

Does the Government Need to Know Your Sex?

Laurie Shrage, lshrage@fiu.edu

<http://www.fiu.edu/~lshrage/>

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Comments from slides:

1. (speaker intro)
2. A couple decades ago, Calvin Trillin wrote in *The New Yorker* about a Louisiana woman, Susie Phipps, who, upon discovering that she had been classified as “colored or black” on her birth records, attempted to have her racial designation changed to “white.” What is interesting about this case is not that a person of mixed ancestry managed to live and be socially recognized as white, but that when she eventually went to court to have her lived racial status replace her assigned one, the government would not permit her records to be changed. According to the government, Phipps was born “colored,” in terms of the “one drop” rule often encoded in the laws at the time, and her official racial status would remain “colored.” Although by the 1980s, a person’s “color” had few legal ramifications, even if it still had many social ones, the courts remained unwilling to allow Phipps to control her legal racial identity. Shortly after Phipps lost her case, the state evidently invalidated its law defining race.
3. Many states today no longer include a racial designation on a birth certificate, though they may request such information from the parents when they register their child’s birth. The birth certificate in this slide, for the Chicano author Tomás Rivera, born in 1935, includes a box for each parent’s “Color or race.” Whether by self-ascription or by assignment, Rivera’s parents’ race is listed as “Mexican.” Today, “Mexican” is more often used to describe a person’s nationality, ethnicity, or place of origin, rather than race. I presume that, at the time, designating Rivera’s parents as “Mexican” would have generated the same racial designation for Rivera himself, though to be consistent with the logic of this racial scheme, his racial classification probably should have been “Texan”!

4. While laws defining race and their implementation have undergone rapid change in the past few decades, this is not the case for laws defining a person's sex. Most government records and identification papers include a sex for each person, such as birth and death certificates, marriage licenses and divorce papers, and driver's licenses and passports. Moreover, when individuals attempt to change their sex status on their official documents, they often meet with the same kind of bureaucratic and legal resistance experienced by Susie Phipps. In this presentation, I will develop a proposal for how the state should collect and manage information about an individual's sex. But, before I do so, I will inquire after the justification for having the government track this information in the first place. You might think the reasons are too obvious to state, but the more I've thought about this, the less obvious they appear.

5. So, here are some possible reasons that the government needs to know (and control) your sex designation. First, the government might collect this information to help with the task of individuating persons residing or traveling within its borders. The government needs to have a unique record for each person, so it can differentiate and distinguish one person from another. Suppose it were the case that two people's government files were exactly alike in all respects except for their sex designation (e.g., they had the same name, age, city of birth, parents with the same names, etc.). It's pretty evident, however, that a person's sex is not likely to be of much use for creating a unique record for a person, in part because place, date and time of birth, parents' names, etc., generally do the trick and when they don't some information other than sex will eventually be needed (because two babies could be born with all the same referencing information, including sex). The state, of course, can simply assign each person born or entering the country a number in order to create a unique official record for each person, and usually does.

Another reason the government may need to know and control an individual's sex status is for verifying a person's identity. In order to provide security, administer entitlements, and so on, the government issues identification papers and may, at times, require access to them to carry out legitimate functions. For the purposes of identity verification, however, a person's lived sex is more useful than the sex recorded at birth. Consider, for example, that Susie Phipps, by all accounts, looked "white." If her identification papers categorized her as "black," she might find herself under suspicion for carrying false documents, or at the very least, her documents would require state officials to make ad hoc judgments reconciling her racial appearance with her official status. Moreover persons who seek and carry false documents can usually manage to make their appearance conform to the race designation on the documents, and so requiring that the race on a person's identity papers be their born race is unlikely to help

with the task of identity verification. This works the same with sex. Having an FtM transsexual classified as female on his identity papers is likely to confuse identity verification rather than assist with it. Yet, for the purpose of identification, even a person's lived race and sex are of limited use. Information that is more useful would be: a recent photo, finger prints, or personal information, such as the ability to supply one's address, last 4 digits of one's social security number, date of birth, mother's maiden name, etc., which we supply to banks, retailers, school officials, etc., when they want to verify a customer's identity.

Another possible reason the government needs to know and control the sex of those subject to its laws and protection is so that it can administer and enforce its laws and regulations. For example, in most states, to obtain a marriage license, officials must determine that the "bride" and "groom" are of the opposite sex in order to comply with state laws. In addition, to monitor entrance to single-sex public amenities or institutions, such as bathrooms or prisons, governmental officials need to be able to determine an individual's sex. Moreover, to adjudicate an individual's access to a private institution that is permitted to discriminate on the basis of sex, such as a women's college, a domestic violence shelter, or a rape crisis center, the government needs to be able to determine an individual's sex. And, finally, to enforce laws prohibiting sex discrimination, the government, again, needs to be able to verify a person's sex. Of course, the government's access to and control of a person's sex status for the purposes I've mentioned is justified only if the laws and institutions that discriminate on the basis of sex represent fair and just arrangements. Many argue, of course, that laws and institutions that involve any form of sex discrimination or that practice sex segregation are unjust. Although I won't have time to evaluate the arguments against all forms of sex discrimination or segregation, I will contend that, wherever in our contemporary world sex discrimination or segregation is appropriate, a person's lived sex is generally more relevant and should be used for enforcement (and accordingly in one's official records). The one exception to this may be in cases of enforcing laws intended to address historic discrimination, where control over the criteria of membership may be turned over to the victimized group (see Mayeda).

The last possible justification is that information about a person's sex is needed for carrying out scientific and medical studies in which the government has a legitimate interest. Such studies may require information about a person's sex that goes beyond his or her lived sex, such as anatomical and genetic information that is correlated with sex. Here, I will argue that such information can be collected by researchers and serve the purposes in which the government has a legitimate interest, without giving the government access to such information in a non-anonymous form. Indeed, I will argue that it is a violation

of our medical and informational privacy for confidential research records to be turned over to the state without a research subject's permission.

6. New understandings of race, as well as an increasing number of people claiming mixed and newly configured racial identities, have succeeded to some degree in transforming how governments manage each person's racial profile. I am arguing that there are equally weighty reasons for initiating change in regard to how secular, democratic governments handle information about a person's sex.

First, biologists, sociologists, anthropologists, psychologists, physicians, and others recognize that there are different criteria for designating an individual as male or female, and for a significant number of people, these criteria do not all yield the same results. Generally, when scientific knowledge and opinion about a particular issue is in flux, the government should defer to appropriate professionals for guidance on policy when questions about that issue arise, and not substitute its judgment for that of scientific and medical experts.

Second, the current practice of requiring that parents provide a "sex" for their child, or that adults provide a "sex" for themselves, in order to obtain identity papers, violates patient privacy if the information required is other than what the parents or adult choose to release. When a government requires access to hospital records, or requires evidence from a physical exam, and then overrides an individual's self-designation, this constitutes an unjustified and illegitimate invasion of privacy. Because the government's legitimate interests can be advanced with information about a person's sex that is volunteered rather than coerced, the government infringes our right to privacy when it obtains this information without consent or by coercion.

Third, when the government does not permit individuals to control the sex designation provided on their official documents, it creates unnecessary social burdens for people with unconventional sex and gender identities, and jeopardizes their full participation in society. To give one example, when parents of an intersex or transgender child cannot change the sex on their child's birth certificate to match their child's identity, their child may confront prejudice and administrative barriers when trying to enroll in school. In anticipation of such barriers, doctors may recommend that children endure painful and disfiguring cosmetic surgeries, or risky hormone therapies, in order to conform to their assigned sex. A system that does not allow such parents control over their child's official sex status violates that child's right to equal protection of the laws. Moreover, by requiring that sex-ambiguous individuals conform to an assigned identity, we socially erase their intersex or transgendered identities in ways that perpetuate their social invisibility and oppression.

I will elaborate on each of these three arguments for change, and then draw some conclusions.

7. The criteria for sexing bodies and persons are multiple and complex. First, even if one believes that a person's sex can be determined objectively, there are several different methods for doing this, and they don't always yield consistent results. For example, we might use information about a person's sex chromosomes to select a sex. But this method makes it difficult to classify people with more rare karyotypes, such as XO, or XXY or with genetic conditions, such as CAIS (complete androgen insensitivity syndrome), where someone has an XY karyotype but not stereotypical male anatomy and usually lives as a woman. If we use the possession of testicles or ovaries to sex a person, then we run into difficulties when a person has one of each, or an "ovotestis," that is, a gonad that has properties of both. If we use other internal or external genitalia as markers of sex, then we run into difficulties with infants who have "micropenises" or elongated clitorises, or partially formed labia, scrotums, tubes, and so on. If we use the possession of breast tissue, facial hair, or voice quality, then again our classificatory practices will produce results different from the other methods, and that often conflict with the lived identities of those classified.

Although bodies fit less neatly into pink and blue packages than most people seem to think, most people live and self-identify as male or female. Because a person's lived identity and self presentation may change, and there may be some people who live as both male and female simultaneously, a classification system that goes by lived identity needs to allow for change of sex identity, and to accommodate individuals who select multiple boxes or add new ones.

Another method for sexing persons is to use one's subjectively experienced sex identity or other mental traits, such as preferences, desires, and so on. A person's subjective or mental sex can be different than a person's lived identity or the identity assigned on the basis of bodily features. Some trans individuals report being born into the wrong body, and such testimony suggests that a person's sex identity is something we each access privately, by surveying the contents of our minds.

A fourth method for determining sex would be to invoke criteria that are often used for membership in a religious or national community. Here the criteria are intersubjectively defined, by already established members of the group. To be male, in this sense, would be to be accepted regularly as male by other males. (see Bettcher)

I think arguments can be made for using one of more of these methods in different circumstances, and that the method used should fit the circumstances. For example, information about one's "objective" sex may be needed for some

kinds of medical care, while information about a person's subjective sex may be needed for counseling a patient about his or her psychiatric, reproductive, or sexual health. For most interactions with one's government and its agencies, a person's lived sex identity should be sufficient, though in some cases a person's intersubjectively determined identity may be needed (for example, when the government or other third parties must adjudicate a person's claim to some sex-based privilege).

8. When secular and democratic societies confront large questions of social justice—for example, about the basic rights of women, ethnic minorities, children, the disabled, immigrants, or workers—they can consult appropriate secular authorities and initiate broad social dialogue in order to promote social change in a positive direction. In general, the courts in the U.S. tend to defer to scientific, medical, and even religious authorities on philosophical and scientific questions, and they also use the more conservative principle of conforming to past precedent. With new information and understandings about sex and gender, our practices and policies will slowly evolve, and along with them the precedents to which the courts appeal for guidance. From biological, social, psychological, and medical perspectives, sex and gender are complex categories and identities, and the courts and the public will need to become better informed in order to generate more humane social policies.

Our commitment to equality and freedom entails that we do not convert arbitrary and insignificant differences between persons (e.g., skin color, reproductive capacity, religious worship, etc.) into systems of social hierarchy and privilege. The karyotype or genitalia with which one is born represent arbitrary differences and are insignificant to one's ability to participate fully in society. When we assign an unchangeable sex status to individuals on the basis of such criteria, even when it doesn't fit their ambiguous anatomy or evolving gender identity, we create unnecessary social barriers that often lead to social marginalization and outcasting.

9. If we use one or more of the "real sex" criteria for assigning a legal sex (karyotype, gonads, internal and external genitalia, reproductive capacity, secondary sex characteristics), then the government will need access to patient medical records in order to determine or confirm an individual's sex. Generally, medical records are considered private and beyond the reach of the government or other third parties, so it's interesting that we generally tolerate without question the ability of third parties and government agencies to access private medical and hospital records for the purpose of establishing a legal sex.

When the state infringes a fundamental, constitutionally protected right, it must demonstrate that an important and legitimate governmental interest is at stake.

What interest might the government be protecting when it violates our right to privacy by coercing information about our anatomical and genetic make-up in order to assign each of us a sex? And, might this interest be equally well served by a more narrowly tailored policy of having the government collect only information that is given with consent about our sex identities?

Under the less invasive policy, most people will likely volunteer their lived sex identity, for the purposes of obtaining identity papers, marriage licenses, and perhaps accessing sex-based privileges and seeking to redress discrimination. Many states already permit transsexuals to change their legal sex and then use this status, rather than their assigned sex at birth, for the purpose of marriage. As I mentioned earlier, the government may need to employ “intersubjective” criteria of sex when it comes to adjudicating the right to a sex-based privilege or a case of sex-based discrimination (see Mayeda).

10. The government may have a legitimate interest, in a general sense, in knowing how many infants are born with particular chromosomal patterns, genitalia, or reproductive capacities. Such information may be necessary to anticipate social problems and needs, future population growth, or to study the social and natural causes of particular birth rates and patterns. Yet, although the government may need to track data on population size and characteristics, disease rates, student performance on tests, religious affiliation, and so on, to carry out its functions, the government does not need to access private individual data in regard to disease status, student records, religious affiliation, or race and sex assignment in hospital and medical records.
11. Is the government treating people equally when it assigns a sex status using the “real sex” criteria? In a formal sense, the government does not violate our right to equal treatment, because it is applying identical criteria to each person. But in the substantive sense of “equality,” it violates our right to equality before the law because the use of these criteria has devastating consequences for persons of ambiguous sex and nonconventional gender identity. The use of these criteria can force some to live at odds with their legal sex, which exposes such persons to prejudicial and discriminatory treatment, and social and economic exclusion. They may also face premature illness and death when, in order to avoid being stigmatized, intersex and trans individuals endure unnecessary surgeries and hormone therapies in order to conform to their assigned sex or pass without question as their lived sex.

Given that the use of “real sex” criteria creates substantial obstacles and burdens for a historically oppressed group, we should question the rationale behind this

practice and whether the larger set of effects offset any beneficial ones the practice may have. When laws permitting racial segregation in public facilities or prohibiting marriage across supposed racial groups were challenged in the courts, these laws, in a formal sense, treated blacks and whites alike. But the impact on people of color was much greater than on whites, in part because the existence of these laws perpetuated social prejudice and perceptions of inferiority in regard to African Americans. When employers used height and strength measurements to evaluate all applicants for certain jobs, they did not treat men and women unequally in a formal sense. But in a substantive sense, they placed unnecessary barriers before women who sought traditionally male jobs. When our government uses "real sex" criteria to determine and regulate a person's legal sex identity, this practice perpetuates the mistaken idea that normal human variation with respect to sex differentiation and gender expression is somehow abnormal and freakish. Because of this mistaken idea, we pathologize people born with ambiguous bodies or people whose sex/gender identity may not match their assigned sex/gender. When intersex and trans people are treated as ill or diseased, they may be subject to coercive medical experimentation and "correction," and invidious forms of discrimination.

12. As advocates for the rights of trans and intersex individuals press for their civil rights, many states are evaluating their methods and procedures for managing information about an individual's sex. By reconstructing and evaluating the purposes behind our current practices, we can develop policies for managing sex information that are more justified and humane. I have argued that the current methods and procedures many governments now use for determining a person's legal sex involve violations of privacy and equal treatment, and are based on erroneous ideas about sex differentiation and gender identity. Although the collection and management of information regarding a person's sex advances some legitimate governmental interests, the methods for doing this need to be more narrowly tailored to their particular purposes. I have argued that for most purposes, the state only needs to know a person's lived sex, and that governmental agencies should not be able to access information pertaining to a person's sex without that person's consent. The state should also allow individuals to change information in their official records and on identification papers without unnecessary difficulty. The policy I am proposing is supported by the political values and principles of liberal democratic societies, and international humanitarian ideals. I have also tried to lay to rest the fears some may have when there is no longer a single standard for "telling the boys from the girls," an anxiety I remember from the 1960s when many boys wore long hair and many girls traded in skirts for jeans. Whether we are in or beyond the age of Aquarius, we need to open our hearts and minds to the possibility of change.

Let me end with a few examples regarding how current policies work, and how they could be changed.

13. The presumption that third parties can know and should control a person's sex identity can lead to depriving people of their basic civil rights. In this case from Kansas, a woman who had had her sex classification changed on her driver's license and birth certificate, was later arrested after she and her male partner applied for a marriage license. By merely attempting to exercise her legal right to marry, she was subject to unjustified arrest, and loss of control over personal and sensitive information regarding her assigned sex at birth. Had she attempted to marry a woman, she would also have likely faced similar difficulties under Kansas law. Can a trans person exercise his or her right to marry a person of the opposite sex in the state of Kansas? Denial of this right would seem to constitute a clear violation of the right to equal treatment. Yet states that have opposite-sex only laws must decide whether to use a person's sex assignment at birth or current legal sex, and courts in different states have ruled differently on this question, leaving trans persons in legal jeopardy even when they successfully marry. Giving control over one's sex classification to each person for the purpose of obtaining identity papers and marriage licenses would help to reduce the legal uncertainty trans and intersex individuals face when exercising their right to marry.
14. Examples from elsewhere show that we do not have to make life hell for trans individuals. A Colorado school district recently decided to accommodate a second-grade girl who had been assigned male at birth. By working with the parents and doctors of this child, school officials are trying to determine what is in the child's best interest, and how to prepare other children and their staff to work with this child. Hopefully, this district's wise policies and practices will be instructive for all.
15. Recently the city of New York has altered its policies in a way that gives individuals more control over their official sex designation, without forcing people to undergo cosmetic and sometimes unnecessary surgeries or hormone and other therapies. Not all trans or intersex individuals wish to undergo major body modification, with all their associated costs and medical risks.
16. The last example I will consider, concerns the right of males, who were assigned female at birth, to attend female-only colleges. Given that my proposal gives

priority to a person's lived sex, it would seem that a person living as a man would lose the right to attend a female-only school. I would be willing to live with this result, as long as women who were assigned male at birth would have the right to attend colleges for women. In cases where a student transitions after being admitted, colleges and single-sex institutions should be sensitive to the needs of each student, and generally lean toward accommodation rather than exclusion.

We should recognize that the challenges ahead were created not by the supposedly pathological desires of intersex or trans persons, but by the failure of our policies and institutions to recognize the full range of human diversity. Because sex, like race, is a category that organizes social life at the most basic levels, resistance to the sort of changes I'm proposing is likely to be strong. So it helps to remember that those who are currently oppressed did not cause the problems that we confront at present with respect to sex assignment. The problems originate with policies and practices that are ultimately illiberal and inequalitarian, not with those who have different and creative sex and gender identities.

17. Bibliography

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