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Parental Gender Designations on Children’s Birth Certificates:
The Need for a Modifiable Form

Megan Brodie Maier

INTRODUCTION

Births have been registered for centuries to prove citizenship, settle disputes in court, and promote individual rights. In the United States, this systemized way of recording births was initially a public health innovation which was used to identify and reduce infant mortality and to regulate child labor.¹ Birth registration, in connection with the census, evolved as a measure to track the vital qualitative and quantitative statistics of birth, disease, death, and transfer of property.² Birth certificates themselves are heteronormative and binary with respect to the child’s sex and parentage: in the U.S., parents or medical professionals must usually choose a gender — male or female — even if the gender is initially unclear.³ Birth certificates also generally contemplate only two parents, one of each gender, without accounting for the numerous individuals who may have contributed genetically to the child.⁴

The focus of this paper is on single, transgender parents and couples who are composed of at least one transgender individual. While intersex children and same-sex couples are referenced, their issues are not examined in depth. Section I of this paper provides insight into what it means to be transgender, and covers the history and purposes of birth certificates. Section II investigates states’ interests in regulating sex and gender. Section III reviews individuals’ interests, including parents’ and children’s rights and concerns. Sections IV and V compare different states’ model laws surrounding state birth registration and birth certificates. On one end of the spectrum, Mississippi is the most oppressive state for transgender parents; on the other end of the spectrum, California is by far the most favorable state for single transgender parents and

¹ Annette R. Appell, *Certifying Identity*, 42 Cap. U. L. Rev. 361, 374 (2014).

² *See id.*

³ The U.S. Guide to Completing The Facility Worksheets for the Certificate of Live Birth and Report of Fetal Death (2003 Revision, updated in June 2016), http://www.cdc.gov/nchs/data/dvs/birth_edit_specifications.pdf (allowing four designations: M–Male, F–Female, A–Ambiguous, Not yet determined or U–Unknown (same as Not yet determined)). *See also* Susan Donaldson James, *German Law: Parents of Intersex Kids Can Pick ‘Gender Undetermined,’* ABC News, (Nov. 1, 2013), <http://abcnews.go.com/Health/german-law-parents-intersex-kids-pick-gender-undetermined/story?id=20752191> (German parents of intersex children may choose “gender undetermined” on birth certificates); Agence France Presse, *Australia Includes ‘Intersex’ On New Gender Guidelines*, Huffington Post, Jun. 14, 2013, http://www.huffingtonpost.com/2013/06/14/australia-intersex-gender-guidelines_n_3438975.html (Australia includes “intersex” in as an option in its gender guidelines).

⁴ Model State Vital Statistics Act & Regulations § 7(e) (U.S. Dep’t of Health & Human Servs., Revision 1992) (identifying the woman who gives birth as the mother); Dorothy E. Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209, 210-11 (“[T]he law often disregards [the genetic tie] in the cases of surrogate mothers, sperm donors, and unwed fathers.”); *See also* Anjana Ahuja, *Three parents? Five parents? All that really matters is healthy babies*, The Telegraph, Mar. 21, 2013, <http://www.telegraph.co.uk/women/womens-health/9946441/Three-parents-Five-parents-All-that-really-matters-is-healthy-babies.html> (“We already have children whom we can describe as having five parents: the egg donor, the sperm donor, the surrogate mother, and the couple that brings the child up.”).

couples who include at least one transgender parent; Oregon lies in the middle. Finally, Section VI proposes solutions that would respect the rights of all parties involved in birth registration. After a review of the various options available to transgender parents, it is clear that too many states unfairly treat transgender parents. These individuals should not have to seek refuge in California to have their children's birth certificates accurately represent their family. All states should provide parents with the ability to choose how to identify themselves on their children's birth certificates, and a progressive federal model is needed to guide states in the right direction.

I. CONTEXT

A. *Gender Identity*

It is important to properly identify transgender individuals when discussing the issues that affect them. The term "transgender" can be defined as a term for "people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth."⁵ The term stands in opposition to the term "cisgender," which describes those whose gender identity is congruent with the sex they were assigned at birth. The term "transgender" is appropriate for cisgender individuals to use when describing transgender individuals,⁶ while other terms are generally considered offensive and should be avoided.

Those in the medical, psychiatric, academic, and advocate fields often have different definitions for the terms "sex" and "gender." The American Psychological Association explains the differences: "[s]ex is assigned at birth, refers to one's biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy," while "[g]ender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women."⁷ While characteristics of biological sex are generally the same across different cultures, aspects of gender may differ, and socially constructed gender expectations influence the ways that individuals act, interact, and feel about themselves.⁸

Sex is designated at birth by a doctor, nurse, or the parents of the child, even if it is at the time unclear. This "initial and constrained choice affords the impression that sexual apparatus is binary, salient, fixed, and unambiguous."⁹ Further, there is currently no standard for defining legal sex, and when a court or governing body is pressed to define it, "the standard seems to

⁵ National Center for Transgender Equality, *Transgender Terminology*, <http://www.transequality.org/issues/resources/transgender-terminology> ("The term "transgender" is correctly used as an adjective, not a noun, thus "transgender people" is appropriate but "transgenders" is often viewed as disrespectful."). The term "trans" is shorthand and often used to describe all members of the transgender community.

⁶ *Id.*

⁷ American Psychological Association, *Answers to your questions about transgender people, gender identity, and gender expression*, 1 (2001), <http://www.apa.org/topics/lgbt/transgender.aspx>.

⁸ *Id.*

⁹ Appell, *supra* note 1, at 384.

change.”¹⁰ Professor Julie Greenberg suggests there are at least eight factors that combine to produce what we call “sex,” including genetic or chromosomal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.¹¹ Those who are transgender or gender nonbinary often have one or more of the above factors in dissonance with another factor or factors.

At least 1.4 million people in the U.S. identify as transgender, and approximately one-third of those are gender nonbinary or nonconforming, which means that they do not identify with one gender or the other.¹² As Professor Anne Fausto-Sterling notes, “biologically speaking, there are many gradations running from female to male.”¹³ As more studies on transgender individuals emerge and public perception evolves, it has become widely accepted that gender is nonbinary and unfixed. Nonbinary individuals are beginning to be recognized at the city and state levels, although it is only recently that parents have been given the option to designate their child as neither male nor female on a birth certificate.¹⁴

Each year, about one in every 2,000 babies is born “intersex,” meaning that they have physical characteristics that are not easily classified as male or female.¹⁵ By forcing intersex newborns — who may be transgender or gender nonbinary — into one of two boxes, we “inscribe a coarse, binary gender by recording sex (male or female) based on genitalia, rather than performance.”¹⁶ For transgender individuals it is, at the very least, a major administrative obstacle to overcome; for intersex individuals it can be physically harmful, as the parents can choose to elect surgery for the child in order to raise them as either male or female.¹⁷

¹⁰ 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, 498 (2016); See also Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 610-14 (2009).

¹¹ See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 & n.74 (1999).

¹² See Zack Ford, *The American Transgender Population Is Larger Than We Thought It Was*, ThinkProgress, Jun. 30, 2016, <https://thinkprogress.org/the-american-transgender-population-is-larger-than-we-thought-it-was-ab83126f33a#nqrbplnws>; See also American Psychological Association, *Non-Binary Gender Identities*, 1 (2015), <https://www.apadivisions.org/division-44/resources/advocacy/non-binary-facts.pdf>. (“Most research has not included non-binary as a response category when inquiring about gender. From the limited research that has done this, it is estimated nonbinary individuals make up 25-35% or more of transgender populations.”); James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality, 7 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>. (Hereafter “NCTE 2015 Survey.”)

¹³ Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, Sciences, Mar./Apr. 1993, at 21.

¹⁴ The Associated Press, NYC to Add Nonbinary “X” Designation to Birth Certificates (September 14, 2018), <https://local12.com/news/nation-world/nyc-to-add-nonbinary-x-designation-to-birth-certificates>.

¹⁵ See National Center for Transgender Equality, *FAQs about Transgender People*, <http://www.transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

¹⁶ Appell, *supra* note 1, at 385.

¹⁷ The pronouns they, them and their are used throughout this paper to be inclusive of transitioning and gender nonconforming or nonbinary individuals.

B. Statistics

Transgender individuals are among the most targeted populations in the U.S., facing discrimination in nearly every aspect of life, including acquiring and sustaining employment.¹⁸ Aimee Stephens, who worked for six years at a funeral home in the Detroit area, sent her employer a letter explaining she was a transgender woman and that she intended to start dressing accordingly at work.¹⁹ After spending months drafting the letter to management at R&G and G&R Harris Funeral Homes, her boss, a devout Christian, told her the situation was “not going to work out,” and fired her.²⁰ Stephens’ case is not uncommon: of 27,715 respondents to the National Center for Transgender Equality (NCTE) U.S. Transgender Survey (“NCTE 2015 Survey”), 27% of those who held or applied for a job during that year — 19% of all respondents — reported being fired, denied a promotion, or not being hired for a job they applied for because of their gender identity or gender expression.²¹

Transgender individuals also reported “disturbing patterns of mistreatment and discrimination and startling disparities between transgender people and the U.S. population.”²² Respondents to the NCTE 2015 Survey noted a high degree of difficulty associated with changing gender markers on identity documents in many states. Approximately one-third (32%) of those individuals who had not yet updated the gender marker on their identity documents reported that cost was the barrier.²³ A staggering 68% of respondents to the NCTE 2015 Survey reported that none of their identity documents display the name and gender they prefer.²⁴ This is nothing new: of those respondents to the 2011 National Transgender Discrimination Survey (“NCTE 2011 Survey”) only 21% had been able to update all of their identity documents and records with their new gender, while 33% had updated none of their identity documents.²⁵

Compared to the general population, transgender individuals are three times more likely to have a household income of less than \$10,000.²⁶ Poverty, combined with the difficulties of spending a lifetime associated with the wrong gender, leads to a need to “triage” survival by income, housing, and healthcare; meaning fertility preservation and childbearing become lower

¹⁸ Laura Nixon, *The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 Wm. & Mary J. Women & L. 73, 76 (2013); *See also* Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol’y Rev. 201, 201 (2012).

¹⁹ Emanuella Grinberg, CNN, She came out as transgender and got fired. Now her case might become a test for LGBTQ rights before the supreme court (September 3, 2018) <https://www.cnn.com/2018/08/29/politics/harris-funeral-homes-lawsuit/index.html>.

²⁰ *Id.* Stephens was offered a severance package, which she declined.

²¹ The 2015 Survey, *supra* note 13, at 12.

²² James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality 2 (2016),

<http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

²³ *Id.*, at 7.

²⁴ *Ibid.*

²⁵ National Transgender Discrimination Survey, NCTE and the National LGBTQ Task Force, 2011, 5, *available at* <http://www.transequality.org/issues/national-transgender-discrimination-survey>.

²⁶ NCTE 2015 Survey, 140. The 2011 Survey indicated transgender individuals were four times more likely than the general U.S. population to have a household income of less than \$10,000.

priorities than maintaining a stable place to live.²⁷ The shelving of fertility preservation and childbearing is also attributable to the World Professional Association for Transgender Health (WPATH) Standards of Care.²⁸ The WPATH guidelines suggest a waiting period before an individual begins hormonal treatment, causing healthcare professionals to become “gatekeepers.” Medical professionals unfamiliar with transgender individuals or WPATH may even believe that “a transgender person’s expressed reproductive desire meant that he or she had insufficiently embraced his or her “new” gender identity.”²⁹

Transgender individuals may also refrain from seeking necessary healthcare because of a history — and/or fear — of mistreatment or discrimination.³⁰ Some transgender individuals begin hormone treatment on their own, without the supervision of a doctor, because of a desire to start the process as soon as possible. Julia, a transgender woman living in rural North Carolina, described her first experience with an endocrinologist as “humiliating.”³¹ She also felt patronized and berated because she had been self-medicating with hormones during the extensive five-month waiting period to get an appointment. Individuals like Julia — particularly transgender women — pose the risk of interfering with their own ability to procreate. These issues are unlike those faced by the majority of Americans and are only a fragment of the troubles transgender individuals regularly encounter. For many transgender individuals, these tribulations are too much to bear: the current suicide rate for transgender individuals is 40% — nearly nine times the attempted suicide rate in the general U.S. population (4.6%).³²

C. Historical Birth Registration

Historically, the use of birth registration was largely to prove identity for inheritance purposes, for taxation, or for military service. Registration can be traced as far back as the Xia Dynasty of Ancient China (2100-1600 BCE), when it was employed for the purposes of

²⁷ See Nixon, *supra* note 21, at 94; See also Nat’l Coal. for LGBT Health, *An Overview of U.S. Trans Health Priorities: A Report by the Eliminating Disparities Working Group* (Aug. 2004), available at <http://transequality.org/PDFs/HealthPriorities.pdf>.

²⁸ World Professional Association for Transgender Health Standards of Care, *Standards of Care*, http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351.

²⁹ Nixon, *supra* note 65, at 94; See also Marcus Jurema, *Fertility Preservation Options for the LGBT Community*, N.J. Fertility Ctr. (June 29, 2012), available at <http://www.ivfnj.com/fertility-preservation-options-for-the-lgbt-community-by-dr-marcus-jurema/> (discussing outdated belief that storing frozen sperm prior to transition would be a sign of doubt); P. De Sutter et al., *The Desire to Have Children and the Preservation of Fertility in Transsexual Women: A Survey* 6, *Int’l J. Transgenderism* (2002), available at http://www.iiav.nl/eazines/web/ijt/97-03/numbers/symposion/ijtvo06no03_02.htm (noting that sterilization was considered a ‘price to pay’ and sometimes thought to help in the transition).

³⁰ See Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2*, 72-74 (2011); See also Nixon, *supra* note 21, at 77.

³¹ Diana Tourjée, *For Trans People on Hormones, Doctors Can Be the Worst Part of the Treatment* (March 3, 2016) https://broadly.vice.com/en_us/article/8qwydx/for-trans-people-on-hormones-doctors-can-be-the-worst-part-of-the-treatment.

³² NCTE 2015 Survey, 5. The NCTE 2011 Survey indicated the suicide rate for transgender individuals was similar: 41%, compared to 1.6% for the general population.

conscription and social control.³³ In ancient Rome, registration was used to prove children's births and social statuses and certificates were issued in Latin during the Augustan era to indicate *Romanitas* — being Roman enough, whether by birth or otherwise — to prove citizenship.³⁴

Birth registration was first introduced in England in 1538 by Thomas Cromwell, an English lawyer and statesman, for “avoiding of sundry strifes and processes and contentions arising from age, lineal descent, title of inheritance, legitimation of bastardy, and for knowledge, whether any person is our subject or no.”³⁵ In 1652, a Law Reform Committee Act directed that there be a registry of births rather than baptisms, but in 1812, the registry regressed to a baptism registry.³⁶ Civil and secular birth registration returned in 1837 with the Acts for the Registration of Birth, Deaths and Marriages.³⁷

When the United States was founded, birth certificates did not exist, although some of the colonies kept birth records.³⁸ The concept of birth registration was first introduced in the colonies in the Commonwealth of Virginia in 1632 by the Grand Assembly as a way to promote individual rights, particularly regarding property.³⁹ Later that decade in 1639, Massachusetts began requiring the government to record births as an alternative to clergy recording baptisms.⁴⁰

D. Contemporary Birth Certificates

In 1900, the Bureau of the Census was charged by Congress with generating a national birth certificate.⁴¹ Although the U.S. Public Health Service was charged with the task in 1946, a national birth certificate still does not exist and each state issues its own version. There is, however, a recommended standard form, which has evolved over time, that requests varying levels of information.⁴²

In versions prior to 1949, the standard form allowed for legitimacy — the status of a child born to parents who are legally married to each other — to be reproduced on certified

³³ See Paula Gerber & Phoebe Irving Lindner, *Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?*, 18 N.Y.U. J. Legis. & Pub. Pol'y 225, 229 (2015).

³⁴ See *id.*; See also Fritz Schulz, *Roman Registers of Births and Birth Certificates Part II*, 33 J. ROMAN STUD. 55, 57, 63 (1943); Claudia I. Arno, How Romans Became “Roman”: Creating Identity in an Expanding World, diss. 2012, available at https://deepblue.lib.umich.edu/bitstream/handle/2027.42/91557/carno_1.pdf.

³⁵ Gerber & Lindner, *supra* note 39 at, 230-31; See also Simon Szreter, *The Right of Registration: Development, Identity Registration, and Social Security: A Historical Perspective*, 35 WORLD DEV. 67, 73 (2007).

³⁶ See Gerber & Linder, *supra* note 39, at 231; See also *Registration of Births*, 32 LANCET 305, 305-7 (1839).

³⁷ *Ibid.*

³⁸ Annette R. Appell, *Certifying Identity*, 42 Cap. U. L. Rev. 361, 364 (2014); See also U.S. Children's Bureau, U.S. Dep't of Labor, Monograph No. 1, *Birth Registration: An Aid in Protecting the Lives and Rights of Children* 6 n.2 (1913). For a look at the Massachusetts and Virginia Colonies, see James A. Weed, *Vital Statistics in the United States: Preparing for the Next Century*, 61 Population Index 527, 528 (1995). To get glimpse into the Connecticut and New Plymouth Colonies, see Watner, *supra* note 2, at 71.

³⁹ See Gerber & Linder, *supra* note 39, at 231-32; See also H.L. Brumberg, D. Dozor & S.G. Golombek, *History of the Birth Certificate: From Inception to the Future of Electronic Data*, 32 J. PERINATOLOGY 407 (2012).

⁴⁰ See Gerber & Linder, *supra* note 39, at 231-32.

⁴¹ See Brumberg, *supra* note 39.

⁴² See Ctrs. for Disease Control & Prevention, U.S. Standard Certificate of Live Birth (2003), available at <http://www.cdc.gov/nchs/data/dvs/birth11-03final-ACC.pdf>.

copies.⁴³ After 1949, the form’s question, “Legitimate: Yes, No” was moved to the “For Medical and Health Use Only” section because information on the child’s legitimacy was thought to be unnecessarily embarrassing to the child or its parents.⁴⁴ Similarly, in the 1968 revision, the parental race fields were relocated to the confidential, non-legal section, which allowed the government to procure the information without permitting the possibility of its dissemination.⁴⁵ Although issues with racial designations did not go away with the 1968 revision — a newborn’s race was determined inconsistently⁴⁶ — the revision panel decided “to discourage its use for personal and discriminatory identification” and to retain the information only for social and scientific purposes.⁴⁷

By pushing legitimacy and parental race “below the line” that separates legal identification from “Information for Administrative Use” and “Information for Medical and Health Purposes Only,” the U.S. government indicated what was nonessential information for the certified copies the individuals would receive.⁴⁸ In fact, the government itself admitted that the delineation indicated its desire to separate information which is required for legal purposes and that which is “deemed vital for medical and public health purposes” and should remain confidential.⁴⁹

The current standard birth certificate, the U.S. Standard Certificate of Live Birth (2003 Revised Version), contains a line of demarcation that separates names, location, and date of the birth from the education and race of the parents, information about the pregnancy, characteristics of labor, and data about the newborn.⁵⁰ As was done for race and legitimacy in previous versions, the current standard form still displays information that can be used by bigoted individuals to discriminate against the holder.

The current standard form also promotes heterosexual norms through its “reifying regulation of sexual identity, gender, race, family, and citizenship.”⁵¹ Although the form has been updated to allow for a temporary designation of “Unknown” for intersex babies, it is still

⁴³ See HALBERT L. DUNN, NAT’L OFFICE OF VITAL STATISTICS, VITAL STATISTICS OF THE UNITED STATES 1949, PART I. v-vi (1951), http://www.cdc.gov/nchs/data/vsus/VSUS_1949_1.pdf.

⁴⁴ In 1978 the legitimacy classification was entirely replaced by a record of the marital status of the child’s mother. See Anna James (AJ) Neuman Wipfler, *supra* note 19, at 491; See also S. Shapiro, *Development of Birth Registration and Birth Statistics in the United States*, 4 POPULATION STUD. 86, 108 fig. 4b (1950).

⁴⁵ See Robert D. Grove, U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, THE 1968 REVISION OF THE U.S. STANDARD CERTIFICATES 5 (1968), <http://stacks.cdc.gov/view/cdc/12478>.

⁴⁶ See Tashiro, Cathy J. “*Mixed but Not Matched: Multiracial People and the Organization of Health Knowledge*,” *The Sum of Our Parts*, ed., Teresa Williams-León and Cynthia L. Nakashima, 173 (2001). (“Until 1989, multiracial children of two parents of color were assigned the race of the father. (Reflecting hypodescent laws, biracial babies with a white parent were assigned the racial status of the nonwhite parent.)”

⁴⁷ *Ibid.*

⁴⁸ Wipfler, *supra* note 19, at 531.

⁴⁹ DIV. OF VITAL STATISTICS, NAT’L CTR. FOR HEALTH STATISTICS, REPORT OF THE PANEL TO EVALUATE THE U.S. STANDARD CERTIFICATES 49, 64 (2000), http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf.

⁵⁰ *Id.* The 2003 revision is the result of an extensive evaluation process, updated to reflect the changes made during the U.S. Department of Health and Human Services clearance process as well as changes recommended by the Data Analysis Committee.

⁵¹ Appell, *supra* note 1, at 390.

not suitable for members of the LGBTQ+ community because it is fixed and inflexible for the parents' genders. Requiring the information requested above the line to fit into heteronormative, binary boxes, does a disservice to transgender parents, who are already hindered from properly identifying themselves on their own identity documents.

Birth certificates can be helpful for issues of inheritance by providing an official record of lineage. In 1839, birth certificates were said to be “fully as necessary for the preservation of the titles and rights of individuals, to preserve a register of births, marriages, and deaths, as it is to preserve a register of deeds.”⁵² However, the more common use of a birth certificate is for an individual's legal proof of identity, which is essential for daily life. According to the U.S. Department of Health and Human Services, birth certificates issued in the U.S. are the key to opening many doors in our society: they can be used to obtain driver licenses, passports, Social Security cards and other documents.⁵³ Further, among U.S. citizens, birth certificates are used more commonly than passports because only 28% of the U.S. population has a passport.⁵⁴ An accurate birth certificate is therefore essential for all individuals — transgender or not.

E. Transgender Individuals and Birth Certificates

Transgender individuals face administrative difficulties in attempting to change their own birth certificates, if it is even an option at all for them. Depending on a person's state of birth, changing a gender designation on a birth certificate is either only possible after undergoing Gender Confirmation Surgery (GCS), or not at all.⁵⁵ Those who are unable to change their birth certificates because of their birth state's laws may face problems, such as being denied entrance into sex-segregated schools or sex-segregated housing, or denial of employment or public benefits. An inability to change one's birth certificate poses a risk of having their transgender history revealed, which can lead to discrimination and physical harm.⁵⁶

The ability for transgender individuals to change their birth certificates is unpredictable and extremely varied, depending on the jurisdiction. In Kansas, an individual simply cannot change their sex on their own birth certificate.⁵⁷ In Alabama, an individual can only obtain an

⁵² Gerber & Lindner, *supra* note 39, at 235; See also Registration of Births, 32 LANCET 305, 305-06 (1839).

⁵³ Gerber & Lindner, *supra* note 39, at 235; See also OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTH CERTIFICATE FRAUD8-10 (1988), <http://oig.hhs.gov/oei/reports/oai-02-86-00001.pdf> at i.

⁵⁴ See Mottet, *supra* note 6, at 373; See also U.S. Gov't Accountability Office, GAO-08-891, State Department: Comprehensive Strategy Needed to Improve Passport Operations 11 (2008), *available at* <http://www.gao.gov/new.items/d08891.pdf>.

⁵⁵ Lambda Legal, Sources of Authority to Amend Sex Designation on Birth Certificates, <http://www.lambdalegal.org/publications/sources-of-authority-to-amend> (last updated September 17, 2018). See *e.g. In re Estate of Gardiner*, 29 Kan. App. 2d 92 (2001). (interpreting K.S.A. § 65-2422c as only permitting “minor changes” to birth certificates and stating that this does not encompass correction of sex on birth certificates of individuals who have changed their sex by surgical procedure thus invalidating K.A.R. § 28-17-20 (b)(1)(A)(i)).

⁵⁶ Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373, 392 (2013).

⁵⁷ See generally *In re Estate of Gardiner*, *supra* note 5.

amended birth certificate by submitting “a certified copy of an order of a court of competent jurisdiction indicating that the ‘sex ... has been changed by surgical procedure and that the name of the individual has been changed.’”⁵⁸ On the opposite end of the spectrum is California, where the Department of Public Health recently updated its policy to allow transgender individuals to obtain a new birth certificate reflecting a gender of female, male, non-binary or (—) without medical provider attestation.⁵⁹

Information on every state’s birth certificate amendment procedures is easily found online.⁶⁰ Conversely, information about how transgender individuals will be listed on their children’s birth certificates is much less obtainable. This is reminiscent of the complicated ways in which states have attempted to deal with same-sex parents. Regardless of whether any parents involved in the matter are transgender, some states have not caught up on how to list same-sex couples on birth certificates. Just as some states after the *Obergefell v. Hodges* decision continued to proffer marriage licenses listing only “Bride” and “Groom,” many states provide only “Mother” and “Father” as options on their certificates of live birth. If the reason for not providing for two fathers, two mothers, or even only one father is outdated software, investments must be made to upgrade systems to better serve all citizens, regardless of their gender identities.

For those whose birth certificates do not accurately represent their parents, embarrassment and bureaucratic barriers are likely to be experienced. In these cases, states have done a disservice to their citizens. Further, some information required by the state at the time of a child’s birth is not recorded on the birth certificate or registration, meaning it is not available for the child, should they desire it. Family history is also not provided to children or parents via birth registration or certificates of live birth. Children and parents are unable to view much more than the time and place specifics of the birth on their birth certificates. The personal information the child generally will see — and what any school, bank, or Transportation Security Administration (TSA) agent who requests the birth certificate will see — is who the “father” and “mother” were. This heteronormative system does not work for gay and lesbian parents, let alone transgender individuals or couples in which at least one parent is transgender. If parental gender designations are going to be reproduced on children’s birth certificates, the better system is one in which parents can self-identify their genders.

⁵⁸ Alabama Public Health, Amendment Package for Alabama Birth and Death Certificates (Revised June 9, 2010) <http://adph.org/vitalrecords/assets/NewHS33.pdf>; See also Alabama Code § 22-9A-19, 22-9A-21.

⁵⁹ California Department of Public Health, Obtaining a New Birth Certificate After Sex Change (Revised January 2018), [https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/ADA_Sex%20Change%20\(01-18\).pdf](https://www.cdph.ca.gov/Programs/CHSI/CDPH%20Document%20Library/ADA_Sex%20Change%20(01-18).pdf).

⁶⁰ National Center for Transgender Equality, ID Documents Center (Last Updated August 2018), <https://transequality.org/documents>.

II. STATE INTERESTS

A. *The State Interest in Sex and Gender*

Individuals are limited in their ability to identify their gender by the state in which they live or were born. The state maintains the authority to define an individual's sex, "regardless of whether that sex conforms to the person's own gender identity."⁶¹ Despite an individual's identification with a gender other than the one assigned to them at birth, the state decides "how and when that sex is legitimately tied to the person, thereby reifying sex distinctions and usurping individual authority over one's own gender identity."⁶² Depending on the state in which a transgender individual was born or resides, they may be unable to change their birth certificate or driver license, which restricts their ability to obtain housing, employment, or public benefits.

A transgender individual who is assigned one gender at birth, but does not identify with that gender, and later desires to change their legal documents to match their gender identity, must turn to the state where they were born. According to Annette Appell,⁶³ "the plurality of definitions among the states regarding standards for switching one's official sexual identity undermines the notion of rigid sexual categories, which the birth certificate maintains by offering just two categories and allowing only one to be displayed."⁶⁴ Transgender individuals regularly face these types of procedural inconsistencies and the processes they must follow are burdensome and unpredictable.

The process to change gender designations on government identification documents is a product of the ubiquity of sex "as a mandatory field on forms required for everything from college applications to public assistance."⁶⁵ According to AJ Wipfler,⁶⁶ this reflects not only the "natural, pre-existing importance of sex, but rather continues to reproduce sex as a fundamental ordering characteristic."⁶⁷ By requiring binary sex designation across most forms of identification, governmental bodies systematically oppress transgender individuals.⁶⁸ Transgender individuals like Zachary, a young black Army veteran who was kicked out of his home and whose identity documents did not match his gender when he got his first job,⁶⁹ are unjustly burdened by binary classifications.

⁶¹ Dan McCrue, *State Decides Hermaphrodite Baby's Gender with Irreversible Sex-Assignment Surgery*, AlterNet, <http://www.alternet.org/state-decides-hermaphrodite-babys-gender-irreversible-sex-assignment-surgery>.

⁶² Appell, *supra* note 1, at 390.

⁶³ Dr. Annette Appell is a professor and former Associate Dean for Clinical Affairs at Washington University Law School in St. Louis. She is also an expert on identity and birth certificates.

⁶⁴ *Ibid.*

⁶⁵ Wipfler, *supra* note 11, at 505.

⁶⁶ AJ Wipfler is a professor and expert on gender identity and the law.

⁶⁷ *Ibid.*; See also Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* 145, 151 (2011).

⁶⁸ See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 748 (2008).

⁶⁹ Transgender Law Center, *Trans and gender nonconforming people speak out: stories of discrimination*, <https://transgenderlawcenter.org/legal/discrimination-stories> (last visited November 30, 2018).

If gender is “not very helpful in confirming a person’s identity,”⁷⁰ it is incongruous that states and the federal government routinely require it to be designated. Numerous administrative systems “have acknowledged the instability or at least the diversity of gender;” and yet continue to presume its necessity and utility as a data point capable of accurate classification.⁷¹ Continuing to require individuals to fit into binary categories oppresses transgender individuals in ways that do not affect cisgender individuals.

B. Data on Newborns and Their Parents

Federal and state governments undoubtedly have an interest in collecting details about the birth of a child. The government gathers information that can be crucial “for implementing an accurate and precise epidemiological intelligence system.”⁷² Additionally, the government needs vital statistics to inform social welfare and economic policies. According to the World Health Organization, “reliable vital statistics on the numbers and distribution of births ... are needed to inform social and economic planning across both public and private sectors. These sectors include health, education, labour and employment, urban planning, finance and economic development, industry and trade, social insurance, environment and population.”⁷³ Considering these uses, gathering vital statistics from the gestational parent and child(ren), unquestionably serves the important governmental purpose of informing various social policies. However, even though the state has the role of collecting vital information for social programs and health data, gathering information that does not accurately reflect families’ compositions does not advance this goal.

III. INDIVIDUAL INTERESTS

Birth certificates create and protect rights and responsibilities for adults and children, offering “proof of a life and the rights that flow from that life.”⁷⁴ As has been stated, “the birth certificate certifies and proves parenthood: the person or persons on the birth certificate are the child’s legal parents.”⁷⁵ By codifying the parent-child relationship as the law constructs it, a range of protections, freedoms, benefits, and obligations are created for both the parent(s) and the child.⁷⁶ Birth certificates may also be required to prove age for entrance into school or

⁷⁰ James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 370 (2009).

⁷¹ Wipfler, *supra* note 19, at 506.

⁷² Simon Szreter, *The Right of Registration: Development, Identity Registration, and Social Security: A Historical Perspective*, 35 WORLD DEV. 67, 73 (2007) at 79.

⁷³ Gerber & Lindner, *supra* note 39, at 234; *See also* WORLD HEALTH ORG., STRENGTHENING CIVIL REGISTRATION AND VITAL STATISTICS FOR BIRTHS, DEATHS AND CAUSES OF DEATH: RESOURCE KIT 26-27 (2013).

⁷⁴ Appell, *supra* note 1, at 391.

⁷⁵ Appell, *supra* note 1, at 396; *See also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 Stan. J. C.R. & C.L. 201, 229 (2009).

⁷⁶ *See* Appell, *supra* note 1, at 396-97.

athletics, to permit work, for the right to drive, vote, or marry, or for receiving Social Security benefits.⁷⁷ Parents have an interest in ensuring their child can establish citizenship, acquire a passport, or be cleared for Military service. A child who has at least one transgender parent and holds an inaccurate birth certificate may feel embarrassed when questioned about their parentage. When schools request birth certificates to confirm age or citizenship of children, or when banks require birth certificates for a minor child’s new account, those with inaccurate documents face complications worse than embarrassment.

A. Constitutional Considerations

i. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying any person within their jurisdiction “the equal protection of the laws,” which essentially requires states to govern impartially.⁷⁸ Treating similarly situated individuals — those who are alike in ways that are relevant concerning a particular issue — differently denies them equal protection of the laws and can be an equal protection problem for a governmental body. Courts have recently considered whether a state’s different treatment of similarly situated individuals constitutes an equal protection violation. Although not using the precise term “similarly situated,” *Perry v. Schwarzenegger* concluded that same-sex and opposite-sex couples are “situated identically”⁷⁹ and that denying same-sex couples the right to marry, when opposite-sex couples could freely marry, was a violation of equal protection. When transgender individuals are denied the right to accurately identify themselves on their own child’s birth certificate, where cisgender individuals are not prevented, they are being treated differently in violation of equal protection laws.

As is discussed below, states that offer a “Parent/Parent” option for couples whose identities do not fit the “Mother/Father” binary provide more comparable treatment between transgender and cisgender parents; however, they still withhold gender-designating parental terms from same-sex parents. By denying same-sex couples the option to choose a “Mother/Mother” birth certificate, a state draws a distinction between individuals solely on a difference that is irrelevant to any legitimate governmental purpose.

⁷⁷ See Birth Registration, Idaho Health and Welfare, 1-2, <http://healthandwelfare.idaho.gov/Portals/0/Health/Vital%20Records/BirthRegistration.pdf>.

⁷⁸ U.S. Const. amend. XIV, § 1.

⁷⁹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) (“[r]elative gender composition aside, same-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage under California law”).

ii. *Privacy and Family Autonomy*

The Supreme Court has long recognized privacy as a fundamental right.⁸⁰ In 1965, the Supreme Court acknowledged that “the First Amendment has a penumbra where privacy is protected from governmental intrusion” and that marriage is a “relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”⁸¹ Besides the right to marital privacy, transgender individuals are entitled to privacy regarding their transgender status. NCTE Deputy Executive Director Lisa Mottet proposes, “[i]f a governmental entity does not protect the privacy of a transgender person and reveals his or her status — either through issuing visibly amended birth certificates or by providing access to records that indicate a person is transgender — it may be in violation of the right to privacy guaranteed by the U.S. Constitution.”⁸² Mottet clarifies that this right to privacy “can be characterized as a right to ‘confidentiality.’”⁸³

Transgender parents can easily have their rights to privacy (confidentiality) violated when they are required to furnish a school, sports team, or bank with their child’s birth certificate. Harley Viesco, who uses they/them pronouns, was shocked to see “father” next to their name on their child’s birth certificate.⁸⁴ They felt that coming out and changing their legal name and gender designation was hard enough; then being denied the same legal recognition as cisgender parents was discouraging. If Viesco’s child must furnish their birth certificate at school, Viesco’s own privacy will be violated.

While becoming parents, transgender individuals may also have their rights to marital privacy violated when forced to fill out a birth certificate worksheet that does not comport with their gender identities. A state’s birth registration and birth certificate policies may also contravene a fundamental right that stems from family autonomy. The term “family autonomy” can refer to the assumption that “a family unit, however defined, should be governed by the private decisions of some or all of its members.”⁸⁵ Transgender individuals must be allowed to make decisions for themselves and their families without being constrained by the government.

Some countries require parents traveling with minor children to provide birth certificates in addition to passports.⁸⁶ Transgender parents whose children’s birth certificates do not match their gender identities may thus fear traveling because of the potential for embarrassment or obstruction when required to provide an inaccurate birth certificate to prove parentage. In 2007, Mickey Smith and Oren Adar, a same-sex couple, adopted their Louisiana-born child in New

⁸⁰ See e.g. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (holding that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy).

⁸¹ *Id.* at 1681-82.

⁸² Mottet, *supra* note 6, at 373.

⁸³ *Id.* (quoting *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)).

⁸⁴ Verity Stevenson, Trans parents call for recognition on their children’s birth certificates (August 5, 2018), <https://www.cbc.ca/news/canada/montreal/trans-parents-birth-certificate-label-1.4775068>.

⁸⁵ Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 Marq. L. Rev. 569, 570 (1992).

⁸⁶ See Davoodi, *supra* note 76, at 708; See also Brief of Amici Curiae Professors of Law Joan Heifetz Hollinger, Courtney G. Joslin, Rhonda Wasserman, et al. in Support of Petitioners at 3, *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011).

York.⁸⁷ The Louisiana state registrar refused to issue a new birth certificate for their child, because Louisiana did not recognize adoption by unmarried parents. Mickey had been unable to enroll his son in school and was stopped at the airport for proof of the parents' relationship with the child.⁸⁸ The couple sued the State Registrar of Louisiana's Office of Vital Records and Statistics, seeking injunctive relief and declaratory judgment for the Registrar's refusal to enforce their New York adoption decree and issue an amended birth certificate. The district court found for the couple and the Fifth Circuit affirmed the district court's decision that the Registrar's refusal violated the Full Faith and Credit Clause. However, in rehearing en banc, the Fifth Circuit Court of Appeals vacated its previous decision, reasoning that "birth certificates are merely 'identity documents that *evidence* ... the existing parent-child relationships, but do not create them."⁸⁹ The Supreme Court denied Adar and Smith's petition for certiorari, so the couple was unable to obtain an accurate birth certificate for their child.⁹⁰

Parents without accurate birth certificates may have extra reason to dread medical emergencies: "doctors may delay a child's emergency treatment while trying to figure out whether a parent is actually a parent with authority to consent."⁹¹ Beyond being given unauthorized treatment or having treatment delayed, a child may feel confusion and fear if a parent is not allowed to accompany them in an ambulance ride or join them in the hospital room.⁹² This is unfair and ultimately dangerous for the child.

IV. STATE COMPARISONS

Three states serve as case studies regarding the varying policies and procedures of birth certificates for transgender parents. Mississippi, Oregon, and California offer different instructions to parents and hospitals regarding how birth certificates should be completed, including how to identify parents and who the parents may be. Unfortunately, for most parents, it is nearly impossible to choose a specific state or city in which to bear a child, even if attempts are made prior to labor to travel to, and remain in, a certain progressive jurisdiction.

States retain the power to collect data on who becomes a parent and how they have become a parent. Although each state provides a different account for precisely what its interests in gathering data on parents and children are, the rationales are generally the same. California law differs as it gives some of the power back to the parents. By allowing parents to choose how to identify themselves, California shows respect to parents in a way other states do not.

⁸⁷ See *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (denied cert); See also Shohreh Davoodi, *More Than A Piece of Paper: Same-Sex Parents and Their Adopted Children Are Entitled to Equal Protection in the Realm of Birth Certificates*, 90 Chi.-Kent L. Rev. 703 (2015).

⁸⁸ See *id.*

⁸⁹ *Id.* at 159.

⁹⁰ *Adar v. Smith*, 132 S. Ct. 400 (2011).

⁹¹ Camilla Taylor, *Accurate Birth Certificates Make Families Less Vulnerable*, LAMBDA LEGAL (Dec. 9, 2010), http://www.lambdalegal.org/news/oc_201012_accurate-birth-certificates.

⁹² Davoodi, *supra* note 76, at 722.

A. Mississippi

The Mississippi birth certificate worksheet provides general information about the interest of the state and the assistance required from hospital staff. Materially, the state regulations require that the husband must be listed on the certificate as the child's father if the mother was married at the time of birth, conception, or any time in between, and that the child's surname is that of the husband of the woman giving birth.⁹³

Mississippi citizens who are transgender face a large hurdle of being unable to amend their own birth certificates: Mississippi will only amend a birth certificate upon receipt of “a certified court order, a medical statement that attests to the reassignment, and the required fee.”⁹⁴ Further, the birth certificate will be amended regarding sex as a “marginal notation,” meaning the birth certificate will display both names — assuming the individual has changed their name — and both genders.⁹⁵

Mississippi only offers “Mother” and “Father” fields on its birth certificates, preventing same-sex couples and many transgender parents from properly identifying themselves. A transgender parent whose cisgender wife gives birth may be one of the biological parents, but could only be listed as “Father,” not “Mother” on their child's birth certificate. A transgender parent who was born in Mississippi who possesses an amended birth certificate that displays two genders may be listed incorrectly on their child's birth certificate, no matter where the child is born. This is a problem no cisgender parent would have to face.

B. Oregon

Parents of children born in the state of Oregon may request to receive either a “Mother/Father” or a “Parent/Parent” formatted birth certificate. Offering a “Parent/Parent” form serves the state interest as well as the “Mother/Father” option, because the birth parent is listed first, and information about the pregnancy is gathered from that individual. Still, there are downsides for some parents. Oregon does not offer a “Mother/Mother” or “Father/Father” format; same-sex parents must choose the “Parent/Parent” form, meaning they are treated differently than opposite-sex couples. Although this option is better than Mississippi's birth certificate language, this gender designator constraint is not imposed on individuals in same-sex relationships in Oregon. Further, transgender individuals who have already transitioned and are in a same-sex relationship would likely prefer a “Mother/Mother” or “Father/Father” format to

⁹³ Handbook on Registration and Reporting of Births, Mississippi Department of Health, 5-7 (2013), http://www.msdh.state.ms.us/phs/Handbook%20on%20Registration%20and%20Reporting%20of%20Births_20130219.pdf.

⁹⁴ Miss. Admin. Code 15-5-85: 106.06.

⁹⁵ *Id.* (“A name change, which is not a correction to the birth facts shall, upon receipt of a certified court order and required fee, be added to the birth certificate as a marginal notation of the fact. The birth name shall not be eradicated and the name changed shall not be put in the birth name place. The face of the certificate shall be stamped to indicate the legal authority under which the name was changed and the date of the change. Change of gender by court order Gender reassignment shall be added to the birth certificate as a marginal notation, upon receipt of a certified court order, a medical statement that attests to the reassignment, and the required fee.”)

the “Parent/Parent” option to most accurately express their parental relationships and gender identities.

C. California

Birth certificates supplied by California are the most inclusive and equitable for transgender parents in the United States.⁹⁶ The California Health and Safety Code, updated January 1, 2016, states that certificates of live birth must

(1) “Contain two lines that both read “Name of Parent.”

(2) Contain, next to each parent's name, three checkboxes to choose from with the following options to describe the parent's relationship to the child:

(A) Mother.

(B) Father.

(C) Parent.”⁹⁷

The code does not discriminate against parents who did not transition prior to having children. Parents of children born before the code took effect are able to retroactively change their children’s birth certificates to appropriately identify their genders.⁹⁸

By allowing both the gestational parent and the non-gestational parent to provide their sexes, the state contemplates that a male could give birth and the second parent could be of either sex. It also allows for a single male parent to give birth. This is the most progressive birth registration and birth certificate form and provides a good model for other states and even the federal model form.

V. DISCUSSION

Transgender individuals who live in more progressive states like Oregon and California tend to enjoy greater protections than those residing in other states.⁹⁹ However, as transgender individuals tend to have spent much of their lives presenting in the wrong gender role, they are acutely sensitive to gender designations, meaning even some individuals in Oregon are marginalized. By denying a transgender man or woman the title of “Father” or “Mother” on their child’s birth certificate, the state does transgender individuals a disservice. By offering “Mother/Mother” or “Father/Father” options on birth certificates, states would oblige the

⁹⁶ The New York City model is also worth noting, as it asks parents whether the gestational parent is female or male. The form requests that the “Mother/Parent (Woman giving birth)” provide their name, date of birth and sex. New York City Department of Health and Mental Hygiene Bureau of Vital Statistics, 2, *available at* <http://www1.nyc.gov/assets/doh/downloads/pdf/vs/VR203-web.pdf>. *See also* Leonard Greene, *Birth certificates ask parents if ‘woman giving birth’ is female*, New York Post, Jan. 30, 2015, *available at* <http://nypost.com/2015/01/30/birth-certificates-ask-parents-if-woman-giving-birth-is-female/>.

⁹⁷ Cal. Health & Safety Code § 102425.1(a).

⁹⁸ *Id.*, at (b)(2).

⁹⁹ *See e.g.* Transgender Justice, Basic Rights Oregon, 2016, at 4, *available at* <http://www.basicrights.org/wp-content/uploads/2015/09/2017-Transgender-Justice-Fact-Sheet.pdf>.

LGBTQ+ community — specifically homosexual transgender individuals — without undermining their own interests. Allowing designations to be retroactively changed, the way California now does, would treat transgender parents more like cisgender parents, without undermining its own interests.

Transgender men who give birth may not enjoy the experience and not want to be labeled “Mother,”¹⁰⁰ meaning this label can be not only inaccurate, but offensive. Rafi, a transgender man who gave birth to his daughter in Colorado, initially had complications because the hospital was unable to use its software to enter his name as the “father” without first entering the name of a mother.¹⁰¹ Eventually, Rafi was able to amend his daughter’s birth certificate to reflect him as her father and sole parent.¹⁰²

If Rafi had given birth in California, he would have been able to express the truth of his family from the moment of his daughter’s birth. It is improbable that the state of Colorado was any better served than California would have been by initially designating Rafi the mother of his daughter. In either case, the government obtained the same information about Rafi’s pregnancy and labor, such as his race and whether he smoked cigarettes during pregnancy. In this way, California provides the most progressive model without failing to acquire important statistical information about the parents.

Although the United States has developed a Standard Certificate form, it only serves as a voluntary model, not a mandate. It is clear from the three jurisdictions surveyed above that states vary in their emulation of the standard form. An unmarried same-sex couple in one state may easily find themselves forced into welcoming their child into the world in another state late in pregnancy. Likewise, a single transgender male who resides in a progressive locale may be in a more restrictive locale when he goes into labor. Both the couple and the single transgender parent would be subject to the laws of the respective jurisdictions in which they give birth. Unfortunately, in both situations, the parents would be traveling home with an inaccurate and incomplete birth certificate for their child.

Besides being legally inconsistent for parents, different jurisdictions offering different birth certificate forms results in administrative variations. If transgender parents with children born in each of the three states surveyed were to enroll their children in the same school, the administrative offices could be processing birth certificates that list a same-sex female couple as “Mother” and “Father,” a same-sex female couple as “Parent” and “Parent,” a single male parent listed as “Father,” and a single male parent listed as “Mother.” Because each of the children was born in a different jurisdiction, the birth certificate worksheet options vary, and the resulting designations on the forms are all different. These children’s teachers would also know the

¹⁰⁰ See e.g. Scott Halliday, Transgender parents, registration of children on birth and human rights (June 28, 2018) https://www.familylaw.co.uk/news_and_comment/transgender-parents-registration-of-children-on-birth-and-human-rights#.XAH22BNKgWo. (“The parent had given birth to the child, but he asserted that he did not want, nor would it be accurate, for him to be recorded as the child’s mother.”)

¹⁰¹ Gabrielle Birkner, *Jewish transgender man gives birth and embraces life as a single ‘abba’*, Jewish Telegraphic Agency, Jan. 22, 2016, available at <http://www.jta.org/2016/01/22/news-opinion/united-states/jewish-transgender-man-gives-birth-and-embraces-life-as-a-single-abba>.

¹⁰² *Id.*

parents' transgender backgrounds, compromising privacy, and potentially leading to different treatment of the children.

An opposite-sex married couple composed of two transgender individuals — the father as the gestational parent, with both individuals contributing their genetic material to the child — could in Oregon choose the “Parent/Parent” model, but not the more accurate “Mother/Father” model they could select in California. In a more restrictive state, such as Mississippi, both parents would likely be misgendered on their child’s birth certificate. The argument for legal consistency is more than a case for administrative uniformity; legal consistency provides individuals with predictability and simplicity. It is only fair and just to offer similarly situated couples comparable birth certificate forms. States generally ask the same medical and health questions of the parents, so it not unreasonable for them to offer the same parental gender designation options.

VI. PROPOSED SOLUTIONS

A. Moving Gendered Information below the Line

Some scholars and advocates call for a new model U.S. Standard Certificate, to move the baby’s gender “below the line.”¹⁰³ If the next revision of the Standard Certificate includes the sex designation for the baby in the non-identifying medical and statistical section, “where fields like parents’ marital status and race have migrated,”¹⁰⁴ perhaps designations identifying a parent’s sex or gender could also be moved. A state’s interest in public health administration and information-gathering can be met through acquiring gendered information “below the line,” without violating the parents’ constitutional rights to privacy. This also avoids an equal protection violation by not treating transgender parents any differently — revealing their transgender statuses (medical history) — than cisgender parents.

B. Giving All Parents the Same Title

A simple way to “solve” the problem of the inaccurate birth certificates that result from improper parental gender designations is to give every parent in the United States — whether male, female, gender nonbinary, gestational parent or not — the title of “Parent.” As previously discussed, this may not be the most considerate way to treat transgender individuals who are particularly sensitive to gender classifications and would prefer to select their own gender designation to most accurately represent their gender identity. However, it would treat every parent the same, regardless of gender identity.

¹⁰³ See Wipfler, *supra* note 19, at 532; See also Elizabeth Reilly, RadicalTweak & Relocating the Power to Assign Sex, 12 CARDOZO J. L. & GENDER 297, 297 (2005).

¹⁰⁴ See Wipfler, *supra* note 19, at 532-33.

C. Allowing Parents to Choose

Parents in California are provided the fairest option: to designate their own labels on their children's birth certificates. All birth certificate forms in the U.S. could offer three possible options for parents: Mother, Father, and Parent, as California does. Each parent involved in the birth could choose their own designation, allowing same-sex, opposite-sex, married, unmarried, and single parents to decide how to define themselves and their families.

The ideal solution is this: a dynamic form, proffered by the U.S. federal government to the states and potentially mandated for consistency reasons. With the widespread use of electronic forms, the form could be easily completed on a computer with drop-down menus in the "Parental Designation" fields. Medical staff would need training, as they do for any new policy or procedure, and they would be relieved of the uncomfortable task of questioning parents' genders by needing only to ask which designation each parent desires.

California has solved the problem for transgender parents who have not transitioned at the time of their children's births and who need to retroactively change their designations. Currently, even an Oregonian with an ostensibly male name who, along with their cisgender female wife, welcomes a child into the world might choose the "Mother/Father" form option. Post-transition, this person could likely go by a female name and have their identifying documents reflect it. When proof of parentage is required, the transgender parent will have their transgender history revealed. Even if these parents had chosen the "Parent/Parent" option, the transgender parent may still be outed by her "old" name, despite the designation of "Parent." To solve this problem, California has chosen to allow parents to amend their children's birth certificates to reflect their new gender identities. This could be done in conjunction with an individual's change of their own birth certificate and other documents during transition.

CONCLUSION

The various fields on the U.S. Standard Certificate have changed at least a dozen times since its inception in 1900, revealing that "[t]he birth certificate is a living organism that matures and evolves."¹⁰⁵ Revisions are made "to reflect changing social conditions and user demands for data,"¹⁰⁶ which demonstrates that changes in social mores influence what data is collected and whether it is reproduced.

Better documentation alone is, of course, insufficient. Medical staff and government officials involved with birth registration and birth certificates must be aware of — and sensitive to — the issues for transgender parents. Transgender men who become pregnant, for example, can feel a "traumatizing disconnect" between their masculinity and the female attributes of their

¹⁰⁵ Wipfler, *supra* note 19, at 530 (quoting Brumberg, *supra* note 10, at 410).

¹⁰⁶ Ctrs. for Disease Control & Prevention, Nat'l Ctr. for Health Statistics, The 1989 Revision of the U.S. Standard Certificates and Reports 18 tbl.1 (1991), *available at* http://www.cdc.gov/nchs/data/series/sr_04/sr04_028.pdf.

bodies.¹⁰⁷ Transgender women, although potentially biological parents to their children, can be horrified when labeled as “Father” on a birth certificate. Same-sex parents are beginning to be treated more fairly by hospitals and states with respect to their children’s birth certificates. Transgender individuals are also deserving of more courteous and fair treatment.

Gathering information about transgender parents serves the state interest of advancing public health and social welfare policies. Transgender individuals will be better served when the government has more information about their numbers and needs. The question is whether gendered information about transgender parents needs to be reproduced on their children’s birth certificates: It does not. It would be best to allow the parents to choose how to identify themselves, as California does. A dynamic and modifiable form is thus the most appropriate solution to satisfy all interests involved.

¹⁰⁷ Jessi Hempel, Time, “My Brother’s Pregnancy and the Making of a New American Family” (September 12, 2016), <http://time.com/4475634/trans-man-pregnancy-evan/>.