this case involved an individual who was able to demonstrate that surgery was not medically feasible for her given her health conditions.[119]

2. Modernized Laws and Policies

Although it has been decades since most state's legislatures or policymakers have examined their policies regarding gender corrections, Washington, Vermont, and California have done so in the last few years. As a result, these three states have the laws or policies that most closely comport with contemporary medical and legal standards and warrant closer examination. In addition, the standard from the U.S. Department of State with regard to Consular Reports of Birth Abroad, updated in 2010, and the U.K. Gender Recognition Act from 2004 are also helpful.

a. Washington

The Washington statute governing birth certificates gives the Secretary of Health broad authority to administer birth certificates.[120] Because the statute does not mention gender corrections specifically, the Secretary of Health has empowered the Director of the Center for Health Statistics to develop the policy. The policy currently in effect[121] has been in place since July 1, 2008 and, according to staff at the agency, is a codification of the unwritten policy that was in effect for many years.[122] The policy requires a registrant to submit a written request and to include a "letter, on applicable letterhead, from the requestor's medical or osteopathic physician stating that the requestor has had the *appropriate clinical treatment.*"[123]

b. Vermont

Vermont's updated statute was originally part of an overall modernization effort of the vital statistics law in 2011.[124] However, the overall modernization effort was stalled due to its length and complexity, and the

119. Interview with Kristina Wertz, *supra* note 114.

120. WASH. REV. CODE ANN. §43.70.150 (West 2009).

121. WASH. DEPT. OF HEALTH, CTR. FOR HEALTH STATS., PROC. NO. CHS-B5, CHANGING GENDER ON BIRTH CERTIFICATES (2008) (on file with author).

122. Email from Spencer Bergstedt to author (October 2, 2012, 20:01 EST) (noting that their previous unwritten policy was not very clear, but that gender marker corrections were approved under the old policy with very little information submitted with the request).

123. WASH. DEPT. OF HEALTH, *supra* note 120 (emphasis added). Washington is the first jurisdiction to use the term "appropriate."

124. H. 99, 2011–12 Leg. (Vt. 2011).

Commissioner on Health asked the legislature to add this provision to a bill related to midwifery so that these provisions could become law in 2011.[125]

Before this law passed, Vermont's statutes did not explicitly provide for gender corrections, so they were processed as any other amendment after an individual received a court order ordering the vital statistics agency to amend the gender marker.[126] Anecdotal evidence indicates that only a limited number of judges were willing to make a gender correction using this provision and did so only upon proof of completed surgery.[127]

The new language in Vermont requires that "the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition."[128] This language accurately reflects the contemporary medical understanding of transgender people because it explicitly considers that an individual may not undergo hormonal or surgical treatment as part of their transition. Treatment "appropriate" to an individual may be limited to living full-time in one's new gender role.

However, the statute also requires a person to have "completed" sexual reassignment.[129] While this should not cause significant confusion, using the term "completed" may unduly exclude some people who have fully transitioned but hope or plan for additional medical treatment later in life. Furthermore, since many individuals receive hormonal treatment indefinitely, they may be seen as never having "completed" treatment.

c. California

In 2011, the California legislature enacted a law that modernized and simplified the state's existing statute in various ways. The law replaced the requirement for "surgical treatment"[130] with a requirement that the individ-

125. Interview with Bill Lippert, Vermont Representative (Feb. 10, 2012); S. 15, 211-12 Leg. (2011), available at http://www.leg.state.vt.us/docs/2012/Acts/ACT035.pdf.

126. VT. STAT. ANN. tit. 18, § 5075 (West 2011).

127. Interview with Jes Kraus, Vermont Attorney (Feb. 13, 2012).

128. VT. STAT. ANN. tit. 18, § 5112(b) (West 2011).

129. *Id.* ("An affidavit by a licensed physician who has treated or evaluated the individual stating that the individual has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition shall constitute sufficient evidence for the court to issue an order that sexual reassignment has been completed.").

130. CAL. HEALTH & SAFETY CODE § 103425 (West 2009) ("Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex . . . A petition for the issuance of a new birth certificate in those cases shall be filed with the superior court of the county where the petitioner resides.").

ual "has undergone clinically appropriate treatment for the purpose of gender transition, based on contemporary medical standards."[131]

d. Standard from Consular Reports of Birth Abroad

As described earlier, the 2010 U.S. Department of State policy for Consular Reports of Birth Abroad requires simply that a person's treating or evaluating physician write a letter certifying that a person "has had appropriate clinical treatment for gender transition to the new gender."[132] To be clear, the policy makes explicit that surgery is not required.[133]

e. Standard from the United Kingdom's Gender Recognition Act

The United Kingdom's Gender Recognition Act of 2004 requires that individuals live in their "acquired gender" for at least two years and have a diagnosis of gender dysphoria.[134] An individual must submit reports by two medical professionals, one of whom must be an expert in the field of gender dysphoria, detailing any medical treatment that the person has had. The individual must also affirm that he or she intends to continue to live in their acquired gender until death.[135]

Although this policy has the advantage of not requiring surgery or any specific medical treatment, the requirement of living in the "acquired gender" for two years is both arbitrary and burdensome, heightening one's risk of violence, discrimination, and harassment for that two-year period. Similarly, the fact that one of the medical professionals submitting their evaluation must be practicing in the field of gender dysphoria is unduly limiting for those who live in rural or other areas that do not have access to these professionals. Lastly, the requirement that there be a diagnosis is similarly arbitrary and is not particularly useful for potential inclusion in U.S. policy

131. CAL. HEALTH & SAFETY CODE § 1004430 (West 2012) ("The petition shall be accompanied by an affidavit of a physician attesting that the person has undergone clinically appropriate treatment for the purpose of gender transition, based on contemporary medical standards, and a certified copy of the court order changing the applicant's name, if applicable. The physician's affidavit shall be accepted as conclusive proof of gender change if it contains substantially the following language: 'I, (physician's full name), (physician's medical license or certificate number), am a licensed physician in (jurisdiction). I attest that (name of petitioner) has undergone clinically appropriate treatment for the purpose of gender transition to (male or female).'").

132. *See* U.S. DEP'T ST., 7 FOREIGN AFF. MANUAL 1320 app. M(b) (2011) *available at* http://www.state.gov/documents/organization/143160.pdf.

133. "Sexual reassignment surgery is not a prerequisite for passport issuance." *Id.*

134. Gender Recognition Act, 2004, c. 7 § 2 (U.K).

135. *Id.*

because many people do not receive the diagnosis of gender dysphoria in the United States.[136]

B. Issues to Consider When Modernizing the Legal Standard

When considering how to update the legal standard, policymakers should look to the modern medical understanding of transgender people, the effect of the surgical standard on transgender people, how other areas of the law have acknowledged transgender people, the constitutional impact of these policies, and the public policy justifications and implications.

1. A Surgical Requirement Contradicts Current Medical Understanding

Current medical thinking has rejected the one-size-fits-all mentality that was common in early treatment of transgender people. In the middle of the twentieth century, the medical community's viewpoint, developed by a small set of early practitioners, was that genital surgery was the successful culmination of a person's treatment and gender transition. Although the lived reality of transgender people never uniformly reflected this understanding, it was widely believed then and continues to persist today among the general population.[137] As more providers began treating transgender people and contributed to medical literature and practice over the past several decades, the view of transgender medicine greatly evolved and expanded.

The World Professional Association for Transgender Health (WPATH), established in 1979, is the international medical association devoted to understanding and properly treating transgender people. WPATH develops and publishes the collective understanding of the best treatment for transgender people based on "the best available science and expert professional consensus," known now as the "Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People."[138] WPATH has altered its Standards of Care six times since 1979 to reflect the continually evolving medical understanding of transgender people and the efficacy of various treatment protocols.[139]

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136. For various reasons, requiring people in the U.S. to get a diagnosis would be ill advised. First, some people cannot get a diagnosis because of limited access to doctors or counselors (less of an issue in the U.K. where socialized medicine is in place). Second, people who are deemed not "clinically distressed" enough may not receive the diagnosis. Third, some doctors and counselors have a limited viewpoint about who should receive the diagnosis. *See infra* note 153 and accompanying text.

137. Spade, *supra* note 4, at 755.

138. WORLD PROF. ASS'N FOR TRANSGENDER HEALTH, *supra* note 33.

139. *Id.*

Over this time period, WPATH increasingly encouraged and required individualized evaluation and individualized treatment, reflecting both its increasingly multi-disciplinary membership and the best available science. The Standards of Care refer to themselves as "flexible clinical guidelines"[140] and state that treatment is to be individualized.[141] As discussed earlier, the current Standards of Care are clear that changes in gender role alone may be sufficient treatment for some transgender people.[142]

Recognizing that surgery is not necessary for many transgender people, as well as the fact that many of these procedures result in sterilization, WPATH issued a statement condemning surgical requirements in 2010, stating, "[n]o person should have to undergo surgery or accept sterilization as a condition of identity recognition . . . ." The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedures."[143]

In addition to WPATH, other experts have recommended de-linking social and legal recognition of gender from specific medical treatments. The foremost organization for psychologists in the United States, the American Psychological Association, released a statement with its medical, social, and legal recommendations related to transgender people in August of 2008, which stated:

> THEREFORE, BE IT FURTHER RESOLVED THAT APA encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their

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140. *Id.*, at 2.

141. "Treatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications." *Id.*, at 5.

142. "As the field matured, health professionals recognized that while many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither. Often with the help of psychotherapy, some individuals integrate their trans- or cross-gender feelings into the gender role they were assigned at birth and do not feel the need to feminize or masculinize their body. For others, changes in gender role and expression are sufficient to alleviate gender dysphoria. Some patients may need hormones, a possible change in gender role, but not surgery; others may need a change in gender role along with surgery, but not hormones. In other words, treatment for gender dysphoria has become more individualized." *Id.*, at 2 (citations omitted).

143. Press Release, World Prof. Ass'n for Transgender Health (June 16, 2010), *available at* http://www.wpath.org/documents/Identity%20Recognition%20Statement%206-6-10%20on%20letterhead.pdf.

> status as transgender for transgender people who permanently socially transition to another gender role . . .[144]

Note that the basis for changing the gender markers on identity documents according to the APA is a person's "social transition," not a specific other medical event, such as hormones or surgery.

In sum, the professional medical associations that have looked at the question of gender transition and how it relates to identity documents like birth certificates have all come to the same conclusion: it is social transition, not surgery, that is medically relevant.

2. Surgery is Not Common and is Often Unattainable

Sex reassignment surgeries are significantly less common than is popularly believed. Transgender people have a variety of medical, personal, and practical reasons for not seeking or being able to acquire surgery. Here are common barriers and considerations:

(1) Some individuals cannot afford the surgery they desire, especially given that a large majority of private and public health insurance plans do not currently[145] cover sex reassignment surgeries.[146]

(2) Many people have medical conditions that make surgery risky or contraindicated.[147]

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144. Policy Statement, Am. Psychological Ass'n, *Transgender, Gender Identity, & Gender Expression Non-Discrimination* (Aug. 2008), http://www.apa.org/about/governance/council/policy/transgender.aspx.

145. Increasingly, companies are ensuring that transgender employees do receive transition-related care through their insurance policies, and a number of colleges and universities have also ended these discriminatory exclusions. Human Rights Campaign Foundation, Corporate Equality Index 2012 27-28 (2011); Karen Aquino, *U. Adds Transgender Insurance*, THE DAILY PENNSYLVANIAN (Apr. 14, 2010), *available at* http://thedp.com/index.php/article/2010/04/u._adds_transgender_insurance.

146. Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 96–98 (2002); *see also* Jamison Green, *Introduction to Transgender Issues* in TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICY MAKERS 12 (Paisley Currah & Shannon Minter eds., 2001).

147. Editorial, *Looking Past Transgender*, THE DAILY FREE PRESS, Nov. 8, 2006, http://dailyfreepress.com/2006/11/08/editorial-looking-past-transgender/ (quoting Lorna Thorpe, Deputy Commissioner of New York's Department of Health and Human Hygiene as saying, "A smaller number undergo surgery – in part because not everyone is medically capable of undergoing the procedure."); *see also* Susan Donaldson James, *Transgender Sue Over Surgery Requirement to Alter Gender on Birth Certificate*, ABCNEWS, Mar. 24, 2011, http://abcnews.go.com/Health/transgender-yorkers-sue-

(3) Many people who want and can afford surgery do not pursue it because they fear complications.[148]

(4) Many individuals are unsure whether the surgery will provide the desired physical or aesthetic result, especially given individual variation and the chance of achieving an optimal result.[149]

(5) Some are prevented by practical considerations involved in undergoing major surgery, including having difficulty in taking several weeks off from work or school, having caregiving responsibilities for family members, or lacking caregivers for themselves following surgery.[150]

(6) Some hold sincere religious beliefs, or personal beliefs, against surgical body modification.[151]

(7) Some have family members or other loved ones who would be upset if they had the surgery, and thus forgo surgeries to maintain these relationships.[152]

(8) For some, maintaining reproductive capacity is important and many surgeries eliminate this possibility.[153]

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birth-certificates-genital-surgery-requirement/story?id=13204628 ("Prinzivalli is morbidly obese and has type 2 diabetes, high cholesterol and a blood disorder that would make surgery dangerous"); *Western Australia Gender Project*, CHANGELING ASPECTS, http://www.changelingaspects.com/Advocacy/WA%20Gender%20Project.htm (last updated Jan. 22, 2008) ("Common medical contraindications for sex reassignment surgeries include: . . . mental illness, poorly controlled diabetes, hemophilia, severe hypertension and deep vein thrombosis").

148. Cameron Bowman & Joshua M.Goldberg, *Care of the Patient Undergoing Sex Reassignment Surgery*, 9 INT'L J. OF TRANSGENDERISM 135 (2006) (noting the risks of complications that may arise from various gender reassignment surgeries).

149. The aesthetic and functional results of surgeries cannot be guaranteed. Furthermore, for transgender men, there exists no surgery that will create an adult-sized erectile phallus without the assistance of an insert device.

150. BOWMAN & GOLDBERG, *supra* note 148; *FTM Genital Reconstruction Surgery (GRS)*, HUDSON'S FTM RESOURCE GUIDE, http://www.ftmguide.org/grs.html (last visited Dec. 27, 2011) (discussing the months-long recovery process for many surgeries).

151. *See* Tobin, *Against the Surgical Requirement*, *supra* note 4, at 400–01 (discussing religious factors as rationale for low rates of sex-reassignment surgery in some communities).

152. Joanne Herman, *Transgender Issues: The Additional Challenges of LBGT Aging*, HUFFINGTON POST, Nov. 4, 2010, http://www.huffingtonpost.com/joanne-herman/shining-the-spotlight-on-_b_777551.html (noting "opposition by family members" as one of the reasons transgender people may not have surgery).

153. Madeline H. Wyndzen, *MtF Transsexual Reproductive Option Preservation*, ALL MIXED UP, http://www.genderpsychology.org/reproduction/index.html (last visited June 27, 2011) (discussing the costs associated with attempting to maintain post-operative reproductive abilities).

(9) Some are denied access to needed approval or diagnosis "letters" from psychologists when their life experiences do not neatly fit the "transsexual" pattern, when they do not match closely enough the stereotypes of man or woman, or when they are not sufficiently "clinically distressed."[154]

(10) A significant percentage of transgender people have determined that surgery is not necessary for them to be comfortable living in their new gender.[155] Many transgender people determine that the alterations they make to their gendered appearance, names, and pronouns give them the well-being they need without further medical treatment.[156]

Ultimately, according to the National Transgender Discrimination Survey, less than 4% of transgender men and only 23% of transgender women have what are popularly understood as genital surgeries.[157] Given these facts, any policy that requires surgery will block the vast majority of transgender people from being able to have an accurate birth certificate.

Given the multitude and severity of the previously discussed practical and legal harms caused by an inaccurate birth certificate, combined with the statistics on the frequency that transgender people receive surgeries, the collective harm to transgender people caused by a surgical requirement must be

154. Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L. J. 15, 24–29 (2003). Because many health care professionals voluntarily follow WPATH's Standards of Care, transgender individuals need one or two letters from mental health professionals before they can have surgery, depending on the type of surgery. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 33, at 27; *see also Choosing a Therapist*, TRANSSEXUAL ROAD MAP, http://www.tsroadmap.com/mental/therapy.html (last visited June 27, 2011) ("Some therapists require more than others before they'll recommend hormones or surgery. Some use a kind of weeding-out policy, trying to test your conviction. Some feel they are gatekeepers who must keep people from making mistakes, and require a lot of sessions. Others are much more open or easy-going.").

155. Tobin, *Against the Surgical Requirement*, *supra* note 4, at 401 n. 39; *see also* Gabriel Arkles, *Prisons as a Tool for Reproductive Oppression: Cross-Movement Strategies for Gender Justice*, SYLVIA RIVERA LAW PROJECT (Sept. 27, 2008), http://srlp.org/prisons/reproductiveoppression (noting the individualized needs of transgender people when it comes to health care); Damien Cave, *New York Plans to Make Gender Personal Choice*, N.Y. TIMES, Nov. 7, 2006, http://www.nytimes.com/2006/11/07/nyregion/07gender.html?pagewanted=all.

156. Tobin, *Against the Surgical Requirement*, *supra* note 4, at 401.

157. GRANT ET AL., *supra* note 54, at 79. What is considered genital surgery by the transgender community is more expansive than what is often considered genital surgery by government staff and others. Here, the Article refers to phalloplasty or metiodioplasty for men and vaginoplasty for women as those surgeries popularly understood as genital surgeries.

recognized for its severity, and should be taken into account when making policy.

In addition, there may be a public health harm caused by policies that require people to undergo unnecessary and unwanted surgeries. When a person undergoes surgical treatment, his or her time and resources, as well as those of others, would be spent securing and recovering from this treatment. Complications may also occur, adding new health problems. A cascade of unnecessary expenditures result from surgeries, including depleting one's personal financial resources, causing an interruption in one's school or work, being unable to complete family care-giving duties, and relying on financial or care-giving resources from family members or others.[158]

3. A Surgical Requirement is Inconsistent with Other Public Policies Related to Transgender People

As legal rights and recognition of transgender people have rapidly increased in the past two decades in the United States, there has been a clear trend that such rights *do not depend on whether a person has had specific medical treatments.*[159] Most pertinently, non-discrimination laws that cover transgender people prohibit discrimination on the basis of "gender identity or expression," or similar language, regardless of whether a person has had or is seeking medical treatment.[160] This implies that transgender people should have the freedom to live their daily lives consistent with their gender identities without facing discrimination or restrictions. In 2011, legislators in Maine considered a bill that would have narrowed the existing non-discrimination protections for transgender people in that state by granting the authority to businesses to limit access to sex-segregated facilities based on "biological sex." This bill was handily defeated (61-81 in the House, 11-23

158. All of these have potential public health consequences in direct or indirect ways, ranging from a person not having resources to be treated for other medical conditions and causing medical issues where none existed before to not being able to care for another family member because of having to recover from surgery. The collective effect has an impact on public health.

159. Interview with Mara Keisling, Executive Director, National Center for Transgender Equality, Washington D.C. (Feb. 10, 2012).

160. Of the 150 local non-discrimination laws in the U.S., only three currently have any references to surgery. Passed in 1999 and 2000, laws in Boulder and Denver in Colorado, and Lexington-Fayette Urban County in Kentucky have references to surgery (although their coverage is not limited to only those who had surgery). BOULDER ORD. No. 7040, Title 12 Human Rights, Section 12-1-1 Definitions (2000), DENVER ORD. No. 934-01, Article IV, Section 28-92 Definitions (2001); LEXINGTON-FAYETTE URBAN COUNTY ORD. No. 201-99, Article II, Chapter 2, Section 2-33 (1999).

in the Senate) by the majority Republican Legislature.[161] As a result, there are no surgical or hormonal lines drawn by any of the 16 state laws that currently protect transgender people from discrimination.[162] As a further example, in proposed federal non-discrimination legislation such as the Employment Non-Discrimination Act even the provision related to sex-segregated shower facilities does not include language requiring surgery as a prerequisite for admittance, but instead speaks of "gender transition."[163]

In fact, many of these laws have already been explicitly interpreted to require access to sex-segregated facilities such as restrooms based on a person's gender identity without regard to medical treatment.[164]

Driver's license policies related to corrections of gender markers, which vary by state, have also moved away from surgery requirements.[165] Although the events of September 11, 2001 and the resulting enactment of

161. L.D. 1046. 2011 Leg., 125th Sess. (Me. 2011), *available at* http://www.mainelegislature.org/legis/bills/bills_125th/billtexts/HP078101.asp ("It is not unlawful public accommodations discrimination, in violation of this Act, for a public or private entity to restrict rest room or shower facilities that are part of a public accommodation to the use of single-sex facilities to members of a biological sex regardless of sexual orientation. Unless otherwise indicated, a rest room or shower facility designated for one biological sex is presumed to be restricted to that biological sex.").

162. *See* CAL. GOV'T CODE § 12926(q) (West 2011); COLO. REV. STAT. § 24-34-401(7.5) (2011); CONN. GEN. STAT. § 46A-51(21) (West 2011); HAW. REV. STAT. §§ 515-2, 489-2 (West 2011); 775 ILL. COMP. STAT. 5/1-102 (West 2011); IOWA CODE § 216.2(9A) (2011); ME. REV. STAT. ANN. tit. 5, § 4553(9-C) (2011); MINN. STAT. ANN. § 363A.03(44) (West 2011); N.J. REV. STAT. § 10:5-5(rr) (2011); N.M. STAT. ANN. § 28-1-2(Q) (West 2011); OR. REV. STAT. § 174.100(6) (2011); R.I. GEN. LAWS § 11-24-2.1(l) (2011); VT. STAT. ANN. tit. 1 § 144 (West 2011); WASH. REV. CODE § 49.60.040 (15) (2011); A.B. 211, 2011 Leg., 76 Sess. (Nev. 2011); H.B. 502, 2011 Leg., 187 Sess. (Ma. 2011).

163. Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 8(a)(3) (2011) ("Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.").

164. *See, e.g.*, COLO. CODE REGS. § 708-1 Rule 81.11 (2011); WASH. STATE HUMAN RIGHTS COMM'N, GUIDE TO SEXUAL ORIENTATION, GENDER IDENTITY, DISCRIMINATION AND WASHINGTON STATE LAWS: SELF-ASSESSMENT CHECKLIST FOR COMPLIANCE AND SUGGESTED BEST PRACTICES FOR EMPLOYMENT 6, *available at* http://www.hum.wa.gov/Documents/Publications/SelfAssessments/Self-Assessment-Employment2ndEdition.pdf; IOWA CIVIL RIGHTS COMMISSION, SEXUAL ORIENTATION AND GENDER IDENTITY: AN EMPLOYER'S GUIDE TO IOWA LAW COMPLIANCE, *available at* http://www.state.ia.us/government/crc/docs/SOGIEmpl.pdf; D.C. MUN. REGS. tit. 4 § 802 (2006).

165. Tobin, *Fair and Accurate Identification*, *supra* note 4.

the Real ID Act initially caused some state agencies to be concerned about any changes to driver's license data, stricter, surgery-based policies on gender markers were not promulgated.[166] Despite the terrorism scare, the trend in the last decade has been away from surgery-based policies and toward gender identity-based policies.[167] The District of Columbia currently has a model policy because it provides a corrected gender marker upon (1) signed documentation from the license holder that they are seeking to have the gender on their license corrected to reflect their gender identity, and (2) the signature of a health or social service professional who attests, in their professional opinion, that the person's gender is as stated.[168] Slightly modified versions of D.C.'s policy have been adopted in New Jersey, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia. Although not modeled on the D.C. policy, new policies that eliminated surgery requirements have also been adopted in Colorado, Florida, Nevada, New Mexico, and Ohio. Many other states have long maintained non-surgery based policies.[169]

Furthermore, although not yet adopted nationally, the trend with regard to homeless shelter policies is increasingly to house people based on their self-identified gender, regardless of whether a person has had any medical treatments. Because most homeless shelters are segregated by gender and

166. One state to roll its policy back was Michigan, which had a policy of self-identification a decade ago. Under the old policy, a person only had to sign a generic form (used for many purposes), writing a sentence that stated that he or she wished the gender on his or her license changed, and the correction was granted, with questions by the staff prohibited. The policy stated: "DO NOT ASK THE APPLICANT TO SPECIFY THE REASON FOR THE REQUEST." MICH. DEP'T OF STATE, TR-34, CHANGING GENDER (1995) (on file with author). The policy was ended in 2003 and changed to a surgery-based policy, due to a change in Secretary of State—not due to any problem caused by the policy, according to state advocates. The policy has changed two more times at least. Dawn Wolfe Gutterman, *Secretary of State Reverses Pro-Trans Policy*, PRIDE SOURCE, May 12, 2005, http://www.pridesource.com/article.html?article=14010; Interview with Jay Kaplan, Attorney, ACLU of Michigan, Detroit, MI (Oct. 2, 2012).

167. Tobin, *Fair and Accurate Identification*, *supra* note 4.

168. The D.C. DMV has an easy-to-use and easy-to-process form developed specifically for gender marker corrections. Gender Designation on a License or Identification Card (D.C. Dep't of Motor Vehicles, 2006), *available at* http://dmv.dc.gov/info/forms/gcp-app_pdf.shtm; *see also* Tobin, *Fair and Accurate Identification, supra* note 4; Mara Keisling et. al., *Gender Identity and the Driver Licensing Process*, AM. ASS'N OF MOTOR VEHICLE ADM'RS, Aug. 3, 2011, *available at* http://www.aamva.org/largefiles/webinars/GenderIdentityAndDLProcess_08032011.wmv; Tom Manuel, *Transgender Drivers: New Norms in Customer Service*, MOVE MAG., Spring–Summer 2011, at 29.

169. *See, e.g.*, Memorandum from Patricia D. Aducci, Comm'r N.Y. Dep't Motor Vehicles b(April 29, 1987), *available at* http://rnytg.org/DMVGenderChangeMemo.pdf (noting that "[p]roof that an operation occurred is no longer necessary."); *see also Driver's License Policy By State*, *supra* note 71.

many do not have private areas for changing or bathing, historically there had been a policy of housing people according to their genitals. In 2003, the National Coalition for the Homeless adopted a resolution urging shelters to house people according to their "self-identified gender."[170] Shelter systems, such as those in Boston, New York City, San Francisco, and Washington, D.C., have had formal policies to this effect for years and the implementation has not caused any problems.[171]

In sum, legislatures and policymakers in a variety of arenas have determined that surgical treatment is immaterial to whether a person should be recognized in accord with the person's gender identity.

4. Reasons Given for a Surgical Requirement are Not Valid

Originally, recognizing that surgery changed a person's gender was a progressive idea—it provided a way for transgender people to correct their gender markers on official government documents whereas before, there was no option to correct the gender marker at all. Generally, courts and agencies have not articulated a state interest in a surgery requirement, presumably because the choice of surgery was so obvious as the dividing line between male and female that the reason it had been used was not seen as necessary to articulate. Thus, it is difficult to locate arguments in favor of a surgery requirement. The few examined below are taken mostly from driver's license and marriage recognition contexts, and one policy debate on birth certificates in New York City. The arguments can be understood best as three separate concerns; as such, they are each explained and analyzed in turn.

a. Fraud or Security

On the rare occasions when a court or agency tries to justify a surgical standard, the government sometimes articulates an interest in "fraud pre-

170. Broader best practices were described in a joint publication of the National Coalition for the Homeless and the National Gay and Lesbian Task Force, which also includes the National Coalition for the Homeless resolution in its Appendix. LISA MOTTET & JOHN M. OHLE, TRANSITIONING OUR SHELTERS: A GUIDE TO MAKING HOMELESS SHELTERS SAFE FOR TRANSGENDER PEOPLE, app. A (2003).

171. Interview with Mara Keisling, *supra* note 158.

vention."[172] This issue often arises in reference to same-sex marriage,[173] and sometimes is presented more generally and vaguely as a potential security problem. For example, there has been the suggestion that terrorists[174] could take advantage of the ability to alter gender markers on birth certificates.

With regard to marriage, most states do not require a person to show a birth certificate when applying for a marriage license; instead, they typically require a driver's license,[175] which, as discussed above, often allow people to change their gender markers without proof of surgery. There have been no reported cases of same-sex couples made up of two non-transgender people where one person changes the gender marker on a driver's license for the purpose of receiving a marriage license.[176]

With regard to the claim that people may disguise their gender to be better able to commit crimes or terrorist acts, one prominent transgender advocate has commented that the last thing a person who is trying to blend in and escape notice should do is dress in the opposite gender.[177] Furthermore, federal policy implicitly indicates that gender marker changes do not impair national security interests. For example, in implementing the Real ID Act, the Department of Homeland Security decided to "leave the deter-

172. Daniel Trotta, *Being Transgender No Longer About Surgery in N.Y.*, REUTERS, Nov. 22, 2006, http://uk.reuters.com/article/2006/11/23/lifestyle-life-transgender-dc-id UKN2020431620061123 ("Opponents are concerned about the possibilities for fraud."). Kenji Yoshino, notes a potential objection: "[P]revention of fraud: Lowering the barriers to sex reassignment increases the incentive for individuals who have no sincere desire to change their sex to do so for opportunistic reasons." Kenji Yoshino, *Sex and the City: New York City Bungles Transgender Equality*, SLATE, Dec. 11, 2006, http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/sex_and_the_city.html.

173. Interview with Reverend Moonhawk River Stone, M.S., LMHC, to author (confirmed Feb. 11, 2012).

174. Yoshino, *supra* note 172 ("[N]ational security: Permitting individuals to make any alterations to their birth certificates makes those records less useful to Homeland Security.").

175. This determination was made after a review of requirements for the 50 states and DC listed on *Marriage License Requirements By States*, USMARRIAGELAWS.COM, http://usmarriagelaws.com/ (last visited Dec. 28, 2011).

176. The implausibility that non-transgender people would fraudulently seek a gender correction on their birth certificate in order to receive a marriage license is easily rebutted when analogized to different situations. For example, typically people understand that fraudulent manipulations, such as a 13 year-old pretending to be 18, would not require the government to recognize a marriage involving a 13 year old. Similarly, non-transgender gay and lesbian people generally understand that they will not receive a legally valid marriage by fraudulently changing the gender marker on their government identity documents.

177. Interview with Mara Keisling, *supra* note 158; GRANT ET AL., *supra* note 54, at 163 (noting that seven percent of participants "reported being arrested or held in a cell strictly due to bias of police officers on the basis of gender identity/expression").

mination of gender up to the States."[178] Further, the State Department allows individuals to update gender markers on their passports without surgery.[179] These should be taken as indications that gender was not an important classification related to prevention of terrorism in the federal government's view.

In fact, there are particularly strong arguments that security and law enforcement agencies' ability to protect the public is *enhanced* by having gender marker policies that are not based on surgeries, but are instead based upon the gender to which a person has transitioned. Transgender people often report being delayed, detained, or otherwise harassed by law enforcement officers because the gender marker on their ID does not match their external gender expression.[180] Sometimes officers are concerned the ID is fraudulent and take various steps to determine the legitimacy of the document. This extra scrutiny consumes law enforcement resources that are better spent identifying truly counterfeit identity documents or dealing with other law enforcement duties.

A second advantage for law enforcement of accurate, up-to-date gender markers involves situations in which police officers respond to crimes, identify witnesses, or attempt to locate persons of interest. The officer attempting to locate someone is better served by knowing the gender that the person is known as by friends and acquaintances, who may be confused or unhelpful when the officer asks about the "woman" or "man" who lives next door. Similarly, when the officers interact with a victim or a witness, they are more likely to alienate a transgender man, with a female designation on his license, by using the terms "ma'am" and "Ms.," or by using "sir" or "Mr." for a transgender woman. This alienation could make the transgender person, or others aware of the disrespect shown, less likely to trust, inform, and work with police in the instant case or in future situations.

In conclusion, there are no realistic fraud or security concerns that are addressed by maintaining a surgery requirement. On the contrary, federal

178. 6 C.F.R. § 37.17 (2008) ("Requirements for the surface of the driver's license or identification card. To be accepted by a Federal agency for official purposes, REAL ID driver's licenses and identification cards must include on the front of the card (unless otherwise specified below) the following information: . . . (c) Gender, as determined by the State."). In the explanatory notes that accompany the rule, DHS explains that it "will leave the determination of gender up to the States since different States have different requirements concerning when, and under what circumstances, a transgendered [sic] individual should be identified as another gender." Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5301 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37).

179. *See supra* notes 132–133 and accompanying text.

180. Interview with Mara Keisling, *supra* note 159.

security experts at the U.S. Department of Homeland Security and U.S. Department of State have instead established or changed policies to allow gender markers to be updated without surgery.

b. Permanence of the Correction

Occasionally, an administrator or judge will state the desire for permanence or irreversibility as a requirement for granting a correction of gender.[181] Presumably, the concern is that someone could "switch back" after changing their gender. The harm to society if a person undergoes a gender correction more than once is never explicitly identified.[182]

A policymaker misses the mark if he or she focuses on avoiding multiple corrections. The proper agency aim should be to maintain *accurate* records. A record should be updated to maintain accuracy as often as there is a change to relevant data. For example, if a person changes his or her name four times over their life due for various reasons, and seeks to amend their birth certificate each time, updating the birth certificate several times maintains an accurate record for them throughout his or her entire life.

In addition, research proves that a concern about impermanence is unsupported by the evidence. Data show that a return to previous gender happens extremely rarely and is generally a result of discrimination and rejection from family, friends, and colleagues.[183] A person is no less likely to transition back to the originally assigned gender after surgery as opposed to before surgery.[184]

There is another reliable way in which people can indicate to the agency that they have undergone medically-recognized gender change: namely, an evaluation by a medical professional. An evaluation from a medical professional should be sufficient to determine if an individual has un-

181. Cave, *supra* note 155 (quoting the city's health commissioner as saying "[s]urgery versus nonsurgery can be arbitrary[.] . . . Somebody with a beard may have had breast-implant surgery. It's the permanence of the transition that matters most."). Maryland's highest court, in considering whether the judicial system has authority to grant a legal order of gender change, decided that the court's equitable jurisdiction did cover such orders, and remanded for the courts below to determine whether the petitioner had "completed a permanent and irreversible change from male to female." *In re* R.W. Heilig, 816 A.2d 68, 87 (Md. 2003).

182. Although the administrative burden of having to process multiple changes may be a cause for concern, this could be addressed by charging fees for corrections. It is difficult to imagine what other harms may exist without resorting to concerns about maintaining sex stereotypes or differences between the sexes.

183. *See* M. Landen et al., *Factors Predictive of Regret in Sex Reassignment*, 97 ACTA PSYCHIATRICA SCANDINAVICA 284 (1998).

184. Even a surgical requirement does not eliminate the possibility of a person changing gender a second time. Relevant surgical procedures could be reversed or undertaken to change a person's body again.

dergone a gender transition and that the gender marker should be changed. Because no method can guarantee that a person may not elect to transition their gender a second time, the method of deferring to a medical professional should be sufficient.

A policy allowing a larger majority of people to have accurate birth certificates should not be dismissed due to conjecture concerning outliers who may change their gender more than once, especially because there is no articulation of the harm to society caused by multiple gender corrections. Instead, the focus should remain on maintaining accurate records.

c. Concerns About Sex-Specific Facilities and Situations

Sometimes government actors, or others who favor surgical requirements, claim that sex-segregated institutions need to know people's anatomical structure, either to ensure bodily privacy or for the prevention of assault.[185] Or, they may assert that for sex-specific jobs or job duties, such as those that might exist in a nursing or medical facility (although increasingly rare), bodily privacy of clients would be violated if a staff member of one anatomical structure observes or treats an unclothed client of another anatomical structure.[186] Yet, on a daily basis and in almost all social situations, a

185. Yoshino, *supra* note 171 (describing reservations "voiced by institutions like hospitals, jails, and schools, which routinely segregate according to sex" and explaining others' potential objections). Yoshino also notes that:
"Another moment of reflection suggests at least four interests that a person or the state might have in another person's gender. First, personal safety: Many communal spaces, like prison cells and public bathrooms, are segregated by sex to protect women, who are generally physically weaker than men, from assault or rape. Second, privacy: As employment-discrimination law recognizes, individuals have an interest in ensuring that their sexual privacy is not invaded by members of the opposite sex in contexts like nursing or medical care. . . . There is little evidence that transgender individuals present a security risk to women, while there is a great deal of evidence that transgender individuals themselves are at immense risk if they are not given accommodations. To the extent that privacy concerns rest on a fear of sexual objectification, they rely on a specious assumption of universal heterosexuality." *See also* Daniel Trotta, *New York Rejects Transgender Birth Certificate Law*, REUTERS, Dec. 5, 2006 (quoting a health department official as saying "how can you send a person with a penis to a women's prison?").

186. "As employment-discrimination law recognizes, individuals have an interest in ensuring that their sexual privacy is not invaded by members of the opposite sex in contexts like nursing or medical care." Yoshino, *supra* note 171. However, it should be noted that the case law on this question is quite old and modern nursing practices, for example, do not include dividing tasks by sex. *See, e.g.*, Backus v. Baptist Med. Ctr., 510 F. Supp. 1191, 1193 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982). Telephone Interview with Allyson Pearlman, 2010 graduate from the Simmons College of Nursing (July 30, 2011) (noting that in her recent education and previous multi-year experience as a volunteer at UCLA Jonsson Cancer Center, she has never seen jobs or job duties divided by gender, and the only instruc-

person's genitals remain entirely private, even inside sex-segregated facilities or in work situations where a person is performing gender-specific duties.[187]

Increasingly, it is rare that people find themselves in environments that involve potential observation of another person's genitals (such as in a shared showering facility inside an institution, like a homeless shelter or prison). Within these contexts, before or at the relevant moment, a person will generally disclose to the authorities that he or she has a different anatomical structure than is typical for that facility. As a general rule, transgender people who have not had genital surgery are very likely to go to great lengths to avoid having other people observe their unclothed bodies. If they are able to do so, their bodily characteristics should not be considered relevant. If one is not able to keep their body private, the facility will learn of the person's bodily anatomy as a practical matter, typically through voluntary verbal disclosure.[188]

Individuals who believe that transgender people should complete surgery before being allowed to change their birth certificates often cite the protection of women as their main goal. More specifically, these individuals feel that transgender women who have not undergone surgery will enter women's bathrooms and locker rooms to sexually assault non-transgender women who also frequent those facilities. However, this concern is based on several incorrect assumptions, including that access to these facilities is currently based on the gender marker listed on a person's birth certificate.

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tion that she received related to this was during cultural competence training, where she was instructed that some Muslim patients may request nurses of the same gender). Also relevant to the issue of gender-specific tasks related to bodily privacy are studies done on whether women prefer male or female gynecologists. Data suggest that gender is not particularly important when women choose gynecologists. *See* Michael Zuckerman et al., *Determinants of Women's Choice of Obstetrician/Gynecologist*, 11 J. WOMEN'S HEALTH & GENDER-BASED MED. 175, 175–76 (2002) (finding that 62% of women did not feel strongly about the gender of their provider and that "almost as many women with a female provider indicated a preference for a male provider (46%) as women with male providers indicated a preference for a female provider (54%)"); Amy M. Johnson, et. al., *Do Women Prefer Care From Female or Male Obstetrician-Gynecologists? A Study of Patient Gender Preference*, 105 J. AM. OSTEOPATHIC ASS'N 369, 369 (2005) ("[t]he majority of patients (66.6%) had no gender bias when selecting an obstetrician-gynecologist, and an even larger majority (198, 80.8%) felt that physician gender does not influence quality of care. There was no statistical difference in patient satisfaction based on physician sex.").

187. "[P]reoccupation with the appearance of body parts that are already hidden from public view has no justification." Tobin, *Against the Surgical Requirement*, *supra* note 4, at 420.

188. It is difficult to imagine an instance where a transgender woman, who still has male genitalia and who has struggled all her life to be seen as a woman by others, would walk into an open women's shower without attempting to conceal that area of her body.

In fact, the large majority of sex-segregated facilities do not maintain written policies with regard to restroom access. Although this is changing, the default rule is essentially a social one: if you look like a man, you can use the men's room and if you look like a woman, you can use the women's room.

When a person's gender is challenged, a person is likely to receive access only if they can present identification with a matching gender marker. An entity will sometimes ask for additional information, such as surgical status, before allowing access. Those who do not have the correct gender on their ID (which is more likely for those whose birth certificates are inaccurate) may be asked to show documentation of their surgical status, a letter from their health care provider, or other official documentation.

The stated concerns are further undermined by the fact that a wide range of companies, organizations, and public places *already* have in place best practices dictating use of facilities by transgender people. These policies explain that transgender people may and should use the restroom and/or locker rooms according to their *gender identity*, not their anatomical structure.[189] As explained above, non-discrimination laws, which cover 45 percent of the U.S. population,[190] are regularly interpreted to ensure that transgender people can access restroom and shower facilities based on their gender identity, regardless of their anatomical status. Moreover, there are no reported cases of these laws being used to gain improper access to a facility for criminal purposes.

Thus, allowing transgender individuals to correct the gender marker on their birth certificates would not markedly alter the existing trend to base access to facilities on self-identity.

The alleged importance of a surgical standard is also sometimes asserted when discussing placement of individuals who are incarcerated. The fear is that non-transgender women in jail, prison, or juvenile justice facilities will be sexually assaulted by transgender women who have not yet had surgery. First, it is important to understand that gender markers on birth certificates have almost no influence on where people are placed in prison, juvenile justice facilities, and longer-term jail stays.[191] The only cognizable

189. Mottet & Ohle, *supra* note 169; *see also* ERNST & YOUNG, WORKPLACE GENDER TRANSITION GUIDELINES (2006) *available at* http://www.hrc.org/files/assets/resources/ErnstYoung_TransitionGuidelines_2006.pdf.; Peter Likins, *Statement on Restroom Access*, UNIV. OF ARIZ. (June 26, 2006), http://equity.arizona.edu/restroom_access.

190. NAT'L GAY & LESBIAN TASK FORCE, *supra* note 77.

191. In addition to the strip search conducted to identify contraband that often precedes incarceration, prisons and juvenile justice facilities generally do medical exams of incoming prisoners. Transgender individuals are then classified/housed by their ex-

situation in which a birth certificate gender marker could become relevant would be for the initial twenty-four to seventy-two hours after arrest while in a jail or holding cell. Second, for a variety of reasons,[192] police are likely to know that the person they arrested is transgender. Thus, even if a person's birth certificate had been altered to reflect their identified gender prior to surgery, the police are unlikely to make housing decisions based on the certificate. As a result, birth certificate policies could only potentially affect an extremely small percentage of transgender women's placement.[193]

Furthermore, just as in homeless shelters and sex-segregated spaces generally, there is a new standard related to the placement of transgender people in jails and prisons. This standard makes a transgender person's physical anatomy only one consideration in housing determinations. The recently promulgated Prison Rape Elimination Act regulations which apply to all prisons, jails, and lockups in the U.S., set forth exactly this policy: that housing classification, including whether a person is to be housed in the male or female facility, be made on a case-by-case basis.[194] Notably, gender

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ternal genitalia, regardless of documentation. *See* Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) ("The practice of the federal prison authorities . . . is to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender.").

192. Strip searches when being placed in a cell or holding area with others are common for those who are arrested for violent crimes or drug-related activity so that police can look for weapons, drugs, or other contraband. *See* Brief of the A.B.A. as Amicus Curiae in Support of Petitioner, Florence v. Board of Chosen Freeholders of the County of Burlington (June 27, 2011) (No. 10-945), 2011 WL 2578557, at *8, *12–*14. Furthermore, if people have been arrested before, their arrest or criminal record should disclose their transgender status to arresting police. Finally, police, depending on what is available to them from the driver's license database, are likely to be able to quickly determine whether the arrestee has undergone a name change by examining their driving record, so unless the person had a gender-neutral name at birth, the name change would likely disclose to officers that the arrestee is transgender.

193. In order for the police not to determine that a transgender woman arrestee is transgender, she would have to (1) be arrested for the first time, (2) be arrested for a nonviolent crime not involving drugs, (3) not be visibly transgender, and (4) have a driver's license record that does not indicate that a gender or name change occurred.

194. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115) (mandating that transgender and intersex inmates, who may be especially vulnerable, receive an individualized assessment on whether the inmate should be housed in a male or female facility). In making the assessment, the agency shall consider on a case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems. *Id.*; *see* WASHINGTON D.C. DEP'T OF CORRECTIONS, INMATE MANAGEMENT RULE 4020.3C, PROGRAM STATEMENT: GENDER CLASSIFICATION AND HOUSING (2011) (explaining that for inmate housing classification, the Transgender Committee makes the assessment and

markers on birth certificates are not considered in placing inmates. These new policies are being established because of the very real levels of sexual violence transgender women face when housed in male areas of jails, prisons, and juvenile justice facilities. According to a University of California-Irvine study in 2007, transgender women in male units experience thirteen times more sexual assault than non-transgender men in the unit.[195]

Last, it is also important to note that one court has found that a female inmate had no right to a different cellmate after she had been placed with a transgender woman who had not had genital surgery. In this case, the court considered whether the inmate possessed a clear constitutional right to be housed with someone having the same anatomical structure and concluded that they did not.[196] Thus, the only court to consider whether there was a right for an inmate to be housed with an anatomically similar inmate has concluded that no such right exists.

Ultimately, transgender women using or living in sex-segregated facilities do not create or increase threats to non-transgender women, regardless of whether those facilities are bathrooms, jails, prisons, homeless shelters, foster care group homes, or college dormitories. In fact, many of these facilities long ago voluntarily abandoned surgical or anatomy-based requirements, recognizing that safety and fairness dictate that transgender people be provided access to the facility that matches their gender identity. Thus, while updating the legal standard for correcting birth certificates will have some positive effects for some transgender people who are currently denied access to sex-segregated facilities because of their lack of government identity documents, overall, there will be little to no noticeable effect on the

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recommendation after interviewing the transgender inmate based on safety/security needs, housing availability, gender identity, and genitalia); KING COUNTY, WASHINGTON DEP'T OF ADULT AND JUVENILE DETENTION, ADULT DIVISIONS, GENERAL POLICY MANUAL 6.03.007 TRANSGENDER INMATES (2006) (assigning inmates' housing based on their safety/security needs, housing availability, gender identity, and genitalia).

195. VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT, UNIV. OF CALIFORNIA-IRVINE 3 (2007), *available* at http://ucicorrections.seweb.uci.edu/pdf/FINAL_PREA_REPORT.pdf.

196. "Expert medical opinion informed Jail officials that housing Lamson [a transgender woman] with the female population would best satisfy Lamson's unique psychological needs and that there was *no risk to the female inmates*. . . . Although it is clear that there is a constitutional right to privacy, I conclude that the contours of that right are not clear when it comes to the determination of where to house transsexuals. Such a constitutional right was not 'clearly established in its more particularized sense' under these circumstances." Crosby v. Reynolds, 763 F. Supp. 666, 669–70 (D. Me. 1991) (emphasis added).

safety of sex-segregated facilities for non-transgender people if birth certificate laws and policies are modernized to eliminate the surgical standard.

5. Surgical Requirements Raise Serious Constitutional Concerns

The surgical requirement for gender correction raises both Equal Protection and Substantive Due Process concerns.

There is a well-founded Equal Protection Clause argument to be made that a surgical requirement discriminates against the class of transgender people—who all must have surgery or else be denied an accurate birth certificate—compared to non-transgender people who have accurate birth certificates without being required to undergo surgery.[197] Depending on which level of scrutiny the court would apply to the class of transgender people, at minimum, there would have to be a legitimate state interest that the surgical policy was rationally related to advancing. None of the policy reasons related to fraud, permanence, and sex-segregated facilities, which were articulated and dismissed in this Section, should be considered rationally related to a legitimate[198] state interest.[199]

197. A second approach under the Equal Protection Clause would be to compare transgender people who have had surgery versus those who have not had surgery. This type of distinction, based on surgical status, is more likely to receive rational basis review.

198. Interests of prevention of fraud and security, and safety, may all be legitimate, however, the surgical rule fails because it is not *rationally related* to advancing these interests.

199. Presumably, the government might also make an argument that a surgical standard is simply easier to administrate than other options. Given the multitude of different surgeries that a person may receive, as well as the fact that the way most agencies determine that surgery has been undergone is through a letter or other document from a health care provider, it should not be *more* difficult to process a letter or other document from a provider stating that the person has had appropriate treatment for the purpose of gender transition. Thus, the argument that surgery is an easier standard to administrate is faulty.

Moreover, there is a sound argument that transgender people deserve either heightened[200] or strict scrutiny[201] in Equal Protection analysis. If the former, the reasons for the policy would need to be "important" and the policy would need to be "substantially related" to forwarding that interest. If the latter, the policy reasons would need to be "compelling" and the policy would need to be "narrowly-tailored" to advancing that interest. Even if a court was to declare that the state interests were "legitimate" and the classification was rationally related to meeting that interest, which would enable it to pass rational basis review, these policy justifications should certainly fail under heightened review or strict scrutiny.

There are also a series of rights implicated by surgical requirements that could be protected by the Substantive Due Process protections of the

200. Heightened or "intermediate" scrutiny is provided for all classifications based on gender. *See* United States v. Virginia, 518 U.S. 515 (1996). A good argument can be made that this issue qualifies for heightened scrutiny because at its most basic level, the government is making a classification based on gender when it is determining which gender marker is appropriate and it is potentially judging or classifying a person based on their sexual characteristics, which may be related to sex stereotypes about what makes a man and a woman. *See* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (reasoning that a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes" and therefore that discrimination against transgender individuals on the basis of their gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause, which receives heightened scrutiny). In addition, the Department of Justice released a report saying that all LGBT people should receive heightened scrutiny. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 33 (2011) *available at*, http://www.justice.gov/crt/about/spl/nopd_report.pdf ("[W]e note that a number of factors weigh in favor of applying heightened scrutiny in the context of discrimination by law enforcement on the basis of sexual orientation and gender identity, including a long history of animus and deeply-rooted stereotypes about lesbian, gay, bisexual, and transgender ('LGBT') individuals.").

201. In determining whether to apply a heightened level of scrutiny, the Supreme Court has set forth two requirements: (1) that the group affected have been historically victims of discrimination by the government, and (2) that the characteristics that differentiate the group bear "no relation" to the ability of members of that group to contribute to society. *See* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 (1973). In addition, courts have sometimes considered whether the characteristics that define the group are immutable and whether the group is politically powerless. *See* Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977) (demonstrating the flexibility of immutability by holding that classifications based on alienage warrant heightened scrutiny even though they can naturalize); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (finding that poor families are not politically powerless). Transgender people should be able to meet the two required factors and also satisfy the two other characteristics that courts have considered. Therefore, they should be deemed a "suspect class" for purposes of applying Equal Protection analysis.

Constitution. First, there is a long-established right to be free of unwanted medical treatment.[202] Second, there is a long line of cases establishing the right to choose parenthood and control one's reproductive capacity.[203] Third, there is a right to be free of sterilization.[204] The latter two rights are restricted by surgical requirements because sterilization and other effects on one's reproductive capacity are inherent in many sex reassignment surgeries. In addition, a good argument can be made for a previously unrecognized right to gender self-determination.[205] Thus, if the government desires to limit any of these rights—which a surgical requirement does[206]—the government action would need to be justified by a compelling state interest, with the policy narrowly tailored to forwarding that interest.[207] As previously discussed, however, the articulated policy reasons for a surgical requirement do not meet that standard.

All of the Substantive Due Process arguments should also be considered valid public policy concerns, even if a court would not accept them as constitutionally guaranteed freedoms. For example, some would argue that the highly personal and private nature of a person's decisions regarding surgical options should not be interfered with by the government, that an individual's bodily integrity should be protected against government intrusion, and finally, that sterilization should not be required of any citizen without a serious public policy justification.

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202. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

203. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

204. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).

205. This argument would be based on *Lawrence* and, more generally, existing Substantive Due Process jurisprudence that recognizes a person's intimate and personal decisions should be respected absent government need to the contrary. Lawrence v. Texas, 510 U.S. 538 (2003). There is also international support for the existence of this right. *See* Goodwin v. United Kingdom, Eur. Ct. H.R. 1 (2002).

206. A surgical requirement can interfere with these rights for several reasons. First, for many, surgery is unwanted medical treatment. Second, a side effect of surgery is often sterilization, which would interfere with one's ability to parent and control one's reproductive capacity. Third, a person's right to gender self-determination is interfered with when the government insists upon providing official government documents that contradict one's self-determination and disclosing this information to third parties.

207. The rights listed are typically referred to as *fundamental* rights, although the Court may be shifting to a "liberty interest" frame, where the requirement that rightsbe connected to or established by our nation's history is no longer present. In addition, the test for the restriction of fundamental rights may be becoming less rigid. For a discussion of the evolution of substantive due process analysis, see Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897–98 (2004).

Regardless of the strength of these arguments, state governments should be concerned that they will be subject to litigation, potentially based on state or federal constitutional provisions. Two lawsuits were filed in 2011 challenging surgical requirements for updating birth certificates and driver's licenses.[208]

C. Specific Recommendation for Legal Standard for Gender Correction

Individuals should be permitted to correct the gender marker on their birth certificates if they make a gender transition that is medically recognized, using a modern medical understanding of transgender people. As official government records, birth certificates must remain reliable documents; therefore, it is important to establish a process to ensure that the amendments are reliable. Usually, agencies require external verification when individuals wish to make other corrections to their birth certificates (e.g. name, paternity, etc.). In order to put forth a statute that will be acceptable by government agencies, some compromise[209] in the form of external verifica-

208. In Alaska, the state ACLU challenged the driver's license / state identification card policy of requiring surgery on the grounds that it violated substantive/fundamental rights protected by the Alaska Constitution. *See* Brief of Appellant, K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles, No. 3AN-11-05431 (Alaska Super. Ct. July 18, 2011), *available at* http://www.akclu.org/InTheCourts/KLvAlaska.AppellantsBrief.pdf. In a Memorandum of Decision, the judge determined that the surgery-based policy was not enacted with appropriate procedure, thus struck it down, not reaching the larger constitutional claims brought by the plaintiffs. However, the judge did determine that the agency not having a gender correction policy at all constituted a breach of the right to privacy of the transgender licensee. K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles, No. 3AN-11-05431, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012) (memorandum decision). In New York, the New York City birth certificate policy of requiring proof of surgical treatment was challenged on the basis that it violated the city's Administrative Procedure Act, was an arbitrary and capricious agency action, and was a violation of numerous provisions of the New York City Human Rights Law. *See* Press Release, Transgender Legal Defense and Education Fund, Transgender Rights Group Files Lawsuit Against New York City Over Refusal to Correct Transgender Birth Certificates (March 22, 2011), *available at* http://tldef.org/press_show.php?id=327.

209. Some may favor a self-identity based policy. *See, e.g.*, TRANSGENDER EQUAL. NETWORK IR., A TIME FOR RECOGNITION: RESPECT, RECOGNITION AND EQUALITY FOR TRANSGENDER PEOPLE 9, *available at* http://www.teni.ie/attachments/714a4ffb-3240-496b-8905-06002a24d6c7.pdf ("TENI would propose that a statutory declaration rather than an affidavit would be appropriate for gender recognition and that the person swear that they have given the matter careful consideration and declare their wish to change their gender and have this recognized legally."). In Argentina, a self-identity based policy, with no external verification, is now national law. *See supra* notes 38–40 and accompanying text. Yet, given the lack of even any U.S. driver's license policies, seen as less legally meaningful, being based entirely on self-identity with no external verification, it seems unlikely that a jurisdiction would

tion is necessary. However, it can be done without obstructing a person's constitutional rights and can be done in a way that comports with contemporary medical understanding.

Although the complete model law is presented in Part V.,[210] the relevant portion regarding the standard of proof is the following:

> A notarized statement from the registrant's licensed treating or evaluating physician or health care provider stating that the registrant *has undergone surgical, hormonal, or other treatment appropriate for that individual for the purpose of gender transition, based on contemporary medical standards*, or stating that the registrant has an intersex condition, and that in the *provider's professional opinion* the registrant's gender designation should be changed accordingly.

There are seven important features to this model language:

(1) First, the language uses the term "licensed physician or health care provider" because, as the Standards of Care recognize, a number of physicians and non-physician health care providers can be appropriately involved in a person's gender transition and have the requisite knowledge to make a competent evaluation. This language is broad enough to include therapists, psychologists, psychiatrists, social workers, as well as other physicians who are licensed to provide health care.

(2) Second, there is no requirement that the provider personally conducted or supervised the person's treatment—a provider

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agree to a solely self-identity based policy for birth certificates. In addition, there are some that want gender removed entirely from the birth certificate. *See* Spade, *supra* note 4, at 805–08. This is more feasible than one might think because the government health statisticians who want gender data can get it on the more detailed health questionnaire that is filled out at the same time with the birth certificate. For example, the health questionnaire typically asks race, whether or not pre-natal care was received, and the health of the baby as delivered. While I am sympathetic to this way of thinking, at this point it is not politically realistic to suggest to state legislatures to remove gender entirely. Also, as discussed in *supra* Part I.D.2., there are important practical and legal reasons that a person may need to have some official record of gender to present to authorities. A gender-less birth certificate cannot meet that need.

210. *See infra* Part V.

who has completed an evaluation should be considered qualified.[211]

(3) Third, the language uses the phrase "has undergone" as opposed to "complete," which is sometimes found in existing statutes and implies that the treatment has ended.

(4) Fourth, the language is clear that it is an *individual* standard and no specific medical treatment is required. This is due to the use of the conjunctive in "surgical, hormonal, *or* other treatment" as well as the important phrase "appropriate for that individual."

(5) Fifth, the reference to "contemporary medical standards" in the statute is included to help ensure that as medicine evolves, so does the statute.[212]

(6) Sixth, the language ensures that providers are exercising their professional judgment, based on the treatment they provided or based on their evaluation, with the phrase "in the provider's professional opinion."

(7) Seventh, the language has an alternative standard for those with intersex conditions so that they do not have to demonstrate treatment of gender transition. For people with intersex conditions, it is sufficient to only require that their provider deem it appropriate for the gender marker on their birth certificate to be corrected.[213]

III. Developing an Accessible and Efficient Procedure for Gender Marker Corrections

The procedure for correcting gender markers on birth certificates must be examined in light of two primary goals. First, the process for gender

211. This is in large part about convenience and practicality. Some people receive treatment from doctors in other countries. Also, occasionally, the specific provider who treated a person retires, dies, or is otherwise not easily locatable. Thus, any doctor who can evaluate the person should be eligible to provide the information about the person's treatment.

212. The inclusion of this "contemporary medical standards" phrase should also help legislators support the measure because they know that what they are endorsing is supported by modern medicine, which otherwise may not be obvious.

213. This is similar to the U.S. Department of State policy related to Consular Reports of Birth Abroad and Passports, which requires only the provider review the gender-related history of the applicant to determine which gender marker should be male or female. U.S. Dep't of St., 7 Foreign Affairs Manual 1300, App. M, Intersex Conditions (2011) *available at* http://www.state.gov/documents/organization/143160.pdf.

correction should be as accessible as possible so that transgender people who warrant the correction can access it, regardless of their income or other personal factors. Relevant to this inquiry is primarily whether a court order process is used or whether a person can go directly to the agency with a provider's statement. Second, the process should be as efficient as possible to conserve government resources.

A. Existing Laws and Policies Related to Process

While the MSVSA requires a court order, only twenty-two states, the Commonwealth of Northern Mariana Islands, District of Columbia, and U.S. Virgin Islands require court orders.[214] In nineteen states, New York City, and Guam, a doctor's affidavit or other documentation submitted directly to the vital statistics agency is sufficient evidence of a gender transition.[215] Three states allow a person to use either process.[216] Procedures are unclear in several other jurisdictions.[217]

One of the consequences of using a court order system, especially when the statutory standard is nonexistent or vague, is that individual judges are likely to establish or apply their own standards of eligibility for a gender correction based on their individual knowledge. Even if the word "surgery" is used in the statute, some judges may distinguish between the types of surgery they deem would make a petitioner eligible for the correction. This problem is exacerbated in states where people are required to go to court in their county of birth or residence, and thus are not able to go to an area of the state where judges might be more familiar with, and less biased against, transgender people and gender transition.[218] Similarly, if

214. The states are Alabama, Alaska, Arkansas, California, Colorado, Delaware, Georgia, Indiana, Louisiana, Maryland, Missouri, Mississippi, Montana, Nevada, New Hampshire, Oregon, South Dakota, Utah, Virginia, Vermont, Wisconsin, and Wyoming. *See infra* app. A

215. The nineteen states are Arizona, Connecticut, Florida, Hawaii, Iowa, Illinois, Kansas, Kentucky, Massachusetts, Maine, Michigan, North Carolina, North Dakota, Nebraska, New Jersey, New Mexico, New York, Rhode Island, and Washington. *See infra* app. A.

216. These are Minnesota, Pennsylvania, and West Virginia. *See infra* app. A.

217. These are Oklahoma, South Carolina, Texas, and American Samoa. *See infra* app. A.

218. For example, in Vermont, people have to go to the probate judge in their county of birth. VT. STAT. ANN. tit. 18, § 5075 (West 2011). Each county has one elected probate judge. Although Vermont's probate judicial system is relatively easy to access and can be utilized without an attorney, this system remains highly restrictive because it increases the potential for someone having to appeal (and hire an attorney) if the elected judge in the county of birth denies the correction. Anecdotally, we know that the ability to go to certain judges or to the courts in a large geographic area, where most judges are more educated about and less biased toward transgender people, is an important survival technique. A system that forces a person to go to a

judges are attempting to determine what treatment is "appropriate" for the individual, one can imagine that different judges will come to different conclusions.

In an attempt to mitigate the problems of judicial inexpertise, both California[219] and Vermont adopted statutory language to limit judges' ability to determine what qualifies as appropriate medical treatment. In Vermont, the statute says that the documentation from the medical provider is "sufficient evidence,"[220] and in California, the documentation should be considered "conclusive proof" of the change in gender.[221] Furthermore, in California, the gender change process is already facilitated by a series of court-created, consumer-friendly forms that reduce the need for an attorney.[222]

In the twenty-four states without requirements for a court order, typically a doctor's statement (nine states), certificate (two states), letter (two states), or affidavit (nine states) must be provided directly to the vital statistics agency. Two jurisdictions require that the documentation be "sworn"[223] and seven require that the documentation be notarized.[224] Nine states require that the physician signing the letter or statement is the actual surgeon who performed the surgery.[225] Two states have more burdensome require-

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specific judge or area of the state makes it more likely a person will be unable to steer away from discrimination. Interview with Kristina Wertz, *supra* note 114 (noting variation on outcome based on judge when California had a surgical requirement).

219. The new law could still be improved by eliminating the requirement of receiving a court order entirely. Conversations with transgender advocates in California indicate that they decided to address primarily the surgical requirement with this legislation. Additional, they have already attempted to minimize the burden of needing to go to court by creating a combined process for name and gender corrections and easy-to-use forms. Interview with Kristina Wertz, *supra* note 115.

220. VT. STAT. ANN. tit. 18, § 5112(b) (West 2011).

221. CA. HEALTH & SAFETY CODE § 103430 (West 2012). However, the strength of the "conclusive proof" statement is somewhat tempered by a later statement that "[a]t the conclusion of the hearing the court shall grant the petition if the court determines that the physician's affidavit shows that the person has undergone clinically appropriate treatment for the purpose of gender transition." *Id.*

222. The Judicial Council of California promulgates a variety of forms, including forms for the applicant, medical affidavits, and judicial orders and decrees. *See Browse All Forms*, CALIFORNIA COURTS, http://www.courts.ca.gov/forms.htm?filter=NC (last visited Dec. 27, 2011) (including relevant forms for name and gender changes: NC-200, NC-210, NC-220, NC-230, NC-300, NC-310, NC-320, and NC-330).

223. These are Kentucky and Guam. *See infra* app. A.

224. These are Iowa, Massachusetts, Maine, Nebraska, North Carolina, Rhode Island, and West Virginia. *See infra* app. A.

225. These are Connecticut, Illinois, Maine, North Dakota, Nebraska, New Mexico, Pennsylvania, Virginia, and West Virginia. *See infra* app. A.

ments for post-surgical reports or descriptions of procedures.[226] For Consular Reports of Birth Abroad, a letter on letterhead is required to be given directly to the State Department.[227]

Although it is not found as a written part of these policies, presumably these documents are examined for authenticity by agency staff. Requiring only a letter or notarized statement, as opposed to an "affidavit," should be easier for a non-lawyer to understand how to produce.[228] In addition, both the Consular Reports of Birth Abroad policy and the new California statute provide suggested language for the medical provider to include in a letter or statement. This also can be helpful for a non-lawyer to navigate the system.

Another important feature, which currently only exists in Connecticut, is a provision relating to the jurisdiction of judges to issue court orders to correct a current resident's gender on his/her birth certificate when they were born in a different state that requires a court order. Because of the time, money, travel, and other costs associated with traveling to the place of birth to hire an attorney and appear in court, it is significantly easier for individuals to file for a court order from their current state of residence. Connecticut's statute provides:

> In the case of a person who is a resident of this state and was born in another state or in a foreign jurisdiction, if such other state or foreign jurisdiction requires a court decree in order to amend a birth certificate to reflect a change in gender, the probate courts in this state shall have jurisdiction to issue such a decree.[229]

226. For New York, this involves "a letter from the surgeon specifying date, place, and type of sex reassignment surgery performed; an operative report from the sex reassignment surgery; and some additional medical documentation." For Virginia, the applicant needs a "preoperative diagnosis, postoperative diagnosis and description of procedure." *See infra* app. A.

227. U.S. Dep't of St., 7 FOREIGN AFFAIRS MANUAL, *supra* note 29, at 1320 app. M(b).

228. Affidavits, depending on the state law, can require additional formatting or other requirements that a lay person would have to research in order to complete properly. However, most non-lawyers know what a "notarized" statement is; thus, this is more accessible.

229. CONN. GEN. STAT. ANN. § 19a-42b(1) (West 2011).

This clarification is important because it reduces the likelihood that courts[230] will express concern about lack of jurisdiction over an executive agency in another state or country.[231]

B. Issues to Consider When Designing a Correction Process

Approximately half of jurisdictions currently have a court order process instead of a direct-to-agency process. These jurisdictions need to consider the various consequences of this policy. For many, the court order process can be an insurmountable practical or financial barrier to obtain a corrected birth certificate. It also compromises privacy, leads to problems caused by lack of judicial inexpertise and bias, as well as raises serious constitutional questions.

1. Practical Concerns with the Court Order Process

Administrative processes are a critical feature of government record keeping and daily life. The government keeps records on our lives in many ways. If people had to hire attorneys or visit judges for all of the government record-keeping features of their lives, the cost of running the government would exponentially increase. Imagine if everyone had to hire an attorney and go to court for every interaction they had with the government, such as having a child and needing to establish a birth record, getting a driver's license, registering the ownership of a car, getting married, recording a death, etc. Because of their easy accessibility, efficiency, and lower cost, administrative processes are often used in lieu of judicial action for record-keeping functions. The judicial process is utilized when there is a need for judicial oversight to prevent fraud or for an investigation where facts are contested.

Requiring people to get court orders to correct the gender markers on their birth certificates is typically a significant burden. There are many expenses associated with it: hiring an attorney competent in the matter, taking time off work or school to meet with an attorney and appear in court, traveling to the courtroom and attorney's office (the cost of which, especially for non-residents of the state, may be significant and time consum-

230. *In re* Heilig, 816 A.2d 68, 84 (Md. 2003) (noting that a lower court in Maryland had held that it did not have power over the Secretary of State of Pennsylvania to order a change in the individual's birth certificate and, in dicta, stating "[o]bviously, the Legislature cannot direct officials in other States to change birth certificates issued in those States but may deal only with birth certificates issued or issuable in Maryland . . . ").

231. Of course, the receptive state or country may not accept the order, but many states are known to do so as a practical matter.