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Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People

Olga Tomchin[†]

In most jurisdictions in the United States, a birth certificate's sex marker, as decided by the appearance of the infant's genitals, creates a rebuttable presumption of legal sex requiring specified (but widely varying) evidence to overcome. These requirements for recognition are generally illogical, inconsistent, and unattainable for most trans people. As a result, the majority of trans* people end up with conflicting sex markers on their identity documents. This regime of a legal sex designated at birth directly harms the most vulnerable and unfairly distributes life chances. The current U.S. rules governing marriage-based immigration for trans* people provide a valuable case study of the inadequacy of the predominant approach to sex classification in the United States. This is particularly true when viewing the many other harms that trans* people (and queer cisgender people) experience partly as a result of legal sex categorization and regulation. The major shortcomings of the U.S. rules governing marriage-based immigration for trans* people demonstrate that the only solution is the total elimination of "sex" as a legal category.*

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Introduction.....	814
I. Complexity, Gender, and the Law.....	818
A. Gender Is Complicated.....	819
B. Legal Sex Categorization Ignores the Complexity of the Trans* Experience.....	821
C. Legal Sex Categorization Harms Trans* People.....	823
II. Elimination of Legal Race as Historical Precedent.....	825
III. The History and Current State of U.S. Marriage-Based Immigration Law for Trans* People.....	829
A. General Marriage-Based Immigration and Historical Treatment of Trans* People.....	830
B. Recent Reforms.....	833
IV. State Marriage and Legal Sex Reclassification.....	834
A. Legal Sex Reclassification.....	835
B. Marriage Recognition.....	837
V. Analysis of Current Rules Governing Trans* Marriage-Based Immigration.....	839
A. Validity of Trans* People’s Marriages Depend on State Laws.....	839
1. Some States Refuse to Recognize Trans* People’s Identities.....	840
2. Most States Retain the Problematic “Sex Reassignment Surgery” Requirement.....	841
a. Some Trans* People Do Not Want Genital Surgery.....	843
b. Many Trans* People Cannot Access Genital Surgery.....	844
B. Current Rules Exclude People with Nonbinary Gender Identities.....	853
C. Current Rules Do Not Serve DOMA’s Purpose.....	854
D. Current Rules Create Confusion and Inconsistency Regarding Legal Rights.....	856
E. Legal Sex Is in the Eye of the Beholder.....	856
VI. Solutions.....	858
A. Inadequate Possible Solutions.....	858
1. Allowing Same-Sex Marriage Recognition.....	859
2. Allowing Unmarried Partner Immigration Sponsorship.....	859
3. Adjusting the Criteria for Legal Sex Classification.....	859
B. Elimination of Legal Sex.....	861
Conclusion.....	861

INTRODUCTION

At birth in the United States, almost¹ every infant is classified as male or female on a birth certificate based on genital appearance.² This initial sex

1. Many intersex infants are assigned a sex shortly after their birth. Intersex describes people who are “born with a reproductive or sexual anatomy and/or chromosome pattern that doesn’t seem to

marker creates a “legal sex”³ that will be the default for how future government bureaucracies and sex-specific laws will classify and control each person. The original birth certificate also carries with it the expectation that the baby will become either a boy or a girl and then grow up to be either a man or a woman. Trans*⁴ people challenge these expectations through their very existence.

Some jurisdictions in the United States continue to treat the “legal sex” designated by the birth certificate as permanent.⁵ However, most governments and administrative bureaucracies in the United States now treat the birth

fit typical definitions of male or female. . . . These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter’s syndrome, Turner’s syndrome, hypospadias, and many others.” *What Is Intersex/DSD?*, ADVOCATES FOR INFORMED CHOICE, <http://aiclegal.org/faq/#whatisintersex> (last visited Feb. 5, 2013). Professor Julia Greenberg explains that, for intersex infants with “ambiguous” genitals,

sex is assigned, in part, based on sex-role stereotypes. The presence of an “adequate” penis in an XY[-chromosomal] infant leads to the label *male*, while the absence of an “adequate” penis leads to the label *female*. A[n] . . . XY . . . [infant] with an “inadequate” penis (one that physicians believe will be incapable of penetrating a female’s vagina when the child reaches adulthood) is “turned into” a female even if it means destroying his reproductive capacity. A[n] . . . XX . . . [infant] who may be capable of reproducing, however, is generally assigned the female sex to preserve her reproductive capability, regardless of the appearance of her external genitalia. If her phallus is considered to be too large to meet the guidelines for a typical clitoris, it is surgically reduced, even if it means that her capacity for satisfactory sex may be reduced or destroyed. In other words, men are defined based on their ability to penetrate females, and females are defined based on their ability to procreate.

Julia A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSGENDER RIGHTS* 51, 52 (Paisley Currah et al. eds., 2006).

2. See Greenberg, *supra* note 1, at 52.

3. For the purposes of this Comment, *sex* refers only to the designation imposed by legal institutions and bureaucracies.

4. *Trans** is an umbrella term for individuals whose identities do not correspond with the gender that they were assigned at birth. It includes identity categories such as transgender, transsexual, gender-variant, genderqueer, and sometimes intersex (if the intersex person so identifies). Some people who identify as transsexual object to being called transgender, and vice-versa, so *trans** is a more inclusive term that is gaining favor in some activist communities. See *Trans* Guide*, OHIO UNIVERSITY LGBT CENTER, <http://www.ohio.edu/lgbt/resources/transgender.cfm> (last visited Feb. 5, 2013) (“*Trans** is more than a shorthand replacement for ‘transgender.’ The asterisk allows for the inclusion of many identities Rather than enumerating a single subset of identities, the term *trans** recognizes our incredibly diverse community and widely varying self-identification. This guide will use *trans**, with the asterisk, as a part of our commitment to inclusion.”); see also, e.g., Annika Adams, *On Display: Navigating the Male Gaze as a Lesbian Trans Woman*, AUTOSTRADDLE (Sept. 2, 2011), <http://www.autostraddle.com/on-display-navigating-the-male-gaze-108521/>; Cara Kulwicki, *New Report Shows Trans* People Experience Huge Gaps in Health Care Access*, FEMINISTE (Oct. 25, 2010), <http://www.feministe.us/blog/archives/2010/10/25/new-report-shows-trans-people-experience-huge-gaps-in-health-care-access/>. The asterisk is not generally used when referring to trans women and trans men since these are specific identity categories under the greater *trans** umbrella.

5. Texas, Ohio, Idaho, and Tennessee do not allow amending of birth certificate sex markers. TENN. CODE ANN. § 68-3-203(d) (2011); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999); *Sources of Authority to Amend Sex Designation on Birth Certificates*, LAMBDA LEGAL (Jan. 03, 2012), <http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html> [hereinafter *Sources*] (describing the procedures of Idaho, Florida, Oklahoma, and Pennsylvania). Additionally, Florida and Kansas do not recognize sex recategorization for marriage purposes. *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002).

certificate sex designation as a rebuttable presumption requiring specified (but widely varying) evidence to overcome.⁶ These requirements for recognition are generally illogical, inconsistent, and unattainable for most trans* people.⁷ As a result, many trans* people end up with conflicting sex markers on their identity documents.⁸ This regime of a legal sex designated at birth directly harms the most vulnerable and unfairly distributes life chances.⁹

The current U.S. rules governing marriage-based immigration for trans* people provide a valuable case study of the inadequacy of the predominant approach to sex classification and the way in which trans* people must “navigate the impossible maze of government bureaucracy” to be recognized.¹⁰ Immigration law has always been and continues to be shaped strongly by racism, classism, xenophobia, homophobia, and sexism.¹¹ A detailed discussion of the injustices present in the greater U.S. immigration system is outside of the scope of this Comment, but their existence informs its analysis. These factors constrain, for instance, which trans* immigrants or cisgender¹² immigrant

6. See, e.g., *Changing Legal Identity Documents in California*, TRANSGENDER LAW CENTER, <http://transgenderlawcenter.org/issues/id/changing-legal-identity-documents-in-california> (last visited Feb. 5, 2013) (discussing the Social Security Administration’s requirement of “‘complete’ sex reassignment surgery,” the California Department of Motor Vehicles’ demand for a physician or psychologist’s letter stating that one is “expressing [their] gender identity full-time,” and the U.S. Department of State’s passport guidelines’ requirement of a doctor’s letter documenting “‘clinically appropriate treatment’ for gender transition”).

7. See *infra* Parts I.B, V.A.

8. See *infra* Part V.E.

9. See *infra* Part I.C.

10. Eli Clare, *Resisting Shame: Making Our Bodies Home*, 8 SEATTLE J. SOC. JUST. 455, 462 (2010).

11. See, e.g., CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 166 (2004) (“[T]he continued construction of Mexican migrant workers outside the American working class and outside the national body, meant that ‘imported colonialism’ would in fact continue, through the ongoing, if informal, importation of undocumented Mexican migrants”); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 531 (“[T]he bedrock principle of modern immigration law . . . grew out of the racist laws designed to exclude, deport, and punish Chinese immigrants.”); *id.* at 532–33 (“The reinvigorated ‘public charge’ exclusion, which excludes poor and working people because their incomes and assets are found to render them likely to become public benefit recipients, likewise discourages potential immigrants of color from developing nations, as well as citizens and immigrants of color in this country seeking to reunite families. Similarly, the welfare ‘reform’ legislation of 1996 adversely affects immigrants of color.”); Mae M. Ngai, *The Civil Rights Origins of Illegal Immigration*, 78 INT’L LAB. & WORKING-CLASS HIST. 93, 98 (2010) (“The US-Mexico border developed over the course of the twentieth century as a border that was . . . easy to cross only without documents, indicating the United States’ desire for Mexicans as a disposable labor force and not as immigrants and prospective citizens.”); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7. MOD. AM. 42, 43 (2011) (“[I]mmigration law today continues to use racial difference as an indicator of non-belonging, reifying notions of racial inferiority in the process.”).

12. *Cisgender* is a term describing individuals whose gender corresponds with the legal sex that they were assigned at birth. Cisgender people are not trans*. *Cis* is the Latin prefix which is the antonym of *trans*. This term has been gaining favor in activist circles since its introduction in the

partners of U.S. citizens or permanent residents get deported and which are able to get visas to enter the country to meet potential spouses who can sponsor them.¹³ Additionally, racial implications have been particularly evident in recent state-level immigration laws that focus on forcing “self-deportation.”¹⁴ Like in all other racialized systems of control such as mass incarceration,¹⁵ the drug war,¹⁶ and surveillance of people receiving public benefits,¹⁷ trans* people suffer disproportionately.¹⁸

Obstacles to marriage-based immigration must be analyzed since many other pathways to legal immigrant status are largely closed off to trans* people. For instance, while family-based immigration is one of the most common forms of immigration to the United States, many trans* people have been rejected by their families.¹⁹ Employment discrimination also makes trans* people much less likely to be sponsored for a work-based visas.²⁰ Furthermore, while some

1990s, including in legal scholarship. *See, e.g.*, David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51, 53 (2011); Demoya R. Gordon, *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CALIF. L. REV. 1719, 1744, 1748 (2009); Adele M. Morrison, *Introduction: Where Is There? Locating, Dislocating and Relocating Gender, Sexuality in Physical and Discursive Space*, 3 FLA. INT’L U. L. REV. 289, 293 (2008).

13. *See* Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 HARV. J.L. & GENDER 357, 397 (2012) [hereinafter Gehi, *Gendered*] (“As the war on terror rages forward, transgender people living at the intersection of different identities are quickly and easily discarded and deported for no other crime than ‘walking while trans.’”).

14. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 32, 131 n.22 (2011) [hereinafter SPADE, *NORMAL LIFE*]; Gehi, *Gendered*, *supra* note 13, at 369; George A. Martinez, 44 ARIZ. ST. L.J. 175, 179 (2012) (arguing that Arizona’s immigration law “reflects an epistemology of whiteness and operates to transform Arizona into a white geographical landscape”); Sandoval, *supra* note 11, at 42–43, 48–51.

15. *See* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (discussing the many ways in which mass incarceration is racialized); *see also* SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISON 11 (2007), available at <http://srp.org/files/warinhere.pdf> (“[T]he increasing imprisonment of low-income people, people of color, and women has occurred in conjunction with the disproportionate arrest and imprisonment of transgender and gender non-conforming people, and has led to a particularly high risk of imprisonment for people who live at the intersections of more than one of these experiences.”); Gehi, *Gendered*, *supra* note 13, at 372–73.

16. *See* ALEXANDER, *supra* note 15 (discussing the racialized impact of the war on drugs); *see also* SYLVIA RIVERA LAW PROJECT, *supra* note 15, at 11 (“[T]he federal government’s ‘War on Drugs’ and its current ‘War on Terror,’ . . . have driven the rates of arrest, detention, and deportation of people of color, homeless people, undocumented residents, and low-income people to unparalleled heights.”).

17. *See* Alejandra Marchevsky & Jeanne Theoharis, *Welfare Reform, Globalization, and the Racialization of Entitlement*, 41 AM. STUD. 235, 243, 256 (2000).

18. *See generally* SPADE, *NORMAL LIFE*, *supra* note 14; Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN’S RTS. L. REP. 315, 324–27 (2009) [hereinafter Gehi, *Struggles*]; Gehi, *Gendered*, *supra* note 13.

19. Gehi, *Struggles*, *supra* note 18, at 324 n.43.

20. *See id.*

trans* people have now been able to gain asylum, increasingly rigid and harsh immigration laws and trans* people's overexposure to the criminal justice system result in a greater likelihood of ineligibility.²¹ And trans* immigrants who end up in immigration detention, in addition to often undergoing horrific physical and/or psychological violence, face particularly difficult barriers in presenting successful asylum cases.²²

U.S. rules governing marriage-based immigration for trans* people serve as an illustrative example of the many harms legal sex categorization and regulation cause for trans* people (and queer cisgender people). This Comment examines those rules and argues that only total elimination of "sex" as a legal category will eliminate their harms. The current regulations primarily benefit trans* people who are privileged based on race, class, and immigration status, and are not responsive to the lived realities of many low-income, undocumented²³ trans women of color who stand to gain the most from legal status through marriage-based immigration.²⁴

Part I of this Comment discusses the harms that result when government bureaucracies, through legal sex classification, ignore the complexity of gender. Part II analogizes the elimination of legal sex to the removal of race as a legal category. Part III provides a detailed exploration of the dramatic changes over the last decade in the U.S. marriage-based immigration legal regime for trans* people, culminating in the current system that requires both federal and state recognition of the legal heterosexuality of marriage. Part IV discusses the various state laws that govern which trans* people can access legal sex reclassification and which marriages are recognized as valid. Part V analyzes the marriage-based immigration rules' recent improvements and critiques the remaining problems. Finally, Part VI argues that the only solution that fully addresses current injustice and irrationality in this area of the law is the elimination of legal sex classification.

I.

COMPLEXITY, GENDER, AND THE LAW

This Part discusses the complexity of gender as a human experience, demonstrates the ways in which legal sex categorization ignores this intricacy,

21. See, e.g., *id.* at 316 n.4, 319–27, 330–34.

22. See Nancy López, *Transgender Immigrant Detainees Cut Off from Legal Help*, NEW AM. MEDIA (Mar. 14, 2012), <http://newamericamedia.org/2012/03/transgender-immigrant-detainees-cut-off-from-legal-help.php> (quoting immigration attorney Cara Jobson: "It's harder to prepare a case for someone who is spending 23 hours a day in administrative segregation. It's hard for them to get out and call me. It's harder for them to get out and call whatever legal advocate might be helping them.").

23. Gehi, *Struggles*, *supra* note 18, at 324 ("Transgender immigrants are often forced to flee their own country because of the persecution they endure there due to their gender identity. This urgency often results in entering and living in the United States as an undocumented immigrant.").

24. See generally *id.* (analyzing the impact of harsh immigration laws on low-income undocumented trans women of color).

and provides a brief overview of the ways through which trans* people experience harm as a result of legal sex classification.

A. Gender Is Complicated

*“There is no one way to be transgender . . . there is no prototypical transgender experience.”*²⁵

For the purposes of this Comment, gender is each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms.²⁶

Meanwhile, sex is the legal fiction that occurs when the appearance of an infant’s genitals at birth (as formalized by an “M” or “F” on a birth certificate) results in each person’s placement into a legal category of “male” or “female.” In both popular consciousness and legal discourse, sex is often imbued with a meaning that is ahistorical and biologically determined—much as race was in the past. In reality, sex and race are similarly a product of “the historically contingent systems of meaning that attach to elements of morphology.”²⁷ Indeed, legal sex is contingent on the classification system used. A single trans* individual is often categorized differently by the DMV, the Social Security Administration, the Passport Agency, state courts, prisons, immigration authorities, and other government agencies.

Trans* people are not a monolith. Their identities, class statuses, races, perspectives on their bodies, transition²⁸ experiences, sexualities, and

25. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 271 (2005).

26. INT’L COMM’N OF JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 (2007), available at <http://www.unhcr.org/refworld/pdfid/48244e60> 2.pdf; see also Julia Serano, *Performance Piece*, in GENDER OUTLAWS: THE NEXT GENERATION 85, 87 (Kate Bornstein & S. Bear Bergman eds., 2010) (“[T]he word gender has scores of meanings built into it. It’s an amalgamation of bodies, identities, and life experiences, subconscious urges, sensations, and behaviors, some of which develop organically and others which are shaped by language and culture.”).

27. See Vade, *supra* note 25, at 278–91 (exploring this subject); see also IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); SPADE, NORMAL LIFE, *supra* note 14, at 32 (“[A]dministrative systems that classify people actually invent and produce meaning for the categories they administer, and . . . those categories manage both the population and the distribution of security and vulnerability.”).

28. *Transitioning* is the process of socially, medically, and/or legally switching from living as one’s assigned gender at birth to living according to one’s gender identity.

relationships are just as varied and diverse as those of cisgender people.²⁹ For instance, some trans* people identify as straight, lesbian or gay, bisexual, pansexual, or queer.³⁰ Some trans* people are in relationships with cisgender people, and some are in relationships with other trans* people.³¹

While most trans* people continuously identify as either a man or a woman, others identify as both or neither.³² People with a binary identity are those (whether trans*³³ or cisgender) who see themselves as either wholly a man or wholly a woman. People with nonbinary³⁴ identities are members of the trans* community who identify outside of a gender binary comprised of the mutually exclusive categories of man and woman.³⁵ Some trans* people have static gender identities of which they are definitively aware from very early childhood, while others have fluid identities that may change or evolve over the course of their lives.³⁶

Furthermore, despite popular conceptions, there is no such thing as a “sex change” surgery or a “sex reassignment surgery” that suddenly switches a

29. See Vade, *supra* note 25, at 264.

30. *Sexuality*, TRANSGENDER EXPLORED, <http://transgenderexplored.com/sexuality.htm> (last visited Feb. 6, 2013).

31. For example, I am a cisgender woman and my partner is a trans woman. See also Suzannah Hills, *The Sex-Change Sweethearts: How a Pageant Princess and Colonel's Son Fell in Love After Both Had Transgender Treatment*, DAILY MAIL (Nov. 9, 2012), <http://www.dailymail.co.uk/news/article-2230658/The-sex-change-sweethearts-How-pageant-princess-colonels-son-fell-love-BOTH-transgender-treatment.html#ixzz2BwA64x4n>.

32. See Vade, *supra* note 25, at 265–66.

33. A trans man is a person who was assigned female at birth and identifies as a man. A trans woman is a person who was assigned male at birth and identifies as a woman.

34. See, e.g., *Bio*, JUSTIN VIVIAN BOND, http://justinbond.com/?page_id=323 (last visited Feb. 6, 2013). Many cultures recognize specific nonbinary identities. See, e.g., Kenji Tokawa, *Why You Don't Have to Choose a White Boy Name to Be a Man in This World*, in *GENDER OUTLAWS*, *supra* note 10, at 207, 211 (noting the existence of nonbinary gender identities in the Philippines and elsewhere in Asia); Janine M. deManda, *Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 U. MO. KAN. CITY L. REV. 507, 519 (2002) (discussing some Native American tribes' recognition of “two-spirit people” whose identities combine male and female elements); Bijal Shah, *Gay American “Deviance”*: *Using International Comparative Analysis to Argue for a Free Speech and Establishment Clause Approach to Furthering Gay Marriage in the United States*, 26 WIS. INT'L L.J. 29, 29 n.148 (2008–2009) (describing Brazilian *travesti*, who are assigned male at birth, “do not identify as women . . . [or] as gay,” and view themselves as a sort of “third sex”). Some cultures in Indonesia and Siberia have between five and seven wholly separate gender categories. Sharyn Graham, *Sulawesi's Fifth Gender*, 66 INSIDE INDONESIA, Apr.–June 2001, <http://www.insideindonesia.org/edition-66/sulawesis-fifth-gender>. However, one must be careful not to assign a culturally specific term like “trans*” to people whose conceptualization of themselves may not correspond to it. See Richard M. Juang, *Transgendering the Politics of Recognition*, in *TRANSGENDER RIGHTS*, *supra* note 1, at 242, 256, 258–59.

35. For instance, a nonbinary person will often not feel comfortable or authentic when forced to check off “M” or “F” on a form.

36. See Vade, *supra* note 25, at 267–68.

woman into a man or a man into a woman.³⁷ Instead, many trans* people experience dysphoria, which is the psychological trauma and distress that may arise from not being recognized as one's gender or from not having one's body appear in a way that aligns with one's gendered understanding of oneself.³⁸ To treat this dysphoria, some trans* and cisgender³⁹ people need gender-confirming healthcare, such as hormone therapy, hair removal, or surgeries,⁴⁰ while others do not.⁴¹ Due to barriers such as class, discrimination, and bureaucratic requirements, many trans* people who desire gender-confirming healthcare, particularly surgery, are unable to access it.⁴² However, access to or desire for hormones or surgery does not impact the authenticity or legitimacy of a person's gender identity.

B. Legal Sex Categorization Ignores the Complexity of the Trans Experience*

*"In a pass/fail situation, standards for acceptance may vary, but somebody always gets trampled."*⁴³

Trans* people and their experiences vary greatly, and gender is complicated. However, the institutions and bureaucracies that govern everyday life almost always reject this complexity. Legal sex categorization and

37. *Id.* at 268. See also Dean Spade, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497, 513 (2010) [hereinafter Spade, *Medicaid Policy*].

38. This definition comes from conversations with my trans* partner, friends, clients, and colleagues. See, e.g., Kate, *25 Things I Do to Make My Body Dysphoria Feel Smaller and Quieter*, AUTOSTRADDLE (Sept. 25, 2012), <http://www.autostraddle.com/radical-self-care-25-ways-of-making-my-body-dysphoria-smaller-and-quieter-146649>.

39. Gender-confirming healthcare for cisgender people includes "[r]econstruction of breasts or testicles lost to cancer, hormone treatment to eliminate hair that is considered gender-inappropriate, chest surgery for gynecomastia, and other treatments . . . provided solely because of the mental health and social consequences . . . [resulting from] physical attributes that do not comport with their self-identity and social gender." Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 786 (2008) [hereinafter Spade, *Documenting Gender*]. Additionally, the same hormones that are given to trans* people are frequently given to cisgender people to treat a variety of conditions such as menopause or late onset of puberty. Spade, *Medicaid Policy*, *supra* note 37, at 501.

40. Depending on a person's desires or experience of dysphoria, surgery can include breast augmentation, facial feminization, hysterectomy (removal of uterus), mastectomy (removal of breast(s)), metoidioplasty (creation of a penis using clitoral tissue and labia skin or sometimes the extension of the urethra), oophorectomy (removal of ovaries), orchiectomy (removal of testicles), penectomy (removal of a penis), phalloplasty (creation of a penis using a skin graft from another part of the body, such as an arm), scrotoplasty (creation of a scrotum using a vulva and often implants), tracheal shave (shaving down of thyroid cartilage to reduce the appearance of an Adam's Apple), vaginectomy (removal of all or parts of a vagina), vaginoplasty (creation of a vagina using penile tissue). See, e.g., Vade, *supra* note 25, at 268 n.52.

41. For instance, some trans men "choose to become pregnant and bear and raise children" and "[s]ome transgender women identify as one hundred percent female and never take hormones or have any surgeries." *Id.* at 268.

42. See *infra* Part IV.A.2.ii.

43. Matt Bernstein Sycamore, *Reaching Too Far: An Introduction, in* NOBODY PASSES: REJECTING THE RULES OF GENDER AND CONFORMITY 7, 9 (Matt Bernstein Sycamore ed., 2006).

regulation, such as prison placement, marriage restrictions, and sex markers on identity documents, force all people into a rigid binary that ignores human diversity and class conditions. Trans* people are often forced to prove their “authenticity” or “realness” in order to rebut the presumption of the legal sex decreed by their birth certificates.⁴⁴

While a few states still treat trans* people’s existences as impossible and consider the “M” or “F” marked on their birth certificates as a permanent declaration of their “true” sex, legal institutions increasingly realize that they cannot wholly ignore trans* people and are incorporating some into the legal sex classification system.⁴⁵ This recognition of some trans* people’s identities has destabilized sex as a rigid legal category. This is most visible in the total lack of consistency and coherence among the multitude of laws and bureaucracies that choose which trans* people will be reclassified and by what proof. Currently, no consensus exists on how to demarcate legal sex boundaries. For instance, some jurisdictions prescribe specific genital surgeries,⁴⁶ some require any form of genital surgery,⁴⁷ and others accept any form of transition-related surgery.⁴⁸ Some jurisdictions, particularly in Europe, demand that trans* people who want recognition be sterilized and/or unmarried.⁴⁹ Other methods of recognition include getting approval from a

44. Vade, *supra* note 25, at 271.

45. *See infra* Part III.A.

46. *See, e.g.*, Spade, *Documenting Gender*, *supra* note 39, at 736 (discussing the law in New York).

47. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 46, § 13(e) (West 2006); MICH. COMP. LAWS ANN. § 333.2831(c) (West 2006); NEB. REV. STAT. § 71-604.01 (2012); N.J. STAT. ANN. § 26:8-40.12 (West 2013); N.C. GEN. STAT. § 130A-118(b)(4)(e) (2011); *Sources, supra* note 5.

48. *See, e.g.*, ALA. CODE § 22-9A-19(d) (2012); ARK. CODE ANN. § 20-18-307(d) (West 2012); COLO. REV. STAT. ANN. § 25-2-115(4) (West 2012); DEL. CODE ANN. tit. 16, § 3131(a) (2003); D.C. CODE § 7-217(d) (2001); GA. CODE ANN. § 31-10-23(e) (2006); MD. CODE ANN., Health - General § 4-214(b)(5) (LexisNexis 2009); LA. REV. STAT. ANN. § 40:62 (2001); MO. ANN. STAT. § 193.215(9) (West 2011); MONT. CODE ANN. § 50-15-204 (2011); NEV. ADMIN. CODE § 440.130 (2006); N.H. CODE ADMIN. R. HE-P 7007.03(e) (2004); OR. REV. STAT. § 432.235(4) (2011); UTAH CODE ANN. § 26-2-11 (West 2012).

49. *See* Thomas Hammarberg, *Forced Divorce and Sterilisation: A Reality for Many Transgender Persons*, COUNCIL OF EUROPE COMMISSIONER’S HUMAN RIGHTS COMMENT (Aug. 31, 2010, 10:02 AM), http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=74. As of June 2010, within the European Union, “[i]t [was] only possible to stay married after change of legal gender in Lithuania and in the Netherlands. In all other Member States this is not possible. For example in the UK and Poland, a married person should divorce prior to his/her new gender being officially recognised. In Bulgaria and Hungary, gender reassignment leads to the marriage being dissolved.” CRISTINA CASTAGNOLI, DIRECTORATE-GENERAL FOR INTERNAL POLICIES, EUROPEAN PARLIAMENT, TRANSGENDER PERSONS’ RIGHTS IN THE EU MEMBER STATES 7 (2010), *available at* <http://www.lgbt-ep.eu/wp-content/uploads/2010/07/NOTE-20100601-PE425.621-Transgender-Persons-Rights-in-the-EU-Member-States.pdf>. Since then, Portugal and Spain have eliminated their forced-divorce laws. HUMAN RIGHTS WATCH, CONTROLLING BODIES, DENYING IDENTITIES: HUMAN RIGHTS VIOLATIONS AGAINST TRANS PEOPLE IN THE NETHERLANDS 59–60 (2011) [hereinafter HUMAN RIGHTS WATCH, CONTROLLING BODIES].

judge through a court order⁵⁰ or an official statement from a doctor that the trans* person has had appropriate clinical treatment⁵¹ or a diagnosis.⁵² In the United States, however, no state yet allows “people who feel that neither ‘M’ nor ‘F’ accurately describes their gender . . . [to] obtain[] records that reflect their self-identities.”⁵³

C. Legal Sex Categorization Harms Trans* People

“Sex registration is like administrative violence that is condoned by the state.”⁵⁴

In situations where the government treats legal sex classification as relevant, trans* people have frequently encountered violence, harassment, or exclusion. Trans* people experience harm in sex-segregated situations as a result of mismatched identity documents and as a function of the inherent social control exercised by legal sex against those who are misclassified.

When institutions are segregated by legal sex, trans* people are frequently hurt. Trans* people often suffer immensely in sex-segregated facilities⁵⁵ such as prisons and immigration detention facilities.⁵⁶ Trans women inmates, including those who have had genital surgery, are almost always placed with men.⁵⁷ None of the nine jurisdictions with written policies about trans* inmates base placement on gender identity.⁵⁸ Placement based on legal sex in homeless and domestic violence shelters, drug treatment centers, and foster care group homes creates a barrier to trans* people accessing these services.⁵⁹ Trans*

50. See, e.g., WIS. STAT. § 69.15 (2011); WYO. STAT. ANN. § 35-1-424 (West 2012); *Sources*, *supra* note 5 (describing Alaska’s, Indiana’s, Maine’s, Minnesota’s, and Vermont’s procedures).

51. See, e.g., HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 60 (Spain); Wendy Jasson da Costa, *Transgender Woman Wins Battle over ID*, IOL NEWS (Oct. 10, 2011), <http://www.iol.co.za/news/south-africa/kwazulu-natal/transgender-woman-wins-battle-over-id-1.1153626> (South Africa); IOWA CODE ANN. § 144.23(3) (West 2005).

52. See, e.g., HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 59–61 (Portugal, Uruguay, and the United Kingdom).

53. SPADE, *NORMAL LIFE*, *supra* note 14, at 145.

54. HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 4.

55. See Kristin Wenstrom, *Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 L. & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 131, 147–50 (2008).

56. See Spade, *Documenting Gender*, *supra* note 39, at 756–58, 780–82, 811–12; Wenstrom, *supra* note 55, at 150–52; Gehi, *Struggles*, *supra* note 18, at 316, 334–41; Gehi, *Gendered*, *supra* note 13, at 374–75.

57. Spade, *Documenting Gender*, *supra* note 39, at 735.

58. Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 364–65 (2009) [hereinafter Spade, *Trans Law & Politics*].

59. Spade, *Documenting Gender*, *supra* note 39, at 753, 778–80 (“These barriers to using services provided to poor people are a factor in [their] ongoing economic marginalization . . .”); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 35 (2003). [hereinafter Spade, *Resisting Medicine*].

people are not allowed to serve in the U.S. military⁶⁰ and may even face disciplinary action or criminal prosecution for “cross-dressing.”⁶¹ Even something as simple as using a public bathroom can result in violence for a trans* person, including from police.⁶² Transphobic politicians have even made attempts to condition access to bathrooms and dressing rooms on birth certificate sex markers.⁶³

Even the use of sex markers on identification documents is harmful.⁶⁴ Frequently, trans* people’s presentation as their identified gender conflicts with the sex marker on their identity documents. In such cases, a sex marker is not at all helpful in identifying the person except by outing them to every police officer,⁶⁵ government agent, bouncer, or bartender who sees the identification document.⁶⁶ Such everyday interactions “can become a nightmare: a trans person risks humiliation, refusal to be served, and possible harm by onlookers who—now aware of her gender variance because of the reaction of the store clerk—may follow her out of the store.”⁶⁷

60. The Army’s Standards of Medical Fitness regulations provide:

A history of, or current manifestations of, personality disorders, disorders of impulse control not elsewhere classified, transvestism, voyeurism, other paraphilias, or factitious disorders, psychosexual conditions, transsexual, gender identity disorder to include major abnormalities or defects of the genitalia such as change of sex or a current attempt to change sex, hermaphroditism, pseudohermaphroditism, or pure gonadal dysgenesis or dysfunctional residuals from surgical correction of these conditions render an individual administratively unfit.

DEP’T OF THE ARMY, ARMY REGULATION 40-501, STANDARDS OF MEDICAL FITNESS, § 3-35 (2007), available at http://www.apd.army.mil/pdffiles/r40_501.pdf.

61. *Transgender Service*, SERVICEMEMBERS LEGAL DEF. NETWORK, <http://www.sldn.org/pages/transgender-service> (last visited Feb. 6, 2013) (explaining that genital surgery or openly identifying as trans* will disqualify an individual from military service, and that the military medical system does not recognize the World Professional Association for Transgender Health’s Standards of Care for Gender Identity Disorders and does not provide transition-related medical care).

62. Vade, *supra* note 25, at 259 n.16; see, e.g., Dean Spade, *Undermining Gender Regulation*, in NOBODY PASSES, *supra* note 43, at 64, 65 [hereinafter Spade, *Undermining*] (discussing his own experience of being arrested for using a public restroom); Gehi, *Struggles*, *supra* note 18, at 326 (“[T]he use of the ‘wrong’ bathroom, which is generally just the bathroom that matches the person’s gender identity, often results in arrests for crimes such as public lewdness, public obscenity, or public indecency.”); Gehi, *Gendered*, *supra* note 13, at 370.

63. See, e.g., Annika Adams, *Republicans Try to “Stomp a Mudhole” in Trans* Rights*, AUTOSTRADDLE, (Jan. 16, 2012), <http://www.autostraddle.com/republicans-try-to-stomp-a-mudhole-in-trans-rights-128134/>.

64. James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 370, 403–05 (2009) (discussing methods for identifying individuals other than a sex marker).

65. Ryka Aoki, *On Living Well and Coming Free*, in GENDER OUTLAWS, *supra* note 10, at 143, 146 (“[F]or trans women, dealing with the police is usually humiliating at best and dangerous at worst.”).

66. The proposal to do away with sex markers inherently suggests the repeal of the portion of the REAL ID Act, which mandates that identity documents list sex markers. See Gehi, *Struggles*, *supra* note 18, at 328–34.

67. Taylor Flynn, *The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in TRANSGENDER RIGHTS, *supra* note 1, at 32, 36.

Legal sex classification functions as a major means of social control. For instance, the Netherlands's sex reclassification law's requirement of sterilization is justified as "the only way to protect the interests of public order."⁶⁸ Controlling recognition of trans* people's genders is "[a]t the core of the law's power over" them.⁶⁹ Categorizing people punishes those who do not fit neatly in the possible boxes, including through the unequal distribution of resources and life chances.⁷⁰ For instance, sex

classification often governs spaces such as bathrooms, homeless shelters, drug treatment programs, mental health services, and spaces of confinement like psychiatric hospitals, juvenile and adult prisons, and immigration prisons The consequences of misclassification or the inability to fit into the existing classification system are extremely high, particularly in the kinds of institutions and systems that have emerged and grown to target and control poor people and people of color, such as criminal punishment systems, public benefits systems, and immigration systems.⁷¹

This misclassification intersects with and results in problems regarding

housing, education, healthcare, identity documentation and records, employment, . . . public facilities, . . . police profiling, police brutality, and false arrest; sexual harassment and assault; beatings and rapes; firings from jobs; evictions; denials and rejections from caseworkers in social service and welfare agencies; rejections for legal services; and family rejection.⁷²

Beyond the harms inflicted by legal sex classification, bizarre absurdities and inconsistencies result from marriage-based immigration rules that depend on legal sex. With so much oppression and human suffering resulting from legal sex classification and such an astounding amount of inconsistency and illogic present in its administration, why does legal sex exist?

II.

ELIMINATION OF LEGAL RACE AS HISTORICAL PRECEDENT

"Law is both a system of behavioral control and an ideology, and legal actors are in some senses both conscious and unwitting participants in the legal construction of race."⁷³

68. HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 18.

69. Flynn, *supra* note 67, at 46.

70. SPADE, NORMAL LIFE, *supra* note 14, at 142; Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in TRANSGENDER RIGHTS, *supra* note 1, at 3, 24; Gwendolyn Ann Smith, *We're All Someone's Freak*, in GENDER OUTLAWS, *supra* note 10, at 26, 29.

71. SPADE, NORMAL LIFE, *supra* note 14, at 142.

72. SPADE, NORMAL LIFE, *supra* note 14, at 11; *see also* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT ON THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011) (documenting discrimination arising in these settings throughout the report).

73. HANEY LÓPEZ, *supra* note 27, at 113.

While the elimination of legal sex may seem like a radical proposal, it is analogous to the elimination of legal race. All people in the United States were also once categorized into legal race, frequently into a binary of “white” or “non-white.”⁷⁴ This distinction was particularly important in immigration law since, earlier in its history, the United States had race-based immigration exclusion laws and only allowed the naturalization⁷⁵ of “white persons” and, later, other specifically designated racial groups.⁷⁶ Antimiscegenation laws used legal race to determine the validity of marriages.⁷⁷ Race-based immigration and antimiscegenation laws combined to create a system of marriage-based immigration and forced-expatriation laws that hinged on the legal racial classification of the couples. This Part’s aim is not to imply that the scope and impact of racism and transphobia are similar, but merely to point out the similarities between the function and irrationality of legal race and legal sex classification in the marriage-based immigration context.

Race was once as prevalent a legal category as sex is today. As with sex markers, some state driver’s licenses previously included racial markers.⁷⁸ Frequently, judges would determine a person’s race based on the “‘scientific’ notion of quantifiable ‘blood in the veins,’” expert witnesses (such as plantation masters), and evidence such as complexion, hair straightness, temperament, hair color, and the dimensions of eyes, nose, mouth, jaw, and lips.⁷⁹ Like current conflicting legal sex reclassification laws, legal race classification laws were incoherent. Depending on the state, definitions of “legal blackness” included anyone with a black grandparent, a black great-grandparent, a black great-great-grandparent, “one drop of ‘Negro’ blood,” “‘ascertainable’ non-White blood,” “any ‘appreciable admixture’ of Black ancestry,” or any person who was “mulatto[], quadroon[], or octoroon[].”⁸⁰ Before emancipation, legal racial classification as black could result in enslavement. During the time of antimiscegenation laws, recognition of marriage validity also hinged on the legal races of the couple. Many marriage cases were based on ideas of “blood.”⁸¹

74. McGrath, *supra* note 64, at 372–77.

75. Naturalization is the act of becoming a citizen of a country if one was not granted its citizenship through birth.

76. See HANEY LÓPEZ, *supra* note 27.

77. See Peter Cumminos, *Race, Marriage, and Law*, HARVARD CRIMSON (Dec. 17, 1963), available at <http://www.thecrimson.com/article/1963/12/17/race-marriage-and-law-pamerican-racism/>.

78. Spade, *Documenting Gender*, *supra* note 39, at 805.

79. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1224–25, 1228–30 (1997). See also *id.* at 1227 n.273 (“[B]lood cannot be typed according to race.”).

80. HANEY LÓPEZ, *supra* note 27, at 118–19.

81. See, e.g., *Jones v. Commonwealth*, 80 Va. 538, 541–42 (1885) (“[I]t was proved that Isaac Jones was a mulatto of brown skin, but that there was no evidence to show the quantum of negro blood in his veins That as to the color and parentage of Martha, . . . there was evidence tending to prove that the woman had negro blood in her veins.”). See also Cumminos, *supra* note 92.

Additionally, legal race played a very important role in immigration.⁸² Starting in 1790, naturalization in the United States was limited to “white persons.”⁸³ In 1870, “persons of African nativity, or African descent” were also granted naturalization rights,⁸⁴ with further expansions in 1940 to “descendants of races indigenous to the Western Hemisphere,”⁸⁵ to Chinese immigrants in 1943,⁸⁶ and to Filipino and Indian immigrants in 1946.⁸⁷ Racial requirements for naturalization were not abolished until 1952.⁸⁸

Racial classification played a particularly crucial role in marriage-based immigration and marriage-based forced expatriation. While “Congress in 1855 declared that a foreign woman automatically acquired citizenship upon marriage to a U.S. citizen, or upon the naturalization of her alien husband,” the Supreme Court clarified in 1868 that this law only applied to “white women.”⁸⁹ Additionally, white women were denied naturalization if they were “married to a man racially ineligible for citizenship.”⁹⁰ Moreover, while all U.S.-citizen women who married noncitizens would automatically lose their U.S. citizenship, in 1922 Congress restricted this forced expatriation to “any woman citizen who marries an alien ineligible to citizenship,” which primarily meant those men who were racially ineligible.⁹¹

Until 1965, racial restrictions were also enshrined in general immigration law. Laws such as the Chinese Exclusion Act forbade people from entering the United States on the basis of race.⁹² In 1924, Congress passed a law stating that “[n]o alien ineligible to citizenship shall be admitted to the United States’ except under restrictive circumstances.”⁹³

Fifty-two reported cases, including two before the U.S. Supreme Court,⁹⁴ set out the requirements for whether someone was white for the purposes of

82. Critical race scholar Rhonda Magee argues that chattel slavery was, among very many other things, *a compulsory form of immigration, the protection and regulation of which, under federal and state law, was our nation’s first system of “immigration law.”* As a consequence, the formal system that developed was inculcated with the notion of a permanent, quasi-citizen-worker underclass and privileged white ethnics under naturalization law—its legacies we can see up to the present day.

Rhonda V. Magee, *Slavery as Immigration?*, 44 U.S.F. L. REV. 273, 276 (2009).

83. HANEY LÓPEZ, *supra* note 27, at 1.

84. *Id.* at 43–44.

85. *Id.* at 45.

86. *Id.*

87. *Id.*

88. *Id.* at 46.

89. *Id.*

90. *Id.* at 46–47.

91. *Id.* at 47. This law was repealed in 1931.

92. BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 38–40 (2004).

93. HANEY LÓPEZ, *supra* note 27, at 129.

94. *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (holding that a Japanese man could not be white and that white person refers to “a person of what is popularly known as the Caucasian race”); *see also* *United States v. Thind*, 261 U.S. 204, 215 (1923) (holding that an Indian man who was arguably Caucasian was not white as “popularly understood”).

naturalization.⁹⁵ These cases resulted in the following racial immigration classifications regarding “whiteness”: Chinese (not white), Hawaiian (not white), Burmese (not white), Japanese (not white), Mexican (white), Native American (not white), Indian (not white, probably not white, white), Syrian (white, not white), Armenian (white), Filipino (not white), Korean (not white), Punjabi (not white), Afghani (not white), Arabian (not white, white), and persons of various mixed ancestry (not white).⁹⁶ In making their decisions, courts often looked to “(1) common knowledge, (2) scientific evidence, (3) congressional intent, and (4) legal precedent.”⁹⁷ “‘Common knowledge’ rationales” are those that “appeal[ed] to popular conceptions of races,” whereas “‘scientific evidence’ rationales appeal[ed] to specialized, reputedly objective knowledge.”⁹⁸ Judges also looked to “skin color, culture, and anthropology” in making legal race determinations.⁹⁹

Instead of dismantling or destabilizing the institutionalization of legal racial classification and hierarchization, these courts (and sadly often the immigrant plaintiffs) sparred over whether a particular immigrant was “white” enough.¹⁰⁰ For instance, in *Ozawa v. United States*, the Japanese immigrant claimed that his “color” was in fact “white.”¹⁰¹ Frequently, immigration scholars merely quibbled with “the consistency of the case law rather than challenging the now-obvious racist premises.”¹⁰²

To the modern reader, these cases and laws are disturbing and absurd. The blatant racism inherent in legal race classification is clear, even if courts at the time claimed they were enforcing neutral laws. The classifications existed to control and punish undesired and unvalued populations, and they often did so in confusing and contradictory manners.

As the elimination of race as a legal category, such as in immigration law in 1965,¹⁰³ did not erase the violence and systemic oppression against people of color,¹⁰⁴ no particular classification system would undo the transphobia, homophobia, and misogyny of sex as a legal category. As the elimination of

95. HANEY LÓPEZ, *supra* note 27, at 4.

96. *Id.* at 203–08.

97. *Id.* at 45.

98. *Id.*

99. *Id.* at 110.

100. Understandably, the plaintiffs often “had no choice but to pursue [their] challenge within the institution, pursuant to the rules, and according to the language that would be used to judge [them.]” HANEY LÓPEZ, *supra* note 27, at 149.

101. *Ozawa v. United States*, 260 U.S. 178, 184 (1922).

102. Johnson, *supra* note 11, at 529.

103. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 IND. L.J. 1111, 1131 (“In the wake of the Civil Rights Act of 1964, Congress passed the Immigration Act of 1965. This new law abolished the national origins quota system and barred racial considerations from expressly entering into decisions about immigrant visas.”) (citations omitted).

104. See Hickman, *supra* note 79, at 1189.

race as a legal category did not erase the violence and systematic oppression against people of color,¹⁰⁵ the abolishment of legal sex would not end all suffering experienced by trans* people. Racism continues to dramatically shape immigration law.¹⁰⁶ However, just as abolishing legal race was necessary in order to eliminate blatantly racist laws such as antimiscegenation laws and racial prerequisites for naturalization, abolishing legal sex is a necessary part of dismantling the structural subjugation of trans* and gender-non-conforming people. Analyzing marriage-based immigration's previous restrictions based on legal race and current restrictions based on legal gender provides valuable insight into the injustices and incoherence of these legal categories.

III. THE HISTORY AND CURRENT STATE OF U.S. MARRIAGE-BASED IMMIGRATION LAW FOR TRANS* PEOPLE

The Defense of Marriage Act (DOMA), Board of Immigration Appeals (B.I.A.) cases, and U.S. Citizenship and Immigration Services (USCIS)¹⁰⁷ memoranda have impacted how the U.S. government treats trans* people attempting to access marriage-based immigration. U.S. citizens and legal permanent residents (LPRs) may petition USCIS to grant their spouses or fiancé(e)s marriage-based immigration benefits.¹⁰⁸ Only marriages between “one man and one woman” qualify for marriage-based immigration, due to the federal Defense of Marriage Act’s definition of “marriage.”¹⁰⁹ DOMA requires federal administrative agencies, like USCIS, to use this definition when issuing rulings.¹¹⁰ However, the lack of a clear legal definition of “man” and “woman” initially led to inconsistent results for trans* people who petitioned or applied for such benefits. In 2005, the B.I.A. issued a precedential decision in *In re Lovo-Lara*, which established that a marriage would be valid for immigration

105. See generally ALEXANDER, *supra* note 15. While less overt, the legal sex classification system is also infected with racism and classism, as much of Part V demonstrates.

106. Johnson, *supra* note 11, at 532 (“Despite the facade of neutrality, these laws have unmistakably disparate impacts on immigrants of color from developing nations. The per-country limits (a ceiling on the number of immigrants from any one nation) and the ‘diversity’ visa program (a formulaic program that favors immigration from ‘low’ immigration countries, thereby favoring white immigration) have precisely such effects. The immigration laws historically have operated to limit immigration from Africa. Southern border enforcement, including the efforts to exclude and deport Mexican and Central American immigrants, also has disparate impacts.”).

107. USCIS is the initial decision maker on marriage-based immigration petitions and is a branch of the Department of Homeland Security.

108. See *Bringing Spouses to Live in the United States as Permanent Residents*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eyJd4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=16aa3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=16aa3e4d77d73210VgnVCM100000082ca60aRCRD> (last visited Feb. 7, 2013).

109. See 1 U.S.C. § 7 (2006).

110. *Immigration and the Defense of Marriage Act (DOMA): A Q&A Fact Check*, IMMIGRATION POLICY CTR., <http://www.immigrationpolicy.org/just-facts/immigration-and-defense-marriage-act-doma-qa-fact-check> (last visited Feb. 7, 2013).

purposes if the state in which it occurred considered it to be a heterosexual marriage as established by the couple's birth certificates.¹¹¹ In 2009, USCIS attempted to incorporate *Lovo-Lara* into its *Adjudicator's Field Manual*¹¹² but narrowly (and erroneously) interpreted the decision to require that trans* people undergo "sex reassignment surgery" in order to be reclassified according to their identified gender.¹¹³ In April 2012, USCIS issued a memorandum that largely overhauled its system of legal sex reclassification and abolished the previous federal "sex reassignment surgery" and birth certificate requirements.¹¹⁴

Part III.A provides an overview of the laws and operation of general marriage-based immigration in the United States and the development of the system's treatment of trans* people. Part III.B discusses USCIS's recent reforms of categorization of trans* people for marriage-based immigration purposes.

A. General Marriage-Based Immigration and Historical Treatment of Trans People*

The Immigration and Nationality Act allows U.S. citizens and LPRs to sponsor their spouses and fiancé(e)s for marriage-based immigration benefits.¹¹⁵ Others who benefit from marriage-based immigration include spouses of those who immigrate via family, employment, asylum, refugee resettlement, investment, diversity, and special immigrant visas.¹¹⁶ Unlike most other types of family-based immigration, spouses of citizens are not subject to

111. *In re Lovo-Lara*, 23 I. & N. Dec. 746, 746 (B.I.A. 2005).

112. The *Adjudicator's Field Manual* "comprehensively details USCIS policies and procedures for adjudicating applications and petitions. USCIS updates the AFM regularly to incorporate new policies and procedures established through statutes, regulations, policy memoranda, or any other pertinent publications." *Introduction to the Adjudicator's Field Manual*, ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, U.S. CITIZENSHIP & IMMIGRATION SERVS., available at <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>. The manual does not establish law, but is a guidebook for USCIS employees.

113. Memorandum from Carlos Iturregui, Chief, Office of Policy and Strategy, U.S. Citizenship & Immigration Services, to Field Leadership (Jan. 14, 2009), available at http://www.uscis.gov/USCIS/Laws%20and%20Regulations/Memoranda/Petitions_Transsexual.pdf.

114. Policy Memorandum on Adjudication for Immigration Benefits for Transgender Individuals 4 (Apr. 10, 2012) [hereinafter Policy Memorandum], available at http://www.uscis.gov/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Transgender_FINAL.pdf.

115. 8 USC §§ 1151(b)(2)(A)(i), 1154(a)(1)(A)(ii) (2006). In 2010, 20,633 spouses of LPRs themselves became LPRs. See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2010 YEARBOOK OF IMMIGRATION STATISTICS 20 (2011) (providing figures for categories of "spouses of alien residents").

116. Grisella Martinez, *Open Window: Matter of Lovo's Implications for Transsexual and Immigrant Communities*, 2 MOD. AM. 28, 30 (2006).

numerical limitations on immigration.¹¹⁷ In 2010, partners of U.S. citizens received 32,900 fiancé(e) visas, 16,249 temporary spouse visas, and 271,909 spouse-based grants of permanent resident status.¹¹⁸

The Department of Homeland Security (DHS), the Department of Justice (DOJ), and the federal courts may be involved in deciding the validity of a marriage-based immigration petition. First, U.S. citizens or LPRs must file a petition to DHS's¹¹⁹ USCIS on behalf of their spouse or fiancé(e) to establish their eligibility for immigration.¹²⁰ A USCIS adjudicator then may accept or reject the petition or request more evidence or an interview.¹²¹ If the petition is approved, then the foreign-national spouse may apply for a visa if overseas or an adjustment of status if she has legal status in the United States.¹²² If the petition is denied, then the petitioner may appeal to USCIS's Administrative Appeals Office (AAO) for a fiancé(e) visa or DOJ's Board of Immigration Appeals (B.I.A.)¹²³ for a spouse visa.¹²⁴ Most B.I.A. decisions may be appealed to the federal appellate courts.¹²⁵

In 1996, the Defense of Marriage Act (DOMA) limited the sorts of couples who could be recognized by the federal government by decreeing that “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”¹²⁶ However, neither DOMA nor any other federal law defines “man” or “woman.”¹²⁷ Additionally, DOMA's legislative history does not include a discussion of trans* people, despite

117. 8 USC § 1151(b)(2)(A)(i) (2006).

118. OFFICE OF IMMIGRATION STATISTICS, *supra* note 115, at 18, 64.

119. *Organizational Chart*, U.S. DEP'T OF HOMELAND SECURITY, <http://www.dhs.gov/xlibrary/assets/dhs-orgchart.pdf> (last visited Feb. 7, 2013).

120. *See* ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, *supra* note 112, § 21.2(a)(2).

121. *Id.* §§ 21.2(a)(1), (b)(11).

122. U.S. CITIZENSHIP & IMMIGRATION SERVS., I AM A U.S. CITIZEN: HOW DO I... HELP MY RELATIVE BECOME A U.S. PERMANENT RESIDENT? 2 (2008); U.S. CITIZENSHIP & IMMIGRATION SERVS., I AM A U.S. CITIZEN: HOW DO I... HELP MY FIANCÉ(E) BECOME A U.S. PERMANENT RESIDENT? 1 (2008).

123. The Board of Immigration Appeals “is the highest administrative body for interpreting and applying immigration laws.” *Board of Immigration Appeals*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/eoir/biainfo.htm> (last visited Feb. 7, 2013). The B.I.A. is part of the Department of Justice's Executive Office for Immigration Review. *Id.*

124. ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, *supra* note 112, §§ 21.2(f)(3)(E), (g)(2).

125. *Board of Immigration Appeals*, *supra* note 123.

126. 1 U.S.C. § 7 (2006). DOMA was a response to the possibility that Hawai'i would recognize same-sex marriages. In re *Lovo-Lara*, 23 I. & N. Dec. 746, 749 (B.I.A. 2005).

127. *See In re Lovo-Lara*, 23 I. & N. Dec. at 749 (“Neither the DOMA nor any other Federal law addresses the issue of how to define the sex of a postoperative transsexual or such designation's effect on a subsequent marriage of that individual.”); *see also* Rachel Duffy Lorenz, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. REV. 523, 553 (2005) (“The 94th Congress took the definitions of male and female to be self-evident, neglecting to include these definitions in DOMA.”).

previous court cases that allowed them to marry in their identified gender and numerous statutes allowing legal sex reclassification.¹²⁸

After DOMA's passage, USCIS and its predecessor, the Immigration and Naturalization Service, tended to recognize marriages with a trans* partner if they were "considered valid in the jurisdiction where [they were] entered into."¹²⁹ However, in 2002, USCIS suddenly began denying all marriage-based immigration benefits to trans* people.¹³⁰ In April 2004, a USCIS memorandum announced an official policy that, to comply with DOMA, explicitly barred all noncloseted trans* people from marriage-based immigration, regardless of their partner's legal sex.¹³¹ Months later, the B.I.A. rejected the policy in a nonprecedential decision that stated, in a case involving a trans* person marrying a cisgender person, that "a foreign marriage is deemed lawful for immigration purposes if valid where performed, unless it contravenes a strong public policy of the state where the parties reside."¹³²

In 2005, the B.I.A. issued its only precedential decision on the subject, *In re Lovo-Lara*, that finally invalidated the 2002 USCIS memorandum by holding that a marriage involving a trans* person is valid for immigration purposes if the state in which it occurred considered the couple to be one man and one woman.¹³³ In other words, the current sex markers on their birth certificates would determine the legal sexes of the couple.¹³⁴ The court reasoned that DOMA did not explicitly forbid marriages involving trans* people if the officiating state legally recognizes them as different-sex marriages.¹³⁵ The B.I.A. further explained that, other than the requirement that

128. *In re Lovo-Lara*, 23 I. & N. Dec. at 749–50.

129. IMMIGRATION EQUAL., IMMIGRATION LAW AND THE TRANSGENDER CLIENT § 4.3 (2008).

130. *Id.* ("[A]dvocates struggled to comprehend the reason for the policy change.").

131. Memorandum from William Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigration Servs., to Reg'l Dirs., Serv. Ctr. Dirs., District Dirs. & Dir. of Office of Int'l Affairs 3 (Apr. 16, 2004), available at <http://www.immigrationequality.org/wp-content/uploads/2011/06/yates-memo.pdf> (USCIS would deny applications "where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so" or "was born a sex other than what they [sic.] claim to be at the time of filing."); see IMMIGRATION EQUAL., *supra* note 143, § 4.3.2 ("This more restrictive approach may have been adapted to avoid the possibility of recognizing any seemingly same-sex marriage.").

132. *In re Widener*, No. A95 347 685, 2004 WL 2375065, at *5 (B.I.A. Sept. 21, 2004) (footnote omitted).

133. *In re Lovo-Lara*, 23 I. & N. Dec. at 753; see also Policy Memorandum, *supra* note 114, at 2 ("Although evidence of sex reassignment surgery was submitted in the *Lovo-Lara* case, the Board's decision does not require submission of evidence of surgery in order to establish a valid heterosexual marriage. Rather, the reasoning underlying the Board's decision suggests that the federal government should defer to how the state/local jurisdiction in which a claimed marriage takes place recognizes a legal change in gender for purposes of heterosexual marriage.").

134. *In re Lovo-Lara*, 23 I. & N. Dec. at 753.

135. *Id.* at 751.

marriages be between two people of legally different sexes,¹³⁶ a marriage is valid for immigration purposes if it is valid under the laws of the state in which it was performed.¹³⁷ The most innovative part of the Board's discussion involved using the example of intersex people to reason that legal sex cannot be solely determined by chromosomes or the sex marker on the original birth certificate.¹³⁸ The court stated that since medical sex could be determined by using eight criteria,¹³⁹ legal sex "for immigration purposes" would be determined by "the designation appearing on the current birth certificate."¹⁴⁰ This holding reinforced the centrality of the birth certificate as the location of legal sex, while allowing for recognition of amended birth certificates.

In 2009, USCIS updated its *Adjudicator's Field Manual* via memorandum to reflect *Lovo-Lara* but narrowly interpreted the holding to require a legal change of sex, which generally referred to a changed birth certificate and sex reassignment surgery, which the manual did not define.¹⁴¹

B. Recent Reforms

On April 10, 2012, USCIS released a memorandum that largely overhauled the 2009 requirements.¹⁴² In particular, the memo abolished the previous federal requirements of a changed birth certificate and "sex reassignment surgery."¹⁴³ The memorandum explained that the changes resulted from a recognition that "[n]ot all states or foreign jurisdictions that recognize a legal change of gender require the completion of gender reassignment surgery before an individual can legally change his or her gender" and that there exists a "broader range of clinical treatments that can result in a legal change of gender under the law of the relevant jurisdiction."¹⁴⁴

The new rules grant marriage-based immigration benefits to trans* people if they fulfill a three-prong test:

- 1) [T]he transgender individual has legally changed his or her gender and *subsequently* married an individual of the other gender, 2) the

136. The B.I.A. considered marriage by proxy or polygamous marriage to be invalid for immigration purposes. *Id.* at 751 n.3.

137. *See id.* at 751–52.

138. *Id.* at 752–53.

139. These categories include "chromosomal sex," "testes or ovaries," "seminal vesicles/prostate or vagina/uterus/fallopian tubes," "penis/scrotum or clitoris/labia," "androgens or estrogens," "facial and chest hair or breasts," "[a]ssigned sex and gender of rearing," and "[s]exual identity." *Id.* at 752.

140. *Id.* at 753.

141. Memorandum from Carlos Iturregui, *supra* note 113. However, the B.I.A. held in a nonprecedential decision that a sex-marker change on a foreign passport is sufficient acknowledgment of sex if that jurisdiction does not change birth certificates for any reason. *In re Ahmad*, No. A96 609 556, 2007 WL 3301748, at *1 (B.I.A. Sept. 26, 2007).

142. *See* Policy Memorandum, *supra* note 114, at 4.

143. *Id.*

144. *Id.* at 2.

marriage is recognized as a heterosexual marriage under the law where the marriage took place, and 3) the law where the marriage took place does not bar a marriage between a transgender individual and an individual of the other gender.¹⁴⁵

For the first prong, the memo explains that “USCIS will recognize that such individual’s gender changed” if the applicant provides any one of the following documents: an amended birth certificate, passport, court order, certificate of naturalization or citizenship, driver’s license, or a “medical certification of the change in gender from a *licensed* physician.”¹⁴⁶

For the second prong, marriages will be presumed valid

in the absence of jurisdictional law and/or precedent that would place the validity of such marriage in doubt. Only in jurisdictions where a specific law or precedent either prohibits or sets specific requirements for a legal change of gender for purposes of that jurisdiction’s marriage laws is the individual required to demonstrate that he or she has met the specific requirements needed to establish the legal change of gender and the validity of the marriage.¹⁴⁷

Basically, these reforms broaden the means through which legal sex may be reclassified by USCIS and make USCIS’s requirements for marriage recognition practically the same as the state’s requirements where the marriage took place.

IV.

STATE MARRIAGE AND LEGAL SEX RECLASSIFICATION

As explained in Part III, federal recognition of marriages for immigration purposes hinges on whether people’s legal sex was reclassified and they subsequently married, whether the state where the marriages took place considers the marriages to be valid, and whether the state considers the marriages to be made up of one man and one woman. However, each jurisdiction has its own laws regarding (1) whether and how a trans* person can rebut the presumption of birth-assigned legal sex for the purposes of marriage, and (2) whether marriage is restricted based on legal sex.¹⁴⁸

145. *Id.* at 4 (citation and footnote omitted).

146. *Id.* at 5–6.

147. *Id.* at 5.

148. While marriages entered into in foreign jurisdictions may and often do serve as the basis for marriage-based immigration petitions, this Part will focus only on U.S. state sex- and marriage-recognition laws. This decision was made both for the sake of brevity and because the existence of fiancé(e) visas and the elimination of USCIS’s birth certificate requirement makes the point moot.

A. Legal Sex Reclassification

*“The notion of classifying things and then claiming that only this or that is a proper version of some being is a distinctly human construct, full of arrogance and hubris.”*¹⁴⁹

Different jurisdictions have dramatically varying and frequently vague requirements for the sort of evidence necessary to obtain legal sex reclassification or birth certificate amendment.¹⁵⁰ While some jurisdictions do not recognize any legal sex recategorization, others require some sort of surgery or specific surgeries; court orders; or clinical treatment, diagnosis, or self-identification. “In determining legal sex, courts typically use . . . a ‘body-parts’ checklist: the court meticulously scrutinizes a litigant’s sexual anatomy and compares its various features to a presumed norm.”¹⁵¹ Where trans* people happen to have been born or currently reside will determine whether they are legally considered men or women.

At one extreme, some jurisdictions will not recognize gender other than that assigned at birth. One Texas court summed up this attitude: “In short, once a man, always a man.”¹⁵² Case law in Ohio and Texas prevents legal sex reclassifications, though some Texas judges will occasionally grant them.¹⁵³ Idaho will not issue a birth certificate reflecting a legal sex reclassification.¹⁵⁴ A Tennessee statute flatly decrees that “[t]he sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”¹⁵⁵

When courts subscribe to a fundamentalist gender ideology that only acknowledges men who are assigned male at birth and women who are assigned female at birth and insist on the infallibility and irrevocability of this initial classification, they ignore trans* people’s lived experiences. In this traditional approach, courts identify a physical and/or metaphysical location for where an eternal “real” or “true” gender of a person is situated that makes no room for nonintersex trans* people’s existences. Some courts invoke religion in framing the “philosophical (and now legal) question . . . : can 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?”¹⁵⁶ Other courts reference chromosomes: “The male chromosomes do not change with either

149. Smith, *supra* note 70, at 30.

150. See Sources, *supra* note 5.

151. Flynn, *supra* note 67, at 37.

152. Littleton v. Prange, 9 S.W.3d 223, 227 (Tex. App. 1999).

153. See, e.g., *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987); Littleton, 9 S.W.3d 223; Sources, *supra* note 5 (“Prior to Littleton v. Prange, Texas issued new birth certificates. Anecdotal reports now indicate that some officials refuse to correct the sex designation on transgender people’s birth certificates, although judges may order such a change.”).

154. Sources, *supra* note 5.

155. TENN. CODE ANN. § 68-3-203(d) (2011).

156. Littleton, 9 S.W.3d at 224. Littleton held that a trans woman “was *created* and born a male.” *Id.* at 231 (emphasis added).

hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.”¹⁵⁷ Frequently, courts refer to genital appearance at birth: “It is generally accepted that a person’s sex is determined at birth by an anatomical examination by the birth attendant. This results in a declaration on the birth certificate of either ‘boy’ or ‘girl’ or ‘male’ or ‘female.’ This then becomes a person’s true sex.”¹⁵⁸ Finally, some courts rely on reproductive capacity: “A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to ‘produce ova and bear offspring’ does not and never did exist.”¹⁵⁹

In contrast, some states now allow the presumption of birth-assigned legal sex to be rebutted through evidence of surgery. Some jurisdictions require specific types of genital surgery before allowing trans* people to legally reclassify their sex on a birth certificate. For instance, people born in New York City must have a phalloplasty or a vaginoplasty, while those born elsewhere in New York State must have a penectomy or a hysterectomy and a mastectomy.¹⁶⁰ Some jurisdictions require an unspecified form of genital surgery. Generally, these jurisdictions’ statutes or rules refer to “sex change operation”¹⁶¹ or “sex reassignment surgery,”¹⁶² which implies that genital surgery is expected. Other jurisdictions’ statutes do not address birth certificate changes but generally allow them upon proof of genital surgery.¹⁶³

157. *Id.* at 230; *see also In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002) (reasoning that a trans woman could not inherit from her deceased husband because absent a “change in his chromosomes” she could not be legally recognized as a woman; as such, her marriage was void).

158. *In re Ladrach*, 513 N.E.2d at 832. In *Kantaras v. Kantaras*, which addressed whether a trans man had any legal rights to his children that his wife bore, the court announced, “We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.” 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004). In *In re Ladrach*, the court explained, “There was no evidence that applicant at birth had any physical characteristics other than those of a male and he was thus correctly designated ‘Boy’ on his birth certificate.” 513 N.E.2d at 832.

159. *In re Estate of Gardiner*, 42 P.3d at 135. The court in *Gardiner* quotes Webster’s New Twentieth Century Dictionary (2nd ed. 1970) to declare that to be male is to be “‘of the sex that fertilizes the ovum and begets offspring: opposed to *female*’” and to be female is to be “‘of the sex that produces ova and bears offspring: opposed to *male*.’” *Id.* Using these definitions, the court declares, “A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to ‘produce ova and bear offspring’ does not and never did exist. There is no womb, cervix, or ovaries . . .” *Id.*

160. Spade, *Documenting Gender*, *supra* note 39, at 736.

161. *See, e.g., ARIZ. REV. STAT. ANN.* § 36-337 (A)(3) (2012); *HAW. REV. STAT. ANN.* § 338-17.7(a)(4)(B) (LexisNexis 2008).

162. *See, e.g., MASS. GEN. LAWS ANN.* ch. 46, § 13(e) (West 2006); *MICH. COMP. LAWS ANN.* § 333.2831(c) (West 2006); *NEB. REV. STAT.* § 71-604.01 (2012); *N.J. STAT. ANN.* § 26:8-40.12 (West 2013); *N.C. GEN. STAT.* § 130A-118(b)(4)(e) (2011).

163. *See, e.g., Sources, supra* note 5 (describing Florida’s, Oklahoma’s, and Pennsylvania’s procedures).

Moreover, many states require a court order to change one's birth certificate.¹⁶⁴ Some statutes do not specify how the court must make its decision.¹⁶⁵ Other statutes require proof that "the sex . . . has been changed by surgical procedure,"¹⁶⁶ or proof of "sex reassignment or corrective surgery . . . and as a result of such surgery . . . the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate,"¹⁶⁷ "sexual transformation,"¹⁶⁸ or "sex change."¹⁶⁹ These statutes do not define "sexual transformation" or the like, so judges tend to interpret these requirements based on personal ideas about what body parts a true man or woman possesses.¹⁷⁰

Finally, a small number of jurisdictions are starting to allow legal sex reclassification without surgery. Laws such as those in Iowa,¹⁷¹ California, and Washington,¹⁷² require only appropriate clinical treatment, which is usually satisfied by taking hormones or receiving counseling.

B. Marriage Recognition

The current USCIS policies require a marriage to be considered legally valid and heterosexual under state law.¹⁷³ A trans* person's ability to marry under state law depends on (1) whether same-sex marriage is allowed; and (2) whether the trans* person's legal sex is reclassified for marriage purposes. As a general rule, if a trans* person in the United States transitions after entering into a valid marriage, it is "well-settled doctrine" that the "subsequent facts cannot retroactively void the marriage."¹⁷⁴

All states that allow same-sex marriage¹⁷⁵ also make legal sex reclassification possible.¹⁷⁶ The April 2012 USCIS memo allows any of the

164. These are Alabama, Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Georgia, Indiana, Louisiana, Maine, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, Oregon, South Dakota, Utah, Vermont, Virginia. *Sources, supra* note 5.

165. See, e.g., DEL. CODE ANN. Tit. 16 § 3131(a) (2003); MO. ANN. STAT. § 193.215(9) (West 2011); MONT. CODE ANN. § 50-15-204 (2011); WIS. STAT. § 69.15 (2011); WYO. STAT. ANN. § 35-1-424 (West 2012); *Sources, supra* note 5 (describing Alaska's, Indiana's, Maine's, Minnesota's, and Vermont's procedures).

166. See, e.g., ALA. CODE § 22-9A-19(d) (2012); ARK. CODE ANN. § 20-18-307(d) (West 2012); COLO. REV. STAT. ANN. § 25-2-115(4) (West 2012); D.C. CODE § 7-217(d) (2001); GA. CODE ANN. § 31-10-23(e) (2006); MD. CODE ANN., Health - General § 4-214(b)(5) (LexisNexis 2009); OR. REV. STAT. § 432.235(4) (2011); *Sources, supra* note 5 (describing Delaware's regulation).

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

168. NEV. ADMIN. CODE § 440.130 (2006).

169. N.H. REV. STAT. ANN. § 5-C:87 V (2012); UTAH CODE ANN. § 26-2-11 (West 2012).

170. Spade, *Documenting Gender, supra* note 39, at 770–71.

171. IOWA CODE ANN. § 144.23(3) (West 2005) (discussing "surgery or other treatment").

172. *Sources, supra* note 5 (describing California's and Washington's procedures).

173. See Policy Memorandum, *supra* note 114.

174. Ruthann Robson, *Reinscribing Normality? The Law and Politics of Transgender Marriage*, in *TRANSGENDER RIGHTS, supra* note 1, at 299, 304.

175. These are California (for the approximately 18,000 couples that married in 2008 before the passage of Proposition 8), Connecticut, the District of Columbia, Iowa, Maine, Maryland,

possible proofs of legal sex reclassification (such as a passport or doctor's letter) to establish the validity of the marriage unless "a specific law or precedent either prohibits or sets specific requirements for a legal change of gender for purposes of that jurisdiction's marriage laws."¹⁷⁷ Since none of the states with same-sex marriage put sex-based restrictions on accessing marriage, trans* people will theoretically always be able to marry for immigration purposes in their identified gender to different-sex partners.¹⁷⁸

In states that only allow different-sex marriages, trans* people may or may not be able to marry in their identified gender. Some states which ban same-sex marriage, such as North Carolina¹⁷⁹ and New Jersey,¹⁸⁰ have explicitly established through case law that trans* people who have had their legal sex recategorized may marry in their identified gender.¹⁸¹ However, Ohio,¹⁸² Texas,¹⁸³ Florida,¹⁸⁴ Kansas,¹⁸⁵ Idaho,¹⁸⁶ and Tennessee¹⁸⁷ never recognize trans* people's identified gender for marriage purposes, even if they have legally amended their birth certificate's sex marker. All other states are silent in their statutes and case law on trans* people's marriage rights but generally allow trans* people whose legal sexes have been reclassified to marry different-sex partners.¹⁸⁸

When trans* people cannot obtain legal sex recognition for marriage purposes in states that ban same-sex marriage, the result is that those trans*

Massachusetts, New Hampshire, New York, Vermont, and Washington as of December 2012. *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL (Jun. 8, 2012), <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html>; Jonathan Capehart, *Marriage Equality Takes Four Steps Forward*, WASH. POST (Nov. 7, 2012, 5:15 PM), http://www.washingtonpost.com/blogs/post-partisan/post/marriage-equality-takes-four-steps-forward/2012/11/07/b3ae62ea-2925-11e2-b4e0-346287b7e56c_blog.html.

176. See *Sources*, *supra* note 5.

177. See Policy Memorandum, *supra* note 114, at 5.

178. For instance, a trans woman in New York (regardless of her birth certificate sex marker) should always be able to marry someone considered legally male if she submits a doctor's letter to satisfy USCIS.

179. See *In re Lovo-Lara*, 23 I. & N. Dec. 746, 746, 748 (B.I.A. 2005).

180. *M.T. v. J.T.*, 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976).

181. See also *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032–37 (D. Minn. 2012).

182. *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *6–7 (Ohio Ct. App. Dec. 31, 2003).

183. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999); *Mireles v. Mireles*, No. 01-08-00499-CV, 2009 WL 884815, at *2 (Tex. App. Apr. 2, 2009).

184. *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

185. *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002).

186. See Matt Wood, *Op-ed: The Importance of Marriage Equality to Trans Community*, ADVOCATE.COM (Apr. 10, 2012), <http://www.advocate.com/politics/commentary/2012/04/10/oped-importance-marriage-equality-trans-community>.

187. See *id.*

188. See Policy Memorandum, *supra* note 114, at 5 ("USCIS will presume the validity of the marriage involving a transgender individual in the absence of jurisdictional law and/or precedent that would place the validity of such marriage in doubt.").

people who marry cisgender people can only marry same-gender partners. For instance, a trans woman in North Carolina (which allows legal sex recategorization for marriage purposes) who has only taken hormones could only marry someone legally considered to be a woman. A trans woman in Ohio (which does not recognize legal sex recategorization) who has had a penectomy and a vaginoplasty and who has legally amended her birth certificate sex marker to female could only marry someone legally considered to be a woman. In both cases, such same-gender marriages would be considered legally heterosexual, and thus the marriages would theoretically meet the current USCIS requirements for marriage-based immigration.

V.

ANALYSIS OF CURRENT RULES GOVERNING TRANS* MARRIAGE-BASED IMMIGRATION

By eliminating the federal “sex reassignment surgery” and birth certificate requirements, the recent USCIS reforms demonstrated a tremendous step forward in acknowledging the lived reality of trans* people. However, the reforms resulted solely from a memorandum sent by a USCIS official and are not backed by any statute or precedential case law. The election of a new president or the appointment of a transphobic USCIS official could easily result in a policy reversal.

Despite the reforms, serious remaining problems illustrate the absurdity of legal sex classification. First, USCIS recognition of marriage-based immigration remains dependent on state laws. Second, the current rules exclude people with nonbinary gender identities. Third, the current system does not serve DOMA’s purpose. Finally, the current legal regime creates confusion and inconsistency regarding legal rights, and state and federal legal sex designations often conflict.

A. Validity of Trans People’s Marriages Depends on State Laws*

The practical impact of the reforms is that in most cases the validity of a trans* person’s marriage for immigration purposes now hinges entirely on whether the marriage is valid in the state where it was performed. In many states without same-sex marriage, whom one may marry hinges on the birth certificate sex marker. The current legal regime governing birth certificate changes is muddled, contradictory, and nonresponsive to the lives of actual trans* people. As a result, many trans* people are not able to change their birth certificates. Of U.S. trans* people who have transitioned, only 24 percent have updated their birth certificates with their identified gender.¹⁸⁹ This greatly

189. GRANT ET AL., *supra* note 72, at 139, 143–45 (discussing the correlations between birth certificate changes, surgical history, race, and education levels).

limits the number of trans* people who are able to access marriage-based immigration in their identified gender.

1. Some States Refuse to Recognize Trans People's Identities*

As discussed previously, some states refuse entirely to reclassify trans* people's legal sex, often reasoning that there is a permanent and true sex decreed by religion,¹⁹⁰ chromosomes,¹⁹¹ or reproductive capacity.¹⁹²

Professor David Cruz has eloquently criticized legal institutions for their tendencies to justify legal sex classification and coercion through religious rhetoric:

[T]he persistent acceptance by government of the unquestioned belief that men and women are or should be categorically different and treated as such, not only because God says so, but also because that is the treatment Nature dictates, is troubling. The history of race, religion, and gender in the U.S. amply demonstrates that reliance on what God or Nature supposedly dictates has often led to unjust exclusions and limitations, and to the casual acceptance and reinforcement of social dividing practices by government.¹⁹³

More fundamentally, many people would likely disagree with courts' particular interpretations of religion or reliance on such principles at all.

From a practical standpoint, some states' insistence on chromosomes as the true source of legal sex makes no sense given courts' unwillingness to demand chromosome tests. Courts suggest that chromosomes are the sole or primary determiner of legal sex but that testing chromosomes is unnecessary. In the cases in which chromosomes are cited as the determiner of gender, the courts never discuss evidence regarding the trans* person's actual chromosomes. Instead, courts generally assume that, for instance, a trans woman must have XY chromosomes. For example, the court in *In re Ladrach*, deciding whether a trans woman and cisgender man could marry, merely stated, "There also was no laboratory documentation that the applicant had other than male chromosomes."¹⁹⁴ If legal institutions actually considered chromosomes to be the location of gender, then infants' chromosomes would be tested at birth and certainly trans* litigants would be required to present chromosome test results rather than detailed evidence regarding the appearance of their genitals at birth, at the time of marriage, and/or during the trial. Most people, including

190. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 224, 231 (Tex. App. 1999) (asking "[t]he deeper philosophical (and now legal) question . . . : can 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?" and holding that a trans woman "was *created* and born a male") (emphasis added).

191. See *supra* note 157 and accompanying text.

192. See *supra* note 159 and accompanying text.

193. David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1003 (2002) (footnotes omitted).

194. *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. 1987).

this author, have never had their chromosomes tested. Another problematic aspect of this focus on chromosomes is its potential impact on people with atypical chromosomes, such as some intersex people.¹⁹⁵ Chromosomes can be XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO.¹⁹⁶ Will people be stripped of their legal sex if they ever undergo a chromosome test that does not produce the typical XX or XY result?

Instead, chromosomes simply serve as a proxy for discussing genital appearance at birth. Courts seem to have chosen this proxy because they cannot think of any other aspect of current physicality (as opposed to body part appearance at birth) that cannot be removed or changed through some form of medical intervention. For instance, hormones can be changed, ovaries and testes can be removed, and vaginas and penises can be created. Chromosomes seem to be the only option for making an argument for an unchanging bodily location of gender. Such courts desperately search for a biological basis to the binary legal sex classification system, but such an approach simply ignores the “amazing biological variety” that characterizes the many possible configurations of human bodies and gender identities.¹⁹⁷ In the end, “[w]here we draw lines, and on what we focus [for determining sex], are cultural choices.”¹⁹⁸

Finally, the reproductive capacity line of reasoning is applied in a contradictory and disparate way only to trans* people. Many cisgender women cannot “produce ova [or] bear offspring.”¹⁹⁹ However, when determining the validity of a marriage involving cisgender people, courts will never invalidate a marriage simply because a woman is infertile or did not birth children. Again, courts reference reproductive capacity merely as a proxy for genital appearance at birth.

2. Most States Retain the Problematic “Sex Reassignment Surgery” Requirement

Currently, of those states that do not allow same-sex marriage but potentially do allow trans* people to marry in their identified gender, twenty-seven require some form of “sex reassignment surgery” in order to rebut the

195. See Greenberg, *supra* note 1, at 56–61.

196. Vade, *supra* note 25, at 280 n.82.

197. *Id.* (“One can have two ovaries, two testes, one ovary and one testis, two ootestes, or streak testes which function as neither. One’s external morphology can consist of a small clitoris, a large clitoris, a small penis, a large penis, both a penis and a vagina. One can have different combinations of internal morphology. Everyone has both testosterone and estrogen and there are endless combinations of relative amounts. Similarly there are endless combinations of phenotypical features (e.g. hair, breasts, etc.).”).

198. *Id.* at 280.

199. *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

presumption of legal sex as determined by genital appearance at birth.²⁰⁰ This requirement, which must be fulfilled in these states in order to access marriage-based immigration as one's identified gender, is problematic for a number of reasons: first, the very term "sex reassignment surgery" is a vague legal fiction; second, having or lacking certain body parts does not make one a man or a woman; and third, a genital surgery requirement is not responsive to most trans* people's lives.

Despite the language in the previous version of the USCIS *Adjudicator's Field Manual* and the statutes of most states, there is no such thing as a surgery that "reassigns" or "changes" one's gender. Depending on the jurisdiction, judge, or adjudicator, "sex reassignment surgery" can mean a penectomy, mastectomy, phalloplasty, hysterectomy, vaginoplasty, or tracheal shave.²⁰¹ These differing interpretations demonstrate that there is no consensus on which body parts are necessary for someone to be considered a man or a woman. The use of vague terms such as "sex reassignment surgery" allows adjudicators of legal sex and marriage recognition to create their own arbitrary medical requirements for proving the realness of one's gender.²⁰²

Furthermore, only trans* people are held to a definition of gender that hinges entirely on possessing certain body parts. For instance, if a cisgender woman undergoes a mastectomy or a hysterectomy, courts would not consider her to have legally lost her femaleness. Conversely, a cisgender man who undergoes an orchiectomy or loses his penis in an accident is not legally considered a woman. If a cisgender man has gynecomastia (enlargement of the breast tissue) his legal sex designation is not questioned. Other than in sports,²⁰³ cisgender people's hormone levels are not tested to legally determine their gender. If a cisgender woman undergoes genital cutting as a child and as a result no longer has labia or a clitoris, she is still legally considered a woman. However, for trans* people, most laws base the legal validity of their gender entirely on whether they possess or lack breasts, a uterus, testicles, labia, or a penis.

Beyond the unfairness created by these inconsistencies, most trans* people cannot live up to the standards set by surgical requirements. In fact, a

200. See *Sources*, *supra* note 5. These states are Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawai'i, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Virginia, and West Virginia. *Id.*

201. Spade, *Documenting Gender*, *supra* note 39, at 736. For definitions of surgical terms, see *supra* note 40.

202. While a rigid and harsh definition of appropriate surgery would obviously be more harmful, the current system's "inconsistent application of those policies results in differing levels of access to accurate ID for various transgender people." Spade, *Documenting Gender*, *supra* note 39, at 773.

203. Joanna Marchant, *Women with High Male Hormone Levels Face Sport Ban*, NATURE (Apr. 14, 2011), <http://www.nature.com/news/2011/110414/full/news.2011.237.html>.

recent major survey of trans* people in the United States found that only 25 percent of trans women respondents had had an orchiectomy and only 23 percent had had vaginoplasty.²⁰⁴ Meanwhile, trans men had even lower rates of genital surgery, with only 21 percent reporting to have had a hysterectomy, 4 percent having had metoidioplasty, and 2 percent having had a phalloplasty.²⁰⁵ Some scholars believe these percentages are in reality even lower since “it is difficult to include people in prisons, people without secure housing, and other highly vulnerable people with exceptionally poor access to healthcare in such studies.”²⁰⁶

While some trans* people do not want genital surgery,²⁰⁷ many trans* people who do want genital surgery cannot access it. Thus, the surgical requirement doubly fails to live up to trans* people’s lived experiences.

a. Some Trans People Do Not Want Genital Surgery*

A significant number of trans* people do not want genital surgery. Of trans men respondents to a recent study in the United States, 72 percent reported no desire for phalloplasty, 44 percent did not want a metoidioplasty, and 21 percent did not wish to undergo a hysterectomy.²⁰⁸ Fourteen percent of trans women respondents reported no desire for any genital surgeries.²⁰⁹

Trans* people “have different aims and desires for their bodies and express gendered characteristics in the ways that make the most sense to those needs and desires.”²¹⁰ They may be satisfied with social transition, hormones, or other nongenital surgeries,²¹¹ or they may not want to risk the possible complications of surgery.²¹²

Some trans* people elect a solely social transition in which they can live as their gender identity.²¹³ Social transition may include “changing external gender expressions such as hairstyle, clothing, and accessories, [which may be]

204. GRANT ET AL., *supra* note 72, at 79.

205. *Id.*

206. SPADE, *NORMAL LIFE*, *supra* note 14, at 145.

207. Sherilyn Connelly, *The Big Reveal*, in GENDER OUTLAWS, *supra* note 10, at 76, 82 (“I’m not a boy because I have a penis, and just because I don’t have a vagina doesn’t mean I’m not a girl.”).

208. GRANT ET AL., *supra* note 72, at 79; *see also* j wallace, *The Manly Art of Pregnancy*, in GENDER OUTLAWS, *supra* note 10, at 188, 191 (“Transition-wise I’ve never really wanted to have genital surgery. . . . [F]or me it’s not worth actually having one surgically attached.”).

209. GRANT ET AL., *supra* note 72, at 79; *see also* Mercedes Allen, *Trans-ing Gender: The Surgical Option*, in GENDER OUTLAWS, *supra* note 10, at 101, 104–05 (“[I]t would seem to me that ‘second best’ would be having major surgery to meet societal expectations and legal standards, when I already see myself as a woman.”).

210. Spade, *Documenting Gender*, *supra* note 39, at 754.

211. Spade, *Medicaid Policy*, *supra* note 37, at 498. Note also that, as with cisgender people, trans* people’s genitals are usually only seen by sexual partners. *See id.*

212. *See, e.g.*, Amy Hunter, *Sex Reassignment Surgery: When Things Go Wrong*, BILERICO PROJECT (June 6, 2010), http://www.bilerico.com/2010/06/sex_reassignment_surgery_when_things_go_wrong.php.

213. *See also* Spade, *Documenting Gender*, *supra* note 39, at 754–55.

an effective, affordable, non-invasive way to alter how they are perceived in day-to-day life.”²¹⁴

Other trans* people are satisfied with the effects of hormone therapy.²¹⁵ Hormones are the most common form of gender-confirming healthcare and are often very effective at “enhancing feminine or masculine secondary gender characteristics (e.g., voice, facial hair, breast tissue, muscle mass)”²¹⁶ to the level desired by the trans* person. Other trans* people are satisfied with nongenital surgeries,²¹⁷ such as tracheal shaves, facial feminization surgeries, breast augmentations, or mastectomies.

Since genital surgeries are often major medical procedures, some trans* people do not want to risk their potential consequences, including serious medical complications.²¹⁸ Additionally, those with serious health conditions may not be able to have genital surgery for safety reasons.²¹⁹

b. Many Trans People Cannot Access Genital Surgery*

Trans* people who do desire genital surgery are often not able to access it because of cost barriers, inability to get past medical gatekeepers, and/or lack of trans* medical care in their community. These factors are highly shaped by race, class, gender, and immigration status.

Cost is the primary obstacle preventing trans* people from accessing genital surgery. Genital surgery is very expensive²²⁰ and few doctors perform

214. *Id.* at 754.

215. Spade, *Medicaid Policy*, *supra* note 37, at 498.

216. Spade, *Documenting Gender*, *supra* note 39, at 755.

217. *See id.* at 754.

218. For instance, genital surgery complications can include infection, severe bleeding, loss of sexual satisfaction or sensation, or fistula. CAMERON BOWMAN & JOSHUA GOLDBERG, CARE OF THE PATIENT UNDERGOING SEX REASSIGNMENT SURGERY (SRS) 13–14, 25–26 (2006); *see also* Flynn, *supra* note 67, at 39 (noting that phalloplasty “presents significant risks, including permanent loss of orgasmic capability, severe scarring, and irreversible damage to the urethra . . . in addition to the exorbitant cost” of the procedure, which “may exceed one hundred thousand dollars”).

219. Spade, *Documenting Gender*, *supra* note 39, at 755.

220. One U.S. surgeon charges a starting rate of \$14,500 for a combined penectomy, orchiectomy, vaginoplasty, and clitoroplasty. *Male to Female (MTF) Gender Reassignment Surgery (GRS)*, DR. HAROLD REED, <http://www.srsmiami.com/MTF-male-to-female.html> (last visited Feb. 10, 2013). He charges \$4,000 for orchiectomy and scrotum removal alone. *Orchiectomy Procedure*, DR. HAROLD REED, <http://www.srsmiami.com/orchiectomy-procedure.html> (last visited Feb. 10, 2013). For trans men, phalloplasties must be done in more stages and at greater expense. *See* ST. PETER’S ANDROLOGY CENTRE, PATIENTS’ GUIDE TO PHALLOPLASTY TECHNIQUES, *available at* <http://www.andrology.co.uk/downloads/Patient-Guide-To-Phalloplasty.pdf> (last visited Apr. 15, 2013); *Why Not Phalloplasty?*, GENDER OUTLAW: FTM TRANSITION BLOG (Nov. 22, 2008, 4:33 PM), <http://genderoutlaw.wordpress.com/2008/11/22/why-not-phalloplasty> (stating that phalloplasty can cost between \$40,000 and \$200,000). A metoidioplasty alone by one surgeon costs \$12,500. *Female to Male (FTM) Gender Reassignment Surgery (GRS)—Metoidioplasty*, DR. HAROLD REED, <http://www.srsmiami.com/FTM-female-to-male.html> (last visited Feb. 10, 2013). He charges an additional \$5,000 for testicular prostheses and scrotalplasty. *Id.*

procedures such as vaginoplasties, metoidioplasties, and phalloplasties.²²¹ Additionally, before trans* people can access such surgery, most surgeons require preliminary treatments at an additional cost to the patient, including extensive therapy (often from multiple therapists) and/or a specified amount of time on hormones. The general economic marginalization of trans* people and the inability of the vast majority of them to get genital surgery covered by health insurance result in such surgery being completely inaccessible to many. Surgical requirements thus make legal recognition “turn on how much money a trans individual has,”²²² which is often influenced by race.²²³

Extreme socioeconomic marginalization renders genital surgery inaccessible for many trans* people. Trans* people earn less than the general population. For instance, trans* people are nearly four times as likely as the general population to have a household income of under \$10,000 per year.²²⁴ Such marginalization results from a

“cycle of poverty” . . . caused by the systematic discrimination and marginalization that trans people are likely to face throughout their lives. From an early age, transgender people are more likely to be kicked out of their homes, forced out of school, shut out of jobs, and denied healthcare, which makes them more likely to be homeless, poor, and/or eventually incarcerated.²²⁵

This “cycle of poverty” exacts an even greater toll on members of the trans* community who experience multiple forms of subordination: trans* people of color and immigrants are even further marginalized due to “the combination of anti-transgender bias and persistent, structural racism” and xenophobia.²²⁶ Thus, trans* people of color are even more likely to experience unemployment and poverty than white trans* people.²²⁷ Of all racial groups,

221. One practitioner who specializes in genital surgeries estimated there are only about twenty-five doctors in the United States who perform such procedures. Seth Doane, *The Sex Change Capital of the U.S.*, CBS NEWS (Feb. 11, 2009, 2:22 PM), <http://www.cbsnews.com/stories/2008/09/07/sunday/main4423154.shtml>. Many trans* people must travel out of state to access surgeons and thus also pay for flights and a hotel room for themselves and a caretaker. Furthermore, “[m]any [undocumented] immigrants experience difficulty traveling because they lack identification or they are concerned about encountering law enforcement. For example, buses are sometimes targeted for immigration raids. In addition, only a few states issue driver’s licenses to undocumented immigrants, which means travel by car may be limited as well.” ASIAN AM. JUSTICE CTR. & NAT’L QUEER ASIAN PACIFIC ISLANDER ALLIANCE, *LIVING IN THE SHADOWS: UNDOCUMENTED AND LGBT 1–2*, available at <http://www.advancingequality.org/files/Living%20In%20the%20Shadows%20Undocumented%20and%20LGBT.pdf>.

222. Flynn, *supra* note 67, at 39.

223. Gehi, *Gendered*, *supra* note 13, at 366–67.

224. GRANT ET AL., *supra* note 72, at 2 (finding that 15 percent of respondents to the National Transgender Discrimination Survey had household incomes below \$10,000 compared to 4 percent of the general population). In this same survey, 19 percent of respondents also “reported experiencing homelessness at some point in their lives.” *Id.* at 4.

225. Gehi, *Struggles*, *supra* note 18, at 324.

226. See GRANT ET AL., *supra* note 72, at 2.

227. See *id.* at 42.

African American trans* people reported experiencing the highest unemployment levels.²²⁸

Trans* immigrants, both undocumented or with legal status, “are [also] more likely to be poor.”²²⁹ Undocumented immigrants’ economic subordination is entrenched “because they are ineligible for federal public benefits, including healthcare, Social Security, food stamps, and cash assistance programs.”²³⁰ Additionally,

[u]ndocumented immigrants are often . . . more dependent upon their communities for support because of the circumstances of their immigration status, so for such individuals, coming out of the closet often has further-reaching implications. For example, should their families throw them out, they could find themselves homeless, with no right to work, and still deportable at any time.²³¹

As a result of all of these factors, trans* immigrants of color, particularly those who are undocumented, are more likely to need to support themselves through criminalized economies “in order to meet their basic needs.”²³² Additionally, as a result of profiling, “[f]or transgender people living in poverty who also identify as people of color or are perceived as immigrants, particularly those with psychiatric or physical disabilities, policing stops are almost inevitable.”²³³ This heightened exposure to policing, the tendency of low-income trans* immigrants of color to accept plea bargains to avoid horrific incarceration conditions, and the existence of the federal Secure Communities program²³⁴ increase risks of detention and deportation.²³⁵ Latin@s²³⁶ “are

228. *Id.*

229. Gehi, *Struggles*, *supra* note 18, at 324–25.

230. ASIAN AM. JUSTICE CTR. & NAT’L QUEER ASIAN PACIFIC ISLANDER ALLIANCE, *supra* note 221, at 2.

231. Ryan Campbell, *Good News for ‘Undocuqueers,’* HUFFINGTON POST (Nov. 26, 2012), http://www.huffingtonpost.com/ryan-campbell/good-news-for-undocuqueers_b_2178241.html (describing the situation for queer undocumented youth generally).

232. Gehi, *Gendered*, *supra* note 13, at 367.

233. *Id.* at 368–71 (“Each of these stops is based on a combination of race, poverty, gender expression, sexual orientation, and/or perceived immigrant status.”).

234. “Secure Communities is a central program in the Obama administration’s immigration enforcement and deportation agenda. . . . [It] sends fingerprints of anyone who’s booked in a participating local or county jail on to federal authorities who then check out people’s immigration status.” Stokely Baksh et al., *Secure Communities 101: Here’s What You Need to Know* (May 25, 2011, 11:40 AM), http://colorlines.com/archives/2011/05/secure_communities_101.html. U.S. Immigration and Customs Enforcement (ICE) officials can then request that people be detained for up to forty-eight extra hours after they would otherwise be released so that they can be detained by ICE. *Id.*

235. Gehi, *Gendered*, *supra* note 13, at 375–77, 384–87 (“Since transgender people of color who are immigrants are also more likely to encounter police interaction than others, many of them have and will continue to face immigration detention and deportation due to no crime other than ‘walking while trans.’”); see also SPADE, NORMAL LIFE, *supra* note 14, at 131–32 n.22; see, e.g., López, *supra* note 22.

236. This alternative spelling has been embraced by advocates of gender neutral language: The @ sign is obviously the deference to the quite recent determination to develop and use

disproportionately impacted by Secure Communities. . . . 93% of the people identified for deportation through Secure Communities are from Latin American countries, while 2% are from Asia and 1% are from Europe and Canada.”²³⁷ Finally, trans women of color, particularly those who do survival sex work, face high rates of violence²³⁸ and make up the overwhelming majority of victims of transphobic murders in the United States.²³⁹

nonsexist language. But whence Latin@s? It refers first of all to two different but related groups: those who come from and identify themselves with the countries of what is today called Latin America; and those within the United States who are descended from the first group.

Immanuel Wallerstein, *Latin@s: What's in a Name?*, in *LATIN@S IN THE WORLD SYSTEM: DECOLONIZATION STRUGGLES IN THE TWENTY-FIRST CENTURY U.S. EMPIRE* 31, 31 (Ramón Grosfoguel et al. eds., 2005), available at <http://www.sociologistswithoutborders.org/essays/LATINOS.pdf>. Latin@ is usually the preferred term of people organizing around queer, trans*, and Latin@ issues. See, e.g., COALICIÓN TRANSLATIN@, *THE VOICE OF TRANSLATIN@ IMMIGRANTS*, <http://translatinacoalition.org> (last visited Feb. 10, 2013).

237. AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW & POLICY, *SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS* 5–6 (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf. This racial profiling within immigration enforcement is endorsed by Supreme Court precedent. Sandoval, *supra* note 11, at 47–48 (discussing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). Sandoval summarizes:

The Court concluded its opinion [in *Brignoni-Ponce*] by stating the Fourth Amendment requires that when a person is stopped there must be at least “reasonable suspicion” that the person is an “alien.” In reaching its holding, the Court allowed the notion of “Mexican appearance” based on racial stereotypes to create suspicion of illegal activity. *Brignoni-Ponce* remains the law and therefore, in the context of immigration regulation, “looking Mexican” carries a presumption of illegality.

Id. at 48.

238. A friend of a murdered, low-income black trans woman described her life situation: She left home and school when she was very young, due to rejection and harassment for being transgender. She engaged in survival sex work to pay for food, and couch surfed for housing. Frequently in and out of jail, Dee Dee was unemployed and faced pervasive job discrimination. She was denied food stamps and government housing because of her criminal record. Dee Dee, like so many low-income transgender women, expressed fear of reaching out to social service providers because many did not honor her gender identity. Gender segregated homeless shelters placed transgender women in men’s facilities, and asked them to dress as men during their stay. The criminal justice system, the police, the government—all pose barriers to leading a healthy life, and increase their exposure to violence.

Chai Jindasurat, *TDOR: Remembering Dee Dee Pearson*, BILERICO PROJECT (Nov. 20, 2012, 11:00 AM), http://www.bilerico.com/2012/11/tdor_remembering_dee_dee_pearson.php (describing the race of one of the murder victims from the list).

239. In lists of transphobia-motivated murders for the period covered by the 2012 Transgender Day of Remembrance, all the U.S. victims were women of color. CARSTEN BALZER & JAN SIMON HUTTA, *TRANS MURDER MONITORING, TRANSRESPECT VERSUS TRANSPHOBIA WORLDWIDE, TRANSGENDER EUROPE, LIST OF 265 REPORTED MURDERED TRANS PERSONS FROM NOVEMBER 15TH 2011 TO NOVEMBER 14TH 2012* (2012), available at <http://www.transrespect-transphobia.org/uploads/downloads/TMM/TvT-TMM-TDOR2012-Namelist-en.pdf>; *Memorializing—2012, INTERNATIONAL TRANSGENDER DAY OF REMEMBRANCE* (Nov. 17, 2012), <http://www.transgenderdor.org/memorializing-2012>. For pictures of or descriptions of the victims who were not identified as people of color in the preceding list, see Naomi Martin, *Police Looking for 23-year-old Missing Man*, NEW ORLEANS TIMES-PICAYUNE (Dec. 20, 2011), http://www.nola.com/crime/index.ssf/2011/12/police_looking_for_23-year-old.html (misidentifying the gender of the victim); Jindasurat, *supra* note 238; Anna Ditkoff, *Murder Ink*, BALTIMORE CITY PAPER (July 11, 2012),

Additionally, most trans* people in the United States cannot get insurance coverage for genital surgery, either because they are uninsured or because their private or public insurance excludes genital surgery. Trans* people in the United States are underinsured²⁴⁰ for a number of reasons. First, those who can afford to buy individual private health insurance are often unable to because almost all health insurance companies consider trans* status to be a preexisting condition.²⁴¹ Second, many trans* people cannot access employer-provided healthcare due to low employment levels²⁴² that are caused by employment discrimination,²⁴³ lack of antidiscrimination laws,²⁴⁴ and general marginalization from families²⁴⁵ and educational institutions.²⁴⁶ Undocumented trans* people are unable to legally work, “are vulnerable to exploitation in the workplace by unscrupulous employers,”²⁴⁷ and are frequently excluded from protection by otherwise-applicable employment and labor laws.²⁴⁸ Third, trans*

<http://citypaper.com/news/murder-ink-1.1341458> (misidentifying the gender of the victim); NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, STORIES OF LOSS: LGBTQH MURDER NARRATIVES FROM 2011 (2011); Susan Shroder, *Oceanside Homicide Victim ID'd*, SAN DIEGO UNION-TRIBUNE (Jan. 24, 2012), <http://www.utsandiego.com/news/2012/jan/24/oceanside-homicide-victim-idd>.

240. Twenty percent of binary-identified trans* respondents to the National Transgender Discrimination Survey indicated they were completely uninsured. GRANT ET AL., *supra* note 72, at 77.

241. See Marisa Carroll, *What the Affordable Care Act Means for Transgender People*, THE NATION (Aug. 14, 2012), <http://www.thenation.com/article/169391/what-affordable-care-act-means-transgender-people#>. However, insurance companies will no longer be able to bar individuals with preexisting conditions once the Affordable Care Act takes effect in 2014. *Id.*

242. Trans* people reported an unemployment rate of twice the general population (14 percent versus 7 percent; the study was conducted in 2008). GRANT ET AL., *supra* note 72, at 3, 10. Black trans* people had an unemployment rate four times that of the general population. *Id.* at 3. Forty-seven percent of all trans* respondents were underemployed. *Id.* at 3.

243. Twenty-six percent of trans* respondents had also been fired explicitly for being trans*. *Id.* at 3. Many trans* people may not be hired because they are outed by the sex marker on their identity documents. Spade, *Medicaid Policy*, *supra* note 37, at 499; see also HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 48–50 (describing employment discrimination experienced by trans* people in the Netherlands as a result of the mismatch between their gender presentation and the gender markers on their official documents). In some foreign jurisdictions, trans* people cannot even change their gendered first names without proof of genital surgery. See, e.g., *id.* at 32–35.

244. Most areas of the United States do not have antidiscrimination laws that protect trans* people. See *Non-Discrimination Laws: State by State Information—Map*, AMERICAN CIVIL LIBERTIES UNION, <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Feb. 10, 2013).

245. In the National Transgender Discrimination Survey, 57 percent of trans* respondents reported “experiencing significant family rejection.” GRANT ET AL., *supra* note 72, at 7.

246. For example, one-sixth of trans* respondents who identified as trans* or who were otherwise gender-nonconforming while in school dropped out due to harassment. *Id.* at 33. Of these, nearly half reported experiencing homelessness at some point. *Id.* Trans* people who experienced mistreatment in school were more than five times as likely as the general population to have a household income under \$10,000. *Id.* at 3.

247. ASIAN AM. JUSTICE CTR. & NAT’L QUEER ASIAN PACIFIC ISLANDER ALLIANCE, *supra* note 221, at 1 (“Employers take advantage of workers’ undocumented status by paying them extremely low wages or not paying them all the wages they earned, and subjecting workers to unsafe working conditions.”).

248. Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 516–17 (2003).

youth are more likely to be harassed in school or to be kicked out of their parents' homes,²⁴⁹ which further decreases their ability to access university-provided or parental health insurance.

Even with health insurance, trans* people's plans generally do not cover genital surgery. Most U.S. insurance policies explicitly exclude coverage for all gender-confirming healthcare for trans* people, even if the policy covers gender-confirming healthcare for cisgender people.²⁵⁰ Even private health insurance that covers gender-confirming treatments for trans* people (such as hormones) often will not cover genital surgeries.²⁵¹

Most publically provided health insurance in the United States does not cover genital surgeries either. For instance, Medicare bars coverage for genital surgeries.²⁵² While federal Medicaid regulations are silent on gender-confirming healthcare,²⁵³ currently only California is known to cover genital surgeries under Medicaid.²⁵⁴ At least twenty-one states explicitly exclude gender-confirming genital surgeries.²⁵⁵ Other states exclude genital surgeries from coverage by labeling them "cosmetic" or "experimental."²⁵⁶ Such

249. See generally NICHOLAS RAY, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH—AN EPIDEMIC OF HOMELESSNESS (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

250. See Carroll, *supra* note 241; Andrew Cray & Kellan Baker, *FAQ: Health Insurance Needs for Transgender Americans*, CTR. FOR AM. PROGRESS (Oct. 3, 2012), <http://www.americanprogress.org/issues/lgbt/report/2012/10/03/40334/faq-health-insurance-needs-for-transgender-americans>. Gender-confirming healthcare for cisgender people includes

[r]econstruction of breasts or testicles lost to cancer, hormone treatment to eliminate hair that is considered gender-inappropriate, chest surgery for gynecomastia, and other treatments . . . provided solely because of the mental health and social consequences faced by people who have physical attributes that do not comport with their self-identity and social gender.

Spade, *Documenting Gender*, *supra* note 39, at 786. Additionally, the same hormones that are given to trans* people are frequently given to cisgender people to treat a variety of conditions such as menopause or late onset of puberty. Spade, *Medicaid Policy*, *supra* note 37, at 501.

251. Cray & Baker, *supra* note 262.

252. NAT'L CTR. FOR TRANSGENDER EQUAL., MEDICARE BENEFITS AND TRANSGENDER PEOPLE (2011), available at http://transequality.org/Resources/MedicareBenefitsAndTransPeople_Aug2011_FINAL.pdf.

253. Spade, *Documenting Gender*, *supra* note 39, at 783.

254. TRANSGENDER LAW CTR., A QUICK AND EASY GUIDE TO MEDICAID AND TRANSITION RELATED PROCEDURES (2011). While Minnesota once covered genital surgery, it no longer does. Spade, *Medicaid Policy*, *supra* note 37, at 505. Ironically, Medicaid usually covers genital surgery performed on nonconsenting intersex infants. Spade, *Documenting Gender*, *supra* note 39, at 786.

255. Spade, *Medicaid Policy*, *supra* note 37, at 500. These restrictive states include Washington and Minnesota, which ban coverage of all gender-confirming surgeries, and New York, which does not cover any type of gender-confirming healthcare, including hormones. *Id.* at 503–05.

256. Spade, *Documenting Gender*, *supra* note 39, at 784 (internal quotation marks omitted). See also *id.* at 783 (discussing the perversity of one branch of a state government demanding genital surgery as the only way to legitimate one's gender while another branch of a state government dismisses genital surgery as being purely cosmetic).

exclusions “reproduce hierarchies of race and class.”²⁵⁷ Even if Medicaid covers genital surgery, very few surgeons who provide such procedures accept Medicaid.²⁵⁸ Undocumented trans* immigrants are categorically ineligible for Medicare and Medicaid.²⁵⁹

Many trans* people cannot get approval for surgery from gatekeeper figures such as doctors, psychiatrists, and government bureaucrats.²⁶⁰ The World Professional Association of Transgender Health (WPATH), for instance, wields extensive influence over the administration of gender-confirming healthcare. WPATH is an international organization of doctors, social workers, lawyers, and other professionals involved in trans* health issues.²⁶¹ It publishes the *Standards of Care* that many doctors use to set the requirements a trans* person must fulfill before accessing gender-confirming healthcare. Until 2011,²⁶² the *Standards of Care* suggested a highly rigid set of requirements, strictly followed by most surgeons,²⁶³ that trans* people had to meet in order to be approved for genital surgery. The minimum eligibility criteria included: “Usually 12 months of continuous hormonal therapy . . . ; 12 months of successful continuous full time real-life experience. . . . [and] [i]f required by the mental health professional, regular responsible participation in

257. Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions to Transition-Related Health Care for Transgender People*, 4 J. SEXUALITY RES. & SOC. POL’Y 7, 7 (2007). These exclusions from Medicaid

disproportionately affect low-income people because Medicaid is usually their only health insurance option. Furthermore, people of color are particularly affected because they are more likely to have low income. People of color also face more severe social and health consequences from lack of Medicaid coverage because of the more intense surveillance they experience from various state systems and the racism they encounter when trying to gain access to health care.

Id. at 8 (citations omitted).

258. Vade, *supra* note 25, at 269 n.54.

259. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(a), 110 Stat. 3009-546, 3009-625.

260. See, e.g., Sassafras Lowrey, *Today’s New Name May Be Tomorrow’s Old*, in GENDER OUTLAWS, *supra* note 10, at 198, 201 (“My transitions have never been fixed, but I told the therapist they would be. . . . I told lies to the therapist to get what I needed.”); *Submission to the United Nations Human Rights Council for Its Universal Periodic Review of Sweden, 8th Session*, RIKSFÖRBUNDET FÖR SEXUELL UPPLYSNING (RFSU, THE SWEDISH ASSOCIATION FOR SEXUALITY EDUCATION) (Dec. 6, 2009), <http://www.rfsu.se/sv/Sex-och-politik/Remisser-och-yttranden/Submission-to-the-United-Nations-Human-Rights-Council-for-its-Universal-Periodic-Review-of-Sweden-8th-Session/>; see also HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 6–7.

261. *Membership Benefits*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, http://www.wpath.org/membership_benefits.cfm (last visited Feb. 10, 2013).

262. WORLD PROF’L ASS’N OF TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 60 (2011), available at <http://www.wpath.org/documents/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf>.

263. See, e.g., *Requirements—Prior to Surgery*, MARCI L. BOWERS, M.D., <http://marciowers.com/grs/prepare.html> (last visited Feb. 10, 2013) (explaining that an individual surgeon’s preprocedure requirements follow WPATH’s *Standards of Care*).

psychotherapy throughout the real-life experience.”²⁶⁴ Additionally, “[p]eriods of returning to the original gender may indicate ambivalence about proceeding and generally should not be used to fulfill [the real-life experience] criterion.”²⁶⁵

As a result, even trans* people who did not want or need hormones were expected to pay for and undergo hormone treatment, and therapy. Since many people wait to complete their social transition until they have spent some time on hormones in order to lower the risk of violence and discrimination, the “real-life experience” requirement further increased the amount of time some people needed to wait to receive genital surgery.

The required “readiness criteria” also included showing “[d]emonstrable progress in dealing with work, family, and interpersonal issues resulting in a significantly better state of mental health.”²⁶⁶ Thus, trans* people who had been fired for coming out or who had been rejected by their families could perversely be denied surgery because of this discrimination.

The *Standards of Care* were recently updated. While they retain the requirements of twelve months of hormones and social transition, the criteria are now slightly more flexible, consisting of “12 continuous months of hormone therapy as appropriate to the patient’s gender goals” and “12 continuous months of living in a gender role that is congruent with their gender identity.”²⁶⁷

Many individual doctors and clinics also require trans* people to prove their “real masculinity” or “real femininity” before they may receive gender-confirming healthcare.²⁶⁸ Nonbinary trans* people, in particular, find it difficult to receive treatment.²⁶⁹ Many therapists and doctors expect trans* people “to perform normative binary gender[s],” including relating a specific gendered narrative about a stereotypically masculine or feminine childhood.²⁷⁰ As explained by one trans* author:

I do know that . . . any . . . honest articulation of my gender identity will never convince Dr. Harry Benjamin’s²⁷¹ followers, who mete out access to medical treatments like gender reassignment surgery and

264. HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 20 (2001), available at <http://www.wpath.org/Documents2/socv6.pdf>.

265. *Id.*

266. *Id.*

267. WORLD PROF’L ASS’N OF TRANSGENDER HEALTH, *supra* note 262, at 60.

268. Spade, *Resisting Medicine*, *supra* note 59, at 28; see also *id.* at 18, 28–29; Vade, *supra* note 25, at 272 n.64.

269. Spade, *Resisting Medicine*, *supra* note 59, at 21.

270. *Id.* at 18, 20.

271. The doctor after whom the organization now known as WPATH was originally named. *History of Association*, WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, http://www.wpath.org/about_wpath.cfm (last visited Feb. 10, 2013). The *Standards of Care* were formerly known as the *Benjamin Standards*. See 1990 *Harry Benjamin Standards of Care*, ALL MIXED UP, http://www.genderpsychology.org/transsexual/hbsoc_1990.html (last visited Feb. 10, 2013).

hormone therapy based on a narrow and pathologizing understanding of “transsexuality,” to allow me self-determination over how I choose to modify my own body.²⁷²

As Shannon Price Minter, Legal Director of the National Center for Lesbian Rights, describes:

[T]ranssexual people who also are lesbian, gay, or bisexual . . . were denied access to [gender-confirming healthcare] because they were not seen as “real” transsexuals. Similarly, only transsexual people who conformed to stereotypical gender norms . . . were able to obtain treatment. More generally, the ability of transsexual people to gain access to medical services and to legal recognition and protection has depended on how successfully they could hide their transsexual status and approximate a “normal” heterosexual life, with the result that those who are unable or unwilling to comply with these oppressive standards have had little or no protection at all.²⁷³

Trans* people may not be able to access genital surgery for other reasons, including a lack of doctors competent at treating trans* people, unavailability of genital surgeries in their jurisdictions or countries, and criminalization of trans* people.

Many medical care providers, including therapists and doctors who could prescribe hormones, do not know how to deal with trans* clients in a competent manner. Nineteen percent of trans* people in a recent study reported having been refused medical care due to their trans* status; half said they had to teach their doctors about trans* health.²⁷⁴ Without access to knowledgeable therapists and doctors, many trans* people are unlikely to be approved for genital surgery.

Additionally, genital surgeries are completely unavailable in some places. As previously noted, only a few doctors in the United States perform genital surgeries, which means many trans* people cannot access these procedures in their home states.²⁷⁵ Moreover, some countries, such as Kyrgyzstan, technically allow trans* people to access genital surgeries but do not have any surgeons willing to perform them.²⁷⁶ Other countries criminalize trans* identities, so trans* people are not able to access any treatment or receive any sort of

272. Sycamore, *supra* note 43, at 29.

273. Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, in TRANSGENDER RIGHTS, *supra* note 1, at 141, 151.

274. GRANT ET AL., *supra* note 72, at 6. Twenty-eight percent of trans* respondents also reported experiencing verbal harassment in a medical setting. *Id.* at 74.

275. See *supra* note 221 and accompanying text.

276. See HUMAN RIGHTS WATCH, THESE EVERYDAY HUMILIATIONS: VIOLENCE AGAINST LESBIANS, BISEXUAL WOMEN, AND TRANSGENDER MEN IN KYRGYZSTAN 30 (2008).

recognition while in the country. Kuwait, for instance, has criminalized “imitating members of the opposite sex.”²⁷⁷

Even governments that do recognize trans* people and provide genital surgery may nevertheless create significant barriers to access. States with universal, centralized healthcare typically have extremely rigid standards for allowing trans* people to access hormones. In Sweden, for example, trans* people who want to access gender-confirming healthcare and legal sex recognition must “follow the ‘true transsexual’ narrative very narrowly. . . . [T]he Swedish medical establishment enforces narrow gender norms on trans people and in order to remain in the programs and get approved for treatment, people have to fit their lives into these expectations.”²⁷⁸ Sweden also makes it illegal to prescribe hormones to trans* people who have not been approved by government psychologists.²⁷⁹ Other countries that only allow gender-confirming healthcare through a centralized model also typically have extremely long waiting lists for each step of the process necessary for legal recognition.²⁸⁰ So, for example, in the Netherlands—where trans* people must undergo six months of therapy followed by twelve months of hormones to access any surgeries—trans* people likely must wait many years before they can undergo genital surgery.²⁸¹

The previously described factors make the genital surgery requirement of many states wholly unresponsive to the lived experiences of many trans* people. Combined with the states that simply refuse to acknowledge a trans* identity, these factors render the current legal regime—which predicates marriage-based immigration on state law—impractical and inconsistent.

B. Current Rules Exclude People with Nonbinary Gender Identities

“Implicit in legislation using the term sex is the assumption that only two biological sexes exist and that all people fit neatly into one of these two categories.”²⁸²

A marriage-based immigration system that only grants validity to couples involving one man and one woman inherently withholds recognition from people with nonbinary identities. While this issue impacts some intersex

277. Rasha Moumneh, *The Gulf’s Gender Anxiety: Moral Panic over Transgender Men and Women Is Symptomatic of the Gulf’s Problems with Shifting Gender Roles*, THE GUARDIAN (July 6, 2011), <http://www.guardian.co.uk/commentisfree/2011/jul/06/gulf-gender-anxiety-transgender>.

278. Spade, *Trans Law & Politics*, *supra* note 58, at 369.

279. *Submission to the United Nations Human Rights Council for Its Universal Periodic Review of Sweden, 8th Session*, *supra* note 260.

280. *See, e.g.*, HUMAN RIGHTS WATCH, CONTROLLING BODIES, *supra* note 49, at 30–31 (noting that trans* people in the Netherlands often must wait months before receiving treatment because the state healthcare system has devoted insufficient resources to this area).

281. *Id.* at 31.

282. Greenberg, *supra* note 1, at 53.

individuals,²⁸³ many nonintersex trans* people also have nonbinary identities. Nonbinary people may identify themselves on a spectrum between male and female, as neither male nor female, as both male and female, or as totally outside of a male-female dichotomy and instead inhabiting a “gender galaxy,” defined as “a three-dimensional non-linear space in which every gender has a location that may or may not be fixed.”²⁸⁴ Such identities are recognized by many cultures²⁸⁵ and exist among trans* immigrants in the United States.²⁸⁶

Some countries are now starting to officially recognize nonbinary identities. For instance, Australia recently started allowing intersex people to list “X” as the sex marker on their passports.²⁸⁷ Additionally, nonbinary people in India and Bangladesh can list “E” on their passports.²⁸⁸ Nepal also allows people with third-gender identities to identify themselves as such on citizenship certificates.²⁸⁹

C. Current Rules Do Not Serve DOMA’s Purpose

In addition to basing recognition of marriages for immigration purposes on problematic state laws and ignoring people with nonbinary identities, the current system does not even successfully restrict federally recognized marriage to different-gender couples. Despite DOMA, same-gender couples may potentially receive marriage-based immigration benefits if they are legally considered to be different-sex.²⁹⁰ Putting aside the issue of whether DOMA is

283. The issue of intersex people and marriage-based immigration benefits is outside the scope of this Comment but should be a subject of further research. See McGrath, *supra* note 64, at 381–87 (discussing the medical and legal sex classification issues affecting intersex people as well as trans* people).

284. Vade, *supra* note 25, at 261. Many nonbinary individuals now identify as genderqueer. *Id.* at 266; see also Amy André & Sandy Chang, “And Then You Cut Your Hair”: Genderfucking on the Femme Side of the Spectrum, in NOBODY PASSES, *supra* note 43, at 254, 255; Esmé Rodriguez, *Glitter, Glitter, on the Wall, Who’s the Queerest of Them All?*, in GENDER OUTLAWS, *supra* note 10, at 163, 166; Sycamore, *supra* note 43, at 10. Nonbinary individuals may identify with male pronouns, female pronouns, or gender-neutral pronouns.

285. See, e.g., sources cited *supra* note 34.

286. For example, one of my East Bay Community Law Center clients from Mexico described herself as having a gender that fell outside of the gender binary.

287. *Australian Passports to Have Third Gender Option*, THE GUARDIAN (Sept. 15, 2011), <http://www.guardian.co.uk/world/2011/sep/15/australian-passports-third-gender-option>.

288. *Id.* (corresponding to “eunuch”).

289. Kyle Knight, *Dividing by Three: Nepal Recognizes a Third Gender*, HUFFINGTON POST (Feb. 27, 2012), http://www.huffingtonpost.com/kyle-knight/nepal-third-gender_b_1303562.html.

290. In the only case where the B.I.A. addressed a same-gender couple in which one partner was trans* and had had genital surgery, the B.I.A. remanded for more fact finding to determine whether the trans* partner remained legally male under Nevada law and, therefore, whether the marriage could validly be considered as between a man and a woman for purposes of DOMA. *In re P.B.*, No. A087 002 967, 2009 WL 523126 (B.I.A. Feb. 18, 2009). See Phyllis Randolph Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031 (2001) (noting that same-gender couples where one partner is trans* have been legally able to marry in states that purport to restrict marriage to opposite-sex couples). However, advocacy groups such as Transgender Law Center and Immigration Equality will not

constitutional or just,²⁹¹ the current legal regime does not even serve its intended purpose.

For example, if one partner is cisgender and one partner is trans* and a state refuses to recognize the trans* person's gender identification, then the result can be two men or two women legally marrying. This occurred in Texas in 2000, when a trans woman and a cisgender woman legally married in a highly publicized ceremony and were soon followed by a similar couple.²⁹² Additionally, in states that recognize a trans* person's gender identity, a same-gender marriage involving a cisgender person and a trans* person may be considered valid under DOMA for immigration purposes if the trans* person waits until after the marriage to seek legal recognition or forgoes it entirely.²⁹³

Other situations may result in the legal recognition of a same-gender marriage where both partners are trans*. If the partners had the same birth-assigned sex and they both have a binary identity, then they may have a valid heterosexual marriage if (1) the state recognizes only one partner's gender identity due to genital surgery or if (2) the state would recognize both of their gender identities but only one's legal sex is reclassified before the wedding while the other's is not. If the partners had the same birth-assigned sex and the same nonbinary identity, then their marriage may be considered valid if (1) one of them qualifies to change legal sex and chooses to legally reclassify to a binary identity²⁹⁴ or if (2) they both qualify to legally change their gender to a binary identity under state law but only one does so before the wedding. If the two trans* partners had different birth-assigned sex and nonbinary identities, they could legally marry if (1) one or both of them qualify to change their legal sex but do not do so before the wedding, (2) neither of them qualifies to change their legal sex, or (3) both of them qualify to change their legal sex and do so before the wedding.

represent same-gender couples attempting to gain marriage-based immigration benefits as legally opposite-sex spouses due to the negative ethical and political ramifications of arguing that trans* people should be recognized as their birth-assigned sex rather than their identified gender. IMMIGRATION EQUAL., *supra* note 129, § 4.6.8.

291. See, e.g., W. Sherman Rogers, *The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive*, 54 HOW. L.J. 125 (2010). Much has already been written on this topic and it is beyond this Comment's scope to reiterate those many arguments.

292. See Frye & Meiselman, *supra* note 290, at 1033–34.

293. See *id.* at 1039–41.

294. A person may choose this option in order to marry, so that an identification card's sex marker more closely reflects a person's presentation for safety reasons, because a person identifies more closely with the new legal sex than the assigned sex, or for other reasons.

D. Current Rules Create Confusion and Inconsistency Regarding Legal Rights

*“[I]t is important to remember that ‘law’ here refers to a complex, incoherent system of practices, rather than to a monolith.”*²⁹⁵

Even organizations devoted to trans* and queer rights, such as Transgender Law Center and Immigration Equality, are often unsure if individual trans* people may sponsor or be sponsored by a spouse for immigration purposes. For example, Transgender Law Center and Immigration Equality, in their joint manual on marriage-based immigration, list the following as “open questions” where the immigration outcome is uncertain:²⁹⁶ same-gender couples who are legally recognized as different-sex due to lack of surgery²⁹⁷ and same-gender couples in states that only recognize birth-assigned sex.²⁹⁸ All couples with at least one trans* partner seeking marriage-based immigration who contact Transgender Law Center are advised to obtain an immigration attorney who is very experienced in trans* marriage applications.²⁹⁹ For those who cannot get pro bono representation, hiring a lawyer is yet another expense they must incur.

E. Legal Sex Is in the Eye of the Beholder

*“Trans folk are told we do not and should not exist, and when we do exist we must make every effort to assimilate. Our existence is often a shadowy one, living as we do in the cracks between bureaucracies and regulations, with mismatched identification and uncertain legal status.”*³⁰⁰

Trans* people’s legal sex is entirely positional and dependent on who is asking, where they are, and where they were born. Trans* people often have an assortment of documentation with mismatched sex markers.³⁰¹ Only 21 percent of trans* people who had transitioned reported in a recent U.S. survey that they were able to update all of their records.³⁰² Forty-six percent of transitioned trans* people had some gender-mismatched records, and 33 percent had no records that matched their gender identity.³⁰³ Ability to access proper documentation is highly correlated to income.³⁰⁴

My partner, a trans woman, currently has a passport and driver’s license that say “F,” a car insurance account that says “F,” a health insurance account

295. HANEY LÓPEZ, *supra* note 27, at 115.

296. In this author’s opinion, recent reforms have not led to greater clarity.

297. IMMIGRATION EQUAL., *supra* note 129, § 4.6.6.

298. *Id.* § 4.6.8.

299. Based on the author’s experiences interning at Transgender Law Center.

300. Kyle Lukoff, *Taking Up Space*, in GENDER OUTLAWS, *supra* note 10, at 122, 126.

301. Gehi, *Struggles*, *supra* note 18, at 328–29.

302. GRANT ET AL., *supra* note 72, at 5.

303. *Id.* at 152.

304. *See id.*

that says “F,” Social Security information that says “M,” a birth certificate that says “M,” and is generally recognized by California as “F.” Professor Dean Spade explains,

Identity documentation problems often occur for trans people when an agency, institution, or organization that keeps data about people and/or produces identity documents . . . has incorrect or outdated information or information that conflicts with that of another agency, institution, or organization. . . . Every government agency and program that tracks gender has its own rule of practice (sometimes dependent on a particular clerk’s opinion) of what evidence should be shown to warrant an official change in gender status in its records or on its ID. The policies differ drastically.³⁰⁵

So, if people have mismatched documentation, what are their “true” legal sexes?

Another consequence of legal inconsistencies is that crossing a state border can mean being considered a different legal sex.³⁰⁶ For instance, if a trans woman born in Kentucky changes her birth certificate and then moves to Tennessee, she will be generally considered by the latter to be legally a male. Her marriage to a man that would have been valid in Kentucky will be interpreted as an invalid same-sex marriage by Tennessee, and this interpretation will be supported by the Defense of Marriage Act.

Finally, being born in one jurisdiction instead of another determines whether one may rebut the presumption of legal sex listed on one’s birth certificate. Spade provides an example:

[R]ight now, if you were born in New York City, you can only change your birth certificate if you can prove you’ve had a vaginoplasty or phalloplasty. However, if your neighbor who was born just over the city line, in New York State’s area of authority, wants to change hir³⁰⁷ birth certificate, ze will have to prove ze’s had a penectomy or a hysterectomy and mastectomy. The bureaucrats who came up with their policy in the city wanted to see people with penises and vaginas to prove they’d become *real men* or *real women*. The bureaucrats up in Albany wanted to see people who had removed their most gendered body parts (in the eyes of those bureaucrats.)³⁰⁸

For marriage-based immigration, these inconsistencies can make immigrants, their spouses, their lawyers, and even government agents unsure of which of a trans* person’s legal sexes (as determined by the passport agency, state judge, DMV, Social Security Administration, or any other bureaucracy)

305. SPADE, *NORMAL LIFE*, *supra* note 14, at 144.

306. Flynn, *supra* note 67, at 33 (“Because each jurisdiction is free to define sex as it chooses, a trans person’s sex can, in effect, change as she crosses state borders.”).

307. *Hir* and *ze* are commonly used gender-neutral pronouns, often by people with nonbinary identities.

308. Spade, *Undermining*, *supra* note 62, at 69.

should be definitive. Additionally, these inconsistencies demonstrate the arbitrariness and illogicality of the legal sex recognition rules. Because legal sex is so difficult to pinpoint and can change depending on a particular government agency or document, an individual's current location, or the part of a state in which an individual is born, sex should not be a legal category at all.

As detailed, the current rules governing recognition of trans* people's marriages for immigration purposes are deeply flawed and indicative of the failures of legal sex generally as a legal category. First, recognition depends on problematic state laws that frequently either simply refuse to acknowledge the genders of trans* people or vaguely demand invasive medical procedures that the vast majority of trans* people never undergo. Second, the current legal regime wholly excludes people with nonbinary identities. Third, the rules do not even serve DOMA's purpose. Fourth, the current system creates intense confusion and inconsistency even among advocates. Finally, trans* people frequently end up with many conflicting legal sexes.

VI. SOLUTIONS

*"[T]inkering with the boundaries of the category is not going to stop the injustice."*³⁰⁹

As detailed throughout this Comment, the current regime governing marriage-based immigration for trans* people is fundamentally flawed, largely because it is based on a system of legal sex recognition that is unfair, inconsistent, and illogical. The legal system's regulation of gender negatively impacts trans* people's lives in countless ways, with marriage-based immigration being just one illustrative example. Adjusting the legal definition of sex will only improve the lives of some, usually more privileged, trans* people. Expanding marriage recognition will only solve one symptom of the much deeper systematic injustice experienced by those whose legal sexes do not match their gender identities. The only fair and just solution is to abolish the concept of legal sex.

A. Inadequate Possible Solutions

Allowing same-sex marriages, recognizing unmarried partnerships for immigration purposes, and adjusting the criteria for legal sex reclassification would benefit some trans* people, particularly in the context of marriage-based immigration. However, as a whole, these potential reforms would prop up the current system of legal sex classification and coercion and would continue to harm the most powerless trans* people.

309. Hickman, *supra* note 79, at 1211.

1. *Allowing Same-Sex Marriage Recognition*

Recognizing same-sex marriages is not enough. Repealing DOMA would still give individual states power to define marriage and gender and prevent people from marrying based upon inconsistent ideas of what makes one a man or a woman. While a *Loving v. Virginia*³¹⁰-style end to all state same-sex marriage bans would solve the marriage-based immigration issue, this issue is merely a symptom of the systematic legal marginalization of trans* people. Thus, most of the injustices faced by trans* people, such as the systemic societal marginalization of trans* people (particularly low-income trans women of color) as facilitated by mismatched sex markers on documentation, would remain unresolved.

2. *Allowing Unmarried Partner Immigration Sponsorship*

The federal government could follow the lead of other countries and amend the Immigration and Nationality Act to allow family reunification for unmarried partners. For example, Canada allows family-based immigration for both same-sex and different-sex common-law³¹¹ and conjugal³¹² partners. While such a statutory change would increase the number of couples who were reunited, it would do nothing to change the coercive misclassification of most trans* people and the harms that result, such as placement of trans women in men's prisons or immigration detention facilities.

3. *Adjusting the Criteria for Legal Sex Classification*

While broadening legal definitions of gender would certainly increase the number of trans* people who could access marriage-based immigration, any reform of legal sex classification laws would still exclude those who are most vulnerable due to class, race, or immigration status and could instead further entrench their marginalization.³¹³ No fair system of classification could exist that would take the diversity and complexity of the trans* community into

310. 388 U.S. 1 (1967). This case ended all explicitly race-based marriage laws in the United States.

311. Common-law partners are defined as those who have “been living together in a conjugal relationship for at least one year in a continuous 12-month period that was not interrupted.” *Sponsoring Your Family: Spouses and Dependent Children—Who Can Apply*, CITIZENSHIP AND IMMIGRATION CANADA, <http://www.cic.gc.ca/english/immigrate/sponsor/spouse-apply-who.asp> (follow “Definitions” hyperlink) (last visited Feb. 10, 2013).

312. Conjugal partners are defined as those who have “maintained a conjugal relationship . . . for at least one year and . . . have been prevented from living together or marrying.” *Id.*

313. See Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288, 312 (2009) (“Changing a law or policy from one transphobic position . . . to another . . . can actually make it harder to push for a policy that is based in the realities of trans people's lives, dividing our communities along lines of class, race, and gender.”).

account. Especially if legal sex categorization is based on surgeries,³¹⁴ hormones, or a doctor's diagnosis, the most vulnerable trans* people will remain excluded from recognition and thus marriage-based immigration.³¹⁵ For instance, only about 62 percent of trans* respondents to the National Transgender Discrimination Survey reported having had hormone therapy.³¹⁶ As previously discussed, some trans* people do not want to take hormones and others want to but cannot because of health issues, access, or cost. Some people do not ever seek gender-confirming medical care or counseling because they cannot afford it, do not have access to trans-positive doctors, or do not desire to. Only 75 percent of trans* respondents to the same survey reported receiving gender-specific counseling and only 50 percent reported receiving a gender-related mental-health diagnosis.³¹⁷ Many trans* people who cannot access gender-confirming healthcare through traditional medical avenues receive informal treatment, such as black-market hormones³¹⁸ or unregulated silicone treatments.³¹⁹

Even a classification system based on identity such as the United Kingdom's Gender Recognition Act still treats sex assigned at birth as a presumption that must be legally rebutted,³²⁰ thus creating obstacles to transition and hurting those with the least access to legal information and assistance, including immigrants.³²¹ As long as legal sex classification persists, some trans* people will be misclassified³²² and harmed as a result.

314. Seventeen percent of trans women respondents in the National Transgender Discrimination Survey reported having had facial feminization surgery, 21 percent had had breast augmentation, and 43 percent of trans men had had a mastectomy. GRANT ET AL., *supra* note 72, at 79.

315. *See also* Vade, *supra* note 25, at 256 (“When courts only recognize as ‘real’ those transgender people who . . . [meet certain criteria], then courts only grant custody, health benefits, and employment protections to [them].”).

316. GRANT ET AL., *supra* note 72, at 78.

317. *Id.*

318. *See* Spade, *Medicaid Policy*, *supra* note 37, at 499; *see also* *Submission to the United Nations Human Rights Council for Its Universal Periodic Review of Sweden, 8th Session*, *supra* note 260.

319. *See, e.g.*, Laura Rena Murray, *The High Price of Looking Like a Woman*, N.Y. TIMES (Aug. 21, 2011), http://www.nytimes.com/2011/08/21/nyregion/some-transgender-women-pay-a-high-price-to-look-more-feminine.html?pagewanted=all&_r=0 (describing the severe health consequences of unregulated silicone injections).

320. *Frequently Asked Questions—Guidance for Gender Recognition Panel Tribunal*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/tribunals/gender-recognition-panel/faqs> (last visited Feb. 10, 2013).

321. *See* Spade, *Trans Law & Politics*, *supra* note 58, at 367–68; Spade, *Documenting Gender*, *supra* note 39, at 751 (“[The] general economic and social marginalization of the transgender population [is] in part due to significant obstacles resulting from the operation and administration of government gender classification policies.”).

322. *See* Spade, *Documenting Gender*, *supra* note 39, at 747 (“The norms and assumptions that underlie gender classification operate to the significant detriment of people who are difficult to classify, who are inconsistently classified in the rule matrix, or whose classification is contrary to their self-understanding.”).

B. Elimination of Legal Sex

*“The terms and categories used in the classification of data gathered by the state do not merely collect information about pre-existing types of things, but rather shape the world into those categories that, ultimately, are taken for granted by most and thus appear ahistorical and apolitical. Indeed, many such characterizations are assumed as basic truths.”*³²³

As long as legal sex classification persists, it will be used to harm those who are most vulnerable. If legal sex classification harms some of the most powerless and marginalized people in U.S. society, causes serious contradictions and confusion in the legal system, and makes an illogical mess of the marriage-based immigration system, then why must gender be legally categorized in the form of sex at all? This Comment proposes that this system of classification—which hurts so many—should be eliminated, much like the formerly ubiquitous system of legal racial classification. This solution is not a suggestion for gender-blindness in the legal system³²⁴ or an argument that gender is not real. Gender-blindness, like race-blindness, would harm those who are most impacted by discrimination.³²⁵ Instead, this Comment proposes that gender is too complex for the government to coercively categorize people through the form of legal sex. Sexism and transphobia can be fought without having to prove conformity with a government-sanctioned sex, as racism can be fought without an official government racial categorization. In fact, the presence of legal sex classification and sex segregation frequently limits who can access antidiscrimination protections.³²⁶ Race and gender are both “socially constructed and socially real,”³²⁷ but courts and legislators should not be deciding for others what their racial or gender identity should be.

CONCLUSION

*“We’re all outlaws at one time or another, simply because laws are designed to govern people as groups. No group of laws can encompass the varied desires and actions of an individual, and when any law omits or excludes us, we are by definition outlaw—not breakers of the law, but outside of it to begin with. We are all outlaws by omission.”*³²⁸

U.S. marriage-based immigration rules for trans* people provide a useful case study of the inadequacy, inconsistency, and injustice of legal sex classification systems. The patchwork of different jurisdictions’ and agencies’

323. SPADE, *NORMAL LIFE*, *supra* note 14, at 141.

324. *See* Spade, *Documenting Gender*, *supra* note 39, at 816; Vade, *supra* note 25, at 277–78.

325. ALEXANDER, *supra* note 15; Vade, *supra* note 25, at 277–78.

326. *See* Spade, *Documenting Gender*, *supra* note 39, at 808–13; Vade, *supra* note 25, at 297–98.

327. Vade, *supra* note 25, at 282; *see also* Hickman, *supra* note 79, at 1236–40.

328. Aoki, *supra* note 65, at 145.

gender-recognition regulations demonstrates the total lack of consensus on what makes someone a man or a woman. Moreover, legal sex-classification rules, particularly USCIS's marriage-based immigration rules, tend to benefit the most privileged trans* people while excluding and withholding recognition from those who are most vulnerable and marginalized, such as trans* people who are low-income, people of color, immigrants, queer, and/or people with nonbinary gender identities. The only real solution is the abolishment of this flawed and harmful system. Gender is far too complicated, subjective, and important for any bureaucrat to control or classify.