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# Gender Identity and Birth Certificates: The Surrogacy Nexus

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# GENDER IDENTITY AND BIRTH CERTIFICATES: THE SURROGACY NEXUS

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ABSTRACT

*This Article confronts and responds to the weaponization of birth certificates in recent controversies around gender identity by drawing parallels between gender identity and intentional parentage. A juxtaposition of gender identity with parentage identity reveals that they share the common underpinning of self-identification, raising the question why birth certificates are permitted to reflect one's parentage identity but, as has been suggested in numerous controversies involving transgender litigants, not one's gender identity. This Article argues that, for the same reasons that a surrogacy arrangement permits the parties to it to define for themselves who are the legal parents of the child they plan to create, a gender marker on a birth certificate should also be a matter of self-definition. This Article emphasizes that basing a law of gender determination on inflexible categories defined by outward anatomical differences furthers no defensible public policy and indeed is in direct conflict with evolving understandings of gender and human rights.*

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## INTRODUCTION

Transgender persons continue to be the target of a multi-pronged legislative assault taking place across the country and around the world.[1] Eliminating gender-affirming treatments, forbidding the participation of transgender athletes in sporting events, and even barring entry to restrooms that align with an individual's gender identity figure prominently in this effort to marginalize and disenfranchise an entire population of persons who do not conform to the rigid, binary definition of gender that prevails in the law.[2] The primary strategy in this multi-valent legislative initiative is

1. Kendall Ciesemier & Chase Strangio, *Why and How Trans Hate Is Spreading,* ACLU (Apr. 27, 2023), [https://perma.cc/DB3P-36AH]; Karoum Demirjian, *Republicans Ram Divisive Measure to House Victory,* N.Y. TIMES, July 15, 2023, at A1 (reporting on House Republicans' sabotaging the defense bill by, in part, insisting on a measure banning health coverage by the military of gender transition surgeries); Azeen Ghoraysi, *Many States Are Trying to Restrict Gender Treatments for Adults, Too,* N.Y. TIMES, Apr. 22, 2023, at A15; Adeel Hassan, *A Closer Look at Legislation on Transgender Issues,* N.Y. TIMES, June 29, 2023, at A11; Rick Rojas & Anna Betts, *North Carolina Enacts Ban on Transgender Care,* N.Y. TIMES, Aug. 17, 2023, at A17.

2. *See* Rick Rojas & Emily Cochrane, *Judge Dismisses Ban in Arkansas for Gender Care,* N.Y. TIMES, June 21, 2023, at A1, A11 (describing "a broad[] campaign by Republican legislators . . . on issues of gender and identity"); Alison Gash, *Commentary: States Advance Anti-Transgender Agendas – a Strategy by Conservatives to Rally Base,* N.H. BULL. (Mar. 7, 2022, 5:40 AM), [https://perma.cc/P5N5-FCU7]; Eduardo Medina, *Utah Bars Transgender Athletes from Competing in Girls' Sports,* N.Y. TIMES, Mar. 26, 2022, at A16.

to make one's sex assigned at birth the sole and permanent determinant of one's legal gender.[3] The achievement of this objective threatens to render observations of a child's genitalia at birth determinative of that person's gender and, in the absence of surgical intervention or a medical expert's sign-off, of the gender category that would appear on the identity documents that person would need to acquire later in life.[4]

A concerted effort to establish an inflexible definition of legal gender where none actually exists raises an important question of public policy. Should one's gender be fixed for all purposes at birth, or is there a role for self-definition to play in legal gender determinations? Any attempt to answer this question will benefit from an examination of changes in the law of parentage, begun several decades ago, to adjust rigid parentage definitions to emerging reproductive technologies.[5] Before that time, intentional parentage was not recognized as a valid legal category and could not be recorded on the child's initial birth certificate.[6] Intentional parentage remained controversial long after assisted reproduction became more mainstream, but it eventually was recognized by the majority of American jurisdictions as valid for parentage designations on birth certificates. Because the common underpinning of intentional parentage and gender identity is self-identification, a solid argument can be made that for the same reasons that a surrogacy arrangement permits the parties to it to define the parents of the child they are creating, a gender marker on a birth certificate should also be a matter of self-definition.[7]

This article is comprised of three parts. Part II examines the creation and dual functions of birth certificates to reveal why birth certificates have become convenient weapons wielded by lawmakers to deny trans people legal recognition of their gender identity. To demonstrate the critical difference between assignments of gender and gender identity, Part III explores the important and sometimes determinative role that birth certificates have played in judicial rulings on questions of gender identity. This part also discusses the role self-definition should play in legal determinations of gender. Part IV argues that the current legal treatment of surrogacy arrangements supports wider availability of gender

3. Sex and gender are distinct concepts. Sex is a designation made based on biological and anatomical characteristics. Gender, though, is cultural. It can be a designation based on an individual's feelings of belonging to a particular gender group and their expression of such. Sex and gender are often confused, as when others "gender" an individual based on that person's physiognomy. *See Sex & Gender,* NAT'L INSTITUTES OF HEALTH, [https://perma.cc/RF2N-HSLE].
4. *See infra*, notes 78-82, 133-41, 166-69, and accompanying text.
5. *See infra*, notes 228-30, 247-48, 291-98, and accompanying text.
6. *See infra*, notes 256-65, and accompanying text.
7. *See infra*, notes 37-38, 220-22, and accompanying text.

marker changes based on self-identification. It explains that the initial controversy about birth certificates in surrogacy cases was in part due to a rigid notion that legal parentage had to be rooted in biology. Decades later, surrogacy as a legal matter now allows the parties to the arrangement to define the legal parents of the child they plan to create no matter what biological connections the child has to particular individuals. Gender identity lies even more comfortably than parentage in this realm of self-definition. If legal parentage has become a matter of self-definition, one's self-attested gender should be accorded the same legal significance.

## I. THE CREATION AND PURPOSES OF BIRTH CERTIFICATES

Most people's conception of a birth certificate probably has a lot to do with how it is typically used by the individual whose information it contains. Kept in a safety deposit box or in an important-documents file, one's birth certificate is retrieved as needed when applying for access to public goods such as education, health care, employment or travel.[8] As one collects the identity documents generated in these various contexts, the birth certificate fades into insignificance and may be considered late in one's life to be a mere genealogical curiosity.

What birth certificates are, are used for, and how they are created assume different forms. Even the reasons why birth certificates exist at all are, as it were, all over the map. Recordings of births, deaths, and marriages were originally the province of religious institutions and, in some areas, local governments.[9] Various initiatives to interest state governments in devising a system of birth registration bore no fruit until concerns about child labor convinced reformers of the necessity of verifying the age of employees.[10] Later, in connection with the work of the United States Census Bureau, the federal government mandated that states collect and report birth data to what is now called the National Center for Health Statistics (NCHS),[11] a subunit of the Centers for Disease Control. This agency ensures that each record of live birth

8. The history of birth certificates reveals that they were "originally intended for the sole purpose of birth registration," but "are now used extensively for employment purposes and to obtain benefits or other documents used for identification." OFFICE OF THE INSPECTOR GENERAL, BIRTH CERTIFICATE FRAUD i (2000).
9. Erin Blakemore, *The History of Birth Certificates Is Shorter Than You Might Think,* HISTORY, Aug. 8, 2017 (updated May 17, 2023), [https://perma.cc/7UXC-GFUP].
10. Matthew Wills, *The Age of the Birth Certificate,* JSTOR DAILY (Jan. 12, 2022), [https://perma.cc/Z2AG-JW54].
11. American Bar Association, *Birth Certificates* (Nov. 20, 2018), [https://perma.cc/SN9U-B3S8].

becomes part of a vast body of statistics essential for research projects that reveal demographic trends and shed light on the nation's health.[12]

### A. *The Creation of Birth Certificates: Observation and Translation*

When a child is born, a birth certificate is created to record information relating to the birth. The "U.S. Standard Certificate of Live Birth"[13] is in the form of an application and is divided into two sections consisting of 58 wide-ranging questions.[14] The first section of required data is non-anonymous, comprising the child's name, date of birth, place of birth, names of parents, and sex. A second, longer section consists of 39 questions asking for extensive, albeit anonymous,[15] information on the mother's, father's and child's characteristics and habits, including race and ethnicity, any prenatal care, details about the labor and delivery, and even whether the infant is being breastfed at discharge.[16]

The Certificate of Live Birth form typically is completed by the parents, must then be certified by medical personnel, and finally must be turned over to the state's department of health for processing.[17] The process comprises two distinct stages. At the observation stage, parents and medical personnel report the facts and circumstances relating to the birth. Male or female gender is assigned at birth, depending upon whether the birth attendant is of the opinion that the child just born possesses either a penis

12. NAT'L OFF. OF VITAL STAT., FIRST THINGS AND LAST: THE STORY OF BIRTH AND DEATH CERTIFICATES 22 (1960).
13. American Bar Association, *supra* note 11.
14. *Id.* ("more than 60 items in the 2003 birth certificate"); H.L. Brumberg & D. Dozor, *History of the Birth Certificate: From Inception to the Future of Electronic Data,* 32 J. PERINATOLOGY 407, 409 (2012).
15. *See* Paul Wise & Mary Ellen Avery, *Socioeconomic Status on Birth Certificates-Reply,* 138 AMER. J. DISEASES CHILD. 205, 206 (1984) (noting that maternal and neonatal information, including obstetric complications, Apgar scores, and demographic and socioeconomic data should be anonymized).
16. *See U.S. Standard Certificates of Live Birth*, [https://perma.cc/RXV3-5LDN]. In 1978 and 1989, the U.S. standard birth certificate was revised. NAT'L CTR. FOR HEALTH STAT., THE 1978 REVISION OF THE U.S. STANDARD CERTIFICATE 6 (1983); NAT'L CTR. FOR HEALTH STAT., 1989 REVISION OF THE U.S. STANDARD CERTIFICATES & REPORTS 7 (1991).
17. American Bar Association, *supra* note 11. *See, e.g., Vital Statistics,* TEXAS HEALTH AND HUMAN SERVICES, [https://perma.cc/HQA5-ESQG] (last visited July 11, 2023), and Birth, Death, Marriage & Divorce Records, New York State, [https://perma.cc/HDZ4-R4MJ] (last visited July 11, 2023).

or a vagina but not both.[18] One's gender is thus assigned, or "assessed" as one court put it.[19] When delivered to the state's bureau of vital statistics, often housed in its department of health, the translation stage begins. The state's department of health parses and disseminates the information. The non-anonymous or "identifying" information can be formatted when requested as a state-issued birth certificate, complete with an embossed seal and the signature of an official.[20] This is the document that most people think of as a birth certificate. The anonymous, public-health-related information is relayed to the NCHS. The NCHS's National Vital Statistics System provides access to the data for public-health research projects relating to such topics as birth rates, maternal health, and infant outcomes.[21]

Consider one state's vital statistics law. Working in the absence of any definition of what statistics are vital,[22] under Pennsylvania's Vital Statistics Law of 1953,[23] the state collects information on all births that occur in Pennsylvania via a system of registration districts, each headed by a local registrar.[24] In a state where 127,304 births occurred in 2021 and 97% of these took place in hospitals,[25] the law requires that a certificate of each birth be prepared, signed and filed "by the attending physician or licensed

18. *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio. Prob. 1987); Radtke v. Misc. Drivers & Helpers Union Local No. 638, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012). Ambiguous genitalia challenge the idea of sex as binary and may signal intersexuality, a condition present in, by one estimate, 1.7 percent of children born. Anne Fausto-Sterling, *The Five Sexes—Revisited,* THE SCIENCES, July/Aug. 2000, at 19, 20. Responses to intersexuality have varied from surgical alignment of the genitalia with one sex or the other to, more recently, understanding and accepting that sex exists along a multidimensional continuum. Anne Fausto-Sterling, *The Five Sexes—Revisited,* THE SCIENCES, July/Aug. 2000, at 19, 20-22. Only very recently has the government made birth certificate regulations responsive to this reality. *See infra,* notes 200-02, and accompanying text.

19. Adams v. Sch. Bd., 968 F.3d 1286, 1300 (11th Cir. 2020) (describing hospital personnel as having examined the subject and recorded the sex).

20. American Bar Association, *supra* note 1. For examples of how to request a copy of a birth certificate from a bureau of vital records, *see* [https://perma.cc/QG62-V8F4] (Connecticut); [https://perma.cc/WK7C-T39T] (Massachusetts); [https://perma.cc/DT9G-AAPH] (New York).

21. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL VITAL STATISTICS SYSTEM, [https://perma.cc/9HK7-9E3T] (Feb. 13, 2024).

22. *See* 35 PA. CONS. STAT. §§ 450.204, 450.205. The term "vital statistics" relates to records of "births, marriages, deaths, diseases, and the like." *Vital Statistics*, BLACK'S LAW DICTIONARY 1572 (6th ed. 1990).

23. 35 PA. CONS. STAT. § 450.1001-.1003.

24. 35 PA. CONS. STAT. § 450.302(a).

25. PA. DEP'T OF HEALTH, LIVE BIRTHS BY HOSPITAL AND METHOD OF DELIVERY (2021), [https://perma.cc/78HY-RESH]; THE HOSPITAL & HEALTHSYSTEM ASSOC. OF PA., MATERNAL HEALTH, [https://perma.cc/Z2XE-4QQQ].

midwife . . . ,"[26] and the government provides an electronic birth registration system for this purpose.[27] Since 2003, Pennsylvania has used the U.S. Standard Certificate of Live Birth.[28] A live birth is defined as "the expulsion or extraction from its mother of a product of conception . . . which shows any evidence of life at any moment after such expulsion or extraction."[29] Births are to be reported within ten days after they occur.[30] The Report of Live Birth consists of information gathered from the Birthing Parent's Worksheet and the Birth Facility Worksheet,[31] including age, gender, place of residence, and medical information about the mother and the baby.[32] The anonymized medical and statistical data is transmitted, as described above, to the National Vital Statistics System.[33]

### B. *The Purposes of Birth Certificates*

Registration of birth and its proof—the birth certificate—conjure the vast bureaucracy of collecting and recording vital statistics undertaken by each state in the union.[34] What may seem a mundane and quotidian task of gathering data and keeping records in fact aims to fulfill two essential purposes.[35] The first of these is to provide a "*legal* record of the

26. 35 PA. CONS. STAT. § 450.401(a).
27. PA. DEP'T OF HEALTH, *supra* note 25; PA. DEP'T OF HEALTH, STATE REGISTRAR NOTICE 2023-02 (Feb. 13, 2023), [https://perma.cc/PVD4-JNPL].
28. PA. DEP'T OF HEALTH, PRENATAL CARE CALCULATION REVISED, [https://perma.cc/QL93-2KRW].
29. 35 PA. CONS. STAT. § 450.105(3).
30. PA. DEP'T OF HEALTH, *supra* note 27; 28 PA. CODE § 1.1.
31. PA. DEP'T OF HEALTH, PENNSYLVANIA'S GUIDANCE ON REPORTING LIVE BIRTHS FOR NEWBORNS 2 (2021) [https://perma.cc/F9SK-3QMX].
32. *Id.* at 6-20.
33. *Id.* at 1.
34. *See* NAT'L COMM. ON VITAL AND HEALTH STAT., NEXT GENERATION VITAL STATISTICS: A HEARING ON CURRENT STATUS, ISSUES, AND FUTURE POSSIBILITIES 6 (2017), [https://perma.cc/X74U-7Z3L] (describing the "[N]etwork of interdependent systems in which vital records data are pulled together from . . . 57 U.S. registration jurisdictions"). As birth registration is a matter of state law, each state, each of the five territories, the District of Columbia, and New York City have birth registration offices. OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEP'T OF HEALTH AND HUM. SERV., NATIONAL VITAL STATISTICS SYSTEM-NATALITY, [https://perma.cc/GLE5-JM4F].
35. Steven Schwartz, *The U.S. Vital Statistics System: The Role of State and Local Health Departments*, NAT. RES. COUNCIL COMM. ON NAT'L STAT., VITAL STATISTICS: SUMMARY OF A WORKSHOP (2009) (describing the two purposes of certificates of birth); Brumberg & Dozor, *supra* note 14, at 408 (describing the birth certificate as "a legal document used for determining citizenship, as well as an important source of perinatal epidemiology").

child's birth,"[36] a certification that a birth has taken place and the facts and circumstances surrounding that birth. This function is by its nature non-anonymous. It describes the person born and the circumstances of their birth. A record of one's birth connects that person to the moment they came into existence and serves, at least for a time, as a kind of unique fingerprint of that person going forward into their lives. This "identified record[]" contains the data that will eventually give the individual access to citizenship, public education, a social security number, a driver's license, a passport, employment, and other benefits;[37] in short, the data is a means to engage with an entire bureaucracy of public and private institutions that mediate and regulate one's participation, interactions, and movement in society. The presentation of a birth certificate to these various institutions is what often precedes the issuance by those institutions of an identity document that will allow the holder of it to verify that they are who they claim to be.[38]

The second of the two important roles fulfills a public-health objective, to use the anonymous demographic data birth certificates provide. This data is "for medical and health purposes only"[39] and will be made available to government officials and public health researchers to assist them in tracking health trends.[40] Birth records are indeed an essential facet of a nationwide data collection and information processing enterprise that furnishes important data sets to researchers[41] working on

36. NAT'L OFF. OF VITAL STAT., *supra* note 12 at 2 (emphasis in original).

37. NAT'L COMM. OF VITAL AND HEALTH STAT., VITAL RECORDS AND VITAL STATISTICS IN THE UNITED STATES: USES, USERS, SYSTEMS, AND SOURCES OF REVENUE 8 & n.3 (2018), [https://perma.cc/M24C-7639]; American Bar Association, *supra* note 11; NAT'L CTR. FOR HEALTH STAT., HOSPITALS' AND PHYSICIANS' HANDBOOK ON BIRTH REGISTRATION AND FETAL DEATH REPORTING 1-2 (1987), [https://perma.cc/6PL6-Q6GX]; David E. Phillips, Tim Adair, and Alan D. Lopez, *How Useful Are Registered Birth Statistics for Health and Social Policy? A Global Systematic Assessment of the Availability and Quality of Birth Registration Data*, 16 POPULATION HEALTH METRICS, Dec. 27, 2018, at 1 (citing the "wide array of individual and society benefits" of birth registration).

38. Office of the Inspector General, *supra* note 8, at iii.

39. U.S. Standard Certificate of Live Birth, *supra* note 16.

40. Brumberg & Dozor, *supra* note 14, at 407-409 ("Birth registration is one of the foundations of public health." and describing the "monitoring of relevant public health trends"); Shin Y. Kim, Sukhjeet Ahuja, Caroline Stampfel, & Dhelia Williamson, *Are Birth Certificate and Hospital Discharge Linkages Performed in 52 Jurisdictions in the United States?,* 19 MATERN. CHILD HEALTH J. 2615, 2615 (2015) ("Public health agencies and researchers rely heavily on birth certificate and hospital discharge data for national and local surveillance and research activities related to pregnancy complications, risk behaviors, and neonatal outcomes.").

41. Brumberg & Dozor, *supra* note 14, at 408 ("The federal government then utilizes the data not only to understand health issues and publish national statistics, but also evaluate health and welfare programs."); Schwartz, *supra* note 35.

public health projects such as "population changes, childbirth trends, maternal and fetal health and mortality, new parent demographics, and other trends that inform policymakers."[42] This use of birth certificates in the interest of public health is not one the public automatically associates with birth certificates, but in fact the bulk of the data collected for them is tabulated and deployed in the interests of such research.[43] In other words, there is a world of difference between the second section of the U.S. Standard Certificate of Live Birth "and the birth certificate document that states issue to individuals."[44]

### C. *Birth Certificates and the Politics of Identity*

In documenting the facts of one's birth and permitting participation in society, the birth certificate could justifiably be understood as proof of one's identity. Archbishop Desmond Tutu was of this opinion, once remarking that a birth certificate "establishes who you are."[45] Tutu was well aware that without a birth certificate one runs the risk of "statelessness," a status that has grave ramifications for the affected individual's health, welfare, and future prospects in the world.[46]

Without doubt, a document meant to establish "who you are" based on what you looked like and how those present at your birth described you has a fairly difficult role to fulfill. If it is then necessary to produce it for the rest of one's life when enrolling in school, signing up for Little

42. American Bar Association, *supra* note 11; *See also* Brumberg & Dozor, *supra* note 14, at 408 (noting the federal government's use of the data "not only to understand health issues and publish national statistics, but also to evaluate health and welfare programs"). *See, e.g.*, Ctrs. for Disease Cont., *Pregnancy Risks Determined from Birth Certificate Data—United States, 1989,* 268 J. AM. MED. ASSOC. 1831 (1992); Margaret A. Honein, Leonard J. Paulozzi, T.J. Mathews, J. David Erikson, & Lee-Yang C. Wong, *Impact of Folic Acid Fortification of the US Food Supply on the Occurrence of Neural Tube Defects*, 285 J. AMER. MED. ASSOC. 2981 (2001) (employing birth certificate reports of spina bifida and anencephaly).

43. Wise & Avery, *supra* note 15, at 205 ("[T]he analysis of vital data has made important contributions to understanding and improving the . . .").

44. Office of the Inspector General, *supra* note 8, at i; *See also* Susan J. Pearson, THE BIRTH CERTIFICATE: AN AMERICAN HISTORY 290 (2021) (noting the conflicting functions of data collection and identification); American Bar Association, *supra* note 11.

45. American Bar Association, *supra* note 11.

46. U.N. HIGH COMM'R FOR REFUGEES, I AM HERE, I BELONG: THE URGENT NEED TO END CHILDHOOD STATELESSNESS 4, 12 (2015), [https://perma.cc/B3EQ-75SC].

League, registering for the military, qualifying for Medicaid, proving parentage, or applying for a Social Security number or a passport,[47] in short, navigating life, we are asking still more of it. Since we rely so heavily on this document to ensure that the bearer of it can gain access to the blessings of citizenship,[48] it would be logical to expect that the preparation of it would be undertaken with great care.[49]

Great care may not be the best way of describing how birth certificates are created, however. The observation, or information-gathering, stage requires someone present at the birth to submit "birth data"[50] or "documentation."[51] This is generally a physician or a midwife.[52] The risk of error at this stage is concerning.[53] Some believe that data gathering at the observation stage suffers because it is assigned to those for whom the proper gathering of vital statistical information is an afterthought or because the task of reporting the gathered data is delegated to those of lower rank and ability.[54] In one pictographic representation of the process, for example, the "birth clerk" responsible for transmitting birth data

47. Petition for Writ of Certiorari, at ** 5-7, Pavan v. Smith, 582 U.S. 563 (2017) (No. 16-992), 2017 WL 587527; NAT'L COMM. OF VITAL AND HEALTH STAT., *supra* note 37 (providing a pictographic representation of these various uses).
48. Although beyond the scope of this article, the information contained in birth certificates can be important for establishing one's citizenship, Brumberg & Dozor, *supra* note 14, at 408, whether bestowed on the basis of the place of birth (*jus soli*), as in the United States, or on the basis of having citizen parents (*jus sanguinis*), as in much of the rest of the world. Gerard-René de Groot & Olivier Vonk, *Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding* Ius Sanguinis *and* Ius Soli, 65 NETH. INT'L L. REV. 319, 321-22 (2018).
49. NAT'L OFF. OF VITAL STAT., *supra* note 12, at 6.
50. American Bar Association, *supra* note 11.
51. Smith v. Pavan, 505 S.W.3d 169, 187 (Ark. 2016) (Wood, J., concurring in part and dissenting in part).
52. The American College of Obstetricians and Gynecologists, *The Importance of Vital Records and Statistics for the Obstetrician-Gynecologist*, ACOG Committee Opinion No. 748, 132 OBSTETRICS AND GYNECOLOGY e78, e719 (2019).
53. *See* Brumberg & Dozor, *supra* note 14, at 407 (lamenting the poor quality of data gathering and recording); Schwartz, *supra* note 35 (describing the challenge of improving the quality of data); Russell S. Kirby, *Invited Commentary: Using Vital Statistics Databases for Perinatal Epidemiology; Does the Quality Go in Before the Name Goes On?*, 154 AM. J. EPIDEMIOLOGY 889, 889 (2001) (expressing concerns about "systematic bias" in reporting and the limitations of data quality studies).
54. *See, e.g.,* Nicholas J. Somerville, Xiaoli Chen, Dominique Heinke, Sarah L. Stone, Cathleen Higgins, Susan E. Manning, Sharon Pagnano, Mahsa M. Yazdy, & Marlene Anderka, *Accuracy of Birth Certificate Head Circumference Measurements: Massachusetts, 2012-2013*, 110 BIRTH DEFECTS RES. 413, 418 (2018) (finding congruence between the medical chart and birth certificates "the majority of the time"); Molly J. Stout, George A. Macones, & Methodius G. Tuuli, *Accuracy of Birth Certificate Data for Classifying Preterm*

to the state is receiving inputs from several sources – the birth log, the mother, and a medical record containing the notes of an obstetrician or "comparable health care provider" and a pediatrician.[55] The birth clerk logs all of this information into an electronic database.[56] It would not be surprising to learn of human error creeping into such a complex process.

The translation, or registration, stage presents other opportunities for error, even error of a more nefarious sort. The translation stage may appear to be a relatively pro forma task of punching information into a database, but vital statistics officials are not mere scriveners. They wield considerable power and have opportunities to misuse or misreport collected data.[57] This is especially true when they are translating the "facts and observations" received from the birth clerk into "identity" categories that are not themselves scientific. The need to assign individuals to identity categories exists in the first place because of someone's opinion about what categories exist and who belongs in them. Herein lies what historian Susan Pearson calls the "hidden political work" of birth certificates.[58] In her wide-ranging historical study, Pearson discloses how the purpose of birth registration and its proof–the birth certificate–evolved from its original emphasis on public health to one serving the government's interest in categorizing and sorting–in short "construct[ing]"–the citizenry.[59] This evolution placed in the hands of bureaucrats a "convenient technology of both inclusion and exclusion."[60] Pearson's important work foregrounds the gatekeeping function of birth certificates in "allocat[ing] goods according to age, gender, race, and citizenship status."[61]

As Garrett Epps observed in *The Atlantic* in 2018, the origins of contemporary birth registration are anything but sanitary. In some instances, those in charge of birth registration used their positions to

*Birth,* 31 PEDIATRIC AND PERINATAL EPIDEMIOLOGY 245, 247-48 (2017) (exploring errors in the classification of preterm births).

55. NAT'L COMM. OF VITAL AND HEALTH STAT., *supra* note 37, at 7 & n.2.
56. *Id.* at 7.
57. Wise & Avery, *supra* note 15, at 205 (mentioning "[t]he potential misuse of collected data . . . .").
58. Pearson, *supra* note 44, at 289.
59. *Id.* at 2-3, 4-6.
60. *Id.* at 9.
61. Weinberg College of Arts & Sciences, *Susan J. Pearson: Dep't of History,* [https://perma.cc/UN9A-7Z3N].

maintain racial segregation.[62] A notorious example of the racial politicization of birth certificates is the case of Walter Plecker.[63] One of the architects of the segregation of the races in the American South, Plecker used his position as Registrar of Vital Statistics for the State of Virginia to establish a database for recording certain characteristics of each child born after 1912.[64] The system had nothing to do with collecting demographic data. Instead, the objective was to define racial categories and assign each person to one of them.[65] Plecker's scheme bore little resemblance to the collection of race and ethnicity data today. Since the aim was to prevent anyone who was "not white" from being classified in the "wrong" category, there were only two racial categories: "white" and "non-white."[66] In short, the system sought to define racial identity as binary and fixed—either white or non-white, but never both and not subject to revision. It was a system of pure ascription.

Under Plecker's scheme, those born after 1912 were ordered to file a racial "certificate" at the local clerk's office.[67] An individual's self-definition of race was routinely called into question by those with the claimed expertise to resolve such matters. These regulators were not coy about their motives, as students of the law can vividly experience in the notorious case *Buck v. Bell* decided in 1927 and the pathbreaking civil rights case *Loving v. Virginia* decided forty years later.[68] Plecker later lobbied the federal government to eliminate the category "mulatto" from the census in order to reinforce, as a legal matter, the binary system of racial identity—white and non-white—that was essential to his worldview.[69] In short, Plecker's goal was to put Virginia's birth certificates to work in the interests of white

62. Garrett Epps, *How Birth Certificates Are Being Weaponized Against Trans People,* THE ATLANTIC (June 8, 2018), [https://perma.cc/363W-JHTF].

63. Gregory Michael Dorr, *Segregation's Science: Eugenics and Society in Virginia* 144 UNIV. OF VA. PRESS (2008) (describing Plecker as "polic[ing] and reinforc[ing] racial integrity through the Bureau of Vital Statistics").

64. *Id.* at 146.

65. *See* Tori Talbot, *Walter Ashby Plecker (1861-1947)*, Encyclopedia Virginia, VIRGINIA HUMANITIES (Last updated Apr. 12, 2023), [https://perma.cc/Z22T-URGG].

66. The bill defined whiteness as "ha[ving] no trace whatsoever of any blood other than Caucasian; but persons who have less than one one sixty-fourth of the blood of an American Indian and have no other non-Caucasic blood shall be deemed to be white persons," a fraction raised to one-sixteenth in the enacted law. DORR, *supra* note 63, at 145-46 (quoting the Virginia's Racial Integrity Act of 1924).

67. DORR, *supra* note 63, at 145-46.

68. *See* Buck v. Bell, 274 U.S. 200 (1927); Loving v. Virginia, 388 U.S. 1 (1967).

69. J. Douglas Smith, *The Campaign for Racial Purity and the Erosion of Paternalism in Virginia, 1922-1930: "Nominally White, Biologically Mixed, and Legally Negro",* 68 THE J. SOUTHERN HIST. 65, 86 (2002).

supremacy.[70] He concealed his nefarious motives in the guise of a neutral, objective, and principled system of classifying individuals according to race that in actuality established no categories other than white and non-white.[71] Plecker used his power as the state official in charge of vital statistics "to adjust the color problem"[72] to promote what he perceived to be the interests of the race—white—that he claimed for himself.[73]

Plecker considered his work as Director of Virginia's Vital Statistic Bureau essential to the cause of white supremacy.[74] He wielded his power over birth certificates as a tool with which he could literally constitute the world around him by reporting the facts in any manner he saw fit. He could "establish[] who you are"[75] even if it was at odds with who you considered yourself to be. Plecker would have agreed with Tutu's opinion that a birth certificate establishes who you are, but he understood only too well and would have pointed out that at no time did Tutu specify whether birth certificates could be made constitutive rather than merely declaratory.[76] Plecker's ability to manipulate the vital statistics system to promote his racist worldview is today a metaphor for the power of the government to have the last word on matters of gender.[77]

As in Plecker's time, lawmakers in several jurisdictions are harnessing the power of birth certificates in attempts to make the gender assigned at one's birth and recorded on one's birth certificate a permanent marker of their personal identity. Idaho's policy, for example, was to make gender not only a matter of binary classification but also a matter of ironclad identification at birth.[78] Sued in 2017, the state was later found in contempt of

70. Epps, *supra* note 62.
71. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1768-69 (1993).
72. BUREAU OF VITAL STATISTICS, EUGENICS IN RELATION TO THE NEW FAMILY AND THE LAW ON RACIAL INTEGRITY 12 (2d ed. 1924).
73. *See* Harris, *supra* note 71, at 1766 (describing the "retention by white-controlled institutions of exclusive control over definitions" for the purpose of "reproduc[ing] racial subordination").
74. DORR, *supra* note 63, at 144 (describing Plecker as "polic[ing] and reinforc[ing] racial integrity through the Bureau of Vital Statistics").
75. American Bar Association, *supra* note 11.
76. The knowledge that persons in Plecker's position can manipulate birth certificates may have fueled the "birther" movement against former President Barack Obama. The movement grew out of a fixation that his Hawaiian birth certificate had been fabricated, that he had not been born in the United States, and was therefore ineligible for the presidency. Ben Smith & Byron Tau, *Birtherism: Where It All Began*, POLITICO (Apr. 24, 2011), [https://perma.cc/4UEV-4KHH].
77. Erica L. Green, Katie Brenner & Robert Pear, *'Transgender' Could Be Defined out of Existence under Trump Administration,* N.Y. TIMES (Oct. 22, 2018) at A1 (detailing the Trump administration's plan to define gender as biologically based and immutable).
78. *See* F.V. v. Jeppesen, 286 F. Supp. 3d 1131, 1134 (D. Idaho 2018).

court when it enacted an identical ban after a federal court declared the first law unconstitutional.[79] Tennessee has more recently defined "sex" as "a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth . . . ."[80] In South Carolina, the legislature is considering a bill that would codify male and female as the only gender categories and make surgical changes to one's anatomy the prerequisite for any change in one's sex assigned at birth.[81] Legislation in several states makes birth certificates determinative of what bathrooms students may use and what sports teams they may join. Outside the United States, lawmakers in Russia, for example, are poised to ban all gender-affirming medical interventions and changes to identity documents.[82]

These discriminatory uses of the birth registration system are abetted by the dual and potentially overlapping functions of birth certificates. Dividing vital statistics data into that "deemed relevant for identification purposes" and "that which is not necessary for this function"[83] is inherently problematic. If birth certificates are necessary for purposes of identification, they may be in conflict with the interest of using them to record purely demographic information "without compromising confidentiality."[84] The Office of the Inspector General has recognized these divergent purposes and uses of birth certificates as "fundamental, irreconcilable conflicts."[85]

The irreconcilable conflict lies in the fundamental difference between section one and section two of the Certificate of Live Birth form. Only the "de-identified"[86] demographic information gathered for section two can fairly be described as unalterable. Section one, by contrast, does not have this quality of unalterability. Name, parentage, and gender

79. *See* Ruth Brown, *State Ordered to Pay $321,224 in Legal Fees Over Idaho's Transgender Birth Certificate Lawsuit,* IDAHO CAPITAL SUN (Aug. 11, 2022), [https://perma.cc/GU83-4HGS]. In a similar lawsuit, Montana was held in contempt for its bad faith defense of an unconstitutional law and will likely be assessed tens of thousands of dollars in attorney fees. *See* Mara Silvers, *Judge Holds Health Department in Contempt in Transgender Birth Certificate Case,* MONT. FREE PRESS (June 27, 2023), [https://perma.cc/LZG8-87Q5].

80. TENN. CODE ANN. §§ 1-3-105(c) (West 2023); TENN. CODE ANN. §49-2-802 (West, Westlaw effective July 1, 2023).

81. *See* S.623, S.C. Gen. Assemb. 125th Legis. Sess., (S.C. 2023), [https://perma.cc/PE6D-62L5].

82. Lucy Papachristou, *Russian Duma Completes Passage of Bill Banning Gender Change,* REUTERS (July 14, 2023), [https://perma.cc/P974-CKAN].

83. Wise & Avery, *supra* note 15, at 205.

84. *Id.*

85. OFF. OF THE INSPECTOR GEN., *supra* note 8, at i; *see also* Pearson, *supra* note 44, at 290 (noting the conflicting functions of data collection and identification).

86. NAT'L COMM. OF VITAL AND HEALTH STAT., *supra* note 34, at 16.

designations are susceptible to change by court order. Even the date of one's birth may be altered if warranted by the circumstances.[87]

Finally, it is important to understand that a birth certificate, though it contains information relevant for identification purposes, is not itself a document that establishes one's identity.[88] Beyond being a historical report meant to capture a moment in time and conveying how one was identified at that moment, a birth certificate does not verify that a person is who they claim to be. For the purposes of obtaining a United States passport, for example, a birth certificate does not establish identity but merely establishes citizenship for applicants born in the United States.[89] This is also the case for obtaining a social security card,[90] verifying employment authorization,[91] and applying for a driver's license.[92] In these contexts, the birth certificate establishes *eligibility* to obtain an identity document, not identity itself.[93]

These conflicts and misapprehensions about what birth certificates are and what they should be used for make them an easily exploitable tool in efforts to aggrandize political power or promote cultural ideologies that target marginalized groups with disadvantageous treatment.[94] In the same way that Pearson has theorized the gatekeeping function of birth certificates, Epps has opined that the current deployment of birth certificates in the service of a rigid gender binary is tantamount to their weaponization against trans people.[95] In this way, the same governmental function of birth registration that was harnessed and corrupted by the forces of racism in Plecker's Virginia is now aimed at policing trans people. The next section analyzes how this new line of attack against trans lives fits within the fraught relationship trans people have had with the law for decades.

87. *See, e.g.,* OHIO REV. CODE ANN. § 3705.15(A); *In re* E.D.R., 772 A.2d 1156, 1161 (D.C. 2001).
88. Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18, ¶ 26 (2002) (noting the government's discouragement of using birth certificates as identity documents).
89. *See Application for a Passport,* U.S. DEP'T OF STATE, [https://perma.cc/9LZR-5CWP].
90. *See Application for a Social Security Card,* SOC. SEC. ADMIN., [https://perma.cc/JZK7-9G3R].
91. For the purposes of the United State Citizenship and Immigration Services' Employment Eligibility Verification form, a birth certificate cannot be used to establish identity. *See Employment Eligibility Verification,* U.S. CITIZENSHIP AND IMMIGR. SERVICES, [https://perma.cc/GB8U-UEYP].
92. *Acceptable Forms of Identification,* REGISTRY OF MOTOR VEHICLES (Mass.), [https://perma.cc/P83S-VUXZ].
93. Annette R. Appell, *Certifying Identity,* 42 CAP. UNIV. L. REV. 361, 392 (2014).
94. Liza Mundy, *The Strange History of the Birth Certificate,* THE NEW REPUBLIC (Feb. 14, 2013), [https://perma.cc/FVA3-KCRX].
95. Epps, *supra* note 62.

## II. GENDER IDENTITY AND THE LAW

Birth certificates may no longer be an implement in the toolbox of racial oppression, but they have been repurposed for use in what can fairly be called a war on the concept of gender identity. The uptick in the policing of birth certificates is a part of the "hidden political work" in the most embattled front in the American culture wars.

### A. *"A Definition for the Word 'Woman'"*

The urgency among certain political groups to establish each individual's gender as a question legally settled at birth was on full display during the confirmation hearings of the most recently confirmed Supreme Court Justice Kentanji Brown Jackson.[96] In the course of Justice Jackson's confirmation hearings, Senator Marsha Blackburn posed what, in her estimation, was "a simple question that requires a simple answer": "Can you provide a definition for the word woman?" [97] In response to Justice Jackson's demurral, that same day Blackburn retweeted a blog post claiming "[a]ny stranger on the street, a kindergartener, your crazy uncle even, could have offered a better answer to the question."[98] Except, no one did, not even Blackburn.

It is actually unsurprising that Justice Jackson had no legal definition of "woman" to offer Blackburn. The word is more of a concept, an intangible idea like "person" than it is a fixed, tangible thing like a parcel of real estate or cattle. Blackburn probably had anatomy in mind, but she was careful not to ask Justice Jackson whether she knew the difference between a penis and a vagina or anything about reproductive capacity. Attempts to define sex using these criteria ultimately lead to dead ends.[99] Blackburn pressed the point in a question about *United States v. Virginia,* taking a statement by Justice Ginsburg out of context to try and elicit from Justice Jackson an admission that "[p]hysical differences between

96. Justice Jackson was sworn in on June 30, 2022. *See Oath Ceremony: The Honorable Kentanji Brown Jackson,* SUPREME COURT OF THE UNITED STATES, [https://perma.cc/8NQA-2KMP].

97. Sen. Marsha Blackburn (@Marsha Blackburn), TWITTER (Mar. 23, 2022, 11:42 AM), [https://perma.cc/RW56-5DM3]; *Jackson Confirmation Hearing, Day 2 Part 6,* C-SPAN, [https://perma.cc/JB4A-G8RF] (1:21:31-34).

98. Spencer Brown, *The First Black Woman Nominated to the Supreme Court Can't Define 'Woman',* TOWNHALL (Mar. 23, 2022), [https://perma.cc/795W-7468].

99. *See infra,* notes 103, 105-23, and accompanying text.

men and women . . . are enduring."[100] Justice Ginsburg meant of course that physical differences between the sexes have been used in countless efforts to disadvantage women but that they are by and large irrelevant to whether one merits equal access to educational and employment opportunities. Blackburn knows full well that the categories are embedded in millennia of social construction that leaves us all "knowing" what the categories mean. Except, we actually do not know, and there is no authority to tell us except the overburdened birth certificate, made to shoulder more responsibility than it really can or should.

Justice Jackson suggested to Blackburn that a biologist might be better suited to answer the question.[101] Biologists do sexually classify organisms based on structural and functional differences in their anatomy, and they probably would define a woman as an adult female human being, as some statutes and interpretations of statutes have.[102] Blackburn tried to get Justice Jackson to do the same, but pairing "woman" with "female" goes only so far. In biological terms, females only "typically" have ovaries, produce eggs, and are capable of bearing young.[103] Some adult female human beings, popularly known as women, have all of these attributes and others have none, underscoring the impossibility of articulating a single definition. Why it might matter legally is a different question. But Blackburn seemed less interested in the law and legal method than she did in making the following statement revealing of her commitment to the anatomy-defines-gender paradigm so familiar in recent anti-trans legislation:

> The fact that you can't give me a straight answer about something as fundamental as what a woman is underscores the dangers of the kind of progressive education that we are hearing about. Just last week an entire generation of young girls watched as our taxpayer-funded institutions permitted a biological man to compete and beat a biological woman in the NCAA swimming championships. What message do you think this sends to girls who aspire to compete and win sports at the highest levels?[104]

100. U.S. v. Virginia, 518 U.S. 515, 533 (1996).

101. *Jackson Confirmation Hearing, Day 2 Part 6, supra* note 97, at 1:21:46.

102. 820 ILL. COMP. STAT. § 125/1 (repealed 2024); Commonwealth v. Kinner, 9 A.2d 177, 178 (Pa. Super. Ct. 1939).

103. *Female*, MERRIAM-WEBSTER, [https://perma.cc/3VAF-7FBE].

104. *Jackson Confirmation Hearing, Day 2 Part 6, supra* note 97, at 1:22:09-51 (referring to Lia Thomas's victory in the 500-meter freestyle at the 2022 NCAA women's swimming championships on March 17, 2022 [https://perma.cc/EUS2-BH7V].

In the law, a definition of "woman" is elusive.[105] Attempts to define this concept depend on the policies lawmakers and jurists think should regulate human behavior. In *United Auto. Workers v. Johnson Controls,* for example, the Court decided that "fertile female" employees—in other words those having ovaries, producing eggs and being capable of bearing young—could not be barred from high-paying jobs that exposed them to lead.[106] In *Dothard v. Rawlinson,* women could be barred from correctional counselor jobs in male-only maximum-security prisons because of the mismatch between their anatomy and the ability to maintain prison security.[107] Neither decision makes any attempt to define "woman." Neither do federal and state gender discrimination prohibitions, the area of the law most concerned with sex designations, offer a definition. An anatomy-defines-gender rule would quickly be found untenable in the employment sphere, as employees do not bring their birth certificates to or expose their genitalia at work.[108] In the final analysis, in fact, discrimination cases like *Johnson Controls* and *Dothard* are not about legal gender at all and instead turn on whether the gender-based perceptions perpetrators have of their victims underlie their discriminatory treatment.[109]

Other areas of the law are similarly lacking in definitions. Instead, the emphasis is on defining various sub-classes of women, each one modified in some way: married women,[110] single women,[111] unmarried women,[112]

105. *See, e.g.,* Frances B. v. Mark B., 355 N.Y.S.2d 712, 716 (Sup. Ct. 1974) ("Neither by statutory nor decisional law has this state defined male and female.").

106. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 198 (1991) ("Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.").

107. *See* Dothard v. Rawlinson, 433 U.S. 321, 335-36 (1977).

108. *See, e.g.,* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("When she got the job, Ms. Stephens presented as a male."). Employees are more likely to have their driver's licenses or Social Security cards in their possession. *See Employment Eligibility Verification, supra* note 91 (listing documents that establish identity and documents that establish employment authorization).

109. *See Bostock*, 140 S. Ct. at 1746 ("[T]he employer violates the law, whatever he might know or not know about individual applicants.").

110. *See, e.g.,* Webber v. W. & S. Life Ins. Co., 220 S.W.2d 584, 585-86 (Ky. 1949); *In re* Wagner, 135 N.Y.S. 678, 683 (Sup. Ct. 1912).

111. *See, e.g.,* Moore v. Smith, 172 So. 317, 318 (Miss. 1937) (including divorced woman within term "single woman").

112. *See, e.g.,* Parker v. Foreman, 39 So.2d 574, 576 (Ala. 1949); B.S.B. v. B.S.F., 217 So.2d 599, 599 (Fla. Ct. App. 1969).

emancipated women,[113] pregnant women,[114] underage women,[115] women of child-bearing age,[116] working women,[117] battered women,[118] etc. The optics can be quite unsavory. Singling women out and relegating them to categories is at times a reflection of their subordinate status in society, their perennial victimhood, or their susceptibility to sexual assault or other disadvantageous circumstances associated with their gender.

A look into the case law to examine some of these usages reveals some very problematic decisions, some relating to slavery,[119] others relating to unchasteness,[120] as, for example, the defense to the crime of encouraging a woman to become a prostitute,[121] and still others relating to the woman not being a fully autonomous person absent a man having some controlling role in her life. Every definition in these authorities is either circular[122] or, more often, focused on the word that modifies woman.[123] Some examples are the abolished tort of seduction, in which the term innocent woman means one who had never had illicit intercourse with a man or one who has had illicit intercourse with a man but has since repented and become virtuous.[124] Crimes and defenses that relate specifically to women, such as detaining a woman against her will with the intent to have carnal knowledge[125] and the battered woman's syndrome, suggest something less to do with outward anatomy and reproductive organs than they do about power dynamics. There is also of course the guarantee of equal protection under the law, requiring a statute using the term woman

113. *See, e.g., In re* Anonymous 3, 782 N.W.2d 591, 595 (Neb. 2010).
114. *See, e.g., In re* Anonymous 3, 782 N.W.2d at 595; Lewis v. Grinker, 794 F. Supp. 1193, 1199 (E.D.N.Y 1991) ("qualified pregnant woman").
115. *See, e.g.,* Schroeder v. State, 241 S.W. 169, 170 (Tex. Ct. Crim. App. 1922); Wells v. State, 81 S.W.2d 89, 90 (Tex. Ct. Crim. App. 1935).
116. *See, e.g.,* MD. CODE ANN. HEALTH-GEN. § 13-2301.
117. *See, e.g.,* P.R. LAWS ANN. tit. 29 § 510m.
118. *See, e.g.,* MINN. STAT. § 611A.31.
119. *See, e.g.,* Tigert v. Wells, 183 S.W. 737, 738 (Tenn. 1916).
120. *See, e.g.,* State v. Grigg, 10 S.E. 684, 685 (N.C. 1890) (defining "innocent" as "chaste and virtuous"); State v. Cline, 87 S.E. 106, 107 (N.C. 1915).
121. *See, e.g.,* State v. Johnson, 632 S.W.2d 33, 33 (Mo. Ct. App. 1982) (describing the crime as "requir[ing] proof that the woman was not formerly a prostitute").
122. *See, e.g.,* Rozar v. State, 91 S.E.2d 131, 132 (Ga. Ct. App. 1956) (term "woman" means "womankind"); *see also* 15 U.S.C. §§ 632(n), 1691c-2(h)(6) (defining small business concern owned and controlled by women as a concern that is owned and controlled to the extent of at least 51% by women); N.J. STAT. § 34:1B-48(g) ("'Women means a woman, regardless of race."); P.R. LAWS ANN. tit. 29 § 473 (defining "working woman" as "any woman employed").
123. *See, e.g., Grigg*, 10 S.E. at 685 (defining "innocent" as "chaste and virtuous").
124. *See, e.g., Grigg*, 10 S.E. at 685.
125. *See, e.g.,* Rose v. Commonwealth, 171 S.W.2d 435, 437 (Ky. Ct. App. 1943); Gambrell v. Commonwealth, 228 S.W.2d 457, 458 (Ky. Ct. App. 1950).

to include man as well, making the point that too often the law draws invidious distinctions between men and women,[126] something neither Blackburn nor Justice Jackson mentioned in their brief exchange.

An example of a decision that aligns with Blackburn's thinking is *In the Matter of the Compensation of the Beneficiaries of Marian A. Williams, Deceased*.[127] There, the court declared that "woman" as used in the worker's compensation statute had an "obvious meaning."[128] The court, like Blackburn, failed to state what made the meaning of the term so obvious, concluding merely that "the word 'woman' is clear and merits no interpretation."[129] Another court has equated woman with female,[130] as Blackburn asked Justice Jackson to do.[131] Equating the two terms commits its own circularity as in "'woman' or 'women' means all persons of the female gender including both cisgender and transgender persons,"[132] a law Blackburn probably would not support and one that poses an even more difficult definitional conundrum: transgender.

### B. *Gender Identity and Birth Certificates*

The legal system's relationship with transgender people has always been fraught. For decades, transgender litigants have battled a legal system that has long considered gender to be an immutable characteristic revealed by the anatomy of one's genitals at birth and translated as a gender marker on one's birth certificate.[133] Within this hidebound conception of gender, the predominant narrative is that transgender people are deserving of

126. *See, e.g.,* In the Matter of the Compensation of the Beneficiaries of Marian A. Williams, Deceased, 635 P.2d 384, 386, 388 (Or. Ct. App. 1981).

127. *Beneficiaries of Marian A. Williams*, 635 P.2d at 384.

128. *Beneficiaries of Marian A. Williams*, 635 P.2d at 386.

129. *Beneficiaries of Marian A. Williams*, 635 P.2d at 386.

130. Schroeder v. State, 241 S.W. 169, 170 (Tex. Ct. Crim. App. 1922); Jackson v. State, 34 So. 611, 611 (Ala. 1903). In particular, when "female" is used in connection with a human being, the word woman can be substituted for it. Commonwealth v. Kinner, 9 A.2d 177, 178 (Pa. Super. Ct. 1939).

131. *Jackson Confirmation Hearing, Day 2 Part 6,* C-SPAN, [https://perma.cc/JB4A-G8RF] ("Do you interpret Justice Ginsburg's meaning of man and woman as male and female?") (1:21:17- 23).

132. 20 ILL. COMP. STAT. § 5130/10.

133. *See* Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories, in* TRANSGENDER RIGHTS 51, 53, 67 (Paisley Currah, Richard M. Juang et al. eds., 2006); *see also* Taylor Flynn, *The Ties that [Don't] Bind: Transgender Family Law and the Unmaking of Families, in* TRANSGENDER RIGHTS 32, 32 (Paisley Currah, Richard M. Juang et al. eds., 2006) (referring to the law's "relentless focus on sexual anatomy"); Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Ct. App. 2004) (describing biological sex at birth to be an immutable trait).

medical treatment[134] to make living in the world somewhat tolerable. The narrative stops short of allowing transgender people to flourish because of their failure to conform to a chromosomal destiny fixed at conception.[135] As the 20th century came to a close, legal theorists Shannon Minter and Paisley Currah, evaluating the previous three decades of jurisprudence regulating the lives of transgender people, described the response of the judiciary to them as incoherent and unprincipled.[136]

Gender identity has been defined as

> each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function through medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. Gender identity is a broad concept that creates space for self-identification, and reflects a deeply felt and experienced sense of one's own gender. Thus, gender identity and its expression also take many forms; some people do not identify themselves as either male or female or identify themselves as both.[137]

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134. *See, e.g.,* G.B. v. Lackner, 145 Cal. Rptr. 555, 558 (Cal. Ct. App. 1978) (reversing denial of insurance coverage for gender-affirming surgery); J.D. v. Lackner, 145 Cal. Rptr. 570, 572 (Cal. Ct. App. 1978); Doe v. State Dep't of Pub. Welfare, 257 N.W.2d 816, 821 (Minn. 1977); Pinneke v. Preisser, 623 F.2d 546, 550 (8th Cir. 1980); Davidson v. Aetna Life & Casualty Ins. Co., 420 N.Y.S.2d 450, 453 (Sup. Ct. 1979).

135. *See, e.g.,* Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18 ¶ 78 (2002) ("The court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in the law . . . ."); Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (quoting Board of Health resolution that "[s]ex can be changed where there is an error, of course, but not when there is a later attempt to change psychological orientation of the patient and including such surgery as goes with it").

136. *See* Shannon Minter & Paisley Currah, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People,* 7 WM. & MARY J. OF WOMEN AND THE L. 37, 39 (2000).

137. *Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples,* Advisory Opinion OC-24/17, para. 32(f), Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) (footnotes omitted), [https://perma.cc/9NSB-UDM7]. Some theorize that gender identity may stem in part from gender norms that regulate the possible roles one may assume in the world and the expectations others have of how they will behave, speak, dress and groom themselves, norms that have grown out of beliefs about differences between the sexes and a willingness to exploit them. *See, e.g.,* Amy Blackstone, *Gender Roles and Society,* in HUMAN ECOLOGY: AN ENCYCLOPEDIA OF CHILDREN, FAMILIES, COMMUNITIES, AND ENVIRONMENTS 335-38 (Julia R. Miller, Richard M. Lerner, et al., eds. 2003).

The tale told about gender identity by jurists begins with cases brought by trans plaintiffs seeking name changes and changes to their birth certificates that would accord with their gender identities.[138] All of these cases involved transgender petitioners who had undergone gender confirmation surgery. Although the courts were generally favorably disposed to petitions for a change of name,[139] requests for changes to birth certificates were routinely denied.[140] At the time, the sole basis for changing the information on a birth certificate was if "an error was made at the time of preparing and filing of the certificate . . . ."[141] These decisions borrowed from and held firm to the belief that sex follows chromosomes, is therefore immutable, and that legal gender follows sex.

By the late 1980s, several states had enacted provisions permitting transgender persons to align the gender marker on their birth certificates with their gender identity if appropriate medical interventions had been performed.[142] Nothing about these developments established that access to such a change was a right rather than a privilege. The lack of rights in this sphere was also reflected at the international level. As late as 1998, for example, the European Court of Human Rights decreed that no party to the European Convention on Human Rights was bound under that treaty to change gender markers on birth certificates. The ruling left transgender people in a "legal hinterland" that put them at risk of "exclusion and persecution."[143] It was not until 2002 that the right to have one's birth certificate changed to reflect one's gender identity was announced by the European Court of Human Rights.[144]

During the first decade of the new century, judicial attention turned to transgender women married to cisgender men. The country was in the

138. *See, e.g.,* Anonymous v. Weiner, 270 N.Y.S.2d 319 (Sup. Ct. 1966); K. v. Health Div. of Hum. Res., 560 P.2d 1070 (Or. 1977).

139. *See, e.g.*, *In re* Matter of Anonymous, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968); *In re* Anonymous, 314 N.Y.S.2d 668, 670 (N.Y. Civ. Ct. 1970); B v. B, 355 N.Y.S.2d 712, 715 (N.Y. Sup. Ct. 1974).

140. *See, e.g.,* Anonymous v. Weiner, 270 N.Y.S.2d 319, 324 (Sup. Ct. 1966); Hartin v. Dir. Of Bureau of Rec. and Stat., 347 N.Y.S.515, 516 (Sup. Ct. 1973) (issuance of new birth certificate omitting gender marker).

141. Anonymous v. Weiner, 270 N.Y.S.2d 319, 323 (Sup. Ct. 1966) (quoting N.Y.C. HEALTH CODE § 207.01(c)); *see also* Hartin v. Dir. of Bureau of Rec., 347 N.Y.S.2d 515 (Sup. Ct. 1973).

142. *See e.g. In re* Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987); *see, e.g.,* OR. REV. STAT. § 432.235(4).

143. Alan Davenport, *Right to a Private Life, Right to Marry—Transsexuals—Inability to Alter Birth Certificate—Whether Consequent Embarrassment and Difficulties Breach Article 8 ECHR—Legal Incapacity to Wed in New Gender—Whether Breach of Article 12 EHCR*—Sheffield and Horsham v. United Kingdom, 3 J.C.L. 265, 267 (1998).

144. *See* Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18 (2002).

thick of the marriage wars: Congress had passed the Defense of Marriage Act in 1996, and by 2008 almost forty states had amended their constitutions to ban same-sex marriage.[145] These included Texas and Kansas, where *Littleton v. Prange* and *In re Gardiner* were litigated.[146] The cases revealed the insignificance of an updated birth certificate on the right of a trans individual to marry.

*Littleton v. Prange* and *In re Gardiner* were wrongful death and probate matters, respectively. In each case the decedent had been married to a transgender woman.[147] A surviving spouse has standing to sue for wrongful death in Texas and succeeds to half of an intestate's estate in Kansas. The challenger of the marriage in each case argued that the marriage was void, despite the gender-confirmation surgeries both women had undergone and despite the existence, in *Gardiner*, of a birth certificate that, long before the marriage, had been amended by court order in another state to reflect J'Noel Ball's gender identity. Only the "original birth certificate" and not the amended one mattered to the court.[148] Christie Littleton's birth certificate was changed during the pendency of the litigation,[149] but the updated birth certificate had no bearing on the outcome. Both decisions relied on the information appearing on the original birth certificate and what could be presumed about the surviving spouses' chromosomes from that information.[150] Later cases in this area employed similar reasoning.[151]

The issue of "transsexual marriage" was rendered moot in 2015 when the United States Supreme Court guaranteed marriage equality.[152] By that time, a few courts had disagreed with the reasoning of *Littleton* and *Gardiner,* deciding that marriage laws require that gender be determined at the time of the marriage, not at the time of the birth, and that a birth certificate amended before the marriage is determinative of the

145. Defense of Marriage Act, 110 STAT. 2419 (1996); *Defense of Marriage Act (DOMA),* LEGAL INFORMATION INSTITUTE (last visited Feb. 11, 2024), [https://perma.cc/2A3G-J2YT].

146. There were statutory bans on same-sex marriage in both states at the time of the litigation. Constitutional bans were enacted later.

147. Littleton v. Prange, 9 S.W.3d 223, 225 (Tex. App. 1999); *In re* Estate of Gardiner, 42 P.3d 120, 122 (Kan. 2002).

148. *Gardiner*, 42 P.3d at 123.

149. *Littleton*, 9 S.W.3d at 231.

150. *Littleton*, 9 S.W.3d at 231; *Gardiner*, 42 P.3d at 122.

151. *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155, 156, 161 (Fla. Ct. App. 2004) (referring to chromosomes and the immutability of gender).

152. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

issue.[153] Texas, the state where *Littleton* was decided, enacted a law to facilitate the legal recognition of transgender people's gender identity, even for the purposes of marriage.[154]

The 2010s were the era of the "bathroom bills." In response to Obama-era regulations that relaxed restrictions on bathroom use in schools, legislators in most states and many municipalities sought to restrict use of public restrooms in accordance with the gender category originally recorded on one's birth certificate.[155] Most of these bills had little traction in any but the most conservative states.[156] The policies fared better in the public schools.[157] The stated concerns were privacy, safety, and comfort. These concerns invariably reduced to the fear that a student would pretend to be trans in order to gain access to the wrong restroom and commit some infraction,[158] as if recognizing a student's gender identity would make it hard to police something that was already a crime no matter who committed it. It was not helpful to school districts defending these policies when they admitted that no harm had occurred from allowing bathroom use in accordance with gender identity.[159]

The policies were incoherent for other reasons, too. In *Adams v. School Board,* for example, the school district's policy determined the gender of each student in accordance with the birth certificate used to enroll the student, whether or not it had been corrected before the enrollment.[160] This approach was more convenient for school district officials, who would not have to verify that the birth certificates submitted to them were original or amended, but it led to uneven application of the policy

153. *See, e.g.*, Radtke v. Miscellaneous Drivers & Helpers Union Loc. No. 638, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) (declaring marriage of transgender woman to cisgender male valid in state with same-sex marriage ban); *In re* Lovo-Lara, 23 I. & N. Dec. 746, 748 (BIA 2005). It is important to note that even pre-*Obergefell,* family law did not recognize any ground for annulling a marriage where gender confirmation takes place *after* the marriage. *See, e.g.*, *In re* Burnett Estate, 834 N.W.2d 93 (Mich. Ct. App. 2013).

154. *See, e.g.*, H.B. 3666, Acts 2009, 81st Leg., Reg. Sess., ch. 978, § 2, (Tex. 2009); *In re* Estate of Araguz, 443 S.W.3d 233, 245 (Tex. App. 2014) (recognizing the legislative overruling of *Littleton*).

155. Kevin Drum, *A Very Brief Timeline of the Bathroom Wars,* MOTHER JONES (May 14, 2016), [https://perma.cc/A3VZ-DCVT].

156. Diana Ali, *The Rise and Fall of the Bathroom Bill: State Legislation Affecting Trans & Gender Non-binary People,* NASPA (Apr. 2, 2019), [https://perma.cc/2WDS-H46X].

157. *See* Andrew DeMillo, *Arkansas Restricts School Bathroom Use by Transgender People*, AP NEWS (Mar. 21, 2023), [https://perma.cc/VP8R-DQZM].

158. *See* Adams v. Sch. Bd., 318 F. Supp. 3d 1293, 1303 (M.D. Fla. 2018), *rev'd and remanded,* 57 F.4th 791 (11th Cir. 2022).

159. *See, e.g.*, *Adams*, 57 F.4th at 806.

160. *Adams*, 57 F.4th at 797.

across the population of transgender students.[161] Those who had corrected their birth certificates before enrolling in the district were allowed to use the appropriate restroom; those who did not correct their birth certificates until after enrolling were not. Under this policy, then, a student who was legally male could nonetheless be barred from using the appropriate restroom.[162]

As alluded to above, today the ability to obtain a change of the gender marker on one's birth certificate to reflect one's gender identity varies throughout the states. Twenty-seven states, Puerto Rico, and the District of Columbia will change a birth certificate's gender marker from the sex identified at birth to the individual's gender identity without a requirement of gender-confirmation surgery or a court order.[163] California, for example, mandates that the gender marker on one's birth certificate be changed without a court order as long as the applicant swears the request is made "to conform the person's legal gender to the person's gender identity" and not for any fraudulent purpose.[164] Illinois recently instituted a similar approach.[165] Twelve states require gender-confirmation surgery before they will change the marker.[166] Ten states have unclear policies or policies that are in flux.[167] Some of these states may not require surgical intervention but may nonetheless require a health professional's certification that the patient has completed treatment deemed necessary or appropriate for a gender transition.[168] Kansas, Montana, North Dakota, Oklahoma, and Tennessee will not change the gender marker on a birth certificate to accord with one's gender identity under any circumstances.[169]

161. *Adams* 57 F.4th at 826 (Jordan, J., dissenting).
162. *Adams* 57 F.4th at 797 ("The School Board does not accept updates to students' enrollment documents to conform to their gender identities.").
163. *Identity Document Laws and Policies: Birth Certificate,* MOVEMENT ADVANCEMENT PROJECT, [https://perma.cc/TT6L-DKAJ]. Some of these may require, though, a medical expert to attest to the appropriateness of the requested change.
164. CAL. HEALTH & SAFETY CODE §§ 103426 (West 2023), 103430; N.J. STAT. ANN § 26: 8-40.12(a) (West 2019). A change of name on one's birth certificate, by contrast, does require a court order. *Id.*
165. *Gov. Pritzker Signs Bill Removing Barriers to Access for Legal Gender Change Process* (Feb. 17, 2023), [https://perma.cc/ERC3-XPL2].
166. *Identity Document Laws and Policies: Birth Certificate,* MOVEMENT ADVANCEMENT PROJECT, [https://perma.cc/TT6L-DKAJ].
167. *Id.*
168. Dan Karasic, *Legal and Identity Documents,* UCSF TRANSGENDER CARE (June 17, 2016), [https://perma.cc/P72K-NRYF].
169. *Identity Document Laws and Policies: Birth Certificates*, MOVEMENT ADVANCEMENT PROJECT (Apr. 1, 2024), [https://perma.cc/T886-WMWJ]; Montana's stance has only

A recent decision by a federal judge upheld Tennessee's law against charges of unconstitutionality and reflects the same conflation of the dual purposes of birth certificates discussed in Part II.C.[170] Rejecting claims based on equal protection, due process, and free speech, the court held that there is a rational basis for the state to tie sex designations on birth certificates to observations of "external genitalia at the time of birth."[171] The court described the law as "a simple and straightforward medical determination" of sex at the time of birth,[172] recorded as a "historical observation"[173] and as such unchangeable.[174] Such a system serves the state's "interest in making and maintaining an accurate designation of sex (based on birth appearance)."[175] This reasoning mimics the thinking of Idaho lawmakers who, as discussed above and in violation of a federal court order, barred most changes to birth certificates based on "subjective feelings or experiences" in the interest of preserving "material facts" and "vital records" that help the government protect the public.[176] This reasoning conflates the dual purposes of birth certificates by mistaking the purpose for which section-one information is gathered with the purpose for which section-two information is gathered. As discussed below in Part IV, there is a strong and analogous precedent in parentage law for rejecting this reasoning.

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recently been clarified. A judge temporarily enjoined the state's prior requirement prohibiting any change to the sex designation on one's birth certificate without a qualifying surgical procedure. *See* Marquez v. Montana, DV 21-873 ¶ 183 (Mont. Dist. Ct. Apr. 21, 2022), [https://perma.cc/462K-FW97]; The injunction was made permanent in June of 2023. *Court Cases:* Marquez v. Montana, ACLU (Apr. 17, 2024), [https://perma.cc/WFM8-HUFR]; In the meantime, Montana has enacted a law defining sex as fixed and binary. Mara Silvers, *Bill Defining 'Sex' as Binary Becomes Law*, MONTANA FREE PRESS (May 22, 2023), [https://perma.cc/VC3Y-5YUD]; Consequently, any change to the sex designation on one's birth certificate is foreclosed in the absence of proof that the original biological or genetic determination of sex was done in error. *DPHHS Officials State 2022 Administrative Rule Governs Sex Marker Birth Certificate Change Requests*, MONTANA DPHHS (Feb. 20, 2024), [https://perma.cc/U329-XM53].

170. Gore v. Lee, No. 3:19-cv-0328, 2023 WL 4141665, at *4, 37 (M.D. Tenn. June 22, 2023).
171. *Gore*, 2023 WL 4141665, at *8.
172. *Gore*, 2023 WL 4141665, at *13.
173. *Gore*, 2023 WL 4141665, at *16.
174. *Gore*, 2023 WL 4141665, at *17.
175. *Gore*, 2023 WL 4141665, at *17.
176. H.B. 509, 2020 Leg., 65th Sess. (Idaho 2020).

### C. *Gender Identity v. Assigned Gender*

The core concern in the gender identity wars is whether a medical or a legal model should prevail in the legal ascription of gender. Put more succinctly, should the rules of ascription of gender be ones borrowed from medicine's use of biological categories or should the law strike out on its own in the interest of diminishing the influence that one's sex assigned at birth has on the entire arc of that individual's life?

Addressing this question should begin with considering the concept of legal identity. Although the concept of legal identity is murky in United States law, the right to a legal identity is enshrined in the Universal Declaration of Human Rights[177] and the International Covenant on Civil and Political Rights.[178] The right recognizes the importance of a legal identity for the navigation of people in the world. Without one, people can be rendered stateless and suffer other indignities.[179] In the legal arena, the questions of identity that receive the most judicial attention are citizenship, standing, and the legal fiction of personhood in connection with the corporate form.[180]

The right to a legal identity, though, has nothing to do with having the right to self-define facets of that legal identity. Most states recognize some role for self-definition with regard to certain of these facets. One may make important identity-defining choices ranging from one's name, to one's marital status, to one's religion. A judicial or administrative process may be required to render these facets of one's identity legally cognizable.[181] One cannot, for example, simply adopt a new name and require legal recognition of it.[182] One cannot move into a married state

177. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to recognition everywhere as a person before the law").

178. Int'l Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966) ("Everyone shall have the right to recognition everywhere as a person before the law.").

179. *See* Annette R. Appell, *Certifying Identity,* 42 CAP. UNIV. L. REV. 361, 369 (2014); United Nations Development Fund, *Having a Legal Identity is Fundamental to Human Rights* (Jan. 19, 2023), [https://perma.cc/UVT6-9ST7].

180. *See, e.g.*, Spencer v. Lampros, 216 F.2d 462, 463 (D.C. Cir. 1954).

181. *See, e.g.*, *In re* Forchion, 198 Cal. App. 4th 1284 (Cal. Ct. App. 2011); De Santo v. Barnsley, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (refusing to recognize a same-sex common-law marriage); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) ("[W]ho may marry and what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth."); *In re* Marriage of Weiss, 49 Cal. Rptr. 2d 339, 347 (Cal. Ct. App. 1996) (recognizing defendant's right to "change her religious beliefs").

182. *In re* Forchion, 198 Cal. App. 4th at 1284.

and back to an unmarried one at will. But by and large the legal system defers to one's decisions on these questions of identity and, aside from concerns about fraudulent intent, does not require external verification of the authenticity of these choices. On the question of religious identity in particular, the law is almost entirely deferential.[183]

Although some role for self-definition exists at the margins, the jurisprudence of identity in general reveals that most questions of legal identity are not matters of self-definition but matters of assignment, described by Cheryl Harris as "the external imposition of definition."[184] Tribal identity, for example, is entirely externally imposed.[185] Similarly, sex stereotyping discrimination cases do not depend on an employee's gender identity but turn on an employer's perception of the employee's sex assigned at birth.[186] As discussed above, wielded by someone like Plecker, the power to assign individuals an identity, even if not used for nefarious purposes, will tether and anchor them to certain fates in potentially permanent and destructive ways.[187]

The primary mechanism in identity assignment, whether wholly imposed or partially self-defined and ratified, amounts to a set of conclusions drawn from observed phenomena, a method commonplace in legal thinking. The identity categories believed to be most readily assignable based on observation alone—race and gender—have also been the most policed, an effort Harris describes as "impos[ing] an entirely externally constituted definition of group identity."[188] Notably, with regard to race and ethnicity in particular, there is a certain generality and lack of fixity and perhaps even an arbitrariness in the definitions of these categorizations that reflects the tension of placing individuals into groups they have had no hand in defining.[189] Gender, as an aspect of identity not reducible

183. *See, e.g.*, United States v. Seeger, 380 U.S. 163, 184-85 (1965) (distinguishing between validity and sincerity in the judicial scrutiny of a litigant's claim of religious faith).

184. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1765 (1993) (discussing Mashpee Tribe v. Town of Mashpee*,* 447 F. Supp. 940 (D. Mass 1978)).

185. Accohannock Indian Tribe v. Tyler, No. SAG-21-02550, 2021 WL 5909102, at *6 (D. Md. Dec. 14, 2021) (articulating the *Montoya* test for "tribe").

186. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1746 (2020) ("By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today.").

187. *See, e.g.*, Kim Tong-Hyung, *South Korea's Truth Commission to Probe Foreign Adoptions,* ASSOCIATED PRESS (Dec. 8, 2022), [https://perma.cc/GEF9-39PF] (describing claims of Korean adoptees sent to the West that agencies had faked their identities and manipulated their records).

188. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1766 (1993).

189. Walter Allen, Chantal Jones, & Channel McLewis., *The Problematic Nature of Race and Ethnic Categories in Higher Education*, RACE AND ETHNICITY IN HIGHER EDUCATION: A STATUS REPORT 13, 15 (Lorelle L. Espinosa, Jonathan M. Turk, Morgan Taylor, &

to anatomical morphology observed at birth, is, like race, socially constructed.[190]

In tension with allowing facets of one's legal identity to be matters of self-definition is a law like North Carolina's infamous and short-lived bathroom bill, H.B. 2, which gave the state sole and final control over each individual's legal gender. "The assumption behind H.B. 2," writes Garrett Epps,

> is that the state, and the state alone, is entitled to assign each of its residents a sex and require compliance with its will. But the premise of American law is that people are individuals. A just state cannot assign them a status—whether of race, caste, disability, or sexual identity—at birth and force them to live their lives in compliance with its estimation of who they are.[191]

Epps's conviction is aspirational, of course. Certain aspects of identity *are* within the complete control of government. Citizenship and age are both examples of how certain aspects of identity lie outside the realm of self-definition.[192] Epps is certainly correct, though, that a regime of non-anonymous identity ascription that requires "compliance" with a set of expected behaviors that impact one's well-being on a daily basis[193]

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Hollie M. Chessman, eds. 2019) ("[S]cholars of race have long acknowledged that racial and ethnic categories are largely arbitrary and dependent on those with the power to create them.") [hereinafter Allen et. al]; Thomas J. Mowen & Richard Stansfield, *Probing Change in Racial Self-identification: A Focus on Children of Immigrants,* 2 SOCIO. OF RACE AND ETHNICITY 323 (2015). *See, e.g.*, United States Census Bureau, *About the Topic of Race,* [https://perma.cc/8UVB-2U2K].

190. GREGORY MICHAEL DORR, SEGREGATION'S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA 228 (Deborah E. McDowell ed., 2008) (noting the urging of the American Association of Anthropologists to eliminate the category of race from the tabulation of collected information given its lack of any "'scientific basis in human biology'"); Doe v. State Dep't. of Health and Hum. Res., Off. of Vital Stat., 479 So.2d 369, 371 (La. Ct. App. 1985) ("The very concept of the racial classification of individuals, as opposed to that of a group, is scientifically insupportable . . . Individual racial designations are purely social and cultural perceptions."); Alan Kwasman, *Socioeconomic Status on Birth Certificates,* 138 AM. J. DIS. CHILD 205 (1984) (disagreeing with a proposal to include "socioeconomic status" on birth certificates).

191. Garrett Epps, *Anti-Trans Discrimination Is Sex Discrimination,* THE ATLANTIC (May 6, 2016), [https://perma.cc/79RF-8UHD].

192. Amanda Holpuch, *Citizens of South Korea Just Got a Little Younger,* N.Y. TIMES, June 28, 2023, at A10.

193. *See generally* Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963-86,* 40 L. & HIST. REV. 679 (2022). Houston's cross-dressing ban was ruled unconstitutional "as applied to individuals undergoing psychiatric therapy in preparation for sex-reassignment surgery" in Doe v. McConn, 489 F. Supp. 76, 79-80 (S.D. Tex. 1980).

raises more concerns than anonymous categorization for the purposes of data collection. In other words, the categorization of birth information performed to complete section two of the birth certificate form is not at all concerning, considering the purposes of that section. By contrast, rendering unalterable any piece of information contained in section one of the birth certificate form, save for the date, place, and time of one's birth, contradicts the identificatory purposes that document is meant to assume later in life and contradicts the practice of altering the information contained in that section of the certificate to align with changed circumstances.

In 2015, the National Center for Transgender Equality conducted a survey revealing that nearly a third of transgender people experience harassment when they present an identity document containing an incorrect name or gender designation.[194] Such an alarming statistic could be the impetus for designing a legal regime more cognizant of the harmful ramifications that can flow from defining an individual's legal gender once and for all at the moment of their birth.[195] The task is to ask, as Nancy Knauer has suggested, "[w]hat types of legal reform would be necessary to create space for the type of gender self-definition envisioned and demanded by the transgender narrative…"[196]

That the law might permit self-definition of any facet of one's identity sounds somewhat fanciful given its being associated more with regulation than with recognition. After all, the law thrives on fixed bright lines and early certainty. It resists the subjectivity that self-definition connotes. Nonetheless, the law is capable of recognizing that the act of defining gender at birth is an act of assignment rather than a confirmation of identity. Many states have recognized that one's gender identity has more bearing upon how one lives and gets along in the world and that the gender marker on one's birth certificate bears little relationship, and perhaps no relationship at all, to what the state needs and expects from its citizenry.[197] As the court in *Adams* remarked,

> Adams identifies as a boy, is identified by others as a boy, is legally deemed by the state of Florida to be a boy, lives as a

194. *See* Jake Wittich, *Transgender Parents Welcome Baby Girl, Prompting Update to State's Birth Certificate System,* CHI. SUN-TIMES (Jan. 6, 2020), [https://perma.cc/J7WS-94AW].

195. Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1053 (7th Cir. 2017) (remarking the "arbitrary nature" of birth certificates).

196. Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion,* 6 PIERCE L. REV. 1, 33 (2007).

197. RUTH LISTER, *Citizenship and Gender,* THE WILEY-BLACKWELL COMPANION TO POLITICAL SOCIOLOGY 372 (Edwin Amenta, Kate Nash, & Alan Scott eds., 2012).

> boy, uses the men's restroom outside of the school setting, and is otherwise treated as a boy—except when it comes to the use of the school bathrooms.[198]

As this description underscores, a gender designation used to categorize someone when they are born may not best describe a gender identity that may not develop or fully form until many years later.

A state willing to accept the divergence between assigned gender and gender identity has a number of alternatives to consider. Possible legal regimes include removing all gender designations, making them optional,[199] or recording them only in section two of the birth certificate, allowing an individual to obtain a change to the gender marker, and adding gender categories such as "indeterminate," "unspecified", and "X."[200] The last of these captures more nuanced thinking than the law typically demonstrates, but some jurisdictions are beginning to move in this direction. By way of example, as of January 1, 2019, people born in New York City may request to have the gender marker on their birth certificate changed to M, F, or X.[201] New York State allows for similar changes upon a sworn affidavit that "I have been living in my correct gender immediately preceding the application."[202] A New York City municipal identification card requires *no* gender marker at all.[203]

Another option would be to continue the use of birth certificates as anonymous demographic documents and historical snapshots and devise a different system for demonstrating one's eligibility for identity documents. As is becoming clear, gender, like race, is not information that needs to appear on a birth certificate.[204] We are beyond the day when it

198. Adams v. Sch. Bd., 318 F. Supp. 3d 1293, 1312 (M.D. Fla. 2018), *rev'd and remanded,* 57 F.4th 791 (11th Cir. 2022).

199. *See* Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents,* 39 HARV. J.L. & GENDER 491, 512-17 (2016).

200. *Id.* at 512.

201. N.Y. CITY HEALTH CODE § 207.05(a)(5)(i)); *Mayor de Blasio Signs Historic Legislation Adding Third Gender Category to Birth Certificates Issued by the City of New York,* NYC (Oct. 9, 2018), [https://perma.cc/6RV4-JVXM].

202. *Gender Designation Amendments*, N.Y. STATE DEP'T OF HEALTH (Jan. 2023), [https://perma.cc/Y89V-PFF7]; *Notarized Affidavit of Gender Change for a Person 17 Years of Age or Older*, N.Y. STATE DEP'T OF HEALTH (Jan. 2023), [https://perma.cc/NUZ6-3QAL]; *New Yorkers May Now Choose "X" Gender on Their Birth, Marriage & Death Certificates*, N.Y. STATE DEP'T OF HEALTH (Jan. 9, 2023), [https://perma.cc/C67W-8ZVQ].

203. Spencer Garcia, *My Genderless ID Makes Me Feel Safe,* ACLU (Feb. 19, 2021), [https://perma.cc/9ATH-CQAZ].

204. *See* Anne Fausto-Sterling, *The Five Sexes—Revisited*, THE SCIENCES (July/Aug. 2000), at 19, 23 ("Surely attributes more visible (such as height, build and eye color) and less

was expected that everyone had a right to information about everyone else's gender based on assumptions about their outward appearance.[205]

Scholars have contributed in important ways to the debate over phasing out or reducing the importance of assigned gender and favoring legal recognition of gender identity. Advocates in favor of elevating the legal status of gender identity argue for more flexible gender marker changes and have been especially concerned about any requirement of surgical "reassignment."[206] Professor Florence Ashley, for example, has opined that trans conversion practices are prima facie unethical because they are based on "an assumption that trans lives are less authentic or desirable, constructing them as disordered and seeking to prevent them."[207] Scott Skinner-Thompson's important work has raised the alarm around the surveillance and regulation of trans and gender-variant people by "experts" and others charged with developing protocols to police gender in schools.[208] In a similar vein, history scholar Gregory Michael Dorr, writing on Plecker's race-identification scheme in Virginia, notes "the need for a new language of biology that better represents the physical beings it purports to describe."[209] Dorr is discussing race, but surely the same can be said of gender: that when identified by others it is a conclusion based on superficial observations that entail a host of stereotypes used to channel individuals in directions that constrain choice and blight opportunity. There can be no better evidence of the harm done by a system that allows an outsider's identifications to define a person's destiny than the dreadful legacy of the eugenics experiment in Virginia and other states.

More conservative voices hew to a medical model for changes to gender markers.[210] Patrick Parkinson's stance, for example, runs at cross

visible (fingerprints and genetic profiles) would be more expedient."). *See also* Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents,* 39 HARV. J.L. & GENDER 491 (2016).

205. Doe v. McConn, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (noting that city offered no rationale for an ordinance criminalizing dressing "to disguise his or her true sex").

206. *See, e.g.*, Kristin Wenstrom, *What the Birth Certificate Shows: An Argument to Remove Surgical Requirements from Birth Certificate Policies,* 17 TUL. J.L. & SEXUALITY 131 (2008).

207. Florence Ashley, Trans*porting the Burden of Justification: The Unethicality of Transgender Conversion Practices,* 50 J.L. MED. & ETHICS 425, 428 (2022).

208. Scott Skinner-Thompson, *Identity by Committee,* 57 HARV. C.R.C.L.L. REV. 657, 691, 713 (2022) (listing the various "stakeholders" whose opinions matter in making determinations of gender in public schools).

209. GREGORY MICHAEL DORR, SEGREGATION'S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA 228 (Deborah E. McDowell ed., 2008).

210. Ernesto Londoño & Azeen Ghorayshi, *To Fight State Limits on Trans Care, or to Flee?,* N.Y. TIMES, July 6, 2023, at A1.The federal Courts of Appeals are split over whether

purposes to Skinner-Thompson's and Dorr's. Parkinson prefers the certainty of the medical model because of its reliance on experts to define one's legal gender and then to determine whether a legal alteration of that gender should be permitted.[211] Writing about a Tasmanian law that, recognizing the fluid nature of gender, now allows wide-ranging changes to a birth certificate's gender marker based on self-identification alone, Parkinson laments the passing of an old but simple system of gender ascription based on observations of anatomy to a new system he finds dizzyingly complex.[212] He criticizes the alteration of the system to benefit "a small minority of people, albeit [one that] exercise[s] an influence disproportionate to their numbers in the media, universities and school education departments."[213] Deeming the new law to have replaced "bodily surgery" with "legislative surgery,"[214] Parkinson describes a host of untoward ramifications that the new law will unspool, among them deleterious effects on prison security, strip searches, bathroom and changing room usage, single-sex institutions of higher learning, and athletics.[215] These concerns stem from the notion that identifications of gender made at birth ought to create reliable gender-based expectations on the part of the public about what an individual is allowed to do and where they are allowed to go.[216] Parkinson suspects that in altering systems based on a rigidly binary understanding of gender, the government is pandering to special interests who want to game the system and sow confusion in society.[217]

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bans on hormone therapy and puberty blockers are likely to survive constitutional scrutiny. *Compare* Brandt v. Rutledge, 677 F. Supp. 3d 877, 2023 WL 4073727, at *38 (E.D. Ark. 2023) (issuing permanent injunction on ban on medical care for transgender minors) *with* L.W. v. Skrmetti, 73 F.4th 408, 415 (6th Cir. 2023) (declaring overbroad injunction against enforcement of ban on medical care for transgender minors).

211. Patrick Parkinson, *Sex, Gender and Birth Certificates* 10-21 (Dec. 2, 2020), [https://perma.cc/ER86-CDMV] (contrasting "classic transgenderism" with the "new transgenderism").
212. *Id.* at 2, 21.
213. Patrick Parkinson, *Tasmania's Gender-Confused Parliament,* Quadrant (Apr. 26, 2021), [https://perma.cc/J6DZ-WR64].
214. Parkinson, *supra* note 211, at 24 ("It is one thing to say that a person who has had sexual reassignment surgery should be recognized as having crossed the binary divide between male and female for the purposes of the law. It is another to suggest that self-identification should be sufficient to have that effect in the absence of any medical steps taken to cross that binary divide").
215. Parkinson, *supra* note 211, at 25-30.
216. *Id.* at 26 (describing these expectations as "the rights of others").
217. Parkinson, *supra* note 213 ("[T]o understand the current law in Tasmania requires descending down a deep rabbit hole…"); Parkinson, *supra* note 211, at 34 (claiming that the changes to Tasmania's law "can lead to great social confusion.").

Critics like Parkinson misunderstand that birth certificates are replete with anonymous medical and health information unnecessary for and unrelated to the issuance of identity documents. As explained above,[218] these important aspects of birth certificates have value for estimating population composition and growth, rates of infant mortality, and other macro-information "essential in planning and evaluating programs in public health and other important areas."[219] One's observed anatomy at birth and its association with certain categories of sex may be important information to include in these anonymous data sets and to consider within the context of public-health research projects. Parkinson's mistake is in focusing solely on the use of birth certificates for obtaining government identity documents.[220] He fails to recognize that the non-anonymous information that birth certificates record for this purpose is mutable. One may, for example, obtain a legal name change or a change of parentage through adoption. The new Tasmanian law of birth registration aims to alleviate the confusion that drives concerns like Parkinson's by institutionalizing the divide between the need for anonymous demographic information on the one hand and, on the other, the lack of any need for an unalterable sex designation to be a piece of information available to the wider public as a person attempts to navigate society. The Tasmanian law does the good work of reifying the understanding that gender, like race, is irrelevant for what we need non-anonymous birth certificates to achieve.

In this same connection, consider the parentage information contained in the non-anonymous birth certificate data. To help parents apply for public benefits, enroll a child in camp, school, or seek a doctor's care for the child,[221] birth certificates need to be flexible enough to contain the names of those who are actually legally responsible for the child. Limiting the parentage designations on birth certificates to the biological progenitors of a child would impede these important child-rearing functions in some cases. Thankfully, the law has come to understand that biology sometimes has nothing to do with child rearing and has developed new parentage categories more in keeping with this purpose.

218. *See supra* notes 83-87 and accompanying text.

219. NAT'L OFF. OF VITAL STAT., *supra* note 12, at 2.

220. Parkinson, *supra* note 211, at 34 ("Is it so unreasonable for Tasmanians to want their birth certificates to be what they are meant to be—a record of their birth?").

221. OFFICE OF THE INSPECTOR GENERAL, *supra* note 8, at iii-iv, 1, 6.

## III. THE SURROGACY NEXUS

Like those who seek legal recognition of their gender identity, individuals who plan to have children with the help of assisted reproductive techniques and draw up documents that define their understandings are above all else seeking the legal recognition of their parentage. In the United States, a birth certificate is the coin of the realm for this purpose, especially for parents who have no biological connection to the child. The nexus between gender identity and intended parentage could not be plainer. Both those whose gender is not in alignment with biology and those whose intention to parent is likewise not biologically grounded must confront a legal system where legal parentage and legal gender have traditionally depended on observations and identifications made by others, not on one's own intentions, actions, or lived experiences. But unlike determinations of legal gender, assigned legal parentage has evolved in the direction of validating the choice to become a parent by means uncoupled from biology.[222] In the evolving law of surrogacy in the United States, this evolution is on full display.

Surrogacy is the form of assisted reproduction in which a woman agrees to gestate an embryo and give birth to a child for another person or couple. The American experiment with commercial surrogacy continues apace almost thirty years after the New Jersey Supreme Court vilified the practice in *In re Baby M.*[223] The court in that case denied that the parties to a traditional surrogacy agreement[224] had the right to recognition of the legal parentage their child would have as defined by their contract.[225] But nor did the court insist that parentage had to follow biology. By this reasoning, biological parentage information on a birth certificate has meaning not for its own sake but because it reflects a set of assumptions about intention to parent, making biology a starting point for parentage determination but not necessarily an endpoint. This approach to establishing legal parentage contrasts sharply with the position that biological sex is the sole determinant of gender.

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222. For the purposes aligning this discussion with the terms "assigned gender" and "gender identity" employed in Part III, I use the terms assigned parentage and parentage identity.

223. *In re* Matter of Baby M., 537 A.2d 1227 (N.J. 1988).

224. Traditional or genetic surrogacy is an arrangement in which the surrogate contributes both genetics and gestation to the creation of the child. Joseph R. Williams, *New Surrogacy Law Brings Opportunities but Practitioners Beware,* N.Y. ST. BAR ASS'N (Mar. 9, 2021), [https://perma.cc/RAY8-N892].

225. The contract spoke not so much about parentage as it did custody, a right stemming from parentage. *See In re* Matter of Baby M., 537 A.2d at 1238.

Because the regulation of surrogacy lies within the jurisdiction of each of the fifty states, and since attitudes toward surrogacy vary widely within and across these jurisdictions, there is no uniform acceptance or rejection of commercial or even altruistic surrogacy in this country. Instead, subsumed within its borders is a variety of different laws that run the gamut from permissiveness to prohibition, a phenomenon that medical ethics scholar Alexander Capron has labeled a "patchwork" of laws.[226] The burning issue of the last twenty-five years in this area of the law has been to what extent we should depart from prioritizing biological facts in favor of giving weight to parentage by intention. Courts have expressed divergent opinions on this question. California and Pennsylvania, for example, have embraced parentage identity,[227] while Ohio has rejected it.[228] Recognition of parentage identity has bestowed legal protection on families created using assisted reproduction who would otherwise find themselves ineligible for legal recognition. In jurisdictions where parentage identity carries no legal weight, parentage determination rules grounded in biology and marriage continue to control.[229]

In connection with a volatile issue like surrogacy, the connotations of a patchwork of laws are primarily negative, among them that such laws sow confusion and encourage evasion of the law. Without uniform rules to govern human behavior, some will be uncertain of what conduct is unacceptable. Others may move to a jurisdiction where the choices they want to make are legal. These uncertainties that families seeking surrogacy confront are the same ones currently unspooling for individuals and families caught in the current legal maelstrom relating to gender identity.[230] Looking to the evolution of the law of surrogacy, we can discern that, for the same reasons that a surrogacy arrangement permits the parties to it to define for themselves who are the legal parents of the child they plan to create, a gender marker on a birth certificate should also be a matter of self-definition.

226. Alexander Morgan Capron, *The New Reproductive Possibilities: Seeking a Moral Basis for Concerted Action in a Pluralistic Society,* 12 LAW, MED. & HEALTH CARE 192, 196 (1984).

227. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Cal. Ct. App. 1998) (declaring intended parents legal parents "given their initiating role as the intended parents in [child's] conception and birth"); *In re* Baby S., 128 A.3d 296, 307 (Pa. Super. Ct. 2015) (citing Department of Health policy "to ensure the intended parents acquire the status of legal parents in gestational carrier arrangements").

228. *See, e.g.*, Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. C.P. 1994).

229. *See, e.g.*, *Belsito*, 644 N.E.2d at 762-63.

230. Londoño et al., *supra* note 210.

### A. *Embracing Surrogacy*

Nearly half of the states have some legislation relating to surrogacy,[231] with the most recent legislative enactments having explicitly permitted the practice.[232] Some jurisdictions have only case law governing surrogacy contracts,[233] and some states have no binding regulation at all.[234] Model laws on the subject, drafted to bring some legal uniformity to the area, have had limited success.[235]

Just as with designations of gender, biology has been an important driver of parentage designations on birth certificates. The Roman law of maternity, that a child's birth mother is irrefutably his legal mother, was a source of certainty in parentage law for centuries.[236] In a time before knowledge of chromosomes or genetic connections existed, the legal certainty of a child's birth mother was evidently sound. It was assumed that whatever biological connection mattered for legal maternity was demonstrated by parturition. In contrast to the indeterminacy of paternity designation, its policy underpinnings went largely unquestioned until developments in technology made parentage possible for more people.[237]

Surrogacy has been a source of joy for many people and a source of deep concern for many others. Potent objections animate debates about whether assisted reproductive technologies exploit women. Feminist theorists Gena Corea and Janice Raymond, opponents of surrogacy, view the practice as just another historical example of the cooptation of women's reproductive power by men.[238] Their fears arise in part from the practice of hiring women in developing countries to satisfy the demand

231. Diane S. Hinson & Maureen McBrien, *Surrogacy Across America,* FAMILY ADVOCATE, Fall 2011, at 32.

232. *See, e.g.*, N.Y. FAM. CT. ACT § 581-201 (2021).

233. *See, e.g.*, S.N. v. M.B., 935 N.E.2d 463, 470 (Ohio Ct. App. 2010).

234. *See, e.g.*, A.L.S. v. E.A.G., No. A10-443, 2010 WL 4181449, at *5 (Minn. Ct. App. Oct. 26, 2010) ("There is currently no legislation or case law in Minnesota establishing the legal effect of traditional or gestational surrogacy agreements.").

235. *See, e.g.,* UNIF. PARENTAGE ACT § 9B U.L.A. 410 (2017); *American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 171 (2008); Family Law Section Adoption Committee and Ad Hoc Surrogacy Committee, *Draft ABA Model Surrogacy Act,* 22 FAM. L.Q. 123 (1988).

236. Susan Klock & Steven R. Lindheim, Mater Semper Certa Est: *Motherhood Is Always Certain*, 110 FERTILITY & STERILITY 1185 (2018).

237. Rita D'alton-Harrison, *Mater Semper Incertus Est: Who's Your Mummy?*, 22 MED. L. REV. 357, 357-83 (2014).

238. GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS 221-22, 224, 357-58 (1985); JANICE RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 35-36 (1993).

for lower-cost surrogacy.[239] Professors Margaret Radin and Barbara Katz Rothman have written about how this practice oppresses and exploits poor, minority women who turn to this comparatively lucrative work under duress.[240]

Counterbalancing these views against surrogacy is the view that surrogacy promotes gender equality by affording some women the opportunity to use their reproductive power as a means of support and other women the opportunity to acquire those services. Legal theorist Marjorie Maguire Shultz, a proponent of this view, has written that embracing surrogacy is one way of expanding the legal recognition of alternative family forms, including same-sex couple- and single-parent-headed families.[241] As applied to the United States, Shultz's view reflects an increasingly permissive stance toward surrogacy. Given the importance of autonomy in the American social contract, there is little appetite for condemning a practice with charges of exploitation, where no evidence of it exists,[242] or with cries of commodification, a concern that seems to describe more an affront to purely dignitary interests than it does a bona fide harm to the public good.[243]

Though it has been controversial on many levels, it has come to be accepted as a policy matter that if a gestational mother agrees to become pregnant in the expectation that another woman will be the legal mother of the child, with all of the attendant responsibilities of raising and supporting that child, there is perhaps no valid objection to giving the agreement legal backing. Reflecting this thinking, there has in recent years been a gradual legislative trend toward permitting commercial gestational surrogacy if the contract is entered into properly, contains the required terms, and (in some states) is judicially pre-approved.[244] Legislators supporting surrogacy arrangements have prudently recognized that to make surrogacy contracts palatable where they would otherwise be opposed, they must be very tightly regulated with specific restrictions on access to

239. *See, e.g.*, Amrita Pande, *Transnational Commercial Surrogacy in India: Gifts for Global Sisters?,* 23 REPROD. BIOMEDICINE ONLINE 618 (2011).

240. MARGARET RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 142 (1996); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 237 (1989).

241. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 WIS. L. REV. 297.

242. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy,* 88 IND. L.J. 1223, 1234-35 (2013).

243. Ruth Macklin, *Dignity is a Useless Concept,* 327 BRIT. MED. J. 1419, 1419 (2003) ("Appeals to dignity are either vague restatements . . . or mere slogans.").

244. *See, e.g.*, 750 ILL. COMP. STAT. 47/1-75 (2005).

surrogacy and clear parentage ramifications.[245] Birth certificates figure prominently in this new regime, the parentage determinations appearing on them having evolved to become more or less defined by consent and intent, endowing self-definition with legal weight. A good example of such an evolved legal regime is North Dakota's. In North Dakota, "mother" now means "a woman who gives birth to a child or, if pregnancy resulted from assisted conception, the woman who is the donor but not the woman who is the gestational carrier."[246] A more recently enacted law, in Connecticut, defines "mother" similarly: it means "a woman who is a parent" and excludes a "person acting as surrogate."[247]

It is fair to say that American society's perspective on surrogacy has evolved from rejecting surrogacy to widespread acceptance. Although a few states have held fast to their bans on surrogacy,[248] today there is virtually no legislative activity aiming to prohibit it. The legislative trend, if there is one, is instead aimed at legalizing surrogacy where it has been illegal[249] or providing a statutory framework for it where it has been practiced with minimal legislative guidance.[250] Attempts in the last decade to enact prohibitions on surrogacy or to limit it to altruistic arrangements, both of which are reflected widely in the laws of other countries, have met with little success. A proposal in South Dakota, for example, would have vested parental rights in surrogate mothers, whether gestational or traditional, and whether or not the surrogate was compensated.[251] Harold Cassidy, the lawyer who represented Mary Beth Whitehead in *Baby M.,* testified in favor of the measure, which ultimately was voted down in committee.[252] A similar fate befell a bill brought in Kansas to criminalize paid surrogacy. After overwhelming testimony in opposition to the measure and statements by the senate leadership to the effect that there was little support for it, the sponsoring senator withdrew the bill.[253]

245. *See, e.g.*, UTAH CODE ANN. § 78B-15-807 (West 2008); N.Y. FAM. CT. ACT § 581-201 (McKinney 2021).
246. N.D. CENT. CODE § 14-19-01(6)).
247. CONN. GEN. STAT. §§ 45a-604(1) (2022), 46b-524(2) (2022)).
248. *Surrogacy Laws by State,* FAM. MAKERS SURROGACY (Aug. 3, 2022), [https://perma.cc/7HEV-6CDB] (listing Louisiana, Michigan and Nebraska).
249. Tim Craig, *D.C. Council Softens Penalties for Welfare Recipients who Refuse Job Training,* WASH. POST (Jan. 8, 2013, 9:20 PM), [https://perma.cc/4QAL-XEAJ].
250. *See, e.g.*, NEV. REV. STAT. §§ 126.710-.810 (2013).
251. Chet Brokaw, *South Dakota Lawmakers Reject Anti-Surrogacy Bill,* THE SAN DIEGO UNION-TRIBUNE (Feb. 14, 2011), [https://perma.cc/SV62-2DHD].
252. *Id.*
253. Patricia J. Williams, *Worlds, and Wombs, Collide in a Kansas Bill Criminalizing Surrogate Pregnancy Contracts,* 298 NATION 10 (Feb. 24, 2014), [https://perma.cc/4LU3-U977].

Thus, while self-identification of one's gender remains hotly contested in the United States, a non-medicalized model of parenthood by personal identification already exists. The ease with which parentage identity can now be included on a child's birth certificate provides a model for allowing birth certificates to reflect gender identity.

### B. *From Assigned Parentage to Parentage Identity*

Thirty-five years ago, when a transgender person could not obtain a change in the gender marker on her birth certificate without surgical intervention, important developments in the law of surrogacy were about to take place.

*Baby M.* is remembered by many as a case that raised a tide of opposition to surrogacy. In the wake of this decision, several states enacted statutes to ban the practice. Under its own surrogacy ban, enacted in 1989,[254] Utah declared surrogate parenthood agreements unenforceable and deemed the surrogate mother and her husband the parents of the child "for all legal purposes."[255] Under this guidance, courts in Utah held firm to the Roman law of maternity. In *J.R. v. Utah,* married couple J.R. and M.R., with the full agreement of W.K.J., the gestational surrogate who gave birth to their biological children, petitioned to have their names entered on the twins' birth certificates. The Utah State Office of Vital Records, citing the statute conclusively presuming W.K.J. to be the mother of the children, refused to conform the information on the birth certificate to the wishes of the three parties.[256] Instead, the certificate showed only the surrogate as the mother of the children and no one as the children's father.[257]

As relevant here, the state argued that the statute promoted the policy of there being "at least one easily identifiable legal parent and guardian" at the moment a child is born and that "the fact of childbirth" was the most convenient of the available facts to provide that identification.[258] The court did not believe that convenience was an interest compelling enough to bar a genetic parent from claiming parentage.[259] In other

254. J.R. v. Utah, 261 F. Supp. 2d 1268, 1281 (D. Utah 2002).
255. *J.R.*, 261 F. Supp. 2d at 1272 (quoting UTAH CODE ANN. § 76-7-204).
256. The case does not make clear when in relation to the birth of the children the request was made. *See J.R.*, 261 F. Supp. 2d at 1268.
257. *J.R.*, 261 F. Supp. 2d at 1271 (the case does not specify what the hospital reported to the Office of Vital Records).
258. *J.R.*, 261 F. Supp. 2d at 1280, 1285.
259. *J.R.*, 261 F. Supp. 2d at 1285.

words, the court believed that "the facts of life itself" and not "a legislative act" would ultimately be determinative of the question of parentage.[260] Courts in other states have embraced similar reasoning.[261]

The primary relevance of *J.R. v. Utah* to the current discussion is its move away from the delivery of a child as the *sine qua non* of maternity and toward a more firmly entrenched genetic model of parentage. This is not quite so monumental a shift as might first appear, given that the focus of the case is on identifying the twins' "real" father. After all, the marital presumption of paternity, a doctrine grounded in policy and "intuitions,"[262] may have been as good a proxy for paternity as was available in the pre-DNA era, but it was certainly not crafted to convey any message about parentage identity. Moreover, once the law embraced DNA evidence in paternity proceedings, the marital presumption was reduced in importance to just one of the "equities" to be considered in assessing the best interests of the child.[263] In a surrogacy case in particular, allowing the marital presumption of paternity to override clear genetic evidence to the contrary would be absurd. *J.R.*'s focus on paternity meant that *J.R.* did nothing to validate the parentage identity of M.R. and did not move identified maternity away from a reliance on biology.[264]

*J.R.* offered incremental change in the law of parentage by gesturing in the direction of a legal regime that could comfortably draw away from investing the fact of giving birth to a child with overriding legal significance. Where *J.R.* went wrong was in stating that the parent-child relationship is a fact. It turns out that legal motherhood, like gender, is not a simple matter of observed facts but a public policy question whose resolution is contextual.

This understanding of legal parentage as untethered from biological truths was ultimately embraced by the Utah Legislature when it repealed its ban on surrogacy. The enactment initially allowed surrogacy only in cases where the intending mother could prove her inability to carry a child

260. *J.R.*, 261 F. Supp. 2d at 1286 (deeming the parent-child relationship "an uncontroverted genetic and biological *fact*" (emphasis in original)); *Id.* at 1297 (declaring that parents' "relationship with their children arises from the *fact* of the biological parent-child relationship" (emphasis in original)).

261. *See, e.g.*, Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001) (petition for pre-birth declaration of parentage brought by genetic parents); Soos v. Super. Ct., 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994); Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio Ct. C.P. 1994) (announcing genetics and birth as the tests for determining parentage).

262. Douglas NeJaime, *The Nature of Parenthood,* 126 YALE L.J. 2260, 2265 (2017).

263. *See, e.g.*, UNIF. PARENTAGE ACT § 613 U.L.A. 410 (2017).

264. NeJaime, *supra* note 262 at 2290 (describing legal maternity as largely "a biological status").

to term. The statute appeared to require at least one of the intending parents to a surrogacy agreement to be a woman.[265] This requirement was declared unconstitutional insofar as it barred a married same-sex male couple from receiving judicial pre-approval of their surrogacy agreement.[266] The case, *In re Gestational Agreement,* reflects a complete rejection of the logic of *J.R.* and moves unerringly in the direction of embracing parentage identity, reflecting the trend in the law described above.

On the opposite side of the spectrum, and consistent with its position making it impossible for a transgender person to have their gender confirmed on their birth certificate, Tennessee, unlike Utah, hews unerringly to biologically determined parentage designations in uncontested surrogacy cases.[267] In a 2005 case that presented the Tennessee Supreme Court with a matter of first impression,[268] an unmarried heterosexual couple had three children with the aid of an anonymous egg donor. The man was the children's genetic father. The couple's relationship deteriorated soon after the children were born.[269] In order to avoid a custody fight, the genetic father claimed in court that his ex-partner was not the children's mother because she had served merely in a gestational capacity and was thus tantamount to a surrogate.[270] The court held that the woman was the children's legal mother because the parties had agreed in advance that she was to be the children's rearing mother, she became pregnant with the triplets and gave birth to them, and, finally, there was no dispute over maternity between the woman and the anonymous egg donor.[271] The dissent warned against any use of intent in parentage determination as "unwieldy, subjective, and questionable" and urged the court to use genetics to ascertain initial parentage.[272]

Nine years later, in *In re Baby,*[273] the Tennessee Supreme Court did just that. There the court heard the complaint of a married couple who had contracted with a woman to help them have a child via traditional surrogacy wherein the surrogate contributes both her egg and gestational services to the procedure. The woman was artificially inseminated with the husband's sperm, became pregnant, and gave birth. Upon the birth of the child, the surrogate wished no longer to abide by the contract and brought a suit for custody. The

265. *In re* Gestational Agreement, 449 P.3d 69, 77 (Utah 2019).
266. *In re* Gestational Agreement, 449 P.3d at 80.
267. *In re* Amadi A., No. W2014-01281-COA-R3-JV, 2015 WL 1956247, at *9 (Tenn. Ct. App. Apr. 24, 2015).
268. *In re* C.K.G., 173 S.W.3d 714, 720 (Tenn. 2005).
269. *In re* C.K.G., 173 S.W.3d at 718.
270. *In re* C.K.G., 173 S.W.3d at 718-19.
271. *In re* C.K.G., 173 S.W.3d at 716-717, 730.
272. *In re* C.K.G., 173 S.W.3d at 734-35 (Birch, J., dissenting).
273. *In re* Baby, 447 S.W.3d 807 (Tenn. 2014).

court ruled that she was indeed the mother of the child and would be entitled to share custody with the genetic father according to a schedule to be decided by the lower courts.[274]

Finally, the Tennessee Court of Appeals, in 2014 and 2015, decided two cases wherein the parties to surrogacy agreements requested the Tennessee Department of Health to issue birth certificates for the children in the names of the intended parents.[275] In contrast to *In re C.K.G.* and *In re Baby,* both cases involved married intended parents who each used a gestational surrogate and an egg donor to have children. The husbands were the genetic fathers of the respective children. They were opposed by the Department of Health, which argued that intention was not enough for legal parentage absent either a genetic or gestational connection between the woman and the child.[276] In *Amadi A.*, the lower court recognized the intended mother as the legal mother,[277] but in *A.F.C.* the trial court ordered the birth certificate to show the mother as "unknown."[278]

The court denied both petitions, remanding *Amadi A.* for further proceedings[279] and affirming the order of the trial court in *A.F.C.* to list the mother as unknown.[280] Finding no definition of "mother" in Tennessee law, the court reasoned that it should look to the state's agreement with the National Center for Health Statistics (NCHS) governing its responsibility to provide the Center with "detailed medical information" on live births.[281] The Center's regulations define "live birth" as "a complete expulsion or extraction from its mother of a product of human conception . . ."[282] and specify that "'[a]ll information on the mother should be for the woman who gave birth to, or delivered the infant.'"[283] To the Court of Appeals, this meant that a birth certificate must report the facts of the delivery; thus, the intended mother's name did not belong on the

274. *In re* Baby, 447 S.W.3d at 812.
275. *In re* Amadi A., No. W2014-01281-COA-R3-JV, 2015 WL 1956247 (Tenn. Ct. App. Apr. 24, 2015); *In re* Adoption of A.F.C., 491 S.W.3d 316 (Tenn. Ct. App. 2014).
276. *In re* Amadi A., 2015 WL 1956247, at *2.
277. *In re* Amadi A., 2015 WL 1956247, at *2.
278. *In re* Adoption of A.F.C., 491 S.W.3d at 317.
279. *In re* Amadi A., 2015 WL 1956247, at *10.
280. *In re* Adoption of A.F.C., 491 S.W.3d at 317.
281. *In re* Amadi A., No. W2014-01281-COA-R3-JV, 2015 WL 1956247, at *4 (Tenn. Ct. App. Apr. 24, 2015); *In re* Adoption of A.F.C., 491 S.W.3d 316, 321 (Tenn. Ct. App. 2014).
282. NAT'L CTR. FOR HEALTH STAT., STATE DEFINITIONS AND REPORTING REQUIREMENTS FOR LIVE BIRTHS, FETAL DEATHS, AND INDUCED TERMINATIONS OF PREGNANCY 2 (1997), [https://perma.cc/T5ET-UGDX].
283. NAT'L CTR. FOR HEALTH STAT., GUIDE TO COMPLETING THE FACILITY WORKSHEETS FOR THE CERTIFICATE OF LIVE BIRTH AND REPORT OF FETAL DEATH 7 (2003), [https://perma.cc/4DLQ-QR4A].

certificate if she was not also the gestational mother. In both cases, then, the birth certificate was ordered to name the gestational mother, forcing the intended mothers into the position of adopting the children in later stepparent adoption proceedings.[284]

As does Patrick Parkinson in his critique of the new Tasmanian law of gender determination, the Tennessee Court of Appeals in *A.F.C.* and *Amadi A.* confused the parentage-establishment function of birth certificates with their public-health and fact-gathering functions.[285] The NCHS's interest in births is purely medical. Its fact-gathering function is anonymous and is geared toward building a database to aid researchers in their public-health and demographic projects. Understandably, "mother" for these purposes is synonymous with birth mother. The Center wants foremost to gather data so that researchers can identify trends to better understand pregnancy and parturition outcomes in the interest of improving public health.[286] The Center has no role in nor is it concerned with matters of legal parentage.

Why the Tennessee Court of Appeals believed the state's reporting obligations to the NCHS were controlling of a parentage-determination matter is doubly perplexing given the specific guidance the Center gives for reporting data on cases of surrogacy. Just below the admonition that "[a]ll birth certificate information reported for the mother should be for the woman who delivered the infant" appears the caveat "[i]n cases of surrogacy or gestational carrier, the information reported should be for the surrogate or the gestational carrier, that is, the woman who delivered the infant."[287] The NCHS is here acknowledging that in many states the intended mother is the legal mother of the child from the moment it is born but that the medical data it seeks relates to the woman who gave birth. In short, nothing about Tennessee's role in reporting vital statistics

284. *In re* Amadi A., 2015 WL 1956247, at *2, 4; *In re* Adoption of A.F.C., 491 S.W.3d at 317, 321-22.

285. *In re* Adoption of A.F.C., 491 S.W.3d at 321 (describing the Vital Records Act's aim of "'promot[ing] and maintain[ing] nationwide uniformity in the system of vital records'" to mean "aid[ing] the public health of the state").

286. NAT. RES. COUNCIL COMM. ON NAT'L STAT., VITAL STAT.: SUMMARY OF A WORKSHOP app. B (2009) (noting that "the primary policy interest of CDC/NCHS is to advance a long-standing public health interest in more rapid statistical information that is collected through the registration of births and deaths"); *See, e.g.*, *Health, United States, 2020-2021: Births*, Nat'l Ctr. for Health Stat. (last reviewed June 26, 2023), [https://perma.cc/9EAK-7X6J].

287. NAT'L CTR. FOR HEALTH STAT., GUIDE TO COMPLETING THE FACILITY WORKSHEETS FOR THE CERTIFICATE OF LIVE BIRTH AND REPORT OF FETAL DEATH 7 (2003), [https://perma.cc/AJW4-KGXB].

to the federal government compelled it to name the birth mother as the legal mother in either *A.F.C.* or *Amadi A.*

The parentage-establishment function of birth certificates, in contrast to the public-health data sought by the NCHS, is specific to the parties and is non-anonymous. Here, too, the Tennessee appellate court misapprehended the creation and purposes of birth certificates. The *A.F.C.* court made this precise statement: "[T]he names listed thereon are not a finding of parentage nor do they create or terminate parental rights."[288] In another section of the opinion, the court stated that naming a mother on a birth certificate is somehow "independent of the determination of who is the 'legal mother.'"[289] This is a glaring misstatement of law. The parties named as parents on a birth certificate have rights and duties until such time as the law deems it appropriate to recognize other parties through, potentially, an adoption proceeding. That is why donors and surrogates do not want their names to appear on the birth certificate of the child born by assisted reproduction. As if knowing its misstatement of the law would cause no harm, the court in *A.F.C.* conveniently had before it the adoption decree securing the intended mother's legal maternity. But the important point is that intended parents do not want to undertake the expense, time, and uncertainty of pursuing an adoption, which remains the only avenue for them if someone else's name is placed on the initial birth certificate. Moreover, there was in these cases no cause for concern that early certainty of parentage would be elusive. By their nature, surrogacy agreements identify the legal parents of the child to be created so that early certainty is a given. As a public policy matter, there was no valid reason why in *Amadi A.* and *A.F.C.* the names of the intended parents self-identified in the agreement could not be placed on the birth certificate in the first instance.

This is not to say that the Tennessee Court of Appeals decided these cases incorrectly. Matters of legal parentage are matters of each state's public policy, and if Tennessee's policy is that the gestational mother is the child's legal mother as an initial matter and that her name must appear on the birth certificate until such time as her rights are terminated pursuant to an adoption or child-protection proceeding, that is its prerogative. If Tennessee has decided that its residents should spend time, energy, and money correcting the record in such cases, with no benefit to the children involved or to the public at large, we should have no cavil with it other than that it appears ill-conceived.

288. *In re* Adoption of A.F.C., 491 S.W.3d 316, 319 (Tenn. Ct. App. 2014).
289. *In re* Adoption of A.F.C., 491 S.W.3d at 319.

Other courts have rendered decisions affirming that recognizing parentage identity is the very best policy choice in surrogacy cases. In *Buzzanca v. Buzzanca*, married couple Luanne and John Buzzanca contracted with a surrogate to gestate an embryo they had acquired but to which neither had contributed genetic material.[290] The identities of the genetic contributors were not known. After Luanne and John separated, Luanne petitioned to be named baby Jaycee's mother. The surrogate made no claim to Jaycee. Due to the absence of genetic ties between either John, Luanne, the surrogate or her husband, and Jaycee, the trial court ruled that she had no parent. The appellate court disagreed. Advancing even farther than did the Supreme Court of Utah in the direction of embracing parentage identity, the California Court of Appeal reasoned that because Luanne had arranged for a medical procedure to be performed on the surrogate that resulted in her pregnancy and the eventual birth of a child, the surrogate in essence had given birth to the child on Luanne's behalf.[291] In short, Luanne's intentional act determined her legal motherhood. For Luanne to be forced to resort to adoption law in this context, the court reasoned, would be "an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning."[292] The court described this view of intentional parenthood as applicable "to any situation where a child would not have been born but for the efforts of the intended parents."[293]

Several states now have statutes that explicitly define an "intended parent" as one whose intent is to become the legal parent of a child born of assisted reproduction or gestational surrogacy.[294] This status does not require that one have a genetic connection to the child.[295] To facilitate the inclusion of the intended parents' names on the child's initial birth certificate, parties to a surrogacy agreement may seek a pre-birth declaration of parentage.[296] This court-issued document is not only meant to short-circuit disputes over parentage arising in surrogacy cases but

290. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282-83 (Cal. Ct. App. 1998).
291. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d at 282, 291.
292. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d at 291.
293. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d at 291.
294. *See, e.g.*, CAL. FAM. CODE § 7960(c) (West 2020); CONN. GEN. STAT. § 7-36(17); 750 ILL. COMP. STAT. 47/10 (2005); MINN. STAT. § 524.1-201(31) (2023); TEX. FAM. CODE ANN. § 160.102(9) (2007).
295. ALA. CODE § 26-17-102(12); CONN. GEN. STAT. § 7-36(17); TEX. FAM. CODE ANN. § 160.102(9) (2007); VA. CODE ANN. § 20-156 (West 2019).
296. *See, e.g.*, Conn. Gen. Stat. § 46b-531; D.C. Code § 16-408 (2017); ME Stat. tit. 19-A, § 193 (2015); N.H. Rev. Stat. Ann. § 168-B : 12 (2023); N.J. Stat. Ann. § 9:17-67 (West 2018); Wash. Rev. Code § 26.26A.750 (2019).

to bestow on parentage identity the same legal significance as genetic parentage. Making available a pre-birth declaration of parentage provides intended parents the most expeditious route to parentage recognition[297] because it renders amendment of the birth certificate and adoption unnecessary after the child is born. It is such a positive development that many jurisdictions are reworking outdated parentage-determination norms in favor of policies that accord legal recognition to families created in nontraditional ways. These policies underscore that the public good is served by allowing self-identification of parentage in surrogacy cases.

## CONCLUSION

Considered today a cornerstone of vital statistics records and public-health-related demographic information, birth certificates have been used in recent years as a weapon to deny the gender identity of transgender persons.[298] Birth certificates are a particularly convenient vehicle in the oppression of transgender people, because the methods involved in their creation and their dual and divergent purposes are not widely understood. Are they identity documents or demographic records? In the hands of some policy makers, they are regrettably and incompatibly both, and for this reason can be employed to deprive transgender persons of the means to interact authentically with institutions both public and private.

The birth certificate problem for trans people aligns with the struggle of parties to surrogacy and other assisted reproductive arrangements to define for themselves the legal parents of the children they plan to create. In the surrogacy context, this problem has largely been resolved in favor of recognizing parentage identity and recording it on birth certificates. There is no defensible policy reason to deprive transgender people of a similar solution. Because a surrogacy arrangement permits the parties to self-define the legal parents of the child they aim to create, birth-certificate gender markers should also reflect one's gender identity, with no requirement of substantiation by "experts."

A rare birth-certificate dispute merging the issues of gender identity and parentage identity demonstrates what is possible. In 2020, the Illinois Department of Public Health accommodated a transgender couple who were preparing to have a child by listing each parent's name in the proper category. Myles Brady-Davis, a transgender man, was listed as the child's

297. Smith v. Brown, 718 N.E.2d 844, 846 (Mass. 1999); Andrew W. Vorzimer, *The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surrogacy Contract*, 21 WHITTIER L. REV. 415, 426 (1999).

298. *See supra* notes 133-76 and accompanying text.

father, and Precious Brady-Davis, a transgender woman, was listed as the child's mother.[299] The Department affirmed and responded appropriately to the "safety issue" that would have arisen from the issuance of a birth certificate that did not reflect the lived experience of the family.

There is reason to believe that the legal diversity we find in the United States concerning surrogacy is a testament to one of this country's most successful ongoing legal experiments. The experiment has culminated in moving the law of parentage designation away from an insistence that parentage designations on birth certificates reflect biology. The same is possible in the realm of gender identity. The American experiment with surrogacy demonstrates that much is to be gained and nothing of importance lost when the government embraces an approach to birth certificates that allows self-definition in the promotion of human flourishing.

299. *See* Jake Wittich, *Transgender Parents Welcome Baby Girl, Prompting Update to State's Birth Certificate System,* CHI. SUN-TIMES (Jan. 6, 2020), [https://perma.cc/ZP9F-BPTW].