexed genitals, in this case) should be the basis for sex definition seemed impenetrable to arguments that a surgical criterion would mean, in effect, that one's legal sex would be dependent on one's location in the social structure. Bluntly put, only by purchasing the anatomical markers ($30,000–$50,000) meant to guarantee permanence could a transgender person meet the metric for legal sex re-classification. The public officials' stated anxiety about gender permanence, then, trumped any concern about the injustice of denying amended birth certificates to the majority of transgender people who could not afford genital surgery. Advocates were well aware of the official resistance to arguments based on class. According to Dean Spade, one of the advocates involved, "Our strategy was to remove the class discussion from the table because the committee would not care about it." To get the policy they wanted, advocates chose to go with a "pro medical authority argument" (interview with Dean Spade, March 23, 2006).

The fundamental strategy of advocates, based on interviews and our analysis of the data, was to "de-medicalize" the policy and, ironically, to 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 surgical procedures. At one point, they submitted a memo from a transgender medical doctor listing thirty-one 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 (NYC DHMH 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" (NYC DHMH 2005).

Advocates invoked medical authorities to show that "permanence" could be attained in social relationships without medical intervention. They pointed to recent trends in non-discrimination 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 2008). 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 NYC DHMH's counsel added (NYC DHMH 2005). Advocates also pointed to the New York State policy on changing sex 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 is not enough" (NYC DHMH 2005). What the officials very much wanted was some sort of official "certification" that the change was "permanent and irreversible."

With the exception of the two urologists on the committee, whose medical practices included performing sex reassignment surgeries, all the other medical people pointed out that "permanent" and "irreversible" were concepts that didn't make sense from a medical perspective (NYC DHMH 2005). Most types of body modification can be reversed: individuals can begin a course of feminizing or masculinizing hormones, stop taking them, start taking them again later. In theory, and in very rare cases in actuality, individuals can have a second set of sex reassignment surgeries. Surgery, then, does not guarantee a permanent commitment to a gender identity. But the bureaucratic mandate that particular sex classifications correspond with the corporeal reality of particular genital configurations eventually outweighed the medical arguments.

"Are You People Out of Your Minds?": Breeder Documents and Terrorists

Some identity documents have more value in producing identity than others. In the lexicon of vital statistics discourse, the birth certificate is referred to as a "breeder document," a primary identity paper that can be used to authenticate individual identity when applying for other identity documents (NYC DHMH 2005). Its descriptions of the sex and birth history of the infant are understood as fixed pieces of data. Unlike the aspects of identity that are recognizably mutable—name, appearance, ability, for example—the operative principle in vital statistics is that sex, like place of birth and parentage, is a very reliable metric of identification because it is static over one's life course. A birth certificate, then, functions both as a documentary record of a static historical fact and as a primary document authenticating the identity of a person. With those

who "change their sex," the dual function of the birth certificate comes into conflict.

The officials' concern with permanence and irreversibility reflected the imperative to render the citizenry, a collection of "identifiable, corporeal bodies," easily legible (Ngai 2004, 36). At the first meeting of the TAC, Schwartz enunciated his concern about linking a transgender "x" to a birth certificate by asserting, "but then we won't know who you are." Changing the definition of sex could loosen too much the link between an individual and the identity document that stands for that individual administratively. This bureaucratic fear of "not knowing" a citizen evokes a central problem of modern statehood, supposedly exacerbated in a post-9/11 era. Indeed, Schwartz proceeded to make a short speech in which he stressed the birth certificate's role as a "breeder document" (NYC DHMH 2005). Pointedly, he cited the 9/11 Commission Report, which recommended new regulations regarding the creation, appearance, and security of birth certificates and other identity documents.

The worry about making identity fraud easier was explicitly connected to security concerns and preventing individuals intent on attacking the United States from obtaining identity documents that mask their true identity. One medical expert on the committee referred to this rationale as the "terrorist straw man" argument—the idea that the policy should not be changed because it might aid terrorists. (Advocates found ludicrous the notion that one might petition the city to change the sex classification on their birth certificate as a way to go underground. A process that mandates one expose one's body and psyche to at least two different medical professionals, who will then write up detailed medical and psychological histories; go to court to change one's name; advertise this name change in a newspaper; and submit all this supporting evidence, including current identity documents, for the review of at least two levels of bureaucracy hardly constitutes a sound plan for avoiding public scrutiny.)

Eventually, the repetition of arguments about the unreliability of genital surgery as a guarantor of permanence convinced the officials on the committee to change the criteria for sex definition. In July of 2005, the committee recommended that the NYC DHMH "recognize . . . medical and mental health providers most knowledgeable about an individual's transgender health[, who] should determine whether an individual is living fully in the acquired gender." The proposed policy would require affidavits from two medical experts licensed in the United States, one from a board-certified medical doctor and one from a mental-health professional, attesting to the "intended" permanence of the transition. The individual would have to be at least eighteen years of age and indicate that he or she had "lived in the acquired gender for at least two years." Despite the absence of a surgical requirement, in the Western tradition of

habeas corpus, the policy required 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" (New York City Department of Health and Mental Hygiene, 2006a). Finally, as in the 1971 policy, the policy mandated an alignment between legal sex and gender norms by requiring the applicant to submit proof that a legal name change had been made.

Overall, however, the policy proposal was viewed largely as a victory by transgender advocates because it marked a shift from the discursive and legal regime of forty years earlier, in which transsexual people were cast inescapably as "frauds," to one in which the new sex of individuals could be listed on their birth certificates, even without surgery. The advocates had begun the process of renegotiating the birth-certificate policy with two goals: first, that re-issued birth certificates list the reassigned sex; second, that the requirement for "convertive surgery" be eliminated. The policy proposal would have accomplished both goals.

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 of 2006, there appeared to be general support from the members of the Board of Health present at the meeting. Their questions and comments were innocuous. 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."

Press coverage following the announcement of the proposed policy, however, 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 from the *Jewish Press* titled "Transgender Folly" railed against dropping the surgery standard (Editorial Board of the Jewish Press 2006). An essay in *Slate*, subtitled "New York City Bungles Transgender Equality," by Kenji Yoshino, an oft-quoted law professor at Yale who writes on gay rights, described the New York City Board of Health as "carried away" by advocates' arguments and invoked national security as one justification for rejecting the proposal (Yoshino 2006).

Although the public testimony submitted about the proposal consisted largely of well-reasoned formal arguments from public interest groups, elected officials, and LGBT institutions in favor of the changes, media coverage elicited less formal email testimony to the Board of Health, almost all in vociferous opposition. The public's expression of the "natural attitude" is illustrated here, though in different forms. "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 individual opined, "when the terms of male and female are being intentionally blurred, for some rag-tag groups benefit [*sic*], society loses." A third comment adopts the more elastic version of the "natural attitude," one that allows for re-classification post-genital surgery:

> 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. (NYC Board of Health 2006)

Just three months after the policy was formally presented, the NYC DHMH summarily withdrew it from consideration. As a justification, they noted "federal identity requirements for vital records post-9/11 and broader societal concerns that were raised during the public comment period." Ultimately, the only change to the 1971 policy that was put in place was to indicate the reassigned sex on re-issued birth certificates. The requirement for convertive surgery remained firmly in place. Significantly, so too did the reference on the amended certificate to the New York City Health Code that refers to the "change-of-sex" provision. Officials cited two main categories of concern: (1) the policy's impact on sex-segregated institutions such as schools, workplaces, hospitals, and prisons; (2) the impact of two pieces of post 9/11 legislation. On the latter, they wrote:

> The United States Congress has recognized the importance of birth certificates in the Intelligence Reform and Terrorism Prevention Act of 2004 . . . . These acts will, for the first time in the nation's history, impose federal regulations on state and local vital records offices. They will include provisions for birth certificate security, death-birth matching and verification of driver's license applications with birth certificates. We anticipate that automated verification of birth certificate data by federal agencies and state motor vehicle agencies will be a central component of the regulations. Key elements of the birth certificate to be verified are first and last name, date of birth and sex. Given the anticipated federal regulations and the importance of sex as a key element of identity, it is important to wait for their promulgation. (NYC Department of Health and Mental Hygiene 2006b)

However, in this era of heightened scrutiny of individuals' bodies and histories, transgender people have already found themselves, inadvertently, under increased surveillance. As individuals, similar to undocumented workers and other "suspicious persons," transgender people are constantly forced to account for themselves. When traveling, they are advised to carry not just standard identity documents but legitimating letters from their physicians (National Center for Transgender Equality 2004). In the workplace, employers of transgender people receive "no match" letters from the Social Security Administration (SSA) when the SSA compares the sex on their employee's drivers' licenses to the sex in their SSA records. Because the standards for legal sex definition change across political jurisdictions, and even among different state agencies within the same political jurisdiction (Currah 2009), transgender people are especially vulnerable to any systems of surveillance and "dataveillance" that require data matching (Clarke 1988).

Conclusion

Writ large, these regulatory changes to the classification of sex on the birth certificate illustrate governmental imperatives to secure the relationship between identification and identity, to ensure, in short, that someone *is* who they say they are. This anxiety about the possible inability of an identity document to secure a constant, socially legible correspondence with an individual is summed up by lead bureaucrat on the issue fretting, "But we won't know who you are." Challenges to the sex designation on the birth certificate center on the tension between sex definition as negotiated by advocates, members of the public, medical experts, and bureaucrats and sex as made real only through the force of law, by legal authority. As the concern about fraud fades from view, permanence emerges as a mechanism for the state to reassert a biological imperative based on the "natural attitude." But what would be the metric that could ensure that this change of sex be one-time, enduring, measurable, and irreversible? In a "natural attitude" lexicon, the solution could only be genital surgery, imagined as final, stable, and non-reversible ("always will be")—very much how the infant body used to function as a guarantee ("once and for all"). Through this process, bureaucrats, with cues from the publics they believe they serve, reworked the "natural attitude" to keep pace with certain biomedical innovations.

Of course, 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 of the genitals. While it is unlikely, it is entirely possible for an individual to have sex reassignment surgery more than once and thus to administratively "switch back" to their original legal sex. 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 prevent the vast majority of individuals whose gender identity does not match their legal sex from having their gender recognized by the state.

So what version of social order is being maintained by the New York City policy on birth certificates? By mandating that a particular bodily topography—the presence of a penis for men, a vagina for women—establishes the link between the self and the law, the state has hewed close to the traditional biological narrative. The state wants to have irrefutable, stable, and permanent evidence that you are who you say you are. But throughout their lives, people change their bodies, their performances, and their identities. Instead of changing the criteria for markers on identity documents, officials insist that individuals change their bodies to align with the "natural attitude." In so doing, officials can retain the integrity of the ideological and discursive system. The sex/gender binary, which is in perpetual crisis, is actually preserved—not by the physiological requirements guaranteeing permanence and irreversibility, because they can't—but by the legal machinations the state requires of its people.

Notes

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1. Following legal usage, we use "sex" to refer to legal designations as male or female. We also use "sex" when it is the term of art used in the particular discourses we are examining. When not discussing legal classifications or specialized disciplinary deployments of the term, we use "gender." We do not distinguish between "sex" and "gender" to reinforce the notion that there is a dichotomy between sex as biological and gender as social; indeed, we understand legal and medical constructions of "sex" to be an effect of gender and the "natural attitude" we use to frame our argument. "Gender identity" refers to one's sense of oneself as male or female. The gender identity of some people is not traditionally associated with the sex assigned to them at birth. Since the early 1990s, "transgender" has become the term most commonly used to describe people in the United States whose gender identity or gender expression does not conform to social expectations for their birth sex (Currah 2006, 3–4). (In some of the older material we examine, the term "transsexual" is used to describe such individuals, and we use that

term when appropriate.) "Transgender men" refers to individuals who were classified as female at birth and whose gender identity is male. "Transgender women" refers to individuals who were classified as male at birth and whose gender identity is female. In our usage, the gender of an individual is determined by his or her gender identity, and pronouns refer to an individual's gender identity.

2. Homer Plessy's lawyer argued against the state's competence in making racial determinations, a rare exception. Ian Haney Lopez shows how individuals from China, India, Japan, and other nations challenged the U.S. racial classification system by arguing, for example, that their particular ancestry should be classified as "white" and hence be eligible for naturalization. In these racial prerequisite cases, the internal logics of the courts' decisions changed when judges stopped invoking scientific accounts of racial difference after early twentieth-century anthropology shifted its emphasis from nature to culture and started deploying dictionary definitions and "common-sense" rationales (Lopez 1996). Over time, challenges to perceived errors in the application of the racial classifications to particular persons in immigration law and other types of law were displaced by challenges to the construction of the categories themselves (Harris 2008). In 1924, U.S. immigration and naturalization classifications shifted to "national origin," which even at the time officials acknowledged was meant to represent and also clarify increasingly murky racial distinctions (Ngai 2004, 31).

3. For this paper, we interviewed several individuals involved as advocates in this issue in New York City and nationally: Dean Spade, at the time an attorney with the Sylvia Rivera Law Project; Chris Daley, at the time the Executive Director of the Transgender Law Center in San Francisco; and Mara Keisling, Executive Director of the National Center for Transgender Equality in Washington, D.C.

4. One participant on the committee remembers at least one official referring to the same-sex marriage issue, but this is not reflected in the official minutes. Interview with Carrie Davis, March 2007.

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