Winter 2005

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Recommended Citation

Justin L. Haines, *Fear of the Queer Marriage: The Nexus of Transsexual Marriages and U.S. Immigration Law*, 9 N.Y. City L. Rev. 209 (2005).
Available at: 10.31641/clr090107

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Acknowledgements

Much thanks to Professor Ruthann Robson for her mentorship and inspiration as a lesbian and legal scholar. I thank Belkys García for her keen insight on this issue and for ongoing motivation.

FEAR OF THE QUEER MARRIAGE: THE NEXUS OF TRANSSEXUAL MARRIAGES AND U.S. IMMIGRATION LAW

*Justin L. Haines**

The idea for this Article originated in the fall of 2004, while I was an intern at a not-for-profit legal organization dedicated to bringing equality to queer and trans community members with immigration issues. During my time at the internship, I had several opportunities to observe client intake and follow-up consultations. One couple that sought assistance was comprised of a non-transsexual female immigrant married to a U.S. citizen male-to-female transgender person.¹

During the consultation before the couple's immigration interview, we prepared the U.S. spouse for what was likely to be asked of her. This transgender woman had legally changed her name and lost several jobs as a result of her transition from male to fe-

* The City University of New York School of Law, J.D. May 2005; currently employed at The Legal Aid Society, Civil Division. It is important that readers understand who an author is and is not. I am not transgendered and therefore I apologize in advance for any misunderstanding or mischaracterization of the transgender movement and struggle for recognition that is central to this paper. As a queer, white male, I have been both privileged and the target of discrimination. I write this paper to highlight a small step in the movement towards equality and recognition of queer and trans lives in the law. Much thanks to Professor Ruthann Robson for her mentorship and inspiration as a lesbian and legal scholar. I thank Belkys García for her keen insight on this issue and for ongoing motivation.

¹ In this Article, I will use the terms "transgender" and "transsexual" as synonyms. I use the term "transsexual" because this is the predominant term used in the case law. For a discussion on the definition of the term "transsexual," see, for example, *In re Heilig*, 816 A.2d 68 (Md. 2003), in which a transsexual woman sought a court-ordered name and gender change. I will use the definition used by the *Heilig* court, which cites a medical dictionary defining "transsexual" as "[a] person with the external genitalia and secondary sexual characteristics of one sex, but whose personal identification and psychosocial configuration is that of the opposite sex." *Id.* at 72 n.3 (quoting STEDMAN'S MEDICAL DICTIONARY 186 (27th ed. 2000)). The court also notes that the medical definition of transsexual excludes those who "as a result of hormone therapy and sexual reassignment surgery have brought their genitalia and some secondary sexual characteristics into conformity with their personal identification." *Id.* The *Heilig* court also distinguishes the term "gender dysphoria," describing it as "a condition to be distinguished from transvestism (cross-dressing) and homosexuality (sexual attraction to persons of one's own gender)." *Id.* However, the term "transgender" is generally a broader term referring to people whose gender identity or expression does not conform to those associated with their birth-sex. The transgender rights movement seeks to achieve recognition of a person's self-determined gender identity, as the plaintiff in *Heilig* asserted.

male. Losing income becomes a major obstacle in sponsoring a spouse as a permanent resident because the applicant must demonstrate that he or she can support the alien² spouse and that the alien will not be a public charge or a drain on the resources of this country.³

Aware of the complications that could ensue during the immigration interview if the U.S. citizen-spouse disclosed that she was transgender, we were tempted to tell her that she would be more successful if she wore men's clothes and acted like a man because her identity documentation, with the exception of her name, indicated her sex as male. To ask her to "act like a man," however, might have required her to betray one of the most fundamental and significant elements of her person, even though the stakes were incredibly high for the continuation of her relationship.

This example highlights several of the issues co-existing in the intersection of U.S. immigration policy, the transgender community's struggle for equality and recognition, and the fear of homosexual marriage in the United States. This Article inquires into current recognition of transgender marriage in the immigration context. When this Article was originally written, only two unpublished cases, the first two highlighted in this Article, existed on the subject. Finally, in May 2005, a third case was published.⁴ It can be cited for the proposition that transsexual marriage, if valid in the state in which it was performed, is not homosexual marriage, is not subject to the Defense of Marriage Act of 1996 (DOMA),⁵ and is valid for federal immigration purposes. This development in the

² In this Article, I use the term "alien" because it is the predominate term used in the Immigration and Naturalization Act (INA) and associated case law. *See, e.g.*, INA § 101(a)(3), 8 U.S.C. § 1101(a)(3). The term "alien" is a broad classification of both immigrants and non-immigrant visitors to the United States. I acknowledge that the term is potentially offensive to those immigrants as it connotes "otherness," unauthorized to reside within our borders.

³ INA § 213A, 8 U.S.C. § 1183A (2000). In order to prove that an immigrant is not excludable as a "public charge" under INA § 212(a)(4), the sponsor must sign an affidavit of support that contractually binds the sponsor to provide the alien with adequate income (125% of the federal poverty line) during the sponsorship period until naturalization or until the immigrant has worked forty qualifying quarters, as defined under the Social Security Act. The contract that is formed is enforceable by the sponsored immigrant, any state, or the federal government.

⁴ *In re* Jose Mauricio Lovo-Lara, 23 I. & N. Dec. 746 (B.I.A. 2005).

⁵ 28 U.S.C. § 1738C. Section Seven of DOMA defines "marriage" and "spouse" for federal purposes: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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." Defense of Marriage Act

law is a significant starting point for the recognition of transgender marriage, especially in the face of a recent change in the Department of Homeland Security's (DHS)⁶ immigration policy.⁷ This change specifically targets transgender people and is rooted in a fear of gay marriage.

At the heart of the struggle for transgender equality is the tension between the transgender person's quest for recognition for his or her subjective sense of gender identity and society's demand for objective proof of gender identity. The transgender movement promotes a new understanding that physical/biological sex⁸ can be distinct from gender identity⁹ and sexual orientation. The complexity of the interaction between biological sex, gender, and sexual orientation does not easily lend itself to the bureaucracy of U.S. immigration law.

If America lived up to true ideals of freedom and equality, all relationships—regardless of sex, gender, and sexual orientation—would be recognized by both state and federal governments. However, the fear of queer marriage is alive and well in America, dating back to 1971,¹⁰ codified in the DOMA,¹¹ and resurfacing in the November 2, 2004 election when eleven states banned gay marriage by constitutional amendment.¹²

(DOMA), Pub. L. 104-199, 110 Stat. 2419. See also Part I *infra* for a more detailed discussion of DOMA.

⁶ Whereas U.S. immigration services were formerly conducted by the Immigration and Naturalization Service (INS), after September 11th the U.S. government created the Department of Homeland Security (DHS), which took over immigration under its U.S. Citizenship and Immigration Services (USCIS) branch. See generally Homeland Security Act of 2002, 6 U.S.C. § 101 (2002).

⁷ Interoffice Memorandum from William Yates, Assoc. Dir. for Operations, U.S. Citizenship and Immigration Serv., Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals HQOPRD 70/6 (April 16, 2004), available at <http://www.immigration.com/newsletter1/pettranssexual.pdf> [hereinafter Yates].

⁸ Physical/biological sex considers a person's hormones and primary and secondary sexual organs.

⁹ Gender identity includes both the subject's sense of his or her gender identity and his or her outward portrayal of socially cognizable gender codes. For more information, see Gender Education and Advocacy, <http://www.gender.org>, and Gender Public Advocacy Coalition, <http://www.gpac.org>.

¹⁰ *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972). The Supreme Court dismissed the appeal challenging a Minnesota law that authorized heterosexual but not homosexual marriages for want of a substantial federal question.

¹¹ 28 U.S.C. § 1738C.

¹² Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, Ohio, Oklahoma, North Dakota, and Utah passed constitutional amendments restricting marriage to a man and woman in that election. Subsequently, Oregon passed a similar amend-

Although transgender marriage is not necessarily homosexual marriage, the two are often collapsed, especially when the original birth-sex of the transgender spouse is the same as the sex of the non-transgender spouse. However, this conception of transgender marriage is limited. There are many more possible marriages involving transgender people with different legal implications. The courts have considered factors including Partner A's sex at birth, Partner B's sex at birth, whether one or both partners have had genital reassignment surgery, and whether one or both partners' sexual reassignment precedes or follows the marriage. For example:

1. Partner A is female at birth. Partner B is female at birth. Partner A transitions¹³ to male prior to the marriage. This may be a heterosexual marriage if sexual reassignment is recognized but will be deemed a homosexual marriage if it is not.
2. Partner A is female at birth. Partner B is male at birth. Partner A transitions to male prior to the marriage. This will be a homosexual marriage if sexual reassignment is recognized and a heterosexual marriage if it is not.
3. Partner A is female at birth. Partner B is male at birth. Both Partner A and B have sexual reassignment. The marriage remains heterosexual before and after sexual reassignment.
4. Partner A is female at birth. Partner B is male at birth. Partner A has sexual reassignment to male after a valid marriage was performed. The marriage was heterosexual but becomes homosexual if sexual reassignment is recognized.¹⁴

As this Article will illustrate, transsexual marriage is not well-understood, and its validity or judicial recognition often depends heavily on objective documentary evidence that demonstrates an actual sexual reassignment through genital surgery. Courts' obsession with objective evidence certified by doctors and the medical

ment. See Editorial, *Bigotry in Ballots Gay Marriage Is Repudiated; So Is Fairness*, PITTSBURGH POST GAZETTE, Nov. 6, 2004, at A16.

¹³ Here, the word "transition" is used narrowly to describe the result of post-sexual reassignment surgery. The term "transition" can be used broadly to include the alteration of gender presentation, not just physical alteration of primary and secondary sexual organs. I do not seek to reify sexual reassignment surgery as the only mode of transitioning, nor as the primary goal for many transgender people. Sexual reassignment surgery is at times a complicated medical procedure, especially for female-to-male transgender persons. However, courts have placed a heavy emphasis on sexual functionality and the completion of sexual reassignment surgery before recognizing the transition.

¹⁴ These are not the only possibilities of transgender couplings, but they are the only marriages that could potentially be recognized by states other than Massachusetts and Vermont, which recognize homosexual unions. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

model disregards the transgender person's gender identity. Furthermore, the legal system reinforces the gender binary. In order to recognize the marriage, courts must struggle to fit the transgender person into a rigid gender paradigm. This Article explores recent DHS policy and three Board of Immigration Appeals (BIA)¹⁵ decisions to illuminate the relevant policy considerations at the nexus of immigration law and the recognition of transsexual marriage.

Part I of this Article will explore marriage-based immigration and the federal government's refusal to recognize same-sex marriage in both the federal and immigration context. Part II will discuss common themes in the history of judicial recognition or lack of recognition of transsexual marriages, especially as they relate to statutory interpretation, documentary evidence, and the Full Faith and Credit Clause of the U.S. Constitution.¹⁶ Part III will examine the newly announced policy directive from DHS,¹⁷ which essentially bans transsexual marriage-based immigration. Part IV will look at two recent unpublished cases¹⁸ and the first published case from the BIA,¹⁹ all which adjudicate petitions for spousal relatives filed by or on behalf of transsexuals. These cases are the first written decisions interpreting Section 201(b) of the Immigration and Nationality Act (INA) as it relates to the validity of transsexual marriages for immigration purposes. Part V will analyze transsexual marriage immigration cases in the context of the transsexual marriage doctrine. Part VI considers the current Citizenship and Immigration Services (CIS) policy and an Equal Protection challenge under rational basis review to invalidate the new CIS policy on transsexual marriages.

I. FEDERAL LAW: MARRIAGE-BASED IMMIGRATION

Under U.S. immigration laws, there are several types of immigration, including humanitarian (asylum),²⁰ employment-based,²¹

¹⁵ The BIA is an appellate review board of the U.S. Department of Justice, Executive Office for Immigration Review. Decisions by the BIA can be appealed to certain federal courts. BOARD OF IMMIGRATION APPEALS, PRACTICE MANUAL (2004), available at <http://www.usdoj.gov/eoir/bia/qapracmanual/pracmanual/tocfull.pdf>.

¹⁶ U.S. CONST. art. IV, § 1.

¹⁷ Yates, *supra* note 7.

¹⁸ *In re* Ady Oren, No. A79 761 848, 2004 WL 1167318 (B.I.A. Jan. 21, 2004); *In re* Esperanza Martinez Widener, No. A95 347 685, 2004 WL 2375065 (B.I.A. Sept. 21, 2004).

¹⁹ *In re* Lovo-Lara, 23 I. & N. Dec. at 746.

²⁰ Refugee Relief Act of 1953, 67 Stat. 400; *see also* INA § 208(a), 8 U.S.C. § 1158(a) (2000).

family-based,²² and the diversity lottery system.²³ Of the various forms of immigration, immediate-family immigration holds a privileged position.²⁴ In fact, the benefits flowing from a marriage relationship are so central to the immigration schema that there are approximately 100 textual references to spouses, husbands, wives, and marriage.²⁵

Under immigration law, a U.S. citizen has the ability to petition for an “immediate relative” immigrant visa. “Immediate relative” is defined as child, parent, or spouse.²⁶ The terms “spouse,” “husband,” and “wife” are not defined within the INA, except to state that these terms do not include spouse, wife, or husband “by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.”²⁷ The courts

²¹ INA § 203(b), 8 U.S.C. § 1153(b) (2000).

²² INA § 203(a), 8 U.S.C. § 1153(a).

²³ INA § 203(c), 8 U.S.C. § 1153(c).

²⁴ Though INA § 201 establishes numerical limits on many forms of immigration, § 201(b)(2)(A)(i) removes them for immediate relatives—children, spouses, and parents of U.S. citizens who are at least twenty-one years old 8 U.S.C. § 1151(b)(2)(A)(i) (2000). Additionally, exceptions to excluding immigrants, such as the § 212(g)(1) waivers for active tuberculosis infection, cite family unity or reunification as justifications. See H.R. REP. NO. 87-1086 (1961), as reprinted in 1961 U.S.C.C.A.N. 2950.

²⁵ The Permanent Partner Immigration Act of 2003 (PPIA) has sought to extend the benefits married U.S. citizens enjoy to gay, bisexual, lesbian, and transgender U.S. citizens by adding the phrase “or permanent partner (ship)” after any reference to marriage, spouse, husband, or wife. H.R. 832, 108th Cong. 1st Session (2003). The bill was initially introduced in 2000 as the Permanent Partners Immigration Act of 2000, H.R. 3650, 106th Cong. (2000). PPIA 2000 was referred to the House Committee on the Judiciary. Four days later, it went to the Subcommittee on Immigration and Claims but never left committee. PPIA 2003 is suffering a similar fate as it was referred to the House Committee on the Judiciary on February 13, 2003 and then to the Subcommittee on Immigration, Border Security, and Claims on March 6, 2003. The bill’s official stated purpose was “[t]o amend the Immigration and Nationality Act to provide a mechanism for United States citizens and lawful permanent residents to sponsor their permanent partners for residence in the United States, and for other purposes.” *Id.*

²⁶ See INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i); INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i) (1999). The INA § 204 reads:

Procedure for granting immigrant status . . . (a) Petitioning procedure (1)(A)(i) Any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) [8 U.S.C.A. § 1153(a)] or to an immediate relative status under section 201(b)(2)(A)(i) [8 U.S.C.A. § 1151(b)(2)(A)(i)] may file a petition with the Attorney General for such classification.

²⁷ INA § 101(a)(35), 8 U.S.C. § 1101(A)(35). See *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982) (holding that a male Australian citizen in the United States was not the spouse of a U.S. citizen within the meaning of the INA even though a

defined these words in hetero-normative terms in 1982,²⁸ and Congress later codified these definitions in legislation outside of the INA with DOMA in 1996.²⁹

Marriage provides one of the relatively few ways to immigrate to the United States. Marriage is widely available, since anyone of a mature age can enter into a heterosexual marriage. Other forms of immigration require blood relations,³⁰ exceptional abilities or skills,³¹ or persecution in the applicant's home country.³² In order to petition for an immediate relative or spouse to obtain legal permanent resident status under the INA,³³ a U.S. citizen files a petition on Form I-130 to DHS along with supporting documentation and a check or money order for \$75.³⁴ In fact, the ease with which

county clerk issued them a marriage license); *In re Ady Oren*, No. A79 761 848, 2004 WL 1167318, at *3 (B.I.A. Jan. 21, 2004).

²⁸ *Adams*, 673 F.2d at 1040 (finding that "[n]othing in the Act, the 1965 amendments or the legislative history suggests that the reference to 'spouse' in section 201(b) was intended to include a person of the same sex as the citizen in question The term 'marriage' ordinarily contemplates a relationship between a man and a woman The term 'spouse' commonly refers to one of the parties in a marital relationship so defined.") (citations omitted).

²⁹ 28 U.S.C. § 1738C.

³⁰ INA §§ 203(a)(1)-203(a)(3), 8 U.S.C. §§ 1153(a)(1)-1153(a)(2)(A). The unmarried sons and daughters of U.S. citizens, the unmarried sons and daughters of permanent resident aliens, and the married sons and daughters of citizens are able to qualify for immigrant visas.

³¹ INA § 203(b), 8 U.S.C. § 1153(b). This section allows immigration for aliens with exceptional abilities and for outstanding professors and researchers.

³² INA § 207, 8 U.S.C. § 1157. *See also* INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

The term "refugee" means: (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 207, 8 U.S.C. § 1157.

³³ INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i)

³⁴ NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, *IMMIGRATION LAW AND DEFENSE* § 4:40 (3d ed. 2004) [hereinafter *IMMIGRATION LAW AND DEFENSE*]. Additional supporting documentation includes (1) a certified copy of the record of the marriage; (2) proof of termination of any prior marriages of either party by certified copies of divorce or annulment decrees or death certificates of prior spouse; (3) proof of U.S. citizenship of the petitioning spouse by birth certificate, passport, or

immigration benefits could be garnered through marriage led to the Immigration Marriage Fraud Amendments of 1986 (IMFA), which limits fraudulent marriages and instills an institutional skepticism.³⁵

A. *Challenging Immigration Policy*

Congress has been described as possessing almost plenary power over immigration, allowing for only the most limited judicial review of immigration policy decisions.³⁶ The U.S. Supreme Court has also recognized that, in exercising its broad discretion over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens."³⁷ Arguments by U.S. citizens and their alien spouses against immigration restrictions using the rationale that marriage is a fundamental right have been unsuccessful,³⁸ despite the fact that the Supreme Court has declared marriage to be a fundamental right on several occasions.³⁹ In the immigration

naturalization certificate; (4) biographic forms G-325A for both petitioner and beneficiary; and (5) one "ADIT" type photo of the petitioner and of the beneficiary. *Id.*

³⁵ Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537. The Immigration Marriage Fraud Amendments of 1986 brought about significant changes to the way in which fiancé(e) and marriage-based immigration occurred in an attempt to ferret out fraudulent marriages. The surveys conducted by the INS, cited in the legislative history, "revealed that approximately 30% of all petitions for immigrant visas involve suspect marital relationships." H.R. REP. NO. 99-906, at 6 (1986), as reprinted in 1986 U.S.C.C.A.N. 5978, 5978. After the amendments, legal permanent resident status is granted conditionally for two years after filing the petition, and the couple must petition to have the condition removed. The couple must satisfy four elements to prove their marriage was *bona fide*: (1) the marriage was entered into in accordance with the laws of the jurisdiction where the marriage took place; (2) the marriage has not been judicially annulled or terminated; (3) no fee or other consideration was given for filing the visa petition; and (4) the parties to the marriage have maintained a *bona fide* marital relationship. Aliens in deportation proceedings cannot use marriage to stop the deportation. Those found to have perpetrated a fraudulent marriage are subject to a \$250,000 fine and five years in prison. *Id.* at 7-8.

³⁶ *Adams*, 673 F.2d at 1041. See also *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))). The cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Id.* at 792 (quoting *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953)).

³⁷ *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

³⁸ See *Anetekhai v. INS*, 876 F.2d 1218 (5th Cir. 1989).

³⁹ The Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374,

context, the Supreme Court has held that the rights of the alien spouse, not the rights of the U.S. citizen, are at issue. Furthermore, the citizen-spouse does not have a fundamental right to have his or her alien spouse remain in the United States.⁴⁰

Federal courts have held that even marriages valid under state law can be disregarded for immigration purposes if the congressional intent of the immigration law demonstrates that the marriage was not meant to be included.⁴¹ The analysis for determining the validity of a marriage for immigration purposes is two-fold: The court must determine, first, whether the marriage is valid under state law and, second, whether the state-approved marriage qualifies under the INA.⁴² Essentially, this analysis is checking whether the marriage conforms to public policy considerations on both state and federal levels.

Congress has written some limits into the INA as to what will be an acceptable marriage for immigration purposes. For example, as the court in *Adams v. Howerton*⁴³ points out, INA § 201(a)(35)⁴⁴ represents Congress's intent to deny recognition of a marriage for immigration purposes, even if it was valid under state law.⁴⁵ However, sometimes a marriage may offend federal immigration policy based upon considerations outside those expressly written in the INA. *Adams*, a case in which the petitioner was trying to have his same-sex partnership recognized for immigration purposes, affirmed that INS has the power to exclude that type of marriage. The *Adams* court highlighted that marriages recognized under state law can be invalid for immigration purposes if the purported spouses do not plan to live together as husband and wife.⁴⁶ Additionally, marriages recognized by state or foreign law have

384 (1978). The court has also stated “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

⁴⁰ *Anetekhai*, 876 F.2d at 1222 (holding a two-year nonresidency requirement for aliens who marry U.S. citizens while subject to deportation proceedings to be constitutional). See also *Burrafato v. United States Dep’t of State*, 523 F.2d 554, 555 (2d Cir. 1975).

⁴¹ *Adams*, 673 F.2d at 1039-40.

⁴² *Id.* at 1038.

⁴³ *Id.* at 1036.

⁴⁴ INA § 201(a)(35), 8 U.S.C. § 1101(a)(35). “[T]he term ‘spouse’ does not include a spouse, wife, or husband by reason of any marriage ceremony where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.” *Id.*

⁴⁵ *Adams*, 673 F.2d at 1039-40.

⁴⁶ *Id.* at 1040 (citing *Garcia-Jaramillio v. INS*, 604 F.2d 1236 (9th Cir. 1979); *Volianitis v. INS*, 352 F.2d 766 (9th Cir. 1965)).

been considered invalid for immigration purposes if they are polygamous—thus offending federal and state public policy⁴⁷—or incestuous, violating state public policy.⁴⁸ Although marriage has traditionally been considered the exclusive jurisdiction of state law, it must clear another hurdle to be recognized by federal law for immigration purposes.

B. The Defense of Marriage Act

One of the clearest indicia of federal public policy as it relates to the recognition of marriages for federal purposes is DOMA,⁴⁹ enacted in response to the possibility of homosexual marriage in the State of Hawaii.⁵⁰ Through DOMA, Congress sought to control the federal courts' application of the U.S. Constitution's Full Faith and Credit Clause,⁵¹ anticipating a lawsuit where one state permitted same-sex marriage and other states had to determine if they would honor that marriage.⁵²

The legislative history of DOMA is filled with open contempt and disdain for the gay community, gay legal organizations, and

⁴⁷ See *Matter of H-*, 9 I. & N. Dec. 640 (B.I.A. 1962) (holding that the polygamous marriage of beneficiary and petitioner, which was valid in Jordan where performed, cannot be recognized as a valid marriage for immigration purposes); see also *Matter of Darwish*, 14 I. & N. Dec. 307 (B.I.A. 1973) (holding that marriage under Dominican Republic law is not dissolved unless an Official of the Civil Registry declaration is issued, and that, therefore, petitioner's previous marriage was not dissolved, making the second marriage polygamous).

⁴⁸ *Matter of Zappia*, 12 I. & N. Dec. 439 (B.I.A. 1967) (holding that when first-cousin Wisconsinites married in South Carolina solely to avoid Wisconsin's ban on incestuous marriage, the foreign citizen did not obtain relative status).

⁴⁹ 28 U.S.C. § 1738C. The legislative history reveals two purposes for the passage of the legislation: first was to "defend the institution of traditional heterosexual marriage;" second was to "protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses." H.R. REP. NO. 104-664, at 2 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

⁵⁰ H.R. REP. NO. 104-664, at 2 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2908 (referring to *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the House Report states, "[t]he prospect of permitting homosexual couples to 'marry' in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.").

⁵¹ U.S. CONST. art. IV, § 1.

⁵² See H.R. REP. NO. 104-664, at 2 ("[I]f Hawaii (or some other State) recognizes same-sex 'marriages,' other States that do not permit homosexuals to marry would be confronted with the complicated issue whether they are nonetheless obligated under the Full Faith and Credit Clause of the U.S. Constitution to give binding legal effect to such unions [DOMA] anticipates these complicated questions by laying down clear rules to guide their resolution.").

the queer quest for equality.⁵³ Congress' perspective that "traditional marriage" had been under imminent attack and the significant protection of the Full Faith and Credit Clause left other states and the federal government vulnerable to having to recognize gay marriage.⁵⁴ Congress feared that chaos would ensue.⁵⁵ Sister-state recognition of marriages usually follows the general rule of *lex celebrationis*: A marriage is valid if it is valid according to the law of the state where it was celebrated.⁵⁶ A choice of law question emerged from the Hawaii situation: Which law governs—Hawaii's, as represented by the "marriage" license, or the law of the forum state, which does not recognize same-sex marriage? Essentially, *Baehr v. Lewin*⁵⁷ raised the question of which state's public policy must be followed.⁵⁸

⁵³ See, e.g., *id.* at 4. "The legal assault against traditional heterosexual marriage law achieved its greatest breakthrough in the State of Hawaii in 1993." *Id.*

⁵⁴ See *id.* at 7. "H.R. 3936 is inspired . . . by the implications that the [*Baehr*] lawsuit threatens to have on the other States and on federal law Simply stated, the gay rights organizations and lawyers driving the Hawaiian lawsuit have made plain that they consider Hawaii to be only the first step in a national effort to win by judicial fiat the right to same-sex 'marriage.' And the primary mechanism for nationalizing their breakthrough in Hawaii will be the Full Faith and Credit Clause of the U.S. Constitution." *Id.* Quoting the Lambda Legal Defense and Education Fund memorandum, the report states, "[m]any same-sex couples in and out of Hawaii are likely to take advantage of what would be a landmark victory. The great majority of those who travel to Hawaii to marry will return to their homes in the rest of the country expecting full legal recognition of their unions." *Id.* at 6-7. The report goes on to add that "[r]ecognition of same-sex 'marriages' in Hawaii could also have profound implications for federal law as well. The word 'marriage' appears in more than 800 sections of federal statutes and regulations, and the word 'spouse' appears more than 3,100 times. With very limited exceptions, these terms are not defined in federal law." *Id.* at 10.

⁵⁵ See *id.* at 7 n.21.

First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to male-female unions. Upholding traditional morality, encouraging procreation in the context of families, encouraging hetero-sexuality—these and other important legitimate governmental purposes would be undermined by forcing another State to recognize same-sex unions. Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of government marital benefits.

Id.

⁵⁶ *Id.* at 8.

⁵⁷ 852 P.2d 44 (Haw. 1993).

⁵⁸ This question is answered in part by looking at the Restatement (Second) of Conflicts of Law, which states that a marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state having the most significant relationship to the spouse and the marriage at the time of the marriage. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 283(2) (1971).

The most significant constitutional question of DOMA remains whether it violates the Full Faith and Credit Clause of the U.S. Constitution.⁵⁹ DOMA's passage was not without opposition.⁶⁰ However, the second sentence of the Full Faith and Credit Clause states that "Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."⁶¹ Congress interpreted that specific clause as granting the power to draft DOMA.⁶² Further supporting its belief, Supreme Court precedent carved out a public policy exception to the Full Faith and Credit Clause.⁶³ Additionally, many state legislators' fear of gay marriage led them to pass "mini-DOMAs," thus closing their own public policy loopholes and circumventing any left open by DOMA.⁶⁴

Ultimately, legislative history reveals that DOMA was a product of reactionary politics and intimately tied to the fear of homosexual marriages, a political inferno ignited by the Hawaii state decision. Significantly, there is no mention of transsexual marriages in the legislative history of DOMA.⁶⁵ The omission of transsexuality in any congressional discussions regarding the passage of DOMA becomes significant for immigration purposes.⁶⁶

The Full Faith and Credit Clause is not only a central issue to

⁵⁹ U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

⁶⁰ 144 CONG. REC. S5931 (daily ed. June 6, 1996) (statement of Senator Edward Kennedy and letter from Professor Laurence H. Tribe, arguing DOMA is possibly violative of the Due Process Clause of both the Fifth Amendment and the Tenth Amendment, and that the second sentence of the Full Faith and Credit Clause does not give Congress authority to decree that if the official acts as mentioned in the Clause offend a Congressional majority, then they be given no effect whatsoever by any state that shares Congress's substantive view); 144 CONG. REC. S10076 (daily ed. Sept. 9, 1996) (testimony by Rabbi David Saperstein, arguing that DOMA dilutes state's rights in the name of state's rights).

⁶¹ U.S. CONST. art. IV, § 1.

⁶² H.R. REP. NO. 104-664, at 23-24 (1996), as reprinted in 1996 U.S.C.C.A.N. 2905, 2929-30.

⁶³ *Id.* at 9 (citing *Nevada v. Hall*, 440 U.S. 410, 424 (1979); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935)).

⁶⁴ At the time of DOMA's enactment, the states that had passed anti-gay marriage public laws were Alaska, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah. *Id.* at 10 n.31.

⁶⁵ See *In re Widener*, No. A95 347 685, 2004 WL 2375065, at *3; *In re Lovo-Lara*, 23 I. & N. Dec. at 750-51 (B.I.A. 2005) (order sustaining petitioner's appeal and approving her visa petition).

⁶⁶ See discussion *infra* Part III.

the DOMA debate, but it also remains central to the debate over whether transsexuals can marry on the state level. Whether a state will recognize sister states' documents is significant to transsexuals because, as explored in the next section, recognition of other state's records, like birth certificates and judicial orders recognizing sex changes and name changes, is central to the judicial treatment of transsexual marriages.

II. JUDICIAL RECOGNITION OF TRANSGENDER MARRIAGE

Since 1971, a limited number of courts have considered transsexual marriages. These courts have addressed whether a marriage is valid once the transsexual spouse has had a sex change;⁶⁷ additionally, the validity of the transsexual's modified birth certificate has been central to each courts' analysis.⁶⁸ Presumably, there are many more valid transsexual marriages in the United States than the small number of cases exposes. The limited number of cases reported, however, reveal how transsexuality has become a reason to deny transsexuals their basic rights and remedies under the law. Courts have declared transsexual marriages void as same-sex marriages,⁶⁹ and this premise has been used as a defense against a court-ordered distribution of marital assets⁷⁰ and other judicial remedies available to spouses.⁷¹ In other cases, transsexuals have attempted to vindicate their right to marry when a license has been denied due to documentary evidence revealing a

⁶⁷ See, e.g., *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004); *In re Marriage License for Nash*, No. 2002-T-0149, 2003 WL 23097095 (Ohio App. 11 Dist. 2003); *In re Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999); *In re Ladrach*, 32 Ohio Misc. 2d 6 (Prob. Ct. 1987); *Phillips v. Plotkin*, 12 Pa. D. & C.3d 54 (Ct. Com. Pl. 1979); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); *Anonymous v. Anonymous*, 67 Misc. 2d 982 (N.Y. Sup. Ct. 1971).

⁶⁸ See, e.g., *In re Taylor*, No. 03CA1753, 2003 WL 22382512 (D.C. Super. Ct. 2003); *In re Heilig*, 816 A.2d 68; *K. v. Health Div.*, 560 P.2d 1070 (Or. 1977); *In re Anonymous*, 57 Misc. 2d 813 (N.Y. Civ. Ct. 1968); *Anonymous v. Weiner*, 50 Misc. 2d 380 (N.Y. Sup. Ct. 1966).

⁶⁹ *Anonymous*, 67 Misc. 2d at 984 (granting declarative judgment that marriage to male-to-female (MTF) transsexual was void).

⁷⁰ *M.T.*, 355 A.2d at 205 (husband seeking to deny support and maintenance uses the defense that marriage was void because wife was MTF transsexual); *In re Gardiner*, 42 P.3d at 120 (suing in probate court to deny MTF transsexual surviving wife as inheritor of intestate estate).

⁷¹ See *Littleton*, 9 S.W.3d at 223 (doctor attempting to evade wrongful death claim by using defense that transsexual marriage was void and surviving MTF transsexual wife cannot be a beneficiary of statute); *Kantaras*, 844 So. 2d at 156 (former wife seeking declarative relief claiming marriage was void to deny female-to-male (FTM) transsexual father custody of children).

sex reassignment.⁷²

In these transsexual marriage cases, the issue is often framed as whether a post-operative transsexual can marry someone with the same birth-sex as the transsexual.⁷³ The majority of jurisdictions has answered that question by reading statutory silence as requiring the conclusion that sex is fixed at birth, which has resulted in a denial of marriages involving transsexuals as same-sex marriages.⁷⁴ One court held that sex can be surgically altered, and a person can be recognized as the new sex.⁷⁵ Other courts have essentially held that transsexuals are neither male nor female.⁷⁶ No judicial opinions appear to have considered the issue of whether a transsexual born the opposite sex of his or her partner, who then transitions anatomically to the same-sex as his or her partner, can marry under state law.

Although transsexual cases have taken place over thirty-eight years and emerge out of myriad factual scenarios in various jurisdictions, courts have been consistent in the structure of their analyses as well as the factors or considerations at play in deciding whether a transsexual marriage will be valid. Most transsexual cases contain the following: a definition of transsexualism;⁷⁷ testimony about the transsexual's self-reported gender identity;⁷⁸ medical testimony from doctors, psychologists, and plastic surgeons;⁷⁹ documentary evidence such as birth certificates;⁸⁰ judicial orders authorizing legal name changes or sex changes; marriage certifi-

⁷² *In re Ladrach*, 32 Ohio Misc. 2d at 6 (MTF transsexual sought declaratory judgment to issue a marriage license); *In re Nash*, 2003 WL 23097095 at *8 (MTF transsexual was denied marriage license after marriage license application failed to disclose prior marriage).

⁷³ *In re Ladrach*, 32 Ohio Misc. 2d at 6.

⁷⁴ *Id.* at 9; *In re Gardiner*, 42 P.3d at 136; *Littleton*, 9 S.W.3d at 230; *In re Nash*, 2003 WL 23097095 at *6; *Kantaras*, 844 So. 2d at 161.

⁷⁵ *M.T.*, 335 A.2d at 211.

⁷⁶ *In re Gardiner*, 42 P.3d 120, 135 ("The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria.").

⁷⁷ *See, e.g., In re Gardiner*, 42 P.3d at 121-24; *Littleton*, 9 S.W.3d at 224; *M.T.*, 335 A.2d at 205.

⁷⁸ *See, e.g., In re Gardiner*, 42 P.3d at 124; *Littleton*, 9 S.W.3d at 224; *M.T.*, 335 A.2d at 205-06.

⁷⁹ *See, e.g., In re Gardiner*, 42 P.3d at 122-23; *Littleton*, 9 S.W.3d at 224-25; *M.T.*, 335 A.2d at 205-07.

⁸⁰ *See, e.g., In re Gardiner*, 42 P.3d at 123; *Littleton*, 9 S.W.3d at 226; *M.T.*, 335 A.2d at 205.

cates;⁸¹ a description of the transsexual's post-surgical genitals or anatomy;⁸² testimony on whether the non-transsexual spouse knew of the other spouse's transsexuality;⁸³ and the functionality of the new genitals or ability to consummate the marriage.⁸⁴ The courts' opinions also contain analyses of the statutory text from both the document-issuing state and the forum state regarding marriages, name changes, and ability to amend birth certificates.⁸⁵ All the courts also go through the history of transsexual cases, one by one, chronologically.⁸⁶

Despite how intimately transsexuality is tied to a medical diagnosis, as well as hormonal and surgical procedures, medical evidence is often given little weight in courts' decision-making processes when they defer to public policy. Of greater importance is deference to the legislature and statutory interpretation, especially for the more recent cases after the passage of DOMA,⁸⁷ although legislative deference predates DOMA in at least one case.⁸⁸ The courts focus on the statute governing birth certificate amendments from both the forum and document-issuing state: Specifically, whether the statute is corrective—fixing errors made at the time of birth—and whether it addresses post-sexual-reassignment-surgery amendments of sex and name on the birth certificate.⁸⁹ If the forum state only has a corrective birth certificate statute, the court will determine, on state public policy grounds, that sex is fixed at birth and sexual reassignment cannot be legally recognized for marital purposes.⁹⁰

Courts that find sex can be reassigned treat the transsexual's

⁸¹ See, e.g., *In re Gardiner*, 42 P.3d at 123; *Littleton*, 9 S.W.3d at 226; *M.T.*, 335 A.2d at 205.

⁸² See, e.g., *In re Gardiner*, 42 P.3d at 124; *Littleton*, 9 S.W.3d at 224; *M.T.*, 335 A.2d at 205-06.

⁸³ See, e.g., *In re Gardiner*, 42 P.3d at 122; *Littleton*, 9 S.W.3d at 225; *M.T.*, 335 A.2d at 205 (defendant husband actually paid for the sexual reassignment surgery).

⁸⁴ See, e.g., *In re Gardiner*, 42 P.3d 120; *Littleton*, 9 S.W.3d at 225; *M.T.*, 335 A.2d at 210-11.

⁸⁵ *In re Ladrach*, 32 Ohio Misc. 2d at 6 (Prob. Ct. 1987); *Littleton*, 9 S.W.3d at 225; *In re Gardiner*, 42 P.3d at 124-32; *Kantaras*, 884 So. 2d 155, 156; *In re Nash*, 2003 WL 23097095 at *4.

⁸⁶ *M.T.*, 335 A.2d at 208-10; *In re Ladrach*, 32 Ohio Misc.2d at 9-10; *Littleton*, 9 S.W.3d at 226-29; *In re Gardiner*, 42 P.3d at 124-32; *In re Nash*, 2003 WL 23097095 at *5-9; *Kantaras*, 884 So. 2d at 158-61.

⁸⁷ *In re Gardiner*, 42 P.3d at 135; *Littleton*, 9 S.W.3d at 230; *In re Nash*, 2003 WL 23097095 at *6; *Kantaras*, 884 So.2d at 161.

⁸⁸ *In re Ladrach*, 32 Ohio Misc.2d at 9.

⁸⁹ *Id.* at 8-9.

⁹⁰ *Id.* at 10.

gender as a matter of fact,⁹¹ whereas courts that fix sex forever at birth treat gender as a matter of law.⁹² Courts that treat sex determination as a matter of law, therefore, give little weight to documentary evidence and testimony from the transsexual and medical experts.⁹³ Because such cases are often of first impression, courts avoid granting homosexual marriage by allowing the legislature to resolve statutory silence.⁹⁴

III. CURRENT CIS POLICIES ON SAME-SEX AND TRANSGENDER MARRIAGE

Transsexuals exist in both a legal and metaphysical nether-space: They have been constructed as neither heterosexual nor homosexual.⁹⁵ In their transitions from one sex to another, transsexuals are often caught between sexes.⁹⁶ Legally, they have been granted some rights to reflect their transition, but other rights and benefits have been withheld unfairly, furthering their disenfranchisement.⁹⁷ The newly-articulated federal immigration policy yet again places transsexuals in this legal limbo.⁹⁸

On April 16, 2004, William R. Yates, the Associate Director of Operations for CIS—a division of DHS—issued an interoffice memorandum announcing CIS's policy on petitions and applications filed by or on behalf of transsexuals. This interpretative memo was sent to all regional, service center, and domestic and overseas district directors, as well as the director of the Office of International Affairs.⁹⁹ It expresses two mutually exclusive treatments; which treatment applies depends on whether or not the immigration benefit sought is marriage-related.¹⁰⁰ The memo explains that

[i]n the context of adjudicating spousal and fiancé petitions,

⁹¹ *M.T.*, 335 A.2d at 209.

⁹² *In re Gardiner*, 42 P.3d at 133-34.

⁹³ *Id.* at 137.

⁹⁴ *Id.* at 136; *Littleton*, 9 S.W.3d at 230; *In re Nash*, 2003 WL 23097095 at *6-7; *Kantaras*, 884 So. 2d at 155.

⁹⁵ *Littleton*, 9 S.W.3d at 226 (“Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual orientation, but sexual identity.” (quoting Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219, 237 (1998))).

⁹⁶ See *In re Gardiner*, 42 P.3d at 135.

⁹⁷ See, e.g., *id.* (recognizing that identity documentation had been legally changed but denying recognition of sex change, as a matter of law, for the purpose of marriage).

⁹⁸ Yates, *supra* note 7.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1.

CIS personnel shall not recognize the marriage, or intended marriage, between two individuals 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.¹⁰¹

However, if the immigration benefit is not tied to marriage, the transsexual's sex will be his or her claimed sex—the one that is outwardly reflected, documented, and medically-fashioned—as it exists at the time of petition or application.¹⁰²

The CIS policy states that if a transsexual seeks marriage-based immigration benefits, as a matter of federal law, he or she will be considered forever locked in his or her birth-sex.¹⁰³ The transsexual and his or her partner will be denied federal marriage-based immigration benefits—even if the transsexual's birth-sex is opposite from the birth-sex of his or her partner—because “one or both of the parties claims to be a transsexual.”

The policy revisions in this memo reflect two different, diametrically opposed motivations. First, the marriage policy revision is an attempt to honor DOMA, which bans any federal recognition of same-sex marriages for immigration purposes and defines marriage as an institution involving a “man” and a “woman.”¹⁰⁴ CIS, in explaining the marriage policy change, admitted that “[d]iffering state practices related to the issuance of new birth certificates and marriage licenses, coupled with a general lack of detailed guidance in this area, have resulted in inconsistent adjudications within the INS and CIS offices of cases involving transsexual applicants.”¹⁰⁵ Yet the policy change regarding transsexuals and other non-marriage-based applications is meant to “accord[] maximal respect, sensitivity and consideration when adjudicating any petition, application or document request filed by, or on the behalf of, a transsexual individual.”¹⁰⁶

The CIS memo begins by highlighting the lack of federal statutes or regulations specifically addressing the question of whether

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ The policy statement that sex is determined “regardless of whether . . . [the] individual has undergone sex reassignment surgery” is analogous to birth-sex. *Id.* This is supported by the procedure outlined in the memo for when an adjudicating CIS officer detects from “objective evidence” that a name change or birth certificate change has occurred: All issued birth certificates should be requested, presumed so that the “original” birth-sex can be determined. *Id.* at 3.

¹⁰⁴ 28 U.S.C. § 1738C. See *supra* text accompanying note 5.

¹⁰⁵ Yates, *supra* note 7, at 2.

¹⁰⁶ *Id.* at 4.

a person can surgically change his or her sex¹⁰⁷ and provides a definition of transsexualism.¹⁰⁸ Without any specific citations to memos or cases, the memo further explains that INS “generally took the position that absent specific statutory authority recognizing sex changes for purposes of Federal immigration law; it could not recognize that a person could change his or her sex.”¹⁰⁹ Despite identifying a transsexual only two sentences before as a person with a dissonant anatomical sex who seeks hormonal and surgical remedies, the memo cites *Adams v. Howerton*¹¹⁰ and DOMA—both of which define marriage as between a “man and a woman” for immigration purposes—as primary reasons for this policy.¹¹¹

In addition to exposing DHS’s fear of granting homosexual marriage, the memo highlights legislative silence, even in DOMA, on the issue of whether “a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage.”¹¹² The memo restates the policies and gives specific examples to guide determinations on petitions.¹¹³ For non-marital immigration benefits, immigration pro-

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.* (“Transsexualism is a condition in which a person feels persistently uncomfortable about his or her anatomical sex, and often seeks medical treatment, including hormonal therapy and ‘sex reassignment surgery.’”).

¹⁰⁹ *Id.* This statement is further cast into doubt by reference to another paragraph on the same page explaining that, in fact, the INS and CIS inconsistently granted immigration benefits to transsexuals. See *supra* note 107 and accompanying text. See also IMMIGRATION LAW AND DEFENSE, *supra* note 34, § 4:40 n.2 (noting that, while Form I-130 spousal petitions in which one of the parties was a post-operative transsexual had been previously approved, “state laws notwithstanding, a March 20, 2003 memo by William Yates, USCIS’ Acting Associate Director of Operations, states that it is now USCIS policy in reliance on the Defense of Marriage Act, 1 U.S.C.A. § 7 to deny Form I-130 spousal petitions where one of the parties is a post-operative transsexual.”).

¹¹⁰ 673 F.2d 1036 (9th Cir. 1982).

¹¹¹ Yates, *supra* note 7, at 2 (“The legislative history of DOMA also clearly supports a traditional view of marriage, especially one that ties its basic character and importance to children, even though the marriage laws do not require that a couple be physically or mentally ready and able to procreate.”).

¹¹² *Id.* Again, in the face of statutory silence, DHS reads transsexuality as potentially homosexual and therefore against federal public policy. There is a great fear of the queer marriage.

¹¹³ *Id.* at 3.

[A] Form I-130, Petition for Alien Relative, or Form I-129F, Petition for Alien Fiancé(e), cannot be approved if one or both of the parties to the petition was born a sex other than what is claimed at the time of filing. This same policy applies to any immigration benefit that is granted based on a marital relationship. For example, an individual shall not be approved for H-4 status based on a marriage to a principal alien if either

cedures have become less burdensome for transsexuals.¹¹⁴ The new policy for non-marital immigration benefits will now allow for transsexuals to have federal identification and documentation that reflects the newly-transitioned sex.¹¹⁵ This, too, is a policy departure from the previous CIS policy of issuing documents based on sex at birth, unless there was a typographical error or unless ordered by a federal judge.¹¹⁶ It is unclear how CIS would handle a transsexual who first applies for replacement documentation that reflects the newly transitioned sex and subsequently applies for marriage-based immigration benefits.¹¹⁷

The new policy seems designed for the ease of adjudicating officers, but it lacks rationality. In this blanket attempt to avoid granting a homosexual marriage, the resulting policy is overbroad and overinclusive in that it applies any time “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.”¹¹⁸ The mere act of claiming transsexuality has become a disqualifying factor, even if the relationship was heterosexual before one partner had sexual reassignment surgery or the marriage became heterosexual after transitioning sexes.

the principal alien or the potential H-4 beneficiary was born a sex other than what they claim to be at the time of filing.”

Id.

¹¹⁴ *Id.* at 3-4.

It is important to note that applicants are no longer required, as previously indicated in the I-90 Replacement National SOP at 6-22, to present a Federal court order directing the agency to change its records where such an alien [that has undergone sex reassignment surgery] indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file. In instances where an individual is requesting a replacement document to acknowledge a name change resulting from sex reassignment surgery, the alien must submit the birth certificate issued at birth, the newly issued birth certificate reflecting the name and/or claimed sex reassignment, and the court order granting the legal name change . . . name changes arising in all other situation should be reviewed in accordance with established procedures.

Id.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2-3.

¹¹⁷ Presumably, although the documentation would reflect the new sex, an alien's A-file would reveal that the sex was transitioned and thus marriage benefits would be denied in light of the policy directives in this memo.

¹¹⁸ Yates, *supra* note 7, at 1. This policy affects not only a MTF transsexual who marries a male spouse or FTM transsexual who marries a female spouse (raising a possible implication of homosexuality), but also a MTF transsexual who marries a female spouse, a FTM transsexual who marries a male spouse, and two transsexuals both female or male at birth or oppositely sexed at birth who transition to opposite sexes.

The new policy also represents a departure from the previous INS policy where birth-sex was fixed for immigration purposes.¹¹⁹ This former policy was unfair in that it viewed sex as immutable; thus transsexual persons could not receive the recognition they sought so desperately. The former policy discriminated against only those couples with the same birth-sex where one partner had transitioned to the opposite sex. There was a possible problem for the INS under this policy, however: Fixing sex at birth meant the INS could recognize a marriage which appears homosexual when a transsexual had sex reassignment. This may have brought about the new DHS policy that says, in effect, "I'm not going to figure out what sex you are or whether your marriage is valid under state law." This discriminatory effect on transsexuals stands in stark contrast to the policy that recognized transsexuals as their new sex when applying for immigration benefits that do not relate to marriage.¹²⁰

The full impact of these new policies has yet to be seen. Now that there is an official articulation of CIS's policy on transsexuals, it is likely that cases will emerge referencing and further documenting its interpretation. Although this memo was issued to clarify CIS's policy on transsexuals, anyone more familiar with the issues of transgender or transsexual people would realize that this policy is anything but clear.

Despite these new policy directives, the first two BIA cases on the subject of transsexual marriage for immigration purposes did not acknowledge them, and these cases have seriously undermined the anti-homosexual rationale as applied to transsexuals,¹²¹ as described in the next section. It was not until the third case that the BIA acknowledged the new policy and found its pre-transsexual marriage ruling consistent with the terms of the policy directive.¹²²

¹¹⁹ *Id.* at 2.

¹²⁰ *Id.* at 1.

In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application *without regard to the applicant's transsexuality*. Any documentation (whether original or replacement) issued as a result of the adjudication *shall reflect the outward, claimed and otherwise documented sex of the applicant* at the time of CIS document issuance.

Id. (emphasis added).

¹²¹ *In re Widener*, No. A95 347 685, 2004 WL 2375065, at *3. *In re Widener* denies the applicability of DOMA to transsexuals and holds that the silence in the legislative history as to transsexuals, despite at least one state's highest court ruling that transsexual marriage is valid, reflects that transsexual marriage does not offend federal public policy. *Id.*

¹²² *In re Lovo-Lara*, 23 I. & N. Dec. At 746, n.2. The BIA found consistency between

However, the BIA failed to acknowledge any of the issues raised in the above discussion of the policy.

IV. THE TRANSSEXUAL MARRIAGE IMMIGRATION CASES

Ironically, the DHS policy change came only two months after an unpublished January 2004 decision, *In re Ady Oren*, which was not only the first trans-marriage immigration case, but was favorable to transsexual marriages.¹²³ When a transsexual had a sex change in Michigan and married in Oregon, the BIA remanded to explore the recognition of both acts under the Full Faith and Credit Clause.¹²⁴ The BIA also requested that the parties address a second issue: Whether a marriage is valid under Oregon law if the same marriage would be valid under federal immigration law and DOMA.¹²⁵

Although the April 2004 DHS policy memo appeared to answer this question by reading legislative silence as denying immigration benefits to transsexual marriages, the two subsequent BIA cases go in the opposite direction. Both the *In re Widener* and *In re Lovo-Lara* courts held that DOMA's legislative history, which sought to prevent homosexual marriages after Hawaii's *Baehr v. Lewin*,¹²⁶ is not determinative of transsexual marriage—a finding recognized in at least one jurisdiction¹²⁷ and unaddressed in DOMA's legislative history.¹²⁸ DHS has appealed *Esperanza*, and therefore the fate of federally-recognized transsexual marriages hangs in the balance.¹²⁹

A. *In re Ady Oren*

In *In re Ady Oren*,¹³⁰ the petitioner appealed the denial of a visa petition to the Board of Immigration Appeals. The petitioner Jack

their decision and the Yates policy because of the legislative silence on transsexuals in DOMA's legislative history: "That memorandum acknowledges that 'neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage.'" *Id.*

¹²³ *In re Ady Oren*, No. A79 761 848, 2004 WL 1167318, at *3 (B.I.A. Jan. 21, 2004).

¹²⁴ *Id.* at *6.

¹²⁵ *Id.*

¹²⁶ 852 P.2d 44 (Haw. 1993).

¹²⁷ *M.T.*, 355 A.2d at 211.

¹²⁸ See *In re Widener*, 2004 WL 2375065, at *5.

¹²⁹ Interview with Victoria Neilson, Legal Director, Immigration Equality, in New York, N.Y. (Dec. 6, 2004).

¹³⁰ No. A79 761 848, 2004 WL 1167318 (B.I.A. Jan. 21, 2004).

Keegan, a female-to-male (FTM) transsexual born Jessica Boell, filed a Form I-130 Petition for Alien Relative with the district director in Portland, Oregon, to seek “immediate relative status” for his spouse Ady Oren, a female citizen of Israel.¹³¹

The district director’s denial of the petitioner’s request was based on how the issue was framed: “[W]hether there can be a valid marriage between a woman and a person born as a woman, but surgically altered to have the physical characteristics of a man.”¹³² The district director made several findings of fact based on documentary evidence:¹³³ Petitioner was born in Michigan in 1970, named Jessica, and had normal female anatomy; petitioner was medically a FTM transsexual who had a bilateral mastectomy, but not genital surgery; after sex reassignment surgery, petitioner was issued a new birth certificate by the state of Michigan indicating male birth-sex; and petitioner later married the beneficiary, a female, in Oregon on November 7, 2001. The BIA also described the supporting documentation filed with the I-130 petition.¹³⁴

An adjudication officer interviewed the petitioner on June 26, 2002.¹³⁵ The adjudication officer asked for two additional pieces of evidence of a valid marriage: a Form I-601 waiver for a false claim to U.S. citizenship by the beneficiary and further supporting documents as to the petitioner’s gender.¹³⁶ In August 2002, the petitioner supplied additional documentation¹³⁷ explaining his gender transition and the accepted medical guidelines that informed it.¹³⁸

¹³¹ *Id.* at *1.

¹³² *Id.* at *2.

¹³³ *Id.*

¹³⁴ *Id.* The documentation included: (1) proof of termination of a prior marriage in the form of a New Mexico Final Decree of Dissolution, dated Sept. 15, 1995, for a marriage between Brian Nelson and Jessica on Feb. 10, 1990; (2) an Oregon Stipulated Judgment Modifying Decree of Dissolution of Marriage, dated 1997; (3) an Oregon Name Change Decree changing the name of Jessica Lee Nelson to Jack Keegan, dated July 13, 2000; (4) a Michigan birth certificate in the name of Jack Keegan, certified on Sept. 27, 2001; and (5) an Oregon marriage license issued to Jack Keegan and Ady Oren, dated Nov. 7, 2001. *Id.* at *1-2.

¹³⁵ *Id.* at *2.

¹³⁶ *Id.*

¹³⁷ *Id.* The documentation included: (1) letters from social workers Heather Leffler and Michael Brownstein explaining the petitioner’s transition from female to male; (2) a letter from Dr. Pierre Brassard, which explained that the petitioner’s mastectomy was performed in compliance with the Harry Benjamin Society Guidelines; (3) a copy of Harry Benjamin Society’s *The Standards of Care for Gender Identity Disorders*; (4) a page from a U.S. passport in the name of Jack Keegan; and (5) copies of Michigan and Oregon laws regarding legal changes of name and gender. *Id.*

¹³⁸ The major purpose of the Harry Benjamin Society’s standards of care is to artic-

In denying the petition, the district director reviewed a number of state decisions on transgender marriage.¹³⁹ He concluded that the petitioner failed to demonstrate a valid marriage under Oregon law because Oregon had not enacted guidelines governing transsexual marriages and because the state did not allow same-sex marriages.¹⁴⁰

On appeal, the petitioner raised both procedural and substantive issues. The BIA found no merit to the procedural issues because the petitioner was given a fair opportunity to present his arguments and was not prejudiced by technical errors.¹⁴¹ Petitioner's substantive argument was that the district director failed to make an individualized determination on the visa petition because the denial letter contained language almost verbatim to the "unrelated state court decision" *Littleton v. Prange*.¹⁴² Additionally, petitioner argued that the district director's decision failed to address whether the marriage between Keegan and Oren was valid under Oregon law.¹⁴³ Because the law allowed for post-operative sex and name changes on birth certificates, the likelihood of allowing transsexual marriage was high.¹⁴⁴

Citing *Adams v. Howerton*,¹⁴⁵ the BIA framed the case as comprised of two separate but required issues. The first issue was

ulate this international organization's professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders, including clinical guidelines for hormone therapy and genital surgery for transsexuals. THE HARRY BENJAMIN INT'L GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 20 (6th ed. 2001), available at <http://hbgda.org/Documents2/socv6.pdf>. These standards create a minimum criteria that should be present before genital surgeries are performed, and the factors include the transsexual's age; history of hormone therapy; having continuous everyday experiences while presenting in the desired gender; participation in psychotherapy; demonstrating informed consent about sex reassignment surgeries (cost, length of hospitalization, complications); and demonstrating a consolidated gender identity. *Id.*

¹³⁹ *In re Oren*, No. A79 761 848, 2004 WL 1167318, at *2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at *3.

¹⁴² The district director wrote on page seven of his decision:

[I]n our system of government, it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. When or whether the legislature will choose to address this issue is not within this Service's control. The legislature of the State of Oregon has failed to make any guidelines governing the recognition of marriages involving transsexuals. The legislature has not done so and current state law does not permit marriages of individuals of the same sex.

Id. at *4; cf. *Littleton*, 9 S.W.3d at 230.

¹⁴³ *In re Oren*, 2004 WL 1167318, at *5.

¹⁴⁴ *Id.*

¹⁴⁵ 673 F.2d 1036, 1038 (9th Cir. 1982).

whether the marriage was valid under Oregon law.¹⁴⁶ The second issue was whether any state-approved marriage qualified under the Immigration and Naturalization Act.¹⁴⁷ In addressing the first issue, the BIA noted that the deputy director's explanation of the denial (based on Oregon legislative silence and prohibition on same-sex marriages) tracked the *Littleton* opinion too closely. Additionally, the deputy director's reasoning did not take into consideration—and may have actually been at odds with—Oregon statutes providing for a legal change of sex.¹⁴⁸ The BIA noted that the district director relied on state transsexual marriage cases in which the jurisdictions had not enacted statutes allowing transsexuals to legally change their birth certificates.¹⁴⁹ However, the BIA distinguished this case from those relied on by the district director, noting that, since 1978, Oregon law—unlike Ohio (*In re Ladrach*) or Texas law (*Littleton v. Prange*)—permitted a post-operative transsexual to obtain a court order recognizing a legal change of sex.¹⁵⁰

Despite living in Oregon, where judges could change a post-operative transsexual's gender on her or his birth certificate, the

¹⁴⁶ *In re Oren*, 2004 WL 1167318, at *4.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *4. Oregon Revised Statutes § 33.460 provides the court jurisdiction to issue change of name and sex, stating that:

(1) A court that has jurisdiction to determine an application for change of name of a person under ORS 33.410 and 33.420 may order a legal change of sex and enter a judgment indicating the change of sex of a person whose sex has been changed by surgical procedure.

(2) The court may order a legal change of sex and enter the judgment in the same manner as that provided for change of name of a person under ORS 33.410 and 33.420.

(3) If a person applies for a change of name under ORS 33.410 and 33.420 at the time the person applies for a legal change of sex under this section, the court may order change of name and legal change of sex at the same time and in the same proceeding.

OR. REV. STAT. § 33.460 (2003). Deletions to the text reflect a technical amendment by Oregon 2003 Session Laws to replace the term "decree" with the term "judgment." Act of July 17, 2003, ch. 576, 2003 O.R. Laws 2646. Oregon also provides for amendment of the birth certificate of a person born in Oregon whose sex has been changed by surgical procedure, as follows:

(4) Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by rule of the state registrar.

OR. REV. STAT. § 432.235(4) (2003).

¹⁴⁹ *In re Oren*, 2004 WL 1167318, at *5 (citing *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999); *Anonymous v. Anonymous*, 67 Misc. 2d 982 (N.Y. Sup. Ct. 1971); and *In re Ladrach*, 32 Ohio Misc. 2d 6 (Ohio Prob. Ct. 1987)).

¹⁵⁰ *In re Oren*, 2004 WL 1167318, at *5.

petitioner did not submit such evidence from an Oregon court to the BIA, as provided for by Oregon law.¹⁵¹ Instead, the petitioner presented an amended birth certificate from Michigan,¹⁵² where Jack Keegan was born and where the state registrar determined whether to amend the gender marker on a birth certificate.¹⁵³

The BIA remanded the case to allow the parties to clarify two issues.¹⁵⁴ First, the BIA wanted the parties to address whether the Michigan-amended birth certificate should be granted full faith and credit. Second, the BIA allowed the petitioner an opportunity to comply with Oregon Revised Statutes § 33.460 to obtain a court decree indicating a legal change of sex in Oregon. Alternatively, the BIA wanted the petitioner to otherwise demonstrate the validity of the marriage under Oregon law. Assuming that the first part of the inquiry was satisfied in one of the ways mentioned above, the parties still had to address the second prong of the inquiry—whether the marriage between Keegan and Oren was valid under the federal immigration law and DOMA.¹⁵⁵

B. *In re Esperanza Martinez Widener*

In *In re Esperanza Martinez Widener*, the petitioner, Jacob Allen Widener, applied for the classification of “spouse” for his transsexual wife Esperanza Martinez under INA § 204(a).¹⁵⁶ The Nebraska Service Center denied the petition, finding that the male petitioner’s marriage to a male-to-female transsexual was invalid and specifically citing DOMA as its rationale.¹⁵⁷ The petitioner appealed the Service Center’s decision to the BIA.¹⁵⁸ On appeal, the

¹⁵¹ *Id.* at *6.

¹⁵² The court states that Michigan, “the state in which the petitioner was born, authorizes the state registrar to issue a new birth certificate to a transsexual who has undergone sex-reassignment surgery.” *Id.* at *3-4. See Mich. Comp. Laws § 333.2831(C).

The state registrar shall establish a new certificate of birth for an individual born in this state when the registrar receives the following: . . .

(C) A request that a new certificate be established to show a sex designation other than that designated at birth. The request shall be accompanied by an affidavit of a physician certifying that sex-reassignment surgery has been performed.

Id.

¹⁵³ *In re Oren*, 2004 WL 1167318, at *2.

¹⁵⁴ *Id.* at *6.

¹⁵⁵ *Id.*

¹⁵⁶ No. A95 347 685, 2004 WL 2375065 *1 (B.I.A. Sept. 21, 2004).

¹⁵⁷ *Id.* Specifically, the Service Center found that the transsexual marriage did not meet the definitions of “marriage” and “spouse” under § 3 of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹⁵⁸ *In re Widener*, 2004 WL 2375065, at *1.

issue was framed as two questions: First, whether the petitioner's marriage to the beneficiary was "a legal union between one man and one woman as husband and wife;" and second, whether the petitioner's spouse was "a person of the opposite sex who is a . . . wife" under § 7 of DOMA, where the beneficiary was born male but had undergone a legally recognized sex change.¹⁵⁹

The undisputed facts of the case were derived from several documentary sources, including an amended birth certificate, a marriage certificate, and a certified copy of the Manila Regional Trial Court's decision, which was based, in part, on testimony evidence provided by medical experts and the beneficiary.¹⁶⁰ Esperanza Martinez was born in the Phillipines as Barry Rommel De Sana Martinez in 1966.¹⁶¹ Esperanza testified to having felt like a woman in a man's body since childhood and having sex-reassignment surgery, beginning with breast augmentation in 1988, removal of testicles in 1990, and sex reassignment in January 2000.¹⁶² A plastic surgeon who examined Esperanza testified, as reported in the Manila decision, that she had the external genitalia of a female, including a vagina, clitoris, and labia majora and minora, but she lacked reproductive capacity.¹⁶³

In May 2001, based on the findings as described above in the Manila case, the Filipino court officially recognized Esperanza's change of sex from male to female.¹⁶⁴ The beneficiary's birth certificate was amended to reflect, pursuant to that court order, the name at birth as Esperanza de Sena Martinez.¹⁶⁵ Additionally, the couple submitted a certificate of marriage indicating that they were legally married in the Philippines on July 7, 2001.¹⁶⁶ The certificate of marriage recorded the petitioner's sex as male and the ben-

¹⁵⁹ *Id.* at *3.

¹⁶⁰ *Id.* at *1-2.

¹⁶¹ *Id.* at *1.

¹⁶² *Id.* at *2.

¹⁶³ *Id.*

¹⁶⁴ The Manila judge, after considering the evidence, wrote:

'This court believes that the granting of the petition, more than its denial, would be more in consonance with the principles of justice and equity. With the sexual reassignment, the petitioner does not only think, feel, and act like a woman, but now looks like a woman. That she has no ovary and cannot conceive does not make her less of a woman, in the same manner that a woman who cannot bear a child ceases to be a woman.'

Id. at *2 (quoting Certified Copy of Decision in Civil Case No. 00-99337, at 2).

¹⁶⁵ *Id.* at *1.

¹⁶⁶ *Id.* at *2.

eficiary's sex as female.¹⁶⁷

The reasoning of the Service Center focused on the definitions of "spouse" and "marriage" found in DOMA.¹⁶⁸ The Service Center concluded that, although some states and countries allowed transsexuals to legally change their sex, it had no legal basis to recognize Esperanza's sex change because of legislative silence on whether two persons with the same birth-sex could be married for immigration purposes.¹⁶⁹ Therefore, it concluded that the marriage between Esperanza and her husband Jacob was invalid for immigration purposes and denied the petition.¹⁷⁰

The BIA found that the relevant immigration statute was INA § 201(b)(2)(A)(i), which allows spouses to be an "immediate relative" for an immigrant visa but does not define "spouse," "wife," or "husband" except for in the INA § 101(a)(35) provision.¹⁷¹ The BIA also laid out the text of DOMA Section Seven, which defines "marriage" and "spouse" for federal purposes.¹⁷² Yet, in its analysis section, the BIA made a sharp departure from other state transsexual marriage cases.¹⁷³ Employing basic principles of statutory construction to determine Congressional intent, the BIA found that neither the text of DOMA nor its legislative history provided guidance on how to determine whether a marriage involving a post-operative transsexual should be considered a same-sex or an opposite-sex marriage.¹⁷⁴ Ultimately, the BIA determined that the state of the law on transsexual marriages at the time of the passage of the DOMA, in addition to DOMA's explicit focus on preventing recognition of "homosexual" marriages, led to the conclusion that Esperanza and Jacob's marriage may be considered a marriage between persons of "opposite sex" under Section Seven of DOMA.¹⁷⁵

The BIA reasoned that, when DOMA was passed in 1996, the legal landscape included a number of state legislatures that had directly addressed the issue of legal recognition of sex changes after surgical procedures.¹⁷⁶ State courts had begun to address the

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at *2-3.

¹⁷² *Id.* at *3.

¹⁷³ This decision, favorable to the concept that transsexuals can change their sex, marks a break from other recent cases like *In re Gardiner*, 42 P.3d 120, and *Kantaros*, 884 So. 2d 155, which held transsexual marriages to be void.

¹⁷⁴ *In re Widener*, 2004 WL 2375065, at *3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

issue of transsexual marriage, and at least one state's highest court had specifically recognized a transsexual marriage as a legal marriage between persons of opposite sex.¹⁷⁷ The BIA also focused on *M.T. v. J.T.*'s central rationale that the validity of sex changes should rest on the harmonization, conformity, or congruence of a person's gender identity and anatomical sex, as well as the ability to function sexually.¹⁷⁸ The legal landscape as constructed by the BIA also included the federal government's proposed Model State Vital Statistics Act, created a year after *M.T. v. J.T.*, which included a section that specifically addressed legal recognition of sex changes by surgical procedure.¹⁷⁹ The BIA noted that many states then adopted legislation modeled after Model Act.¹⁸⁰

Most significant to the BIA was the fact that DOMA was created in response to *Baehr v. Lewin*.¹⁸¹ The BIA, employing strict textualism, noted that the Conference Report, cited as DOMA's legislative history, "repeatedly refers to the consequence of 'permitting *homosexual* couples to marry' . . . [while] [t]here is no mention of the treatment of *transsexual* marriages or of state laws recognizing sex changes by post-operative transsexuals."¹⁸² In the House Report's section-by-section analysis, the BIA found the most convincing evidence that DOMA was not meant to include transsexuals: "Prior to the Hawaii lawsuit, no state has ever permitted

¹⁷⁷ *M.T.*, 355 A.2d at 211.

¹⁷⁸ *In re Widener*, 2004 WL 2375065, at *4.

'A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person's gender. If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.'

Id. (quoting *M.T.*, 335 A.2d at 210-11).

¹⁷⁹ *Id.* The relevant section of Model State Vital Statistics Act reads:

Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual's name has been changed, the Secretary shall amend the certificate of birth of the individual as prescribed by regulation.

MODEL STATE VITAL STAT. ACT § 21(e) (1977).

¹⁸⁰ The BIA cites the expansive court decision, *In re Heilig*, 816 A.2d 68, 83, which documented that twenty-two states and the District of Columbia have enacted provisions specifically permitting legal recognition of sex changes by post-operative transsexuals. *In re Widener*, 2004 WL 2375065, at *4.

¹⁸¹ 852 P.2d 44 (Haw. 1993).

¹⁸² *In re Widener*, 2004 WL 2375065, at *5 (internal citations omitted).

homosexual couples to marry. Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex marriage.”¹⁸³ This passage, as read by the BIA, makes it apparent that DOMA was not directed at the New Jersey decision of *M.T. v. J.T.*, which recognized the validity of transsexual marriage, or at the states that had enacted sex-change-recognition legislation.¹⁸⁴ The consistent reference to homosexuals in the floor discussions and in the Conference Report was fixed on and limited to the issue of homosexual marriage and, therefore, DOMA did not preclude federal recognition of the marriage at issue.¹⁸⁵

The BIA ultimately remanded the case for further proceedings to determine whether the marriage would offend the public policy of the state where the parties resided.¹⁸⁶ It noted that the petitioner’s biographic information indicated he was a resident of South Carolina, a state that did not have a sex-change statute.¹⁸⁷ The BIA also indicated that the lack of such a statute did not indicate strong public policy reasons for voiding the marriage, but that issue should be addressed on remand.¹⁸⁸ The BIA concluded that the marriage was an “opposite sex marriage” for purposes of DOMA Section Seven¹⁸⁹ before vacating the decision of the Service Center and remanding the case for further proceedings.¹⁹⁰

C. *In re* Jose Mauricio Lovo-Lara

Decided on May 18, 2005, *In re Jose Mauricio Lovo-Lara*,¹⁹¹ the first officially reported trans-marriage case, again tackled the issue of whether DOMA prevented granting immediate-relative status to a state-recognized marriage between a transsexual and a non-transsexual partner when both were the same birth-sex.¹⁹² With nearly identical reasoning to the unreported *Martinez* case, the BIA again found that DOMA was not a barrier to federal recognition of a transsexual marriage.¹⁹³ Yet, as explained below, this case is significant not only because it is published—and not only because it

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *6.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ 23 I. & N. Dec. 746 (B.I.A. 2005).

¹⁹² *Id.*

¹⁹³ *Id.* at 751.

recognizes the limitation of DOMA to same-sex marriages—but because, unlike *Martinez* and *Oren*, it was a final decision not remanded for further proceedings. Additionally, for the first time in these immigration cases, the BIA refers to the transsexual by the pronouns “she” and “her,” reflecting a recognition of the petitioner’s chosen sex rather than using “safe” language of “petitioner” or “beneficiary.”

In *Lovo-Lara*, the petitioner appealed from an August 3, 2004 decision by the Nebraska Service Center, in which the director denied the visa petition of a transsexual female U.S. citizen¹⁹⁴ sponsoring her El Salvadorian husband whom she had married in North Carolina on September 1, 2002.¹⁹⁵ As in other transsexual marriage cases, documentary and medical evidence played a central role in *Lovo-Lara*. The transsexual petitioner submitted an affidavit from a physician verifying the sex-reassignment surgery and several North Carolina documents in support of her visa petition, including her birth certificate, which listed her female name and female sex; a court order officially changing the petitioner’s sex designation from male to female; a court name change order; a marriage record reflecting the marriage of the female petitioner and the male beneficiary; and a driver’s license listing the petitioner’s female name and sex.¹⁹⁶

The Service Center director denied the visa application on the first level of review, citing DOMA as controlling federal immigration law and holding that DOMA requires that “one partner to the marriage must be a man and the other partner must be a woman.”¹⁹⁷ The director further noted that Congress had not addressed the specific issue of transsexual marriage¹⁹⁸ and stated that “without legislation from Congress officially recognizing a marriage where one of the parties has undergone sex change surgery . . . , [the Service Center] ha[d] no legal basis on which to recognize a change of sex so that a marriage between two persons born of the same sex can be recognized.”¹⁹⁹ The director found that because both partners were “born of” the same sex, this was a same-sex marriage, and the visa petition was denied because the non-

¹⁹⁴ *Id.* at 746-47. The petitioner was born on April 16, 1973 as a male, and she submitted a physician’s affidavit that she had sex reassignment surgery from male to female on September 14, 2001. *Id.*

¹⁹⁵ *Id.* at 746.

¹⁹⁶ 202 *Id.* at 747.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* (internal citation omitted).

U.S. citizen was not eligible to be considered a spouse of the transsexual U.S. citizen.²⁰⁰

The BIA heard the appeal and framed the issue of the case as “[w]hether a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under § 201(b)(2)(A)(i) of the [INA], where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage valid.”²⁰¹ The BIA’s analysis followed two steps: First, whether the marriage was valid under state law, and second, whether the marriage qualified under the INA.²⁰² In determining the validity of the state marriage, the BIA referred to North Carolina’s marriage statute, which referred to marriage as being between a man and woman.²⁰³ Though the statute did not define the terms “male” and “female,” it clearly prohibited homosexual marriage.²⁰⁴

The BIA further delved into statutory analysis to determine if a post-operative transsexual could be recognized as the newly assigned sex under North Carolina law. The BIA looked to the North Carolina birth certificate amendment statute, which allowed a new birth certificate to be issued to change the sex designation upon medical proof of reassignment surgery.²⁰⁵

The BIA recognized the petitioner had presented evidence that she had undergone sex-reassignment surgery, provided the required documentation to a registrar, and had been issued a new

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 748. The BIA cited *Adams*, 673 F.2d at 1039, for the proposition that in order to determine “whether a marriage is valid for immigration purposes, the relevant inquiry is whether the marriage was valid under State law, as governed by the law of the place of celebration of the marriage.” *Id.*

²⁰³ The BIA stated, “[s]ection 51-1 of the General Statutes of North Carolina provides that ‘a valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other.’” *Id.*

²⁰⁴ *Id.*

²⁰⁵ See N.C. GEN. STAT. § 130A-118(b)(4) (2004).

A new certificate of birth shall be made by State Registrar when . . . (4) A written request from an individual is received by the State Registrar to change the sex on that individual’s birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.

Id.

birth certificate listing her sex as female.²⁰⁶ As further evidence of state recognition of the petitioner's female sex, the petitioner's marriage had been recorded by the state, and she was listed as the bride. Considering such evidence, the BIA held that the petitioner's marriage to the beneficiary was valid under the laws of North Carolina, a decision not contested by opposing counsel.²⁰⁷

Given the validity of the underlying marriage, the next issue the BIA considered was whether the marriage qualified as a valid marriage under the INA.²⁰⁸ To answer this, the BIA looked to available federal statutory schemes for a federal definition of marriage. First, the BIA looked to the INA, which grants "immediate relative" classification to children, spouses, and parents of a U.S. citizen but fails to define "spouse."²⁰⁹ The court then looked to DOMA, which defines "marriage" and "spouse."²¹⁰ Significantly, the BIA noted, however, that "neither DOMA nor any 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."²¹¹ Further, the BIA noted that this statutory silence served as the basis for the Service Center's conclusion that it was without a legal basis to recognize the petitioner's sex change.

The BIA recognized Congress's clear intent to exclude same-sex marriages in DOMA's statutory language and its legislative history.²¹² The BIA astutely noticed that in the DOMA House Report, the terms "same sex" and "homosexual" were used interchangeably, and that the report referred to the consequences of "homosexual" marriages, not mentioning transsexual marriages.²¹³

The BIA then delivered the central reasoning for allowing

²⁰⁶ *In re Lovo-Lara*, 23 I. & N. Dec. at 748.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *See* 1 U.S.C. § 7 (2000).

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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.

Id.

²¹¹ *In re Lovo-Lara*, 231 I. & N. Dec. at 749.

²¹² *Id.* (citing H.R. Rep. No. 104-664, at 2-6 (1996), as reprinted in 1996 U.S.C.C.A.N. 2906-10; and *Baehr*, 852 P.2d at 44). The BIA cited the House Report for DOMA, which specifically states that DOMA responded to the 1993 Hawaii Supreme Court decision considering the legality of same-sex marriages.

²¹³ *Id.*

transsexual marriage for immigration visa petitions: Congress's notably omitted discussing the case *M.T. v. J.T.*,²¹⁴ which recognized a transsexual marriage,²¹⁵ acknowledged the various state statutes in existence at the time DOMA was being considered, and provided for the legal recognition of a post-operative sex change.²¹⁶ The BIA noted this omission, stating, "[r]ather, Congress's focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the House Report, was fixed on, and limited to, the issue of homosexual marriage."²¹⁷

The BIA concluded that "Congress only intended to restrict marriages between persons of the same sex . . . [and there was] no indication that DOMA was meant to apply to marriages involving a postoperative transsexual where the marriage was considered valid in the state in which it was performed as one between two individuals of the opposite sex."²¹⁸ The BIA's decision was based on a finding that the legislative history of DOMA left the basic marriage analysis of *lex celebrationis* intact: "[T]he validity of a particular marriage for immigration purposes is determined by the law of the State where the marriage was celebrated."²¹⁹

The BIA rejected DHS counsel's arguments that the BIA should look to the common meaning of "man" and "woman," as they are used in DOMA.²²⁰ DHS counsel argued that the terms "man" and "woman" could be defined conclusively by an individual's immutable chromosomal pattern (XX for female and XY for male).²²¹ The BIA was not convinced of the homogeneity of chromosomal patterns and pointed to debate within the medical community.²²² Relying on Julie Greenberg's article *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*,²²³ the BIA pointed to eight criteria typically used to determine an individual's sex,²²⁴ as well as to cases of persons with an "intersexual con-

²¹⁴ 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

²¹⁵ *In re Lovo-Lara*, 231 I. & N. Dec. at 750.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 751.

²¹⁹ *Id.* (citing *In re Hosseinian*, 19 I. & N. Dec. 453, 455 (B.I.A. 1987)).

²²⁰ *Id.* at 752.

²²¹ *Id.*

²²² *Id.*

²²³ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

²²⁴ *In re Lovo-Lara*, 231 I. & N. Dec. at 752. These criteria include:

1) Genetic or chromosomal sex XX or XY; 2) Gonadal sex – testes or ovaries; 3) Internal morphologic sex – seminal vesicles/prostate or vagina/uterus/fallopian tubes; 4) External morphologic sex – penis/scro-

dition” where those eight factors may be incongruent or ambiguous.²²⁵ The BIA found the “DHS counsel’s reliance on chromosomal patterns as the ultimate determinative factor questionable.”²²⁶

BIA proceeded to reject DHS counsel’s second argument that BIA should rely on the sex designation provided on an individual’s original birth certificate.²²⁷ As with DHS counsel’s first argument, BIA also rejected this argument based on the occurrence of intersexuality.²²⁸ BIA stated that the sex determination on the original birth certificate was made by the birth attendant based on the appearance of the external genitalia. However, the court also observed that intersexed people could have normal-looking external genitalia of one sex but, at the same time, have the chromosomal sex of the opposite sex, which may not be apparent until puberty.²²⁹

After rejecting the unreliable sex indicia of the chromosomal test and original birth certificates, BIA held that, for immigration purposes, it was “appropriate to determine an individual’s gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born.”²³⁰ Furthermore, BIA held that the correct test for validity of a marriage for immigration purposes was still determined by the laws of the state in which it was performed—in this case, North Carolina legally considered the petitioner to be a female and her marriage valid.²³¹ BIA further held that DOMA did not preclude recognition of the marriage and therefore the marriage between the petitioner and the beneficiary could be the basis for benefits under the INA.²³²

V. THE TRANSSEXUAL MARRIAGE DOCTRINE

The three transsexual-marriage immigration cases described above—*In re Ady Oren*, *In re Esperanza Martinez Widener*, and *In re Jose*

tum or clitoris/labia; 5) Hormonal sex – androgens or estrogens; 6) Phenotypic sex (secondary sexual features) – facial and chest hair or breasts; 7) Assigned sex and gender of rearing; and 8) Sexual identity.”

Id.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 753.

²²⁸ *Id.* (citing Greenberg, *supra* note 223, at 281-92).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

Maurico Lovo-Lara—are not unlike other transsexual marriage cases. Such cases have many of the same components: birth certificates and marriage licenses in question; medical testimony from doctors; anatomy descriptions after sexual reassignment surgery; the interplay between document-issuing states and the forum state of the marriage; and a general concern that a transsexual marriage could be, in fact, a homosexual marriage. Also, because of the history of fraudulent marriages in immigration, the level of documentation necessary for I-130 petitions is likely to reveal any changes in birth certificates, names, or sex. These changes will most likely be met with the skepticism with which DHS scrutinizes all marriage petitions.

What differentiates the above three transsexual marriage cases from others is the additional consideration of immigration law. Because federal immigration law could potentially bestow a benefit based on marriage, DOMA—and its history—must be explicitly considered. Therefore, these transsexual immigration cases are particularly important for two reasons. First, in considering DOMA specifically, courts found that transsexuality is not equivalent to homosexuality: DOMA is inapplicable to transsexuals who, after sex reassignment surgery, became oppositely sexed from their spouses. The basic statutory analysis in *In re Widener*²³³ and *In re Lovo-Lara*²³⁴ is simple but powerful—with implications for all transsexual marriages. Here, Congress's obsession with and fear of gay marriage, as revealed in its reaction to *Baehr v. Lewin*, has effectively limited DOMA's scope.

Second, these immigration cases demonstrate that statutory silence can be read in favor of transsexuals. In recent non-immigration transsexual marriage cases, statutory silence was read to mean that transsexuals were outside the marriage statutes.²³⁵ For example, the *Gardiner* court wrote, “[i]f the legislature intended to include transsexuals, it could have been a simple matter to have done so We do not read into a statute something that does not come within the wording of the statute.”²³⁶ Although legislative silence has repeatedly been used against transsexual marriage, in immigration cases silence has proved helpful in keeping transsexuals out of the ambit of prejudicial statutes.

²³³ *In re Widener*, No. A95 347 685, 2004 WL 2375065.

²³⁴ *In re Lovo-Lara*, 23 I. & N. Dec. at 746.

²³⁵ See *supra* Part II.

²³⁶ *In re Gardiner*, 42 P.3d at 136.

VI. THE POSSIBILITY OF AN EQUAL PROTECTION CHALLENGE

The new CIS policy, as outlined in the Yates memo, is internally inconsistent by treating transsexuals differently based on whether or not they are seeking marriage-related benefits. This internal inconsistency not only defies logic but also creates a strong case for an equal protection challenge. Although Congress has been described as having almost plenary power over immigration, there has been at least one successful equal protection challenge to the INA.

In *Francis v. INS*,²³⁷ the petitioner, Ernest Francis, was admitted to the United States as a permanent resident on September 8, 1961.²³⁸ Originally from Jamaica, West Indies, Francis was fifty-five years old, married to a U.S. citizen, and the father of a nine-year-old U.S. citizen daughter.²³⁹ On October 20, 1971, following a guilty plea, the petitioner was convicted of criminal possession of marijuana and sentenced to a term of probation.²⁴⁰ Besides this conviction and a fine of \$25 for gambling in 1973, the petitioner had no criminal record.²⁴¹ Based on the marijuana conviction, the INS initiated a deportation proceeding against him under INA § 241(a)(11) on December 6, 1972.²⁴² The petitioner did not challenge his deportability but instead argued that he should be eligible for discretionary relief under § 212(c) of the INA, which allowed the Attorney General to admit lawful permanent residents “who temporarily proceeded abroad voluntarily and not under an order of deportation, and who [were] returning to a lawful unrelinquished domicile of seven consecutive years.”²⁴³ Petitioner sought declarative relief confirming his eligibility to apply to the Attorney General for a waiver.²⁴⁴

The petitioner contended that if INA § 212(c) was not applicable to him, it would be a violation of the Equal Protection Clause of the Fifth Amendment.²⁴⁵ Put simply, § 212(c) would apply to a lawfully admitted alien convicted of a narcotics offense who had temporarily left the country after his conviction, and it would not apply

²³⁷ 532 F.2d 268 (2d Cir. 1976).

²³⁸ *Id.* at 269.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).

²⁴⁴ *Francis*, 532 F.2d at 270.

²⁴⁵ *Id.* at 272.

to someone who had stayed.²⁴⁶ The government argued that Congress chose to treat these two classes differently, however: Analogous discretionary relief is available to aliens under § 244(a)(2), but those who commit a deportable offense must stay in the country for ten years.²⁴⁷ The court found that this argument overlooked the fact that deportable residents easily qualify for § 212(c) relief if they briefly leave the country.²⁴⁸

The Second Circuit reviewed the INA provisions at issue, despite recognizing the virtually unrestricted authority of Congress and the executive branch to regulate the admission and retention of aliens.²⁴⁹ The court noted, however, that the enforcement of these policies was subject to the procedural safeguards of due process,²⁵⁰ and then it reviewed the provisions under a minimal scrutiny test, stating that “[d]istinctions between classes of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²⁵¹ Ultimately, the Second Circuit decided in the petitioner’s favor:

Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner. We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.²⁵²

The petitioner was allowed to seek discretionary relief from the Attorney General. Although the issues in *Francis*, a 1976 case, are not identical those at the heart of later trans-marriage cases, *Francis* still demonstrates the possibility of a successful equal protection challenging to INA provisions. Part the case’s success, however, was that the two classes were narrowly drawn in comparison to each other.²⁵³

²⁴⁶ See *id.*

²⁴⁷ *Id.* at 273.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 272.

²⁵⁰ *Id.*

²⁵¹ *Id.* (citing *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

²⁵² *Id.* at 273.

²⁵³ Interview with Janet Calvo, lead counsel on the *Francis* case and Professor of Law at the City University of New York School of Law. (November 2004).

Francis, therefore, offers a potential strategy for overturning the new DHS policy on transsexuals, even if a federal appeals court eventually overturns *In re Widener*. The comparison groups in such a case would be transsexuals seeking immigration benefits related to marriage versus those seeking other immigration benefits. A perfect plaintiff would be a transsexual applying for marriage benefits who had originally sought and received new immigration documentation—such as work papers—which acknowledge the person with the new sex. In this way, DHS would be treating the same person as male in one instance and female in another. The comparison groups could also be two aliens with similar countries of origin and sexual-reassignment surgeries, but one applies for marriage-based benefits and the other for non-marriage-based benefits.

VII. CONCLUSION

The drafters of the INA most likely never imagined the statute's applicability to transsexual aliens. Consequently, it was not until 2004 that the Department of Homeland Security first articulated a policy interpreting the INA as applied to transsexual marriages. District directors now must determine if they can extend the meaning of the INA to new factual and unanticipated circumstances. With each such application, meaning is created and, in at least the three cases mentioned above, contested. In general, understanding transsexualism is a new task for most decision-makers, who justify their apprehension to decide these cases by referring to them as ones of "first impression" or going through all previously decided transsexual marriage cases.

Currently, INA's applicability to transsexual marriages is actively contested; which interpretation will ultimately prevail remains to be seen. Since immigration cases rarely reach the Supreme Court (and infrequently go to federal circuit courts), statutory interpretation takes place in lower courts.

In addition, the complicated analysis required to adjudicate transsexual marriages for immigration purposes begs the question: Why are so many rights in the United States inextricably linked with the institution of marriage? Transsexual marriage immigration cases demonstrate that petitioners succeed only by distinguishing their marriages from homosexual marriages—the scourge of modern America. These cases do nothing to defeat the anti-homosexual mentality in the United States.

There are other limitations to the authority of these cases. First, they depend heavily on the ability to show—via documentary,

medical, and legal evidence—that a person has surgically altered his or her genitals. Second, they reinforce and reify medical authority over queer bodies. Third, they do nothing to expand people's views of gender and sex beyond the binaries of male and female. Fourth, the holdings of these cases are regrettably limited to transsexuals fortunate enough to live in states where sex changes are legally recognized.

Ultimately, *In re Ady Oren*, *In re Esperanza Martinez Widener*, and *In re Jose Mauricio Lovo-Lara* are a part of the body of cases dealing with transsexual marriage. The BIA interprets DOMA to exclude transsexuals under federal law and should continue to be cited for such a proposition. However, the federal appeals courts have not ruled on this specific issue, meaning that there is still a chance these cases may be overturned.

In the spirit of hope, these cases potentially mark an interpretative swing of the pendulum back toward *M.T. v. J.T.*, restoring of dignity and humanity of transsexuals. Ultimately, such a policy is more enlightened and in keeping with the overall goal of immigration law to reunite families. However, we must be mindful that *M.T.* implemented a strict genital-surgery requirement, which, while acknowledging the person's gender identity, was incredibly burdensome and—for many people—impossible. Although it bestowed certain rights, it did not offer the model policy that transgender activists would like to see enacted.