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A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States

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A QUEST FOR ACCEPTANCE: THE REAL ID ACT
AND THE NEED FOR COMPREHENSIVE
GENDER RECOGNITION LEGISLATION
IN THE UNITED STATES

*Jason Allen**

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I. INTRODUCTION

Dr. Richard Curtis expected the stares. After all, despite a keen familiarity with his surroundings, he was definitely the new guy at the office upon his return from a two-year leave of absence. His shorter haircut and deeper voice only scratched the surface of surprises in store for patients who had scheduled appointments with a woman general

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practitioner.¹ The feminine ensemble of a skirt, blouse, and earrings was shed for a business suit.² While serving as a locum physician in a nearby London borough, Dr. Vanda Zadorozny gradually had vanished.³

These changes in outward appearance, plus testosterone supplements, a hysterectomy, and a double mastectomy, could only go so far in completing Dr. Curtis' transformation.⁴ While his body finally matched the gender signals his brain long had been sending, this drastic effort meant nothing if the courts refused to grant him legal recognition as a male. Otherwise, in the eyes of the law, he simply would be a woman masquerading as a man for purposes such as marriage and employment. Moreover, England's General Medical Council would continue to acknowledge him only as a female graduate of the Royal London School of Medicine.⁵

The Gender Recognition Act (GRA) eliminates the outcast status of transgender people in the United Kingdom, allowing them to attain recognition in the gender with which they most identify.⁶ In October 2005, Dr. Curtis became the first transgender person reregistered under the Act as a male doctor in England.⁷ Despite this groundbreaking legislation overseas, the United States clings tightly to antiquated notions about transgender people and their place in its legal system. The lack of national gender recognition rights has resulted in scattershot policies across the country where state standards are often at odds.⁸ To further complicate matters, federal and state standards do not always align. For example, while the Social Security Administration requires proof of genital surgery in order to change the sex designation on a Social Security card, the Department of Motor Vehicles (DMV) in most states will

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1. Peter Munro, *Woman GP Turns Up for Work a Man: Patients "Were Shocked By My Change of Sex,"* EVENING STANDARD, Oct. 10, 2005, at 15.
 2. Colin Fernandez, "Call Me Dr. Richard": Shock for Patients as Doctor They Knew as a Woman Turns into Britain's First Transsexual GP, DAILY MAIL, Oct. 11, 2005, at 37.
 3. Munro, *supra* note 1.
 4. Fernandez, *supra* note 2.
 5. See *id.*; Jenny Kumah, *UEA Hosts Transgender Conference*, BBC, June 18, 2007, available at http://www.bbc.co.uk/norfolk/content/articles/2007/06/18/radionorfolk_transgender_20070618_feature.shtml ("The General Medical Council now recognises Dr. Curtis as a male GP, following a recent change to the law.").
 6. Gender Recognition Act, 2004, c. 7 (U.K.), available at <http://www.opsi.gov.uk/acts/acts2004/20040007.htm>.
 7. Munro, *supra* note 1.
 8. See Lambda Legal, *Amending Birth Certificates to Reflect Your Correct Sex* (Nov. 11, 2002), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31991108>.

change the sex designation on a driver's license upon presentation of a doctor's letter.⁹

The impending effects of the Real ID Act, signed by President George W. Bush ostensibly to guard citizens from terrorism, bring the issue of gender recognition rights to the forefront.¹⁰ Obtaining the national identification card required by that Act forces individuals to present extensive documentation proving their identities.¹¹ This will be a slight inconvenience for the vast majority of society. Transgender people, however, face an inquisition involving government gatekeepers who may or may not believe that a gender transition has occurred. While such evaluations arguably exist under current individual state standards for obtaining driver's licenses,¹² the Real ID Act puts a national face on problems previously encountered by transgender people and emphasizes the necessity of a national gender standard to eliminate the current federal and state patchwork.

This Article maintains that the Real ID Act highlights the need for U.S. federal gender recognition legislation in the mold of the GRA.¹³ Part II offers background into the psychology of transgender people, explaining how the medical community views and treats this "condition." Part III illustrates the fundamental value of gender recognition rights and examines the inadequacy of U.S. statutory and case law. This discussion then traces the evolution of the GRA in the United Kingdom as the culmination of a mandate from the European Court of Human

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9. Cole Krawitz, *Impending "Realness:" Transgender Communities Dealt a Blow by Real ID*, DEMOS.ORG, June 27, 2006, <http://www.demos.org/democracydispatches/article.cfm?type=2&id=16BC0BB3-3FF4-6C82-5E896A6D91D04334>.
 10. See Gwen Smith, *Nothing Real About It*, PLANETOUT.COM, May 17, 2005, <http://www.planetout.com/news/feature.html?sernum=1155>.
 11. See Alan Elsner, *Road to Digital Driver's Licenses Chaotic*, EWEK.COM, Oct. 10, 2005.
 12. See generally Real ID Act Proposed Regulations, 72 Fed. Reg. 10,820 (Mar. 9, 2007) (to be codified at 6 C.F.R. pt. 37), available at <http://www.realnightmare.org/resources/106> (follow "The regulations are available here" hyperlink under the heading "Real ID Regulations Released") (discussing variance among pre-existing state DMV policies, many of which are insufficient to address Congress' national security concerns).
 13. This Article assumes, *arguendo*, the constitutionality of national gender recognition legislation in the United States but recognizes the difficulty of garnering constitutional authority for such an infringement on state sovereignty. Congress possibly could use its power granted under section 5 of the Fourteenth Amendment to enforce the guarantees of due process and equal protection against the states. See generally Julie A. Greenberg & Marybeth Herald, *You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819 (2005) (arguing that a state's refusal to recognize a transgender person's legal gender from another state violates the Full Faith and Credit Clause, Dormant Commerce Clause, Equal Protection Clause, and substantive due process).

Rights (ECHR). Part IV argues that the United States should adopt a modified GRA, highlighting problems in that Act and offering suggestions to improve protection of transgender people.¹⁴

II. UNDERSTANDING THE TRANSGENDER WORLD

Gender recognition legislation will never become a reality without public education on issues facing the transgender community. Even close relatives of transgender people experience difficulty coping when a loved one transitions to a new gender.¹⁵ Distinguishing between the wrongly-interchanged terms “sex” and “gender” is an essential first step in the learning process. “Sex” identifies a person based solely on sexual anatomy and physical organs.¹⁶ “Gender,” on the other hand, is a much more flexible concept built on social and cultural expectations.¹⁷ Classification as masculine or feminine is often based on gender symbols such as clothing, body decoration, mannerism, gait, occupational choice, and sexual orientation.¹⁸ This categorization begins when parents place babies in blue or pink nurseries the moment they arrive home from the hospital.¹⁹ While some transgender people demonstrate the fluidity of gender by not establishing their gender identities until adulthood, experts have concluded that “gender identity generally is established ‘very,

14. The Supreme Court underscored the importance of U.S. awareness of foreign law in *Lawrence v. Texas*, where it analyzed decisions of the European Court of Human Rights in striking down a Texas statute banning consensual homosexual conduct in the privacy of the home. See *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (“The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”). But see *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (“[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans.” (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002)(Thomas, J., concurring in denial of certiorari))).

15. See Fernandez, *supra* note 2 (interviewing a transgender person’s father who seemed to care little about his child’s post-surgery happiness, dwelling instead on his own lost sleep and his former daughter’s attractiveness).

16. Hollin K. Dickerson, Comment, *Vindication Without Substance: Gender Recognition and the Human Rights Act*, 40 TEX. INT’L L.J. 807, 810 (2005); Taylor Flynn, *Protecting Transgender Families: Strategies for Advocates*, HUM. RTS., Summer 2003, at 11, 13.

17. See Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures*, 7 N.Y. CITY L. REV. 161, 162 (2004).

18. Vern L. Bullough, *Transgenderism and the Concept of Gender*, INT’L J. TRANSGENDERISM, July–Sept. 2000, <http://www.symposion.com/ijt/gilbert/bullough.htm>.

19. See The Gender Trust, *Biological Definitions*, <http://www.gendertrust.org.uk/php/showarticle.php?aid=8> (last visited May 13, 2007).

very firmly, almost immediately, by the age of 3 to 4 years.’”²⁰ When adulthood arrives, society expects individuals to conform to their assigned genders and perform different social roles.²¹

Most people fit squarely into the socially-acceptable scenario where the physical organs of their sex match their culturally-conditioned gender. Of course, individuals rarely perfectly align with the stereotypes of masculinity and femininity like a Ken or Barbie doll, but transgender people violate these norms in a more overt way. The nature of transgenderism is that a person’s birth-assigned sex does not always correspond to the gender with which he or she most identifies.²² This state of having a body with physical parts, hormones, and chromosomes incompatible with the preferred gender has been labeled by the medical community as gender dysphoria or gender identity disorder.²³ The condition is exemplified by “a drive to live in the opposite gender to that in which a person has been registered at birth.”²⁴ Indeed, one transgender activist group defines transgender people as “those of us whose gender identity and/or expression . . . does not or is perceived to not match stereotypical gender norms associated with our assigned gender at birth.”²⁵ Transgender people thus differ from cross-dressers, who wear clothes normally

20. *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

21. The Gender Trust, *supra* note 19.

22. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267 (1999).

23. AM. PSYCHIATRIC ASS’N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV 532 (4th ed. 1994) [hereinafter DSM-IV]. Many transgender people resent the stigmatizing terminology of the medical framework, which classifies them as having a “disorder.” See Gender Identity Disorder Reform, <http://www.gidreform.org> (last visited May 13, 2007) (advocating “reform of the psychiatric classification of gender diversity as mental disorder”). Activists hope that gender identity disorder eventually will be removed from the DSM in the same way that homosexuality was eliminated from the DSM. See *id.* (“Thirty-four years after the American Psychiatric Association (APA) voted to delete homosexuality as a mental disorder, the diagnostic categories of ‘gender identity disorder’ and ‘transvestic fetishism’ in the Diagnostic and Statistical Manual of Mental Disorders continue to raise questions of consistency, validity, and fairness.”). Even so, transgender people currently must submit to the medical framework and receive a diagnosis of gender identity disorder before they can undergo gender reassignment surgery. See Dean Spade, *Resisting Medicine, Re-Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 23–24 (2003) (“The medical model, ultimately, was what I had to contend with in order to achieve the embodiment I was seeking. I learned quickly that to achieve that embodiment, I needed . . . to convince the doctors that I suffered from GID and wanted to ‘be’ a ‘man’ in a narrow sense of both words.”).

24. Department for Constitutional Affairs, Frequently Asked Questions, <http://www.dca.gov.uk/constitution/transsex/faqs.htm> (last visited May 13, 2007).

25. The Sylvia Rivera Law Project, Transgender Introduction (June 25, 2003), http://www.srlp.org/documents/TLC_new_trans_101.htm.

associated with the opposite gender but retain their birth-assigned gender.²⁶

Individuals with gender identity disorder may seek assistance from medical professionals who follow one of the standardized treatments that allows transgender people to claim legitimate health care expenses. One such option is the Standards of Care developed in 1979 by Dr. Harry Benjamin.²⁷ The Benjamin standards include five treatment stages: (1) initial diagnostic assessment, (2) psychotherapy, (3) real-life experience, (4) hormonal therapy, and (5) surgery.²⁸ As physicians tailor treatment to each individual's needs, however, today it is uncommon for a transgender person to undergo all five of the standards.²⁹

Most transgender people simply opt for hormone therapy,³⁰ rejecting Benjamin's classist idea of surgery as the pinnacle of "transitioning" from one gender to another. The focal point of transgenderism today has shifted from whether a transgender person has undergone surgery to whether the person successfully can maintain a "living identity," presented through external expression such as hairstyles and clothing.³¹ For example, when a woman undergoes a mastectomy, she is not immediately banned from women's restrooms. In a similar vein, the transgender community strives not to be defined based on surgery or body appearance alone.

Still, because "no effective treatment exists to alter the 'brain' sex so that it conforms to anatomical sex," surgery may appeal as the only

26. See The Gender Trust, Frequently Asked Questions, <http://www.gendertrust.org.uk/php/showarticle.php?aid=1> (last visited May 13, 2007).

27. See generally HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS (6th ed. 2001), available at <http://www.hbigda.org/Documents2/socv6.pdf> [hereinafter STANDARDS OF CARE].

28. *Id.* at 3.

29. For example, Benjamin originally envisioned the real-life experience as requiring the patient to live entirely in the new gender role for at least twelve months, both at work and in the community, before confronting the drastic option of genital surgery. *Id.* at 20. The general awkwardness of such a task has led modern treatment to minimize or exclude this stage. Telephone Interview with Dean Spade, Teaching Fellow, The Williams Institute at the UCLA School of Law, in L.A., Cal. (Apr. 3, 2007); see STANDARDS OF CARE, *supra* note 27, at 18 ("Although professionals may recommend living in the desired gender, the decision as to when and how to begin the real-life experience remains the person's responsibility.").

30. The Sylvia Rivera Law Project, FAQ for New Transgender Birth Certificate Regulations Proposed in New York City, http://www.srlp.org/index.php?sec=03H&page=nycbc_fa (last visited May 13, 2007) ("[H]ormone therapy is the most common treatment for transgender people and chest reconstruction surgery is the most common surgical treatment for transgender men.").

31. Telephone Interview with Dean Spade, *supra* note 29.

available opportunity to align the psychological with the biological.³² For male-to-female transgender people, the surgical operation includes removing the testes, dissecting the penis, and creating a pseudo-vagina.³³ Breast implants and electrolysis for hair removal may be employed to more closely approximate a non-transgender female.³⁴ Female-to-male transgender people usually undergo a hysterectomy and mastectomy,³⁵ but no medical procedure exists for crafting a fully-functioning penis.³⁶ Regardless of their treatment plan, transgender people unwilling to accept their socially-assigned gender roles can be blindsided by the U.S. legal system's scant protection of gender identity.

III. THE VALUE OF GENDER RECOGNITION

A transgender person desiring gender recognition rights wishes to obtain rights to recognition in the new gender. Considering the myriad situations where society segregates people by gender and subjects them to different rules as a result, this seemingly small request takes on sizeable importance. Obvious areas with gender implications include employment, marriage, and sexual harassment, but *every* gender-based categorization becomes an opportunity to deny transgender people gender recognition. From sports, prisons, and schools to Social Security, pensions, and military service, laws regularly account for gender without actually defining who qualifies as male and who qualifies as female.³⁷ Participating in routine activities like writing a check, using a credit card, or flying on an airplane often requires identification linking gender and appearance.³⁸ Examined from this perspective, a birth certificate

32. Greenberg & Herald, *supra* note 13, at 884.

33. THE INTERDEPARTMENTAL WORKING GROUP ON TRANSEXUAL PEOPLE, REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSEXUAL PEOPLE 28 (2000), available at <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf> [hereinafter WORKING GROUP REPORT].

34. *Id.*

35. *Id.* at 29.

36. See STANDARDS OF CARE, *supra* note 27, at 21–22. This surgical limitation ultimately affects fewer patients, however, because more biologically-born males experience gender dysphoria. WORKING GROUP REPORT, *supra* note 33, at 26 (noting that there are roughly five male-to-female transgender people for every one female-to-male transgender person).

37. See *Goodwin v. United Kingdom*, App. No. 28957/95 35 Eur. H.R. Rep. 447, 456–462 (2002) (Commission report).

38. Lambda Legal, Lambda Legal Wins Case Seeking Name Change for Transgendered Woman in Georgia, <http://www.lambdalegal.org/news/pr/transgendered-name-change.html> (last visited May 13, 2007).

truly becomes a legal document that can haunt a transgender person for life.³⁹

A. The Lackluster U.S. System

The gender recognition problem affects a significant portion of the U.S. citizenry even though transgender people remain a discrete and insular minority. The most authoritative estimate places the prevalence of transgenderism at 1 in 30,000 adult males and 1 in 100,000 adult females.⁴⁰ Because these figures are decades old and many cases go unreported without surgery, however, a more recent study suggests that 1 in 500 males is a transgender person.⁴¹ Another calculation pegs transgender people as 2–5% of the U.S. population.⁴² In the end, while the statistics vary, the transgender community is obviously more than a blip on the radar.

1. Statutory Law

Because the United States lacks an overarching gender recognition scheme,⁴³ state laws range from favorable to nonexistent, forcing trans-

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39. See Jennifer Marie Albright, Comment, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. REV. 593, 594 (2002).
40. DSM-IV, *supra* note 23, at 535 (“There are no recent epidemiological studies to provide data on prevalence of Gender Identity Disorder. Data from smaller countries in Europe with access to total population statistics and referrals suggest that roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek sex-reassignment surgery.”).
41. Lynn Conway, *How Frequently Does Transsexualism Occur?*, Jan. 30, 2001, <http://ai.eecs.umich.edu/people/conway/TS/TSp prevalence.html>.
42. JENNIFER LEVI & SHANNON MINTER, NATIONAL CENTER FOR LESBIAN RIGHTS, TRANSGENDER ISSUES: A FACT SHEET (2002), available at <http://www.transgenderlaw.org/resources/transfactsheet.pdf>.
43. Gender recognition rights do not automatically flow from basic anti-discrimination laws. Even traditional U.S. anti-discrimination legislation such as Title VII of the Civil Rights Act of 1964 has not always protected transgender people. *Compare* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984) (“While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals . . .”), *with* *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”). Currently, 28% of the population is covered by local transgender anti-discrimination laws, a jump from approximately 5% in 2001. Kelly Pate Dwyer, *An Employee, Hired as a Man, Becomes a Woman. Now What?*, N.Y. TIMES, July 31,

gender people to risk losing their acquired gender every time they cross state lines.⁴⁴ Twenty-five states and the District of Columbia allow a gender amendment to an individual's birth certificate following surgery.⁴⁵ An additional seventeen states authorize general birth certificate amendments and grant court discretion on the acceptance of revisions.⁴⁶ Further drawing attention to the lack of a consensus in the U.S. approach, five states amend birth certificates through an administrative process and three states refuse gender amendments.⁴⁷ Only Tennessee has passed actual legislation prohibiting a transgender person from altering birth certificate gender after surgery.⁴⁸

Depending on procedures followed, however, difficulties still occur in those states that do provide for birth certificate revision. Some states

2005, at 10(1); *see generally* NATIONAL GAY AND LESBIAN TASK FORCE, SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE ANTI-DISCRIMINATION LAWS (2006), *available at* <http://www.transgenderlaw.org/ndlaws/nglftltpichart.pdf> (listing local transgender-inclusive anti-discrimination laws).

44. *See* Greenberg & Herald, *supra* note 13, at 823 (“[T]he results can be bizarre and confusing when transsex people cross state lines only to find that their legal sex has changed according to the laws of a given jurisdiction.”).
45. ALA. CODE § 22-9A-19(d) (2006); ARIZ. REV. STAT. ANN. § 36-337(A)(3) (Supp. 2005); ARK. CODE ANN. § 20-18-307(d) (2007); CAL. HEALTH & SAFETY CODE § 103425 (West 1996); COLO. REV. STAT. § 25-2-115(4) (2007); CONN. GEN. STAT. ANN. § 19a-42 (West Supp. 2005); D.C. CODE § 7-217(d) (2001); GA. CODE ANN. § 31-10-23(e) (2006); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (LexisNexis 2004); 410 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West Supp. 2005); IOWA CODE ANN. § 144.23(3) (West Supp. 2005); KY. REV. STAT. ANN. § 213.121(5) (West 1990); LA. REV. STAT. ANN. § 40:62 (Supp. 2005); MD. CODE ANN., HEALTH-GEN. § 4-214(b)(5) (West 2005); MASS. ANN. LAWS ch. 46, § 13(e) (LexisNexis 2006); MICH. COMP. LAWS ANN. § 333.2831(c) (West 2001); MO. ANN. STAT. § 193.215(9) (West 2004); NEB. REV. STAT. ANN. § 71-604.01 (LexisNexis Supp. 2004); N.H. REV. STAT. ANN. § 5-C:87(V) (West 2005); N.J. STAT. ANN. § 26:8-40.12 (West 2007); N.M. STAT. ANN. § 24-14-25(D) (LexisNexis Supp. 2004); N.C. GEN. STAT. § 130A-118(b)(4) (2005); OR. REV. STAT. ANN. § 432.235(4) (West Supp. 2005); UTAH CODE ANN. § 26-2-11 (Supp. 2005); VA. CODE ANN. § 32.1-269(E) (2007); WIS. STAT. ANN. § 69.15(4)(b) (West Supp. 2004).
46. ALASKA STAT. § 18.50.320 (2006); DEL. CODE ANN. tit. 16, § 3131 (2003); FLA. STAT. ANN. § 382.016 (West 2002); IND. CODE ANN. § 16-37-2-10 (West 2004); MINN. STAT. ANN. § 144.218(4) (West 2005); MISS. CODE ANN. § 41-57-21 (1999); MONT. CODE ANN. § 50-15-204 (2003); N.D. CENT. CODE § 23-02.1-25 (2002); OKLA. STAT. ANN. tit. 63, § 1-321 (West 2004); 35 PA. STAT. ANN. § 450.603 (West 2003); R.I. GEN. LAWS § 23-3-21 (2003); S.C. CODE ANN. § 44-63-150 (2002); S.D. CODIFIED LAWS § 34-25-51 (2004); TEX. HEALTH & SAFETY CODE ANN. §§ 191.028, 192.011 (Vernon 2001); VT. STAT. ANN. tit. 18, § 5075 (2000); W. VA. CODE ANN. § 16-5-24 (LexisNexis 2006); WYO. STAT. ANN. § 35-1-424 (2005).
47. *See* Lambda Legal, *supra* note 8.
48. TENN. CODE ANN. § 68-3-203(d) (2006) (“The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.”).

“issue an entirely new birth certificate with the new sex designation, [but] others will only amend the prior certificate, sometimes noticeably.”⁴⁹ Even without an obvious, privacy-shattering modification, true gender recognition remains impossible because “the mere issuance of a new birth certificate cannot, legally speaking, make [a transgender person the opposite sex].”⁵⁰ For example, while a Texas court conceded that a male-to-female transgender person had “officially changed her name and her birth certificate to reflect her new status,” this did not settle “whether the law [would] take note of these changes and treat her as if she had been born a female.”⁵¹ Anticipating the need for gender recognition rights, legislative advisers in the United Kingdom realized that “[t]he issue of [new birth] certificates might . . . save transsexual people some embarrassment. But unless this carried with it recognition for some or all legal purposes it would not do much to relieve their underlying concerns.”⁵²

2. Case Law

Beyond this pure statutory inadequacy, court interpretations of transgenderism paint a bleak picture of gender recognition rights in the United States. While most of these judicial opinions focus on transgender marriage, the rulings extrapolate easily to other gender-sensitive settings. In 1976, U.S. gender recognition prospects appeared promising when New Jersey validated a marriage between a male-to-female transgender person and a biological male in *M.T. v. J.T.*⁵³ The court reasoned that if gender reassignment surgery makes an individual’s physical anatomy and gender identity congruent, the person acquires the sex where those two variables align.⁵⁴ Employing this congruence test, the court concluded that because a transgender person’s gender and genitalia had “been harmonized through medical treatment . . . [she] should be considered a member of the female sex for marital purposes.”⁵⁵

Decades later, *M.T. v. J.T.* remains the only case in the United States upholding a transgender marriage and legally recognizing a male-to-female transgender person as female. Ignoring the congruence test, judges began relying heavily on physical anatomy at birth to determine

49. Lambda Legal, *supra* note 8.

50. *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005).

51. *Littleton v. Prange*, 9 S.W.3d 223, 226 (Tex. App. 1999).

52. WORKING GROUP REPORT, *supra* note 33, at 19.

53. 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976).

54. *M.T.*, 355 A.2d at 209.

55. *M.T.*, 355 A.2d at 211.

gender. *In re Ladrach* signaled this turning point, where an Ohio court framed the issue as “whether two individuals, biologically and legally of the same sex at birth, may contract to marry each other.”⁵⁶ The court held that gender is “determined at birth by an anatomical examination by the birth attendant,”⁵⁷ eliminating the mental component of gender invoked in *M. T. v. J. T.* Shirking responsibility, the court placed the burden on the legislature to expand the definition of gender by revamping public policy.⁵⁸

Littleton v. Prange concerned a male-to-female transgender person’s right to recover her deceased husband’s estate.⁵⁹ Phrasing the issue in Biblical language, the court asked, “[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”⁶⁰ Admittedly unfamiliar with this terrain,⁶¹ the court adopted the biological test by emphasizing that regardless of gender reassignment surgery, “[t]here are some things we cannot will into being. They just are.”⁶² Deferring to the legislature to alter public policy,⁶³ the court decided that an operation merely left the plaintiff with a “male body in all aspects other than what the physicians ha[d] supplied.”⁶⁴

Similarly, *In re Estate of Gardiner* revolved around a male-to-female transgender person’s right to the estate of her deceased husband.⁶⁵ Once more, the transgender person’s physical anatomy at birth resulted in marriage invalidation, with the court effectively proclaiming that it refused to legitimize same-sex marriage.⁶⁶ The court acknowledged that the plaintiff had “undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, [the transsexual] remain[ed] . . . a male.”⁶⁷

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

57. *Ladrach*, 513 N.E.2d at 832; *see also* *Littleton v. Prange*, 9 S.W.3d 223, 233 (Tex. App. 1999) (Lopez, J., dissenting) (noting that a physician’s determination of sex based on physical anatomy is “memorialized by a certificate of birth, without an examination of the child’s chromosomes or an inquiry about how the child feels about its sexual identity”).

58. *Ladrach*, 513 N.E.2d at 832.

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

60. *Littleton*, 9 S.W.3d at 224.

61. *Littleton*, 9 S.W.3d at 225 (“[The plaintiff] is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms.”).

62. *Littleton*, 9 S.W.3d at 231.

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

64. *Littleton*, 9 S.W.3d at 231.

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

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

67. *Gardiner*, 42 P.3d at 137.

The court joined the chorus of judicial requests for legislative intervention regarding such an important public policy matter.⁶⁸

A glimmer of hope for transgender people emerged from Florida in *Kantaras v. Kantaras*.⁶⁹ The trial court held that “[c]hromosomes are only one factor in the determination of sex and they do not overrule gender or self identity, which is the true test or identifying mark of sex.”⁷⁰ The appellate court, however, overruled this endorsement of self-determined gender and opted for the ever-popular physical anatomy at birth test.⁷¹ The holding on reversal reinforced that male and female “refer to immutable traits determined at birth.”⁷² The court issued the familiar refrain that gender recognition “raises issues of public policy that should be addressed by the legislature.”⁷³ While U.S. law slowly whittled away at any gender recognition rights existing after *M.T. v. J.T.*,⁷⁴ the ECHR began prodding the United Kingdom in an alternative direction.

B. A Progressive Approach to Gender Recognition: The United Kingdom

The United Kingdom forged its trail to gender recognition only after a decades-long string of judicial defeats to transgender people.

1. *Corbett v. Corbett*: Adoption of the Biological Test

The milestone *Corbett v. Corbett* decision in 1970, concerning a transgender person’s sex for marriage purposes,⁷⁵ became the worldwide go-to authority for courts seeking to deny gender recognition rights. In *Corbett*, multiple medical experts testified that an individual’s sex depends on (1) chromosomal factors, (2) gonadal factors, (3) genital factors, and (4) psychological factors.⁷⁶ Discarding the psychological component vital to gender recognition, however, Judge Ormrod concluded that “the law should adopt . . . the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the

68. *Gardiner*, 42 P.3d at 137.

69. 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

70. *Kantaras*, 884 So. 2d at 157.

71. *Kantaras*, 884 So. 2d at 161.

72. *Kantaras*, 884 So. 2d at 161.

73. *Kantaras*, 884 So. 2d at 161.

74. 355 A.2d 204 (N.J. Super. Ct. App. Div 1976).

75. *Corbett v. Corbett*, [1970] 2 All E.R. 33, 88.

76. *Corbett*, 2 All E.R. at 100.

purpose of marriage accordingly, and ignore any operative intervention.”⁷⁷ Cementing the new standard, the court stated that “the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.”⁷⁸

While *Corbett* invalidated a marriage,⁷⁹ courts in the aftermath of the decision took the biological test far beyond that realm. For example, employing the biological test, the court in *R. v. Tan* determined that a male-to-female transgender prostitute was male and therefore subject to more serious criminal penalties.⁸⁰ In *Tan*, the defendant, Gloria Greaves, was assigned male at birth but “had been psychologically and socially female for more than 18 years.”⁸¹ She had even been registered as a woman for national insurance purposes.⁸² The gender distinction became important when she was charged with prostitution because both the Sexual Offences Acts of 1956 and 1967 provided harsher punishments for male prostitutes.⁸³ The *Tan* court acknowledged that Greaves had undergone a sex change operation but held that the *Corbett* biological test controlled.⁸⁴ As a result, Greaves was deemed male and was sent to prison for longer than the female prostitute convicted in the same case.⁸⁵

2. The ECHR Intervenes: The Road to *Goodwin*

While a series of gender recognition cases in the ECHR eventually culminated in a monumental transgender victory, the *Corbett* biological approach initially withstood vigorous attacks. *Rees v. United Kingdom*, the court’s first gender recognition case, involved a female-to-male transgender person who claimed that the United Kingdom violated the European Convention on Human Rights (European Convention) by not recognizing him as male.⁸⁶ The ECHR found that, while the United Kingdom might have “positive obligations inherent in an effective respect for private life,” the community’s interests outweighed those of the

77. *Corbett*, 2 All E.R. at 106.

78. *Corbett*, 2 All E.R. at 104.

79. *Corbett*, 2 All E.R. at 107.

80. *See R. v. Tan*, [1983] Q.B. 1053, 1064 [hereinafter *Tan*].

81. *Tan*, [1983] Q.B. at 1055.

82. *Tan*, [1983] Q.B. at 1056.

83. *See Tan*, [1983] Q.B. at 1063.

84. *Tan*, [1983] Q.B. at 1063–64.

85. *See Tan*, [1983] Q.B. at 1064.

86. *Rees v. United Kingdom*, 9 Eur. H.R. Rep. 56, 58 (1987).

individual.⁸⁷ The transitional stage of gender recognition law at the time motivated the court to give the United Kingdom a “wide margin of appreciation.”⁸⁸ The ECHR warned, however, that the “need for appropriate legal measures should . . . be kept under review having regard particularly to scientific and societal developments.”⁸⁹

The ECHR again adhered to the biological test in *Cossey v. United Kingdom*, observing that “no significant scientific developments” had occurred since *Rees* and “that gender reassignment surgery [still did] not result in the acquisition of all the biological characteristics of the other sex.”⁹⁰ The court reiterated that the United Kingdom retained its “margin of appreciation” because European countries lacked a unified approach to gender recognition.⁹¹ In *X, Y, & Z v. United Kingdom*, a female-to-male transgender person sought registration as the father of a child.⁹² Unsurprisingly, the ECHR granted the United Kingdom “a wide margin of appreciation” because “the issues in the case touch[ed] on areas where there [was] little common ground amongst the Member States of the Council of Europe and . . . the law appear[ed] to be in a transitional stage.”⁹³

Following these defeats, gender recognition rights suffered another blow from the ECHR, but the court specifically chastised the United Kingdom for not taking remedial measures. In *Sheffield & Horsham v. United Kingdom*, two male-to-female transgender people claimed the United Kingdom’s failure to recognize them as females violated the European Convention.⁹⁴ The rationale from *Rees* and *Cossey* again prevailed with the ECHR because “transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States.”⁹⁵ The court stressed, however, that while it had repeatedly prodded the United Kingdom to monitor gender recognition law as science and society developed, the government seemed content with the status quo.⁹⁶ The United Kingdom soon would have to acknowledge that “there is an increased social accep-

87. *Rees*, 9 Eur. H.R. Rep. at 64.

88. *Rees*, 9 Eur. H.R. Rep. at 64.

89. *Rees*, 9 Eur. H.R. Rep. at 68.

90. *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, 641 (1990).

91. *Cossey*, 13 Eur. H.R. Rep. at 641.

92. *X, Y, & Z v. United Kingdom*, 24 Eur. H.R. Rep. 143, 147 (1997).

93. *X, Y, & Z*, 24 Eur. H.R. Rep. at 144.

94. *Sheffield & Horsham v. United Kingdom*, App. Nos. 22885/93, 23390/94, 27 Eur. H.R. Rep. 163, 172–73 (1998).

95. *Sheffield*, 27 Eur. H.R. Rep. at 193.

96. *Sheffield*, 27 Eur. H.R. Rep. at 193.

tance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter.”⁹⁷

That moment arrived in 2002 with *Goodwin v. United Kingdom*, in which a post-operative male-to-female transgender person claimed the United Kingdom’s lack of gender recognition violated the European Convention.⁹⁸ The ECHR determined that the humiliation felt by transgender people denied these rights could no longer “be regarded as a minor inconvenience arising from a formality.”⁹⁹ The court emphasized the United Kingdom’s hypocrisy of allowing gender reassignment surgery yet refusing to properly recognize individuals following the operation.¹⁰⁰ Paving the way for its about-face, the ECHR noted that “transsexualism has wide international recognition as a medical condition for which treatment is provided”¹⁰¹ and that twenty European states already had given “post-operative transsexuals [the right] to marry a person of sex opposite to their acquired gender.”¹⁰² The ECHR further reasoned that the United Kingdom could not wait for future scientific research when gender recognition would cause minor hardship, if any, to the public interest.¹⁰³

The ECHR therefore renounced the *Corbett* biological test and held the United Kingdom in violation of Article 8 (right to respect for private life) and Article 12 (right to marry and found a family) of the European Convention.¹⁰⁴ The coup de grâce came in the court’s closing words, which finally established the United Kingdom’s elusive “positive obligation” for change:

The Court has found that the situation, as it has evolved, no longer falls within the United Kingdom’s margin of appreciation. It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfill its obligations to secure the applicant’s, and other

97. *Sheffield*, 27 Eur. H.R. Rep. at 194.

98. *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 447, 455 (2002).

99. *Goodwin*, 35 Eur. H.R. Rep. at 472–73.

100. *Goodwin*, 35 Eur. H.R. Rep. at 473.

101. *Goodwin*, 35 Eur. H.R. Rep. at 474.

102. *Goodwin*, 35 Eur. H.R. Rep. at 467. The European states allowing a post-operative transgender person to marry a person of the opposite gender were Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey, and the Ukraine.

103. *Goodwin*, 35 Eur. H.R. Rep. at 476–77.

104. *Goodwin*, 35 Eur. H.R. Rep. at 484.

transsexuals', right to respect for private life and right to marry in compliance with this judgment.¹⁰⁵

Although ECHR decisions are nonbinding on the United Kingdom, the Human Rights Act requires the United Kingdom's courts and tribunals to take into account any "judgment, decision, declaration or advisory opinion" made by that court.¹⁰⁶ Therefore, with an unequivocal mandate from the ECHR, the dismal gender recognition situation in the United Kingdom was about to change direction.¹⁰⁷

3. The U.K. Solution: The Gender Recognition Act

Following the ECHR's indictment in *Goodwin*, the United Kingdom embarked on an intense legislative process resulting in the Gender Recognition Act,¹⁰⁸ which received royal assent on July 1, 2004.¹⁰⁹ The GRA allows "transsexual people who have taken decisive steps to live fully and permanently in their acquired gender to gain legal recognition in that gender."¹¹⁰ To obtain a gender recognition certificate, an applicant must be at least eighteen years old and have lived in his or her new gender for two years or more.¹¹¹ The Act does not require the transgender person to undergo a surgical operation; a detailed report including a gender dysphoria diagnosis by a doctor or psychologist practicing in the field suffices.¹¹²

105. *Goodwin*, 35 Eur. H.R. Rep. at 483.

106. Human Rights Act, 1998, c. 42, § 2(1)(a) (U.K.), available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

107. *Bellinger v. Bellinger*, [2003] UKHL 21, [2003] 2 A.C. 467, 480 (H.L.) (U.K.). In the interim after *Goodwin* but before the passage of the Gender Recognition Act, England's House of Lords issued a final decision in *Bellinger v. Bellinger*, invalidating a marriage between a male-to-female transgender person and her husband and noting that a change in law would be a matter for Parliament to deal with in forthcoming legislation. The court did, however, find the current state of law incompatible with the European Convention on Human Rights under the Human Rights Act. *Bellinger*, 2 A.C. at 480.

108. Gender Recognition Act, 2004, c. 7.

109. OFFICE OF PUBLIC SECTOR INFORMATION, EXPLANATORY NOTES TO GENDER RECOGNITION ACT (2004), available at <http://www.opsi.gov.uk/acts/en2004/2004en07.htm>.

110. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, INTRODUCTION AND BACKGROUND TO THE GENDER RECOGNITION BILL (2003), <http://www.dca.gov.uk/constitution/transsex/intro.htm>.

111. Gender Recognition Act, 2004, c. 7, §§ 1(1), 2(1)(b).

112. *Id.* §§ 3(1)(a)–(b).

An individual possessing a gender recognition certificate becomes the acquired gender “for all purposes.”¹¹³ In an instant, the person receives every right and responsibility granted to a male or female at birth,¹¹⁴ may marry a person of the gender opposite his or her new gender,¹¹⁵ is eligible for pension and retirement benefits at the age appropriate to the new gender,¹¹⁶ and may receive a new birth certificate in that gender.¹¹⁷ Furthermore, the individual is considered to be the new gender for purposes of the Sex Discrimination Act 1975.¹¹⁸

The GRA addresses a gender recognition certificate’s effect on certain areas of society especially intertwined with gender. A person’s newly acquired gender does not affect inheritance status under a will¹¹⁹ or parental status as the mother or father of a child.¹²⁰ In criminal law, the Act also ensures that prosecutors retain the ability to charge a certificate holder with a “gender-specific offence.”¹²¹ Additionally, the GRA prohibits a transgender person’s participation in a “gender-affected sport”¹²² as the acquired gender if it affects the fairness or safety of the competition.¹²³ While implementation of the GRA proved challenging,¹²⁴ the Act serves as a model for the rest of the world and demonstrates that granting comprehensive gender recognition rights remains a realistic goal.

113. *Id.* § 9(1).

114. *Id.* § 9(1).

115. *Id.* § 11.

116. *Id.* § 13.

117. *Id.* § 10. The GRA, however, requires the U.K. Registrar General to keep the original birth certificate on file and discreetly link it to a Gender Recognition Register with the new birth certificate. *Id.* § 10, sched. 3; see OFFICE OF PUBLIC SECTOR INFORMATION, *supra* note 109, ¶ 32.

118. Gender Recognition Act, 2004 c. 7, § 14; see GENDER RECOGNITION PANEL, EXPLANATORY LEAFLET: A GUIDE FOR USERS 7 (2007), available at <http://www.grp.gov.uk/documents/guidance/ExplanatoryLeaflet.pdf> (“[A]n employer must treat a transsexual woman with a Gender Recognition Certificate no less favourably than their other female employees.”); see generally Sex Discrimination Act, 1975, c. 65, available at <http://www.pfc.org.uk/node/297> (outlawing sex discrimination in employment and vocational training, education, and the provision and sale of goods, facilities, services, and premises).

119. Gender Recognition Act, 2004 c. 7, §§ 15, 18.

120. *Id.* § 12.

121. *Id.* § 20. For example, a male-to-female transgender person still can be charged with rape as a male.

122. A gender-affected sport is one where “the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport.” *Id.* § 19(4).

123. *Id.* §§ 19(1)–(2).

124. See *infra* Part IV.G.

IV. IMPROVING THE GRA: NATIONAL GENDER RECOGNITION LEGISLATION FOR THE UNITED STATES

Gender recognition rights become timely in the United States when examined through the lens of the Real ID Act,¹²⁵ signed into law on May 11, 2005, by President George W. Bush.¹²⁶ Congress tacked the Real ID Act onto a military spending bill, forcing opposing legislators also to vote in one fell swoop against money designated for troops in Iraq and tsunami relief.¹²⁷ The Real ID Act attempts to disrupt terrorist travel in the United States in response to revelations that the 9/11 hijackers used fraudulent driver's licenses to pass airport security.¹²⁸ Its most disturbing provisions involve the creation of a national identification system.¹²⁹ Starting in 2008, U.S. citizens must present either an approved ID card or driver's license in order to board airplanes and enter federal buildings or other secure areas including nuclear reactors.¹³⁰

While this identification scheme appears harmless on the surface, the Real ID Act requires the national ID card to designate a person's gender.¹³¹ To obtain a card, an individual must present verifying documents such as a birth certificate, Social Security card, utility bills, and photos.¹³² The card may be refused if any information on the documents, including gender, does not align properly.¹³³ Understandably, transgender people fear that if they cannot prove gender and get their preferred notation on the national ID cards, they may be pigeonholed forever into the incorrect gender.¹³⁴ Furthermore, copies of the verifying documents remain on file with the government for up to a decade,¹³⁵ increasing the complications a transgender person will confront when attempting to transition after receiving an ID card.

While such evidentiary concerns for obtaining a driver's license might exist under current state DMV regulations, the Real ID Act exac-

125. Real ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005).

126. Dana Heupel, *State Prepares for New Licensing Rules*, SPRINGFIELD ST. J.-REG., Oct. 20, 2005, at 18.

127. *Questions and Answers*, AUGUSTA CHRON., June 12, 2005, at A11.

128. Elsner, *supra* note 11.

129. Real ID Act § 202.

130. Heupel, *supra* note 126.

131. Real ID Act § 202(b)(3).

132. *Id.* § 202(c)(1).

133. See LeiLani Dowell, *Civil Rights Groups Denounce REAL ID*, WORKERS WORLD, Apr. 14, 2005, <http://www.workers.org/2005/us/real-id-0421>.

134. Gwen Smith, *ID Law Targets Terrorists, Trans: Pending Bill to Create Federal Rules for ID Cards Targets Terrorists, but Hurts Transgendered People*, WASH. BLADE, Mar. 11, 2005, <http://www.washingtonblade.com/2005/3-11/view/columns/pending.cfm>.

135. Real ID Act § 202(d)(2).

erbates the dangers to transgender people because of the aggregation of data across state borders. For example, because the Social Security Administration requires genital surgery for a change in sex designation but the DMV in most states requires only a doctor's letter, cross-checking records in these databases results in a disparity that creates significant problems for transgender people.¹³⁶ Indeed, the Missouri DMV notified transgender people who had already changed the sex designation on their driver's licenses that they needed to return with additional medical evidence or risk suspension of driving privileges.¹³⁷

U.S. gender recognition cases today continue to follow the *Corbett* biological test for determining gender, an approach now abandoned in the United Kingdom. With courts clamoring for legislative intervention in this public policy area, and the imminent threat of the Real ID Act, Congress must provide a gender recognition answer. The United States should grab hold of the foundation laid by the GRA, correcting its faults and strengthening loose ends, to follow the United Kingdom in charting a new course.

A. Pre-Operative vs. Post-Operative Gender Recognition

When the ECHR determined in *Goodwin* that the United Kingdom's treatment of transgender people went beyond its "margin of appreciation," the court specifically noted that the issue "[was] the lack of legal recognition of the gender re-assignment of *post-operative* transsexuals."¹³⁸ Yet two years later, by not making surgery a requirement for gender recognition under the GRA, the United Kingdom single-handedly granted rights to both pre-operative and post-operative transgender people.¹³⁹ In doing so, the United Kingdom acknowledged the reality that many transgender people never undergo any surgery and that a surgery requirement would bar many transgender people from gender recognition rights.¹⁴⁰ In comparison, many other countries base their

136. Krawitz, *supra* note 9.

137. *Id.*

138. *Goodwin v. United Kingdom*, App. No. 28957/95, 35 E.H.R.R. 18, 483 (2002) (emphasis added).

139. *See* Gender Recognition Act, 2004, c. 7, § 2(1).

140. Sylvia Rivera Law Project, *Talking Points in Support of Proposed NYC Transgender Birth Certificate Regulations*, http://www.srlp.org/index.php?sec=03H&page=nycbc_talkingpts (last visited May 13, 2007) ("Recent data has shown that only 3% of transgender men have genital surgery. So a policy that requires genital surgery to get a correct birth certificate excludes many people from getting this basic documentation that they need to live and work.").

gender recognition laws on an outdated understanding of transgender people and refuse these rights until after surgery.¹⁴¹

Gender recognition can occur at three different points along the treatment spectrum: (1) after living in the new gender role, (2) after undergoing hormonal treatment, or (3) after surgical intervention.¹⁴² The drafters of the GRA properly chose the first option, leaving open the unusual but progressive possibility that “legal women may have a penis, and . . . legal men may have a vagina.”¹⁴³ While U.S. case law repeatedly comes down against gender recognition, even the early transgender victory in *M.T. v. J.T.* required gender reassignment surgery before attaching legal rights.¹⁴⁴ Against this decades-old backdrop, however, Iowa permits amendment of sex designation on birth certificates after a doctor states “that by reason of surgery *or other treatment* by the licensee, the sex designation of the person has been changed.”¹⁴⁵ Iowa therefore recognizes that individually-tailored treatments for transgender people have become the norm, and medical histories or other factors often eliminate genital reconstruction as a treatment option. Likewise, the United States should implement national legislation that provides across-the-board gender recognition regardless of surgery.

Opponents of pre-operative gender recognition rights claim that the GRA’s lack of a surgery requirement creates an incentive to commit fraud. For example, men in the United Kingdom are eligible for retirement pensions at age 65, but women may currently gain this status as early as age 60.¹⁴⁶ The GRA creates a short-cut that allows a male-to-female transgender person with gender recognition to retire and obtain the pension five years earlier.¹⁴⁷ No evidence exists that transgender people commonly use gender change to engage in any kind of fraud, however, and this viewpoint only perpetuates a stereotype. Furthermore, beyond the absurd idea that an individual would live many years in a new gender simply to obtain retirement benefits, such a disparity in

141. Whether achieved through statute or case law, Australia, Canada, New Zealand, Austria, Belgium, Denmark, France, Germany, Italy, and the Netherlands all require some form of surgical operation before granting gender recognition rights. Finland, however, does not require surgery before changing a person’s legal gender. WORKING GROUP REPORT, *supra* note 33, at 58–67.

142. *Id.* at 27.

143. Stephen Whittle, *Born Identity*, COMMUNITY CARE, Nov. 24, 2005, at 38.

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

145. IOWA CODE ANN. § 144.23(3) (West Supp. 2005) (emphasis added).

146. GENDER RECOGNITION PANEL, GENDER RECOGNITION: HOW GETTING A FULL GENDER RECOGNITION CERTIFICATE MAY AFFECT A TRANSSEXUAL MAN’S OR TRANSEXUAL WOMAN’S NATURAL INSURANCE, BENEFITS AND PENSIONS 5 (2005), available at <http://www.grp.gov.uk/documents/guidance/GuideBenefitsPension.pdf>.

147. Department for Constitutional Affairs, *supra* note 24.

pensions between men and women likely would violate the Equal Protection Clause in the United States.

Additionally, those in favor of a surgery requirement argue that surgery is “proof” that a person has truly transitioned, but they fail to explain the inadequacy of relying on documentation from a physician detailing other treatment in place of surgery. Under the GRA, the Gender Recognition Panel possesses broad discretion to grant or deny gender recognition, with the ultimate test being whether the members are “satisfied” that the applicant has gender dysphoria.¹⁴⁸ This standard is based on self-identity, along with the ability to appeal or reapply after six months,¹⁴⁹ and ensures that almost all applicants will be granted gender recognition.¹⁵⁰ While proponents of a surgical requirement might frown upon such a simplistic process, the ease of obtaining gender recognition is precisely the point of the Act. Indeed, the GRA takes the evaluation out of the hands of bureaucrats and grants the power to the transgender person’s physician, the most competent decision-maker in such a situation. The GRA demands only a doctor’s medical opinion as evidence, although applicants can submit supplementary forms such as utility bills to prove they have lived in the gender for two years.¹⁵¹

While a surgery requirement would permit a transgender person simply to verify a past operation and immediately receive gender recognition, the concept of gender hinges much more on psychological factors than body appearance. Moreover, the government does not need to “protect” individuals from transitioning to a new gender because swapping back to the birth-assigned gender almost never occurs. In sum, the arguments in favor of a surgery requirement do not reasonably outweigh the damage to the many transgender people who would be excluded from recognition because of a lack of surgery. Eliminating the surgery requirement truly allows a person the freedom to determine his or her own gender identity, and any potential U.S. gender recognition legislation should continue the path forged by the GRA.

148. Gender Recognition Act, 2004, c. 7, § 2(1).

149. *Id.* § 8(1), (4).

150. Out of 1,153 applications for gender recognition received by December 2005, the Gender Recognition Panel had rejected only 17 applications while issuing 896 full gender recognition certificates. The United Kingdom Parliament, House of Commons Hansard Written Answers, column 2549W, Dec. 19, 2005 (statement of Ms. Harman), available at http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo051219/text/51219w74.htm#51219w74.html_spnew2.

151. Gender Recognition Act, 2004, c. 7, § 3.

B. Marriage

The GRA's most controversial provisions pertain to marriage. The Act allows a transgender person to wed an individual of the opposite sex *after* receiving a gender recognition certificate.¹⁵² Therefore, a male-to-female transgender person with gender recognition is considered to be a female and could legally marry a male¹⁵³ or create a civil partnership with another female.¹⁵⁴ This result yields few complaints, especially in light of the GRA's aim to grant gender recognition for "all purposes,"¹⁵⁵ and it follows in the footsteps of the many other countries granting gender recognition.¹⁵⁶ If the United States enacts gender recognition legislation, it must permit transgender marriage in order to legitimize that the person truly has transitioned to a new gender.

Much more troubling issues arise when focusing on transgender people who married in their birth-assigned genders *before* receiving gender recognition. Under U.K. law, only two people of the opposite sex can marry.¹⁵⁷ Consequently, the GRA requires married applicants to divorce their spouses before receiving full gender recognition.¹⁵⁸ Otherwise, by leaving a couple of the same sex intact following gender recognition, the U.K. government would be sanctioning same-sex marriage. A married applicant who satisfies all other criteria for legal recognition will receive an *interim* gender recognition certificate.¹⁵⁹ This interim certificate, however, has no legal effect except to serve as evidence for ending the marriage in pursuit of a full gender recognition certificate.¹⁶⁰

152. Ministers, however, may refuse to perform the ceremony based on religious beliefs. See Gender Recognition (Disclosure of Information) (England, Wales and Northern Ireland) (No. 2) Order, 2005, S.I. 2005/916, arts. 4(2)(a), 4(3), available at <http://www.opsi.gov.uk/si/si2005/20050916.htm> ("[T]he disclosure is made for the purpose of enabling any person to make a decision . . . which complies with the doctrines of the religion . . ."). Furthermore, although clergy in the Church of England and Church of Wales normally are obligated to solemnize marriages, the GRA amends the Marriage Act 1949 to include a conscience clause permitting refusal if the clergyman "reasonably believes that the person's gender has become the acquired gender" under the GRA. Gender Recognition Act, 2004, c. 7, § 11, sched. 4, ¶ 3.

153. OFFICE OF PUBLIC SECTOR INFORMATION, *supra* note 109, ¶ 27.

154. See Civil Partnership Act, 2004, c.33, § 1(1) (U.K.), available at <http://www.opsi.gov.uk/acts/acts2004/40033--b.htm#1>.

155. Gender Recognition Act, 2004, c. 7, § 9(1).

156. WORKING GROUP REPORT, *supra* note 33, at 58–67.

157. Matrimonial Causes Act, 1973, § 11(c) (U.K.).

158. Gender Recognition Act, 2004, c. 7, §§ 4(3), (5)(1).

159. *Id.* § 4(3).

160. *Id.* § 5(2).

The United Kingdom's misguided approach leaves married transgender people in a quandary. They are forced to overcome needless legal complications simply to maintain a status to which they already committed.¹⁶¹ The non-transgender spouse, while perhaps initially uncomfortable with the other's gender issues, often becomes a pillar of support for coping with problems. Moreover, these couples remain legally married even though the transgender person's transition may leave them both appearing to be of the same gender. The United Kingdom looks away as long as the transgender person does not petition for gender recognition, but requesting a full gender recognition certificate requires divorce, an action especially disdained by Christian transgender people.¹⁶²

This façade of refusing to permit same-sex marriages is absurd considering that the U.K.'s Civil Partnership Act grants same-sex couples nearly the entire buffet of rights enjoyed in marriage.¹⁶³ The United Kingdom, toying with semantics, refuses to refer to civil partnerships as marriages in order to keep marriage preserved exclusively for heterosexuals. The GRA's proponents take comfort that transgender people booted from pre-existing marriages can register for civil partnerships like homosexuals.¹⁶⁴ Yet the same proponents acknowledge that marriage dissolution affects the benefits entitlements of both spouses¹⁶⁵ while burdening the couple to split resources and avoid harming their children.¹⁶⁶

The U.K. commitment to banning homosexual marriage, regardless of its own dubious motive, goes especially askew when the GRA throws transgender people into the mix. Following participation in a

161. See Jonathan Walker, *Bill May Force Couple's Split*, BIRMINGHAM POST (England), Mar. 29, 2004, at 3 (discussing the dilemma of a transgender person married for thirty-six years).

162. See Camillo Fracassini, *Sex-Change Couple Seek Marriage Recognition*, SUNDAY TIMES, Oct. 30, 2005, at 7 (quoting transgender spouse as stating, "When we married we made a public commitment in front of our friends and family to stay together for better or for worse and [we] have no intention of breaking that promise").

163. *Gay Couples to Get Joint Rights*, BBC NEWS, Mar. 31, 2004, http://news.bbc.co.uk/1/hi/uk_politics/3584285.stm (observing that the Civil Partnership Act entitles same-sex couples "to a range of property rights, the same exemption as married couples on inheritance tax, social security and pension benefits, and also the ability to get parental responsibility for a partner's children").

164. GENDER RECOGNITION PANEL, GUIDANCE FOR MARRIED PEOPLE OR THOSE IN CIVIL PARTNERSHIPS 4 (2005), available at http://www.grp.gov.uk/documents/guide_married_civil_partner_05.pdf.

165. *Id.* (observing that income tax, capital gains tax, and inheritance tax all may be affected by annulment).

166. *Id.* at 3.

previously legal marriage, which homosexuals never had to begin with, transgender people attaining gender recognition should be able to remain married under a special exception in any possible U.S. legislation. Congress should examine France's gender recognition policy, established entirely through case law, which does not retrospectively annul a previous marriage after a transgender person changes genders.¹⁶⁷

Another hotly-debated effect of the GRA on marriage concerns transgender people who married in their acquired genders *before* the Act's passage. In the eyes of the law, the transgender person actually wed someone of the same birth-assigned gender and violated the U.K. prohibition on same-sex marriage. Therefore, any such union pre-dating the GRA is technically void.¹⁶⁸ Even though the couple legally can marry today under the GRA, the Act does not apply retroactively for any marriage perks that might have accrued during the pair's prior time together, such as benefits under an employer's health plan. Given the small number of couples in such a situation, a U.S. gender recognition law should permit retroactive acknowledgment of a previous transgender marriage upon substantial proof of the relationship. The United States, if it unflinchingly allows transgender marriages subsequent to enactment, need not bolster antiquated law simply out of spite for the few couples that broke the rules years before.

C. Privacy

When tackling an issue as sensitive as gender recognition, personal privacy achieves paramount importance. The GRA makes it a criminal offense for a person who acquires protected information about an individual's application or former gender status in an official capacity to disclose that information.¹⁶⁹ Those who gain protected information in an "official capacity" include anyone who grants transgender rights based on a gender recognition certificate,¹⁷⁰ in addition to public officials,¹⁷¹

167. See WORKING GROUP REPORT, *supra* note 33, at 64 (observing that, while a sex change does not automatically annul a previous marriage in France, a number of French courts have granted annulments because a valid marriage can exist only between two people of opposite sexes).

168. As a result, the transgender person in *Bellinger v. Bellinger* must marry her husband again after receiving a gender recognition certificate, even though the couple participated in a ceremony in 1981. [2003] 2 A.C. 467, 471 (H.L.).

169. Gender Recognition Act, 2004, c. 7, § 22(1).

170. GENDER RECOGNITION PANEL, *supra* note 118, at 6.

171. Gender Recognition Act, 2004, c. 7, § 22(3)(a).

employers,¹⁷² and business clients.¹⁷³ Yet while the GRA contains this privacy protection, U.K. lawmakers delineated an extensive list of exceptions where a person may disclose a transgender person's protected information without incurring liability.¹⁷⁴

The vagueness of the disclosure exceptions generates a false sense of security for transgender people, who trustingly hand over their most intimate secret to the government. A consent exception allows disclosure if the transgender person agrees to it,¹⁷⁵ but the GRA fails to account for consent obtained through fraud or while the individual is under duress. Furthermore, the GRA condones ignorance of the law by permitting disclosure when the offender lacks knowledge that the individual possessed a gender recognition certificate.¹⁷⁶ The GRA additionally includes a law enforcement exception ripe for abuse by granting disclosure "for the purpose of preventing or investigating crime."¹⁷⁷ Officers willing to fabricate stories to shield their intent can obtain unfettered access to private records.

Beyond the nine specific disclosure exceptions, the GRA provides for the creation of additional exceptions as needed.¹⁷⁸ This harrowing

172. *Id.* § 22(3)(b).

173. *Id.* § 22(3)(c).

174. *Id.* § 22(4). The GRA permits disclosure of protected information if:

- (a) the information does not enable that person to be identified,
- (b) that person has agreed to the disclosure of the information,
- (c) the information is protected information by virtue of subsection (2)(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued,
- (d) the disclosure is in accordance with an order of a court or tribunal,
- (e) the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,
- (f) the disclosure is for the purpose of preventing or investigating crime,
- (g) the disclosure is made to the Registrar General for England and Wales, the Registrar General for Scotland or the Registrar General for Northern Ireland,
- (h) the disclosure is made for the purposes of the social security system or a pension scheme,
- (i) the disclosure is in accordance with provision made by an order under subsection (5), or
- (j) the disclosure is in accordance with any provision of, or made by virtue of, an enactment other than this section.

Id.

175. *Id.* § 22(4)(b).

176. *Id.* § 22(4)(c).

177. *Id.* § 22(4)(f).

178. *Id.* § 22(5), (7).

free rein means that legislators may surprise transgender people with new, unaccounted-for disclosure rules that did not exist at the time of their gender recognition applications. Moreover, influential complaints place pressure on the government to increase the exceptions list. For example, Christian activists scoffed at the GRA through the legislative process for its lack of religious protection.¹⁷⁹ The day the GRA went into effect, companion legislation provided for additional exceptions permitting disclosure of information by religious officials when making decisions about transgender marriage, church employment or membership, and participation in sacraments.¹⁸⁰ Further exceptions introduced include disclosure for the purpose of obtaining legal advice¹⁸¹ and for medical purposes.¹⁸²

Congress must carefully scrutinize privacy policies when crafting a U.S. gender recognition law in order to avoid including easily-manipulated language that opens loopholes for disclosure of personal information. The GRA's broadly worded exceptions leave virtually all data vulnerable to disclosure if massaged properly to fall under one of the provisions. Furthermore, while a gender recognition law should evolve with society, the security of those protected must always remain the government's first priority. Leaving open the possibility for new disclosure exceptions exposes transgender people to uncalculated risks they never imagined when they applied for gender recognition.

D. Omitted Provisions

Harboring the idealism to grant gender recognition for "all purposes," the GRA drafters could have included that single sweeping provision and left the courts to interpret its application in specific areas as they arose. Yet rather than shortening the GRA considerably, U.K. lawmakers believed it necessary to enumerate the effects of a gender rec-

179. See generally THE CHRISTIAN INSTITUTE, *TRANSSEXUALISM BRIEFING* (2004), available at http://www.christian.org.uk/transsexualism/briefing_05mar04.pdf (explaining Christian opposition to the GRA at the Commons stage for, among other things, its lack of religious disclosure exceptions). Ironically, transgender interest groups supported certain religious exemptions, noting that they sought only personal human rights but did not wish to impinge on the beliefs of others. See Claire McNab, Vice President, Press for Change, *Why Welcome the Church Exemption?*, July 16, 2003, <http://www.pfc.org.uk/node/409>.

180. Gender Recognition (Disclosure of Information), (England, Wales and Northern Ireland) (No. 2) Order, 2005, S.I. 2005/916, art. 4, available at <http://www.opsi.gov.uk/si/si2005/20050916.htm>.

181. *Id.* art. 3.

182. *Id.* art. 5.

ognition certificate in situations including marriage, parenthood, pensions, discrimination, inheritance, sports, and crime.¹⁸³ Despite providing these clarifications, however, the GRA omits discussion of prisons, schools, and the military, all arenas where gender plays a key role.

Most countries with gender recognition policies separate *post-operative* transgender prisoners according to acquired gender, without examining birth-assigned gender.¹⁸⁴ Even lacking gender recognition legislation, U.S. federal prisons similarly “incarcerate persons who have completed sexual reassignment with prisoners of the transsexual’s new gender, but . . . incarcerate persons who have not completed it with prisoners of the transsexual’s original gender.”¹⁸⁵ Such a misguided policy, which does not adequately protect *pre-operative* transgender prisoners, could be corrected by U.S. gender recognition legislation that eliminates any surgery requirement and instead focuses on self-identified gender.¹⁸⁶ Indeed, transgender women who have not undergone any surgeries are in extreme danger in men’s prisons because they become targets whether or not they have a penis. New Zealand has partially rectified this problem by placing *pre-operative* transgender inmates in single cells or in cells with other transgender inmates,¹⁸⁷ but this unfairly segregates them from the rest of the prison population in an effort to protect them. The best solution is to ignore any surgery and place both pre-operative and post-operative transgender people into prisons based on their newly-acquired genders.¹⁸⁸ Because of the hostility directed at transgender prisoners,¹⁸⁹ especially those who never undergo surgery, a U.S. gender recognition law should spell out the nation’s position on such inmates instead of leaving the matter to judicial discretion.

The United States also needs to go beyond the GRA and address the implications of gender recognition on schools and military service. Gender becomes the dividing line for admission into some of the most

183. Gender Recognition Act, 2004, c. 7, §§ 11–15, 19–20.

184. WORKING GROUP REPORT, *supra* note 33, at 60–67.

185. Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993); see Lamb v. Maschner, 633 F. Supp. 351, 354 (D. Kan. 1986) (denying a pre-operative transgender prisoner’s request to be transferred to a women’s facility).

186. See *supra* Part IV.A.

187. WORKING GROUP REPORT, *supra* note 33, at 62.

188. A woman with a penis would not be a threat to birth-assigned females in prison because there is no evidence that transgender people are more likely to be sexual predators than non-transgender people.

189. See SHANNON MINTER, NATIONAL CENTER FOR LESBIAN RIGHTS, REPRESENTING TRANSSEXUAL CLIENTS: SELECTED LEGAL ISSUES (2003), <http://www.transgenderlaw.org/resources/translaw.htm> (observing that incarceration by birth sex “puts male-to-female transsexuals at great risk of sexual violence”).

elite educational institutions, and a transgender student may bear the burden of exclusion without receiving explicit legislative support. Additionally, the transgender soldier becomes caught in no-man's land while serving in a military still rife with gender stereotypes. In fashioning U.S. law, Congress must remember the transgender prisoner incarcerated with cruel fellow inmates, the transgender student applying for higher education, and the transgender soldier struggling to determine the barracks in which to sleep.

E. Application Fee

The GRA's drafters willingly accepted gender self-determination as a fundamental human right, yet they hypocritically included a provision requiring transgender people to submit an application fee for gender recognition.¹⁹⁰ Most applicants must pay £140, although poor individuals may be charged a smaller fee or none at all depending on their circumstances.¹⁹¹ Even with this variable fee scale, however, the United Kingdom faltered because it requires transgender people to pay for the gender recognition that everyone else obtains for free. Imagine the uproar if hospitals forced only the wealthy parents of newborns to hand over money in order to legally establish the child's status as a boy or a girl. Future U.S. gender recognition legislation must eliminate application fees and instead rely on taxpayer dollars for administrative funds. If the United States insists on a fee, however, it should charge only the equivalent cost of renewing other identification like driver's licenses.¹⁹²

F. Interest Group Participation

The United Kingdom solicited input from transgender people in an effort to craft a gender recognition law responsive to the needs of those most affected. Nevertheless, "[t]he final version . . . took none of these concerns into account and bears close similarity to the debated

190. Gender Recognition Act, 2004, c.7, § 7(2).

191. Gender Recognition (Application Fees) Order, 2005, S.I. 2005/638, arts. 2–3 (U.K.), available at <http://www.opsi.gov.uk/si/si2005/20050638.htm>; see also GENDER RECOGNITION PANEL, FEES FOR APPLYING TO THE GENDER RECOGNITION PANEL (2006), available at http://www.grp.gov.uk/documents/new_application_fees_050405.pdf (outlining how to determine an applicant's appropriate fee).

192. The standard £140 fee in the United Kingdom equates to approximately US\$292. See XE.com, Universal Currency Converter, <http://www.xe.com/ucc/> (last visited Nov. 4, 2007).

Gender Recognition Bill.”¹⁹³ Press for Change, the major U.K. transgender lobbying group, submitted an extensive list of recommendations in response to an early GRA draft, but only remnants of those ideas came to fruition in the final Act.¹⁹⁴ Moreover, some transgender people resent the GRA’s characterization of their genders as “acquired,”¹⁹⁵ when they maintain that their gender dysphoria existed since birth.¹⁹⁶

At every stage of the legislative process, the United States must employ a research team that seeks assistance from activists and functions as an intermediary, filtering feedback to the drafters. When dabbling in the field of gender recognition rights, where few members of Congress will ever be affected, lawmakers need to encourage the transgender community to relay its aspirations. The transgender backlash to parts of the GRA demonstrates that asking for these opinions means nothing if they are not incorporated into the statute.

G. Implementation

Transgender people, thrilled with the passage of the GRA, wanted to obtain newly-minted gender recognition certificates as soon as possible.¹⁹⁷ Yet the roadblock of reality set in as the government first undertook implementation tasks necessary before the processing of applications could begin. The United Kingdom had to decide the appearance of a gender recognition certificate, establish application fees, clarify the Act’s privacy provisions, and form the actual Gender Recognition Panels.¹⁹⁸

With those hurdles passed, and over a year following the Act’s royal assent, only 668 individuals had applied for a gender recognition certificate, a paltry percentage of the estimated 5,000 transgender people in the United Kingdom.¹⁹⁹ This low turnout illuminates that, at least in its

193. Dickerson, *supra* note 16, at 828.

194. See Press for Change, Submission to the Joint Committee on Human Rights Regarding the Draft Gender Recognition Bill, Sept. 2003, available at <http://www.pfc.org.uk/files/legal/jchr-sub.pdf>.

195. Gender Recognition Act, 2004, c. 7, § 1(2).

196. See Gender Identity Research & Education Society, Responses to the Draft Gender Recognition Bill (Apr. 22, 2004), available at http://www.gires.org.uk/Text_Assets/Crown_copyright_gender_recognition.pdf (noting that the phrase “newly recognized gender” would be more appropriate).

197. See, e.g., Posting of Claire McNab, cmcnab@pfc.org.uk, to pfc-news@lists.pfc.org.uk (May 28, 2004), <http://www.pfc.org.uk/pfclists/news-arc/2004q2/msg00072.htm>.

198. *Id.*

199. Posting of Claire McNab, cmcnab@pfc.org.uk, to pfc-news@lists.pfc.org.uk (July 16, 2005), <http://www.pfc.org.uk/pfclists/news-arc/2005q3/msg00022.htm>.

infancy, the Act's impact remains theoretical. It also suggests that the U.K.'s lack of preparedness for the application process may have scared off those initially eager to jump on the GRA bandwagon, causing doubts as to whether any epic legal change actually would flow from a certificate. Transgender activists further note that most applicants experienced delays because the government made the early "fast track" certificates available only to people who had lived in their new gender for at least six years.²⁰⁰

The GRA's shortage of implementation machinery sent the message that lawmakers had passed the legislation to appease transgender people but intended to postpone gender recognition rights as long as possible. The Act's life-changing potential, followed by modest governmental enthusiasm, should leave the United Kingdom unsurprised at the relatively scarce number of initial applications received. Groundbreaking legislation requires the full thrust of the government behind it, and a U.S. gender recognition law would need forces mobilized to achieve its goals soon after enactment. Without any urgent pressure from a legislative timetable, as the ECHR imposed upon the United Kingdom, the United States remains in an unfortunate position where Congress may continually ignore gender recognition rights.

V. CONCLUSION

When Frances Mary Fischer claimed to be female during a vehicle inspection but lacked legal gender documentation, New York police groped her breasts to determine their authenticity.²⁰¹ Similarly, mud-slinging political candidates contested a Georgia city council election on the grounds that transgender incumbent Michelle Mickey Bruce misled voters by identifying herself as a woman.²⁰² The dearth of gender recognition legislation in the United States subjects countless individuals across the country to such indignities on a regular basis. Private citizens, exasperated with the U.S. gender recognition landscape, drafted the "International Bill of Gender Rights" in 1993 as a reminder that every human being possesses certain gender rights.²⁰³ Congress, however, fails

200. *Id.*

201. Lambda Legal, *Snapshots of Lambda Legal's Work Towards Equality Every Day* (Nov. 10, 2003), <http://www.lambdalegal.org/our-work/publications/impact/2003/fall/page.jsp?itemID=31989974>.

202. Megan Matteucci, *Transgender Candidate Misled Voters, Suit Alleges*, ATLANTA J.-CONSTR., Nov. 19, 2007, at 1B.

203. The International Bill of Gender Rights, June 17, 1995, *available at* <http://www.pfc.org.uk/node/275>.

to see the need to give individuals the “right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role.”²⁰⁴

The promise of gender recognition rights emanating from the *M.T. v. J.T.* decision in 1976 all but disappeared in the ensuing succession of judicial defeats to the interests of transgender people. With the advent of the Real ID Act, the United States stands poised to shatter any meaningful possibility of gender recognition. The disparate state laws governing gender change throughout the country ensure that some transgender people, possessing identifying documents that do not match their gender, will encounter severe complications attempting to acquire national ID cards.

While the United Kingdom eventually acknowledged the flaws of the *Corbett* biological test, the United States refuses to accept that gender involves psychological components beyond mere physical anatomy. The GRA serves as an impetus for the United States to develop its own gender recognition law, but the United Kingdom’s well-meaning approach is not without problems. At this early juncture, the United States can address the Act’s most gaping holes and unify the current varying state provisions. Frances Mary Fischer, Michelle Mickey Bruce, and other persecuted transgender people then will rejoice in obtaining the coveted gender recognition that so many people take for granted. ♣

204. *Id.*

