WHAT COUNTS AS LEGAL SEX/GENDER AND WHO DECIDES?

Policy analysis of US legal gender marker changes on identification documents

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BACKGROUND

- Genetic determinism the use of genetics to explain behavioral and health outcomes – functions as a limiting factor to transgender and nonbinary people's healthcare
- Frequently used as justification for eugenic practices (sterilization, experimental medical treatments)

A Glimpse of Eugenics History and Queer People

- Family studies in the 1900s labeled transgender people as "feeble-minded"
- Trans people were involuntarily committed after crime of cross-dressing and consequent insanity verdicts
- Therapists at the American Institute of Family Relations measured/enforced strict gender norms using the Terman-Mills Male-Female Test
- Proposed "treatments" for "transgenderism" included experimental hormonal treatments, electric shock therapy, sterilization, and castration
- State laws regulating legal gender marker changes multiplying at fast pace, mostly limiting access through extrapolating biological definitions of sex to define gender

OBJECTIVE

Investigate how the language used in state-level legal gender marker change policies calls on the master discourses of eugenics, medicalization, and genetic determinism to limit trans individuals' reproductive freedom.

METHODOLOGY

- Analysis of policies collated by the Movement Advancement Project (MAP) and the National Center for Transgender Equality, state government websites, and/or Westlaw.
- Data collection occurred between January and February of 2023. The dataset was reviewed and updated in March of 2024.
- State policies were rated on 4 measures, with total scores ranging from 0 - 3.5 (least to most restrictive)
- 1. whether the policy references "genetics" or "chromosomes"
- 2. if the state requires provider verification surgical procedure or other "appropriate treatment"
- 3. if the state requires a surgical procedure
- 4. if there is an "X" gender option

Definitions of sex reduce transgender people to their biology and a medicalized model of transgender identity limits individuals' capacity to have children.

State-Level US Gender Marker Policy Assessment

MONTANA Most restrictive Least restrictive Score: 2 Average: 1.46 The sex of a registrant as cited on a certificate may be corrected only if: [...] the sex of the individual was misidentified on the original certificate and the department receives a correction affidavit and supporting documents, including a copy of the results of chromosomal, molecular, karyotypic, DNA, or genetic testing that identify the sex of the individual. **Codified Policy** LOUISIANA

LOUISIANA Score: 3.5

The state registrar may prepare a new certificate with a proper sex designation [...] when the parent [...] requests a new birth certificate and presents competent medical evidence in the form of affidavits from two or more physicians certifying and establishing by medical diagnosis that the original erroneous sex designation was due to a hereditary genetic defect or hormone deficiency, including but not limited to congenital adrenal hyperplasia or a related condition, and not due to sexual reassignment or major corrective surgery.

State discusses genetics in gender marker policies

FLORIDA
Score: 2.5

The term "gender" in s. 322.08, F.S., does not refer to a person's internal sense of his or her gender role or identification, but has historically and commonly been understood as a synonym for "sex," which is determined by innate and immutable biological and genetic characteristics.

DMV Memo

MICHIGAN Score: 1

Court Case

It is not clear why Michigan's law for changing the sex designation on birth certificates, when used for identification purposes, would require a transgender person to undergo invasive, often irreversible, and expensive surgery.

Not only does it impose a unique burden on a transgender person, depending on the nature of the surgery required by section 2831(c), it may well result in that person's sterilization. No state interest supports such an unnecessary burden, as the laws of many other states confirm.

ALABAMA Score: 2

Court Case

The injuries caused by Policy Order 63 are severe. For individuals born in Alabama or previously licensed here whose gender identity differs from the sex they were assigned at birth, the policy requires surgery, which **results in permanent infertility in "almost all cases,"** to be able to obtain a license with a sex designation that matches their gender. Even for those who want it, this surgery may be unaffordable.

- Physicians and the state are both designated as the ultimate authority in defining someone's gender, rendering trans individuals invisible and without autonomy to determine their identity based on lived experience
- Other anti-trans legislation utilizes biological definitions of sex to limit trans people's' access to healthcare and public spaces
- Globally, policy that require sterilization for legal gender marker requirement are being dismissed

Richardson, S. S. (2022). Sex contextualism. Philosophy, Theory, and Practice in Biology, 14, 2.

DISCUSSION

The translation of genetics into public policy poses **an inherent risk to transgender people** by creating additional pathways for oppression and a narrow lens of the trans experience.

Codified Policy

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REFERENCES:

Dusic, E. J., Powers, L. N., Candadai, S. V. C., & Fullerton, S. M. (2024). Policy and laboratory practice: How quality control procedures for genetic testing perpetuate biological essentialism and discrimination against transgender, gender diverse, and intersex people. *Journal of Genetic Counseling*. https://doi.org/10.1002/jgc4.1925
Lowik, A. J. (2018). Reproducing eugenics, reproducing while trans: The state sterilization of trans people. Journal of GLBT Family Studies, 14(5), 425–445
Ordover, N. (2003). American eugenics. University of Minnesota Press.
Rajkovic, A., Cirino, A. L., Berro, T., Koeller, D. R., & Zayhowski, K. (2022). Transgender and gender-diverse (TGD) individuals' perspectives on research seeking genetic variants associated with TGD identities: A qualitative study. Journal of Community Genetics, 13(1), 31–48.
Restar, A., Jin, H., Breslow, A., Reisner, S. L., Mimiaga, M., Cahill, S., & Hughto, J. M. (2020). Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations. *SSM, Population Health*, *11*, 100595. https://doi.org/10.1016/j.ssmph.2020.100595