TRANSGENDER IMMIGRATION: LEGAL SAME-SEX MARRIAGES AND THEIR IMPLICATIONS FOR THE DEFENSE OF MARRIAGE ACT

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The continued possibility of federally sanctioned same-sex marriages might surprise those who believe that the Defense of Marriage Act (DOMA) recognizes only those marriages between men and women. In the case of transgender individuals, however, this debate is far from over. While some state courts recognize sex-reassignment surgeries as controlling in deciding whether to authorize a marriage, other state courts have held that an individual's sex, for marriage purposes, is immutably fixed at birth. Unfortunately, DOMA fails to reconcile these differing views by merely restricting marriage to one "man" and one "woman."

This failure to define man and woman is a fundamental flaw in DOMA's drafting, which results in unpredictable treatment for transgender individuals in the federal context—for example, in the case of immigration. This Comment therefore argues that the federal government should resolve DOMA's ambiguity by clarifying the Act's definition of man and woman. An appropriate definition must take into account current medical evidence suggesting that an individual's sex designation at birth is useful, but not dispositive, and that at least eight distinct factors contribute to notions of sexual identity. Lastly, this Comment asserts that immigration is an ideal forum to test the practicability of these factors, both because of the recent frequency of marriages involving transgender individuals in immigration cases, and because the United States Citizenship and Immigration Services (USCIS) is historically familiar with the use of balancing tests in its decisions.

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INTRODUCTION

In the United States, the legality of marriage lies across a spectrum. At one end of the spectrum, heterosexual marriage is unequivocally legal in all but the most extreme circumstances.[1] At the other end, homosexual marriage is explicitly illegal in every state but one.[2] Transgender marriage, however, is neither definitively legal nor illegal—its location on the spectrum remains undefined. Some states do not legally recognize sex reassignment surgeries for marriage purposes and invalidate transgender marriages, such as between a male and a post-operative female, because this is considered a same-sex marriage.[3] On the other hand, in these states a

1. The three requirements for a valid marriage are: (1) legal capacity to contract a marriage; (2) voluntary assent to the marriage; and (3) compliance with the statutory requirement as to the formalities of the marriage. Generally, marriages of minors may be voidable. In many states, marriages between first cousins and bigamous relationships are also prohibited. 36 AM. JUR. 2D *Proof of Facts* § 1, at 449 (1983).

2. Statutes prohibiting same-sex marriages have withstood First, Eighth, Ninth, and Fourteenth Amendment challenges. Mitchell Waldman, *Status of Parties as of Same Sex*, 52 AM. JUR. 2D *Marriage* § 49, at 765 (2000). As of the time of writing, thirty-nine states statutorily prohibit same-sex marriages with laws modeled after the federal Defense of Marriage Act (DOMA). Fourteen states, including Alaska, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and Utah have state constitutional amendments prohibiting same-sex marriages. Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, STATELINE.ORG, Nov. 3, 2004, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=15576. *See generally* Robin Cheryl Miller, *Marriage Between Persons of Same Sex*, 81 A.L.R. 5th 1 (2004). In 2003, the Supreme Judicial Court of Massachusetts ordered the state to recognize same-sex marriage, holding that the Massachusetts Constitution forbids the state from restricting the protection, benefits, and obligations of civil marriage solely because the marriage is same sex. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). The decision was later upheld by the First Circuit Court of Appeals. Largess v. Supreme Judicial Court, 373 F.3d 219 (1st Cir. 2004) (per curiam) (holding that same-sex marriages do not constitute a threat to a republican form of government, and thus foreclosing federal intervention in the state issue).

3. *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (holding that sex is defined by immutable traits at birth and concluding that a marriage between a post-operative male and chromosomal female is an illegal same-sex marriage); *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002) (holding that Kansas marriage statutes do not consider post-operative females to be females for marriage purposes and invalidating a marriage between a post-operative

marriage between a male and a male who, although chromosomally female, has undergone sex-reassignment surgery, is legal as an "opposite-sex" marriage.[4] Meanwhile, in other states, these same cases might produce the opposite result.[5]

In attempting to define marriage through the Defense of Marriage Act (DOMA),[6] the federal government has contributed to this inconsistent treatment of transgender individuals. Although purporting to establish a consistent definition of marriage for federal purposes as purely between opposite-sex individuals, DOMA fails to define *opposite sex*, leaving transgender individuals without guidance as to whether their marriages will be recognized by the government. Immigration consequences further intensify the uncertainty surrounding the treatment of transgender persons: Denying spousal immigration benefits to a transgender individual and his spouse could result in deportation and a divided family—in effect, directly contravening the central purpose of U.S. family-based immigration preferences.[7]

This Comment explores the intersection of DOMA, state marriage laws, and immigration. Part I discusses transgender individuals, and it explains how courts approach the validity of transgender marriages. Part II introduces federal immigration law and its relation to DOMA, illustrating U.S. border and immigration authorities' inconsistent treatment of transgender marriages and how this treatment affects immigrating families. Part III examines a crucial gap in DOMA that renders transgender marriages neither explicitly legal nor illegal at the federal level.

Ultimately, this Comment argues that DOMA needs better to define male and female in order to clarify who is able to marry legally. This definition must take into account current medical evidence, which suggests

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female and a chromosomal male); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999) (holding that a marriage between a post-operative female and a chromosomal male is same sex and thus illegal under Texas law).

4. This scenario has not yet been presented in court. However, dicta in *Gardiner* and *Littleton* suggest that post-operative females, for example, would remain males for the purposes of marriage. *Gardiner*, 42 P.3d at 137 ("J'Noel remains a transsexual, and a male for purposes of marriage . . . ."); *Littleton*, 9 S.W.3d at 230 ("Biologically a post-operative female transsexual is still a male.").

5. *See* M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding that marriage between a post-operative female and a chromosomal male is valid because a post-operative female is a female for marriage purposes).

6. 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

7. *See generally* John A. Fisher, *Sex Determination for Federal Purposes: Is Transsexual Immigration via Marriage Permissible Under the Defense of Marriage Act?*, 10 MICH. J. GENDER & L. 237 (2004). "The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united." H.R. REP. NO. 85-1199, at 7 (1957); H.R. REP. NO. 82-1365, at 29 (1952) (commenting on "the underlying intention of our immigration laws regarding preservation of the family unit").

that an individual's sex is determined by more than the opinion of an obstetrics nurse at the time of birth.[8] By employing a balancing test that considers the vital importance of sex-reassignment surgery and psychological factors in determining an individual's sex, the government could lift the veil of legal uncertainty that now shrouds transgender individuals and their right to marry.

I. TRANSGENDER MARRIAGES

The American legal system creates substantial uncertainty for transgender individuals. Conflicting definitions and continually evolving medical evidence contribute to this confusion, and state courts evaluating the validity of transgender marriage have rendered a variety of results. DOMA, which recognizes only marriages between a "man" and a "woman" while failing to define those terms, further obscures transgender individuals' legal status for marriage purposes by leaving the federal government without a standard for addressing these conflicts.

DOMA is generally considered to have two purposes. First, it preserves the integrity of the traditional heterosexual marriage between a man and a woman. It also allows the federal government to use a uniform definition of marriage, while protecting the right of states to recognize same-sex marriages within their borders if they so choose.[9] DOMA, then, seeks to create a uniform definition of marriage for federal purposes, so as to eliminate the possible conflicts of law that may result when states define marriage differently.[10]

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8. *See generally* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271–93 (1999). *See infra* text accompanying note 31.

9. H.R. REP. NO. 104-664, at 2 (1996).

10. For example, in debating DOMA in the U.S. House of Representatives, one legislator remarked:

> But if Hawaii does ultimately permit homosexuals to "marry," that development could have profound practical implications for federal law. For to the extent that federal law has simply accepted state law determinations of who is married, a redefinition of marriage in Hawaii to include homosexual couples could make such couples eligible for a whole range of federal rights and benefits.

Id. at 10. The legislator's comment refers to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (remanding a challenge to Hawaii's prohibition on same-sex marriages to consider whether the state, under the strict scrutiny mandated by the state constitution, could overcome the ban's presumptive unconstitutionality by demonstrating that it furthered a compelling state interest and was narrowly drawn). On remand, the court held that the state "failed to sustain [its] burden to overcome the presumption that [Hawaii's prohibition on same-sex marriages] is unconstitutional." Baehr v. Miike, 1996 WL 694235, at *21 (Haw. Cir. Ct. 1996).

DOMA, however, is flawed in a manner with serious implications for transgender individuals. While defining marriage for federal and immigration purposes strictly as "opposite sex"—or between a man and a woman—it does not define "man," "woman," "opposite sex," or "same sex."[11] As discussed below, these definitions are not always self-evident.

A. Transgender Basics

Transgender individuals are an amorphous group who often are mischaracterized or misunderstood. For the purposes of this Comment, transgender persons include those who "have gender identities, expressions or behaviors not traditionally associated with their birth sex."[12] Sometimes referred to as transsexuals, transvestites,[13] or gender variant persons, transgender individuals generally feel that their gender identity conflicts with their anatomical sex.[14] They may identify as gay, lesbian, or heterosexual, or they may choose not to identify with a traditional sexual orientation.[15]

Many transgender individuals explain that, while growing up, they felt that they should have been born as the opposite sex.[16] Some transgender

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11. *See* 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

12. GENDER EDUCATION & ADVOCACY, INC., GENDER VARIANCE: A PRIMER, *at* http://www.gender.org/resources/dge/gea01004.pdf. The term "transgender" includes: "pre-operative and post-operative transsexuals, transvestites, drag queens, cross-dressers, gays and lesbians, bisexuals and straights who exhibit any kind of dress and/or behaviour interpreted as 'transgressing' gender-roles." Janice Raymond, *The Politics of Transgenderism*, *in* BLENDING GENDERS: SOCIAL ASPECTS OF CROSS-DRESSING AND SEX-CHANGING 215, 215 (Richard Elkins & Dave King eds., 1996).

13. Transvestites are individuals who wear clothing of the opposite gender primarily for erotic purposes, although some transvestites may do so for emotional or other reasons. Typically, transvestites are male heterosexuals with a male gender identity, and have no desire to become females. *See* MILDRED L. BROWN & CHLOE ANN ROUNSLEY, TRUE SELVES: UNDERSTANDING TRANSSEXUALISM—FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS 11–12 (1996). This Comment focuses primarily on transgender individuals who want to alter their sex.

14. *Id.* at 6.

15. Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS (2000).

16. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1083 (7th Cir. 1984) ("She explains that although embodied as a male, from early childhood she felt like a female."); Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004). The court in *Kantaras* observed:

> As a child, while born female, Michael's parents and siblings observed his male characteristics and agreed he should have been born a "boy." Michael always has perceived himself as a male and assumed the male role doing house chores growing up, played male sports, refused to wear female clothing at home or in school and had his high school picture taken in male clothing.

Id. at 156; *In re* Estate of Gardiner, 42 P.3d 120, 122 (Kan. 2002) ("J'Noel testified that she was born with a 'birth defect'—a penis and testicles. J'Noel stated that she thought something was

individuals thus choose to undergo hormone treatment or sex-reassignment surgery to alter the sex markers not in line with their sexual identity. For these individuals, sex-reassignment surgery is not a sex "change" per se, but rather a physical alignment of that which already existed.

While some commentators label transgender individuals as suffering from gender dysphoria, the current psychiatric literature now prefers the term "Gender Identity Disorder." According to the American Psychiatric Association:

> There are two components of Gender Identity Disorder, both of which must be present to make the diagnosis. There must be evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex (Criterion A). This cross-gender identification must not merely be a desire for any perceived cultural advantages of being the other sex. There must also be evidence of persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex (Criterion B). The diagnosis is not made if the individual has a concurrent physical intersex condition . . . (Criterion C). To make the diagnosis, there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion D).[17]

While not all of these criteria are present in every transgender person,[18] current medical evidence largely accepts that most transgender individuals feel born into the body of the wrong sex.[19]

Intersex individuals, although distinct from transgender individuals, also factor prominently into the gender-variance mix. Unlike transgender individuals, intersex individuals are "born with chromosomal and/or physiological anomalies, and/or ambiguous genitalia."[20] A wide variety of

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'wrong' even pre-puberty and that she viewed herself as a girl but had a penis and testicles."); M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). The court in *M.T. v. J.T.* noted:

> M.T. testified that she was born a male. . . . She had no real adjustment to make because throughout her life she had always felt that she was a female.
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> . . . She told [her doctor] that she had always felt like a woman and was living like a woman. She wanted sex reassignment surgery . . . so that she could end the conflict she was feeling . . . in order to live her life completely as the woman she thought herself to be.

Id. at 205–06. For more testimonials from transgender individuals, see Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1225–28 (1997).

17. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532, 533 (Michael B. First et al. eds., 4th ed. 1994).

18. BROWN & ROUNSLEY, *supra* note 13, at 7–8.

19. *Id.* at 6.

20. GENDER EDUCATION & ADVOCACY, INC., *supra* note 12.

disorders result in intersexuality, including: chromosomal sex disorders such as Klinefelter Syndrome[21] and Turner Syndrome;[22] gonadal sex disorders such as Swyer Syndrome;[23] internal organ anomalies such as Persistent Mullerian Duct Syndrome;[24] external organ anomalies typically referred to as hermaphroditism;[25] and hormonal disorders such as Androgen Insensitivity Syndrome,[26] 5 Alpha-Reductase Deficiency,[27] Congenital Adrenal Hyperplasia,[28] and Progestin-Induced Virilization.[29] The exact number of intersex individuals is unknown.[30]

Usually, when a child's genitalia are ambiguous, doctors will assign a sex and surgically "normalize" the genitalia to unambiguously male or female.[31] However, recent medical research suggests that assigning gender at birth may be harmful because sexual identity cannot be changed by external factors alone.[32] In addition, not all intersex persons receive

21. Klinefeller Syndrome is the condition of males with two or more X chromosomes in addition to one Y chromosome. Greenberg, *supra* note 8, at 283.

22. Females with Turner Syndrome do not fit exactly into the category of XX or XY, but instead may have an XO chromosomal pattern, resulting in unformed and nonfunctioning gonads. *Id.* at 284.

23. Swyer Syndrome is similar to Turner Syndrome in that it results in unformed gonads coupled with the presence of XY chromosomes resulting from the lack of a sex-determining segment on the Y chromosome. *Id.*

24. Persistent Mullerian Duct Syndrome occurs when both male and female internal organs are present due to failure to secrete anti-Mullerian hormones, which prevent the formation of female organs. *Id.* at 285.

25. Hermaphroditism is the condition of having ambiguous external genitalia caused by a variety of different disorders. *Id.*

26. Individuals with Androgen Insensitivity Syndrome are born with XY chromosomes and testes, yet androgen receptors are nonfunctioning, causing the formation of external female genitalia. *Id.* at 286.

27. 5 Alpha-Reductase Deficiency is similar to Androgen Insensitivity Syndrome, resulting in a male chromosome pattern, testes, and external female genitalia resulting from the body's inability to convert testosterone to its more powerful androgen form to create male external genitalia. *Id.* at 287.

28. Congenital Adrenal Hyperplasia is the condition of individuals with XX chromosomes and female internal organs, who nevertheless have a masculinized external appearance and possibly ambiguous genitalia. *Id.* at 288.

29. Resulting from excess male hormones in a normal XX female, Progestin-Induced Virilization usually produces normal female gonads accompanied by larger-than-normal external organs. *Id.* at 288–89.

30. Research indicates that the percentage of children born with ambiguous genitalia is between 1 and 4 percent. *Id.* at 267–68 (citing Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCIENCES, Mar.–Apr. 1993, at 20, 21).

31. *Id.* at 271–72. Greenberg notes that sex is assigned mostly according to the size of external genitalia. For example, if the penis is too small to penetrate a female's vagina, the child will usually be assigned and surgically altered to be a female without regard to the future reproductive capacity of the child. *Id.* at 272.

32. *See generally* Milton Diamond, *Sexual Identity and Sexual Orientation in Children With Traumatized or Ambiguous Genitalia*, 34 J. SEX RES. 199 (1997). For example, in the case when a child's penis looks too small, the penis will be turned into a clitoris and the child is raised as a girl. Diamond's article suggests that despite being raised as a girl, the child will not identify as a girl unless she was born with a female psychological identity.

"normalizing" surgery, which presents the risk, further discussed below, that an individual whose sex falls outside the binary categories of male and female will be unable to marry. Given the impossibility of definitively assigning intersexuals to a particular sex, courts generally have allowed an intersex person's sexual identity (or psychological sex) to control sex determination, allowing intersexuals who wish to be married the choice of being classified as either male or female.[33]

B. Legal Status of Transgender Individuals

The legal and administrative status of transgender people in the United States and abroad varies widely. This variation exists not only across jurisdictions in the United States, but also across agencies within individual jurisdictions.

Birth certificate amendment procedures, for example, deviate widely by state. The majority of states allow transgender persons to amend their birth certificates to reflect changes after sex-reassignment surgery.[34] California requires a physician's affidavit documenting the sex change.[35] Arizona law, meanwhile, provides that the petitioner must provide a sworn statement from a licensed physician that he has performed a surgical operation or a chromosomal count indicating a different sex than that listed on the birth certificate.[36] In Louisiana, a transgender person must petition for a birth certificate change in a court that may require "such proof as it deems necessary . . . that the petitioner was properly diagnosed as a transsexual or pseudo-hermaphrodite," and that sex reassignment surgery has been performed.[37] Montana law states that the Department of Public Health and Human Services has discretion on what proof may be offered to amend a birth certificate; however, "[t]he probative value of a[n] . . . 'altered' . . . certificate of birth is determined by the judicial or administrative body before whom the certificate is offered as evidence."[38] Many states also authorize birth certificate amendments but do not specifically address

33. Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 408–09 (2004) (arguing that courts are more likely to allow intersexuals the possibility of defining their own sex based on sexual identity given the lack of a "baseline" or clear sex marker at birth).

34. For a detailed list of state statutes regulating birth certificate changes and the proof required for such changes, see Fisher, *supra* note 7, at 268.

35. CAL. HEALTH & SAFETY CODE § 103430(a) (West 1996).

36. ARIZ. REV. STAT. ANN. § 36-32b(A)(4) (West 2002).

37. LA. REV. STAT. ANN. § 40:62(e) (2001).

38. MONT. CODE ANN. § 50-15-204(e)(5) (2005).

sex-realignment surgery.[39] Tennessee, notably, is the only state that statutorily bars transgender individuals from changing their birth certificates.[40]

Inconsistent court rulings also have contributed to the unpredictable treatment of transgender persons' birth certificates. In Ohio, a probate court denied a post-operative male-to-female the ability to change the sex listed on her birth certificate, interpreting the Ohio correction-of-birth-record statute's silence as not intending such a procedure.[41] New York courts also have issued various rulings on whether transgender individuals may change their birth certificates to reflect post-operative sex.[42] Most notably, in *Anonymous v. Mellon*,[43] a New York court upheld the New York Board of Health's decision not to indicate a post-operative female's sex on her birth certificate, consequently leaving the certificate devoid of any sex designation.[44] Such state variation on amended birth certificates reflects the ever-present ambiguity that plagues the classification of transgender individuals.

Other forms of official state and federal documentation further illustrate the wide deviation between jurisdictions and between agencies when it comes to the classification of transgender individuals. States require different forms of identification to issue driver's licenses,[45] for example, and the interaction between conflicting states' and the federal government's ambiguous treatment of transgender individuals can produce a perplexing result. To illustrate, a transgender woman with a male birth certificate, from a state where amendment is not allowed, nevertheless can obtain a driver's license as a female in any state where a birth certificate is not required for a driver's license. And in the case of passports, transgender persons may change sex designation without showing a birth

39. *See, e.g.*, N.D. CENT. CODE § 23-02.1-25 (2001), MINN. STAT. ANN. § 144.218(4) (West 2004).

40. Fisher, *supra* note 7, at 260–61.

41. *In re* Ladrach, 513 N.E.2d 828 (Ohio Probate Ct. 1987). The court was interpreting Ohio Rev. Code Ann. section 3705.20. The *Ladrach* holding was later affirmed in *In re Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003) (holding that an out-of-state birth certificate reflecting post-operative sex was not conclusive and that public policy in Ohio prohibited a female-to-male from marrying a female).

42. *See* Anonymous v. Weiner, 270 N.Y.S.2d 319 (Sup. Ct. 1966) (upholding the New York City Department of Health's decision that a post-operative female may not change her birth certificate to female); *In re* Anonymous, 293 N.Y.S.2d 834 (Civ. Ct. 1968) (holding that while the court did not have jurisdiction to order the change of a sex designation on a birth certificate, the petitioner could change her name to any name so long as it was not fraudulent).

43. 398 N.Y.S.2d 99 (Sup. Ct. 1977).

44. *Id.* at 100.

45. Greenberg, *supra* note 8, at 315–16.

certificate (amended or not) by submitting proof of sex-reassignment surgery or the intention to undergo such surgery shortly thereafter.[46]

Still more examples abound of the conflicting categorization of transgender persons.[47] The federal prison authorities treat post-operative transgender persons as members of their post-operative sex for purposes of sex-segregated incarceration.[48] Courts also have held that sex-reassignment surgery may be medically necessary and must be covered by both public and private insurance.[49] Despite widespread acceptance of medical insurance coverage for sex-reassignment surgery, however, the Americans with Disabilities Act[50] still classifies transsexualism as a "sexual behavior disorder," comparing it to exhibitionism and pedophilia.[51] Even the sports world has experienced difficulty in categorizing transgender individuals for purposes of eligibility in female competition.[52]

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46. *Id.* at 315.

47. For a thorough discussion of such situations, see generally Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275 (1997). Storrow argues: "The divergence of the legal outcomes faced by transsexuals lies, at least in part, in the different approaches the medical and legal establishments take toward transsexuals. Though law and medicine agree on the medical necessity of sex reassignment surgery for transsexuals, they differ on who the transsexual becomes post-surgery." *Id.* at 331–32.

48. *See* Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993) (explaining a federal prison authority's policy to incarcerate individuals who have completed sex-reassignment surgery with prisoners of their same post-operative sex, while incarcerating pre-operative individuals with prisoners of the transgender person's chromosomal birth sex).

49. *See, e.g.*, Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980); J.D. v. Lackner, 145 Cal. Rptr. 570 (Ct. App. 1978); G.B. v. Lackner, 145 Cal. Rptr. 555 (Ct. App. 1978); Doe v. Dep't of Pub. Welfare, 257 N.W.2d 816 (Minn. 1977); Davidson v. Aetna Life & Cas. Ins. Co. 420 N.Y.S.2d 450 (Sup. Ct. 1979). *But see* Rush v. Johnson, 565 F. Supp. 856 (N.D. Ga. 1983); Denise R. v. Lavine, 347 N.E.2d 893 (N.Y. 1976), *rev'g* 364 N.Y.S.2d 557 (App. Div. 1975). For a discussion of these cases, see Storrow, *supra* note 47, at 280–85.

50. 42 U.S.C. §§ 12101–12213 (2000).

51. Section 12211(b) of the Americans with Disabilities Act provides: "Under this Chapter, the term 'disability' shall not include—(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." *Id.* § 12211(b)(1).

52. Femininity testing in sports began in the mid-1960s with the implementation of a visual genitalia test at the 1966 European Track and Field Championships in Budapest and the 1967 Pan American Games in Winnipeg. *See* PAMELA DOIG ET AL., CANADIAN ACADEMY OF SPORT MEDICINE, POSITION STATEMENT: SEX TESTING (GENDER VERIFICATION) IN SPORT 3 (2003), *at* http://www.casm-acms.org/PositionStatements/GendereVerifEng.pdf. In 1968, the International Olympic Committee (IOC) introduced the Barr Body test (also known as the "sex-chromatin test") for the 1968 Winter and Summer Olympics, which relied on the presence of a second X chromosome to determine sex. *See* MARTINE ROTHBLATT, THE APARTHEID OF SEX: MANIFESTO ON THE FREEDOM OF GENDER 71 (1995). This method has received intense criticism. *See* Richards v. U.S. Tennis Assoc., 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977) (finding that a sex-chromatin test is "grossly unfair, discriminatory, and inequitable, and violative of [individual]

C. Transgender Marriage

While the disparate legal treatment of transgender persons imposes an individual burden, this burden is exacerbated when such individuals attempt to marry. Perhaps unsurprisingly, treatment of transgender marriage also varies widely by jurisdiction in the United States. Transgender marriage cases present two ideological groups, divided by courts' willingness to accept the ability of an individual to change "birth" sex through surgery. The first group of cases treats sex as immutably fixed at birth, and the courts in these cases maintain that sex cannot be changed by hormone therapy or sex-reassignment surgery. The second group of cases recognizes the critical importance of sex-reassignment surgery in aligning one's sexual identity with physical sexual markers. As a result, courts in this second group place more importance on the psychological aspects of sex in the form of sexual identity. Ultimately, these two approaches result in vastly dissimilar treatment for transgender couples in different states.

1. The "Immutably Fixed at Birth" Cases

Some courts invalidate transgender marriages merely because of chromosomal sex. An English court first considered this question in *Corbett*

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rights under the Human Rights Law of [New York]" when used as a method for determining who is female for tennis competitions). The court in *Richards* also held that when an individual

> finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.
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> . . . [T]he Barr body test . . . is not and should not be the sole criterion, where as here, the circumstances warrant consideration of other factors.

Id. at 272–73. Since the 1992 Winter Olympics in Albertville, the IOC has applied a polymerase chain-reaction technique that identifies Y chromosomes. *See* DOIG ET AL., *supra*, at 8. Given the drawbacks of a chromosomal test, including the high probability of false or inconclusive results, the IOC also conducts a follow-up gynecological exam for cases in which ineligibility would result from the chromosome test. *Id.* The International Amateur Athletic Federation, on the other hand, eliminated all such compulsory testing in 1991, finding that chromosome testing is unfair to individuals with atypical chromosomes. *See* ROTHBLATT, *supra*, at 72. In 2004, the Ladies European Golf Tour eliminated its female-at-birth standard of determining eligibility, allowing the first ever transgender golfer to compete in the tour. Associated Press, *Bagger 'Delighted' to Qualify*, Nov. 3, 2004, *at* http://sports.espn.go.com/golf/news/story?id=1915331 (last visited Oct. 15, 2005). The British Ladies Golf Union made a similar policy change to allow transgender female competitors in 2005. However, the U.S. Ladies Professional Golf Association (LPGA) still requires proof of female sex at birth to qualify for its tour. The LPGA is considering amending its rules to conform to this prevailing trend in professional and amateur athletics. Associated Press, *Policy Change Paves Way for Bagger to Play British*, Feb. 10, 2005, *at* http://sports.espn.go.com/espn/pring?id=1987891&type=story (last visited Oct. 15, 2005).

v. Corbett,[53] and although *Corbett* is a British case, many U.S. courts have followed its reasoning.[54] In *Corbett*, the court considered the marriage of a male and a post-operative female,[55] consulting an "unusually large number of doctors" to determine the sex of the respondent transgender individual—on which the legality of the marriage rested.[56] The presenting physicians agreed that at least four criteria determined sex: (1) chromosomal factors; (2) gonadal factors; (3) genital factors; and (4) psychological factors. The court, however, held the fourth factor irrelevant for cases in which the first three factors are congruent at birth, essentially obviating consideration of the psychological factor.[57] Consequently, the court also eviscerated the legal significance of sex-reassignment surgery:

> [T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed . . . by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term "change of sex" is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.[58]

Given that the first three factors were congruent at birth for the respondent, the court did not inquire into her psychological gender identity. It concluded: "[T]he respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth."[59] Thus, in determining that sex is immutably fixed at birth by chromosomes, gonads, and genitalia, the *Corbett* court essentially precluded the recognition of sex-reassignment surgery.[60]

The two most prominent U.S. cases following the *Corbett* reasoning are *Littleton v. Prange*[61] and *In re Estate of Gardiner*.[62] In *Littleton*, a Texas court considered whether a post-operative female had standing to bring a

53. [1971] P. 83 (U.K. 1970).

54. *See* Kogan, *supra* note 33, at 373–82. Kogan posits that *Corbett*, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), and *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002), constitute the first wave of transsexual marriage cases in that all three "rely upon birth biology to the total exclusion of psychological and social criteria in determining a person's sex to assure that they not condone same-sex marriage." *Id.* at 381.

55. *Corbett*, [1971] P. at 84.

56. *Id.* at 89.

57. *Id.* at 100.

58. *Id.* at 104.

59. *Id.* at 106.

60. *Id.* at 104–05.

61. 9 S.W.3d 223 (Tex. App. 1999).

62. 42 P.3d 120 (Kan. 2002).

claim as a man's surviving spouse under Texas's wrongful death statutes.[63] The plaintiff, Christie Lee Littleton, was born with male genitalia but identified herself as a female from the age of four. She enrolled in a four-year psychological and psychiatric treatment program at the University of Texas Health Science Center at the age of twenty-three,[64] and her treatment culminated in three surgical procedures and complete sex reassignment.[65] According to her doctors' testimony, Littleton had the capacity to function sexually as a female,[66] and she married a man in Kentucky in 1989. After her husband's death in 1996, Littleton filed a medical malpractice claim as his surviving spouse, which opened the nature of Littleton's marriage to judicial scrutiny.[67]

The court in *Littleton* first employed the soon-to-be-familiar argument of legislative deference: Given that the statutory basis for Littleton's wrongful death claim required a spousal relationship, the court concluded, the legislature must determine whether or not Texas would recognize transgender marriage.[68] Framing the question as an elemental evaluation of sex-reassignment surgeries, the court asked, "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[69] On the one hand, the court acknowledged medical evidence suggesting that certain individuals are born with "sexual self-identity . . . in conflict with their biological and anatomical sex,"[70] as well as testimony from doctors who considered Littleton to be a female.[71] However, because sex-reassignment surgery cannot construct internal organs such as a womb, cervix, and ovaries, and because Littleton remained a male chromosomally, the court held that she was still a male.[72] Accordingly, the extent of Littleton's accomplishment through her four years of treatment and three surgeries was that "*[i]n her mind*, she ha[d]

63. *Littleton*, 9 S.W.3d at 223.

64. *Id.* at 224. As a youth, Littleton also had experienced embarrassment from changing clothes in front of other boys, and had asked to be excused from sports and physical education. *Id.*

65. Littleton's surgeries included removing the penis, scrotum, and testicles, as well as constructing a vagina, labia, and breasts. *Id.*

66. *Id.* at 225.

67. *Id.* The case was an appeal of a grant of summary judgment in favor of the defendant.

68. *Id.* at 230.

69. *Id.* at 224. The court further suggested that "to depart from a reliance on birth biology will defy more than mere logic; it will defy the Lord's natural plan for the universe." Kogan, *supra* note 33, at 381.

70. *Littleton*, 9 S.W.3d at 230.

71. *Id.* at 231.

72. *Id.* at 230.

corrected her physical features to line up with her true gender."[73] Littleton was an anatomical and genetic male at birth, and this could not change.[74]

The Supreme Court of Kansas reached a similar result in 2002 in *Gardiner*, in which a son challenged the marriage between his father and a post-operative female[75]—arguing that the marriage involved two males and was thus invalid.[76] J'Noel Gardiner, the wife, was born with male genitalia but testified that nonetheless she viewed herself as a female since before puberty. In an effort to align her physical appearance with her gender identity, Gardiner underwent a series of procedures including electrolysis and thermolysis to remove body hair, hormone treatment, a tracheal shave to change her voice, a forehead/eyebrow lift, a rhinoplasty, cheek implants, an orchiectomy to remove testicles, the construction of a female vagina, a labia, and a clitoris—all accompanied by therapy and counseling.[77] According to her doctors, Gardiner had a "fully functional vagina" and had completed total sex-reassignment surgery.[78] Gardiner also changed her name, amended her birth certificate in Wisconsin, and was listed as a female on her driver's license, passport, health documents, and on records at the university where she taught.[79]

Like the court in *Littleton*, the Supreme Court of Kansas noted the importance of legislative intent and looked to *Webster's New Twentieth Century Dictionary* to ascertain the legislature's intentions in using the terms "male" and "female" in the Kansas marriage statute.[80] Finding that the 1970 edition of *Webster's New Twentieth Century Dictionary* defined a female as "designating or of the sex that produces ova and bears offspring: opposed to *male*,"[81] and establishing that Gardiner did not have ova or the capability to bear offspring, the court held that she did not fit into the

73. *Id.* at 226 (emphasis added).

74. *Id.* at 231. In so deciding, the court also invalidated Littleton's birth certificate amendment. Littleton had her birth certificate amended under Texas Health and Safety Code section 191.028, which provides that birth certificates may be amended if the record is "incomplete or proved by satisfactory evidence to be inaccurate." TEX. HEALTH & SAFETY CODE ANN. § 191.028 (1989). While the trial court found the birth certificate amendment valid, the Texas Court of Appeals held that the legislature intended the term "inaccurate" to mean inaccurate at the time of its recording—that is, at the time of birth. Thus, the court foreclosed the possibility of amended birth certificates for use in validating future marriages. *Littleton*, 9 S.W.3d at 231.

75. 42 P.3d 120, 120 (Kan. 2002).

76. *Id.*

77. *Id.* at 122–23.

78. *Id.*

79. *Id.* at 123.

80. The court was interpreting KAN. STAT. ANN. § 23-101 (1995).

81. *Id.* at 135.

definition of female as the legislature intended.[82] Further, the court implied that not only was Gardiner not a female, but that she no longer had any true sex, stating: "The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."[83] Given the statutory language of the Kansas Marriage Statute, which defined marriage as "between two parties who are of opposite sex,"[84] a person experiencing gender dysphoria did not fall within the meaning of the statute.[85] Like the reasoning in *Corbett* and *Littleton*, the court's analysis in *Gardiner* disregarded the psychological aspects of sexual identity and determined that sex was immutably fixed at birth.[86]

Finally, the most recent reiteration of *Corbett's* reasoning is provided by *Kantaras v. Kantaras*.[87] Kantaras was born a female by the name of Margo Kantaras.[88] He underwent sex-reassignment surgery, including hormonal treatments, a hysterectomy, and a double mastectomy, changed his name to Michael John Kantaras, and married a woman.[89] When Kantaras later filed a petition for dissolution of the marriage, including a request for custody of both of the couple's children,[90] his wife counterpetitioned for

82. *Id.* In determining legislative intent, the court did not consider the existence of Kansas Administrative Regulations, which allow an amendment to Kansas birth certificates on presentation of a medical certificate indicating that a physiological or anatomical change has occurred. *See* KAN. ADMIN. REGS. § 28-17-20(b)(1)(A)(i) (1993), *available at* http://www.kslegislature.org/legsrv-kars/index.do (last visited Oct. 20, 2005); *see also* Fisher, *supra* note 7, at 251–52 (questioning the court's adherence to a policy of legislative deference given that it did not consider other legislative manifestations of intent to recognize sex-reassignment surgery).

83. *Gardiner*, 42 P.3d at 135.

84. KAN. STAT. ANN. § 23-101 (1995 & Supp. 2004). The statute continues: "All other marriages are declared to be contrary to the public policy of this state and are void." *Id.*

85. *Gardiner*, 42 P.3d at 136. This seems to suggest that in Kansas, individuals experiencing gender dysphoria never could be married legally because they could not satisfy the narrow "biological male" or "biological female" requirement the court lays out in its opinion. Nonetheless, the court stated in its conclusion that even considering that "J'Noel ha[d] undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery . . . . J'Noel remain[ed] a transsexual, and a male for purposes of marriage." *Id.* at 137.

86. *In re* Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003), also followed similar reasoning in holding that Ohio public policy prohibits a post-operative female-to-male transsexual from marrying a female.

87. 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

88. *Id.* at 155.

89. *Id.* at 155–56.

90. *Id.* at 156. At the time of the marriage, Kantaras's wife had just delivered the child of her ex-boyfriend. After the marriage, Kantaras adopted her son, and the couple also had a second child using artificial insemination with the help of Kantaras's brother. *Id.*

dissolution and annulment, claiming that the marriage was void given Florida's ban of same-sex marriage and homosexual adoption.[91]

The trial court determined that Kantaras was a male at the time of the marriage as well as the adoption, engaging in extensive findings of fact and relying on medical evidence and witness testimony to reach its decision.[92] The court observed:

> As a child, while born female, [Kantaras's] parents and siblings observed his male characteristics and agreed he should have been born a "boy" . . . Kantaras always has perceived himself as a male and assumed the male role doing house chores growing up, played male sports, refused to wear female clothing at home or in school and had his high school picture taken in male clothing.[93]

In addition, the court looked to Florida's acceptance of Kantaras as a man for other social and legal purposes. This included Kantaras's male driver's license, passport, name change, amended birth certificate, male participation in adoption proceedings, and an artificial insemination program, and as a father in his children's school activities.[94] Thus, Kantaras was awarded custody of his two children.

The Florida District Court of Appeal reversed the trial court, following the reasoning of *Corbett*, *Littleton*, and *Gardiner* in interpreting the "common meaning of male and female" as codified in the Florida statutes "to refer to immutable traits determined at birth."[95] The court declined to refer to medical evidence in reaching its decision, instead relegating the duty of determining the public policy at issue to the legislature.[96] The marriage was declared void, as Kantaras was not a "man" at the time of the marriage under this "common meaning."[97] Similar to *Corbett*, *Littleton*, and *Gardiner*,

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91. *See* FLA. STAT. ANN § 741.04(1) (1987) (prohibiting the issuance of a marriage license unless one party is a male and the other a female); *id.* § 741.212 (Supp. 1998) (writing the provisions of the federal DOMA into Florida law); *id.* § 63.042(3) (2002) (prohibiting adoption by individuals known to engage in current, voluntary homosexual activity); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004), *rehearing en banc denied*, 377 F.3d 1273 (11th Cir. 2004) (holding that Florida's prohibition against homosexual adoption survives both due process and equal protection challenges).

92. For an analysis of the trial court's 800-page decision before it was overruled, see Kogan, *supra* note 33, at 392–96.

93. *Kantaras*, 884 So. 2d at 156.

94. *Id.*

95. *Id.* at 161.

96. *Id.*

97. *Id.*; *see also* Frances B. v. Mark B., 355 N.Y.S.2d 712 (Sup. Ct. 1974) (holding that a marriage between a female and a post-operative male-to-female was void because the defendant male-to-female could not function sexually as a male); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971) (holding that a marriage between a post-operative transgender female and a

the court in *Kantaras* also relied on chromosomes and birth biology as the defining indicator of an individual's sex, regardless of personal sexual identity or surgery.

2. The Medical Evidence Cases

Despite the trend developed in *Corbett*, *Littleton*, *Gardiner*, and *Kantaras*, other courts have acknowledged the importance of psychological aspects in determining the sex of transgender individuals. In the United States, the main case validating a marriage involving a transgender individual is the New Jersey appellate decision of *M.T. v. J.T.*[98] In *M.T. v. J.T.*, wife M.T. testified that although she was born a male, she began dressing as a girl by the age of fourteen and always had felt like a woman.[99] Her doctor testified that "[h]e knew of no way to alter [M.T.'s] sense of her own feminine gender identity in order to agree with her male body, and the only treatment available to her was to alter the body to conform with her sense of psyche gender identity."[100] Thus, M.T. chose to undergo hormone therapy as well as surgery to remove her male sex organs and construct a vagina functional for sexual intercourse.[101] Yet when M.T. filed a complaint for support and maintenance from her husband,[102] respondent J.T., he argued that the marriage was a nullity—given M.T.'s male sex at the time of the marriage.[103]

To start, the court in *M.T. v. J.T.* acknowledged that New Jersey requires "two persons of the opposite sex, a male and a female," to form a valid marriage.[104] The question, then, was whether a post-operative female could be considered a female for the purpose of lawful marriage.[105] Relying on the plaintiff's medical evidence, the court acknowledged that several standards may be used to determine an individual's sex. Ultimately, however, the court accepted the importance of tests other than simply looking to

male who did not know of his spouse's transgender status was a nullity). The state of Ohio has used similar reasoning to invalidate marriages involving transgender individuals. *See supra* note 41 and accompanying text.

98. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). In addition, a California superior court held in an unpublished opinion that a post-operative female-to-male may marry a female in California. *See Legal Briefing: Transgender Ruling*, L.A. DAILY J., Nov. 26, 1997, at 1 (reporting on the unpublished case of Vecchione v. Vecchione).

99. *M.T. v. J.T.*, 355 A.2d at 204.

100. *Id.* at 206.

101. *Id.*

102. *Id.* at 205.

103. *Id.*

104. *Id.* at 207–08.

105. *Id.* at 208.

external genitalia or chromosomes at the time of birth.[106] Explicitly rejecting *Corbett*, the court reasoned: "[W]e must disagree with the conclusion . . . that for purposes of marriage sex is somehow irrevocably cast at the moment of birth . . . ."[107] Laying out a new paradigm to deal with transgender marriages, the court concluded:

> If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female . . . we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.[108]

While the *M.T. v. J.T.* opinion opened the debate for a more flexible understanding of marriage, it still based its decision on one's post-operative capacity to perform sexual intercourse.[109] Because the court's recognition of the marriage depended on "the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female,"[110] it highlighted the importance of both surgery and heterosexual intercourse for transgender individuals in New Jersey.

Courts in foreign jurisdictions also have recognized the validity of psychological and sexual identity factors when considering the validity of a marriage involving a transgender individual.[111] In *In re Kevin*,[112] an Australian court determined that an individual may use his or her post-operative sex for marriage purposes even though Australia bans same-sex marriages.[113] Similarly, the European Court of Human Rights accepts the recognition of transgender individuals' post-operative sex for marriage purposes. In *Goodwin v. United Kingdom*,[114] that court held that the U.K.'s "refusal to recognize post-operative transsexuals as their post-operative sex violated Articles

106. *Id.*
107. *Id.* at 209.
108. *Id.* at 210–11.
109. *Id.* at 209.
110. *Id.*
111. Of course, one might argue that the laws of foreign jurisdictions are irrelevant to the U.S. legal system. In the immigration context, however, it is important to understand the laws of other countries given the principle of comity, that is, of presuming the validity marriages executed lawfully in other countries unless they violate public policy. *See infra* Part III.A.2.
112. (2001) 165 F.L.R. 404, 462–63, 472–76, *aff'd*, Attorney-Gen. v. "Kevin and Jennifer," (2003) 172 F.L.R. 300.
113. *Id.* On appeal, the *In re Kevin* decision was upheld. The appellate court noted that marriage is undefined in the Australian Constitution and thus held marriage to be an "evolving institution." *"Kevin and Jennifer,"* (2003) 172 F.L.R. at 313.
114. 2002-VI Eur. Ct. H.R. 1.

Eight (right to respect for private life) and Twelve (right to marry) of the European Convention on Human Rights."[115] The court asserted: "[T]he unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."[116] Noting that "society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost," the court in *Goodwin* recognized the right of a post-operative male-to-female to marry a man.[117]

II. TRANSGENDER MARRIAGE AND IMMIGRATION

Given the inconsistent treatment that transgender individuals experience across the United States, such individuals face a substantial risk that their family relationships will no longer be recognized when moving across state lines.[118] This inconsistency is even greater in the case of transgender individuals who choose to marry immigrants. In particular, DOMA offers no clear path to help immigration officials navigate the foggy interplay between marriage under the Act, state law, and immigration law.

A. Immigration: A Primer

Modern immigration law is governed by the often amended Immigration and Nationality Act of 1952, as codified under Title VIII of the United States Code.[119] Immigration Law concerns citizenship, lawful

115. *Id.*
116. *Id.* at 31.
117. *Id.* at 32.
118. *See generally* Shana Brown, Comment, *Sex Changes and 'Opposite-Sex' Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgender Persons' Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113 (2001).
119. Since March 1, 2003, the power to enforce immigration laws within the United States has been delegated to the Department of Homeland Security (DHS), which presides over United States Citizenship and Immigration Services (USCIS) (formerly known as the Immigration and Naturalization Service, or INS). *See* 1 THOMAS GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 1 (2003). The United States Department of State, Bureau of Consular Affairs and USCIS share the duty of adjudicating applications, depending on various factors including the location of the intending immigrant. *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 276 (5th ed. 2003). In the interest of simplicity, this Comment focuses on USCIS, but the Department of State uses virtually the same adjudication procedures. *See* GORDON ET AL., *supra*, at § 1. Thus, this Comment's recommendations apply equally to USCIS and the Department of State. However, applicants denied by USCIS have greater rights to review. *See* Allan H. Wernick, *Consular Processing of Immigrant Visas*, 90-12 IMMIGR. BRIEFINGS, Dec. 1990, at 1.

permanent residency, and a host of other residency classifications including tourists, qualified employees, and diplomats. The focus of this Comment will be lawful permanent residence (LPR) status because, in most cases, lawful permanent residence is a prerequisite to the acquisition of citizenship after birth.[120] Although there are numerous methods of gaining lawful permanent residency in the United States,[121] the three main immigration avenues for nonresident aliens are employment-based, family-based, and "diversity" immigration.[122] This Comment will focus on family-based immigration because of its relevance to the evolving debate about same-sex and transgender marriages.

B. Spousal Immigration Benefits

Family-based immigration is a two-step process. First, the immigrant's family member must establish that a valid familial relationship exists.[123] Second, the immigrant must wait for a visa to become available according to the preference system established in the Immigration Act of 1990.[124]

For immediate relatives[125] of U.S. citizens, including spouses, the intending immigrant need not wait for a visa to become available.[126] Yet, while

120. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1276–77 (4th ed. 2005). Lawful permanent residence (LPR) status is most frequently associated with a "green card." LPRs (green-card holders) are foreign nationals who may live and work in the United States without time restriction so long as they maintain residence here and do not engage in criminal activity that qualifies for removal under the Immigration and Nationality Act (INA) section 237, 8 U.S.C. § 1227 (2000). *See also* LEGOMSKY, *supra*, at 9–12.

121. Other methods include diversity visas, labor certification, and professional visas. *See* ALEINIKOFF, *supra* note 119, at 274–84.

122. *See* LEGOMSKY, *supra* note 120, at 9.

123. The immigrant's family member must file a Petition for Alien Relative with USCIS proving both that the petitioner is a United States citizen or LPR and that the petitioner and beneficiary have the requisite relationship. *See* ALEINIKOFF, *supra* note 119, at 276. The petitioner achieves this step through completing Citizenship and USCIS Form I-130, Petition for Alien Relative. Dep't of Homeland Security, USCIS Form I-130: Petition for Alien Relative, OMB# 1615-0012, *available at* http://149.101.23.2/graphics/formsfee/forms/i-130.htm.

124. The preferences are as follows: First Preference: unmarried sons or daughters of U.S. citizens; Second Preference: spouses, children, and unmarried sons and daughters of lawful permanent residents; Third Preference: married sons and daughters of U.S. citizens; Fourth Preference: brothers and sisters of U.S. citizens. INA § 203(a), 8 U.S.C. § 1153; *see also* ALEINIKOFF, *supra* note 119, at 279–80.

125. Under the INA, an immigrant qualifies as an immediate relative if he or she is the spouse of a U.S. citizen, the child of a U.S. citizen, or the parent of a U.S. citizen where the citizen is at least twenty-one years of age. INA § 201(b), 8 U.S.C. § 1151(a); *see also* ALEINIKOFF, *supra* note 119, at 302.

126. Under INA section 201(c), 8 U.S.C. § 1151, Congress set up a complicated formula for all family-sponsored immigration. There is a cap on immigration for family-sponsored immigrants (currently set at 480,000 since FY 1995). *Id.* However, immediate relatives of U.S. citizens may immigrate in unlimited numbers. These immigrants still affect the cap in that they may reduce

spousal relationships are advantageous in that they trigger the expedited processing and waiver of the cap available for immediate relatives, they also may be difficult to prove. Given the absence of an objectively verifiable blood relationship, United States Citizenship and Immigration Services (USCIS) may consider a wide variety of discretionary categories to determine if a marriage is bona fide.[127] As a result, spousal relationships are subject to greater unpredictability in immigration than immediate relatives of blood relationship.

Furthermore, USCIS narrows considerably the definition of spouse for immigration purposes—in some cases refusing to recognize a legally valid marriage because it fails USCIS's bona fide test. For example, if a couple effectuated a marriage solely to secure legal residency for the alien spouse, then USCIS considers the marriage fraudulent and not bona fide.[128] Additionally, marriages are invalid for immigration purposes if they violate public policy.[129] USCIS typically will rely on state or foreign law in the jurisdiction of the marriage to determine whether the marriage offends public policy; in special circumstances such as same-sex marriages, however, federal policy will supersede the public policy of individual states.[130]

C. DOMA and Its Effect on Immigration Law

DOMA reduces the question of immigration through same-sex marriages to a largely meaningless inquiry. In addition to creating a federal definition of marriage, DOMA requires immigration officers to consider this

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the number of visas available for nonimmediate relatives to as low as 226,000. *Id.* § 201(c)(1)(B)(ii), 8 U.S.C. § 1151(c)(1)(A). The visas available for nonimmediate relatives cannot be decreased below 226,000. If immediate relatives exceed 254,000, the overall cap is increased. *See, e.g.*, ALEINIKOFF, *supra* note 119, at 284–85; LEGOMSKY, *supra* note 120, at 241–42. The effect of this formula is that USCIS earmarks a minimum of 226,000 visas for nonimmediate relatives, while immediate relatives may immigrate in unlimited numbers. The number of visas available for potential immigrants from each foreign state and preference category is tracked and updated monthly by the State Department's Visa Office in the Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html?css=print (last visited Oct. 15, 2005).

127. *See* SARAH B. IGNATIUS & ELISABETH S. STICKNEY, NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW AND THE FAMILY § 4.1 (2004).

128. INA § 237(a)(1)(G), 8 U.S.C. § 1227; *see also* Harry J. Joe, *Ethics in Immigration Law: Immigration Benefit Fraud and the Peril of Conscious Avoidance*, 1 IMMIGR. BRIEFINGS, June 2002, at 1.

129. There are also statutory bars against unconsummated proxy marriages. *See* INA § 101(a)(35), 8 U.S.C. § 1101(a)(35). Examples of marriages that commonly have been found to be against public policy include polygamous marriages and incestuous marriages. *See* IGNATIUS & STICKNEY, *supra* note 127, §§ 4.13–4.15.

130. Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982) (holding that although Colorado marriage statutes may be sufficiently indefinite so as to allow same-sex marriages, the plaintiffs' Colorado marriage was against federal public policy and therefore invalid for immigration purposes).

definition when deciding immigration cases. If the immigration officer cannot decide the validity of a petition from the face of the documents, then she has the option to request an interview.[131] Interviews are conducted for all cases in which fraud is suspected, as well as for a small percentage of randomly selected couples.[132] Notably, spousal interviews are the most common type of family-sponsored immigration interviews because of the high potential for marriage fraud.[133]

If USCIS suspects fraud, then it has the power to conduct "any necessary investigation."[134] This power includes the ability to conduct searches of personal items without a warrant, to interview parties separately and compare answers,[135] and to question neighbors, friends, and coworkers without informing the petitioners.[136] USCIS also may challenge documentation submitted by the petitioners.[137]

Ultimately, DOMA's failure to define man and woman may create problems in USCIS adjudication when marriage laws vary between states. For example, states that legally do not recognize sex-reassignment surgery may reach the peculiar result of validating an opposite-sex marriage that looks like a same-sex marriage. In both *Littleton* and *Gardiner*,[138] there is dicta suggesting that two people of the opposite chromosomal sex, even though apparently of the same sex or having the same genitals, could get married.[139] A marriage under this standard will look exactly like a same-sex marriage: This not only seems to run contrary to DOMA, but also creates serious immigration problems beginning at the early stage of initial filing for

131. DEP'T OF JUSTICE & INS, ADJUDICATOR'S FIELD MANUAL § 10.5 (2004) [hereinafter FIELD MANUAL]. The officer may also perform internal research, request additional documentary evidence, or conduct a field investigation.

132. Beth Stickney, *Conditional and Permanent Residency Through Marriage: Part II*, IMMIGR. BRIEFINGS, Nov. 1999, at 1, 9.

133. FIELD MANUAL, *supra* note 131, § 10.5(c). Additionally, if the petition is based on a marriage that is less than two years old at the time of filing, then an interview is required under the Immigration Marriage Fraud Act of 1986. Because of the suspicion of fraud, these interviews may be substantially more in depth than typical interviews. Immigration Marriage Fraud Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537.

134. 8 C.F.R. § 103.2(b)(7) (2005).

135. For example, USCIS often will ask identical questions to both spouses and then compare answers. Stickney, *supra* note 132, at 9–10.

136. IGNATIUS & STICKNEY, *supra* note 127, § 4:25.

137. *Id.*

138. *See supra* Part I.C.1.

139. *See, e.g.*, *In re* Gardiner, 42 P.3d 120, 137 (Kan. 2002) ("J'Noel remains a transsexual, and a male for purposes of marriage."). This language suggests that J'Noel could marry a female, since *Gardiner* defined marriage as between a biological male and a biological female. *Id.* at 135. Under this reasoning, a chromosomal male who is a post-operative homosexual female could marry a homosexual chromosomal woman.

family-based lawful permanent residency. If a transgender applicant indicates that she is a female as listed on her passport, driver's license, and photo, then it is unlikely the initial application will be approved for interview because USCIS will not view the marriage as bona fide. However, if she indicates on her application that she is a male, then it likely will be flagged for fraud, because the photo of the husband and wife will appear to be two females. A couple in this situation therefore likely will not make it into the interview stage of lawful permanent residency proceedings.

Assuming that USCIS grants an interview, this hypothetical couple will appear to be of the same sex. Regardless of information uncovered in the investigation, USCIS most likely will consider the marriage to be same sex and, as a result, void because of public policy.[140] Thus, a transgender individual in a state that applied the *Littleton-Gardiner* standard *never can marry* an immigrant spouse, regardless of that spouse's gender or sexual orientation.

This proposed situation conflicts substantially with a Ninth Circuit ruling requiring the INS to recognize sexual identity as immutable characteristics. In *Hernandez-Montiel v. INS*,[141] a Mexican citizen, Geovanni Hernandez-Montiel, sought asylum and withholding of deportation due to persecution based on his identity as a homosexual man with a female gender identity.[142] According to his testimony, Hernandez-Montiel realized that he was attracted to men at the age of eight and began dressing like a woman at the age of twelve.[143] Hernandez-Montiel's family attempted to "cure him" of his sexual orientation and sexual identity,[144] and he also was persecuted by the Mexican police.[145] His requests for asylum and withholding of deportation, however, were denied by both the immigration judge as well as the Board of Immigration Appeals (BIA).[146] Both found that Hernandez-Montiel's sexual identity was volitional and could be changed to avoid persecution.

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140. *See, e.g.*, Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).

141. 225 F. 3d 1084 (9th Cir. 2000).

142. *Id.* at 1087. Although *Hernandez-Montiel* is an asylum case, its reasoning is instructive in that it elucidates the Ninth Circuit's view that sexual identity is immutable.

143. *Id.* at 1087.

144. *Id.* at 1088.

145. *Id.* at 1088–89.

146. The immigration judge stated:

> [T]he record reflects that respondent's decision to dress as a women [sic] is volitional, not immutable, and the fact that he sometimes dresses like a typical man reflects that respondent himself may not view his dress as being so fundamental to his identity that he should not have to change it.

Id. at 1089–90. The decision of the Board of Immigration Appeals (BIA) also rested on its conclusion that Hernandez-Montiel's "decision" to dress as a woman was volitional. *Id.* at 1089–90.

Appeals from the decisions of certain USCIS decisions are handled by the BIA, a unit of the Executive Office for Immigration Review. *See* LEGOMSKY, *supra* note 120, at 4–5. Appellants,

On appeal, the Ninth Circuit held that the INS could not mandate that Hernandez-Montiel change his sexual orientation and sexual identity to escape persecution. The court cited extensive medical evidence, concluding that "[s]exual identity is inherent to one's very identity as a person."[147] The court rejected as a mischaracterization the BIA's finding that Hernandez-Montiel belonged to a group composed of "homosexual males who dress as females."[148] Labeling the relevant social group as that of "gay men with female sexual identities," the court implied the absence of volition and found that individuals like Hernandez-Montiel "should not be required to change [their sexual identities]."[149] Ultimately, the *Hernandez-Montiel* court found that gender nonconformity, not just sexual orientation, is an immutable characteristic that USCIS must recognize.[150] Based on these findings, the Ninth Circuit granted Hernandez-Montiel asylum in the United States. The reasoning of *Hernandez-Montiel* thus suggests that USCIS must recognize the transgender individual's perceived sexual identity and cannot systematically deny immigration benefits to transgender individuals and their spouses, at least in the Ninth Circuit.[151]

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who may include the noncitizen or Immigration and Customs Enforcement, submit their case to one of the BIA members who screens the case and may enter summary dismissal if certain conditions are met. 8 C.F.R. § 1003.1(b)(3), (d)(2) (2005). BIA decisions are binding on all immigration judges and on all DHS officers and employees *in that particular case*. *Id.* § 1003.1(g). BIA decisions may be binding in similar cases only if the ruling is designated as precedential. The Attorney General has the power to review decisions of the BIA, and may choose to do so in cases that raise important questions of law or policy. *See* LEGOMSKY, *supra* note 120, at 720. For a detailed description of BIA procedure, see *id.* at 717–23.

147. *Id.* at 1092 (citing ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948), *in* CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 1, 7 (William B. Rubenstein ed., 2d ed. 1997)).

148. *Hernandez-Montiel*, 255 F.3d at 1094.

149. *Id.*

150. It should be noted that the court in *Hernandez-Montiel* did not refer per se to transgender individuals in its opinion. Instead, the court explicitly stated that while Hernandez-Montiel's brief alleged that he might be considered a "transsexual" (someone who believes that he or she belongs or ought to belong to the opposite sex), the court would not decide whether "transsexuals" constitute a particular social group. *Id.* at 1095 n.7. However, the court did recognize that Hernandez-Montiel's nonconforming gender identity, not just his sexual orientation, contributed to his persecution. While Hernandez-Montiel had the physical capability to change his gender identity, such as by wearing typical male clothes, the court still recognized the immutability of gender identity. *Id.* at 1095–96. This idea applies to all gender-variant individuals, whether "transsexual" by definition or not. *See also* Taylor Flynn, Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 405–06 (2001) (arguing that *Hernandez-Montiel* could be both a gay rights case and a trans rights case, given that Hernandez-Montiel was persecuted for his sexual orientation as well as his manner of dress).

151. However, the Ninth Circuit has not yet decided a transgender marriage case. Texas (*Littleton*) is in the Fifth Circuit, Kansas (*Gardiner*) is in the Tenth Circuit, and Florida (*Kantaras*)

Recent BIA decisions also have reflected the immigration system's inability to consistently adjudicate petitions involving transgender marriages. In an unpublished opinion, for example, the BIA considered a marriage between U.S. citizen Jack Keegan and his Israeli wife, Ady Oren.[152] Keegan was born in Michigan with female anatomy. He underwent a bilateral mastectomy, but not genital surgery, and his amended Michigan birth certificate indicated that he was a male.[153]

In re Oren[154] presented two questions to the BIA. First, it considered whether the marriage was valid under Oregon law.[155] Oregon, the BIA noted, allows post-operative transgender individuals to seek a court order recognizing a legal change of sex.[156] Yet because Keegan's amended birth certificate was issued in Michigan, a jurisdiction with a different birth certificate amendment procedure than Oregon, the BIA concluded that the petitioner must show recognition of a change of sex by an Oregon court.[157] The BIA thus remanded the case to USCIS to consider Oregon marriage law.[158]

The second question presented to the BIA was the validity of Keegan's marriage under federal immigration law and DOMA. In remanding the case to USCIS to consider the state law marriage question, the BIA left this question open. Therefore, it failed to address the more complex question of how DOMA interacts with federal immigration law.[159]

In 2004, however, the BIA issued another unpublished decision squarely determining that DOMA does not preclude transgender marriages for immigration purposes. The petitioner in *In re Widener*,[160] Jacob Allen Widener, applied for classification of Esperanza Martinez, born as a male, as his spouse under section 204 of the Immigration and Nationality Act.[161] After Martinez's sex-reassignment surgery, a Filipino court officially recognized a change of sex from male to female, and also changed her birth

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is in the Eleventh Circuit. Until the Supreme Court rules on this issue, sexual identity is not necessarily immutable in all circuits, and the ambiguity inherent in transgender marriages persists.

152. *In re* Oren, File No. A79 761 848, 2004 WL 1167318 (Board of Immigration Appeals Jan. 21, 2004).

153. *Id.* at *2.

154. File No. A79 761 848, 2004 WL 1167318 (Board of Immigration Appeals Jan. 21, 2004).

155. *Id.* at *4.

156. *Id.* at *6.

157. *Id.* In the alternative, Keegan had to show that Oregon would be required to recognize the birth certificate under the Full Faith and Credit Clause. *Id.*

158. *Id.*

159. *Id.*

160. File No. A95 347 685, 2004 WL 2375065 , at *2 (Board of Immigration Appeals Sept. 21, 2004).

161. *Id.* (citing INA section 204, 8 U.S.C. § 1154 (2000)).

certificate to female.[162] Martinez and Widener married in the Philippines in 2001, with the marriage certificate indicating the petitioner's sex as male and the beneficiary's sex as female.[163] The couple then moved to South Carolina. The Department of Homeland Security (DHS) service center that processed Martinez's petition denied it, however, noting that because Congress had not addressed the issue of transgender marriage, the center had no legal basis to validate the marriage for immigration purposes.[164]

Examining the validity at the marriage between Martinez and Widener, the BIA framed the question in terms of the meaning of "opposite sex" under DOMA.[165] The BIA found that when DOMA was passed, state courts already had addressed transgender marriages, and in fact, New Jersey had recognized a transgender marriage as a legal, opposite-sex marriage.[166] In addition, numerous states provided for amendment of birth certificates for post-operative transgender persons.[167] Thus, Congress could have passed a version of DOMA that prescribed the nonrecognition of transgender marriages, and yet did not. The BIA concluded that "DOMA therefore does not preclude recognition of the marriage at issue in this case for purposes of federal law," remanding the case for further consideration of whether Martinez and Widener's home state of South Carolina would recognize changes of sex by post-operative transgender individuals.[168]

The BIA subsequently followed similar reasoning in upholding the validity of a visa petition for a post-operative female and her spouse in *In re Lovo*.[169] In accordance with North Carolina law,[170] the petitioner, born a male, had her birth certificate legally changed to female.[171] The couple filed a visa petition based on their North Carolina marriage,[172] but just as in *Widener*, the DHS service center denied the petition because Congress's failure to address transgender marriage meant that

162. *Id.*
163. *Id.*
164. *Id.* at *2–*3.
165. *Id.* at *3.
166. *Id.* at *3–*5. The BIA was referring to *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).
167. *Id.* at *5.
168. *Id.* at *5–*6.
169. File No. A95 076 067, 2005 BIA LEXIS 8 (Board of Immigration Appeals May 18, 2005). Petitioner, a U.S. citizen, married Jose Mauricio Lovo-Lara, a citizen of El Salvador, in North Carolina in 2002. *Id.* at *2.
170. North Carolina law permits the amendment of birth certificates after sex-reassignment surgery if the request is accompanied by a notarized statement from a physician attesting to the reassignment. N.C. GEN. STAT. § 130A-118(b)(4) (2004).
171. *Lovo*, 2005 BIA LEXIS 8, at *2, *5–*6.
172. *Id.* at *2.

the center had "no legal basis on which to recognize a change of sex."[173] As a result, there was no legal basis to validate the marriage.[174]

On appeal, the BIA unequivocally established the validity of the marriage,[175] first concluding that the marriage was valid under North Carolina law.[176] While the BIA agreed with the DHS service center as a preliminary matter that federal law did not address transgender marriages, it next turned to the legislative history of DOMA. Observing, as it did in *Widener*, that Congress had ignored case law and legislation upholding transgender marriages as legal, the BIA stated: "[T]he legislative history of the DOMA indicates that in enacting the statute, Congress *only* intended to restrict marriages between persons of the same sex."[177] The BIA further remarked that DOMA's legislative history also failed to "indicate that, other than in the limited area of same-sex marriages, Congress sought to overrule our long-standing case law holding that there is no Federal definition of marriage and that the validity of a particular marriage is determined by the law of the State where the marriage was celebrated."[178] As such, DOMA did not prevent recognition of the marriage.[179]

While the decision in *Lovo* rested squarely on the preceding reasoning, the case also is significant in that the BIA took the opportunity to rebut DHS's argument that sex determination should depend on chromosome patterns alone.[180] In rejecting the argument, the BIA noted that the medical community recognizes the existence of eight criteria in determining an individual's sex.[181] The BIA also discussed intersexual individuals who do not fall into a binary chromosome pattern, as well as the possibility of misidentification at birth.[182] Although these points are dicta, their inclusion in the opinion is notable in that it provides an example of a federal adjudicatory body recognizing the importance of current medical evidence on transgender individuals.

Conversely, a different USCIS decision found that DOMA indeed precluded the recognition of a transgender marriage. In November 2004, a

173. *Id.* at *3–*4.
174. *Id.* at *4.
175. *Id.* at *17.
176. *Id.* at *6. The BIA also noted that neither the service center director nor DHS disputed this point. *Id.*
177. *Id.* at *11.
178. *Id.* at *12.
179. *Id.* at *17.
180. *Id.* at *14–*17.
181. *Id.* at *14–*15.
182. *Id.* at *15.

married couple filed a lawsuit against DHS for denying permanent residency to the husband, a Filipino named Jiffy Javanella, whose wife had undergone a sex-reassignment operation.[183] The wife, Donita Ganzon, a post-operative female, became a U.S. citizen in 1987. The couple married in 2001; however, Javanella was placed in deportation proceedings because Ganzon's petition for Javanella's lawful permanent residency was denied by USCIS. DHS explained the denial by stating that no federal statute or regulation addressed sex-reassignment surgery. Citing an internal USCIS policy memo based on DOMA that "disallows recognition of change of sex in order for a marriage between two persons born of the same sex to be considered bona fide," USCIS denied their petition.[184]

III. RECOMMENDATION

The complications that transgender marriages create in the realm of immigration illustrate DOMA's inability to effectuate its own goals uniformly. Consistent "male" and "female" classifications are needed to provide predictable standards for transgender individuals throughout the federal system, as well as to ensure better administrability for DOMA.

A. DOMA: The Need for Clarification

Developing express criteria for classifying individuals as male or female for federal purposes will contribute to DOMA's goal of creating a uniform federal marriage standard.[185] Unless Congress provides clearer definitions for "man," "woman," and "opposite sex," transgender marriages will continue to

183. *See* Gillian Flaccus, *Filipino Husband Denied U.S. Citizenship Because Wife Was Transsexual*, Nov. 30, 2004, http://www.hrc.org (search "Gillian Flaccus"; follow hyperlink) (last visited Oct. 20, 2005).

184. *Id.* The case filed by Ganzon and Javanella is still ongoing. In response to plaintiffs' complaint for declaratory relief, DHS filed a motion to reconsider the visa denial with the BIA. The BIA withdrew its denial and reopened the case without a deadline for decision. DHS then filed a motion to dismiss on the grounds that the agency decision was not final. The plaintiffs argued that given the government's failure to establish a deadline, its reconsideration was illusory, and added an action for mandamus to compel a response. The judge struck the declaratory judgment and granted mandamus. The government's answer was due on August 18, 2005. Telephone Interview by Rebecca Zubaty with Debra Soshoux, Attorney, Korenberg, Abramowitz & Feldman, in Los Angeles, Ca. (Aug. 7, 2005). The government missed the August 18 deadline. E-mail from Debra Soshoux, Attorney, Korenberg, Abramowitz & Feldman, to author (Aug. 25, 2005) (on file with author).

185. *See supra* note 10 and accompanying text. For a discussion of the need for a uniform sex-determination standard in DOMA, see Fisher, *supra* note 7, arguing that whether Congress intended to accept post-operative transsexuals as their post-operative sex for purposes of DOMA depends on whether Congress accepts or rejects the medical understanding of transsexuals.

receive inconsistent treatment across state jurisdictions and federal administrative agencies.[186] Further, given the courts' tendency to defer to Congress for clarification of legislation such as DOMA, it is likely that no resolution will occur unless Congress works to alleviate the anarchy of shifting standards.[187] Finally, DOMA seeks to preserve the existence of "traditional" or "opposite sex" marriages.[188] Clarification that allows transgender individuals to live as their post-operative sex works toward this goal by effectuating marriages between, for example, a male and a sexually functioning, post-operative female.

The current system of allowing state courts to determine the validity of marriages for federal purposes, based on a multiplicity of definitions for male and female, has allowed conflicting results that undermine DOMA's aim of preserving "traditional" marriages. Under the test elaborated in *Littleton*, *Gardiner*, and *Kantaras*, apparent same-sex marriages are legal so long as the individuals are of the "opposite" chromosomal birth sex.[189] It is unlikely that the authors of DOMA foresaw such a puzzling result, and aligning legislative intent with the reality of state court decisions in Texas, Kansas, and Ohio requires the imposition of federal guidelines.[190] The federal government thus should enact legislation that prevents this result so long as same-sex marriages are illegal at the federal level.

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186. *See supra* Part II.B. Apart from the examples discussed in Part II.B, there are numerous areas of government for which a definition of "spouse" or "sex" is required. For example, sex must be clearly defined for military service and spouse must be clearly defined when determining federal income taxes. INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, YOUR FEDERAL INCOME TAX 23 (2004).

187. Policy makers discussing DOMA in the House of Representatives also have agreed that these sorts of questions should be determined by elected officials:

> Changes to public policies are matters reserved to legislative bodies, and not to the judiciary. It would indeed be a fundamental shift away from democracy and representative government should a single justice in Hawaii be given the power and authority to rewrite the legislative will of this Congress and of the several states . . . .

H.R. REP. NO. 104-664, at 17 (1996). The representative's comment refers to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *see supra* note 10.

188. *See* H.R. REP. NO. 104-664, at 17 (1996). *Contra* Susan Frelich Appleton, *Contesting Gender in Popular Culture and Family Law:* Middlesex *and Other Transgender Tales*, 80 IND. L.J. 391, 422 (2005) (arguing that modern equality principles embodied in Supreme Court cases "have gender-neutralized the law's old stereotypical expectations of husbands and wives in one aspect of family life after another"). The goal of preserving "traditional" marriages may, for some, be a questionable one. However, given the popular support for DOMA, see *infra* notes 192–193, it is unlikely that fighting against DOMA is the most effective route to secure LGBT rights.

189. For example, a marriage between a post-operative transgender female and a chromosomal female.

190. In fact, the legislators charged with formulating DOMA foresaw the exact opposite result. *See* H.R. REP. 104-664, at 10 (1996) ("And the Committee believes it can be stated with certainty that none of the federal statutes or regulations that use the words 'marriage' or 'spouse' were thought by even a single Member of Congress to refer to same-sex couples.").

DOMA has been the subject of continuous controversy since its passage, and its constitutionality has been subject to intense academic scrutiny.[191] Regardless, the Act and its progeny appear to be enduring: In the 2004 election, eleven states passed their own referenda banning same-sex marriage.[192] Sadly, these state laws also fail to define man or woman, thus exacerbating DOMA's ambiguity by permitting inconsistent application of analogous state law.[193]

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191. *See, e.g.*, *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (upholding DOMA's constitutionality under the Tenth Amendment); *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Judiciary Comm.*, 104th Cong. 43, 44 (1996) (statement of Cass R. Sunstein, University of Chicago) ("S. 1740 is unprecedented in our nation's history; it is probably either pointless or unconstitutional; and while the constitutional issues are far from simple, it is safe to say that S. 1740 is a constitutionally ill-advised intrusion into a problem handled at the state level."); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (arguing that the choice of law provision of DOMA harms homosexuals); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997) (arguing that the DOMA public policy exception is unconstitutional because it allows states to discriminate against another state's laws in violation of the Full Faith and Credit Clause, and thus, that DOMA is unconstitutional because it results in Congress sanctioning the same practice); Mark Strasser, *Domestic Relations Jurisprudence and the Great, Slumbering* Baehr*: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921 (1995) (arguing that the nonrecognition of same-sex marriage violates the Equal Protection Clause as well as the Due Process Clause); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996) (arguing that DOMA is unconstitutional because it circumvents the Full Faith and Credit Clause and intrudes on the state law area of family law); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM L. REV. 1435, 1482 (1997) (arguing that DOMA "short-circuits" the Full Faith and Credit Clause). *Contra* Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998) (arguing that DOMA is a valid exercise of Congress's power under the "Effect" clause of the Full Faith and Credit Clause); Patrick J. Shipley, *Constitutionality of the Defense of Marriage Act*, 11 J. CONTEMP. LEGAL ISSUES 117 (2000) (arguing that DOMA passes constitutional muster because the Supreme Court does not recognize marriage as a "public act" under the Full Faith and Credit Clause).

192. States that have passed anti–gay marriage referenda include Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *See We the People*, THE ECONOMIST, Nov. 6–12, 2004, at 34.

193. *See, e.g.*, North Dakota Constitutional Measure No. 1, *at* http://www.nd.gov/sos/electvote/elections/measures/measure1-ftm.pdf ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); Oregon Measure No. 36, *at* http://www.sos.state.or.us/elections/nov22004/guide/meas/m36_text.html ("[O]nly a marriage between one man and one woman shall be valid or legally recognized as a marriage.") (last visited Oct. 25, 2005); Arkansas Proposed Constitution Amendment No. 3, *at* http://www.sos.arkansas.gov/elections/elections_pdfs/2004/amendments/04amendsforballot3.pdf ("Marriage consists only of the union of one man and one woman . . . and the legislature has the power to determine the capacity of persons to marry . . . ."); Michigan Proposal 04-2, *at* https://sosntsl01.sos.state.mi.us/voterguide/prop04-2.asp ("[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage . . . .") (last visited Oct. 25, 2005).

1. Defining Male and Female

The 94th Congress took the definitions of male and female to be self-evident, neglecting to include these definitions in DOMA. However, because of the possibility of disharmony between sex markers, the definition of sex is far from clear. Current research suggests that at least eight factors determine an individual's sex, including: (1) chromosomal sex, (2) gonadal sex,[194] (3) internal morphologic sex,[195] (4) external morphologic sex,[196] (5) hormonal sex,[197] (6) phenotypic sex,[198] (7) assigned sex and gender of rearing, and (8) sexual identity.[199]

While no court has considered all of these factors, DOMA must take all eight into account in order to conform with current medical research involving transgender and intersex individuals.[200] For example, a transgender person may have male chromosomes but female sexual identity and external morphologic sex. An intersex individual may have male chromosomes but the internal organs of both males and females.[201] Weighing all eight factors accounts for the possibility, recognized by contemporary medicine, that not all people fit neatly into a binary sexual reality based merely on one or two factors.

A balancing test weighing all eight factors would achieve other important policy goals, too. First, requiring an eight-factor test would ensure that an individual's sexual identity is a fundamental part of a court's legal analysis rather than a mere discretionary consideration. The inclusion of psychological factors also would require a court to assess sexual identity as it exists at the time of the court's decision—rather than looking back to the time of birth. Thus, the validity of sex-reassignment would be respected as an important part of sexual identification.

194. Gonadal sex concerns the reproductive sex glands: testes or ovaries. Greenberg, *supra* note 8, at 278.

195. Internal morphologic sex concerns the presence of seminal vesicles and a prostate; or a vagina, a uterus, and fallopian tubes. *Id.*

196. External morphologic sex concerns the nature of external genitalia such as penis and scrotum; or clitoris and labia. *Id.*

197. The nature of androgens or estrogens is hormonal sex. *Id.*

198. Phenotypic sex concerns secondary sexual features, such as facial and chest hair or breasts. *Id.*

199. Sexual identity involves how individuals identify themselves. *Id.* Contrast sexual identity with gender identity, which is defined as how society identifies an individual. *Id.*

200. *See generally id.*

201. For example, as with Persistent Mullerian Duct Syndrome, *see supra* note 24.

2. Immigration as a Test Case

As discussed above in Part II.C, the lack of reliable standards is especially acute in the immigration context. Given the unpredictability of transgender marriage cases in state courts, and the BIA's varying recognition of state court precedent, immigrants and their spouses have no clear ex ante expectation of how USCIS will decide their cases. Critically, the denial of an application for adjustment to lawful permanent residence may result in the suspension of a work permit or commencement of removal proceedings against the intending immigrant. Moreover, the lack of clear federal guidance in defining sex could break up marriages involving children, directly contravening the main purpose of family-based immigration: to keep families united.[202] In establishing a definition of male and female for the purposes of immigration, policymakers can lend stability to the immigration process and to other federal agencies that use marriage as a prerequisite for benefits.[203]

In applying the proper balancing test to spousal immigration benefits, the first step would be to determine whether dissonant sexual factors exist at the time of the interview. If these factors are harmonious, then the standard bona fide marriage protocol should apply. If, however, one or more factors are inconsistent with any other, then USCIS should inquire further into the sex of the individual by applying the eight-factor balancing test. The novelty of the test is that sexual identity as well as other characteristics affected by sex-reassignment surgery must be considered, even for cases in which there was no detectable disharmony at birth.

USCIS officers already have the discretionary power to look into such matters and may still validate the marriage even absent a factor test.[204] This proposed test, however, would ensure that psychological and surgical factors are given due consideration. Absent this balancing test, a USCIS officer may choose to take the route of the *Corbett* court, admitting the existence of psychological factors but only acknowledging their possible relevance in cases when the physical factors were discordant at birth.[205] The eight-factor balancing test, conversely, rectifies the artificial bifurcation of *Corbett* by acknowledging that all factors, psychological and physical, are relevant in all cases.

202. *See supra* note 7.

203. For example, the Internal Revenue Service determines filing status based on marriage. Currently, marriage for tax purposes is defined as "only a legal union between a man and a woman as husband and wife." INTERNAL REVENUE SERVICE, *supra* note 186, at 23. This definition suffers from the same ambiguity as DOMA. Application of the eight-factor balancing test discussed in Part III.A.1, *supra*, can remedy these concerns.

204. *See supra* Part II.C.

205. Corbett v. Corbett, [1971] P. 83, 87 (U.K. 1970).

USCIS is an ideal forum to investigate the administrative feasibility of a multifactor definition of male and female within the federal system. Discretionary judgment and balancing tests are hardly terra incognita to USCIS officers, who often make use of interviews and balancing tests in immigration decisions.[206] Given USCIS's infrastructure and its trained staff, which routinely handles this type of adjudication at the administrative level, enacting a workable definition of "man" and "woman" for immigration purposes would be cost-effective and could provide a model for the legislature in clarifying DOMA.

The *Littleton* and *Gardiner* courts, in reaching their decisions, expressed fear that creating a more subjective definition would create administrative anarchy. However, these fears are unwarranted. Courts in particular often use balancing tests in their decisionmaking,[207] and furthermore, widespread inconsistency in defining male and female presently occurs even though some courts have adopted a bright-line rule. The adoption of a uniform standard, though subjective on its face, ultimately will improve the objectivity of sexual-identification standards and the implementation of DOMA. Slowly introducing this new balancing test in the immigration forum will provide meaningful insight into how appropriate legislation can clarify DOMA.

The advantages of employing this proposed eight-factor standard in immigration cases also extend beyond the domestic front. Given that both the European Court of Human Rights and the Australian Family Court[208] have recognized marriages between post-operative transgender individuals and have upheld the right for them to recognize their own sexual identities, principles of comity would suggest strongly that such marriages be recognized in the United States. Under this principle, USCIS recognizes marriages from foreign jurisdictions so long as the marriage is valid in its place of issue.[209] USCIS still has discretion in this matter in that it can choose to invalidate marriages that "are repugnant to the public policy of the domicile of the

206. For example, in the case of nonimmigrant tourist visas, interviewing officers have significant discretion to deny applications based on factors pointing to fraud or intent to remain in the United States permanently. *See* LEGOMSKY, *supra* note 120, at 394. Determinations of "hardship," used in Nicaraguan Adjustment and Central American Relief Act proceedings, as well as cancellation of removal, rely on various factors determined by an interviewing officer or immigration judge. *Id.* at 574, 606.

207. "[C]ourts are perfectly capable of dealing with less than a bright line rule in determining a person's sex for purposes of marriage. The suggested fear of social chaos is a poor excuse for the first-wave court's failure to accept the complex realities, uncertainties, and indeed, ambiguities of transsexuals' lives." Kogan, *supra* note 33, at 382.

208. *See supra* Part I.C.2.

209. Daniel Levy, *The Family in Immigration and Nationality Law: Part I*, IMMIGR. BRIEFINGS Sept. 1992, at 1, 3–4 (1992); *see id.* at 39 (Appendix I, Immigration Decisions Regarding Validity of Marriages by Foreign Country and by State of the United States).

parties or to the laws of nature as generally recognized in Christian countries."[210] This generally occurs when USCIS encounters polygamous or homosexual marriages, which are explicitly illegal in the United States.[211] Given the lack of strong domestic policy against transgender marriages relative to same-sex and polygamous marriages, however, comity favors the recognition of these marriages when they are recognized abroad.

B. The Balancing Test and Critical Gender Theory

Although the proposed eight-factor balancing test represents a move toward clarifying the rights of transgendered individuals, some commentators argue that the recognition of transgender marriages for federal purposes is only a small step in the road to achieving rights for sexual minorities. Notably, some critical gender theorists and proponents of lesbian, gay, bisexual, and transgender rights "consider transsexuals, not as a potentially revolutionary force in society, but rather as an incredibly conservative group whose social demand for sex-reassignment surgery merely reinforces the dimorphic structure of gender in a patriarchal society."[212] Politically, many transgender individuals argue not for the societal transcendence of gender but rather for individual transcendence of one's own birth sex.[213] According to Janice Raymond:

> The claim for tolerance, based on the notion that transgenderism in all its forms is a form of gender resistance, is alluring but false. Instead, transgenderism reduces gender resistance to wardrobes, hormones, surgery and posturing—anything but real sexual equality. A real sexual politics says yes to a view and reality of transgender that transforms, instead of conforming to, gender.[214]

Thus, instead of working toward the true "continuum of sex types,"[215] in which male and female are but two points on a spectrum of endless

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210. Matter of H, File No. A-12378722, 9 I. & N. Dec. 640, 641 (Board of Immigration Appeals May 1, 1962).

211. *Id.* at 642 (holding that the statutory bars against polygamy in the United States express a strong federal public policy against polygamy and thus refusing to recognize a polygamous marriage for immigration purposes); *see also* Sullivan v. INS, 772 F.2d 609 (9th Cir. 1985) (holding that a homosexual spouse is not a "spouse" qualified for suspension of deportation); Adams v. Howerton, 673 F.2d 1036, 1039–40 (9th Cir. 1982).

212. Kogan, *supra* note 16, at 1230.

213. "On a personal level, [transgenderism] allows for a continuum of gendered expression. On a political level, it never moves off this continuum to an existence in which gender is truly transcended . . . . What good is a gender outlaw who is still abiding by the law of gender?" Raymond, *supra* note 12, at 222–23.

214. *Id.*

215. ROTHBLATT, *supra* note 52, at 1.

variations, advocating for transgender rights merely reinforces the "apartheid of sex . . . [where a]t birth we are cast into a sex type based on our genitals . . . then . . . brainwashed into a sex-type-appropriate culture called gender."[216]

The separation of all individuals into the binary categories of male and female still requires that society maintain a dimorphic gender paradigm. However, a model that requires social and legal recognition of the existence of more than two sexes is, for now, politically impracticable. In addition, allowing for a proper balancing test may help dissuade the myth that sex and gender are easily determined. Indeed, "[t]ransgender rights litigation presents an opportunity to broaden judicial understandings of sex by helping courts comprehend that gender identity, rather than anatomy, is the primary determinant of sex."[217] Chiseling away at the strict binary nature of sex by allowing room for variation among different sexuality factors is a step in a positive direction.

Some may question the purposes behind DOMA and the suggestion that the Act should be refined to better effectuate its questionable goal of promoting "traditional" marriages. Nonetheless, DOMA seems to be unassailable right now.[218] The struggle for legalization of same-sex marriage will be protracted and could span decades, and the rights of transgender individuals must be protected despite the present lack of same-sex marriage rights. The fight for the rights of those who do not conform to typical gender norms cannot progress as an all-or-nothing effort.

In addition, transgender marriages further open the debate on the role of sex within marriage. As noted by Mary Coombs, "[b]y breaking the perceived naturalism of the link between sex and gender, transgender relationships disrupt the gendered patriarchy on which traditional marriage rests."[219] To consider transgender marriage, courts must engage in a continuing debate about what marriage actually requires.[220] Does marriage require the ability to procreate? Clearly it does not, as many heterosexual couples are unable to do so.[221] Further, the legal system does not require proof of ability to procreate

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216. *Id.* at 19.

217. Flynn, *supra* note 150, at 395.

218. *See supra* notes 192–193 and accompanying text.

219. Mary Coombs, *Sexual Dis-Orientation: Transgender People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 266 (1998).

220. *Id.* at 259–60.

221. *Contra* H.R. REP. NO. 104-664, at 14 (1996). That the state promotes marriages for reasons other than procreation was not taken as self-evident during discussions in the House of Representatives:

> Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned

before licensing a marriage. Does a marriage require the ability to engage in heterosexual intercourse? If so, then post-operative transgender individuals' ability to function sexually as their post-operative sex means that these individuals should be able to marry.[222] If neither standard provides a justification for allowing marriage for some and not others, courts could justify the prohibition of same-sex marriages by finding that it degrades the integrity of the family in offering state sanction to those whose relationship does not conform to traditional gender roles. If that is the only justification for disallowing same-sex marriage, then a couple that includes a pre-operative transgender woman (who has the genitals of a male) should be able to marry a male so long as both gender roles are represented within the family. Regardless of one's views on marriage, in any event, transgender individuals may contribute to a broader understanding of marriage and sex. "In effect, transgender folks, by breaching the wall of gender dichotomy, demonstrate that heterosexual marriages and gay or lesbian marriages are points on a continuum, not two entirely distinct institutions."[223]

CONCLUSION

Sexual categorization is fundamental to a variety of administrative and legal determinations in the United States.[224] Nonetheless, legislation such as DOMA, which attempts to clarify the federal government's position on sexual orientation and sexual identity, has failed to account for the possibility of individuals who do not fall neatly into male or female gender categories. The failure to define "male" and "female," such that individuals may predict official interpretations of their sex for marriage purposes, has resulted in substantial uncertainty and widespread variation in the treatment of transgender and intersex individuals. This has resulted in the possibility that transgender individuals, in the case of immigration, may not be allowed legally to marry anyone at all, a result which should be unacceptable even to those who define marriage at its narrowest conceivable definition.

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about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.

Id.; Kogan, *supra* note 33, at 378; *see also* ROTHBLATT, *supra* note 52, at 67 ("Were childbirth still the reason for marriage, then postmenopausal marriages would be illegal and nonprocreative marriages could be annulled in secular fora. Neither is the case.").

222. Kogan, *supra* note 33, at 378–79.

223. Coombs, *supra* note 219, at 263.

224. *Contra* ROTHBLATT, *supra* note 52, at 58–77 (arguing that there is no valid reason to maintain sex classifications and deconstructing the justifications for such classifications in the military, hazardous jobs, marriage, identification, government statistics, and sports).

Clarifying a definition of sex that encompasses current medical evidence regarding sexual identity is essential to preserving the integrity of the government's characterization of individuals as male or female. Striving toward a better understanding of gender, sexuality, and the truly immutable characteristics of individuals is essential for all those who view marriage as more than the words "male," "female," and "opposite sex." While a clear definition of male and female falls far short of creating a panacea for society's intolerance of sexual minorities, it is undoubtedly a step in the right direction. Proper definition achieves clarification, and ultimately, understanding.

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