

# SEX CHANGE: CHANGING THE FACE OF TRANSGENDER POLICY IN THE UNITED STATES

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## INTRODUCTION

El'Jai Devoreau is a man. His Georgia birth certificate says so, his New Jersey driver's license says so, and the Social Security Administration says so.<sup>1</sup> But he used to be a woman.<sup>2</sup> Because of this and because of the inadequate transgender recognition laws in this country, he is now in court fighting for his job.<sup>3</sup> Unfortunately, he is not the only person facing the challenges of being transgender in today's society. The subtlest form of discrimination is denying someone a name and recognition—denying him or her an identity. This is effectively what has happened to unknown numbers of transgender American citizens.<sup>4</sup>

These Americans have been denied basic rights and encouraged to take drastic, unnecessary, and potentially dangerous measures to secure something as simple as government-issued identification that accurately represents a person's expressed or acquired gender. Sometimes a legal identity compatible with one's self-identity is simply not available. Fortunately, on June 10, 2010, the United States Department of State implemented a new policy ("passport policy") that allows transgender people to change the gender marker on their passports and Consular Certificates of Birth Abroad even if they have not yet undergone and may not ever undergo sexual reassignment surgery.<sup>5</sup> The passport policy throws into

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<sup>1</sup> Richard Pérez-Peña, *A Lawsuit's Unusual Question: Who Is a Man?*, N.Y. TIMES (Apr. 10, 2011), <http://www.nytimes.com/2011/04/11/nyregion/11sexchange.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Transgender Americans: A Handbook for Understanding*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/files/assets/resources/hrcTGguide.pdf> (citing several studies that estimate a vast range of potential population numbers for transgenders in the United States). This raises perhaps another interesting topic, unrelated to the *specific* topic of this Note, but that certainly requires some attention: how can we accurately measure the size of the population of transgender American citizens?

<sup>5</sup> Press Release, U.S. Dep't of State, *New Policy on Gender Change in Passports Announced* (Jun. 9, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm> [hereinafter *passport policy*].

sharp relief the woefully inconsistent, anachronistic, and unjust state of the current transgender laws and policies in this country and provides hope that there is a new way forward for transgender identification laws.

Under the passport policy, it is now easier than it has ever been for transgender individuals to obtain accurate, federally-issued government identification, even if they have not undergone, and may never undergo, sexual reassignment surgery. Contrasted with the widely varied, often difficult, and slowly developing state, local, and administrative policies on obtaining new identification and current lack of discernible legal definition, this new, more enlightened, passport policy should expose the flaws in current transgender law and catalyze a comprehensive reform. This reform must first provide a legal definition of transgender so that legislatures can provide adequate protections under the law and standardize requirements for obtaining new legal documents reflecting one's acquired gender. A definition will also assist the courts in uniformly applying existing anti-discrimination laws and in authorizing identification changes where a court order is necessary.

A new definition of transgender, in order to accomplish its goals while providing the transgender community with actual help, must also exhibit certain features. The first and most important of these features is that the definition must recognize that sexual reassignment surgery is neither the only nor necessarily the best option for a transgender individual. The second is perhaps harder and requires the definition to outline what makes someone transgender. Many current definitions rely on sexual reassignment surgery to define transgender—meaning that someone who has undergone the surgery is considered transgender and someone who has not is not—but this logic is backwards. Transgender identification comes first, while changing one's identity, physical or otherwise, comes second. Once a definition of transgender is established, legislatures will be able to write anti-discrimination laws that include transgender as a class discrete from sex or sexual orientation and gender marker and name change laws that do not require unnecessary treatment to secure new legal documents.

Part I of this Note will provide current definitions for the term “transgender” and other related concepts, such as “transsexual” and “intersex.” It will also discuss the differences between medical definitions and the definitions commonly accepted by transgender advocates, and will begin to lay the foundation for establishing a legal definition. Part II will briefly discuss the history of transgenderism and provide a background on the development of the law pertaining to transgender rights in the United States. It will also explore the current federal and state government policies, as well as the current case law pertaining to transgender status and identification. Part III will contrast the definitions from Part I with the new passport policy to demonstrate the necessity of a policy change in the identification area of the law.

Part IV will draw on cases and policies from both inside and outside the United States, as well as the standards and recommendations of the World Professional Association for Transgender Health (“WPATH”), upon which the Department of State relied in creating the new federal policy. These policies will form a basis for proposing a new, moderate, legal definition of transgender and a legislative method of implementing this new definition. This Note will conclude that transgender law in this country is inadequate in its protections because it is inadequate in its awareness, and that the first essential steps in reforming transgender law are (1) formulating a legally cognizable definition of transgender, and (2) memorializing that definition through legislation that requires a uniform identification procedure.

### I. DEFINITIONS

“Transgender” is a term and concept that causes much confusion and controversy, even amongst the lesbian, gay, bisexual, and transgender (“LGBT”) community itself. This Note aims to propose a definition of “transgender” that may be used by the legal community as a whole. In order to do so it is necessary to first explore the various definitions that are available. Currently, the legal community—among others—has no widely accepted “standard” or consistently used definition of transgender. In fact, even the definition used by the passport policy is an implied one. This section will also provide clarification of the notion of gender identity—a concept integral to understanding transgenderism—using a standard developed in 2006 by a group of international human rights experts.<sup>6</sup>

#### *A. Definition and Clarification of the Concept Gender Identity*

In 2006, twenty-nine international human rights experts gathered in Yogyakarta, Indonesia to create international guidelines for dealing with sexual minorities in international human rights law.<sup>7</sup> The group included experts from twenty-four nations and “included a former United Nations High Commissioner for Human Rights, as well as UN independent experts, members of UN treaty bodies, judges, activists, and academics.”<sup>8</sup> The areas of expertise represented ranged from housing to health to law.<sup>9</sup> The guidelines developed at the convention—the

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<sup>6</sup> THE YOGYAKARTA PRINCIPLES: THE APPLICATION OF INT’L HUM. RTS. L. IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2006), <http://www.yogyakartaprinciples.org/index.html> (last visited Jan. 18, 2011).

<sup>7</sup> Press Release, Int’l Comm’n of Jurists and Int’l Service for Human Rights, Experts Release Groundbreaking Principles on Sexual Orientation, Gender Identity, and Human Rights (Mar. 26, 2007), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

<sup>8</sup> Press Release, Human Rights Watch, Yogyakarta Principles: a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights (Mar. 26, 2007), available at <http://www.hrw.org/news/2007/03/25/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights>.

<sup>9</sup> *Id.*

Yogyakarta Principles—include a definition of gender identity in their preamble.<sup>10</sup> The Principles understand ‘gender identity’ to mean

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[.]<sup>11</sup>

This definition includes elements of transgender in it and sets up what is the key distinction in the realm of gender identity: the biology versus psychology definition. This distinction is at least part of the difficulty in fully understanding transgenderism since it includes aspects of both biology and psychology—meaning it encompasses all manners of disagreements between physical sexual characteristics such as genitalia and psychological gender experiences. For the law to adequately protect transgender individuals, it too will have to account for the non-physical aspects of transgenderism. The next subsection will provide a more detailed definition of “transgender” and will attempt to clarify some of the distinctions between transgender and other, related, terms.

#### *B. Definition and Clarification of the Concept “Transgender”*

There are several ways to understand transgenderism, and as discussed above, gender identity plays a significant role in these definitions. A large part of why transgender issues are slow to develop and difficult to understand is because the term itself is widely misunderstood. This section will attempt to clarify the term as it is understood by the medical community and transgender advocates to provide a base upon which the law can build.

#### 1. Diagnostic and Statistical Manual of Mental Disorders-IV

First introduced in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”) III, Transsexualism—changed to Gender Identity Disorder (“GID”) in the DSM-IV—is considered by the American Psychiatric Association (“APA”) to be a treatable psychological disorder.<sup>12</sup> GID is defined as a “conflict between a person’s actual physical gender and the gender that person identifies himself or herself as.”<sup>13</sup> To require a diagnosis of GID, a person must be caused “significant discomfort” by their biological sex.<sup>14</sup> The WPATH notes that “transgender”—as

<sup>10</sup> Int’l Comm’n of Jurists, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> THE HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N’S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, SIXTH VERSION 1, 3 (Feb. 2001), <http://www.wpath.org/Documents2/socv6.pdf>.

<sup>13</sup> *Gender Identity Disorder*, PUBMED HEALTH (last visited Feb. 18, 2010), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002495/>.

<sup>14</sup> *Id.*

opposed to “transsexual” under the DSM-III or GID currently—is not an official diagnosis, but is instead a colloquial, broader term that is used for ease rather than accuracy.<sup>15</sup> For clinical purposes, the DSM definition further divides individuals with GID into categories based upon their sexual orientations.<sup>16</sup> This distinction, however, was not meant to guide treatment decisions in any way and has no impact on the diagnosis itself. It was instead meant to track the progress of treatment and was based on the notion that certain sexual orientations experienced better outcomes in treatment.<sup>17</sup> This is significant because it reinforces the point that transgenderism and sexual orientation are different and, as such, should be considered separately under the law.

While accepted by the medical community, the LGBT advocacy community often rejects the characterization of transgenderism as a mental disorder.<sup>18</sup> Transgender advocates and their allies have thus begun a movement to have it removed from the DSM, much like homosexuality was removed.<sup>19</sup> For this reason, it is important to take into consideration the nonmedical definitions that are available, particularly those endorsed by advocates.

## 2. Nonmedical Definition

The terms “sex” and “gender” are used interchangeably in most contexts;<sup>20</sup> however, they must be distinguished in the interest of precision and understanding.<sup>21</sup> “Sex” is used by social scientists to “refer to a person’s biological or anatomical identity as male or female.”<sup>22</sup> In contrast, “gender” refers to “the collection of characteristics that are culturally associated with maleness or femaleness.”<sup>23</sup> Thus, the distinction between the two terms is similar to the distinction made above in the context of gender identity—“sex” refers to biology while gender refers to psychology and socially constructed norms.<sup>24</sup> As a result,

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<sup>15</sup> STANDARDS OF CARE, *supra* note 12, at 4.

<sup>16</sup> The categories are as follows: sexually attracted to males; sexually attracted to females; sexually attracted to both; sexually attracted to neither. These categories are used regardless of the sex or gender of the person being diagnosed. GENDER IDENTITY DISORDER, <http://www.behavenet.com/capsules/disorders/genderiddis.htm> (last visited Jan. 18, 2011) (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4<sup>th</sup> ed. 2000)).

<sup>17</sup> STANDARDS OF CARE, *supra* note 12, at 4.

<sup>18</sup> See GID REFORM ADVOCATES, <http://www.gidreform.org/#who> (an organization of advocates who reject the notion that transgender is a disorder and advocate its removal from the DSM).

<sup>19</sup> Groups and associations have started grassroots advocacy online, often involving petitions to remove Gender Identity Disorder from the next edition of the DSM. See *Remove Transgender from the DSM-5*, CHANGE.ORG, [http://www.change.org/petitions/view/remove\\_transgender\\_from\\_the\\_dsm-5](http://www.change.org/petitions/view/remove_transgender_from_the_dsm-5) (an example of an online petition asking for the removal of GID from the DSM).

<sup>20</sup> Jamison Green, *Introduction to Paisley Currah & Shannon Minter, Transgender Equality: A Handbook for Activists and Policymakers 1, 2* (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf> (distinguishing the terms “sex” and “gender”).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Answers to your Questions About Transgender People, Gender Identity, and Gender Expression*,

“gender” is a much more fluid term than “sex,” varying across cultures and across generations.<sup>25</sup> Since it is relatively difficult to conform to gender stereotypes all of the time, and because some “masculine” or “feminine” traits are actually universal, gender fluidity is a much more common phenomenon than most people realize.<sup>26</sup>

As a result of the broad and ambiguous nature of the term “gender” and the relatively narrow definition of the term “sex,” the meaning of the terms “transgender” and “transsexual” have different scopes. Generally, people use the term “transgender” colloquially when they actually mean the narrower “transsexual.”<sup>27</sup>

For the majority of people, their gender and sex correlate—biological females “feel” female and biological males also “feel” male.<sup>28</sup> Transsexuals, however, experience a disconnect between their physical sex and their gender—they *feel* female when they are biologically male or vice versa.<sup>29</sup> The term “transsexual” refers to the medical and psychiatric diagnosis for people whose sex and gender are incongruent, many—but not all—of whom undergo hormone therapy or sexual reassignment surgery in order to conform their sex to their gender.<sup>30</sup>

“Transgender,” on the other hand, has become an umbrella term.<sup>31</sup> Though there is some dispute about when it first appeared, it took on its modern meaning in the mid-1990s as a reaction to the growing transgender movement.<sup>32</sup> The term sweeps within its definition: “pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers (sometimes referred to as ‘transvestites,’ ‘drag queens’ or ‘drag kings’); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.”<sup>33</sup>

In the broadest sense of the term, “transgender” even includes people who would not consider themselves transgender—for instance tomboys or effeminate men.<sup>34</sup> Thus, the current definition is likely overbroad for purposes of the law since it includes those who do not consider themselves to be transgender as well as cross-dressers who do not wish to change their sexual or gender identity and many

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AM. PSYCHOLOGICAL ASS’N 2 (2011), <http://www.apa.org/topics/sexuality/transgender.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> Green, *supra* note 20.

<sup>27</sup> *Answers, supra* note 24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Answers, supra* note 24.

<sup>32</sup> LGBT Resource Center, Univ. of Cal. Riverside, TRANS HISTORY TIMELINE, <http://out.ucr.edu/SiteCollectionDocuments/TransTimeline.pdf> (last visited Feb. 26, 2012), (citing *Bending the Mold: An Action Kit for Transgender Youth*, LAMBDA LEGAL (2004), [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/305.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/305.pdf)).

<sup>33</sup> Green, *supra* note 20.

<sup>34</sup> *Id.*

others who may object to the use of the term transgender. This point will be addressed in greater depth later in section IV.

It is nevertheless important to understand what the term “transgender” means when it is used by experts and advocates in the fields of psychology, law, and human rights. Most likely, a definition that falls somewhere in between the narrow “transsexual” one and the broad “transgender” one will be the most effective in the legal realm. Consequently, groups like the WPATH rely on a moderate definition of the term in fashioning their recommendations and standards, as discussed below.

There is also some dispute, even among those who are themselves transgender, about the applicability of the term “transgender” to transsexuals.<sup>35</sup> The reason for this is because the term, as used by one of the first well-known transvestites in the United States—Virginia Charles Prince—was intended to refer specifically to her desire to be a woman socially but remain a male biologically.<sup>36</sup> Her lack of desire to *become* the other sex and subsequent use of the term transgender to refer specifically to this experience has led some transsexuals, particularly those who have undergone sexual reassignment surgery, to reject the term.<sup>37</sup> As a result of the confusion and the controversy, the law will need to carefully define transgender to make clear which aspects of the broad concept are included under the legal definition and which aspects are omitted as unnecessary features of the classification.

### C. Intersex

Other terms and concepts relating to transgenderism are important to understanding both the narrower medical definition and broader advocate definition of transgender. The most important of these is “intersexed,” which is a term that falls within the broad definition of transgender discussed above and refers to a physical condition, but is not widely understood by those outside the medical profession.<sup>38</sup> On rare occasions, a person is born with “a reproductive or sexual anatomy that [does not] seem to fit the typical definitions of female or male.”<sup>39</sup> This may mean that such a person appears to be one sex externally but has the internal anatomy belonging to the opposite sex.<sup>40</sup> Other examples of intersexuality include

a girl . . . born with a noticeably large clitoris, or lacking a vaginal opening, or a boy . . . born with a notably small penis, or with a scrotum that is divided so that it has formed more like labia. Or a person . . . born with

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<sup>35</sup> Dave King & Richard Ekins, *Pioneers of Transgendering: The Life and Work of Virginia Prince* (2006), available at <http://www.gender.org.uk/conf/2000/king20.htm>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *What Is Intersex?*, INTERSEX SOC’Y OF N. AM., [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited Jan. 18, 2011).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

mosaic genetics, so that some of her cells have XX chromosomes and some of them have XY.<sup>41</sup>

Intersexed individuals often experience the kind of gender disconnect that is the main feature of transgenderism; however, they have the unique characteristic of also having physical—or sexual—confusion.

With all of these definitions, it is understandable why a legal definition might be slow to develop and why states have struggled to create policies that allow for transgender people to acquire accurate identification or that adequately protect transgender rights.

## II. BACKGROUND OF TRANSGENDER LAW AND POLICY

### A. *Background of Transgender Law in the United States*

Transgenderism has been documented for most of human history—from eunuchs<sup>42</sup> who were assigned to guard harems because they posed no threat of sexual assault to women who posed as men in order to become warriors or rulers to the portrayal of female characters by male stage actors.<sup>43</sup> Different cultures and generations have viewed the various features of transgenderism with attitudes that range from reverence to hatred, and transpeople have even occupied relatively common roles in society at various times.<sup>44</sup>

The first documented complete sexual reassignment surgeries that went beyond mere castration occurred in 1930 when relatively well-known artist, Einar Wegener became Lili Elbe.<sup>45</sup> Hormone therapy for transgenders began nineteen years later in 1949;<sup>46</sup> but the first public transgender American was Christine Jorgensen in 1952, who underwent sexual reassignment surgery and “for many . . . was the first visible transsexual in the media.”<sup>47</sup> Later, in 1969, transgender

<sup>41</sup> *Id.*

<sup>42</sup> A eunuch is “[a] man who has been castrated, especially (in the past) one employed to guard the women’s living areas at an oriental court.” NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

<sup>43</sup> *The Transgender Timeline*, TRANSGENDER ZONE, <http://www.transgenderzone.com/features/timeline.htm> (last visited Jan. 18, 2011).

<sup>44</sup> *Id.*

<sup>45</sup> Einar Wegener began the transition to Lili Elbe in her teens and continued it while married to Gerda Wegener. She lived a “double life,” attending certain events as Lili and others as Einar. Only a few of her closer friends were aware that Einar and Lili were one and the same. After she completed her transition in 1930, her marriage to Gerda was invalidated and she became engaged to a man. Tragically she died—or perhaps faked her death—in 1931, less than a year after completing her fifth surgery, which would have allowed “her to have intercourse with the man to whom she was engaged.” *World’s First Sex Change*, TRANSGENDER ZONE, [http://www.transgenderzone.com/features/sex\\_change.htm](http://www.transgenderzone.com/features/sex_change.htm) (last visited Jan. 18, 2011). Other sexual reassignment surgeries had been attempted, dating back to 1912, but sexual science pioneer Magnus Hirschfeld characterized them as “incomplete.” *A Brief History of Transsexuality*, CINEMATTER, <http://www.cinematter.com/tshistory.html> (last visited Jan. 24, 2012).

<sup>46</sup> Dr. Harry Benjamin, another pioneer in the area of transgender health, began treating patients with hormones in 1949. *The Transgender Timeline*, *supra* note 43.

<sup>47</sup> While Christine was certainly not the *first* well-known gender-bending figure—the Marquise de Sade’s gender was the subject of much discussion during the late 1700s and early 1800s—she was the first American to have completed sexual reassignment surgery and gone public with her transition. She

individuals—like Sylvia Rivera—were part of a display of civil disobedience in Greenwich Village that catalyzed the LGBT rights movement.<sup>48</sup> Transgender rights really became a national issue in their own right in 1993 with the tragic rape and murder of transgender teen, Brandon Teena.<sup>49</sup>

Yet despite the long history and relatively early scientific, psychological, medical, and even social advances, the political and advocacy movements are relatively young. When the gay rights movement first began gaining momentum during the 1960s, the transgender movement joined forces. The inclusion of transgenderism in anti-discrimination laws, therefore, is a relatively recent development and still has far to go.

### 1. Transgender Case Law

The first cases involving transgender issues in the United States were ones that dealt with statutes outlawing various aspects of transgenderism.<sup>50</sup> In the twentieth century, many states and localities maintained laws that prohibited cross-dressing or disguising one's sex in public.<sup>51</sup> In the 1960s and 1970s, convictions under these statutes began to be challenged in the courts.<sup>52</sup> Some convictions were upheld while other ordinances and statutes were invalidated either as applied to the defendants' specific situations or on their face for vagueness and overbreadth.<sup>53</sup> One of the oldest and most often enforced ordinances, St. Louis' Ordinance Number 5421, was ruled invalid in federal court in 1986 after 122 years on the books.<sup>54</sup>

To illustrate the tremendous disparity in the outcome of cases involving transgender issues, and the confusion with which many people approach

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was also an ex-soldier who had joined the Army in 1945. Her story shocked the United States media, which made her one of the most talked about figures in 1953. She became a successful entertainer and photographer, then writer and speaker, finally retiring in Southern California before her death in 1989. *The Christine Jorgensen Transsexual Story*, TRANSGENDER ZONE, <http://www.transgenderzone.com/features/ChristineJorgensen.htm> (last visited Jan. 25, 2012). See also *The Transgender Timeline*, *supra* note 43; *World's First Sex Change*, *supra* note 45.

<sup>48</sup> *The Transgender Timeline*, *supra* note 43. In 1969, a series of riots known as the "Stonewall Riots," resulted from LGBT patrons at Greenwich Village's Stonewall Inn resisting arrest during a bar raid.

<sup>49</sup> *Id.* Brandon Teena was a transgender boy who lived a troubled life as a result of his community's rejection of his gender identity and expression. In 1993, Brandon was discovered to be biologically female and was assaulted and raped by two men. He reported the attack but nothing was done. The two men later found Brandon and shot and stabbed him, also shooting and killing the two people with whom he was found. His story became the inspiration for Hilary Swank's Academy Award-winning performance in *Boys Don't Cry*. *Brandon Teena's Tragic Story*, ABC NEWS (Aug. 24, 2000), <http://abcnews.go.com/2020/story?id=132702&page=1#.TyCclHYnYVe>.

<sup>50</sup> WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1423-25 (2d. ed. 2004).

<sup>51</sup> *Id.*

<sup>52</sup> See *People v. Archibald*, 296 N.Y.S.2d 834 (N.Y. App. Div. 1968); *City of Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978); *City of Columbus v. Rogers*, 324 N.E.2d 563 (Ohio 1975).

<sup>53</sup> ESKRIDGE & HUNTER, *supra* note 50, at 1424.

<sup>54</sup> *D.C. v. City of St. Louis*, 795 F.2d 652 (8th Cir. 1986).

transgenderism, this section will consider two cases at either end of the spectrum—one in which a transgender woman was denied rights due to her status and one in which a transgender man was protected due to his status.

One of the first transgender *rights* cases—not involving appearance, but involving the rights to which transgender people are entitled—was *Littleton v. Prange*<sup>55</sup> in 1999. The Court of Appeals of Texas, Fourth District found that a post-operative transgender woman's marriage was null and void and denied her standing to bring a wrongful death suit for her husband's death.<sup>56</sup> Although she had completed all necessary medical treatment, sexual reassignment surgery, and amended her legal documents, including her birth certificate, to reflect her new gender, the Supreme Court denied the writ of certiorari.<sup>57</sup> This case is significant for several reasons. First, it illustrates just how long it has taken for transgender issues to reach the courts and how hesitant the Supreme Court is to hear them. Second, it shows just how restrictive the laws can be. A woman who took all necessary steps to become the correct sex and gender was still not allowed to enter into a lawful marriage or have the right to sue over her husband's death.<sup>58</sup> The right to sue has since become a focal point of the transgender rights movement, and is included in many of the anti-discrimination statutes that classify transgender as a protected status.<sup>59</sup>

*Barnes v. City of Cincinnati*,<sup>60</sup> which occurred six years after *Littleton*, was the first case to find in favor of a transgender plaintiff under a Title VII discrimination claim.<sup>61</sup> Although it was from a different jurisdiction and dealt with federal law rather than state law, it was a step in the right direction because it granted a cause of action, albeit in relation to a different right than the one sought in *Littleton*. *Barnes* involved a Cincinnati police officer who lived as a man while on duty but as a woman while off duty.<sup>62</sup> Sergeant Barnes was placed on probation and subsequently demoted, ostensibly because he had received failing scores from his evaluators.<sup>63</sup> At least one other police sergeant, however, testified that Barnes had been intentionally placed in a probation program to fail and that his evaluators had consistently given him lower scores "because Barnes had not been acting masculine enough."<sup>64</sup> Moreover, Barnes produced a psychologist who testified

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<sup>55</sup> *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

<sup>56</sup> *Id.*

<sup>57</sup> *Littleton v. Prange*, 531 U.S. 872 (2000).

<sup>58</sup> *Littleton*, 9 S.W.3d. at 223.

<sup>59</sup> See *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, NAT'L GAY & LESBIAN TASK FORCE (July 30, 2007), available at [http://www.thetaskforce.org/downloads/reports/fact\\_sheets/TI\\_antidisc\\_laws\\_7\\_30\\_07.pdf](http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_30_07.pdf).

<sup>60</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

<sup>61</sup> Roddrick Colvin, *Innovations in Non-discrimination Laws: Exploratory Research on Transgender-Inclusive Cities*, 14 J. PUB. MGMT. & SOC. POL'Y 19, 22 (2008).

<sup>62</sup> *Barnes*, 401 F.3d at 734.

<sup>63</sup> *Id.* at 735.

<sup>64</sup> *Id.*

that his evaluation test scores were higher than the minimum required to pass.<sup>65</sup> Barnes' scores, according to the expert witness, were also higher than another probationary sergeant's scores who had not been demoted.<sup>66</sup> In fact, Barnes was the only sergeant to fail probation between 1993 and 2000.<sup>67</sup>

The city argued that Barnes' claim had to fail because he was not a member of a protected class.<sup>68</sup> The court, in rejecting the city's argument, cited *Smith v. City of Salem, Ohio*,<sup>69</sup> another Sixth Circuit case, in which it had ruled that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."<sup>70</sup>

*Barnes* is the most recent—and most generous—federal case involving transgender discrimination.<sup>71</sup> Significantly, though, the Supreme Court denied the writ of certiorari in that case and has yet to decide whether or not transgender is a protected class under Title VII—either in its own right or as a subset of gender.<sup>72</sup> Nevertheless, *Barnes* indicates progress when compared with the early cases, such as *Littleton*, that involved transgender rights.

The major difference between *Barnes* and *Littleton* was their venue—one was decided in state court under state law, while the other was decided in federal court under federal law. The vast differences in states' laws and the Supreme Court's refusal to address the transgender issue cause different outcomes from state to state and provide other federal circuit courts with the capacity to deny a Title VII claim.

Courts have also considered statutes that may or may not be used to protect or provide rights to transgender individuals. Currently, there are three states—New York, Massachusetts, and New Jersey—whose courts have interpreted their state's sex discrimination laws to include transgender citizens.<sup>73</sup> For the most part, however, statutes that include transgender people have been stated to do so by the legislature or by the executive of the state.<sup>74</sup> Thus, transgender citizens who live in states that have no policies that are considered by the legislature or executive to be transgender-inclusive might have the option of resorting to the judicial system to have state laws interpreted to include transgender as a protected status. However,

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<sup>65</sup> *Id.*

<sup>66</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729, 735 (6th Cir. 2005).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

<sup>70</sup> *Barnes*, 401 F.3d at 737 (quoting *Smith*).

<sup>71</sup> Colvin, *supra* note 61.

<sup>72</sup> *Id.*

<sup>73</sup> *Litigation Watch*, TRANSGENDER L. & POL'Y INST. (Apr. 2, 2010), <http://www.transgenderlaw.org/cases/index.htm#goodcaselaw> (last visited Jan. 18, 2011).

<sup>74</sup> *Id.*

this strategy has the potential to hurt rather than help in a case where transgender individuals lose and the result is an adverse ruling and, therefore, precedent that excludes transgender as a protected class until action by the legislature. Furthermore, taking the cause to the courts will likely result in inconsistent rulings and protections. For these reasons, the legislature, and not the courts, must be responsible for paving the way for transgender individuals to become a protected class.

## 2. Transgender Legislation and Executive Orders

As discussed above, the first transgender case law resulted from statutes and policies that outlawed acts such as cross-dressing in public.<sup>75</sup> The ordinance invalidated in *D.C. and M.S. v. City of St. Louis*<sup>76</sup> made cross-dressing “an indecent or lewd act.”<sup>77</sup> This ordinance and those like it never used the words “cross” and “dress” in conjunction with one another.<sup>78</sup> Instead, they outlawed “disguising” oneself, which was used to arrest cross-dressers or appearing in “dress not belonging to [one’s] sex” in public.<sup>79</sup> Such laws proliferated in the late nineteenth and early twentieth centuries, with the majority of recorded arrests coming before 1920, though the arrests certainly continued until the 1980s.<sup>80</sup> The first locality to prohibit discrimination based on gender identity or expression was Minneapolis, Minnesota in 1975.<sup>81</sup> Minnesota, taking a cue from its largest city, became the first state to outlaw discrimination based on gender identity or expression in 1993.<sup>82</sup> Twelve more states and the District of Columbia followed suit, but not until after 2000.<sup>83</sup>

### *i. Change of identification laws and policies*

Perhaps the most important type of laws that the transgender community is concerned with—and the only type that is unique to it—are laws dealing with changing legal documents to reflect one’s acquired sex or gender. Currently, the

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<sup>75</sup> See discussion *supra* Part I.A.

<sup>76</sup> *D.C. v. City of St. Louis*, 795 F.2d 652 (1996). In this case, two men were arrested in St. Louis and charged with cross-dressing and indecent or lewd conduct. The ordinance under which they were charged read:

Any person who shall, in this city, appear in any public place in a state of nudity or in a dress not belonging to his or her sex or in an indecent or lewd dress, or shall make an indecent exposure of his or her person, or be guilty of an indecent or lewd act of behavior shall be guilty of a misdemeanor.

The Eighth Circuit Court of Appeals ruled that this ordinance was void for vagueness.

<sup>77</sup> *ESKRIDGE & HUNTER, supra* note 50, at 1423.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *The Transgender Timeline, supra* note 43.

<sup>82</sup> *State Non-Discrimination Laws*, NAT’L GAY & LESBIAN TASK FORCE (July 1, 2009), [http://www.thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_1\\_12\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf).

<sup>83</sup> *Id.*

majority of states *will* allow an individual to change the gender designation on his or her birth certificate in some manner.<sup>84</sup> The requirements for these laws vary widely, ranging from requiring a court order that both the gender and name be changed on the birth certificate or in the birth record to requiring a certified letter from the surgeon who performed the sexual reassignment surgery to providing proof that the individual underwent proper medical treatment, even if it was not surgical.<sup>85</sup>

The steps taken by the state in changing the records also vary. In some cases, the state will amend the existing birth certificate to reflect the new gender and name, while in others the state will issue a new birth certificate and seal the previous certificate and birth record.<sup>86</sup> In fact, of the forty-seven states and the District of Columbia that allow transgenders to change their birth certificates, twenty-four issue new birth certificates while the other twenty-four will only amend the original one.<sup>87</sup> These statistics are somewhat misleading, as some jurisdictions that issue amended birth certificates do not indicate which parts of the certificate have been amended, and subsequently seal the old record, resulting in the same effect as that of receiving a new certificate.<sup>88</sup> Furthermore, as evidenced by the *Littleton* case, both a physical change and an identification change of one's sex do not always result in a legally recognized change.<sup>89</sup> The inconsistencies in both the process and effect of changing one's legal identity must be reconciled if the transgender movement is to move forward.

Each state has its own way of permitting—or prohibiting—transgender citizens from obtaining new documents, and all of the state policies differ from the federal government's policy for issuing such new documents. This has the potential to prevent transgender individuals from travelling internationally—because his or her passport, birth certificate, and driver's license reflect different names and/or genders—or doing anything else requiring uniformity of identification. Furthermore, the tendency of the law to require that those who apply for new legal documents undergo surgery places pressure on transgender individuals to undertake radical treatment that may or may not be the correct

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<sup>84</sup> Dr. Becky Allison, *U.S. States and Canadian Provinces: Instructions For Changing Name And Sex On Birth Certificate*, DR. BECKY.COM, <http://www.drbecky.com/birthcert.html> (last visited Jan. 18, 2011).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* For example, in Alabama, one may procure an amended birth certificate that notes change of name and gender, but one cannot get an entirely new birth certificate. Arizona, however, will issue an entirely new birth certificate and “close” the original; this requires a note from a surgeon. *Id.*

<sup>87</sup> *Id.* The difference between a new birth certificate and an amended birth certificate is actually quite significant. A new birth certificate may be issued for many reasons, including that the previous one was lost or destroyed, and bears no indication that anything has been changed, if indeed it has. On the other hand, an amended birth certificate indicates what specifically has been changed. An amended birth certificate is only issued when something has been changed but a new birth certificate is available when the original is lost or destroyed and, if the law provides, when a change has been made.

<sup>88</sup> *Id.*

<sup>89</sup> See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

approach for their conditions.<sup>90</sup> Moreover, various administrative agencies have their own policies pertaining to name and gender marker change, often making it difficult for transpeople to obtain benefits such as Medicaid or Social Security.<sup>91</sup>

However, this next section provides some examples of these definitions at work within the law.

### III. NEW POLICY AND INTERNATIONAL MODELS FOR CHANGE

Given the current lack of a solid background of definitions and the current legal situation, it is useful to begin looking forward by examining ways in which the United States might improve. This section will discuss the passport policy introduced previously in more detail, highlighting the recommendations upon which it relied and emphasizing that it does not actually require sexual reassignment surgery, unlike the vast majority of state laws.<sup>92</sup> It will also explore a few international policies that establish legal definitions of transgender and provide for uniform identification change procedures. In addition to the definitions discussed in the previous section, the policies explored in this section will provide the foundation for the proposed definition and identification change procedures in the next section.

#### *A. New Passport Policy*

The United States Department of State has created a new passport policy, which states that a transgender person may seek to change the gender on his or her passport or Consular Certificate of Birth Abroad with the proper medical certification.<sup>93</sup> This certification must be “[a] signed original statement, on office letterhead, from the attending medical physician (internist, endocrinologist, gynecologist, urologist or psychiatrist),” and must include:

[the] Physician’s full name; Medical license or certificate number; Issuing state or other jurisdiction of medical license/certificate; Drug Enforcement Administration (DEA) registration number assigned to the physician; Address and telephone number of the physician; Language stating that he/she is the attending physician for the applicant and that he/she has a doctor/patient relationship with the applicant; Language stating the applicant has had appropriate clinical treatment for gender transition to the new gender (male or female); Language stating “I declare under penalty of perjury under the laws of the United States that the forgoing is true and

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<sup>90</sup> ESKRIDGE & HUNTER, *supra* note 50, at 1429.

<sup>91</sup> See, e.g., Dean Spade, *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOCIAL JUSTICE 497 (2010); *Policies or Practices for Changing Name and/or Gender Marker on Some Federal Identity Documents*, TRANSGENDER LAW CENTER (Sept. 2006), <http://transgenderlawcenter.org/pdf/Federal%20Policies%20or%20Practices.pdf>.

<sup>92</sup> New Policy on Gender Change, *supra* note 5; see also, Allison, *supra* note 84.

<sup>93</sup> 7 FAM 1300 APPENDIX M: GENDER CHANGE (June 10, 2010), <http://www.state.gov/documents/organization/143160.pdf>.

correct”: and Annotate the application “gender transition” to record the reason for issuing the full validity passport in the new gender.<sup>94</sup>

No other medical records or information are required, but the applicant must update his or her passport photo so that his or her current appearance is shown.<sup>95</sup> The Department of State document explicitly states that “[s]exual reassignment surgery is not a prerequisite for passport issuance and such documentation must not be requested.”<sup>96</sup> Limited validity passports are available for those who are currently undergoing treatment and intend to have sexual reassignment surgery, but permanent passports are available for those whose treatment does not involve the surgery at all.<sup>97</sup> The Task Force has commended this policy for recognizing that sexual reassignment surgery is not the only appropriate treatment for transgender persons and for being a match for some of the most permissive state policies that allow transgenders to change their driver’s license and birth certificate gender designations.<sup>98</sup> To determine what requirements were necessary for obtaining a new passport or Birth Abroad Certificate, the government relied on standards and recommendations from WPATH.<sup>99</sup> This more permissive policy is a step in the right direction for United States policy that reflects little of the reality of transgenderism.

#### 1. WPATH Standards and Recommendations

The American Medical Association considers WPATH to be an authority in the field of transgender health.<sup>100</sup> WPATH is “an international association devoted to the understanding and treatment of individuals with gender identity disorders.”<sup>101</sup> In existence since 1979, WPATH consists of both medical and legal professionals who currently participate in research or clinical practice “that affects the lives of transgender and transsexual people.”<sup>102</sup> The WPATH promulgates Standards of Care that “articulate [the] organization’s professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders.”<sup>103</sup> For the purposes of these Standards of Care, the organization relies on the classification of transgender in the DSM-IV and

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Task Force History*, NAT’L GAY AND LESBIAN TASKFORCE, <http://www.thetaskforce.org/about-us/history> (last visited Jan. 18, 2011).

<sup>99</sup> New Policy on Gender Change, *supra* note 5.

<sup>100</sup> GENDER CHANGE, *supra* note 93.

<sup>101</sup> *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, THE WORLD PROFESSIONAL ASS’N FOR TRANSGENDER HEALTH, INC. (June 17, 2008), available at <http://www.tgender.net/taw/WPATHMedNecofSRS.pdf>.

<sup>102</sup> *Id.*

<sup>103</sup> *Standards of Care*, THE WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, INC. [http://www.wpath.org/publications\\_standards.cfm](http://www.wpath.org/publications_standards.cfm).

International Statistical Classification of Diseases and Related Health Problems (“ICD”), which is published by the World Health Organization (“WHO”).<sup>104</sup> The DSM-IV has four subsets: childhood onset, adolescence onset, adult onset, or not otherwise specified.<sup>105</sup> These refer to the age of the individual being diagnosed. The ICD-10 has a wider variety of diagnoses, including Transsexualism, Transvestism, Gender Identity Disorder of Childhood, and other Gender Identity Disorders.<sup>106</sup> The goal of the Standards of Care is to “articulate the ‘professional consensus about the psychiatric, psychological, medical and surgical management of [gender identity disorder].’”<sup>107</sup> This consensus offers a good starting point for the law since it incorporates both the medical and surgical characterization of and treatments for the various transgender conditions as well as the psychiatric and psychological ones.

Currently, the WPATH Standards of Care include a wide variety of sex reassignment procedures that encompass more than the genital modification usually referred to by the term “sexual reassignment surgery.” They include hysterectomy, mastectomy, breast prosthesis and augmentation, facial reconstruction, and body hair removal, as well as the genital reconstruction procedure.<sup>108</sup> Significantly, none of these procedures is required, either for adequate treatment of gender dysphoric people—those with any of the various DSM-IV or ICD-10 diagnoses—or for the new passport policy.<sup>109</sup> Moreover, each individual’s proper treatment is unique to him or her and is neither elective nor cosmetic, but is medically necessary.<sup>110</sup> These distinctions and the emphasis on diversity of treatment options are important to the legal discussion because the current identification change policies in the United States usually require proof of surgery. However, according to the consensus among mental health experts, surgery is not necessary, providing further evidence that the current state policies are inadequate.

### *B. International Policies*

The definitions and policy models discussed above are important for understanding the options available to legislatures, executives, and judiciaries inclined to reforming transgender law, but there are also legal models from outside the United States that may provide guidance. The WPATH and WHO are international bodies and their standards and definitions reflect an international consensus among experts. Likewise, governments and entities outside the United States are also dealing with transgender issues. In the international community,

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<sup>104</sup> STANDARDS OF CARE, *supra* note 12.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> WPATH, *supra* note 101.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

there are a few examples of laws and policies that the United States could use as models for the necessary changes in transgender law.

### 1. United Kingdom

The United Kingdom (“UK”) has one of the simplest and most transgender-friendly policies, as well as one that is uniform across the country, eliminating the difficulties posed by varying governmental policies. This law is the Gender Recognition Act of 2004, which came into effect in 2005.<sup>111</sup> In the United Kingdom, for purposes of the law, a person is considered to be the gender that was recorded at birth.<sup>112</sup> Notably, under this Act, transgender individuals can apply to the Gender Recognition Panel for a Gender Recognition Certificate.<sup>113</sup> This certificate, reflecting the “acquired gender,” entitles the individuals to be recognized under the law as their new gender and enables them “to enjoy all the rights appropriate to a person of his or her acquired gender.”<sup>114</sup> Once this certificate has been issued, the holder may then apply to the Registrar General—at least in Scotland—for a new birth certificate reflecting the person’s new name and gender.<sup>115</sup>

The application process for a Gender Recognition Certificate is similar to that of the new passport policy in the United States. An applicant must provide “two reports from registered medical practitioners, one of whom works in the field of gender dysphoria.”<sup>116</sup> A psychologist who works in the area of gender dysphoria satisfies the second part of these requirements, meaning a surgeon’s note is not required.<sup>117</sup> Included in these reports must be a documented diagnosis of gender dysphoria,<sup>118</sup> making it slightly stricter than the requirements under the passport policy.

There are many advantages that the United Kingdom’s policy has over the policies currently in existence in the United States. While it requires a documented diagnosis, which is a requirement that some transgender activists are working against, the United Kingdom’s policy does not appear to require surgery, unlike many state laws. Moreover, it creates a national body whose sole purpose it is to evaluate each individual case and determine whether or not to issue new identification. Perhaps the most important advantage, however, is that the Gender

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<sup>111</sup> *Gender Recognition*, GENERAL REGISTER OFFICE FOR SCOTLAND, <http://www.gro-scotland.gov.uk/regscot/gender-recognition.html> (last visited Jan. 18, 2011).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> PRESIDENT’S GUIDANCE NO. 1, <http://www.grp.gov.uk/documents/guidance/GuidanceNo1FINAL.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Recognition Certificate confers upon its holder all of the rights attached to their new gender.

If such a certificate had existed in the *Littleton* case—in which a woman was denied the right to sue for the wrongful death of her husband because her transgender status voided the marriage—the court would have had no grounds on which to deny her the right to sue. The distinct disadvantage of the UK’s approach is that it would invalidate legally obtained marriages in jurisdictions where same-sex marriages are not allowed.<sup>119</sup> This problem, however, can be remedied through marriage equality—the subject of many other Articles and Notes, but not this one.

## 2. Scotland

Scotland, as a separate governmental entity within the UK, has taken further steps to determine a definition of transgender and to include that definition in legislation. In 2004, the Scottish Executive’s Hate Crime Working Group (“Working Group”) adopted a broad definition of transgender.<sup>120</sup> “[A]fter consultation with transgender and LGBT groups,” the Working Group found that the existing definition of transgender included both those who fell within the narrow definition of transsexual—that is, individuals who have undergone or will undergo sexual reassignment surgery and hormone therapy to change their biological sex<sup>121</sup>—and those “who do not have hormone or surgical treatment, so long as they have had ‘medical supervision’ which ‘could be as minimal as counselling.’”<sup>122</sup>

Interestingly, the Working Group chose to adopt an even broader definition than this one, including “those characteristics of a person’s identity, appearance, or behaviour which are usually associated with the gender opposite to the person’s legal gender” and thus including within its breadth “transvestism and cross-dressing, intersexuality, and bigender identities.”<sup>123</sup> This definition was to be used to clarify Scotland’s hate crime legislation, which includes transgender as a protected class.<sup>124</sup> Scotland’s Executive, however, rejected the Working Group’s definition in 2006, adopting a less broad, though still generous, definition in its transgender-inclusive hate crime legislation.<sup>125</sup> This definition explicitly included

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<sup>119</sup> Gender Recognition Act 2004, available at <http://www.legislation.gov.uk/ukpga/2004/7/notes/division/4/11>.

<sup>120</sup> TRANSGENDER DISCRIMINATION LAWS AROUND THE WORLD (July 24, 2007), [http://www.equality-network.org/Equality/website.nsf/search/9052198889019D8B80257322004793DD/\\$FILE/DLR%20-%20trans%20anti-discrimination%20laws%20internationally.pdf](http://www.equality-network.org/Equality/website.nsf/search/9052198889019D8B80257322004793DD/$FILE/DLR%20-%20trans%20anti-discrimination%20laws%20internationally.pdf).

<sup>121</sup> See Green, *supra* note 20.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

“transvestism . . . transsexualism . . . intersexuality . . . [and those individuals] having, by virtue of the Gender Recognition Act 2004, changed gender.”<sup>126</sup>

The lesson to be learned here is twofold. First, LGBT and transgender advocates can work together with governmental bodies to create a definition of transgender for legal purposes and to reconcile broad, social conceptions of transgender with narrow, medical definitions. The method used in Scotland is not unprecedented in the United States, where experts are called to testify before Congress, agencies are created, and presidential task forces are convened routinely to bring together government and experts to work on an issue. Second, a set legal definition of transgender is useful when writing anti-discrimination and hate crime legislation. By creating a legal category for an accepted definition of transgender, it can be included as a class of its own, and not as a subset of sex/gender or sexual orientation. It also reduces litigation and confusion by defining what is meant by the term. It illustrates well what exactly a definition of transgender can do, and helps to reinforce the argument that a legal definition is needed in the United States.

### 3. European Union

Although the UK is a member of the European Union (“EU”), as a body it has separately considered transgender issues in writing its policies and deciding its cases. In addition to anti-discrimination policies that include transgender as a protected class,<sup>127</sup> the EU passed a policy in 1999 containing a definition of transgender that includes “people ‘intending to undergo, undergoing or having undergone gender reassignment.’”<sup>128</sup> This policy indirectly defines transgender more broadly than do the state policies that effectively narrow the meaning to the equivalent of transsexual by including those who have not undergone sexual reassignment surgery and by using the term “gender reassignment” instead of “sexual reassignment,” an ambiguous and possibly broader term. Another member of the EU, Spain, has a policy similar to the UK’s, which allows “transgender people to change their name and gender on official documents without needing to undergo surgery.”<sup>129</sup> These policies show the United States that more permissive approaches to legal gender change can and do work, and provide a roadmap for how such policies might be crafted and implemented.

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<sup>126</sup> *Id.*

<sup>127</sup> *How EU Law Offers Protection from Sexual Orientation Discrimination*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2009), [http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-protection-law\\_EN.pdf](http://fra.europa.eu/fraWebsite/attachments/Factsheet-homophobia-protection-law_EN.pdf).

<sup>128</sup> *International Laws Protecting Transgender Workers*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/international-laws-protecting-transgender-workers>.

<sup>129</sup> *Id.*

## IV. THE WAY FORWARD FOR THE UNITED STATES

As evidenced by the definitions and policies explored above, there are several ways that the United States federal and state governments could go about remedying the inequities in transgender laws and policies. However, there are two steps that are crucial for this change to take place. This section proposes a way to accomplish these two goals by incorporating some aspects of current policies within the United States, some aspects of current policies outside the United States, and some aspects of the recommendations of various international bodies such as the WPATH. The first of these steps is for Congress, the state legislatures, or perhaps an administrative agency to work with advocacy groups and coalitions of experts to create a legal definition of transgender that is separate from the legal definitions of sex, gender, or sexual orientation. The Scottish model described above provides a good example of how this would work—with experts and government officials convened to work on a specific problem. The second step is to take a similar approach to gender transition as the United Kingdom and pass overarching legislation, or administrative regulation, that allows for a transgender individual to change his or her legal gender with one application procedure that results in not only a change in legal documents, but in status as well. The next several sections will consider these two steps in more detail, propose a definition by combining previously discussed sources, and suggest a way in which the United States might implement both steps.

*A. Determining a Legal Definition for “Transgender”*

The first step that must be taken in moving transgender policy forward is for policy and lawmakers to settle on a single definition of the term “transgender,” rather than by continuing to refer to it as a subsection of other classifications. For example, the most common of those other classifications is sexual orientation,<sup>130</sup> however, transgender is not accurately defined as a subsection of sexual orientation for two main reasons. The first reason is that transgenderism has no direct impact on sexual orientation.<sup>131</sup> Sexual orientation is a concept separate from gender identity, in that a transgender person may be sexually oriented towards either his or her original, biological gender or towards the individual’s new gender.<sup>132</sup> The second is because it further confuses the concepts and the legal framework to be applied. Transgender issues and sexual orientation issues, while similar and traditionally part of the same policy and advocacy movements, are distinct in many

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<sup>130</sup> *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, *supra* note 59 (24 of 122 jurisdictions locate their protections for transgender people under the classification of “sexual orientation” or “affectional preference.”).

<sup>131</sup> *Answers*, *supra* note 24, at 2.

<sup>132</sup> Green, *supra* note 20, at 4 (noting that “transgender persons may be heterosexual, homosexual, bisexual or asexual.”); *see also* GENDER IDENTITY DISORDER, *supra* note 16.

of their goals.<sup>133</sup> Conflating the two concepts leads to further confusion and misapplication of the law.<sup>134</sup>

A legal definition, standing alone, may not accomplish much. However, creating a workable legal definition of transgender will help policymakers in several areas of the law, including but not limited to health law, family law, and property law. To give an example, consider the two cases discussed earlier and the Scottish hate crimes legislation. A recognized legal definition of transgender allows for courts and legislatures to be explicit about the rights afforded to transgender individuals, whether it is the right to sue sought in *Littleton* or the protection against employment discrimination sought in *Barnes*. Without an identifiable group of people who are “transgender” under the law, it is impossible for there to be uniformity in court decisions, executive policy, or legislation.

Creating a legal definition can help to eliminate inconsistency—and encourage recognition—in the law. Moreover, doing so can allow for explicitly transgender inclusive legislation—as evidenced by the Scottish legislation—which inserted transgender as its own protected class and did not rely on the courts to imply transgender as a subset of either sexual orientation or sex.<sup>135</sup> Furthermore, it will help the courts apply the correct level of scrutiny to laws that discriminate on the basis of gender identity.<sup>136</sup> It will allow transgender and sexual orientation to occupy discrete classes and, therefore, allow the courts and the legislatures to designate them as separate protected classes for purposes of anti-discrimination laws.<sup>137</sup> A definition of transgender is necessary for the implementation of any legislation, policy, or decision that relies on a designation of transgender.

In order to do this, Congress, administrative agencies, and state legislatures have several models from which to work. There are two models in particular that seem to be more appropriate than others. The first is the recent passport policy and the second is the Scottish model, both discussed earlier. In producing the new passport policy, the Department of State relied on the WPATH recommendations, which espouse the consensus of international health experts and advocates for the proper treatment of transgender individuals, both medically and legally.<sup>138</sup>

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<sup>133</sup> Interview with Paisley Currah, Richard M. Juang, & Shannon Price Minter, available at <http://www.upress.umn.edu/excerpts/currahqanda.html>.

<sup>134</sup> *Id.* For instance, transgender marriage issues add an extra layer of complication to same-sex marriage issues—because the rights of people with acquired genders are not specifically addressed—and are therefore not adequately addressed by sexual orientation focused policy.

<sup>135</sup> See *Gender Recognition*, *supra* note 111.

<sup>136</sup> See *Transgender Legal Issues*, GAY & LESBIAN ADVOCATES & DEFENDERS 5 (Nov. 2011), <http://www.glad.org/uploads/docs/publications/trans-legal-issues.pdf> (discussing the inadequacies of current definitions and the implications of different definitions of transgender in the law).

<sup>137</sup> See *id.* at 3.

<sup>138</sup> *Mission Statement*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, [http://www.wpath.org/about\\_mission.cfm](http://www.wpath.org/about_mission.cfm) (last visited Jan. 18, 2011).

Other such recommendations exist, including the Yogyakarta Principles<sup>139</sup> and the International Bill of Gender Rights.<sup>140</sup> As for the Scottish model, the Scottish Executive convened a “working group” whose sole purpose was to research transgenderism and produce a definition that could then be used by the legislature.<sup>141</sup> In carrying out its function, the working group conferred with LGBT organizations, rather than with solely with the medical profession, in order to produce a broad, inclusive definition of transgender.<sup>142</sup> Either of these techniques, or a combination of them, would be ideal for finalizing a definition of transgender to be used throughout the country by agencies, courts, and legislatures confronted with the many issues raised by transgenderism.

### *B. A Proposed Legal Definition*

While there are many sources from which Congress, agencies, or courts could extract an entire definition or even useful elements of a definition, three in particular seem especially useful. The first and second of these go together since they have already been combined for the purposes of governmental policy. The first is the passport policy, which will also be discussed as a model for recognition legislation, and the second is the WPATH standards and recommendations. As discussed previously, this new federal policy permits those who have not undergone sexual reassignment surgery to obtain federally issued identification reflecting his or her acquired gender.<sup>143</sup> The WPATH emphasizes that sexual reassignment surgery is not the proper treatment for every individual diagnosed with GID.<sup>144</sup>

From these two sources—one an implemented policy and one an international standard drafted by experts—the United States can derive a definition that embraces transgender citizens who cannot, will not, or should not undergo life-changing surgery. The third source, the DSM, provides a way to limit the definition from being overly broad and sweeping within its ambit people who merely have a few non-conforming gender characteristics.<sup>145</sup> It is also already used by the WPATH in the formulation of its Standards of Care,<sup>146</sup> so it fits naturally with the above two sources. While controversial, including aspects of the DSM definition need not commit the law to the idea that transgender is a psychological disorder, but instead acknowledges that in order for someone to be

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<sup>139</sup> See THE YOGYAKARTA PRINCIPLES, *supra* note 6.

<sup>140</sup> See Phyllis Randolph Frye, Esq., INTERNATIONAL BILL OF GENDER RIGHTS, <http://transgenderlegal.com/ibgr.htm> (last visited Jan. 10, 2012). The International Bill of Gender Rights is a document drafted and adopted by the International Conference on Transgender Law and Employment Policy, Inc. It attempts to “articulate basic human rights for transgendered people.”

<sup>141</sup> *Gender Recognition*, *supra* note 111.

<sup>142</sup> *Id.*

<sup>143</sup> See New Policy on Gender Change, *supra* note 5.

<sup>144</sup> See STANDARDS OF CARE, *supra* note 12.

<sup>145</sup> See *supra* text accompanying note 16 (defining GID).

<sup>146</sup> See WPATH, *supra* note 101.

considered transgender, they must experience a real disconnect between gender and sex, and must have the desire to take steps toward reconciling them.

With all of these resources working together, a new definition would look something like this: “transgender” means a person whose experienced gender is not in accord with his or her biological sex and who wishes to undergo treatment in order to acquire the correct gender or sex. This treatment could include, but is not limited to, sexual reassignment surgery, hormone therapy, or psychological treatment. Possible treatment paths are provided by many resources, including the WPATH recommendations, and likely need room to change as psychology, policy, society, and science all continue to deal with transgender issues.

This definition broadens current implicit definitions by not requiring surgical treatment. At the same time, it is sufficiently narrow to avoid the accidental inclusion of *anyone* who might defy gender norms. This is fundamentally different from the current passport policy because it is an explicit definition of transgender that defines the experience rather than relying on the treatment options to define the experience by inference.

### *C. Passing Transgender Recognition Legislation*

The second step is, perhaps, the most desirable for the transgender community. Under a law similar to the United Kingdom’s Gender Recognition Act,<sup>147</sup> transgender persons would not have to worry about the inconsistencies in the state and federal policies pertaining to identity and identification changes, as all legal identification could be changed with one application process. Nor would the rights a transgender person has be in doubt, as they were in *Littleton*.<sup>148</sup> Such legislation would make it clear that a transgender person’s new gender comes with all of the rights ascribed to that gender—for instance, the ability to marry someone of the opposite gender in all states. It would also make it easier for transgenders to be classified as a protected class under anti-discrimination laws because there would already be a legal apparatus through which the members of the class would be more easily identifiable than they currently are under the conflicting policies and definitions, both legal and non-legal.

Admittedly, this second step relies heavily on the first proposed step. Without a definition of transgender, it would be difficult to pass legislation that standardizes the procedures and requirements for legally changing one’s gender. Nevertheless, the two steps could be combined by containing the definition of transgender within the legislation and fleshing out the details of that definition with the requirements for obtaining new legal documents.

As for what materials should be required for someone to obtain new identification, the best model is already found within the United States. The

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<sup>147</sup> See discussion *supra* Part III.B.1.

<sup>148</sup> *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999).

passport policy, following the recommendations of the WPATH, merely requires that an applicant show that he or she is receiving the proper treatment for his or her unique condition.<sup>149</sup> In terms of the definition of transgender, this is preferable to the majority of state policies requiring proof that the applicant already underwent sexual reassignment surgery because it acknowledges that some transgender persons need not, and should not, undergo surgical treatment and includes them regardless of what treatment *is* proper. Under the proposed definition, these materials could include a doctor's certification that surgery has been performed, as many states require now, or simply the certification that the applicant is consistently seeking alternative methods of treatment such as psychotherapy or hormone therapy.

Also following the example of the UK act, an administrative body could undertake the implementation of this legislation. Licenses and identification papers are already issued by various administrative agencies on both the state and federal levels.<sup>150</sup> As a result of this possibility, there are many options for how this legislation might look. It may simply formalize a definition of transgender and related concepts and give an existing administrative agency the authority to make identification change policies. Alternatively, it could create an agency—or, perhaps more attractively, a new section in an existing agency—whose responsibility it is to create and implement identification change policy. This second option would look very much like the UK's Gender Recognition Panel. There is no way to know which model would work best, but the definition alone is not sufficient.

#### CONCLUSION

The current state of laws and policies pertaining to transgender rights in this country is, at best, inconsistent and, at worst, unjust. As a class lacking both a legal definition and adequate legal awareness, transgenders have no consistent legal identity. If the law is going to begin to provide any kind of protection to this class of citizens, it is going to have to first define the meaning of transgender. Many organizations and written instruments already exist that would make this process a relatively easy one for legislatures, agencies, or even courts. An already promulgated and enforced policy of the United States Department of State provides a platform for this much needed definition by allowing for "transgender" to include more than just transsexuals. The law must also allow transgender individuals to change their legal genders—and in doing so obtain the legal rights attached to their acquired gender—so that their experience and identity are accurately considered in the eyes of the law. Making sure that transgender individuals are considered

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<sup>149</sup> GENDER CHANGE, *supra* note 93, at 1.

<sup>150</sup> See, e.g., *ID Requirements for Airport Checkpoints*, TRANSPORTATION SECURITY ADMIN., [http://www.tsa.gov/travelers/airtravel/acceptable\\_documents.shtm](http://www.tsa.gov/travelers/airtravel/acceptable_documents.shtm) (listing acceptable forms of identification, all of which are issued by a government).

separately from sexual orientation and gender or sex as classes will ensure that the confusion surrounding the concept of transgender and its relation to sexual orientation does not get translated into legal policies and that transgender individuals do not fall through the cracks when it comes to protection based on sex. A definition and a way for transgender citizens to legally declare themselves and be recognized are the only way to do this and guarantee that protections are universal, consistent, and respectful of each citizen's identity. The laws must stop encouraging unnecessary and potentially dangerous procedures by refusing nothing less in name change and gender change applications. Such an overhaul is likely to take time and to meet much resistance. However, the seeds are planted both at home and abroad and the transgender rights movement is only gaining momentum.