

TRANSGENDERED IN ALASKA: NAVIGATING THE CHANGING LEGAL LANDSCAPE FOR CHANGE OF GENDER PETITIONS

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ABSTRACT

Over the past several decades, the law has evolved considerably in the area of transgender rights. In this Article, the Authors introduce the legal issues surrounding legal change of gender for transsexual individuals, looking to current social science, past case law, and general constitutional principles for guidance. The Authors also examine the political and practical implications of a proposed regime for change of gender petitions for transsexuals in Alaska.

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INTRODUCTION

In Alaska, as in many states, courts are seeing an increased number of petitions for change of gender.¹ These petitions are similar to the routine change of name petitions courts have seen for years, yet they carry with them a tremendous potential for political controversy.² At the moment, Alaska's trial courts have little guidance as to how to rule on these petitions. As a result, some petitions have been denied outright, while others have been considered but with inconsistent legal standards. This Article was written with an eye toward helping Alaska's courts to

1. Correspondences with the Clerks of Court in Anchorage, Fairbanks, Juneau, and Palmer have confirmed that petitions for change of gender have no individual CourtView code (CourtView is the case management software used by the Alaska Court System), which makes it difficult to pinpoint when change of gender petitions first appeared in Alaska courts or how the frequency of petitions has changed over time. Informal interviews with Alaska Superior Court judges, however, have suggested that although these petitions are still relatively infrequent, their numbers have grown in recent years.

2. Although these petitions do not appear to be on the political radar at the moment in Alaska, transgender rights have been hotly debated in Anchorage in the context of whether people should be allowed to discriminate against transgendered individuals when making housing and employment decisions. See *infra* Part III.A. Many of the arguments against extending anti-discrimination protections to the transgender community express a sentiment at odds with granting gender change petitions. See generally <http://sosanchorage.com>, and especially Pastor Prevo's short opinion piece *Any Man Can Put on a Dress and Walk into the Ladies' Restroom*, available at www.sosanchorage.com/information/ANY_MAN_CAN_PUT_ON_A_DRESS_AND_WALK_INTO_THE_LADIES.pdf. If a court granted a transgender woman a legal gender change, she would be entitled to use a public ladies' restroom with or without the protections of an anti-discrimination ordinance. Therefore, it seems likely that, should gender change petitions gain political attention, Pastor Prevo, who has been described as the leader of the opposition to the anti-discrimination ordinance, would likely oppose such a petition, as would those who share his beliefs. See Megan Holland, *Gay Rights Measure's Changes Criticized by Both Sides*, ANCHORAGE DAILY NEWS, June 18, 2009, at A1.

understand the issues behind the controversy, to process the petitions in a manner consistent with state precedent, and to explore the practical and legal effects of such decisions.

Most people take for granted the privilege of having legal identification that matches the gender that they present to the world. When most individuals travel by airplane, purchase alcohol, vote, or apply for a job, bank account, or apartment rental, they are not treated with mistrust because their identification documents indicate a mismatch between the gender they were legally assigned at birth and the one they live as an adult. Not everyone shares this privilege. Having identification that matches lived gender is “incredibly vital[,] as one’s legal gender designation has the potential to impact many areas of life: the ability to marry, the ability to travel, the ability to inherit, insurance coverage, one’s enrollment in the draft, where one might be incarcerated, and more.”³ For many transgender individuals, the only way to obtain identification that matches their lived gender is through a complete surgical reconstruction of their genitals, which is collectively referred to as sexual reassignment surgery (SRS). These surgeries carry risks, are expensive, and often require extended recovery periods.⁴

The decision each state has to make regarding the procedure for obtaining a legal gender change has been and will continue to be informed by impassioned stances on both sides of the argument. As with any civil rights issue, the debate centers on the pull between individual human rights and society’s sense of social stability and order. On the one hand, “[i]f a person does not have identification that accurately reflects his or her social gender, that person is put in a position of potential danger on a daily basis and may be forced to live on society’s margins because of an inability to obtain gainful employment, credit, or bank accounts.”⁵ On the other hand, most of us view gender as one of the salient categories which we use to structure and make sense of our own identities and our interactions with each

3. Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675, 680 (2008).

4. See, e.g., Kristin Wenstrom, Comment, “*What the Birth Certificate Shows*”: *An Argument To Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 TUL. J.L. & SEXUALITY 131, 140–41 (2008) (“These surgeries may be prohibitively expensive, some cost over \$70,000 and very few medical insurance providers cover such surgeries in their plans. . . . Many [choose] not to have surgery due to the risks of complications, the painful and extended recovery period, and the reduction of erotic sensation. . . . A requirement that an applicant have undergone genital surgery is especially burdensome for transgender men. . . . A recent study found that only three percent of [female-to-male transsexuals] pursue genital surgery due to the costs, limitations of the procedure, as well as the medical risks associated with it.”).

5. *Id.* at 681.

other. Social categories are only salient, however, to the extent they have garnered social consensus. Thus, many people are uncomfortable with the fact that gender is not universally perceived as a fixed characteristic. For a state to adopt laws that reflect a perception of gender as something that is changeable would be to undermine a pillar upon which many have constructed their worldview. When the debate is framed in this way, it is easy to see why considerable controversy exists regarding the rights and liberties of transgender individuals.

Alaska's courts and lawmakers will have to decide where they stand on the continuum of individual rights. Where to draw the line is rarely an easy decision. The public can make its view known through voter initiatives and lobbying.⁶ The Alaskan judiciary, however, is in the interesting position of being the interpreter of what is arguably the most fiercely individual-rights-protective constitution of any in the United States. Alaskan jurisprudence, like the historical sentiment in the state at large, has long been "grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles."⁷ As this Article will show, Alaskan precedent suggests that it is appropriate for courts to require some showing of a petitioner's intention to live permanently as the desired gender before approving a change of gender petition.⁸ That precedent further suggests, however, that a requirement of certain sexual reassignment surgeries is not an appropriate legal standard for Alaskan courts to apply.⁹

Over the past several decades, the law has evolved considerably in the area of gay, lesbian, bisexual, and transgender (GLBT) rights.¹⁰ This

6. See *infra* Part III.A., regarding the Anchorage Ordinance debate.

7. *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972).

8. Because gender change petitions have not been directly addressed by the Alaska Supreme Court or the United States Supreme Court, Alaska trial courts have a substantial amount of discretion in deciding what constitutes proof of permanency. This Article strives to outline several approaches being used in the United States and abroad, for the purpose of providing a reference for Alaska courts.

9. There are many surgeries that fall within the category of sexual reassignment surgery. Requiring some of those surgeries, such as phallus construction for a female-to-male individual, before a change of gender petition will be granted, appears to be more punitive than functional. It is the position of this Article that Alaskan precedent disfavors the use of such surgeries as a barrier to legal gender change. See *infra* Part IV.

10. For the evolution and recognition of civil and constitutional gender rights, see such cases as *Romer v. Evans*, 517 U.S. 620 (1996) (holding that an amendment to the Colorado Constitution banning laws that offered protections to the GLBT community violated the Equal Protection Clause of the United States Constitution); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute criminalizing certain intimate sexual conduct between same-sex

Article focuses on the specific legal arguments surrounding legal change of gender for transsexuals and draws from current social science and general constitutional principles for guidance. The courts do not operate in a vacuum, so this Article also explores the practical consequences of the choices to be made regarding the change of gender issue.

I. PETITIONS FOR GENDER CHANGE: AN OVERVIEW

As the legal rights of the GLBT community evolve in the law, so do the recognized rights of transsexual individuals. Many states have adopted statutes that allow a person to petition for a change of gender.¹¹ Alaska, in contrast, does not have any specific statute providing a vehicle for official gender change. To show how Alaska's courts have applied the law to transgender Alaskans seeking a court-ordered gender modification, this Article follows one Alaskan gender change petitioner, to whom the Authors have given the pseudonym "Jane."

A. Terminology

Understanding transgender issues requires some familiarity with certain terminology. In our case study, Jane is a transsexual. Transsexuals "identify themselves as transgendered."¹² A transgender individual expresses his or her gender "in ways incongruous with the sex . . . to which [he or she was] assigned at birth."¹³ Jane asked for a court order changing her gender as part of her transition from male to female.

persons violated the federal and state Equal Protection Clauses and the Due Process Clause of the Fourteenth Amendment); and, most recently in Alaska, *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (holding that the absolute denial of benefits to public employees with same-sex domestic partners was not substantially related to the asserted governmental interests and violated the plaintiffs' right to equal protection under the Alaska Constitution).

11. *See, e.g., In re Heilig*, 816 A.2d 68, 83 (Md. 2003) ("It appears that 22 states and the District of Columbia have enacted statutes expressly enabling a person who has undergone a change in gender to have his or her birth certificate amended to reflect the change."); Bergstedt, *supra* note 3, at 682 ("Currently, twenty-five states and the District of Columbia authorize an amendment to birth certificates by statute."); Wenstrom, *supra* note 4, at 132 n.2 (2008) (noting that, whether by statute or extension of common law, "[f]orty-eight states allow for amendment of the gender designation on the birth certificate.").

12. Jennifer M. Albright, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. REV. 593, 594 (2002).

13. *Id.* (citing JASON CROMWELL, *TRANSMEN & FTMS: IDENTITIES, BODIES, GENDERS & SEXUALITIES* 23, Univ. of Illinois Press (1999); *see also* Albright, *supra* note 12, at 594 ("Transsexuals desire to adopt the opposite gender role and bring their biological sex in conformity with the adopted gender role.")).

The difference between “sex” and “gender” is an important distinction when assessing whether a court should order that a person’s gender be legally changed. “Sex” often “denotes anatomical or biological sex,” while “gender” refers to “a person’s psychosexual individuality or identity.”¹⁴

B. Jane’s Story¹⁵

Jane was born anatomically male but has always identified more with the female gender. As an adult, she decided to present herself to the world as a woman. Because the gender marker on her legal documents does not match her lived gender, she has had tremendous difficulty with basic activities such as obtaining employment outside of the home, and she runs the risk of being accused of fraud, denied services, humiliated, attacked, and subjected to harassment.¹⁶

Alaska’s statute governing amendments to birth certificates is ambiguous as to gender amendment procedure,¹⁷ but in practice gender amendments will be honored when submitted to the Bureau of Vital Statistics with a court-ordered gender reassignment.¹⁸ Thus, Jane petitioned the court for a change of gender order so that she could obtain legal identification documents with gender designations matching her lived gender.

Jane has undergone permanent hair removal procedures to her face and chest. She took female hormones that resulted in changes to the texture of her skin and hair, substantial growth of breast tissue, and a redistribution of fat in her body, which had the effect of giving her a slimmer waistline. She experienced depression prior to commencing the hormone therapy, but her depression decreased during the course of hormone treatments. The hormone therapy also caused changes to her male genitalia, and she now has little ability to maintain an erection. Jane also altered the way she dresses and now lives as a woman full-time.

14. *Heilig*, 816 A.2d at 72 n.4.

15. This is an anonymous account of a real person’s story based on a case study from an Alaska trial court.

16. *Wenstrom*, *supra* note 4 at 135–36.

17. ALASKA STAT. § 18.50.290. Although the statute governs birth certificate amendments generally, it does not address whether gender amendment is allowed or what procedure is required.

18. See Sources of Authority to Amend Sex Designation on Birth Certificates, <http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html> (last visited Dec. 1, 2009) (“Alaska has a general regulation providing for the change of information on birth certificates. As with changes of name, changes of sex will be recognized with a court order.”).

Jane has always considered herself a woman, and her family accepts her gender as female. She did marry a woman, years ago, in an effort to conform socially to a male role. Jane's spouse, a biological woman, has accepted Jane's gender as female, and the couple plans to remain married. Jane intends to follow through with genital gender reassignment surgery once she has saved enough money. Jane was diagnosed with Gender Identity Disorder, but has no other evident mental health issues. Indeed, her therapist reported that Jane was able to operate as a well-adjusted female biologically, socially, and emotionally, both at home and in the community.

II. A DIVIDED COUNTRY: COMPETING POLICIES

A. Differing State Policies

Many states with statutes or regulations for gender amendments to birth certificates discuss gender change procedure in the same code or regulation that also governs name change procedure.¹⁹ Alaska has a statute governing birth certificate amendments, and, while it specifies name change procedure, it is silent as to gender amendments.²⁰ At least twenty-five states and the District of Columbia do have statutory schemes for birth certificate amendments, and some states issue amended or new birth certificates despite their lack of statutory guidelines.²¹ Of the states that have a gender change petition policy, whether by statute or by administrative regulation or policy, nearly all require sexual reassignment surgery before granting a petition.²² In fact,

19. See Bergstedt, *supra* note 3, at 682 n.3 (recording a list of state statutes addressing legal gender change procedure, many of which discuss name change procedure as well).

20. See ALASKA STAT. § 18.50.290.

21. For a compilation of gender change statutes, see Bergstedt, *supra* note 3, at 682 n.3 ("Ala. Code § 22-9A-19(d) (2006); Ariz. Rev. Stat. Ann. § 36-326(A)(4) (2003); Ark. Code Ann. § 20-18-307(d) (2005); Cal. Health & Safety Code § 103425 (West 2006); Colo. Rev. Stat. § 25-2-1154(4) (2001); Conn. Gen. Stat. § 19a-42(a) (2007); D.C. Code Ann. § 7-217(d) (2001); Ga. Code Ann. § 31-10-23(e) (2006); Haw. Rev. Stat. Ann. § 338-17.7(a)(4)(B) (LexisNexis 2008); 410 Ill. Comp. Stat. 535/17(1)(d) (2005); Iowa Code Ann. § 144.23(3) (2005); Ky. Rev. Stat. Ann. § 213.121(5) (West 2007); La. Rev. Stat. Ann. § 40:62(A) (2001); Md. Code Ann., Health-Gen. § 4-214(b)(5) (LexisNexis 2005); Mass. Gen. Laws ch. 46, § 13(e) (2006); Mich. Comp. Laws Ann. § 333.2832(1) (West 2001); Mo. Ann. Stat. § 193.215(9) (West 2004); Neb. Rev. Stat. § 71-604.01 (2003); N.H. Code Admin. R. Ann. He-p. §7007.03(e) (2004); N.J. Stat. Ann. § 26:8-40.12 (West 2007); N.M. Stat. Ann. § 24-14-25(D) (West 2003); N.C. Gen. Stat. § 130A-118(b)(4) (2007); Or. Rev. Stat. § 432.235(4) (2007); Utah Code Ann. § 26-2-11(1) (2007); Va. Code Ann. § 32.1-269(E) (2004); Wis. Stat. Ann. § 69.15(4)(b) (West 2003).").

22. See *id.*

many states require a petitioner to submit an affidavit from the surgeon who performed the surgery to verify that the surgery is complete and irreversible.²³

The extent to which individuals are required to undergo surgery varies from state to state. Females transitioning to males (FTMs) are sometimes able to get a changed birth certificate after either a hysterectomy or a male chest reconstruction surgery.²⁴ Breast augmentation for males transitioning to females (MTFs) will not satisfy the requirement for SRS,²⁵ but in some states the removal of the testicles for MTFs may constitute SRS and thus allow for a birth certificate amendment.²⁶ Arguably, surgical reassignment requirements are only appropriate when the surgeries are desirable and affordable. Many transgender people, however, and especially FTMs, decide not to have genital surgery because the procedures are cost prohibitive or because the result may not be aesthetically pleasing.²⁷

The way states physically handle birth certificate changes also varies. "Some states issue new birth certificates with all the old information removed, while some merely amend them by striking out the old information and writing the new information in the margins."²⁸ Some states do not have settled policy on whether a person may amend his or her birth certificate. In South Carolina, for example, there exist no ordinances, judicial precedent, or statutes regarding gender amendment to the birth certificate.²⁹ A few states have full prohibition on gender change for birth certificates.³⁰ Practical realities for immigrants can be grim. For them, the change of birth certificates and other government documents depends on the regulations of their home country.³¹

23. *Id.* at 682.

24. *Id.* "However, even where a birth certificate has been changed, the absence of a phalloplasty or metoidioplasty may be enough to successfully challenge the validity of a marriage." *Id.* at 682 n.36; *see also* Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004); *In re* Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005).

25. Bergstedt, *supra* note 3, at 682 n.36.

26. *Id.*

27. *See* Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT'L L. 393, 401 (2006-2007) ("Some find the results of available surgical techniques unsatisfactory in light of the high cost, painful recovery, and risks of complications and diminished sensation. Transsexual men in particular, owing to the less advanced state of female-to-male SRS, undergo it much less frequently than trans women."); *see also* Bergstedt, *supra* note 3, at 682 ("Many FTMs opt not to have genital surgery because of the cost or lack of aesthetic quality.").

28. Bergstedt, *supra* note 3, at 683.

29. *Id.*

30. *Id.*

31. *Id.* at 683-84.

Courts in other jurisdictions, such as Australia, have called gender self-determination a right,³² and the European Court of Human Rights (ECHR) has directly pegged gender self-determination as an act within an individual's fundamental right to privacy.³³ "[T]he ECHR's gender recognition jurisprudence has emphasized the individual's 'freedom to define herself [or himself] as a female [or male] person.' The ECHR identifies this freedom as an aspect of the right to private life under the European Convention . . . and characterizes it as 'one of the most basic essentials of self-determination.'"³⁴

B. *Heilig*, A Guiding Light?

The Maryland Court of Appeals decision *In re Heilig*³⁵ is still the only example known by the Authors of a court attempting to fashion a law for gender change out of general principles of common law, current social science, and its state's incomplete but limiting statute. The *Heilig* court identified seven factors, saying "[t]here is a recognized medical viewpoint that gender is not determined by any single criterion, but that the following seven factors may be relevant . . ."³⁶ The seven factors set forth are:

- (1) Internal morphologic sex (seminal vesicles/prostate[,] or vagina/uterus/fallopian tubes);
- (2) External morphologic sex (genitalia);
- (3) Gonadal sex (testes or ovaries);
- (4) Chromosomal sex (presence or absence of Y chromosome);
- (5) Hormonal sex (predominance of androgens or estrogens);
- (6) Phenotypic sex (secondary sex characteristics, e.g. facial hair, breasts, body type);
- and (7) Personal sexual identity.³⁷

The *Heilig* court operated within the constraints of its own legislative guidelines. The Maryland statute that the *Heilig* court applied required a court to issue an order which specifically found that "the sex of an individual born in this State has been changed by surgical procedure . . ."³⁸ The court noted that the legislative history for the enactment of this statute indicated that the applicant must have had a sex change operation.³⁹ However, neither the statutory text nor

32. See Jean Tobin, *supra* note 27, at 426.

33. *Id.* at 425.

34. *Id.*

35. 816 A.2d 68 (Md. 2003).

36. *Id.* at 73.

37. *Id.*

38. MD. CODE ANN., HEALTH-GEN. § 4-214(b)(5) (2005); see also *Heilig*, 816 A.2d at 82.

39. *Heilig*, 816 A.2d at 83.

legislative history specified the precise nature or extent of the required procedure.

While limited in its holding by this legislation, the *Heilig* court discussed at length how gender is not merely a function of surgical sexual reassignment. The opinion includes a lengthy discussion of the social science treatises discussing the aspects of gender identity.⁴⁰ After surveying the field of social science articles, the court summarized: "The ultimate conclusion of such studies, which, as noted, is the central point sought to be made by transsexuals, is that the preeminent factor in determining gender is the individual's own sexual identity as it has developed in the brain."⁴¹ In its conclusion of this survey of the relevant treatises, the *Heilig* court quoted from one study in particular, as follows:

In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the 'correctness' of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.⁴²

The *Heilig* court noted that while most states with legislation allowing gender change require irreversible surgical procedures, a minority of states, including Utah, Virginia, and Wisconsin, do not specifically require that any irreversible procedure or surgery be undertaken.⁴³

This discussion is particularly instructive. It suggests that in the absence of legal constraints from the legislature or the appellate courts, courts need not find all of the *Heilig* factors in order to acknowledge a petitioner's change of gender.

C. Applying *Heilig* to Jane

With *Heilig* as a guide, how do the change of gender factors apply to Jane? Jane has not undergone sexual reassignment surgery but plans to do so as soon as it is economically feasible. She underwent numerous

40. See generally *id.* at 71-89.

41. *Id.* at 77.

42. *Id.* (quoting William Reiner, *To Be Male or Female – That is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224, 225 (1997)).

43. *Id.* at 84 n.8.

hormonal and surgical procedures in her transition from male to female. She was diagnosed as having Gender Identity Disorder and has completed counseling to address how best to live as a woman, despite contrary biological realities.

Because Jane lacks the requisite SRS, she would be denied her change of gender petition in most jurisdictions. However, if she were in a jurisdiction that applied the *Heilig* factors, her petition might be granted if the last three factors (hormonal sex, phenotypic sex, and personal sexual identity) were weighted more significantly than the first four factors (internal morphologic sex, external morphologic sex, gonadal sex, and chromosomal sex). With respect to hormonal sex (criterion five), Jane has undertaken medical procedures to change her hormonal sex from male to female. Jane has been taking female hormones for two years, and as a result, she no longer can function sexually as a male. Jane also now has the secondary sex characteristics to satisfy the phenotypic sex criterion (criterion six). She has developed breast tissue and a more feminine body shape, and she has undertaken multiple laser surgeries to remove hair on her face and chest. Finally, Jane satisfies the personal sexual identity criterion (criterion seven) because she has personally experienced her gender as female since childhood.

A court, especially one charged with defending a constitution such as Alaska's, could find that these three factors are entitled to considerable weight and, in combination, are more relevant to the petitioner's gender than the absence of genital sexual reassignment surgery. As this Article will show, the Alaska Constitution includes heightened protections for liberty, privacy, and equal treatment under the law, all of which appear to be at odds with a requirement of any form of SRS that is more punitive than functional. Indeed, Alaska's tradition of preventing governmental interference with individuals' "personal autonomy to control . . . appearance or to direct the course of [people's] lives,"⁴⁴ may suggest that Alaska courts applying the *Heilig* factors should weigh factors five through seven more heavily by grouping factors one through three together as a single consideration when petitioners put forth legitimate reasons for avoiding sexual reassignment surgery.

D. SRS Requirements May Violate Public Policy

Although the trend in the United States is for states to require sexual reassignment surgery before granting gender change

44. *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001).

amendments to official documents, there is broad support for granting a change of gender petition when the petitioner has not undergone SRS.⁴⁵ Put another way, there are several additional reasons why *Heilig* factors five through seven should weigh more significantly than factors one through three. The first three factors (internal morphologic sex, external morphologic sex, and gonadal sex) all require surgery for transgender persons, and some scholars assert that it may be bad policy to encourage sexual reassignment surgery.⁴⁶ These surgeries are expensive, not very successful at replicating functional genitalia for FTMs, and, like any invasive surgery, carry physical risks.⁴⁷

Requiring surgical procedures to obtain a gender amendment raises numerous accessibility issues. The cost of surgery and its general exclusion from insurance coverage⁴⁸ precludes numerous transgender individuals from obtaining reassignment,⁴⁹ implicating a potential class bias in rules mandating surgical reassignment. The reality that sex-change operations differ in both their invasiveness and ultimate success for transgender men and transgender women suggests that such a requirement may be interpreted as a form of sexual discrimination.⁵⁰

45. See generally Tobin, *supra* note 27.

46. See *id.* at 424–29 (“A legal rule with only a very weak basis in public policy, or even a wholly irrational one, may go unchallenged if its harmful effects are few and slight. The surgical requirement for gender recognition is far from harmless. . . . [T]his rule results in unequal treatment and real harm to trans individuals’ lives and human rights.”); see also Alice Newlin, *Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 490–92 (2008).

47. See Tobin, *supra* note 27, at 401 (“Some find the results of available surgical techniques unsatisfactory in light of the high cost, painful recovery, and risks of complications and diminished sensation. Transsexual men in particular, owing to the less advanced state of female-to-male SRS, undergo it much less frequently than trans women.”); see also Wenstrom, *supra* note 4, at 140 (“Many choose not to have surgery due to the risks of complications, the painful and extended recovery period, and the reduction of erotic sensation.”).

48. See Wenstrom, *supra* note 4, at 140 (“These surgeries may be prohibitively expensive, some cost over \$70,000 and very few medical insurance providers cover such surgeries in their plans.”); see also Tobin, *supra* note 27, at 400 (“While coverage by public or private health insurance is increasingly the norm in Europe . . . in other countries, such as the United States, private insurers almost universally deny coverage for SRS.”).

49. See Tobin, *supra* note 27, at 400 (“Others simply cannot afford these surgeries, which cost in the tens of thousands of dollars.”).

50. “Surgeries for trans men do not result in a penis ‘with the full capacity to function sexually as a male’ in the sense of erection, penetration and ejaculation. New Zealand’s Family Court cited this differential as one reason for favoring an appearance test over a sexual function test. The appearance test seems to have the advantage of not operating as a blanket exclusion of trans men. Nevertheless, it too may disproportionately exclude trans men, because current surgical techniques produce a much greater cosmetic approximation of typical genitals for trans women than for trans men. Because it ‘is more advantageous

Additionally, disabilities, as well as certain medical conditions and personal preferences, may preclude the option of surgery for some transgender people.⁵¹ These realities have led some scholars and courts to find the requirement of sexual reassignment surgery objectionable:

It is curious, therefore, that the Court appeared to fasten on SRS as the threshold of states' obligation to recognize that freedom. Surgical requirements make the enjoyment of this "basic" right impossible for individuals with certain medical conditions, as well as those who cannot afford these expensive procedures. For others, gender recognition will remain out of reach for years before SRS can be obtained. The then-Chief Justice of the Family Court of Australia has thus criticized the surgical requirement (albeit in dicta) as "a cruel and unnecessary restriction upon a person's right to [gender recognition, with] little justification on grounds of principle."⁵²

Finally, viewing gender self-determination as a right, setting SRS as a prerequisite for gender change conflicts with the right to bodily integrity:

Bodily integrity is universally recognized as a fundamental human right, protected by national laws and constitutions as well as international conventions. It is well established that a state violates that right by forcing individuals to undergo invasive medical procedures. The state, however, should not force an individual to forgo one basic right to enjoy another. This is precisely what states do whenever they make surgery a prerequisite for gender recognition.⁵³

and burdensome for people seeking legal recognition of their transition from female to male rather than male to female,' Australia's Family Court has suggested in dicta that surgery requirements may operate as 'a form of indirect [sex] discrimination.'" *Id.* at 424–25.

51. "Certain medical reasons such as age, weight, preexisting medical conditions, or HIV status may make some treatments unavailable. . . . In addition, there are many personal reasons that someone may not undergo surgery such as not being able to take time off work, not having support people who would be available to help them through the recovery period, or having a fear of doctors, hospitals, and/or surgery." Wenstrom, *supra* note 4, at 140; *see also id.* at 141 ("A recent study found that only three percent of [female to male transsexuals] pursue genital surgery due to the costs, limitations of the procedure, as well as the medical risks associated with it. This means that only three percent of the trans male population would be eligible for an amended birth certificate.").

52. Tobin, *supra* note 27, at 426 (citation omitted).

53. *Id.* at 427 (citation omitted).

The conflict between equality and rights to both bodily integrity and gender self-determination, on the one hand, and SRS requirements on the other, indicates that such requirements are detrimental to both the individual transgender person and society as a whole.

III. MAJORITY RULE AND MINORITY RIGHTS

A. The Current Political Climate in Alaska

Anchorage has seen its own political debate surrounding, in part, the civil rights of transgender individuals. In May 2009, Acting Mayor Matt Claman proposed an amendment to the City's current anti-discrimination ordinance, at the request of a citizens' group known as Equality Works. The amendment would have added sexual orientation to the list of characteristics (already including, among others, race, sex, religion, marital status, and age) protected from discrimination in employment, education, property sales and rentals, public accommodations, and City practices.

This was the third time in over thirty years that a proposition to ban discrimination based on sexual orientation had been up for public hearing. More than five hundred people signed up to testify before the city council, making the debate "[t]he longest, bitterest argument in Anchorage's social and political experience."⁵⁴

Several drafts of the amendment were presented in an effort to obtain a consensus. A central point of the dispute was whether the amendment would protect transgender individuals. The first version of the amendment provided that the term "sexual orientation" applied to transgender individuals.⁵⁵ This inclusion proved controversial,⁵⁶ leading

54. Don Hunter, *Gay Rights Go Before Assembly Once Again*, ANCHORAGE DAILY NEWS, June 7, 2009, at A1. Interestingly, immediately before this round of the Anchorage anti-discrimination ordinance debate, Fairbanks saw its own debate over the rights of transgender children in the public school system. See Joel Davidson, *Alaska School District Adds 'Gender Identity' to Official Policy*, CATHOLIC NEWS AGENCY, Mar. 11, 2009, available at <http://www.catholicnewsagency.com/new.php?n=15340>.

55. *Id.* at A6-A7. ("Sexual orientation means actual or perceived heterosexuality, homosexuality, bisexuality or gender expression or identity. As used in this definition, 'gender expression or identity' means having or being perceived as having a self-image, appearance, or behavior different from that traditionally associated with the sex assigned to that person at birth.").

56. Pastor Prevo announced, "[t]his ordinance actually [empowers] transvestites, cross-dressers. It goes to provide protection for what I believe is really that aspect of the homosexual movement that probably even the normal homosexuals are not proud of." Don Hunter, *Measure Empowers Those Whose Behavior Is Extreme*, ANCHORAGE DAILY NEWS, June 7, 2009, at A7. "Prevo said he would 'possibly' consider supporting an amendment if the word 'sexual

the drafters to drop the explicit protection for transgender individuals. The Anchorage Daily News reported on the issue, stating:

Just as the issue did when it arose decades ago, it is bitterly dividing the city but has also brought them together for the discussion before the Assembly. In line together in the middle of the Assembly chambers, waiting for their turns to speak, were transgender people standing beside those who likened them to pedophiles and miscreants.⁵⁷

In August 2009, a version of the amendment was passed by the Assembly by a seven to four vote, but then was vetoed by the recently-elected mayor, Dan Sullivan.⁵⁸ Ultimately, the amendment failed, as the Assembly did not gather the eight votes needed to override the mayor's veto.⁵⁹

B. The Role of the Court

Anchorage's debate over the proposed anti-discrimination ordinance makes clear the political fervor surrounding the rights and protections afforded to the transgender community. The public controversy, however, simply highlights the need for courts to be removed from the will of the majority. Historically, the democratic process has often failed to protect minority rights.⁶⁰ Thus, it has always been the responsibility of the courts to defend the liberty of those outside of the majority:

orientation' was removed and in its place was written 'straight, gay and lesbians,' and if iron-clad exemptions were given to not only religious organizations but also religious people." Megan Holland, *Gay Rights Measure's Changes Criticized by Both Sides*, ANCHORAGE DAILY NEWS, June 18, 2009, at A1.

57. Megan Holland, *Battle Lines Drawn—Hearing Continues on Sexual-orientation Issue that Divides City: Round 2 of the Anti-Discrimination Ordinance Debate*, ANCHORAGE DAILY NEWS, June 17, 2009, at A1.

58. See Don Hunter, *Assembly OKs Gay Rights Ordinance 7-4*, ANCHORAGE DAILY NEWS, Aug. 11, 2009; Don Hunter, *Sullivan Vetoes Gay Rights Ordinance*, ANCHORAGE DAILY NEWS, Aug. 17, 2009.

59. See Don Hunter, *Assembly Makes No Move To Override Gay Rights Veto*, ANCHORAGE DAILY NEWS, Aug. 25, 2009.

60. Consider the civil rights movement of the 1950s and 1960s. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 668 (2d ed. 1985) (speculating that the Civil Rights Movement would have failed without the intervention of federal courts). For a discussion of how direct democracy in particular has failed minority rights, see Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1209 (2005) ("When it comes to laws that discriminate against minorities, initiatives can easily play to popular prejudices. Thus, while initiatives promoting civil rights for minorities generally fail, those restricting minority rights often succeed.").

[T]he very purpose of limiting the power of the elected branches of government by constitutional provisions like the Equal Protection Clause is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”⁶¹

Similarly, although the framers of the Alaskan and Federal Constitutions probably did not have transgender people in mind when they drafted the Due Process, Equal Protection, and Privacy (Alaska) Clauses, they likely knew that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress, and as our constitution endures, persons in every generation can invoke its principles in their own search for greater freedom and equality.”⁶²

IV. THE FEDERAL AND ALASKA CONSTITUTIONS

Alaska has no statutory scheme addressing change of gender. There is no appellate opinion in Alaska that discusses whether such relief may be granted. The superior courts maintain broad jurisdiction in equity and do thereby possess the inherent authority to consider such petitions.⁶³ With guidance from the Alaska and Federal Equal Protection Clauses, Alaska’s constitutional right to privacy, the Maryland Court of Appeals’ decision in *Heilig*,⁶⁴ and a variety of legal and medical treatises addressing the topic, some Alaska Superior Courts have held that petitioners were entitled to an order recognizing a change of gender.

61. *Varnum v. Brien*, 763 N.W.2d 862, 875 (Iowa 2009) (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

62. *Id.* at 876 (internal quotation marks omitted) (citing *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (acknowledging the intent of the Framers of the Federal Constitution that the Constitution endure and be interpreted by future generations)).

63. *See Wolff v. Arctic Bowl, Inc.*, 560 P.2d 758, 770 (Alaska 1977) (“The exercise of equitable jurisdiction is a matter of discretion for the trial court.”); *see also* 27 Am. Jur. 2d, *Equity* § 1 (2009) (“‘Equity’ has been said to be the name of the principal or set of principles under which substantial justice may be attained in particular cases where the prescribed or customary forms of ordinary law seem to be inadequate.”).

64. *See generally In re Heilig*, 816 A.2d 68 (Md. 2003).

A. Equal Protection

Both the Federal and Alaska Constitutions prohibit discrimination based on sexual orientation.⁶⁵ The Supreme Court stated in the landmark case of *Romer v. Evans* that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁶⁶ Because the Alaska Constitution “mandates equal treatment of those similarly situated[,] it protects Alaskans’ right to non-discriminatory treatment more robustly than does the federal equal protection clause.”⁶⁷ The Alaska Supreme Court has “long recognized that [this clause] affords greater protection to individual rights than the United States Constitution’s Fourteenth Amendment.”⁶⁸ This Article, therefore, will focus on the more broadly protective Equal Protection Clause in place in Alaska.

Alaska applies a three-step, sliding scale test “that places a progressively greater or lesser burden on the [S]tate, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake.”⁶⁹ The first step is to identify the group subject to discrimination and determine whether there is “disparate treatment of similarly situated persons.”⁷⁰

As a transgender individual, Jane is potentially subject to discrimination within the meaning of the Equal Protection Clause of the Alaska Constitution. Her request for change of gender touches on two equal protection claims: gender discrimination and discrimination based on sexual orientation.

If the court decided to deny Jane’s request for a change of gender, it would effectively be denying her right to live in her true gender, implicating her right to be free from discrimination based on gender.⁷¹

65. See generally *Romer v. Evans*, 517 U.S. 620 (1996); *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005).

66. *Romer*, 517 U.S. at 633.

67. *State Dep’t of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001) (internal quotation marks omitted).

68. *Alaska Civil Liberties Union*, 122 P.3d at 785 (citing Alaska Const. art. 1, § 1); *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003).

69. *Alaska Civil Liberties Union*, 122 P.3d at 787 (quoting *Malabed*, 70 P.3d at 420-21).

70. *Id.*

71. The assertion that transgender persons face harassment and discrimination is supported by the brutal fact that the murder rate for transgender persons is seven to ten times higher than the national average. *Wenstrom*, *supra* note 4, at 135 n.11; see also *id.* at 136 (noting other kinds of discrimination transgender individuals often experience when their documented gender does not match their lived gender, such as being accused of fraud,

As the Maryland Court of Appeals noted in *Heilig*, “a person has a deep personal, social, and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become.”⁷² Jane’s right to be free from discrimination based on sex, as established by the Alaska Constitution, would be offended if her petition was denied, because such denial discriminates against individuals who are unable to conform to social expectations attached to their lived gender.⁷³ The discrimination can likewise be classified as sexual orientation discrimination because disallowing or strictly limiting access to gender change is “so closely correlated with being homosexual as to make it apparent that such a prohibition targets gay and lesbian people as a class.”⁷⁴

Having identified Jane’s petition as falling under the auspices of Alaska’s Equal Protection Clause, the next step is to examine whether the disparate treatment is allowed under a three-step, sliding scale analysis.⁷⁵

First, it must be determined at the outset what weight should be afforded the constitutional interest impaired by the challenged enactment. The nature of this interest is the most important variable in fixing the appropriate level of review. . . . Depending upon the primacy of the interest involved, the state will have a greater or lesser burden in justifying its legislation. Second, an examination must be undertaken of the purposes served by a challenged statute. Depending on the level of

denied services, humiliated, or even attacked). Denying Jane her requested legal gender change would serve to further expose her to this discrimination because legal documents that display a gender designation at odds with a person’s lived gender open the door to targeted harassment. *Id.* at 135 (“Transgender people living outside their birth assigned gender are vulnerable to harassment, violence, and discrimination when their gender identity is revealed. A common way in which their status is revealed is through incongruent identity documents.”).

72. *In re Heilig*, 816 A.2d 68, 79 (Md. 2003).

73. ALASKA CONST. art. I, § 3 (“No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section.”).

74. *See Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (citing *Lawrence v. Texas*, 539 U.S. 558, 583 (2003)) (internal quotation marks omitted). The Iowa Supreme Court recently held that restricting marriage to couples composed of one man and one woman targeted and discriminated against the GLBT community. Similarly, by placing the opportunity to present to the world legally as one’s lived gender outside the realistic reach of transgendered men and women, a prohibition or strict limitation on gender amendments will differentiate “implicitly on the basis of sexual orientation.” *Id.*

75. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787–89 (Alaska 2005).

review determined, the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest. Third, an evaluation of the state's interest in the particular means employed to further its goals must be undertaken. Once again, the state's burden will differ in accordance with the determination of the level of scrutiny under the first state of analysis. At the low end of the sliding scale, we have held that a substantial relationship between means and ends is constitutionally adequate. At the higher end of the scale, the fit between means and ends must be much closer. If the purpose can be accomplished by a less restrictive alternative, the classification will be invalidated.⁷⁶

Agencies seeking to prevent change of gender petitions will likely use the arguments of cost control and efficiency to attempt to overcome the assertions in favor of granting change of gender under the Equal Protection Clause. In *Alaska Civil Liberties Union v. State*, the Alaska Supreme Court examined whether the municipality's denial of same-sex partner benefits violated the Equal Protection Clause. The court held that while "[t]he governmental interests of cost control, administrative efficiency, and promotion of marriage are legitimate . . . the absolute denial of benefits to public employees with same-sex domestic partners is not substantially related to these governmental interests."⁷⁷

Petitions for change of gender have practical complications. Just as the courts consider administrative and practical consequences in cases concerning same-sex marriage, Alaska courts will need to weigh the practical realities and complications that granting change of gender petitions entails. In *Alaska Civil Liberties Union*, the court considered whether same-sex couples were constitutionally entitled to benefits programs previously only available to married couples.⁷⁸ In making this determination, the Alaska Supreme Court weighed the three asserted governmental interests of "cost control, administrative efficiency, and promotion of marriage—in limiting benefits to spouses and dependent children."⁷⁹ These same interests arise in the context of change of gender petitions. Additionally, courts will need to consider the specific administrative concerns presented by change of gender. For example, issues will likely arise regarding how to treat and house prisoners who have a change of gender, how to address the additional administrative

76. *Id.* at 789 (citation omitted).

77. *Id.* at 793–94.

78. *Id.* at 783.

79. *Id.* at 790.

costs related to change of gender petitions, and how those petitions will affect the state's Marriage Amendment.⁸⁰

In a recent decision, *Varnum v. Brien*,⁸¹ the Iowa Supreme Court called one's sexual orientation "central to personal identity."⁸² Similarly, one's gender is central to one's identity. The state would have to demonstrate a particular compelling governmental interest to overcome one's right to live in his or her true gender. Looking at the Iowa Court's decision in *Varnum*, it is unlikely any government interest could be compelling enough to overcome the burden required under Alaska's Equal Protection Clause. Notably, living in one's true gender does not require SRS. As a result, a state's interest in supporting societal gender expectations does not require SRS. Jane's interest in living according to her self-identification as a woman, rather than living according to her assigned gender, must be given great weight because gender implicates so many aspects of her day-to-day life. While there may be legitimate governmental interests in efficiently utilizing court resources and administrative efficiency in processing change of gender claims, as well as in limiting changes to birth certificates and other governmental forms of identification, these interests are not sufficiently compelling to overcome a person's essential and fundamental right to live as the gender that he or she clearly perceives is correct for him or her.

Ultimately, the Alaska Supreme Court determined that the government's asserted interests in *Alaska Civil Liberties Union* did not outweigh the rights of same-sex couples under an equal protection analysis.⁸³ When considering change of gender legal arguments, continued evaluation of the legal and practical realities of allowing people to change their gender is warranted. As noted above, granting petitions to change gender has the potential to affect regulation of marriage (if, for example, a transsexual who changed their gender elects to marry a person who lives in the gender the transsexual changed from); Department of Corrections housing (for example, housing a transsexual whose birth certificate identifies them as one gender while they retain the genitalia of the opposite gender); cost control (in the form of increased requests for amending documents with governmental departments); and administrative efficiency (both in the court system and in the departments that make and effectuate the amendments to documents).

80. ALASKA CONST. art. I, § 25.

81. 763 N.W.2d 862 (Iowa 2009).

82. *Id.* at 907.

83. *Id.* at 893-94.

Based on case precedent and the emerging trends in the law, it is unlikely that the government would be able to assert an interest outweighing the rights of transgender persons. In *Varnum*, the Iowa Supreme Court applied the equal protection test to its marriage amendment and held that the state law prohibiting gay marriage was unconstitutional, stating that “the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”⁸⁴ It further stated that:

[B]ecause sexual orientation is central to personal identity and may be altered [if at all] only at the expense of significant damage to the individual’s sense of self, classifications based on sexual orientation are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic.⁸⁵

Furthermore, “[b]ecause sexual orientation is such an essential component of personhood, even if there is some possibility that a person’s sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so.”⁸⁶ The court specifically held that distinguishing between same-sex marriage and heterosexual marriage “would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution.”⁸⁷ The court specifically noted a person’s sexual orientation is “an essential component of personhood.”⁸⁸ Similarly, a person’s gender is their “psychosexual individuality or identity.”⁸⁹ The rights of personal identity identified in *Varnum* support the assertion that gender is also protected under the Equal Protection Clause. Further, this language arguably supports granting change of gender petitions based on equal protection rights.

Similarly, in 1999, the State Supreme Court of Vermont, in *Baker v. State*,⁹⁰ overturned a law that prevented same-sex couples from enjoying the benefits and protections of marriage.⁹¹ Using an equal protection analysis, the court held that “plaintiffs may not be deprived of the

84. *Id.* at 907.

85. *Id.* at 893 (quoting *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 438–39 (Conn. 2008)).

86. *Id.* at 895 (quoting *Kerrigan*, 957 A.2d at 432).

87. *Id.* at 906.

88. *Id.* at 895.

89. *In re Heilig*, 816 A.2d 68, 72 n.4 (Md. 2003).

90. 744 A.2d 864 (Vt. 1999).

91. *Id.* at 867.

statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”⁹² The Vermont Supreme Court did not go so far as to mandate that the state accept gay marriage. Instead, it left the legislature to determine whether and how it would regulate the availability of civil unions. Both the *Varnum* and *Baker* courts found that the Equal Protection Clause protects the rights of same-sex couples regarding marriage. The courts underscored that equal protection prevents states from treating homosexual and heterosexual couples differently when it comes to marriage. Similarly, it is arguable that the Equal Protection Clauses of the Federal Constitution and the Alaska Constitution prevent Alaska courts from treating transsexuals differently than heterosexuals when it comes to living in one’s true gender. Further, the cases demonstrate how courts continue to expand the scope of protection for members of the GLBT community.

B. Due Process and Privacy

The Due Process Clause of the Fourteenth Amendment to the United States Constitution also provides valuable guidance on the issue of granting a change of gender petition. The most instructive federal case on this issue is *Lawrence v. Texas*.⁹³ In *Lawrence*, the Court considered the petition of two homosexual men who were criminally prosecuted under Texas sodomy laws.⁹⁴ The Court characterized the issue as “[w]hether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.”⁹⁵ The Court also acknowledged that “adults may choose to enter upon [relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons.”⁹⁶

The Court further stated that this “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁹⁷ This is no less true for Jane. Her choice of how to express her gender and associated sexuality is within the realm of protection envisioned by the *Lawrence* Court.

92. *Id.*

93. 539 U.S. 558 (2003).

94. *Id.* at 563.

95. *Id.* at 564.

96. *Id.* at 567.

97. *Id.* at 572.

In its holding, the *Lawrence* Court specifically addressed the right to privacy and the link between liberty and the Due Process Clause, stating:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.⁹⁸

The Court ultimately held that the Texas statute did not further a legitimate state interest that could “justify its intrusion into the personal and private life of the individual.”⁹⁹

One could argue, however, that *Lawrence* cannot be construed to suggest that there is a constitutional duty to require a facile procedure for gender amendments to official identification documents. In *Lawrence*, for example, the activity regulated, a sexual act, was unambiguously within the realm of private life. Transgender petitioners, on the other hand, seek to perform a more public act: changing the gender which appears on their official documents. However, the constitutional rights implicit in this debate are not necessarily limited to the constraints of *Lawrence*, because the privacy protections afforded in that case are magnified by the specific right to privacy in the Alaska Constitution, which grants that “[t]he right of the people to privacy is recognized and shall not be infringed.”¹⁰⁰ The state supreme court has interpreted the Privacy Clause as follows: “Because this right to privacy is explicit, its protections are necessarily more robust and broader in scope than those of the implied federal right to privacy.”¹⁰¹

98. *Id.* at 578 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992)) (internal quotation marks omitted).

99. *Id.* The European Court of Human Rights (ECHR) has also upheld gender self-determination. *Tobin*, *supra* note 27, at 425 (“[T]he ECHR’s gender recognition jurisprudence has emphasized the individual’s ‘freedom to define herself [or himself] as a female [or male] person.’ The Court identifies this freedom as an aspect of the right to private life under the European Convention, and characterizes it as ‘one of the most basic essentials of self-determination.’”).

100. ALASKA CONST. art. I, § 22.

101. *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (internal quotation marks omitted) (quoting *Ravin v. State*, 537 P.2d 494, 514–15 (Alaska 1975)) (Boochever, J., concurring) (reasoning that “[s]ince the citizens of Alaska . . . enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that that right is broader in scope than that of the Federal Constitution.”).

Liberty¹⁰² and privacy¹⁰³ in the Alaska Constitution have often been analyzed together when addressing questions of personal autonomy.¹⁰⁴ Before the right to privacy was added to the constitution by voter initiative in 1972,¹⁰⁵ the Alaska Supreme Court, in *Breese v. Smith*,¹⁰⁶ held that a student's right to liberty included the right to express himself by wearing long hair.¹⁰⁷ The *Breese* court stated:

No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The United States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles. The spectre of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty. It has been observed that [there] are few things more personal than one's body and its appearance, and there could be few laws more destructive of the notion that there is a range of decision making within which the individual is autonomous than a rule regulating physical makeup.¹⁰⁸

The individual autonomy at issue in *Breese* also applies to the rights involved in change of gender: just as the student in *Breese* had "the right 'to be let alone,'"¹⁰⁹ so, too, does Jane. If "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person,"¹¹⁰ Jane has the inalienable right to possess and control her person. Further, Jane's request to have her legal documents reflect her lived gender is a "personal aspect" of her life "which [has] no direct

102. ALASKA CONST. art. I, § 1.

103. ALASKA CONST. art. I, § 22.

104. See, e.g., *Sampson v. State*, 31 P.3d 88, 90 (Alaska 2001); *Ravin v. State*, 537 P.2d 494, 500 (Alaska 1975) ("In Alaska this court has dealt with the concept of privacy on only a few occasions. One of the most significant decisions in this area is *Breese v. Smith*, where we considered the applicability of the guarantee of 'life, liberty, the pursuit of happiness' found in the Alaska Constitution, to a school hairlength [sic] regulation.")

105. Erwin Chemerinsky, *Privacy and the Alaska Constitution: Failing to Fulfill the Promise*, 20 ALASKA L. REV. 29, 30 (2003).

106. 501 P.2d 159 (Alaska 1972).

107. *Id.* at 168.

108. *Id.* at 168-69 (citations and internal quotation marks omitted).

109. *Id.* at 171.

110. *Id.*

bearing on the ability of others to enjoy their liberty.”¹¹¹ As such, her request appears to be clearly within the scope of liberty defined by the *Breese* court, making a strong argument that her requested gender designation is a fundamental and protected right in Alaska. Moreover, to deny Jane her right to specify her gender would be to take a position antithetical to the *Breese* court’s recognition that our country as a whole, and Alaska in particular, is a “grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles.”¹¹² Jane’s decision to live as a woman certainly reflects a minority sentiment and a lifestyle divergent from the mainstream. To interfere with her decision by denying her the right to present herself to the world as a woman, however, would be to erode Alaska’s “basic value” of “maximum individual choice.”¹¹³

Any state-required procedure that infringes the right of the individual “to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,”¹¹⁴ must therefore fall short of the *Breese* precedent. At least in Alaska, the law surrounding gender change petitions is not “clear and unquestionable.”¹¹⁵ A surgery with such substantial drawbacks as SRS, when required in order to have legal documents that match one’s lived identity, can be seen as constituting “interference of others,” just as it is a “restraint,” on “those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty.”¹¹⁶ Thus, a requirement of genital reconstruction SRS¹¹⁷ for legal gender change appears to be at odds with the protections of the Alaska Constitution.

The case law interpreting Alaska’s specific constitutional right to privacy also supports change of gender actions by courts. *Sampson v. State*¹¹⁸ held that neither the right to privacy nor the right to liberty include a right to assisted suicide.¹¹⁹ In coming to its conclusion, the

111. *Id.* at 168 (quoting *Richards v. Thurston*, 424 F.2d 1281, 1284–85 (1st Cir. 1970)).

112. *Id.* at 169.

113. *Id.*

114. *Id.* at 168.

115. *Id.*

116. *Id.*

117. Most, but not all, of the surgeries considered to be SRS involve genital reconstruction. The analysis for chest reconstruction surgery, which is also sometimes considered SRS, would be different because the drawbacks to those surgeries are not as severe.

118. 31 P.3d 88 (Alaska 2001).

119. *Id.* at 95.

court summarized the case law interpreting the privacy clause and reasoned as follows:

*Valley Hospital [Ass'n v. Mat-Su Coalition for Choice]*¹²⁰, *Breese, Ravin [v. State]*¹²¹, and *McCracken [v. State]*¹²² collectively set the framework for recognizing fundamental rights of personal autonomy implicit in our constitution. These cases establish that the history and tradition of a right in Alaska are important because they help to determine whether the right falls within the intention and spirit of our constitution. Moreover, history and tradition tend to define our society's expectations of what rights are necessary for civilized life and ordered liberty. All of these cases address situations involving personal autonomy to control our appearance or to direct the course of our lives; none even remotely hints at any historical or legal support for the proposition that the general right of personal autonomy incorporates a right to physician-assisted suicide.¹²³

Although the *Sampson* decision limited the holding of *Breese*, the court made clear that what was at stake in *Sampson* was fundamentally different from what was at stake in the previous cases that interpreted the right to privacy and personal liberty.¹²⁴ The court thus created a narrow exception to the traditional interpretation of the constitutional protections afforded to issues of personal autonomy regarding control of one's appearance and life direction.

Jane's situation does not fall within the narrow exception of *Sampson*. Unlike the petitioners in *Sampson*, Jane is not seeking an exception to a bedrock criminal principle under the authority of the Privacy Clause. Also, unlike the asserted right to assisted suicide at issue in *Sampson*, the right to have one's legal gender follow one's lived gender is an issue directly "involving personal autonomy to control our appearance or to direct the course of our lives."¹²⁵

An aspect of appearance is how one holds oneself out to the world. Jane is asking that she be allowed to present herself to the world, via her legal gender designation, in a manner congruent with her lived identity. Moreover, her desire to live in full conformity with the social concepts associated with being a woman is clearly a matter involving her ability to direct the course of her life. Finally, it is also a matter that affects

120. 948 P.2d 963 (Alaska 1997).

121. 537 P.2d 494 (Alaska 1975).

122. 518 P.2d 85 (Alaska 1974).

123. *Sampson*, 31 P.3d at 94.

124. *Id.*

125. *Id.*

control over her own body, which the Alaska Supreme Court recently held to be a “fundamental autonomy.”¹²⁶

Thus, the limited holding of *Sampson* should not preclude application of the *Breese* precedent to the question of what legal standard should be used to determine whether a petition for change of gender ought to be granted.¹²⁷ As stated in *Sampson*, Alaska has a long legal history and tradition of protecting people’s right to control their appearance and life direction.¹²⁸ The holdings in *Sampson* and *Breese* suggest that the constitutional protections of liberty and privacy grant Alaskan citizens the right to match their legal gender designation to their lived gender without the imposition of any overly burdensome preconditions, such as genital sexual reassignment surgery.

C. Due Process: Liberty and the Right to Employment

Jane testified that she has experienced difficulty obtaining and maintaining employment because her state identification lists her as male, yet she presents to the general public as female.¹²⁹ There is evidence that suggests Jane’s troubles are not unique. A recent law review article noted that, due to the discrimination faced by transgender people, refusing amendment of gender designations on birth certificates

126. *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 582 n.28 (Alaska 2007) (“The dissent appears to liken a minor’s decision of whether to terminate a pregnancy to decisions about attending school field trips, joining sports teams, viewing ‘R’-rated movies, and lifting weights at the gym. But this analogy overlooks the fundamental autonomy at stake in an adolescent’s control over her own body.”).

127. Indeed, *Sampson* refers to much of the relevant *Breese* language when explaining the *Breese* holding, which it did not reject: “We also stated that the rights to control personal appearance implicated the important Alaska values of the ‘preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles,’ as well as ‘notions of a government of limited powers.’ . . . We also recounted the importance of individual autonomy in Alaskan history.” *Sampson*, 31 P.3d at 93–94 (citing *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972)).

128. *Id.* at 94.

129. Driver’s licenses with gender markers that match a person’s lived identity are essential to obtaining employment. Although in most places it is easier to obtain a reassigned gender on a driver’s license than a birth certificate, and generally proof of medical or surgical procedures are not required, there are still barriers that prevent many transgender individuals from obtaining congruent identification, and thus prevent them from obtaining employment. See Bergstedt, *supra* note 3, at 680–81. Bergstedt also notes that while all fifty states and the District of Columbia have some avenue for changing a person’s gender on his or her license, some states have a much more daunting process than others. *Id.* at 681 n.30. From Bergstedt’s personal research, the states with the most restrictive policies are Georgia, Idaho, Iowa, Kansas, Mississippi, Missouri, Nebraska, Nevada, Ohio, and Tennessee. *Id.*

prevents “transgender people from acquiring congruent identity documents that are necessary for obtaining employment, benefits, and services.”¹³⁰ The article further notes that “[transgender] people are routinely fired when their gender identity is discovered by their employer.”¹³¹

Although the availability of employment is not a fundamental right in Alaska sufficient to require strict scrutiny under the United States Constitution,¹³² it is still considered an “important right.”¹³³ It is protected under Article I, Section I of the Alaska Constitution, and the Fourteenth Amendment of the federal Constitution.¹³⁴ Without income from employment, Jane is financially unable to undergo sexual reassignment surgery. If courts were to require surgery as a prerequisite to gender amendment, Jane would be in a catch-22, where she could not obtain employment because her identity documents would expose her to discrimination, but could not amend her identity documents to overcome the discrimination and acquire employment because she would lack the requisite financial means to do so.

Protection of citizens’ right to employment requires courts to permit state actions¹³⁵ interfering with personal employment only when

130. Wenstrom, *supra* note 4, at 132 (citing Letter from Dean Spade, Founder, Sylvia Rivera Legal Resource Program, et al. to Isaac Weisfuse, City of New York Dept. of Health (Nov. 18, 2002), available at <http://srp.org/node/93>).

131. *Id.* at 133 n.7 (citing Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, TRANSGENDER RIGHTS 217, 219 (2006)); see also Bergstedt, *supra* note 3, at 681 (“If a person does not have identification that accurately reflects his or her social gender, that person is put in a position of potential danger on a daily basis and may be forced to live on society’s margins because of an inability to obtain gainful employment, credit, or bank accounts.”).

132. *Matson v. Alaska Commercial Fisheries Entry Comm’n*, 785 P.2d 1200, 1204 (Alaska 1990).

133. *Id.* at 1205.

134. The Alaska Constitution declares that “all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry” ALASKA CONST. art. I, § 1. The United States Constitution contains a parallel provision. U.S. CONST. amend. V. The U.S. Constitution also protects citizens against state deprivations of life, liberty, or property without due process of law, and it grants citizens the right to equal protection of the laws. U.S. CONST. amend. XIV, § 1.

135. “State Action” is defined as “[a]nything done by a government; esp., in constitutional law, an intrusion on a person’s rights (esp. civil rights) either by a governmental entity or by a private requirement that can be enforced only by governmental action (such as a racially restrictive covenant, which requires judicial action for enforcement).” BLACK’S LAW DICTIONARY 1444 (8th ed. 2004). One could argue that a requirement of SRS for gender amendment to legal documents, be it by statute, judicial precedent, or Bureau of Vital Statistics policy, is a state action that interferes with personal employment.

the interference is “closely related to an important state interest,”¹³⁶ and courts may be hard-pressed to find a state interest that closely relates to a policy requiring sexual reassignment surgery prior to a legal gender amendment.

V. PRACTICAL REALITIES

A. Transsexuals and Marriage

The issues surrounding change of gender and transsexualism bleed into the issues surrounding gay marriage. Those who oppose same-sex marriage may view legal gender change as an attempt to circumvent the Defense of Marriage Act (DOMA)¹³⁷ and the state laws and constitutional amendments that have sought to preserve a traditional notion of marriage.¹³⁸

DOMA holds that no state will be required to give full faith and credit to any same-sex marriage granted by another state. The Full Faith and Credit Clause, on the other hand, allows people to have some certainty as to their legal status and responsibilities.¹³⁹ The country has

136. *Matson*, 785 P.2d at 1205 (citing *State v. Enserch Alaska Constr., Inc.*, 787 P.2d 624, 632 (Alaska, 1989)).

137. 28 U.S.C. § 1738C (2006).

138. See Christine Vestal, *Gay Marriage Legal in Six States*, STATELINE.ORG (Apr. 8, 2009), available at <http://www.stateline.org/live/details/story?contentId=347390> (indicating the thirty states that have constitutional amendments prohibiting same-sex marriage and the thirty-six states that have statutes prohibiting same-sex marriage).

139. The Full Faith and Credit Clause reads as follows: “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.” U.S. CONST. art. IV, § 1. DOMA, on the other hand, states, “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” 28 U.S.C. § 1738C. Thus, DOMA carves out an exception to the expansive rule of full faith and credit. Some have suggested that DOMA is unconstitutional because it violates the Full Faith and Credit Clause, and at least one court has addressed the issue, holding that DOMA was valid. *Wilson v. Ake*, 354 F.Supp.2d 1298, 1303 (M.D. Fla. 2005) (“Adopting Plaintiffs’ rigid and literal interpretation of the Full Faith and Credit Clause would create a license for a single State to create national policy.”). For a discussion of the intersection of DOMA, full faith and credit, and transgender jurisprudence, see Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL’Y 301 (2003). See also Newlin, *supra* note 46 (“Even when a state does provide a mechanism for changing one’s legal sex, the state’s chosen procedure may not be entitled to full

faced this issue before, during the period when some states began allowing divorces and others did not.¹⁴⁰ Problems would clearly arise if, for instance, Bill was married to Susan in Kansas, divorced her and married Fran in Ohio, and was considered married to Susan in one state, to Fran in another, and to no one at all in a third.

Despite mixed public opinion, the Full Faith and Credit Clause was eventually interpreted to require states to respect the findings of divorce made by sister states.¹⁴¹ There was political uproar at the time, not unlike the current moment's political storm surrounding same-sex marriage. Unless DOMA is rescinded, however, as more states allow gay marriage, history is preparing to repeat itself and the country will see a great deal of confusion surrounding peoples' legal status and their responsibilities and benefits via their relationships to others.

Gender change adds another wrinkle to the debate on gay marriage. Marriage has been held repeatedly to be a fundamental right in the United States.¹⁴² Even prisoners have been afforded constitutional protection when their right to marriage has been abridged by jailors.¹⁴³ It is unclear, however, who, if anyone, a transsexual is allowed to marry. Presumably, when one has changed from a woman to a man in a state with no same-sex marriage, his pool of eligible spouses has flipped. That, however, has not been the case in this budding area of jurisprudence. The Ohio Court of Appeals in *In re Marriage License of Nash*¹⁴⁴ affirmed the denial of a marriage license for a transsexual who had undergone SRS and obtained an amended birth certificate and

faith and credit in other states. As the law currently stands, Tennessee will not recognize a marriage contracted in Illinois between a man and a transgender woman, because Tennessee considers this a same-sex marriage.”)

140. For a history of U.S. divorce policy and its intersection with the Full Faith and Credit Clause, see Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 396–406 (2007).

141. *Williams v. North Carolina*, 317 U.S. 287, 303–04 (1942); see also *JUDICIARY: Divorce Wins a Verdict*, TIME, Jan. 4, 1943, available at <http://www.time.com/time/magazine/article/0,9171,790647,00.html> (noting that the Supreme Court had recently overruled the thirty-seven-year-old precedent exempting divorce decrees from full faith and credit, thereby requiring all states to recognize divorces granted by other states).

142. See Allen E. Schoenberger, *Alternative Visions of the Family: The European Constitutional Perception of Family Law: Comparison with American Jurisprudence*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 419, 440 n.167 (2009) (citing *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)).

143. Schoenberger, *supra* note 142, at 440 (citing *Turner v. Safley*, 482 U.S. 78, 91 (1987)).

144. Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

driver's license.¹⁴⁵ Under this outcome, Mr. Nash is not allowed to marry anyone. He is legally a man, and his state has since banned same-sex marriage,¹⁴⁶ so he cannot marry another man; yet the court refuses to grant him a marriage license with a woman. Because marriage is a fundamental right, this situation presents clear constitutional problems.

Beyond the considerable due process complications, full faith and credit is also likely to be implicated as transgender rights grow. Perhaps as states take differing positions on the requirements for legal gender change (and marriage availability), Congress will enact another exception to the Full Faith and Credit Clause, further contributing to the oncoming storm of status confusion.

Looking abroad, the courts may find guidance from Europe. Not only does the European Court of Human Rights require its member countries to permit change of gender designations for transgender individuals who undergo sex change operations,¹⁴⁷ it has gone a step further in requiring its countries to allow marriages between a transgender individual and a person of his or her original gender.¹⁴⁸ This protects the right to marry and keeps people's marital status relatively clear.

B. On the Horizon: REAL ID

The REAL ID Act of 2005 may make the legal change of gender process even more arduous.¹⁴⁹ Though the final version of the law leaves

145. *Id.* at *1; see also Schoenberger, *supra* note 142, at 440 ("The major exception [to the lack of American judicial opinions regarding transgender marriage] is *In re Marriage License of Nash*, in which an Ohio court affirmed the denial of a marriage license, holding that such a marriage was against public policy, despite the fact that a number of other American courts have considered the validity of such marriages for other purposes such as inheritance, support payments, and standing to litigate medical malpractice cases.").

146. OHIO CONST., ART. XV, § 11 (effective Dec. 2, 2004).

147. See *I v. United Kingdom*, (2003) 36 E.H.R.R. 53, P 73; see also Schoenberger, *supra* note 142, at 435–38 for a discussion of ECHR cases dealing with transgender issues.

148. Schoenberger, *supra* note 142, at 440 ("The ECHR held in *Goodwin v. United Kingdom* that the United Kingdom's failure to recognize a marriage between a person who had undergone a sex change operation and a person of his/her original gender violated Article 8 of the Convention.") (citing *Goodwin v. United Kingdom*, 35 Eur. H.R. Rep. 18). After the *Goodwin* decision, the UK adopted the Gender Recognition Act (GRA) (2004), which sets the standard for what petitioners must show to change their gender designation. See Tobin, *supra* note 27, at 429–34 (discusses the GRA and its rejection of an SRS requirement).

149. PUB. L. NO. 109-13, § 202(b), 119 Stat. 231, 311 (2005). The act imposes federal security and authentication standards, set by the Department of Homeland Security, on driver's licenses and identification cards. Without an ID that meets those federal standards, people will be denied access to federal

the issue of gender change to the states,¹⁵⁰ the Department of Homeland Security will require states to adhere to standardized procedures for submitting name and gender changes. In his article *Estate Planning and the Transgendered Client*, Bergstedt hypothesizes that through the implementation of REAL ID, “common law name changes will likely become obsolete.”¹⁵¹ Similarly, this Act could affect the way in which states process change of gender petitions as well. Most significantly, immigrants who are required to use passports in order to apply for documents covered under REAL ID will most certainly have their incongruent gender documents exposed to scrutiny.¹⁵²

CONCLUSION

Alaska’s courts face the task of addressing change of gender petitions without the benefit of specific legislative guidelines. As more petitions are filed, consistent application of the law will become increasingly important. Alaska has heightened constitutional protections for privacy, and under the equal protection, due process, and privacy analyses, it is likely that courts will continue to grant change of gender petitions when petitioners have met requirements that serve to protect the stability of gender as a reliable marker of identity. Courts following Alaskan precedent, however, are also unlikely to set any restrictions as onerous as genital sexual reassignment surgery as a hurdle to legal gender change. Case law around the country is trending toward protection of GLBT rights. International legal standards are allowing for more protections for transgender individuals. Jane, and others like Jane, will likely have the liberty to pursue their personal identity with the increasing support of legislation and precedent protecting their rights to privacy and freedom from discrimination based on sex. Alaska is once again well-situated to be a pioneer in another novel yet quickly growing field of jurisprudence.

buildings, nuclear power plants, and commercial airplanes. For more information, see James J. Fazzalaro, *The Real ID Act, Enhanced Drivers’ Licenses, and Related Applications* Nov. 16, 2007; Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 797-800 (2008).

150. Bergstedt, *supra* note 3, at 688 (citing Eric Resnick, *Transgender Concerns Ease on Real ID Rules, Just a Bit*, GAY PEOPLE’S CHRONICLE.COM, Feb. 1, 2008, available at <http://www.gaypeopleschronicle.com/stories08/february/0201084.htm>).

151. *Id.* at 687.

152. *See id.* at 689 (noting that a naturalized U.S. citizen from a country that does not amend birth certificates would have trouble changing his or her birth certificate and subsequently his or her driver’s license).