

Thoughts on Laurie Shrage's "Does the Government Need to Know Your Sex?"

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Laurie Shrage raises an important question about when and for what reasons the government may rightly record and control information (often referred to as "vital statistics") about its citizens. In particular, Shrage expresses concerns about sex designation at birth. Does the government need this information and how does recording and controlling this information impact those for whom binary, naturalized categories of sex do not capture their gender identity? These questions are timely as recent feminist scholarship, queer scholarship, and scholarship in transgender studies have further complicated our understanding of sex, gender, sexuality, and identity. Sex, the biological marker (based on the presence or absence of primary or secondary sex characteristics or the presence or absence of certain sex determining genes, sex hormones, and/or sex chromosomes) that was thought to determine whether an individual is male or female, is much more complicated than a simple binary can capture. The relationship between sex (the biological) and gender (the socially constructed meaning of the biological) is being reassessed as the division between biological categories and social categories are blurring. Contemporary concerns about surveillance and privacy heighten the importance of Shrage's question.

I am in general support of Shrage's view that the current method of sex assignment at birth, particularly when it is meant as a permanent marking of a binary sex identity category, needs to be changed. But I do want to try to raise a few issues with the arguments she makes, particularly about privacy, push a bit further on identifying reasons for the government and other public and private institutions to have some information about people's gender identities, and raise a worry about an alternative to the current system. Ultimately, I think it is important to bear in mind that governmental policies are blunt instruments and thus, unfortunately, are rarely going to capture the nuance and complexity of lived experiences or be that helpful in promoting social justice.

Some thoughts on Privacy

Shrage claims that the "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." How exactly does marking a birth certificate with an M or an F violate privacy? One of the answers that Shrage gives is that a requirement that an M or an F be assigned at birth coerces "information about our anatomical and genetic make-up in order to assign each of us a sex." She is quite right about this coercion in the case of intersex individuals where a sex assignment of either M or F often is accompanied by "crisis" medical management that may include bodily interventions through surgeries and/or the administration of hormones. Such interventions are not merely coercive, they are harmful, and efforts have been under way for many years to incorporate more enlightened protocols for addressing intersex presentation at birth.¹ But how is the assignment of an M or an F at birth a violation of privacy for an individual who later in life adopts an alternative gender identity? Part of what is tricky in thinking about being assigned a sex as a violation of privacy is that our gender is performed in public ways and thus is publicly visible, much as height and to some extent weight is publicly visible. When we are asked for our sex, height, and weight to obtain an identity document, the question doesn't itself seem to be a violation of privacy. Unlike height and weight, which change overtime (and thus individuals can make wishful claims about these numbers if they choose) sex assignment at birth is thought to be

permanent. Given this assumption of permanence, the birth certificate becomes a verifying document about the claims one makes about hir gender. If one is living as a man or a transman and was assigned a W at birth, this assignment will be revealed when identity documents are being issued. Perhaps it is this revelation that constitutes a violation of privacy.

In most jurisdictions in the US, an individual is allowed to change the sex on hir birth certificate.² In some places the change is noted as a change, so the violation of privacy might exist in that the revelation is part of the verifying document. But if one may change the verifying document to reflect a person's lived gender identity without indication that a change has been made, then it appears that the act of marking a birth certificate with an M or an F is not itself a violation of privacy. The government has a need to identify its citizens and it often does this by gathering vital statistics, which includes "gender". I agree with Shrage that "for most purposes, the state only needs to know a person's lived sex" as this is what is publicly performed, but don't know that it requires an individual's consent or constitutes a violation of privacy if a person is asked for this information for the purposes of obtaining identity documents.

The Need to Know

Shrage identifies four reasons the government might need to know and control sex designation at/from birth.

1. To create a unique record of the individuals within its territory;
2. To verify a person's identity;
3. To administer the law;
4. To carry out scientific studies (medical studies) in which the state has a legitimate interest.

She argues that there are usually better ways of achieving these ends than requiring that individuals be assigned a permanent M or F at birth. I think that is right, but wonder whether requiring knowledge of a permanent gender identity at some point may be necessary. The difference between ideally having a government that respects all individuals' (changing) identities and desires and the practical methods designed to facilitate social functioning is significant. Here is an anecdote that may bring my concern to light. A few years back I was asked by one of my transgendered students for a series of letters of recommendation. Each time zhe asked me for a letter I had to inquire about which pronouns to use in the letter. For the study abroad program I was asked to use "she", for the internship with a LGBT group "zhe", for a job after college "she" again. Because I was directly and personally engaged with this student, I was quite happy asking about and changing the way I identified hir in these letters. But this seems to be quite beyond what we can legitimately expect from governments. Gender identities are fluid, they may change multiple times or be invoked differently for different personal or professional reasons. It seems difficult for a government or any large bureaucracy to be able to adequately handle this part of our lived experience (and I'm not sure that sort of government involvement in our lives is welcome).

One of the arguments that have been made by government bodies considering allowing changes to policies regulating identities on verifying documents is the need to prevent fraud. Of the limited arguments of this sort I have read, none are particularly compelling (need to protect would be spouses who might be inadvertently marrying someone of the same sex, someone might change their gender to get benefits reserved for the other gender or escape family obligations).³ But the deeper worry about fraud arise from a recognition that there are a myriad of ways to "get over" on a systems of rules and regulations that are by necessity unable to account for nuance. Clunky identify instruments, like the mark of M or F on a birth certificate, might be thought of as just that, a somewhat oversimplified way for governments to try to manage information about individuals. And, this management can occur

when individuals are allowed to change their verifying documents to reflect their lived gender identity once, but probably not more than once. I think this may be a useful solution for most transpeople and many intersex individuals, but it doesn't address the transitioning process itself or how to officially identify those for whom M or F isn't suitable. As Shrage discusses, these cases present real challenges in certain contexts, e.g. same sex educational institutions and prisons, and it may be that these are precisely the times that a more reflective assessment be made on a case-by-case basis.

Allowing individuals to change their verifying documents to reflect their lived gender identities once, may go some way toward addressing the concerns Shrage discusses (with the exception of transitioning cases just noted). Recognizing sex markers as clunky identity tags that allow for the operation of certain government functions may be useful as well. The government has a legitimate interest in having the population identified as either M or F, and that identification can be based on either birth assignment or lived gender identity. These markers will mean different things to different people; for some people they will represent what they think of as "real sex", for others they will represent an achievement, for others they will represent a compromise. Having the government collect and record this information does achieve the goals that Shrage identifies and may actually be an acceptable way to go, particularly in light of one looming alternative – genetic identification. Advances in mapping the human genome and developments in microarray technologies have led to the creation of new, and to my mind, more intrusive methods for collecting information to identify individuals, methods that raise greater worries about privacy as well as social justice. The simplicity and clunkiness of the current system of using binary sex identification, especially if we allow a change to be made once to a verifying document, is certainly open to criticism, but imagining a gattaca-like system makes me more sympathetic to the blunt instruments the government currently uses.

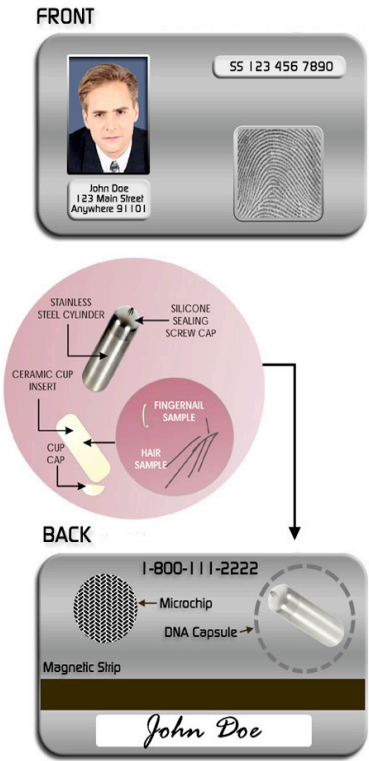


Figure 1: Image from jascorp.com

¹ See Intersex Society of North America, the Accord Alliance, and the Intersex initiative websites for more details. Although Shrage uses “transgender” and “intersex” in ways that might suggest that the question about sex identity is the same for both groups, there are important differences, indeed potentially divergent interests, that some of those who identify as trans have and some intersex individuals have.

² Currah, P. and L.J. Moore. 2009 “We Won’t Know Who You Are’: Contesting Sex Designations on New York City Birth Certificates” *Hypatia* 24.3 (forthcoming).

³ Meyerowitz, Joanne. 2002. *How Sex Changed: A History of Transsexuality in the United States*. Cambridge: Harvard University Press.