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COMMENT

Trans People and Legal Recognition: What the U.S. Federal Government Can Learn From Foreign Nations

AMY RAPPOLE[†]

In May 2014, the World Health Organization (“WHO”), along with six other United Nations agencies, released an interagency statement that recommended, in part, that governments worldwide stop the involuntary sterilization of transgender people.¹ The report stated that: “[i]n many countries, transgender and also intersex persons are required to undergo sterilization surgeries that are often unwanted, as a prerequisite to receiving gender-affirmative treatment and gender-marker changes.”² The countries requiring surgery generally want the individual to have genitals that more closely approximate the sex the individual wants listed on their gender marker; when a person undergoes such a surgery, the person’s capability to reproduce is usually destroyed.³ One such gender marker⁴ that can require surgery to change is the gender⁵ listed on a

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1. WORLD HEALTH ORG., INTERAGENCY STATEMENT: ELIMINATING FORCED, COERCIVE, AND OTHERWISE INVOLUNTARY STERILIZATION at 7–8 (2014), available at http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1 [hereinafter WHO, *INVOLUNTARY STERILIZATION*].

2. *Id.* at 7.

3. *See id.* at 2, 7–8.

4. A gender marker is the designation of “male” or “female” listed on an

birth certificate.⁶

Creating and altering birth certificates is a function of the states in the U.S., but the federal government can and does guide state laws through revisions to the Model State Vital Statistics Act. As many state legislatures follow the Act in making their own laws and regulations about birth certificates, the federal influence is indirect but significant.⁷ American society utilizes birth certificates for a variety of important functions, such as in the contexts of schooling and employment, and birth certificates are also frequently essential in acquiring other important documents, such as driver's licenses and passports.⁸ The gender listed on a person's birth certificate is thus essential in many 'routine' administrative activities and can expose a person to discrimination or even violence if the listed gender seemingly "conflicts" with the person's physical appearance.⁹ Nonetheless, most American states continue to require individuals seeking a change in their gender marker to undergo precisely the procedures denounced by the WHO and other United Nations agencies.¹⁰

Part I of this paper identifies several of the problems trans people face, including discrimination and physical assaults, when governments deny them the right to have their gender markers correspond with their chosen gender. Part II analyzes the laws of

identification document such as a birth certificate or driver's license. Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Vital Statistic Statutes and Politics to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 376–77 (2013).

5. According to the American Psychological Association, the term "gender" refers to the attitudes, feelings, and behaviors a culture associates with a person's biological sex. The term "sex" refers to a person's biological status and is usually categorized as male, female, or intersex. AM. PSYCHOLOGICAL ASS'N, GUIDELINES FOR PSYCHOLOGICAL PRACTICE WITH LESBIAN, GAY, AND BISEXUAL CLIENTS at 2 (2011), available at <http://www.apa.org/pi/lgbt/resources/guidelines.aspx>. The term "intersex" refers to a variety of conditions that lead to atypical development of physical sex characteristics. AM. PSYCHOLOGICAL ASS'N, WHAT DOES "INTERSEX" MEAN? at 1 (2006). There is much debate about what the words "sex" and "gender" really mean, and since this paper is not trying to address this independently complicated issue, the words will be used interchangeably. See *What Do We Mean by "Sex" and "Gender"?*, WORLD HEALTH ORG. (last visited Mar. 17, 2015) <http://www.who.int/gender/whatisgender/en/>.

6. WHO, *INVOLUNTARY STERILIZATION*, *supra* note 1, at 2.

7. See Mottet, *supra* note 4, at 400.

8. *Id.* at 391.

9. *Id.* at 392.

10. See *id.* at 390–91.

several U.S. states, many of which only allow for a change of gender on a birth certificate when the individual requesting the change can prove that he/she has had sex reassignment surgery, a procedure which can sterilize the individual.¹¹

Part III describes how several countries have amended laws that formerly required sex reassignment surgery and have promulgated policies that encourage local governments to change their own laws.¹² Part IV focuses on the depathologization of trans people and outlines new national policies which recognize that being trans does not automatically necessitate medical treatment.¹³ Part V recommends that the United States federal government, following the recommendations of the WHO report, implement policies similar to those adopted by the countries described in Part IV, specifically the policies of Denmark and Sweden.¹⁴

I. WHY TRANS PEOPLE NEED LEGAL GENDER RECOGNITION

Legal gender recognition is essential for trans people.¹⁵ Trans people need legal gender recognition, including the option of listing one's preferred gender on gender markers, because it is a fundamental right and can help keep trans people safe.¹⁶ Indeed, many human rights treaties advocate legal recognition of a person's identity as a human right.¹⁷ For example, the Yogyakarta Principles,

11. Whether an individual is sterilized depends on the extent of the surgery. For a person transitioning from female to male, a hysterectomy is usually performed, and therefore the person is sterilized. For a trans person transitioning from male to female, usually the penis and testicles are removed, which also causes sterility. Committee on Healthcare for Underserved Women, *Health Care for Transgender Individuals*, 512 AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMM. OPINION 1, 3–4 (2011).

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. The term “trans people” is used throughout this paper to encompass a wide range of individuals including people who identify as transsexual, transgender, transvestite/cross-dressing, androgyne, polygender, genderqueer, agender, gender variant or with any other gender identity and or gender expression which is not standard male or female, and who express their gender through their choice of clothes, presentation, or body modifications, including the undergoing of multiple surgical procedures. The specific issue addressed relates to those individuals who wish to have legal gender recognition for a gender that is different from the gender listed on their birth certificates.

16. WHO, *INVOLUNTARY STERILIZATION*, *supra* note 2, at 1, 7–8.

17. International Covenant on Civil and Political Rights art. 16, Dec. 16, 1966, S. EXEC. REP. 102-23, 999 U.N.T.S. 172 (“Everyone shall have the right to recognition everywhere as a person before the law.”); *see also* Convention on the

created by the International Commission of Jurists,¹⁸ states, in part, that “[p]ersons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity, and freedom.”¹⁹

The United Nations High Commissioner for Human Rights has recommended that nations “facilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”²⁰ In June 2014, the American Medical Association declared that all states should eliminate the requirement that individuals undergo surgery before being able to change the gender marker on a birth certificate.²¹ AMA President Ardis Dee Hoven stated in a press release that “[s]tate laws must acknowledge that the correct course of treatment for any given individual is a decision that rests with the patient and their physician.”²²

Elimination of All Forms of Discrimination against Women (CEDAW) art. 15, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S.14; Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3; Org. of Am. States, American Convention on Human Rights art. 3, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 144; African Charter on Human and People’s Rights (Banjul Charter) art. 5, June 27, 1981, 1520 U.N.T.S. 245.

18. The International Commission of Jurists is a group of sixty eminent judges and lawyers from all over the world that aims to promote and protect human rights through the Rule of Law. *About, INT’L COMM’N OF JURISTS*, <http://www.icj.org/about/> (last visited Mar. 6, 2015).

19. The complete statement on legal gender recognition declares, “Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.” INT’L COMM’N OF JURISTS (ICJ), *THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY* 11–12 (2007).

20. U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶ 84, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

21. Press Release, AMA Calls for Modernizing Birth Certificate Policies (June 9, 2014), <http://www.ama-assn.org/ama/pub/news/news/2014/2014-06-09-modernizing-birth-certificate-policies.page>.

22. *Id.*

States' refusal to follow the AMA recommendations poses numerous dangers and burdens for trans people.²³ In the first comprehensive study of its kind, researchers found that trans people were two times more likely than the general population to be unemployed and that ninety percent of trans people had experienced discrimination at work or had hidden that they were trans from their co-workers.²⁴ Over half of the respondents had attempted suicide, and one-fifth had been denied equal treatment by a government agency or official.²⁵ Only twenty-one percent of the individuals who had transitioned gender were able to update all of their records, and nearly half who presented ID documents that did not match their gender identity or expression reported being harassed.²⁶ Fifteen percent of respondents reported being asked to leave establishments and three percent reported being attacked.²⁷ Having sexual-related surgery²⁸ was the single most important factor in receiving legal gender recognition through changes on identity documents – since most states require surgery before granting such changes.²⁹ However, these surgeries are expensive³⁰ and are excluded from most healthcare plans,³¹ making them unavailable to most trans people who want to

23. *See generally* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2–6 (2011) (explaining current challenges trans people face).

24. *Id.* at 3.

25. *Id.* at 5, 7.

26. *Id.* at 5.

27. *Id.*

28. Male to female surgeries include breast augmentation, orchiectomy (removal of testes), vaginoplasty (creation of a vagina/removal of the penis), and facial feminization surgeries. Female to male surgeries include chest reconstruction, hysterectomy, metoidioplasty (which releases the clitoris), surgeries that create testes, and phalloplasty (surgical creation of penis and testes). *Id.* at 79.

29. *See id.* at 139.

30. A 2008 study found that the average cost of male to female surgery is \$10,358, while the average cost of female to male surgery is \$17,944. Mary Ann Horton, *The Cost of Transgender Health Benefits* at 4 (Sept. 30, 2008), *available at* <http://www.tgender.net/taw/thb/THBCost-OE2008.pdf>. Is this the right cite for this?

31. In 2014, a federal health care board ruled that sex reassignment surgery is a necessary medical procedure and that Medicare must cover it. Kasy Steinmetz, *Board Rules That Medicare Can Cover Gender Reassignment Surgery*, TIME.COM (May 30, 2014), <http://time.com/2800307/medicare-gender-reassignment/>. Only California, Vermont, Oregon, Connecticut, Colorado, New York, and Washington D.C., prohibit insurance companies from excluding treatments related to gender transitions. *See* CAL. CODE REGS. tit. 10, § 2561.2 (2014); VT. DEP'T OF FIN. REGULATION, DIV. OF INS., INS. BULLETIN NO. 174, GUIDANCE REGARDING PROHIBITED DISCRIMINATION ON THE BASIS OF GENDER IDENTITY INCLUDING MEDICALLY NECESSARY GENDER DYSPHORIA SURGERY AND RELATED HEALTHCARE (2013); OR. INS. DIV., BULLETIN INS 2012-1, RE: APPLICATION OF

have surgery.³²

State courts have also recognized how important it is for individuals to receive legal gender recognition. For example, in 2003, Maryland's highest court stated that "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."³³ This sentiment has been echoed by courts in both California³⁴ and Puerto Rico.³⁵

II. U.S. STATE POLICIES

In the U.S., each state has its own policy on gender marker changes for birth certificates and there are large differences in how the states approach this issue. Despite the difficulties in getting sex reassignment surgery, over a quarter of U.S. states have laws that specifically require individuals to undergo surgery before the state will change the gender listed on a person's birth certificate.³⁶ Idaho,

SENATE BILL 2 (2007 LEGISLATION SESSION) TO GENDER IDENTITY ISSUES IN THE TRANSACTION AND REGULATION OF INSURANCE IN OREGON (2007); STATE OF CONN. INS. DEP'T, BULLETIN IC-34, RE: GENDER IDENTITY NONDISCRIMINATION REQUIREMENTS (2013); COLO. DIV. OF INS., BULLETIN No. B-4.49, INSURANCE UNFAIR PRACTICES ACT PROHIBITIONS ON DISCRIMINATION BASED UPON SEXUAL ORIENTATION (2013); N.Y. DEP'T OF FIN. SERVICES, INSURANCE CIRCULAR LETTER No. 7, RE: HEALTH INSURANCE COVERAGE FOR THE TREATMENT OF GENDER DYSPHORIA (2014); D.C. DEP'T OF INS., SEC. & BANKING, BULLETIN 13-IB-01-30/13, REVISED: PROHIBITION OF DISCRIMINATION IN HEALTH INSURANCE BASED ON GENDER IDENTITY OR EXPRESSION (2014). However, sex reassignment surgery is still not covered under Medicaid, and most states do not prohibit insurers from excluding it. Tammy Reed, *Oregon Medicaid Program to Start Covering Gender Reassignment Surgery in January*, EXAMINER.COM (Aug. 15, 2014, 12:00 PM), <http://www.examiner.com/article/oregon-medicaid-program-to-start-covering-gender-reassignment-surgery-january>.

32. See GRANT ET AL., *supra* note 23, at 77–79.

33. In re R.W. Heilig, 816 A.2d. 68, 79 (Md. 2003). Should the In re be italicized here?

34. See *Somers v. Superior Ct.*, 92 Cal. Rptr. 3d 116, 121–22 (Cal. Ct. App. 1st Dist., 2009) (holding that California-born trans individuals who reside outside of California must have the same opportunity to seek a new birth certificate as California-born trans individuals who live inside California, in part due to the Privileges and Immunities clause of the Constitution).

35. See *Ex Parte Delgado*, 165 P.R. Dec. 170, 180 (2005) (P.R.), (emphasizing in dicta the strong desire of trans people to live ordinary lives in their true gender).

36. ALA. CODE § 22-9A-19(d) (2004); ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2006); ARK. CODE ANN. § 20-18-307(d) (West 2005); COLO. REV. STAT. ANN. § 25-2-115(4) (West 2006); DEL. CODE ANN. tit. 16 § 3131(a) (West 2006); GA. CODE ANN. § 31-10-23(e) (West 2005); HAW. REV. STAT. § 338-17.7(a)(4)(B) (West 2005); 410 ILL. COMP. STAT. ANN. 535/17(1)(d)(West 2006); LA. REV. STAT. ANN. § 40:62 (2014); MD. CODE ANN., HEALTH-GEN. § 4-214(b)(5) (West

Ohio, and Tennessee will not change the gender listed on a birth certificate under any circumstances.³⁷ Some states do not have laws that specifically address changing gender markers on birth certificates, but Lambda Legal,³⁸ which has created a comprehensive list of relevant statutes and regulations, reports that these states will change the gender marker on a birth certificate if the individual undergoes surgery.³⁹ California, New York, Oregon, Vermont, Washington, and the District of Columbia do not require an individual to undergo surgery to obtain an amended birth certificate, but generally do require that a doctor certify that the applicant has had “appropriate clinical treatment.”⁴⁰

While the U.S. federal government does not regulate birth certificates, the Department of State and the Social Security

2014); MASS. GEN. LAWS ANN. ch. 46, § 13(e) (West 2008); MICH. COMP. LAWS ANN. § 333.2831(c) (West 2006); NEB. REV. STAT. § 71-604.01 (2005); 1-209 NEV. REG. ADMIN. REGS. § 440.130 (Apr. 2014); N.J. STAT. ANN. § 26:8-40.12 (West 2006); N.M. STAT. ANN. § 24-14-25(D) (West 2010); 24 RCNY HLTH. CODE § 207.05(a)(5) (2006) (New York City has a different administrative code than New York state); N.C. GEN. STAT. ANN. §§ 130A-118(b)(4), (e) (West 2005); N.D. ADMIN. CODE § 33-04-12-02 (2015); UTAH CODE ANN. § 26-2-11 (West 2004); VA. CODE ANN. § 32.1-269(E) (West 2006); WIS. STAT. ANN. § 69.15(4)(b) (West 2014); WYO. RULES AND REGS. HLTH VR ch. 10, § 4(e)(iii) (2004).

37. IDAHO CODE ANN. § 39-250 (West 2015) (changing gender on birth certificate is explicitly not permitted); OHIO REV. CODE ANN. § 3705.15 (LexisNexis 2006) (failing to explicitly permit gender changes on birth certificates and interpreted as not encompassing gender corrections as a result of sex change surgery); TENN. CODE ANN. § 68-3-203(d) (2014) (specifically forbidding correction of gender designations for trans people).

38. Lambda Legal is a national legal organization that, in part, advocates for the civil rights of trans people. According to its website, it is the nation’s oldest and largest legal organization working to achieve full civil rights for lesbians, gay men, bisexuals, and trans people. *About Us*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us> (last visited Mar. 12, 2015).

39. See ALASKA STAT. ANN. § 18.50.290 (West 2014); CONN. GEN. STAT. ANN. § 19A-42 (West 2015); MINN. R. 4601.1000 (West 2015); 35 PA. STAT. § 450.603 (West 2014); S.C. CODE ANN. § 44-63-150 (West 2014) (and S.C. CODE REGS. ANN. 61-19 § 33 (West 2015)); ADMIN. R. S.D. 44:09:05:02 (West 2015); TEX. HEALTH & SAFETY CODE ANN. § 191.028 (West 2013).

40. CAL. HEALTH & SAFETY CODE § 103426 (West 2014); D.C. CODE ANN. § 7-217 (West 2015) (and D.C. CODE ANN. § 7-210.01 (West 2015)); N.Y. COMPILATION CODES R. & REGS. tit 10, § 35.2 (West 2015); OR. ADMIN. R. 333-011-0275(1)(e) (West 2015); 18 VT. STAT. ANN. § 5112 (West 2014). While Washington does not have a statute or regulation regarding adults amending their own birth certificates, the Ingersoll Gender Center reports that Washington only requires “appropriate clinical treatment” and not surgery to change the gender marker on a birth certificate. *Transitioning Guidelines*, INGERSOLL GENDER CENTER, <http://ingersollcenter.org/transitioningguidelines#Appropriate> (last visited Mar. 17, 2015). These laws do not define what “appropriate clinical treatment” is, but require a doctor’s certification that such treatment has occurred, unlike the policies of Sweden, Denmark, and Argentina, as discussed in part IV.

Administration recently amended their policies for modifying gender markers on passports and for social security so that applicants no longer need to undergo surgery.⁴¹ The federal government should build on these changes by revising the Model State Vital Statistics Act to make it clear that the federal government recommends that states remove surgical requirements for legal gender recognition.⁴² Since other countries have taken steps toward rejecting surgical requirements, or have successfully rejected surgical requirements, it is useful to look at the processes these foreign nations have undergone to see how such changes should occur in the United States and how they might occur beyond a change in the Model States Vital Statistics Act.⁴³

III. OVERVIEW OF FOREIGN POLICIES REGARDING THE RECOGNITION OF TRANS PEOPLE

This section outlines how foreign countries have revised their laws or will likely revise their laws due to changing views about trans people and court rulings on surgical requirements for such people. An overview of these countries' approaches offers lessons for the federal and state governments on legal gender recognition.

A. The United Kingdom – From No Legal Recognition to Human Rights Leader

The transformation of U.K. policy on legal gender change began with the 2003 House of Lords case *Bellinger v. Bellinger*.⁴⁴ The appellant in *Bellinger* was identified as male at birth but always identified as female, and eventually lived as a woman⁴⁵ and had gender reassignment surgery.⁴⁶ She married a man who was fully aware of her background and “sought a declaration that the marriage was valid.”⁴⁷ The appellant needed this declaration because the Matrimonial Causes Act of 1973 stipulates that a marriage is void if the parties are not a male and female.⁴⁸ Both the trial court⁴⁹ and the

41. See *infra* Part V.

42. *Id.*

43. See Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 415 (1998) (arguing that using comparative law leads to insights about one's own legal system).

44. [2003] UKHL 21, [2003] A.C.D. 74 (H.L.).

45. Meaning the appellant identified herself as a woman and presented herself to the public accordingly. *Id.* at [4].

46. *Id.* at [3]–[4].

47. *Id.* at [6], [8].

48. *Id.* at [7]. The Marriage (Same Sex Couples) Act, passed in 2013, allows

Court of Appeal⁵⁰ refused to declare the marriage valid.⁵¹

In the Supreme Court, the appellant argued that she was a “female” under the definition of the law at the time of her marriage and, in the alternative, sought a declaration that the law was incompatible with Articles 8⁵² and 12⁵³ of the European Convention on Human Rights (“ECHR”).⁵⁴ The Lord Chancellor intervened in the suit as the minister responsible for the law, and his Department stated that “its inter-departmental working group on transsexual people had been reconvened to examine the implications of giving full legal status to transsexual people in their acquired gender.”⁵⁵ The Lord Chancellor made this statement in response to the European Court of Human Rights’ ruling in *Goodwin v. United Kingdom*,⁵⁶ decided after the Court of Appeal’s ruling in *Bellinger*.⁵⁷

Before *Goodwin v. United Kingdom* the European Court of Human Rights had held that the United Kingdom’s refusal to grant post-operative trans people legal gender recognition did not constitute a violation of Articles 8 and 12 of the ECHR.⁵⁸ In *Goodwin v. United Kingdom*, the applicant, born in 1937, was a citizen of the U.K. who was identified as male at birth and had gender reassignment surgery in 1990, after living as a woman for five years.⁵⁹ In 1996, the

same sex couples to marry in Britain and Wales. Marriage (Same Sex Couples) Act, 2013, c. 30 (Eng. & Wales).

49. *Bellinger v. Bellinger*, [2000] 3 F.C.R. 733 (UK).

50. *Bellinger v. Bellinger*, [2001] EWCA (Civ) 1140; [2002] 2 W.L.R. 411 (Eng.).

51. *Bellinger*, [2003] UKHL 21, [8].

52. Article 8 of the European Convention on Human Rights provides:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

53. Article 12 of the European Convention on Human Rights provides: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” *Id.* art. 12.

54. *Id.* arts. 8, 12. See *Bellinger*, [2003] UKHL 21, [10].

55. *Bellinger*, [2003] UKHL 21, [10].

56. 2002-VI Eur. Ct. H.R. 1.

57. *Bellinger*, [2003] UKHL 21, [11]–[12].

58. *Id.*

59. *Goodwin*, 2002-VI Eur. Ct. H.R. at 9.

Department of Social Services Contributions Agency refused to give her a state pension at the age when women qualify for the benefit, and instead told her she would need to keep working until she reached the age at which men receive their state pensions.⁶⁰ The applicant argued that the government's refusal to grant her pension at the normal age for women was contrary to Article 8 of the ECHR.⁶¹

In its decision, the European Court of Human Rights noted that in previous cases, such as *Rees v. United Kingdom*⁶² and *Cossey v. United Kingdom*,⁶³ it had held that the refusal of the U.K. government to alter the register of births or issue amended birth certificates did not interfere with the duty to respect private life.⁶⁴ However, the Court went on to reject the U.K.'s refusal to alter the register of births because that approach prevented any growth in that area of the law.⁶⁵ The Court chose to consider "present day conditions"⁶⁶ to interpret the Convention and ruled that "the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."⁶⁷ Thus, the Court found that the law violated both Articles 8 and 12 of the ECHR and overturned *Rees* and *Cossey*, among other cases.⁶⁸

Taking into account the European Court of Human Rights' holding in *Goodwin* and the fact that the Lord Chancellor had already decided that the Matrimonial Causes Act of 1973 would have to change, the court in *Bellinger v. Bellinger* held that it was incompatible with Articles 8 and 12 of the European Convention of

60. *Id.* at 10.

61. *Id.* at 22–23.

62. App. No. 9532/81, 9 Eur. H.R. Rep. 56, 66–67 (1987).

63. App. No. 10843/84, 13 Eur. H.R. Rep. 622, 633 (1991).

64. *Goodwin*, 2002-VI Eur. Ct. H.R. at 26.

65. The Court specifically stated: "A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement." *Id.* at 21 (citation omitted).

66. The Court cited *Tyrer v. United Kingdom* for this language, in which the Court held that the Convention was a living document and the Court had to consider developments and standard practices in the field of human rights. 2 Eur. H.R. Rep. 1, 10 (1979–80).

67. *Goodwin*, 2002-VI Eur. Ct. H.R. at 31–32.

68. *Id.* at 32, 35. See Betty C. Burke, *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform*, 64 LA. L. REV. 643 (2004) (concluding that *Goodwin's* reinterpretation of Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms overturned prior cases like *Rees* and *Cossey* and placed civil rights obligations on the United Kingdom's treatment of transsexuals in its administrative practices).

Human Rights to forbid a post-operative trans person like Bellinger from marrying her husband. Still, the court refused to strike down the law because it felt that such a major change was not one for the courts to make.⁶⁹ The legislature made that change in 2004 when it passed the Gender Recognition Act,⁷⁰ which permits a person who is at least 18 years of age to apply for a gender recognition certificate on the basis of having lived in the acquired gender or having changed gender under the law of a country or territory outside of the United Kingdom.⁷¹

The law does not require an individual to undergo sex reassignment surgery. However, it does require the individual applying for the certificate to have gender dysphoria;⁷² to have lived as the acquired gender for at least two years; and to provide the government with reports from medical practitioners including the details of the applicant's diagnosis of gender dysphoria.⁷³ The gender recognition certificate allows an individual to obtain a new birth certificate reflecting the individual's self-identified gender, without it showing that the gender on the certificate has been changed.⁷⁴ By shifting from a policy of refusing to grant legal gender recognition even with surgery to allowing a change in gender markers without requiring surgery, the U.K.'s advancement in the protection of trans people's rights makes for an impressive example of how countries can change their laws to give trans people legal gender recognition.⁷⁵

69. *Bellinger v. Bellinger*, [2003] UKHL 21, [2003] A.C.D. 74 (H.L.) [13]–[18].

70. Gender Recognition Act, 2004, c. 7 (U.K.).

71. *Id.* § 1.

72. According to the United Kingdom's National Health Service, gender dysphoria is a condition in which an individual, "experiences discomfort or distress because there is a mismatch between their biological sex and gender identity." *Gender Dysphoria*, NHS CHOICES, <http://www.nhs.uk/conditions/Gender-dysphoria/Pages/Introduction.aspx> (last modified Apr. 29, 2014). See *infra* Part IV for more information about the diagnosis and what the requirement of the diagnosis means for trans people.

73. Gender Recognition Act, §§ 1–3.

74. *Id.* §§ 9–10. See also *United Kingdom Gender Recognition Act*, GEN. IDENTITY RES. & EDUC. SOC'Y, <http://www.gires.org.uk/GRA.php> (last visited Oct. 6, 2014) (summarizing the impacts and consequences of "gender recognition certificates" issued under the Gender Recognition Act).

75. While the change is impressive, the law does require applicants to be single, which has forced some people to annul their marriages. Lisa Fishbayn, "Not Quite One Gender or the Other": *Marriage Law and the Containment of Gender Trouble in the United Kingdom*, 15 AM. U. J. GENDER SOC. POL'Y. & L. 413, 433 (2007).

B. Australia – The National Government Sets an Example

In July 2013, the Australian federal government presented a policy document called “Australian Government Guidelines on the Recognition of Sex and Gender.”⁷⁶ The paper provided guidance to national departments and agencies “on the collection, use and amendment of sex and/or gender information in individual personal records.”⁷⁷ The goals of the guidelines were threefold: to create more standardized sex and gender classifications for the Australian government; to create a standardized system for changing or establishing sex and gender on personal records; and to maintain consistent collection of this information by the Australian government.⁷⁸

The guidelines allow for a change of gender or sex on personal records so long as the applicant presents documentation, such as a statement from a registered medical practitioner or an amended State or Territory birth certificate, specifying the individual’s preferred gender.⁷⁹ The guidelines do not require sex reassignment surgery or hormone therapy to recognize a change in gender.⁸⁰

As in the United States, the registration of births and changes to birth records are the responsibility of the States and Territory governments—not the federal government.⁸¹ Thus, the guidelines are not binding on Australian States or Territories.⁸² However, the guidelines do explain that the federal government will try to help the State or Territorial governments follow the guidelines in situations in which the two levels of government are “jointly responsible . . . for

76. COMMONWEALTH OF AUSTRALIA, AUSTRALIAN GOVERNMENT GUIDELINES ON THE RECOGNITION OF SEX AND GENDER (2013), *available at* <http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>. The guidelines were presented in part to implement a bill introduced in the Australian legislature in July 2013 and passed in August 2013 called the Sex Discrimination Amendment (Sexual Orientation, Gender Identity, and Intersex Status) Bill 2013 to amend the Sex Discrimination Act 1984. *Id.* at 2; *Sex Discrimination Amendment (Sexual Orientation, Gender Identity, and Intersex Status) Bill 2013* (Cth) (Austl.). The Act made it illegal to discriminate based on sexual orientation, gender identity, and intersex status. *Id.* ss 5A–5C.

77. COMMONWEALTH OF AUSTRALIA, *supra* note 76, at 2.

78. *Id.*

79. *Id.* at 4.

80. *Id.*

81. *Births, Deaths and Marriages Registries*, AUSTRALIA.GOV.AU, <http://australia.gov.au/topics/law-and-justice/births-deaths-and-marriages-registries> (last visited Nov. 8, 2014).

82. *Id.*

the maintenance and record of individuals' information.”⁸³ This declaration seems to indicate that in such situations, the federal government's policy would be more influential on State or Territorial governments.

The following year, the Australian Capital Territory⁸⁴ changed its own laws to reflect national policy when it enacted the Births, Deaths and Marriages Registration Amendment Act of 2014.⁸⁵ The Act amended the Territory's Births, Deaths and Marriages Registration Act of 1997 to allow a person to change the sex on his/her record of birth if the person believes his/her sex to be the “altered” sex and if the person has either received “appropriate clinical treatment” or is an intersex person.⁸⁶ The Act also allows a child's guardians to change the sex indicated on their child's record of birth if they believe that it is in the child's best interests and if the child has received “appropriate clinical treatment” or is an intersex person.⁸⁷ Australia's other states and territories have yet to enact similar legislation and still require individuals to undergo surgery before being able to obtain legal gender recognition.⁸⁸

83. COMMONWEALTH OF AUSTRALIA, *supra* note 76, at 8.

84. An Australian territory where the national capital, Canberra, is located. *Capital Cities*, AUSTRALIA.GOV.AU, <http://www.australia.gov.au/directories/state-territory-and-local-government-directories/capital-cities> (last visited Feb. 27, 2015).

85. *Births, Deaths and Marriages Registration Amendment Act 2014* (ACT) (Austl.).

86. *Id.* s 24(1)(c). The law does not define what appropriate clinical treatment is, but the individual who wants the change presumably needs to present medical evidence regarding their gender identification in order to receive the change on their birth record. OFFICE OF REGULATORY SERVS, AUSTRALIAN CAPITAL TERRITORY GOV'T, CHANGES OF SEX, http://www.ors.act.gov.au/community/births_deaths_and_marriages/changes_of_sex (last visited Mar. 20, 2015) (requiring that applications to change sex on one's birth registration include a statutory declaration from a doctor of psychologist that an applicant has received “appropriate clinical treatment”).

87. *Births, Deaths and Marriages Registration Amendment Act 2014* s 24(2)(c).

88. The following is a list of the other Australian territory and state policies – they generally require that the applicant be single to apply to the Register for a change in the gender marker on their birth certificate. *See Sexual Reassignment Act 1988* (SA) s 7-9 (Austl.) (requiring an individual, who cannot be married and has undergone sexual reassignment surgery to apply to a magistrate for a gender recognition certificate, and if granted the Registrar must register the reassignment of sex); *Births, Deaths and Marriages Registration Act 1995 No 62* (NSW) s 32B (Austl.) (requiring an individual, who cannot be married and has undergone a “sex affirmation” procedure to apply to the Register to change the person's sex in his/her register of birth); *Births, Deaths and Marriages Registration Act 1996* (Vic) s 30A (Austl.) (requiring an individual, who cannot be married and has undergone a “sex affirmation” procedure to apply to the Register to change the person's sex in his/her

C. New Zealand – The Role of Family Courts

In 1995, the New Zealand legislature passed the Births, Deaths, Marriages, and Relationship Registration Act 1995.⁸⁹ The Act does not explicitly require individuals to have sexual reassignment surgery before being able to apply for a new birth certificate, but states that a Family Court, on the application of an eligible adult, can declare that the applicant receive a new birth certificate listing the sex sought by the applicant.⁹⁰ For a Court to issue this declaration, the individual must: assume the gender identity of the chosen sex; undergo medical treatment that enables the individual “to acquire a physical conformation that accords” with the chosen sex; and intend to maintain that gender.⁹¹

In 2008, the Family Court of Auckland clarified these requirements in *Michael v Registrar-General Births, Deaths, and Marriages*.⁹² The Court held that “medical treatment” included both psychological as well as surgical treatment, meaning that the medical treatment need not be surgical.⁹³ The Court also ruled that Family Courts must focus on the individual goals of the applicant and, therefore, must take into consideration the “unique circumstances” of each particular applicant.⁹⁴ In line with this reasoning, the Court held that a physical conformation does not require complete conformity with the physical characteristics of the nominated sex.⁹⁵ Overall, the Court held that the law did not require a generalized surgical treatment for individuals and that “to do so would be to misunderstand transsexualism and the treatment for it.”⁹⁶ While the case does not require courts to allow trans people who have not had

register of birth); *Births, Deaths and Marriages Registration Act 1996* (NT) s 28B (Austl.) (requiring an individual, who cannot be married and has undergone sexual reassignment surgery to apply to the Register to change the person’s sex in his/her register of birth); *Births, Deaths and Marriages Registration Act 1999* (Tas) s 28A (Austl.) (requiring an individual, who cannot be married and has undergone sexual reassignment surgery to apply to the Register to change the person’s sex in his/her register of birth); *Gender Reassignment Act 2000* (WA) s 15 (Austl.); *Births, Deaths and Marriages Registration Act 2003* (Qld) s 23 (Austl.) (providing that an individual who has undergone sexual reassignment surgery can apply to note the reassignment of the individual’s sex).

89. Births, Deaths, Marriages, and Relationships Registration Act 1995 (N.Z.).

90. *Id.* sec. 28(1).

91. *Id.* sec. 28(3).

92. “*Michael*” v Registrar-General Births, Deaths and Marriages (unreported) Family Court, Auckland, FAM 2006-004-002325, 9 June 2008, Fitzgerald J (N.Z.).

93. *Id.* ¶ 62.

94. *Id.* ¶ 65.

95. *Id.* ¶¶ 66–67.

96. *Id.* ¶ 72.

surgery to gain legal gender recognition, its holding that determinations are to be made on a “case-by-case” basis suggests that courts in New Zealand are unlikely to require sex reassignment surgery before allowing an individual to change the gender marker on his/her birth certificate.⁹⁷

D. The Netherlands: From Mandating Sterilization to No Longer Requiring Surgery

In 2011, Human Rights Watch (“HRW”) published a report entitled, “Controlling Bodies, Denying Identities: Human Rights Violations Against Trans People in the Netherlands.”⁹⁸ The report stated that the Netherlands was one of the first European countries to grant trans people legal recognition.⁹⁹ The underlying law, however, required individuals to become sterile, both by taking hormones and having sex reassignment surgery, before allowing them to apply for a new birth certificate.¹⁰⁰ In line with these requirements, the law explicitly required trans people to be physically altered to the desired gender “insofar as possible and safe from a medical and psychological perspective.”¹⁰¹ Such requirements would take years to meet.¹⁰² The HRW report noted that, despite its initial progressiveness, the Netherlands was now “wholly out of step with best practices,” and described how having the wrong gender listed in the Dutch register of civil status records (*Gemeentelijke Basisadministratie van Persoonsgegevens*, known as the GBA) frequently “outs” trans people because of the GBA’s ubiquity in Dutch society.¹⁰³

97. Nan Seuffert, *‘Michael’ v Registrar-General of Births, Deaths and Marriages*, 17 WAIKATO L. REV. 115, 118 (2009); see also DEP’T. INTERNAL AFFAIRS, N.Z. GOV’T, GENERAL INFORMATION REGARDING DECLARATIONS OF FAMILY COURT AS TO SEX TO BE SHOWN ON BIRTH CERTIFICATES, available at [http://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/\\$file/GeninfoDeclarationsofFamilyCourt.pdf](http://www.dia.govt.nz/diawebsite.nsf/Files/GeninfoDeclarationsofFamilyCourt/$file/GeninfoDeclarationsofFamilyCourt.pdf).

98. HUMAN RIGHTS WATCH, CONTROLLING BODIES, DENYING IDENTITIES: HUMAN RIGHTS VIOLATIONS AGAINST TRANS PEOPLE IN THE NETHERLANDS (2011), available at <http://www.hrw.org/sites/default/files/reports/netherlands0911webwcover.pdf>.

99. *Id.* at 1.

100. BURGERLIJK WETBOEK, Boek 1, Artikel 28 [DUTCH CIVIL CODE, Book 1, Art. 28] (Neth.), translated using Google Translate, available at http://wetten.overheid.nl/BWBR0002656/Boek1/Titel4/Afdeling13/Artikel28/geldigheidsdatum_05-05-2015.

101. *Id.*

102. HUMAN RIGHTS WATCH, *supra* note 98, at 2.

103. Many government institutions and agencies that require personal data to discharge their duties have access to the GBA. *Id.* at 1, 4.

In 2013, the Netherlands amended its civil code to change the treatment of trans persons.¹⁰⁴ The new law allows persons who are at least sixteen years of age to apply for a change of sex on the individual's birth certificate on the basis of an expert certification that the person has a conviction to be of the opposite sex and understands the extent and significance of this decision.¹⁰⁵ Thus, the Netherlands now has one of the most progressive laws with respect to trans legal recognition: not only may individuals under 18 obtain a new birth certificate, but they may do so without undergoing any physical change whatsoever.

E. Germany and Austria – The Important Role of Court Decisions

There is no legislation allowing trans people to obtain new birth certificates without undergoing surgery in Germany or Austria.¹⁰⁶ Germany still follows its *Transsexuellengesetz* (“Transsexuals Act”)¹⁰⁷ which requires trans people to have surgery, and Austria adheres to its *Personenstandsgesetz* (“Personal Status Law”),¹⁰⁸ which does not specifically address gender changes. However, court rulings are changing how these laws are being interpreted.

104. WET ERKENNING GENDERIDENTITEIT [GENDER IDENTITY RECOGNITION ACT], Act of 18 December 2013, Stb.-2014-1 (Neth.), translated using Google Translate, available at <https://zoek.officielebekendmakingen.nl/dossier/33351/stb-2014-1?resultIndex=8&sorttype=1&sortorder=4>. The Gender Identity Recognition Act rescinded the sterilization and “physical adaptation” requirements to register a change in sex on one's birth certificate; for a discussion of the law, see DUTCH MINISTRY OF EDUC., CULTURE & SCI., IMPLEMENTATION OF THE BEIJING DECLARATION AND PLATFORM FOR ACTION: NETHERLANDS REVIEW REPORT 25 (2014), available at <http://www.tweedekamer.nl/kamerstukken/detail?id=2014D38532&did=2014D38532>.

105. WET ERKENNING GENDERIDENTITEIT [GENDER IDENTITY RECOGNITION ACT], Act of 18 December 2013, Stb.-2014-1 (Neth.).

106. CRISTINA CASTAGNOLI, EUR. PARL. DIRECTORATE-GENERAL FOR INTERNAL POLICIES, TRANSGENDER PERSONS' RIGHTS IN THE EU MEMBER STATES (2010), available at http://www.europarl.europa.eu/RegData/etudes/note/join/2010/425621/IPOL-LIBE_NT%282010%29425621_EN.pdf.

107. TRANSSEXUELLENGESETZ [TRANSSEXUALS ACT], Jan. 1, 1981, BUNDESGESETZBLATT [FEDERAL LAW GAZETTE] I at 1654, § 8.1 nos. 3–4 (Ger.), translated using Google Translate (May 5, 2015), available at <http://www.gesetze-im-internet.de/tsg/BJNR016540980.html>; see also UNIVERSAL PERIODIC REVIEW, MID-TERM IMPLEMENTATION ASSESSMENT 16 (2012), available at http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/UN-Dokumente/UPR_zu_Deutschland/upr_report_germany_2009_midterm_assessment_2011.pdf.

108. PERSONENSTANDSGESETZ 2013 [PERSONAL STATUS LAW] (Austria), translated using Google Translate (May 5, 2015), available at http://www.parlament.gv.at/PAKT/VHG/XXIV/II/01907/fnameorig_269991.html.

In April 2009, the Austrian Higher Administrative Court ruled that requiring gender reassignment surgery for legal recognition was illegal.¹⁰⁹ The court specifically ruled against requiring the complainant to have sexual reassignment surgery because it would lead to her losing her job due to the excessive sick leave she would need to recuperate.¹¹⁰ In doing so, the court held that, “the risk of losing her job and thus the risk of social disintegration” is not reasonable.”¹¹¹ However, the legislature has yet to respond to this ruling.¹¹²

Similarly, in January 2011, the German Constitutional Court held that provisions of the *Transsexuellengesetz*,¹¹³ which required trans people to have sexual reassignment surgery and be sterile before they could obtain legal gender recognition, was unlawful because the governmental interest in not “contradict[ing] the concept of the sexes” was outweighed by the “transsexual persons’ right to sexual self-determination safeguarding their physical integrity.”¹¹⁴ However, there has still been no change in the “Law of Transsexuals,” and some federal district courts are no longer changing gender marker statuses because the invalidated parts of the law have yet to be changed by the legislature.¹¹⁵ Thus, both Germany and Austria are nations whose laws, while not yet on par with countries like Australia and England, are being influenced by progressive court decisions.¹¹⁶

109. Verwaltungsgerichtshof [Administrative Court], Feb. 27, 2009, dkt. No. 2008/17/0054, *Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes Administrativrechtlicher Teil No. 17640A/ 2009* (Austria), English translation available at http://www.tgeu.org/sites/default/files/Austrian_High_Court_of_Administration_striking_down_requirement_for_genital_surgery_2009_ENGLISH.pdf.

110. *Id.*

111. *Id.*

112. See generally Gregory A. Knott, *Transsexual Law Unconstitutional: German Federal Constitutional Court Demands Reformation of Law Because of Fundamental Rights Conflict*, 54 ST. LOUIS. U. L.J. 997, 1001 (comparing legal developments in the treatment of trans people in Germany and Austria since 2009).

113. *TRANSSEXUELLENGESETZ*, *supra* note 107.

114. Bundesverfassungsgericht [Federal Constitutional Court], Jan. 11, 2011, 1 BvR 3295/07 (Ger.), English translation available at http://tgeu.org/wp-content/uploads/2015/01/Germany_Federal_Court_Sterilisation_2011.pdf; see Press Release No. 7/2011, German Federal Constitutional Court, Prerequisites for the statutory recognition of transsexuals according to § 8.1 nos. 3 and 4 of the Transsexuals Act are unconstitutional; see also Anne Sanders, *Marriage, Same-Sex Partnership, and the German Constitution*, 13 GERMAN L. J. 911, 934 (2012).

115. See MID-TERM IMPLEMENTATION ASSESSMENT, *supra* note 107.

116. SILVAN AGIUS ET. AL., INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N, HUMAN RIGHTS AND GENDER IDENTITY: BEST PRACTICE CATALOGUE 24 (2011), available at http://www.coe.int/t/dg4/lgbt/Source/HumanRightsandgenderidentity_EN.pdf.

IV. THE DEPATHOLOGIZATION OF TRANS PEOPLE – OVERVIEW OF SWEDISH, DANISH, AND ARGENTINE POLICIES

The policies considered to this point have relied on a certain understanding of trans people: namely, that they have a psychological condition requiring treatment, and therefore must present medical evidence in order to achieve legal gender recognition.¹¹⁷ This understanding is referred to as the “medical model.”¹¹⁸ The American Psychiatric Association added “transsexualism” to the Diagnostic and Statistical Manual of Mental Disorders-III (“DSM”) in 1980; the latest DSM refers to such individuals under the category of Gender Identity Disorder (GID).¹¹⁹

However, the World Professional Association for Transgender Health, an international organization that publishes standards of care for health care professionals working with trans people, stated in a 2012 publication that being transsexual, transgender, or gender nonconforming “is a matter of diversity, not pathology.”¹²⁰ The Association’s standards emphasize that having characteristics that are not stereotypically associated with a person’s assigned sex at birth is not inherently negative or pathological.¹²¹ While some trans people can have gender dysphoria, a “discomfort or distress caused by a discrepancy between a person’s gender identity and that person’s sex assigned at birth,” not all trans people experience these symptoms.¹²² Sweden, Denmark, and Argentina have recognized that not all trans people are distressed by a discrepancy between their gender identity and the sex assigned to them at birth, and have enacted laws which do not require trans people to obtain medical approval before being legally recognized as the opposite gender.¹²³

A. Sweden – Depathologization and Possible Compensation for Forced Sterilization

In the fall of 2012, the Swedish Administrative Court of Appeals

117. *See infra* Part III.

118. Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 HARV. C.R.-C.L. L. REV. 619, 619 (2011).

119. *Id.* at 624.

120. ELI COLEMAN ET. AL., WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 4 (7th ed. 2012), *available at* http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

121. *Id.* at 5.

122. *Id.*

123. *See infra* Part IVA–C.

held that the sterilization requirement for legal gender recognition intrudes upon an individual's privacy and cannot be viewed as a voluntary choice if people are forced to be sterilized in order to obtain legal gender recognition.¹²⁴ On July 1, 2013 the Swedish Parliament repealed the sterilization requirements by revising its Gender Recognition Act.¹²⁵ The modified law now allows adults who have felt "for some time" that they were of the preferred gender to receive legal gender recognition.¹²⁶ The law does not require any medical evidence or diagnosis to receive legal gender recognition.¹²⁷

Now that the Swedish government has repudiated its prior policies, some in the trans community are seeking damages. From 1930 to 1975, Sweden conducted forced sterilizations on many groups of people, including trans people that wanted to change gender markers, the Roma, and disabled individuals.¹²⁸ In 1999 Sweden passed a law which compensated groups such as the Roma for the harms inflicted on them, but did not compensate trans people who underwent sterilization to get their gender markers changed.¹²⁹ A group of 162 trans individuals have since formed a class (registered with the Swedish Chancellor of Justice) and are trying to seek similar compensation.¹³⁰ In June 2013, the Council of Europe adopted a resolution stating that at least symbolic compensation must be given for victims of forced sterilization.¹³¹ While Sweden has yet to rule on the class, the Swedish experience demonstrates some of the consequences that may follow modified policies on legal gender

124. Regeringsrätten [Supreme Administrative Court] 2012-12-19 T1968-12 (Swed.), English translation available at http://www.tgeu.org/sites/default/files/Sweden_Sterilisation_verdict_19_12_2012_EN.pdf.

125. 1 § KÖNSTILLHÖRIGHETSLAGEN [GENDER RECOGNITION ACT] 2013:45 (Swed.), English translation available at <http://tgeu.org/sweden-gender-recognition-act-reformed-2012/>.

126. *Id.*

127. *Id.*

128. JACK BYRNE, OPEN SOCIETY FOUNDATIONS, LICENSE TO BE YOURSELF 18 (David Scamell & Sebastian Krueger eds., 2014), *available at* http://www.wpath.org/uploaded_files/140/files/license-to-be-yourself-20140501.pdf.

129. LAG OM ERSÄTTNING TILL STERILISERADE I VISSA FALL [ACT ON COMPENSATION FOR STERILIZATION IN SOME CASES], SVENSK FÖRFATTNINGSSAMLING [SWEDISH CODE OF STATUTES] 1999:332 (Swed.), translated using Google Translate (May 5, 2015), *available at* http://www.riksdagen.se/sv/Dokument-Lagar/Lagar/Svenskforfattningssamling/sfs_sfs-1999-332/.

130. BYRNE, *supra* note 128, at 135.

131. EUR. PARL. ASS. DEB. 24th Sess. 1945 (June 26, 2013).

recognition.¹³²

*B. Denmark – Depathologization and Consequences for
Insincere Applications*

On June 11, 2014, Denmark followed Sweden and repealed the requirement that persons undergo sex reassignment surgery before receiving a legal gender change.¹³³ Like Sweden's, the Danish policy does not require an applicant to provide medical evidence in order to receive legal gender recognition.¹³⁴ Instead, the law mandates a six month waiting period between the initial application and the government's issuance of a new birth certificate and other identity documents.¹³⁵ The motion to amend the law, which included the bill that was eventually passed and remarks on the bill, commented that the six month waiting period would serve a precautionary function, helping to reduce the likelihood that an applicant would regret his/her decision to undergo the legal change.¹³⁶

As the law only requires that the applicant make a statement that he/she genuinely feels that he/she belongs to the opposite sex – and does not require any medical evidence to that effect – the government cannot independently verify the veracity of the applicant's claim.¹³⁷ The motion to amend the law stated that there could be consequences under the penal code for those who falsified their applications.¹³⁸

*C. Argentina – Depathologization and Extending Legal Gender
Recognition to Youth*

The new Argentine policy towards trans people is the most progressive policy the world has yet seen on this issue.¹³⁹ In 2012, a unanimous Argentine Senate passed, and President Cristina

132. *Id.*

133. Press Release, Transgender Europe, Historic Danish Gender Recognition Law Comes into Force (Sept. 1, 2014), <http://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>.

134. LOV NR 752 AF 25/06/2014 GÆLDENDE – LOV OM ÆNDRING AF LOV OM DET CENTRALE PERSONREGISTER [ACT NO. 752 OF JUNE 26, 2014 – ACT AMENDING THE LAW ON THE CENTRAL OFFICE], translated using Google Translate (May 5, 2015), available at <https://www.retsinformation.dk/forms/r0710.aspx?id=163824>.

135. *Id.*

136. 2013/1 LSF 182 – FORSLAG TIL LOV OM ÆNDRING AF LOV OM DET CENTRALE PERSONREGISTER [2013/1 BILL 182 – BILL TO AMEND THE LAW ON THE CENTRAL OFFICE], translated using Google Translate (May 5, 2015), available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=162658>.

137. LOV, *supra* note 134.

138. FORSLAG, *supra* note 136.

139. BYRNE, *supra* note 128, at 41.

Fernández de Kirchner signed into law, the Gender Identity and Health Comprehensive Care for Trans People Act.¹⁴⁰ The law requires the government to issue a new birth certificate to reflect an individual's acquired gender.¹⁴¹ It does not require applicants to present any evidence of medical treatment (psychological or physiological); an applicant needs only to submit an application to the appropriate governmental office stating that he/she falls under the protection of the law—meaning that the person wishes to have his/her gender marker changed to reflect his/her acquired gender.¹⁴² The individual can then obtain a new birth certificate and ID card, and can request for the change to be reflected on all other documents that include the person's former name and sex.¹⁴³ It has been reported that the entire process takes around fifteen days to complete.¹⁴⁴

The law is also unique in that children can request this change with the participation of their parents. In 2013, a six year old who had been identified as male at birth, but who self-identified as female since the time she could speak, was able to change her birth certificate and national ID to reflect her identity.¹⁴⁵ The girl's mother stated, “[b]y accepting that my son was not the son I gave birth to, but a girl, I accepted her identity and put myself at her side.”¹⁴⁶

This monumental law was passed in large part due to the work of trans advocates, who framed the issue in terms of identity. As Mauro Cabral, the co-director of the advocacy group Global Action for Trans* Equality stated: “The campaign for legal gender recognition formulated trans rights as a particular example of the right to identity (including the right to embody that identity). This

140. LEY 26.743, 23/6/2012, 32.404 B.O. 1, 2 (Arg.) [LAW 26.743, May 23, 2012, 32.404 B.O. 1, 2], translated using Google Translate, *available at* <http://www.infoleg.gov.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>.

141. *Id.*

142. *Id.*

143. *Id.*

144. Annie Murphy, *No More 'Lying': Law Bolsters Transgender Argentines*, NPR (Oct. 1, 2012, 5:03 PM), http://www.npr.org/2012/10/01/162100680/no-more-lying-law-bolsters-transgender-argentines?ft=1&f=2&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+NprProgramsATC+%28NPR+Programs%3A+All+Things+Considered%29.

145. Sunnive Brydum, *Trans Six-Year-Old is Argentina's Youngest to Amend Gender on Birth Certificate*, ADVOCATE (Sept. 28, 2013, 2:40 PM), <http://www.advocate.com/politics/transgender/2013/09/28/trans-six-year-old-argentinas-youngest-amend-gender-birth>.

146. *Id.*

was hugely significant in achieving this legislative change.”¹⁴⁷

Court decisions also played a major role in the creation of this legislation.¹⁴⁸ Before 2012, Argentina did not have any laws addressing gender recognition, and so to try to get such recognition, aggrieved individuals were forced to resort to the courts.¹⁴⁹ In 2001, a court granted a trans man who had undergone sex reassignment surgery the right to change his sex and the name on his national ID, but not his birth certificate.¹⁵⁰ The court emphasized the individual autonomy interest in choosing how to live one’s life without suffering because of someone else’s idea of morality.¹⁵¹ Beginning in 2010, individuals filed a series of appeals arguing that no evidence of any sort, other than a person’s self-defined gender identity, should be needed to receive legal gender recognition.¹⁵² These appeals succeeded and helped to spur legislative change.¹⁵³ Today, the law is seen as the benchmark for activists and policymakers who wish to develop progressive gender recognition laws.¹⁵⁴

V. RECOMMENDATIONS FOR THE UNITED STATES

The U.S. federal government has already taken some steps to advance legal gender recognition for trans people. The Social Security Administration previously required that a person undergo sexual reassignment surgery before it would recognize a legal gender change.¹⁵⁵ On June 14, 2013, the Social Security Administration presented a new policy allowing people to change their gender designation in their Social Security records by presenting a government-issued document reflecting the change, a court order directing legal recognition of the change, or a physician’s statement that an individual has received “appropriate clinical treatment for

147. BYRNE, *supra* note 128, at 28.

148. *Id.* at 20.

149. *Id.* at 9, 17.

150. Tribunal de Familia Nro.1 de Quilmes, 19/10/2001 [Family Court Number 1 of Quilmes, Oct. 19, 2001], “K., FB,” Sup.Const 19/10/2001, 2, La Ley 2001-F, 217 (Arg.), translated using Google Translate, *available at* <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/07/In-re-KFB-Family-Tribunal-No-1-of-Quilmes-Argentina.pdf>.

151. *Id.*

152. BYRNE, *supra* note 128, at 28.

153. *Id.*

154. *Id.* at 41.

155. Dean Spade, *Documenting Gender: Incoherence and Rulemaking*, 59 HASTINGS L.J. 731, 762 (2008).

gender transition.”¹⁵⁶ In addition, the State Department no longer requires sexual reassignment surgery for an individual to change his/her gender on a passport. Instead, the policy requires evidence, such as a physician’s statement, that an individual has received “appropriate clinical treatment for gender transition to the new gender of either male or female.”¹⁵⁷

In addition, many U.S. states are moving away from surgical requirements for another important form of identification: driver’s licenses. Only Alabama, Kentucky, Missouri, Oklahoma, Pennsylvania, and Virginia explicitly require an individual to undergo surgery to change the gender marker on his/her driver’s license.¹⁵⁸ Many States, and the District of Columbia, are using “Gender Designation Forms” as sufficient proof of gender.¹⁵⁹

Considering recent federal and state changes in regard to changing gender markers on identification documents, the federal government should create a policy which discourages states from requiring that an individual undergo surgery before the sex on his/her birth certificate may be amended.¹⁶⁰ The main way for the federal government to do this would be to issue a revised Model State Vital Statistics Act and Regulations doing away with the surgical requirement.¹⁶¹

156. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, RM10212.200 CHANGING NUMIDENT DATA FOR REASONS OTHER THAN NAME CHANGE (2013), available at <https://secure.ssa.gov/poms.nsf/lnx/0110212200>. The policy does not define what satisfies appropriate clinical treatment, but does require the individual to see a doctor, which indicates that a trans person needs to seek some sort of treatment or affirmation by a doctor that the individual does in fact feel that he/she is of the acquired gender.

157. U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL 1320 app. M(b)(1)(f)(2014), available at <http://www.state.gov/documents/organization/143160.pdf>.

158. See *ID Documents Center*, NAT’L CTR. FOR TRANSGENDER EQUAL., http://transequality.org/Resources/DL/DL_policies_text.html (last updated Jan. 4, 2013).

159. Gender Designation Forms are forms that allow individuals to change their gender marker; they are supplemented with a signed statement by a medical professional confirming the validity of the gender that is being claimed. Tom Manuel, *Transgender Drivers: New Norms in Customer Service*, MOVE MAG., Spring/Summer 2011, at 32, available at http://www.nxtbook.com/nxtbooks/networkpartners/move_2011spring/index.php?startid=29#/38.

160. The Human Rights Campaign is advocating for the use of Executive power to improve the lives of LGBT people. *A Blueprint for Positive Change*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/a-blueprint-for-positive-change#executive> (last visited Jan. 11, 2015).

161. The working group that creates and revises the Model State Vital Statistics Act and Regulations is a team composed of officials from state agencies that

The Model State Vital Statistics Act and Regulations serve as a guide to state registrars of vital statistics and state lawmakers who are interested in changing state vital statistics laws and regulations.¹⁶² One purpose of the 1977 Act was “[t]o incorporate current social customs and practices and current technology” into state policies, as well as promote uniformity of those policies.¹⁶³ The current Model State Vital Statistics Act requires a court order “indicating that an individual born in this State has undergone the necessary course of treatment to transition permanently from one sex to the other and that the sex on the live birth record shall be changed.”¹⁶⁴ Today’s current social customs and practices demonstrate that surgery and forced sterilization should no longer be a requirement for legal gender recognition, and the Model State Vital Statistics Act should clearly reflect that reality.¹⁶⁵

It is very likely that there would be major pushback from such a change.¹⁶⁶ In fact, Governor Chris Christie of New Jersey recently refused to sign a bill¹⁶⁷ into law which would have abolished his state’s surgical requirement to amend the gender on a birth certificate.¹⁶⁸ Governor Christie stated that he was concerned the change would create legal uncertainty and open the door to fraud and abuse.¹⁶⁹ Individuals who were concerned with getting rid of surgical requirements for driver’s licenses made similar arguments—namely, that getting rid of the requirement would cause fraud or security concerns, such as an individual legally changing gender to avoid police detection.¹⁷⁰ However, this sort of situation is unlikely to occur, as a person who is running from state authorities would presumably not want to start making applications to the state about

manage such records and federal officials from the National Center for Health Statistics. See CENTERS FOR DISEASE CONTROL AND PREVENTION & NAT’L CTR. FOR HEALTH STATISTICS, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS (1992) (amended 2011) [hereinafter MODEL STATE VITAL STATISTICS ACT AND REGULATIONS].

162. *Id.*

163. See *In re R.W. Heilig*, 816 A.2d 68, 83 (Md. 2003).

164. MODEL STATE VITAL STATISTICS ACT AND REGULATIONS, *supra* note 161, at 43.

165. Mottet, *supra* note 4, at 391.

166. *Id.* at 413–19.

167. A.B. 2659, 215th Leg., Reg. Sess. (N.J. 2014).

168. Parker Marie Molloy, *Chris Christie Vetoes N.J. Trans Birth Certificate Bill*, ADVOCATE.COM (Jan. 13, 2014, 4:34 PM), <http://www.advocate.com/politics/transgender/2014/01/13/chris-christie-vetoes-nj-trans-birth-certificate-bill>.

169. *Id.*

170. Mottet, *supra* note 4, at 414.

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changing his/her gender.¹⁷¹ Moreover, the State Department's new regulations already allow a person to change the gender listed on his/her passport without surgery; this fact suggests that the federal government does not see gender reclassification as a security risk.¹⁷²

Opponents of trans rights also argue that surgery should be required so as to deter the administrative burden on the state posed by individuals who would choose to change their gender multiple times.¹⁷³ However, it is extremely rare for individuals to return to the previous gender, and a person is no less likely to do so after having undergone surgery.¹⁷⁴

Others express concern about the use of sex-specific facilities, arguing that surgical requirements are needed to prevent assault or to allow bodily privacy from the other sex.¹⁷⁵ This argument fails because most trans individuals who have not had surgery go to great lengths to avoid displaying their bodies and because many public and private institutions already have policies in place for trans people, such as the creation of unisex bathrooms.¹⁷⁶ Another argument might be that this would make placement in appropriate detention facilities problematic, but gender markers are not utilized for such decisions.¹⁷⁷

To assuage some concerns, the Model State Vital Statistic Act should also recommend legal penalties for making fraudulent applications, which would assist in deterring such practices.¹⁷⁸ Finally, the Act should also not require the applicant to provide a medical diagnosis, because being trans is not a disease.¹⁷⁹ Policymakers should also consider having the Act recommend that

171. *Id.* at 415.

172. *Id.*

173. *Id.* at 416.

174. *Id.*

175. Mottet, *supra* note 4, at 417.

176. *Id.* at 398, 418.

177. *Id.* at 421.

178. *See supra* Part IV(C). A recent study, one of the first of its kind, demonstrated that the gender identity of transgender children is deeply held and is not a result of confusion or pretense. *Transgender Kids Show Consistent Gender Identity Across Measures*, ASS'N FOR PSYCHOLOGICAL SCI. (Jan. 29, 2015), <http://www.psychologicalscience.org/index.php/news/releases/transgender-kids-show-consistent-gender-identity-across-measures.html> (detailing findings to be published in forthcoming article in PSYCHOLOGICAL SCIENCE). While it is unlikely that a single study will sway the nation's opinion about waiting for people to become adults before being allowed to change their gender, hopefully more studies will be done and can lead to possible changes in the rights of children to have legal gender recognition.

179. *See supra* Part IV.

children be allowed to change the gender marker on their birth certificates, with either a parent or guardian's consent or with representation, as is allowed in Argentina.¹⁸⁰ These changes will improve the lives of trans people¹⁸¹ and make the United States a leader in this important area of human rights.¹⁸²

VI. CONCLUSION

To satisfy modern cultural understandings and scientific findings, the United States government needs to recommend that states remove the surgical requirement for amending birth certificates and other official documents.¹⁸³ Numerous countries and the WHO have recognized that trans people should not be required to have surgery before they can have their gender markers on birth certificates changed.¹⁸⁴ Argentina, Denmark and Sweden all acknowledge that being trans does not automatically equate to being mentally ill, and US policy should reflect this fact as well.¹⁸⁵ In order to recognize the identities of all American citizens, the United States federal government should revise the Model State Vital Statistics Act and Model State Vital Statistics Regulations to recommend that states no longer require surgery for trans people to change gender markers on their birth certificates.¹⁸⁶

180. *See supra* Part IV(C).

181. *See supra* Part I.

182. *See supra* Part IV(C).

183. *See supra* Part V.

184. *See supra* Part I–III.

185. *See supra* Part IV.

186. *See supra* Part V.