OUT OF BOUNDS: GENDER OUTLAWS, IMMIGRATION & THE LIMITS OF ASSIMILATION

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ABSTRACT

Queer and transgender Americans have secured substantial federal protections in the past decade, from United States v. Windsor*'s takedown of the Defense of Marriage Act to* Obergefell v. Hodges's *guarantee of marriage equality to* Bostock v. Clayton*'s affirmation of the inclusion of queer and transgender identity in Title VII protections. Other recent developments, including new state-level laws protecting the rights of trans/nonbinary individuals, as well as a federal embrace of third gender markers on United States passports, have expanded foundational protections. Although mainstream acceptance of queer and trans identities has grown substantially in the past several decades, the Supreme Court's 2022* Dobbs v. Jackson Women's Health *decision highlights the precarity of these protections. Yet queer and trans people continue to confront regressive homophobic and transphobic laws and policies as well as an epidemic of private and public violence and discrimination throughout the United States. Despite these protections, queer and trans noncitizens confront a very different regime than the one their United States citizen counterparts face. Recent developments have opened doors to queer and transgender noncitizens, such as access to marriage-based immigration; yet these avenues primarily benefit gay cisgender individuals, who can align with the mandates of a cisheterosexist immigration regime, while continuing to exclude those who are less able—or less willing—to assimilate into the cisheteronormative American ideal. This Article examines how the expansion of cisheteronormatively anchored rights leaves out queer and trans noncitizens along two axes: access to immigration benefits and access to identity. After reviewing these two axes along which queer and trans noncitizens experience disparate treatment, the Article concludes that assimilationist advocacy strategies for rights of queer and trans persons have led to disparities between queer and trans noncitizens and citizens. This Article further posits that reimagining systems to center the needs of queer and trans noncitizens reveals the liberatory possibilities of the abolition of state regulation of gender and sexuality, leading to a safer and more equitable landscape.*

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Cuando vives en la frontera
people walk through you, the wind steals your voice,
you're a *burra*, *buey*, scapegoat,
forerunner of a new race,
half and half—both woman and man, neither—
a new gender. . .
—Gloria Anzaldúa, *To live in the Borderlands means you*
in BORDERLANDS/LA FRONTERA[1]

INTRODUCTION

The United States (U.S.) has long compelled immigrants to adopt the values of, and conform to, the dominant mainstream American culture. Arguments in favor of more multicultural models of immigration are becoming more prominent as the public conversation around immigration, culture, and heritage gain nuance and complexity. Yet resistance or failure to assimilate—and to publicly appear as outside the status quo—continues to elicit racist and xenophobic violence and derision from nativist segments of the American public.[2]

The assimilation debate in immigration mirrors a similar thread that runs through queer and transgender[3] advocacy. Those who support incremental, assimilationist legal advocacy, which is epitomized by the campaign for marriage

1. GLORIA ANZALDÚA, *To live in the Borderlands means you*, *in* BORDERLANDS/LA FRONTERA 118–19 (1987).

2. One of the most prominent models of immigrant acculturation describes assimilation as the rejection of one's former heritage and culture in favor of the adoption of the new culture. *See generally* John W. Berry, *Acculturation and Adaptation in a New Society*, 30 INT'L MIGRATION 69 (1992).

3. I take the "Gender Outlaw" reference in my title from Kate Bornstein's seminal work on nonbinary identities: KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US (1994). Throughout this Article, I use the terms "queer" and "transgender" or "trans" in recognition of the often ambiguous statuses (Osamudia James, *infra* note 65) and liminal recognition (Lihi Yona, *Liminally-Recognized Groups: Between Equality and Dignity* (2022) (J.S.D. Dissertation, Columbia University)) of these subject groups in contrast to the clarity of status and recognition afforded lesbian and gay individuals who more closely align to the prevailing static binary stability promulgated by mainstream culture (for both gender identity and sexual orientation) cemented by cisgender (gender identity aligns with sex assigned at birth) and straight/heterosexual social norms. I aim to be inclusive in the use of the terms "queer" and "trans," and, although many individuals who use different identifiers—including nonbinary, agender, genderqueer, genderfluid, bisexual, pansexual, asexual, and bigender, as well as members of the intersex community—may not use the terms "queer" or "trans" to describe their modes of existence in the world, I endeavor to use these two terms in alignment with common usage within these communities. Rather than mirroring the umbrella of "LGBTQIA+" to suggest an equivalency in varied identity descriptors, which too frequently defaults to meaning gay and lesbian, I attempt to provide a shorthand that explicitly elicits the "gender troubling" (*see generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990)), liminal, and fluid modes of existence that challenge prevailing practices of regulating orientation and gender identity. Queer here does not function as a catch-all, but rather encompasses a complex and varied alternative to straight; trans or transgender I use here as a term to encompass not just binary trans people but as an alternative to cisgender that captures a multitude of gender-expansive existences and celebrates the complexity and fluidity of non-cisgender identities. In certain instances, I use specific initialisms to

equality, follow fundamentally different philosophies than those who promote a more radical re-envisioning of structures that center the needs of the most marginalized.[4] Queer and trans immigrants sit in the crosshairs of these two debates around assimilation, both of which center on the ability of an outsider to adopt the values and practices of (straight, cisgender, white, citizen) mainstream American culture.

In gay rights legal advocacy, the assimilationist model won out[5] with 2013's blockbuster gutting of the Defense of Marriage Act (DOMA) in *United States v. Windsor*,[6] followed by 2015's *Obergefell v. Hodges*'s guarantee of marriage equality.[7] The sole goal of the campaign, marriage, was explicitly most salient to affluent white gay men seeking access to the conservative social stability that the institution of marriage provides.[8] After the Supreme Court overturned *Roe v.*

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mirror the language certain groups use to self-identify or to reflect language used in the relevant source material.

4. Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 81 (2013) ("Isn't the term 'marriage equality' a contradiction in terms, since marriage is about creating and maintaining a distinct hierarchy of relationships and distributing material necessities (health care, child custody, public benefits, immigration status) according to that hierarchy?"); *see also, e.g.*, Stewart Chang, *Is Gay the New Asian?: Marriage Equality and the Dawn of a New Model Minority*, 23 ASIAN AM. L.J. 5, 27 (2016) ("When formal equality is tied to marriage, only those who subscribe to and have access to the institution of marriage are able to attain equality. In this respect, *Obergefell* stifles heterogeneous sexualities. Through *Obergefell*, what is gained is not so much a right to marry, but access to the rights that come with marriage." (Internal citations omitted)); *cf. generally* William Eskridge, including WILLIAM ESKRIDGE, FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT: THE CASE FOR SAME-SEX MARRIAGE (1996).

5. The recent overruling of *Roe v. Wade* in *Dobbs v. Jackson Women's Health* casts doubt as to the future fate of *Windsor* and *Obergefell*, particularly given Justice Thomas's call to overrule *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*. Dobbs v. Jackson Women's Health Org., 597 U.S. ___ (2022) (Thomas, J., concurring). Although the precarity of protections so recently considered concrete is concerning given the real harm that any revocations of these protections would cause, queer and trans legal advocacy groups have a unique opportunity to reflect on these successes to build movements based not on the needs of those closest to the levers of power, but rather the needs of the most marginalized who are at risk of individual and state violence. With notable Republican support in both the House and the Senate, Congress passed the Respect for Marriage Act, H.R. 8404, 117th Cong. (2022), in November 2022 to protect marriage equality by statute.

6. United States v. Windsor, 570 U.S. 744, 745 (2013).

7. Obergefell v. Hodges, 576 U.S. 644, 644 (2015).

8. Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 22 ("If these arguments sound socially conservative, that's no accident. It's one of the richest ironies of our society's blind spot toward gays that essentially conservative social goals should have the appearance of being so radical. But gay marriage is not a radical step. . . . [I]t is conservative in the best sense of the word."); Evan Wolfson, *Winning the Freedom to Marry: Helping Others Understand How Ending Exclusion from Marriage Helps Families and Hurts No One,* 13 J. GAY & LESBIAN MENTAL HEALTH 194, 196 (2009); *contra* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION, 38 (1995) (noting that some "legitimationists," including Andrew Sullivan, had "called for the movement to minimize the public exposure of drag queens, sadomasochists, effeminate men, butch women, political radicals, multiculturalists, and anyone not aspiring to join the middle-class mainstream"); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1368–69 (1988) ("The central issue . . . is how to avoid the 'legitimating' effects of reform if engaging in reformist discourse is the only effective way to challenge the legitimacy of the social order. . . . What

Wade[9] in *Dobbs v. Jackson Women's Health*,[10] threatening the jurisprudential underpinnings of marriage equality, a bipartisan effort in Congress with notable Republican support,[11] passed the Respect for Marriage Act in November 2022.[12]

The assimilationist campaign continues to be credited with the rapid change in social acceptance of gay and lesbian people.[13] Yet the social acceptance gained by some segments of the queer and trans community overshadows the fact that marriage equality has had little practical effect on the lives of many queer and trans people. The campaign's oft-cited slogan, "Love is Love," narrows the focus of the issue to the core nuclear family; by design, the cheerful slogan masks the uglier challenges that queer, trans, and gender-expansive communities face. Queer and trans communities continue to be the target of deadly violence on numerous fronts, with little governmental or institutional protection.[14]

Recently, trans and gender-expansive people have faced an onslaught of attacks originating from both right-wing politicians[15] and self-proclaimed liberals, including many prominent feminists.[16] The vulnerability of these communities, in comparison to the somewhat stronger position of some gay cisgender communities, is indicative of the limits of assimilationist advocacy. In these models, segments of minoritized communities gain ground by aligning themselves with the mainstream and differentiating themselves from those further along the "outsider" spectrum. The issues most pressing for trans people's health and safety are conceived as wholly distinct from those that confront gay cisgender

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subordinated people need is an analysis which can inform them how the risks can be minimized, and how the rocks and the very hard places can be negotiated.").

9. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. ___ (2022).

10. Dobbs v. Jackson Women's Health Org., 597 U.S. ___ (2022).

11. Annie Karni, *Prominent Gay Republicans Helped Smooth the Way for Marriage Bill,* N.Y. TIMES (Dec. 8, 2022), https://perma.cc/EP7M-YWNV.

12. Respect for Marriage Act, H.R. 8404, 117th Cong. (2022).

13. *See*, *e.g.*, Nathaniel Frank, *The Long Road to Marriage Equality*, SLATE (June 26, 2015, 3:28 PM), https://perma.cc/5LQJ-75PM; Shankar Vedantam, Parth Shah, Tara Boyle, & Jennifer Schmidt, *Radically Normal: How Gay Rights Activists Changed the Minds of Their Opponents*, NPR (Apr. 8, 2019, 6:48 PM), https://perma.cc/S68K-JKQE.

14. *E.g.*, Jack Healy, Mitch Smith, Adam Goldman, & Patricia Mazzei, *At Least 5 Dead and 25 Injured in Gunman's Rampage at an L.G.B.T.Q. Club in Colorado*, N.Y. TIMES (Nov. 20, 2022), https://perma.cc/E3N3-VEPV.

15. *See*, *e.g.*, H.B. 454, 134th Gen. Assemb. (Ohio 2021); S.B. 44, 2022 Reg. Sess. (La. 2022); S.B. 140, 32d Leg., 2d Sess. (Alaska 2021); H.B 4608, 124th Sess. Gen. Assemb., 2d Reg. Sess. (S.C. 2021); H.B. 2086, 101st Gen. Assemb., 2d Reg. Session (Mo. 2022); H.B. 2735, 101st Gen. Assemb., 2d Reg. Session (Mo. 2022); S.B. 843, 101st Gen. Assemb., 2d Reg. Session (Mo. 2022); H.B. 2316, 112th Gen. Asseb., 2d Reg. Sess. (Tenn. 2021); S.B. 2153, 112th Gen. Assemb., 2d Reg. Sess. (Tenn. 2021); H.B. 1895, 112th Gen. Asseb., 2d Reg. Sess. (Tenn. 2021); S.B. 1861, 112th Gen. Assemb., 2d Reg. Sess. (Tenn. 2021); H.B. 1084, 156th Gen. Assemb., Reg. Sess. (Ga. 2021); S.B. 160, 89th Leg., Reg. Sess. (Kan. 2021); H.B. 2649, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022). *See generally Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMS., https://perma.cc/U8LK-YGPA (last visited Dec. 12, 2022).

16. Pamela Paul, *The Far Right and the Far Left Agree on One Thing: Women Don't Count*, N.Y. TIMES (July 3, 2022), https://perma.cc/R4U9-CWSF; Sarah Wheaton, *The Metamorphosis of J.K. Rowling*, POLITICO (July 3, 2022), https://perma.cc/38E3-ZWCP.

communities.[17] The wave of state-led efforts further marginalized trans people by preventing access to basic necessities, including healthcare, identity documents, and bathrooms. Trans people are further ostracized by policies that foreclose pathways to social integration, such as access to gender-appropriate facilities, activities, and sports teams. In a pattern that is, in some ways, the inverse of the comparatively increased cultural acceptance cisgender gay and lesbian people have gained, trans people have become a frequent target of escalating violence and regulation as the community has gained visibility.[18]

One of the primary legal strategies to increase the physical safety of trans people has been improving access to accurate identity documents (IDs). Making it easier to correct gender markers on state-issued IDs and making name changes easier to obtain decreases the risk that a trans person will out themself when their gender presentation does not match the gender marker on their ID. The 2015 U.S. Transgender Survey reported that "[n]early one-third (32%) of respondents who have shown an ID with a name or gender that did not match their gender presentation were verbally harassed, denied benefits or service, asked to leave, or assaulted."[19] Each year sees record numbers of trans people murdered: forty-four trans people murdered in 2020 and fifty-seven in 2021.[20] For trans people, IDs with incongruent gender markers are anything but inconsequential, yet an estimated 43% of trans adults do not have IDs with the name they use and their correct gender.[21] What gender marker an ID displays can be the difference between whether someone is in danger or not.

Those with gender identities that fall outside of the male/female binary have long been unable to obtain IDs that reflect their correct gender. Increasingly, more jurisdictions are providing "X" gender markers (commonly referred to as a third, nonbinary, or gender-neutral gender marker) on state-issued IDs in addition to binary "M" and "F" markers. The Department of State (DOS) now allows third gender markers on U.S. government documents, including passports, for those outside the M/F gender binary.[22] New York[23] and California[24] recently implemented Gender Recognition Acts that allow third gender markers on state-issued IDs. In conjunction with the inclusion of a third gender marker, some of these

17. *See* Paul, *supra* note 16.

18. *See Legislative Tracker: Anti-Transgender Legislation*, *supra* note 15.

19. S.E. James, J.L. Herman, M. Keisling, L. Mottet, & M. Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 9 (2016), https://perma.cc/QAU2-BK2K.

20. Trudy Ring, *Here are the 57 Trans Americans Killed in 2021*, ADVOCATE, https://perma.cc/95V5-F4RV (last visited Oct. 19, 2022).

21. Kathryn K. O'Neill, Nathan Cisneros, Will Tentindo, & Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2022 General Election*, WILLIAMS INST. UCLA SCH. L. 4 (Sept. 2022), https://perma.cc/BHN2-G74X.

22. U.S. PASSPORTS: SELECTING YOUR GENDER MARKER, DEP'T OF STATE, https://perma.cc/B773-HLRY (last visited Dec. 12, 2022).

23. Gender Recognition Act, A.5465-D/S.4402-B, 2021 N.Y. Sess. Laws Ch. 158 (McKinney) [hereinafter New York Gender Recognition Act].

24. Gender Recognition Act, 2017 Leg., (Ca. 2017) https://perma.cc/48P4-2JJ7 [hereinafter California Gender Recognition Act].

laws no longer require physician-supplied medical certification of gender to obtain IDs with the correct gender marker and instead allow someone to select their gender marker without additional evidence.[25] These changes make it much easier for trans, gender-expansive, and intersex people to get IDs that more accurately reflect their identities.

Many of these policies primarily, if not exclusively, are tailored towards U.S. citizens. Only a U.S. citizen can get a U.S. passport. Neither New York nor California require proof of immigration status to get a state driver's license, but both states offer a tiered system of IDs: the lower tier is only a state ID and driver's license; the higher tier, which requires proof of immigration status, is compliant with REAL ID Act requirements and can be used to board domestic flights and visit secure federal buildings. Yet it can be difficult for noncitizens of any immigration status to obtain even the documents required to get a lower tier ID, particularly for people who have a more precarious or no immigration status.[26] This makes it harder for trans noncitizens to correct gender markers than their citizen counterparts.

Noncitizens fare little better with federal policies. The federal agency with which noncitizens may have the most contact is the U.S. Citizenship and Immigration Service (USCIS). USCIS issues Employment Authorization Documents (EADs or work permits) and lawful permanent resident cards (green cards), which often function as primary IDs for noncitizens. Current USCIS policy limits gender to binary M/F markers and requires physician certification to correct gender markers for USCIS documentation.[27]

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25. *See* New York Gender Recognition Act, *supra* note 23; SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, RM 10212.200(B)(2)(a) (Sept. 2022), https://perma.cc/BVS6-8BTE ("Request for binary change (male/female): Accept the applicant's self-identified sex designation of either male or female, even if it is different from the sex designation shown on identity documents, such as a passport, or state-issued driver's license or identity card."); Darlynda Bogle, *Social Security Administration to Offer Self-Attestation of Sex Marker in Social Security Records*, SOC. SEC. ADMIN. (Mar. 31, 2022), https://perma.cc/DYK9-537D. Social Security cards do not display gender markers; the policy update applies to Social Security records.

26. *See, e.g., Driver's License Handbook: Obtaining a Driver's License,* CA. DEP'T OF MOTOR VEHICLES, https://perma.cc/9V2T-W5JV (last visited Dec. 12, 2022) (stating that documents establishing identity and residency are required to acquire a California driver's license). Trans noncitizens may experience even more barriers. For example, name change proceedings in state courts may require notice to USCIS and other immigration agencies for noncitizens before issuing a final order chilling transgender noncitizens without status from pursuing legal name changes for fear of immigration consequences. Noncitizens may live in less formalized living spaces without a lease, may have limited access to banking institutions, may work under the table, and may experience many other informal channels that do not offer the legitimating checks of more formal experiences. California requires that all documents submitted for a driver's license be "a certified copy, or an unexpired original document," and accepts "U.S. Birth Certificate[s], U.S. Passport[s], U.S. Armed Forces ID Cards, Certificate[s] of Naturalization, Permanent Resident Card[s], or [] foreign passport[s] with a valid I-94" to prove identity.

27. (*Vol. 1 Ch. 5: Verification of Identifying Information*, U.S. CITIZENSHIP & IMMIGR. SERVS. POL'Y MANUAL) https://perma.cc/V6HD-AAS4 [hereinafter USCIS POLICY MANUAL]. USCIS's requirements pose significant barriers to trans immigrants, who have increased challenges accessing institutions such as

Under the current state and federal ID landscape, documented noncitizens may have greater access to state-issued IDs [28] than their undocumented counterparts, who may experience additional barriers to accessing accurate IDs even where they are eligible to receive them. Trans noncitizens with documented immigration status, who are most (legally) assimilated and closest to the axis of U.S. citizenship, will have more access to institutional recognition of their gender (if their gender identity falls within the two or three options available). Trans noncitizens without status, or with less settled status, who are further from legal assimilation, have the fewest gender options and face significant obstacles in getting any form of ID, let alone an ID that reflects their correct gender and preferred name.[29] As in the marriage context, the gap in access to accurate IDs between trans citizens and noncitizens, as well as the gap between trans people with a binary gender and nonbinary individuals, suggests that the assimilation of one group may exacerbate disparities and leave behind those who have been more marginalized.

The recent expansion of family-based immigration benefits to those in same-sex marriages primarily benefits gay and lesbian noncitizens who more easily conform to the white cisheteronormative ideals prioritized in the adjudicative systems DOS and the Department of Homeland Security (DHS) administer.[30] Noncitizens whose sexual orientations, gender identities, and gender expressions are static, binary, and mono-oriented, and who most closely mirror the straight, cisgender paradigms adjudicators expect, are less disruptive to the underlying assumptions and priorities of those systems. The frontline officers who administer these systems can more easily parse relationships that follow the dominant mold that they are presumably most familiar with: that of the stereotypical straight and cisgender relationship. Doing so does not require the underlying adjudication structure to change. The adjudicator can use the same norms and metrics used to

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medical care and legal systems, and who may be unable to obtain a state-issued ID, depending on their immigration status and state of residency.

28. Many states restrict state-issued identity documents to documented immigrants. *States Offering Drivers Licenses to Immigrants*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 11, 2022), https://perma.cc/W32K-TTLA ("[E]ighteen states and the District of Columbia have enacted laws to allow unauthorized immigrants to obtain driver's licenses.").

29. Yet even lawful permanent residents (LPRs), one step away from citizenship, are not entirely immune to the vagaries of the gender marker landscape. LPRs and others with certain temporary, pending, or nonimmigrant status will be able to access REAL ID compliant state IDs. REAL ID Act of 2005, Pub.L. No. 109-13, § 202(c)(2)(B) 119 Stat. 303. LPRs will also have their U.S. LPR card (known as a green card), which is issued by the binary gender-granting USCIS.

30. *See* Connor Cory, *The LGBTQ Asylum Seeker: Particular Social Groups and Authentic Queer Identities*, 20 GEO. J. GENDER & L. 577, 588 (2019) ("These domestic rights have been handed down to deserving gays, often imagined as white, affluent, long-term monogamous couples. . . . [T]he analytical underpinning holding up the advances in gay and lesbian rights has less to do with notions of self-determination and fundamental human rights, and more to do with convincing arguments about how gays and lesbians are not a threat to decent society."); *see also* Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 40, 59–61 (2011) ("This analysis . . . resists deepening the divide between those trans people who might benefit from a tinkering with the identity surveillance rules and those whose immigration status, criminal record, psychiatric detention or other factors would make the identity surveillance or gendered detention systems no less dangerous even with certain 'trans fixes.'").

measure straight cisgender immigrants without raising the specters of fraud and deception that fluid and nonbinary identities and orientations do.[31]

The assimilationist process shoehorns non-straight and non-cisgender individuals into an adjudicative system that does not account for the variable varied metrics queer, trans, fluid, and gender-rebellious identities raise, which often run counter to the immigration system's (white) cisheteronormative ideals. This alienates those noncitizens whose gender and orientation do not conform to that paradigm. The further away someone's identity is along any axis, access to the immigration system becomes increasingly difficult. This creates a hierarchy that privileges queer and trans people who have greater access to U.S. citizenship and who can assimilate with the white cisheteronormative culture.[32]

This Article examines how the expansion of cisheteronormatively anchored rights leaves out queer and trans noncitizens along two axes: access to immigration benefits and access to identity. Section I summarizes the history of U.S. immigration laws imposed on non-straight and non-cisgender individuals and reviews the underpinnings of the marriage equality movement. This Article then discusses the current adjudicative landscape of family-based spousal petitions for queer and trans couples. Section II highlights two examples of the disparity in institutional recognition of queer and trans existence between citizens and noncitizens: (1) comparing recent federal guidance permitting third gender markers for U.S. passport holders to the lack of an analogous gender freedom for noncitizens while examining the limitations of third gender markers; and (2) federal immigration agencies' historical inability to follow their own guidance for queer and trans immigrants. Finally, this Article concludes that the current immigration regime privileges queer and trans individuals who can assimilate into white cisheteronormative structures, while excluding those whose identities and experiences resist that assimilation. This Article ends with a call for advocacy that resists the temptation to expand the regulation of relationships and identity, and to look instead to broader strategies that will most effectively protect more marginalized segments of our community.

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31. *See* Toby Beauchamp, *Artful Concealment and Strategic Visibility: Transgender Bodies and U.S. State Surveillance After 9/11*, 6 SURVEILLANCE & SOC'Y 356, 361 (2009) ("[T]he [REAL ID] Act is most overtly directed at the figures of the immigrant and the terrorist. . . . But maintaining a singular, consistent, and legally documented identity is deeply complicated for many gender-nonconforming people. . . . Yet concealment is strongly associated with the category of transgender, a perception fueled by cultural depictions of trans deception and . . . simultaneously meticulously tracking and documenting gender changes.").

32. *See* Diane Richardson, *Sexuality and Citizenship*, 32 SOCIOLOGY 83, 88 (1998), https://perma.cc/B4F8-TGTN ("[C]laims to citizenship status, at least in the West, are closely associated with the institutionalization of heterosexual as well as male privilege. . . . [T]he normal citizen has largely been constructed as male and . . . heterosexual."); *see generally* SHANE PHELAN, SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP (2001).

I. THE QUEER IMMIGRANT AND THE FAILED PROMISE OF MARRIAGE EQUALITY

The U.S. excluded queer and trans immigrants for most of the twentieth century. Racialized fears of "degeneracy" and "perversion" imbued early immigration policy with muddled pseudoscience that linked gender presentation and "[s]exual deviance" to "racial difference."[33] From the end of the nineteenth into the beginning of the twentieth century, U.S. immigration officials excluded immigrants whose gender or sexuality was perceived to transgress the established binary under the banner of public charge.[34] Through the 1917 Immigration Act, the U.S. "excluded from admission into the United States" noncitizens considered "mentally [] defective,"[35] a broad term that included in its scope people whose gender expression or sexual orientation challenged the prevailing cisgender heterosexual paradigm[36] and presaged the twentieth century's predilection to pathologize people who challenged the stability of white cisheterosexual society.[37] Following the xenophobia and gay panic of the 1940s and early 1950s, the 1952 Immigration and Nationality Act more explicitly barred people perceived to transgress gender and sexual boundaries by adding language to exclude noncitizens with a "psychopathic personality."[38] The 1965 Immigration and Nationality Act (INA) updated the phrase to specifically enumerate "sexual deviation" as grounds for exclusion.[39] The INA's specificity was ultimately unnecessary. The Supreme Court's 1967 decision in *Boutilier v. INS* held that Congress had intended to exclude queer and trans people under the "psychopathic personality" bar of the 1952 Act.[40] Exclusion of queer noncitizens continued during the 1980s.[41] It was not until 1990 that Congress removed "psychopathic personality,

33. *See* MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA, 29–30 (2009).

34. *Id*. at 29–35.

35. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874 (1917). The 1917 Act, building off of the Chinese Exclusion Act of 1882, also excluded people originating from many Asian regions.

36. Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals A Possibility?*, 8 GEO. IMMIGR. L.J. 201, 202 (1994); CANADAY, *supra* note 33, at 29–30.

37. This pathologizing echoes in the medical certification of gender by licensed medical professionals currently required to certify gender marker correction by U.S. immigration agencies, discussed *infra* in Section II.

38. Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 182 (1952) (amended 1965). *See also* Shannon Minter, *Sodomy and Public Morality Offenses Under U.S. Immigration Law: Penalizing Lesbian and Gay Identity*, 26 CORNELL INT. L.J. 771, 776–77 (1993) ("This categorization reflected the contemporary dominant view that homosexuality was a mental illness. . . . Congress . . . adopted the more general language, but registered the caveat that [t]his change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates." (Internal citations omitted)).

39. Immigration and Nationality Act of 1965, Pub. L. 89-236, § 15, 79 Stat. 991 (1965) (amended 1990).

40. Boutilier v. INS, 387 U.S. 118, 118 (1967).

41. *Compare* Hill v. INS, 714 F.2d 1470, 1472 (9th Cir. 1983) (affirming district court grant of writ of habeas corpus on the basis that INS required medical certification of sexual deviation or mental disorder to exclude British tourist who "made an unsolicited statement to the immigration inspector that he was a homosexual.") *with In re* Hill, 18 I & N Dec. 81, 84 (BIA 1981) (holding medical certification

sexual deviation, or a mental defect" from the INA as bases for the exclusion on noncitizens.[42]

Although the U.S. did not exclude queer or trans noncitizens under the INA after 1990, the Defense of Marriage Act (DOMA), also passed in 1990 and signed into law by President Bill Clinton, barred same-sex couples from accessing federal immigration benefits based on partnership with a U.S. citizen. DOMA enshrined heterosexuality as a requirement for marriage for the purposes of obtaining federal benefits, including immigration benefits.[43] A Ninth Circuit decision from 1982, *Adams v. Howerton*, which held that INA section 201(b) entitled only heterosexual married couples to federal immigration benefits, had already created a *de facto* ban on marriage-based immigration benefits for same-sex couples.[44]

Binary trans people have experienced similar hurdles. In 2005, the Board of Immigration Appeals (BIA), in *In re Lovo-Lara*, held that DOMA did not prohibit recognition, for purposes of marriage-based immigration benefits, of a heterosexual marriage between a cisgender U.S. citizen husband and his transgender noncitizen wife where the marriage was considered a valid heterosexual marriage in the state where it occurred.[45] *Lovo-Lara* was in tension with the then-existing USCIS guidance. In 2009, USCIS issued a memo directing that marriages in which one partner was trans (and, implicitly, identified with a binary gender), and the other partner identified as the opposite binary gender, would be considered a valid heterosexual marriage for immigration purposes. The memo required that the trans person had undergone "sex reassignment surgery," their "sex change [sic]" was legally recognized, and the marriage was otherwise a legally valid heterosexual marriage.[46]

The Supreme Court's 2013 decision in *Windsor* overturned DOMA, thereby opening the door to allow U.S. citizens legally married[47] to same-sex partners to

not required to exclude self-declared homosexual); *see also In re* Longstaff, 716 F.2d 1439, 1440 (5th Cir. 1983) ("May a resident alien be denied naturalization because he was a homosexual at the time he was admitted to the United States? The district court [] answered this question in the affirmative. We affirm its judgment that the petitioner is ineligible for naturalization because, being excludable on the ground of his homosexuality when he arrived here, he was not lawfully admitted to the United States.").

42. *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

43. Defense of Marriage Act, Pub. L. 104-199, § 3(a), 110 Stat. 2419 (1996) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife."), *held unconstitutional by* United States v. Windsor, 570 U.S. 744 (2013), *amended by* Respect for Marriage Act, H.R. 8404, 117th Cong. (2022).

44. Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

45. *In re* Lovo-Lara, 23 I. & N. Dec. 746, 746 (BIA 2005).

46. Carlos Iturregui, Interoffice Memorandum from the U.S. Citizenship and Immigr. Servs. (Jan. 14, 2009), https://perma.cc/UF5D-BGDV [hereinafter *Iturregui Memo*].

47. United States v. Windsor, 570 U.S. 744, 775 (2013).

petition for immigration benefits for their non-citizen spouse.[48] Later that year, in *In re Zeleniak*, the BIA confirmed that the Supreme Court's ruling in *Windsor* extended federal immigration benefits based on marriage to legally married same-sex couples.[49] Two years later, the Supreme Court's 2015 *Obergefell* decision held marriage equality is a right for same-gender couples,[50] remedying the post-*Windsor* "patchwork" of state-level legality and reciprocity.[51] *Obergefell* marked the culmination of the Supreme Court's evolution on same-gender sexual and romantic relationships, from its 1986 decision upholding the Georgia anti-sodomy law in *Bowers v. Hardwick*,[52] to its 2003 overruling of *Bowers* in *Lawrence v. Texas*,[53] to its 2013 decision in *Windsor*.

Since 2015, litigation in state and lower federal courts throughout the country has further extended governmental recognition of same-sex couples. The right to marriage for same-sex couples[54] and, by extension, the protection of rights for the nuclear family, including adoption, foster care, and surrogacy,[55] remain the

48. The Court's analysis in *Windsor* assumed relationships between two cisgender people and did not address the possibility of a heterosexual marriage where one or both parties could be transgender. *Cf. In re* Lovo-Lara at 749.

49. *In re* Zeleniak, 26 I. & N. Dec. 158, 158 (BIA 2013) (holding section 3 of DOMA does not bar same-sex couples from petitioning for federal marriage-based immigration benefits following *Windsor*); Dep't of State, NEXT STEPS ON DOMA–GUIDANCE FOR POSTS, 90 No. 29 Interpreter Releases 1583 ("A same-sex marriage is now valid for immigration purposes, as long as the marriage is recognized in the 'place of celebration.' A same-sex marriage is valid for immigration purposes even if the couple intends ultimately to reside in one of the 37 states that do not recognize same-sex marriages. The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.").

50. Obergefell v. Hodges, 576 U.S. 655 (2015).

51. Bijal Shah, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100, 155 (2013) ("This patchwork of U.S. state and federal law regulating same-sex marriage has therefore discouraged the formation and flourishing of a type of population deemed undesirable–LGBT-headed families."); *see also* Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families as Interstate Immigration Law*, 65 VAND. L. REV. 11, 13, 28 (2012); Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1441 (2012).

52. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding constitutionality of Georgia law criminalizing sodomy).

53. Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers* and holding Texas law criminalizing sodomy unconstitutional).

54. I use the terms same-sex or same-gender couples rather than "gay marriage" to include people with less binary and more fluid orientations, including people with multi-sexual orientations and those who are bisexual or pansexual, rather than limiting the term to mono-oriented gay or lesbian people. However, even the term "same-sex couple" fails to adequately delineate what true equality might look like without regard to gender, as it necessarily contemplates a static dyadic or even triadic menu of proscribed gender options. For example, for someone who was assigned female at birth (AFAB) but identifies as nonbinary, does the current marriage schema consider a partnership with a cisgender woman a same-sex or opposite-sex relationship?

55. *See, e.g.*, Kiviti v. Pompeo, 467 F. Supp. 3d 293, 301 (D. Md. 2020) (holding that child born through surrogacy to married gay couple could derive citizenship at birth even where not biologically related to U.S. citizen parent because INA sections 301 and 309 do not require biological relationship to both parents); *see also* Mize v. Pompeo, 482 F. Supp. 3d 1317, 1326 (N.D. Ga. 2020); Rogers v. United States Dep't of Health & Hum. Servs., 466 F. Supp. 3d 625, 636 (D.S.C. 2020) (holding that lesbian couple adequately stated Equal Protection and Establishment Clause claims for being denied opportunity to act as foster parents by government-funded evangelical foster care agency that denied

central touchstones in legal advocacy discussions about the rights afforded to queer and trans people.

A. THE (CONSERVATIVE) CAMPAIGN FOR MARRIAGE EQUALITY

From the start, the marriage equality campaign was explicitly exclusionary, prioritizing the desires of (mostly) cisgender, white, affluent gay citizens.[56] For some same-gender couples, gaining access to federal benefits through same-sex marriage was the long-awaited ticket to unification—spiritually, legally, and geographically—with their loved one. Yet the assimilation of (some) queer people into the straight mainstream after *Windsor* and *Obergefell* was at the expense of some more marginalized people and led to the stratification of rights within the queer and trans community.[57]

Large swaths of the lesbian, gay, and trans community celebrated the acceptance of sexual orientation as immutable in both culture and law. The immutability framing heralded the long-forewarned assimilation of predominantly white, cis, and male gay people into mainstream cisheterosexist "bourgeois"[58] society.[59] While it had been percolating in the halls of academia and theoretical debate for decades, the law quickly accepted the immutable/essentialist understanding of sexual orientation in formal equality gained traction in the burgeoning mainstream LGBTQ[60] rights movement of the late 2000s and early 2010s.[61] The law quickly followed. In 2011, Lady Gaga's "Born This Way" was a political

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same-sex foster parents by policy); Fulton v. Philadelphia, 141 S. Ct. 1868, 1871 (2021); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1720 (2018).

56. Sullivan, *supra* note 8 ("Gay marriage is not a radical step. . . . It is conservative in the best sense of the word.").

57. *Id.*

58. *Id.*

59. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory,* 61 OHIO ST. L.J. 867, 882 (2000) ("Queer theorists demonstrated the constructed nature of sexual identity and consistently rejected a sharp opposition between heterosexuality and homosexuality. Sexuality exists on a continuum and this blurs the lines between the categories of heterosexuals, bisexuals, transsexuals, and homosexuals. The destabilization project was intended to strip heterosexuality of its 'naturalized status' and its artificial superiority. If heterosexuality was simply not 'natural,' homosexuality would no longer be a chosen form of perversion." (Internal citations omitted)).

60. I use "LGBTQ" here and in other sections to reflect the language used by the majority of the movement's most prominent members.

61. *LGBT Rights*, GALLUP (2022), https://perma.cc/WAT2-R33C. Although there is not sufficient data to establish a causal relationship, Gallup's data on this point is illustrative of the weight that social understanding of sexual orientation as a "born this way" characteristic rather than something due to environmental factors, which could be a changeable characteristic, has on the acceptance of the LGBT community. The increase in poll participants responding that they believe being gay or lesbian is something one is born with correlates with increases in social acceptance and legal protections. Compare 1977, when 13% of respondents viewed "homosexuality" as "something a person is born with," and 56% said "homosexuality" was "due to factors such as upbringing and environment," with 2019, when 49% viewed "being gay or lesbian as something a person is born with" and 32% said "homosexuality" was "due to factors such as upbringing and environment".

statement.[62] Four years later, Justice Kennedy's acceptance of sexual orientation as "immutable"[63] came as no surprise. Some lauded the assimilation of gay culture into the mainstream, noting that "the point of gay liberation" was "the freedom not merely to be gay according to some preordained type, but to be yourself, whatever that is."[64] That freedom, however, was not available to all.

Some queer and trans advocates had cautioned against prioritizing marriage as the movement's primary goal. These advocates were wary that gaining access to an institution with such a troubled history was an act of assimilation that would dilute the power of the organized movement and subordinate the needs of community members with more marginalized identities.[65] Although queer and trans Americans have seen social, political, and legal gains over the past decade,[66] stark contrasts remain prevalent. The protections afforded to cisgender gays and lesbians who align with straight mainstream norms, particularly in the monogamous

62. Lady Gaga, *Born This Way*, *on* BORN THIS WAY (Interscope Records 2011) ("Rejoice and love yourself today/'Cause, baby, you were born this way/No matter gay, straight, or bi, lesbian, transgender life/I'm on the right track, baby, I was born to survive.").

63. Obergefell v. Hodges, 576 U.S. 655, 658 (2015).

64. Andrew Sullivan, *The End of Gay Culture*, NEW REPUBLIC (Oct. 23, 2005), https://perma.cc/3UVC-B79X.

65. *See* Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. REV. 199, 201–02 (2022) ("Law and long-term litigation strategies in pursuit of equality, however, can entrench social hierarchy positioning, buttressing status even as equality movements attempt to dismantle it."); *see also* Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage,* 7 TEMP. POL. & CIV. RTS. L. REV. 319, 325 (1998) ("[T]he social acceptance promised by civil rights reforms is available only to those who are sufficiently 'just like' those currently occupying the mainstream. For these gays and lesbians, the shared characteristics of class, gender and/or race provide a partial bridge to integration into the mainstream. Marriage will supply the missing piece, carrying gays and lesbians across to the promised land of integration and acceptance. However, for other gays and lesbians, because of their race, gender, and class characteristics—coupled with the reality of homophobia—marriage will provide them neither access to the mainstream as out gays and lesbians, nor the acceptance that they deserve." (Internal citation omitted)). Foster's own critique presupposed a hierarchy of integration by privileging (presumably cisgender) "gays and lesbians" over more marginalized people in the community, such as transgender people, whom she did not mention in her critique; *cf*. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse,* 29 CONN. L. REV. 561, 599 (1997); Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 419 (2012) ("Respectability is thus a system of hierarchy and domination grounded on distinctions between the respectable and the degenerate. . . . And it is through entwined processes of identification and differentiation, of hierarchization and domination, that claims to respectability are made.") (citing BEVERLY SKEGGS, FORMATIONS OF CLASS AND GENDER: BECOMING RESPECTABLE 118 (1997)); Levit, *supra* note 59, at 887 ("[A]rguments based on sameness will work, if at all, only for those gays and lesbians who most closely approximate the mainstream heterosexual model. . . . Poor, nonwhite committed monogamous gay couples will not be treated like upper middle class white committed monogamous gay couples. Since mainstreaming will work selectively, at best, to the extent that an equality strategy relies on a heterosexual ideal, it risks polarizing and destroying a sense of community among sexual minorities.").

66. The seventeen years between the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding that the criminalization of same-sex sodomy violated the Fourteenth Amendment, and its affirmation in *Bostock v. Clayton Cnty*., 140 S. Ct. 1731 (2020), holding Title VII protects employees from discrimination based on sexual orientation and gender identity, marks a momentous shift in legal protections for gay communities in the U.S.

nuclear family context, are unavailable to many queer and trans people who live outside that paradigm. These more marginalized queer and trans people experience the brunt of an epidemic of individual and structural violence, which too often prevents them from living safe and secure lives.[67] Splintering the queer and trans communities into those who can assimilate and those who cannot leads to practices and laws that "reinforce social inequality."[68]

The lives and deaths of two trans women in New York City shed light on the limitations of marriage equality as a vehicle for liberation. Venus Xtravaganza was a Puerto Rican transgender woman who was featured in *Paris is Burning*, the iconic 1990 documentary spotlighting the predominantly Black and Brown trans and queer New York ballroom scene.[69] Reportedly, Venus "wanted desperately to marry. Marriage alone, however, would likely have provided her few—*if any*—material benefits and surely would not have thrust her into 'society's mainstream'—due precisely to the persistence of racism, poverty, and hostility toward transgender[] people."[70] Venus was strangled to death by an unknown assailant in a hotel room in 1988.[71] "The 'active' interplay of poverty, racism, and sexual subordination" was a daily fact of her life and death as an openly transgender woman living in New York City in the 1980s.[72]

Nearly twenty years after the release of *Paris is Burning*, marriage equality has done little to diminish the escalating lethal violence and institutional neglect transgender people face. In 2019, Layleen Polanco Xtravaganza, a transgender Afro–Latina who was a member of the same ballroom family as her predecessor

67. *An Epidemic of Violence 2021*, HUM. RTS. CAMPAIGN (2021), https://perma.cc/86VM-WYBN ("Fatal violence against transgender and gender non-conforming people is the tragic result of a society that devalues our lives, with Black and Brown trans people facing significantly higher rates of harassment, bias and physical violence. *This has been the deadliest year on record since we began tracking incidents of fatal violence in 2013*." (emphasis in original)).

68. Levit, *supra* note 59, at 913.

69. Ballroom is a subculture that originated in queer and trans Black and Brown communities in New York City. For decades, the ballroom scene has functioned as "a formidable social movement and creative collective for LGBT people of color," particularly for the "Black and [B]rown transgender and gender-nonconforming people [who] face[d] particular challenges in establishing secure, nourishing communities—both within LGBTQ spaces and in society at large" and who were "marginalized by prejudice, violence, housing insecurity, and HIV infection rates among other burdens." Benji Hart & Michael Roberson, *The Ballroom Scene Has Long Offered Radical Freedoms For Black and Brown Queer People. Today, That Matters More Than Ever*, TIME (Feb. 26, 2021), https://perma.cc/QU4G-NJHS. A primary feature of the subculture are the "balls," which "incorporated fashion, pageantry and dance alongside community-building and self-care." In creating safe communities, "[t]he scene also fostered a kinship system of 'houses'—chosen families with anointed 'mothers' and 'fathers' who guide and support their 'children'—and uplifted a collective rejection of both white supremacy and Black homophobia." Originating in the Harlem Renaissance, the ballroom scene continues today and has become a cultural touchstone featured in Madonna's 1990 *Vogue* to the recent television series *Pose*. *Id.*

70. Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 599–600 (1997).

71. *Id.* at 575.

72. *Id.*

Venus, died tragically while held in solitary confinement at Rikers Island.[73] She had been held at Rikers for fifty-two days because she was unable to pay $500 bail following an arrest. She died of an epileptic seizure after Rikers staff denied her medical treatment.[74] Like Venus, marriage equality may have made little difference for the life chances for incarcerated trans women. Prohibition of solitary confinement, a practice that trans people too frequently face in detained settings, bail reform, access to medical care, and prison abolition would make more tangible differences for the safety and survival of many queer and trans people.

The costs of assimilation are stark in the post-marriage equality world.[75] Cisgender gay and lesbian people have markedly assimilated, becoming more respected and respectable as a group in American society, which the marriage equality campaign was designed to do.[76] Yet the ladder has started to be pulled up for those who come behind them. Although less widely supported than marriage equality,[77] many of the flagship litigation outfits arguing on behalf of gay and transgender legal rights, including Lambda Legal and the ACLU, have litigated significant cases on behalf of binary transgender, nonbinary, and intersex people.[78] Some of these suits affirmatively seek to expand transgender people's

73. Mankaprr Conteh, *How Layleen Cubilette-Polanco's Family, the House of Xtravaganza, and Activists Are Mourning and Organizing a Month After Her Death*, VOGUE (July 12, 2019), https://perma.cc/T9C9-A3UV.

74. *Id.*

75. *See* Anna Carron, Note, *Marriage-Based Immigration for Same-Sex Couples After DOMA: Lingering Problems of Proof and Prejudice*, 109 NW. U. L. REV. 1021 (2015) (reviewing anti-queer biases in evidentiary requirements for spousal visas).

76. *See*, *e.g.*, Sullivan, *supra* note 8.

77. *LGBT Rights*, GALLUP, *supra* note 61. Compare 2021 support for same-sex marriage (70% should be recognized under the law as valid, 29% should not be) with 1996 (27% should be valid, 68% should not be valid); 2021 69% reported gay and lesbian relations as morally acceptable, 30% morally wrong. In 2021, the first time Gallup polled several questions on trans issues, including "changing one's gender [sic]," 46% of respondents reported morally acceptable, 51% morally wrong. The only 2021 question that Gallup had previously polled was regarding "allowing openly transgender men and women to serve in the military," which in 2021 actually showed a decline in responses in favor (66%) and an increase in opposition (33%) over 2019 (71% in favor, 26% in opposition). Although Gallup titles this report as "LGBT Rights," the questions focus almost entirely on lesbian and gay identity, with only three questions about binary transgender issues on the hot topics of military service, bathrooms, and sports teams. Only one question, asked only in 2017 and 2019, mentions bisexual identity, and only in connection with "lesbian, gay . . . and transgender people" regarding whether additional laws to reduce discrimination are necessary. No questions regarding nonbinary gender identities or sexual orientations were polled. This is not to say that cisgender gay people are immune from the discrimination and violence of individual or state-sponsored homophobia. Florida's "Don't Say Gay" law, which prohibits instruction on sexual orientation and gender identity in Florida's public school system in grades K–3, is an example of the pervasive anti-gay culture that continues to thrive throughout the country. *See* H.B. 1557, 2022 Reg. Session (Fla. 2022), https://perma.cc/K5Z5-AMDM (codified as amended at Fla. Stat. Ann. § 1001.42 (West)). Florida also recently prohibited transgender minors from accessing gender-affirming healthcare. *See* Azeen Ghorayshi, *Florida Restricts Doctors From Providing Gender Treatments to Minors*, N.Y. TIMES (Nov. 4, 2022), https://perma.cc/CBP8-RK77.

78. *See*, *e.g.*, *Cases: Transgender Rights*, LAMBDA LEGAL, https://perma.cc/K6BK-REEY (last visited Jan. 13, 2023); *Court Cases: LGBTQ Rights*, ACLU, https://perma.cc/HSE5-4386 (last visited Jan. 13, 2023).

rights, including many foundational rights that cisgender people—particularly cisgender men—may take for granted, such as accurate identity documents,[79] the right to be protected from sexual assault, or the right to receive adequate medical treatment while in state custody.[80]

The campaign for marriage equality that culminated in *Obergefell* has made it easier for gay men and lesbians to assimilate and adopt the mores of conventional straight culture. However, this campaign has left behind those that culture excludes. Because of race, class, gender, gender identity, passability, and some intersection of these facets, these people are more easily excluded from the benefits that conformity brings.[81] As Justice Kennedy noted in his *Obergefell* opinion, "sexual orientation is both a normal expression of human sexuality and immutable" and that "their immutable nature dictates that same-sex marriage is their only real path to this profound commitment."[82] Marriage equality provides a mere "toehold on respectability."[83] But maintaining that toehold requires "tr [ying] to secure justice by making the dominant claim that [they are] not like [the] other[s]."[84] To maintain that standing, the assimilated must continue to distinguish themselves from the unassimilated, widening the gap between them.[85]

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79. *See, e.g.*, F.V. v. Jeppesen, No. 1:17-cv-00170-CWD (D. Idaho Mar. 5, 2018); Ray v. McCloud, 2:18-cv-272 (S.D. Ohio Dec. 16, 2020); Arroyo v. Rosselló, No. 17-1457CCC (D.P.R. Apr. 20, 2018).

80. *See*, *e.g.*, Yoakam v. Va. Dep't of Corrections, No. 3:21-cv-31 (W.D. Va. Aug. 25, 2021); Rios v. Redding, No. 1:20-cv-1775 (D. Colo. Mar. 22, 2022); S. Poverty L. Ctr. v. Dep't of Just., No. 1:18-cv-10861 (S.D.N.Y. Apr. 5, 2018).

81. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 885 (2006).

82. Obergefell v. Hodges, 576 U.S. 644, 658–61 (2015). Justice Kennedy's statement that sexual orientation is immutable was received by the public as vindication by the Supreme Court that sexual orientation is not a choice—one is, in fact, "born this way." *See, e.g.*, Ian Millhiser, *Here is the Single Most Important Word In Today's Historic Marriage Equality Opinion*, THINKPROGRESS (Jun. 26, 2016), https://perma.cc/Z3P4-J86X ("Kennedy's declaration that sexual orientation is immutable has obvious political significance. It puts to bed, at least for legal purposes, what remains of the debate over whether people can choose not to be gay."); *cf*. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2 (2015).

In the more recent *Bostock v. Clayton Cnty*. decision, which held that Title VII prohibited discrimination against queer and trans people, Kavanaugh, on page 21 of his dissent, was the only justice to address immutability. *Bostock*, 140 S.Ct. 1731, 1833 (2020) (Kavanaugh, J., dissenting ("[D]iscrimination 'because of sex' is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely recognized as such. There is no ambiguity or vagueness here.")).

83. Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations among Women*, 1 J. GENDER RACE & JUST. 335, 336 (1997–1998).

84. *Id*. Melissa Murray explores the inequality inherent in Justice Kennedy's *Obergefell* opinion for people who are unmarried. Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L.J. 1263, 1265 (2019) ("In this regard, not only is the *Obergefell* opinion unabashed in its veneration and prioritization of marriage, it is equally unabashed in its dismissiveness of life outside of marriage, which, on Kennedy's telling, is less dignified, less profound, and less valuable. This is all to say that Kennedy's rationale for marriage equality rests, perhaps ironically, on the fundamental *inequality* of non-marital relationships and kinship forms.").

85. Joshi, *supra* note 65 ("Nothing is more respectable than—and grants moral authority more than —marriage. The norm of marriage prescribes lifelong commitment and sexual monogamy aimed at producing a nuclear family. Moreover, it constructs sexuality as a necessarily secretive and private

This leaves those who benefit the least without the support of the broader umbrella of the community.[86] This division presents itself clearly in the immigration context.

B. QUEER AND TRANSGENDER IDENTITY UNDER U.S. IMMIGRATION LAW

Federal recognition of the right to marriage was not without benefit to queer and trans people. This included those who existed on the outer bounds of mainstream society, despite the stratification it caused. Marriage equality expanded access to an enormous number of benefits under both state and federal systems, giving large numbers of queer and trans people broader access to family unity under U.S. immigration laws. In a relationship between a U.S. citizen or lawful permanent resident (LPR) and a noncitizen, the citizen or LPR may now petition for a family-based visa on behalf of their spouse,[87] where one or more parties is queer or trans regardless of gender. If granted, the noncitizen spouse now has a pathway to lawful permanent residence and, eventually, naturalization.[88]

1. The United States Excluded Queer and Transgender Immigrants for Most of the 20th Century

The post-*Windsor* and *Obergefell* landscape was the culmination of a dramatic shift in treatment of queer and trans noncitizens. The U.S. had formally excluded queer and trans immigrants until 1990. The 1917 Immigration Act excluded them as "mentally defective."[89] The 1952 Immigration and Nationality Act continued the exclusion by enshrining people with a "psychopathic personality" as inadmissible to the U.S., which the Supreme Court confirmed in *Boutilier v. INS*.[90] Finally, the 1965 Immigration and Nationality Act explicitly deemed any "sexual deviation" as a basis for exclusion.[91] Congress did not remove the inadmissibility until 1990, the same year DOMA was enacted, which limited the definition of marriage to heterosexual married couples, thereby prohibiting couples who were not cisgender and straight from federal benefits, including immigration benefits.[92] Although DOMA shut the door to marriage-based immigration, humanitarian immigration began to be more accessible to queer and trans people

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aspect of identity. The state acts as moral custodian to ensure that relationships that mimic this heteronormative paradigm are privileged, while others receive less respect.").

86. Francisco Valdes, *Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265, 1298 (1999) ("Thus, even though Queerness remains a white, male and middle-class formation in many respects, the important, distinctive and (still) under-used contribution to critical theory of Queer positionality is its programmatic emphasis on expansive antisubordination stridency.").

87. Immigration and Nationality Act (INA) § 201(b), 8 U.S.C. § 1151(b) (2009); 22 C.F.R. § 42.21 (2006); 8 C.F.R. § 204.2(a)(1) (2007) ("A United States citizen or alien admitted for lawful permanent residence may file a petition on behalf of a spouse.").

88. INA § 201(b), 8 U.S.C. § 1151(b) (2009); 22 C.F.R. § 42.21 (2006); 8 C.F.R. § 204.2(a)(1) (2007).

89. Immigration Act of 1917, Pub. L. No. 64-301, § 3, 39 Stat. 874 (1917).

90. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(a)(4), 66 Stat. 163 (1952); Boutilier v. INS, 387 U.S. 118, 118 (1967).

91. Immigration and Nationality Act of 1965, Pub. L. 89-236, § 15, 79 Stat. 991 (1965).

92. 1 U.S.C.A. § 7, *held unconstitutional by* United States. v. Windsor, 570 U.S. 744 (2013).

later that decade. In 1994, the BIA held that "homosexual [sic] men" was a valid particular social group for the basis of an asylum claim.[93] This holding opened the door to permit other queer[94] and trans[95] individuals to seek refuge in the U.S. under U.S. asylum law on the basis of their sexual orientation or gender identity.

Nearly a decade after *Windsor* and seven years after *Obergefell*, the U.S. immigration regime has made great strides in assimilating same-sex couples into family-based immigration.

2. Marriage-Based Immigration for Same-Sex Couples Reinscribes Preexisting Socioeconomic Hierarchies

The assimilated queer or trans noncitizen who gains immigration status through a spousal petition occupies a particularly privileged place. They are at the top of the hierarchy of queer and trans noncitizens twofold: first, in the ability to access the privileges of U.S. immigration status, and second, in the power that status confers. This exponential stratification reinscribes existing hierarchies in U.S. law and society.[96]

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93. *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 823 (B.I.A. 1994).

94. *See*, *e.g.*, Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997) (holding that a lesbian woman from Russia forced to undergo electroshock to "cure" her of her sexual orientation had suffered persecution).

95. Hernandez-Montiel v. INS, 225 F.3d 1088, 1099 (9th Cir. 2000) (holding, in phrasing that conflates sexual orientation with gender identity, that "gay men with female sexual identities" qualified for asylum; frequently cited as precedent that transgender people may qualify as a valid particular social group under asylum law).

96. Data shows that there are wide gaps between documented and undocumented LGBTQ populations. Shoshana K. Goldberg & Kerith J. Conron, *LGBT Adult Immigrants in the United States*, WILLIAMS INST., UCLA SCH. L. 2–3 (Feb. 2021), https://perma.cc/4S2E-YA7G.

This 2021 study indicates key findings that suggest that family-based immigration for mixed-status couples has allowed significant opportunities for LGBT immigrants to gain documentation. In 2021, 22.7% of LGBT adults were undocumented, down from 30% in 2013. In 2021, 75.7% of undocumented LGBT immigrant adults identified as Latino/a, up from 71% in 2013. This is contrasted with documented LGBT immigrant adults, of which in 2021 39% identified as Latino/a, 31.9% API, 6.2% Black, and 20.3% White; compared to 2013, when 30% identified as Hispanic, 35% API, 12% Black, and 23% White. 2021 data indicates that, in raw numbers, there were 8,300 Black undocumented LGBT adult immigrants in the United States (2.9% of all undocumented LGBT adult immigrants) out of all Black undocumented immigrants in the United States, representing a substantial decrease from the 2013 numbers (15,400 Black LGBT undocumented adult immigrants out of all 444,400 undocumented Black immigrants). In 2021, "128,500 same-sex couples residing in the U.S. include a foreign-born spouse or partner," up from 87,900 in 2013.

The 2021 data indicates that naturalized citizen men in same sex couples earn *more* ($68k) than those in either different sex couples ($55k), native citizen men in same sex ($55k) or different sex ($60k) couples, and significantly more than non-citizen men in either same-sex or different sex couples ($35k). Non-citizen women in same-sex couples earn more ($25k) than their counterparts in different sex couples ($20.9k), as do naturalized citizen women in same-sex couples ($50k) over different-sex couples ($37k), while native citizen women in same sex couples ($44.2k) out earn those in different sex couples ($39k). This indicates significantly increased earnings over 2013, when median income for men in same sex relationships was less for non-citizen ($24k) and naturalized ($40k) than native born ($48.5K); for women in same-sex relationships, non-citizens ($22.4k) and native-born ($38.5) earned less than those who were naturalized ($45k), who out-earned their male counterparts.

This data suggests an increased trend towards documented immigration status for LGBT adults (decrease of 30% undocumented in 2013 to 22.7% in 2021) as well as a significant increase in earning

The expectations of the adjudicating body are the same regardless of the genders of the applicants. Queer couples and couples in which one or more partners is trans are held to the standards of their straight cisgender counterparts, even though the paradigmatic queer or trans relationship may have very different values, experiences, and evidence. For instance, it is usually significantly more difficult—and a much larger financial burden—for a queer couple to have a child than for many straight couples, which is usually a clear signal to an adjudicator of a relationship's validity. In addition to the hurdles biased adjudicative standards impose, immediate relative petitions are subject to the sponsorship income and asset requirements. This hurdle requires the sponsoring U.S. citizen or lawful permanent resident to prove income more than 125% of the federal poverty guideline for their household size.[97] Queer and trans people face significantly higher poverty rates than similarly situated straight people, and the financial threshold may be a barrier to some couples.

a. Cisgender Mono-Oriented Individuals May Face Fewer Financial Barriers

The sponsorship requirements for spousal immigration petitions are disproportionately onerous for some parts of the queer and trans community. Under INA section 213A, a sponsor of an intending immigrant must submit an affidavit of support[98] proving income over 125% of the federal policy guidelines.[99] If the sponsor is not able to prove sufficient income on their own, a second person may also file an affidavit of support to provide sufficient resources to guarantee the intending immigrant does not become a public charge.[100] Queer and trans people are, as a group, statistically more likely to fall below the federal poverty line, which would render them ineligible to sponsor a spouse on their own. Additionally, due to a higher likelihood of estrangement from family

power for LGBT adults, especially for naturalized men in same-sex relationships (increase from $40k in 2013 to $68k in 2021). Latino/a LGBT adults made up a larger percentage of both undocumented (75.7%) and documented immigrants (39%) in 2021 than undocumented (71%) and documented (30%) in 2013. Documented Black LGBT adult immigrants decreased from 12% in 2013 to 6.2% in 2021. There are also over 40,000 more same-sex couples in the U.S. with a foreign-born spouse in 2021 than in 2013. The study does not indicate results for trans or gender-expansive immigrants.

These findings indicate a shift towards increased immigration and documented status for certain subsets of the LGBT adult population. Naturalized men in same-sex relationships faired the best, marking a $25k increase in earning power, whereas the number of Black undocumented immigrants fell by nearly half despite little change in the overall number of Black undocumented immigrants. Although not conclusive, the data could indicate a positive shift for LGBT adults who most closely assimilate to the white male cishet ideal.

97. Dep't of Homeland Sec., U.S. Citizenship & Immigr. Servs., Instructions for Affidavit of Support Under Section 213A of the INA, Item Numbers 8–22, OMB No. 1615-0075, https://perma.cc/MQ5D-GHQW.

98. 8 C.F.R. § 213A.2(a)(1)(i)(A) (2011).

99. 8 C.F.R. § 213A.2(a)(2) (2011).

100. *Id.*

members,[101] queer and trans people may have more difficulty obtaining a joint sponsor to assist with the financial obligations required under the INA.

A 2019 Williams Institute study on LGBT[102] poverty in the U.S. found that gay cisgender men have *lower* poverty rates (12.1%) than any other group the study delineated by gender identity and sexual orientation, including straight cisgender men.[103] The study indicates that the income requirements for a spousal visa petition would be less of a burden for gay cisgender men than for their straight counterparts.[104] Lesbian cisgender women (17.9%), bisexual cisgender men (19.5%) and women (29.4%), and transgender people (29.4%) had significantly higher poverty rates.[105] This data indicates that it may be less burdensome for a gay cisgender man to prove sufficient income to sponsor his immigrant spouse than it would be for a straight cisgender sponsor, but it may be more onerous for others, especially bisexual cisgender women and transgender people due to higher poverty rates.

Poverty rates for LGBT people of color are also significantly higher than the poverty rates for their white counterparts.[106] Poverty rates for LGBT Black people (30.8%) are higher than for straight cisgender Black people (25.3%) and significantly higher than LGBT white people (15.4%). The poverty rate for LGBT American Indian/Alaskan Native (32.4%), Asian (22.9%), Native Hawaiian/Pacific Islander, "Other" race (42.1%), and Multiracial (22.3%) is each higher than that of straight cisgender people of the same race. LGBT Hispanic people

101. LGBTQ+ people face rejection and estrangement from their families at rates significantly higher than the overall population at every stage of life. Seven percent of youth identify as LGBTQ+, but LGBTQ+ youth account for 40% of the overall youth homeless population. *Our Issue*, TRUE COLORS UNITED, https://perma.cc/G9TM-CFYD. Of homeless LGBTQ+ youth, 55.3% of LGBQ and 67.1% of transgender individuals reported that the primary reason for their homelessness was because they were "forced out by [their] parents [or] ran away because of" their sexual orientation or gender expression. Soon Kyu Choi, Bianca D.M. Wilson, Jama Shelton, & Gary Gates, *Serving Our Youth 2015*, WILLIAMS INST., UCLA SCH. L. 5 (June 2015), https://perma.cc/MY7H-HEKK. 8% of transgender adults and 3% of cisgender/genderqueer sexual minority adults experience homelessness, compared to 1% of straight cisgender adults. Bianca D.M. Wilson, Soon Kyu Choi, Gary W. Harper, Marguerita Lightfoot, Stephen Russel, & Ilan H. Meyer, *Homelessness Among LGBT Adults in the US*, WILLIAMS INST., UCLA SCH. L. 1 (May 2020), https://perma.cc/GQX2-FPZE. LGBTQ+ elders also experience a lack of support from their family. "Some 76% of LGBT adults are anxious about having "adequate family and/or social supports to rely on as they age," particularly because they are likely to be estranged from family. Their social networks more often include gay and straight friends (74%) rather than family (62%)." Victoria Sackett, *LGBT Adults Fear Discrimination in Long-Term Care*, AARP (Mar. 27, 2018), https://perma.cc/2SSE-R856.

102. I use the term "LGBT" here to reflect the language the study's authors use.

103. The study noted that, although "LGBT people are still more likely to experience poverty than their cisgender straight counterparts. . . . some LGBT groups have higher levels of education, live in urban areas, and have fewer children (namely, gay cisgender men), all factors that protect them from poverty." M.V. Lee Badgett, Soon Kyu Choi, & Bianca D.M. Wilson, *LGBT Poverty in the United States*, WILLIAMS INST. UCLA SCH. L. 2 (Oct. 2019), https://perma.cc/X9GM-AU45.

104. *Id.*

105. *Id.*

106. *Id.* at 3.

are the only race/ethnicity where the poverty rate for LGBT people (37.3%) is lower than that of their straight cisgender counterparts (38%).[107]

This data indicates that white gay cisgender men and women are disproportionately advantaged in meeting the fiscal eligibility requirements to sponsor a spouse for an immigrant visa. Conversely, transgender and bisexual people of color are comparatively financially disadvantaged, and it may be more difficult for them to meet the income requirements to sponsor a partner.[108]

b. Current Requirements for Marriages Favor Immigration from Western Countries

After *Windsor*, the legality of same-sex marriage was a convoluted patchwork, where some states recognized same-sex marriage and others did not. *Obergefell* remedied that patchwork. Under current law, marriages must be legally valid in the place of celebration to be eligible for immigration purposes.[109] The assessment of marriage validity for queer and trans people now functions in a manner similar to the post-*Windsor*, pre-*Obergefell* patchwork, but on a global scale. These requirements preference spousal-based immigration applications from countries where same-sex marriage is already legally recognized.

Approximately thirty countries and territories have legalized same-sex marriage.[110] Most of these countries are in Europe and the Americas.[111] South Africa is the only country in Africa and Taiwan is the only country in Asia to legalize same-sex marriage.[112]

In contrast, over eighty countries criminalize same-gender contact among consenting adults.[113] Over half of these countries are former subjects of the British Empire, which imported its anti-sodomy laws to its colonies.[114] As a result of the violence of Europe's colonial project, many of these countries continue to criminalize same-gender relationships, which promotes hatred and violence against queer and trans communities within broader societies.[115] Many of these countries,

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107. *Id.* at 13.

108. LGBTQ+ people from historically minoritized and racialized groups may also find it more difficult to locate a joint sponsor to assist with the fiscal sponsorship of their partner. Homelessness rates for these communities, particularly transgender people, indicate but does not prove this hypothesis, given the rates of family estrangement and lack of family support for these groups. Wilson, Choi, Harper, Lightfoot, Russel, & Meyer, *supra* note 101, at 1.

109. *See*, *e.g.*, *In re* Lovo-Lara, 23 I. & N. Dec. 746, 748 (B.I.A. 2005); *In re* Da Silva, 15 I. & N. Dec. 778, 779 (B.I.A. 1976); *In re* H-, 9 I. & N. Dec 640, 641 (B.I.A. 1962).

110. David Masci, Elizabeth Podrebarac Sciupac, & Michael Lipka, *Same-Sex Marriage Around the World*, PEW RSCH. CTR. 4 (Oct. 28, 2019), https://perma.cc/L6CM-GXEE.

111. *Id.*

112. *Id.*

113. Alok Gupta, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism*, HUM. RTS. WATCH (Dec. 17, 2008), https://perma.cc/7NX7-Y4F4.

114. *Id.*

115. *Id.* ("Colonial legislators and jurists introduced such laws, with no debates or 'cultural consultations,' to support colonial control. They believed laws could inculcate European morality into resistant masses. They brought in the legislation, in fact, because they thought 'native' cultures did not punish 'perverse' sex enough. The colonized needed compulsory re-education in sexual mores. Imperial rulers held that, as long as they sweltered through the promiscuous proximities of settler societies,

primarily in Africa, Asia, and the Caribbean, continue to enact harsh criminal penalties against queer and trans people, including life imprisonment and death.[116] The state-sponsored violence against queer and trans people promotes a culture of violence and encourages private actors to harm queer and trans people with impunity. In countries where same-sex marriage is not legally recognized, the numerous barriers to obtaining a legal marriage make it less likely that a queer or trans[117] person living there who is in a relationship with a U.S. citizen or LPR would be able to obtain a legally valid marriage.

Conversely, the widespread (although not universal) access to same-sex marriage throughout much of Europe lessens the burden on European immigrants from those countries who are in same-sex marriages with U.S. citizens or LPRs. It follows that it may be easier for same-sex partners of U.S. citizens or LPRs to emigrate from Europe and the Americas[118] than many countries in Africa or Asia.

C. TRANSGRESSIVE IDENTITIES BENEFIT LEAST FROM MARRIAGE-BASED IMMIGRATION

The ease with which certain segments of queer and trans populations may be able to sponsor a noncitizen relative, including a spouse, corresponds to a shift in U.S. immigration policy. Some data shows that white gay cisgender men out earn even their straight counterparts, indicating that they may be better positioned as a group to meet the income requirements imposed by the U.S. immigration system and likewise better positioned to retain expensive qualified immigration counsel and pay the onerous filing fees.[119]

The cost of petitioning for an immigrant visa for a spouse renders such an application out of reach for many queer and trans immigrants. This is especially true for those most at risk of living in poverty: bisexual women and transgender people,[120] and for queer and trans people of color who are outside of the categories of people who may most easily assimilate to the white cisheteronormative paradigm.

'native' viciousness and 'white' virtue had to be segregated: the latter praised and protected, the former policed and kept subjected.").

116. Lucas Ramón Mendos, *State-Sponsored Homophobia 2019*, INT'L LESBIAN, GAY, BISEXUAL, TRANS, & INTERSEX ASS'N (Mar. 2019), https://perma.cc/KY9B-KZS6.

117. Although same-sex marriage ostensibly focuses on sexual orientation and not gender identity, these distinctions may not be carefully parsed in cultures that ostracize and criminalize those who disrupt the stability of the heterosexual gender binary. The gender-troubling aspects of non-cishet people may be viewed as equally other in their disruption of social and legal standards.

118. Thirty-two countries currently recognize same-sex marriages. *Marriage Equality Around the World,* HUM. RTS. CAMPAIGN, https://perma.cc/94CV-CHGY (last visited Dec. 12, 2022).

119. Private immigration lawyers may charge upwards of several thousand dollars for a family-based petition. USCIS filing fees to adjust status to lawful permanent resident within the United States are over $1,700. U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-130, PETITION FOR ALIEN RELATIVE (last updated Dec. 12, 2022), https://perma.cc/6QGK-PMXP; U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS, https://perma.cc/EY8M-ERC9 (last updated Dec. 13, 2022).

120. *See supra* Section I.B.2.a.

Both bisexual women and transgender people inhabit identities and experiences that resist the essentialist/assimilationist narrative and instead exist in modes that transgress categories, which threaten the status quo. It may be unsurprising, therefore, that people who hold these identities are statistically at the most risk and would be more likely to face additional barriers to sponsoring, or being sponsored, under a marriage-based visa.

The post-*Windsor*/*Obergefell* marriage equality world encourages assimilation into the mainstream for those who most closely approximate the white straight cisgender male ideal. The high earning power of naturalized gay cisgender men, compared to the relative poverty of other segments of the queer and trans community, particularly bisexual women and transgender people, is evidence of this pattern of assimilation.

D. LESSONS & POSSIBILITIES FOR REIMAGINING IMMIGRATION BASED ON SOCIAL TIES

Within queer and trans communities, marriage equality has exacerbated disparities in immigration opportunities while upholding and reifying the validity and desirability of an institution that has historically subjugated one of the participants. In its place, a more equitable system would not only be neutral as to gender and sexual orientation on paper,[121] but would allow for the extension of immigration benefits based on kinship and social ties that are more flexible and culturally responsive.

Shifting to a system that permits U.S. citizens to petition for others based on a model of social connections would obviate the need for a valid marriage, thereby circumventing disparities in access to marriage for people from countries without marriage equality, or where either same-sex relationships or gender transition is stigmatized or criminalized. Although a legal marriage contract would not be submitted to the adjudicator for review, much of the other evidence proving the relationship—photos, affidavits, letters, messages—could remain mostly the same. Additional policies could direct the adjudicator on issues that might arise specifically in cases where the parties are the same gender or one or both are transgender, including accepting alternative evidence where it may not be safe or possible for outward displays of affection or photographic evidence of a relationship. Instead of giving rise to the specter of fraud, such circumstances would allow equitable opportunities for people in same-gender relationships, or where one or both parties are trans, to have more access to the immigration opportunities afforded straight cisgender couples.

Revision of policies surrounding affidavits of support, an expansion of fee waivers, and flexible payment plans to family-based petitions would similarly increase access to immigration benefits for a broader swath of queer and trans immigrants. Although these changes could be complicated by the public charge provisions of the INA, such challenges would not be insurmountable, and

121. *See infra* Section II.D for further discussion of gender-neutral proposals.

granting flexibility around the upfront cost of family-based petitions would allow greater and more equitable access to the U.S. immigration system.

Centering queer and trans immigrants in creating these solutions would also benefit a large number of people desiring access to the U.S. immigration system whose relationships—familial, socially interdependent, or romantic—fall outside the straight cisgender mainstream American paradigm. A U.S. citizen in an interdependent relationship with a noncitizen, for whom they would not otherwise be able to prospectively petition, could then more effectively and reliably access the immigration system. De-centering marriage (and other legal indicators of relation, such as birth certificates) and instead focusing on the bond between two individuals would aid in the de-regulation of the family and relationships. USCIS and DOS already look at substantial secondary evidence in addition to the primary evidence of the legal relationship to test an interdependent social bond. Downgrading the weight given the legal documents that prove the relationship would allow a broader range of relationships that may not have the legal signifiers required by the United States' over-regulation of family relationships. Such relationships might include interdependent platonic partnerships, asexual or aromantic relationships, and supportive and interdependent relationships between family members other than parent and child, such as between grandparent and child. It would also more closely reflect the reality that many people do not live in countries where the legal regulation of an individual and familial relationships—through birth certificates, marriage certificates, or death certificates—is as common and universal as it is in the U.S.

II. TRANSGENDER AND GENDER-EXPANSIVE NONCITIZENS & THE PERILS OF ESSENTIALIZED GENDER

Just as marriage equality instigated assimilation for certain segments of queer and trans populations into mainstream straight cisgender American society but left others behind, current advocacy for a third gender marker on IDs threatens to similarly reinscribe existing hierarchies. Rather than adding another gender marker, which would be accessible primarily to U.S. citizens and noncitizens with more permanent and stable forms of immigration status, removing gender as an identity data point would de-prioritize gender as a site of state regulated and enforced identity control[122] while also permitting greater liberation for unlimited genders.

Although gender markers are ubiquitous today, they were not always an essential data point. U.S. passports only began including gender markers in 1977.[123] Before then, officials relied on photographs and descriptions. In the nineteenth century, "all U.S. passports included in the body of the passport a description of

122. For a deeper exploration of decategorizing gender, *see generally* HEATH FOGG DAVIS, BEYOND TRANS: DOES GENDER MATTER? (2017).

123. U.S. Dep't of State, *History of the Designation of Sex on U.S. Passports* (May 1, 2017), *available on* PACER at Zzyym v. Blinkin, No. 15-cv-02362-RBJ, Dkt. No. 64-4, AR0087 (filed Sept. 11, 2017).

the person of the bearer, including name, age, height, complexion, hair, eyes, distinguishing physical marks or features, forehead, nose, mouth, chin, and face."[124] As part of an effort to standardize passport data fields, a panel of passport experts convened in the late 1960s and early 1970s. The panel recommended inclusion of gender markers because, with "the rise in the early 1970s of unisex attire and hairstyles, photographs had become a less reliable means for ascertaining a traveler's sex."[125] Gender markers thus were born out of the fear that gender was becoming ungovernable.

Governmental regulation of gender continues to be a site of tension.[126] For trans people, removing barriers to obtaining accurate IDs can be lifesaving. Every year sees increasing rates of lethal violence against trans people, particularly Black trans women. Access to confidential name changes and IDs that reflect the gender identity of their owner are fundamental safety requirements for transgender people that can significantly increase life chances. The most recent U.S. Transgender Survey, published in 2015, found that "32% of respondents who had shown an ID with a name or gender that did not match their gender presentation were verbally harassed, denied benefits or service, asked to leave, or assaulted."[127] The 2015 results indicated a decrease from the 2012 results, which reported that "40%[] of those who presented ID[s] (when it was required in the ordinary course of life) that did not match their gender identity/expression reported being harassed, 3% reported being attacked or assaulted, and 15% reported being asked to leave."[128] Gender markers are not trivial afterthoughts, but are instead critical sites of control and vulnerability.

In June 2021, the Biden Administration announced that the DOS would add a third gender marker option for U.S. passports, and revised its policy to permit self-attestation of gender for all passport applicants, "no longer requir[ing] medical documentation to change the gender marker on [a] U.S. passport."[129] DOS

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124. *Id.*

125. *Id.* at AR0088.

126. *See*, *e.g.*, Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 40, 46, 48–49, 59 (2012) ("These arrangements result in the enforcement of rigid gender norms on trans bodies with doctors often requiring performances of hyper masculinity and femininity read through straight, white, upper class norms. . . . Critical trans studies scholars and activists have identified these criteria and relationships of authority as technologies of the production of gender normativity in which trans bodies experience intensified surveillance and correction."); *see also* Dean Spade, *Medicaid Policy Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497 (2010).

127. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. TRANSGENDER EQUAL. (Dec. 2016), https://perma.cc/RG4M-QKG4.

128. Jaime M. Grant, Lisa Mottet, & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L GAY & LESBIAN TASK FORCE & NAT'L CTR. TRANSGENDER EQUAL. 5 (Sept. 11, 2012), https://perma.cc/T944-PG5X.

129. Antony J. Blinken, *Proposing Changes to the Dep't's Policies on Gender on U.S. Passports and Consular Reps. of Birth Abroad*, U.S. DEP'T OF STATE (June 30, 2021), https://perma.cc/G99G-8XXT. This policy change follows a victory for third gender markers in the case of Dana Zzyym, ZZyym v. Pompeo, No. 15-cv-02362-RBJ (D.Col. Sept. 19, 2018); Zzyym v. Pompeo, No. 18-1453 (10th Cir.

was the first federal agency to join a growing number of jurisdictions in the U.S. and around the world that permit third gender markers and self-attestation of gender.[130] DOS's announcement followed the adoption of New York's Gender Recognition Act into law on June 24, 2021, which permits third gender markers on New York IDs.

These changes removed the onerous requirement of medical certification of gender. Medical certification of gender subjects transgender, nonbinary, and other gender-expansive people to the control of their medical providers and has created significant burdens that are particularly heavy for those who are low-income.[131] It is perhaps most arduous for trans people without immigration status who may already be prevented from accessing appropriate medical care due to lack of access

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2020) (vacating and remanding where DOS acted in arbitrary and capricious manner for failing to issue passport with "X" gender designation). DOS took well over six months to implement the policy to request an X marker on a passport despite initial statements that they expected third gender markers to be available the end of 2021.

Notably, DOS (passports only) and the Social Security Administration are the only federal agencies that have updated their policies to permit self-attestation of gender or third gender markers. *See ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://perma.cc/WRK2-L2N6 (last visited Dec. 14, 2022). Because U.S. passports are often the gold standard of proof for updating fields with other federal agencies, the passport change will have a wide impact in allowing transgender people to correct their gender marker with other agencies. It remains to be seen how widely other federal agencies will provide a third gender marker and the ease with which applicants will be able to correct them.

The expansion of the binary M/F gender markers to encompass a third gender marker X (variously referred to as a nonbinary or gender neutral gender marker and which is designed for nonbinary, gender nonconforming, intersex, and trans individuals who identify outside of the M/F dyadic gender or who may otherwise desire a gender neutral marker; however, rather than being gender-neutral, in which case gender could be *removed* from the ID, the X gender marker is clearly a stand in for a third "other" gender), raises additional theoretical concerns. A third gender marker assumes an assimilationist approach that flattens gender variance into an essentialist crystallization of gender that, in this new landscape, is merely displayed as a triadic, rather dyadic, landscape. Congruence between the information displayed in legal identification and gender presentation have been a serious point of safety and an argument in favor of more liberal access to gender marker corrections. Yet expanding to an essentialist triadic gender formation, rather than questioning the work that a gender marker does, is in tension with many of these concerns. Only certain privileged individuals will be able to safely access a third gender marker, while many others will either not be able to access these markers or will be exposed to risks of increased harm by doing so. Heath Fogg Davis explores some of these questions in *Beyond Trans: Does Gender Matter?* (2017).

130. In March 2022, the Social Security Administration began offering self-attestation of gender. Social Security cards do not display gender markers and do not qualify as a photo ID in most settings. Darlynda Bogle, *Social Security to Offer Self-Attestation of Sex Marker in Social Security Number Records*, SOC. SEC. ADMIN. (Mar. 31, 2022), https://perma.cc/9C26-UTT2.

131. Transgender people and cisgender bisexual women have higher poverty rates (both at 29.4%) than any other group delineated along sexual orientation and gender identity, with cis gay men at 12.1%, a full 1.3 percentage points *lower* than cis straight men. Black (38.5%) and Hispanic (48.4%) trans people had significantly higher poverty rates than white trans people (18.6%), while Black (39.7%) and Hispanic (45.4%) cis-bisexual women were also significantly higher than cis-bi white women (23.4%). Badgett, Choi, & Wilson, *supra* note 103; *see also* Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care*, 4 SEXUALITY RES. SOC. POL'Y 7, 11 (2007); Paisley Currah & Lisa Jean Moore, *"We Won't Know Who You Are": Contesting Sex Designations on New York City Birth Certificates*, 24 HYPATIA 3 (2009).

to health insurance and ineligibility for benefit programs due to immigration status.[132]

There are serious reasons to rethink third gender markers. Although the new passport gender marker policy will lower the evidentiary burden and increase access to IDs with correct gender markers for transgender, nonbinary, and intersex people, the third gender marker is itself the problem. Third gender markers publicly out the ID holder as trans, nonbinary, or intersex. This conflicts with one of the most pressing reasons trans people need accurate gender markers: incorrect gender markers can lead to discrimination, harassment, and violence.[133] Moving from a dyadic to a triadic framework still relies on an essentialized conception of gender—it is just no longer one or the other, there's now a "both" or a "neither." Gender identities outside the binary are varied and sometimes fluid. An "X" simply flattens them, making them easier to pin down in the boundaries of the gender marker box. But nonbinary identities necessarily resist confinement. My X is not your X, if my X means agender and your X means genderqueer, and the person over there has an X that means genderfluid. To the outside observer, we're all simply the queer "other." An X gender marker also fails to capture fluid identities, which, by their nature, resist static categorization. Removing gender markers from IDs altogether would decrease chances of outing because of incongruent gender markers, loosen the grip that essentialized notions of gender has on our culture, encompass a broad range of gender identities, and credit fluidity.

Removing gender markers on all IDs would not be revolutionary. Gender markers are a fairly recent phenomenon, and there has been some movement towards removing them. The Center for Medicare and Medicaid reportedly removed gender markers in 2018.[134] Congresswoman Eleanor Holmes Norton, the Delegate of the District of Columbia, introduced a bill in 2021 that would remove the REAL ID Act requirement that requires states to include gender on IDs.[135] It would only be one step more to amend the REAL ID Act to prohibit states from issuing identity documents with gender markers and lessen the evidentiary burden on trans and gender-expansive asylum seekers, or repeal the Act altogether.

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132. Eligibility for public benefits varies by state. New York permits immigrants who are Persons Residing under Color of Law (PRUCOL), a benefits eligibility category and not an immigration status, to obtain certain public benefits including health insurance. Undocumented immigrants who are not considered PRUCOL are only eligible for limited emergency benefits. *See* Documentation Guide Citizenship and Immigrant Eligibility for Health Coverage in New York State (Mar. 3, 2008), https://perma.cc/N525-CJY4; *Immigrant Eligibility for Public Benefits in New York State*, EMPIRE JUSTICE CENTER & N.Y. IMMIGRATION COALITION (Aug. 27, 2021), https://perma.cc/3JGE-AV2R.

133. C. L. Quinan, *Rise of X: Governments Eye New Approaches for Trans and Nonbinary Travelers*, ONLINE J. MIGRATION POL'Y INST. (Aug. 17, 2022), https://perma.cc/2T8K-FPQC.

134. *Know Your Rights - Medicare*, NAT'L CTR. FOR TRANSGENDER EQUAL., https://perma.cc/YV99-RH8N (last visited Dec. 12, 2022).

135. Press Release, Eleanor Holmes Norton, Congresswoman, Norton Introduces Bill to Remove Gender Designation Requirement from REAL ID Act for LGBTQ History Month (Oct. 12, 2021), https://perma.cc/NVJ7-ZTU2.

Noncitizens are particularly disadvantaged. Noncitizens are ineligible for U.S. passports, but may be subject to other DOS processes such as consular processing. Within the same agency, U.S. citizens and noncitizens have different opportunities for who they can be in the eyes of the government. This widens an already existing gap in disparate treatment between those members of the queer and trans community who can assimilate into the mainstream—here, along lines of citizenship—and those who cannot.

The different gender markers available to citizens and noncitizens, as well as in the different evidentiary standards required to establish the validity of an individual's gender identity, is exacerbated by federal agencies' repeated inability to abide by their own policies on transgender immigrants. USCIS and U.S. Immigrations and Customs Enforcement under DHS, and the Executive Office for Immigration Review (EOIR) under the Department of Justice, historically have struggled to understand queer and trans noncitizens; these agencies have a fraught history of providing them with something less than cultural competency, despite sometimes receiving significant training on the needs of queer and trans immigrants.[136] USCIS's current gender marker policy has not been updated in over a decade and continues to rely on a binary conception of gender and substantial evidence corroborated by medical professionals to correct gender markers.[137]

USCIS, and DHS more broadly, could issue a new policy that aligns with the DOS's passport gender marker policy. Yet doing so would not resolve the underlying tension between the requirements for identity documents and the evidentiary burdens required in individual immigration applications, in which someone's gender identity might itself become an element that the applicant/respondent has the burden to prove under the REAL ID Act.[138] A third gender marker could also create risks for individuals who might not want to out themselves with a binary or nonbinary trans identity by displaying it on a primary ID. Discrepancies in identity documentation could call into question the veracity of the individual's account of their own gender and, even further, could cast doubt on their overall credibility.[139] The REAL ID Act extended broad discretion to the asylum

136. Some asylum officers received significant training on LGBTI asylum cases provided by Immigration Equality. *Asylum Division Training Programs*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 19, 2016), https://perma.cc/8SZ6-L6J9.

137. USCIS POLICY MANUAL, Vol. 11, Ch. 2: USCIS-Issued Secure Identity Documents, https://perma.cc/VP4U-N4QK.

138. *See* REAL ID Act of 2005, Pub. L. No. 109–13, § 101(b), 119 Stat. 303.

139. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(b), 119 Stat. 303; INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii) (2005) ("[A] trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including DOS reports on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy,

adjudicator to determine an applicant's credibility, and even small inconsistencies may result in an adverse credibility determination.[140]

A. EOIR's Failure To Abide by Applicable Law and Policy Evinces Skepticism of the Legitimacy of Queer and Trans Identities

Immigration Judges (IJs) and the BIA have regularly failed to understand the cultural context of transgender people in removal proceedings and have misapplied law and policy guidance in the face of clear and well-known precedent. A close examination of these offending decisions shows at best a deep-rooted skepticism of the legitimacy of trans identity even where it is corroborated by external evidence, if not outright hostility toward trans people. One way this manifests is in the misgendering of trans applicants in immigration decisions, in clear contravention of federal law and policy.[141]

Skepticism and hostility toward the legitimacy of trans identity is embedded in immigration law. This is especially evident in asylum adjudications. The REAL ID Act's heightened corroboration requirements compels queer and trans asylum seekers whose claims are based on their gender identity, gender expression, or sexual orientation to prepare evidence to prove the veracity of their identity not merely through their own testimony, but also through external corroborating evidence.[142] The heightened evidentiary burden and invasive corroborating evidentiary standards subjects these asylum seekers to scrutiny and interrogation by the asylum adjudicator and, if in removal proceedings, cross-examination by DHS counsel. Far from being able to self-select their gender through self-attestation, trans asylum seekers, including those seeking withholding of removal and relief under the Convention Against Torture (CAT), are obliged by statute to corroborate their gender identity or risk failing to meet their evidentiary burdens.[143]

Even if DHS and DOS were to expand a third gender option and permit self-attestation on identity documents and all immigration forms, trans asylum seekers would not be afforded the same presumptions of their gender due to the REAL ID

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or falsehood goes to the heart of the applicant's claim, or any other relevant factor."); *cf*. Dean Spade, *Laws As Tactics*, 21 COLUM. J. GENDER & L. 40, 58–59 (2012) ("[T]he advent of certain kinds of recordkeeping is a feature of state-building projects that produce population-level caretaking programs that always entail identity surveillance. This surveillance produces a regularized population through the use of classification systems that collect standardized data, and the terms of classification used tend to be presumed neutral. These classification terms, however, are always highly contested by those who are difficult to classify or who are unclassifiable or who contest their classification. The cost of illegibility in these systems, of course, is any number of conditions that generally produce a shortened lifespan.").

140. INA § 208(b)(1)(B)(iii); 8 U.S.C. § 1158(b)(1)(B)(iii) (2005).

141. Chan Tov McNamarah, *Misgendering As Misconduct*, 68 UCLA L. REV. DISCOURSE 40, n.6 (May 11, 2020), https://perma.cc/8AZC-ZEAS.

142. REAL ID Act of 2005, Pub. L. No. 109-13, § 101(b); INA § 208(b)(1)(B)(ii); 8 U.S.C. § 1158 (b)(1)(B)(ii) (2005) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.").

143. *Id*.; 8 C.F.R. § 1208.16(b); § 1208.16(c)(2).

Act's corroboration requirements. Thus, the addition of a third gender—as opposed to omitting gender markers entirely—would only deepen the already wide divide between trans asylum seekers and their U.S. citizen counterparts.

1. EOIR Has Failed to Adequately Comprehend Transgender Identity, Leading to Anomalous Outcomes

Immigration agencies, including USCIS and EOIR, have long struggled with competency and classification with regards to transgender people. *Hernandez-Montiel v. INS* provides a famous example. Following the IJ's denial of Hernandez-Montiel's asylum claim, the BIA affirmed, stating in part that Hernandez-Montiel experienced brutal violence because of the decision to dress as a woman, which they found was not an immutable characteristic. While the Ninth Circuit reversed and held that both sexual orientation and "sexual identity" were immutable, the decision nonetheless garbled Hernandez-Montiel's identity and pinned it to sex assigned at birth, holding that "gay men with female sexual identities" was a valid particular social group for asylum.[144]

a. Immigration Judges and the BIA Struggle to Understand and Respect Transgender Identity

In more recent years, the language used by IJs and the BIA demonstrates skepticism of transgender identity, even where corroborated by external evidence. This is evidenced by frequent misgendering of trans applicants in written opinions, conflation of sexual orientation and gender identity, and repeated violations of the agencies' own policies and existing federal law.

i. Federal Law and EOIR Policies Reveal Extensive Misgendering of and Offensive Language Toward Transgender Immigrants

Intentionally misgendering someone who is trans is not only deeply offensive and cruel, but inflicts lasting harm on its target.[145] Intentional misgendering may constitute harassment under Title VII, and numerous federal courts have held "the practice hostile, objectively offensive, and degrading."[146] Refusing to use the correct pronouns or to acknowledge someone's gender frequently grows out of a rejection of the validity of that person's gender identity and discounts their autonomy, agency, and lived existence.[147]

144. Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000).

145. McNamarah, *supra* note 141.

146. *Id.*

147. *See id.* ("The most popular argument offered to support misgendering is that doing so concedes trans parties' gender identities. It submits that to refer to a trans woman by the pronouns or honorifics corresponding with her gender[] (that is, using she/her/hers pronouns or the titles Mrs. or Ms.), is to acknowledge and affirm that she is, in fact, a woman. Because amici do not want to affirm parties' gender or otherwise give that impression, they do the opposite by choosing to use inappropriate pronouns."(Reviewing *amici* briefs, internal citations omitted)).

General public literacy around trans issues continues to grow, yet terms that are now considered offensive, or are permissible only in limited in-group settings, often permeate courtrooms and decisions.[148] Many phrases and terms, such as "born biologically male,"[149] "sex reassignment surgery,"[150] "transsexual," or the even worse "male to female transsexual,"[151] are offensive and fail to grasp fundamental aspects of trans identity by distilling sex and gender to binary identities driven by a simplistic and unscientific understanding of genitals and chromosomes.[152] Yet such terms regularly appear in judicial opinions.[153] Lack of familiarity with trans identities and appropriate language may partially explain the hostility. But at least part of this must come from a deeper hostility to acknowledging the validity of a trans person's gender, even where it is corroborated by external evidence.[154]

In the immigration context, appellate courts' imprecise and offensive language in a line of early precedential asylum cases further confuses the issue, where the court refused to even articulate the words "transgender" or "transsexual," and instead couched the particular social group formulation in terms of sexual orientation, conflating gender and sexual orientation. The earliest example of this is the particular social group of "gay men with female sexual identities" articulated in *Hernandez-Montiel v. INS*.[155] The inaccurate and confusing particular social

148. *E.g*, Oral Argument, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17–1618), https://perma.cc/HQE9-7NUX. Lack of sensitivity around language used when discussing queer and trans people is not exclusively limited to trans people—gay people are often referred to as "homosexuals" in the formal writing of judicial opinions, despite the term being outdated and offensive in most other contexts. *See* Jeremy W. Peters, *The Decline and Fall of the 'H' Word*, N.Y. TIMES (Mar. 21, 2014), https://perma.cc/2KJV-5ATG.

149. Cazares-Zandre v. U.S. Att'y Gen., 791 F. App'x 96, 97 n. 1 (11th Cir. 2019).

150. Surgical requirements were, until recently, common on both state and federal levels to correct gender markers.

151. Morales v. Gonzales, 478 F.3d 972, 975 (9th Cir. 2007) (referring to respondent as "a male-to-female transsexual").

152. *See, e.g*., Dagmar Wilhelm, Stephen Palmer, & Peter Koopman, *Sex Determination and Gonadal Development in Mammals*, 87 PHYSIOLOGICAL REV. 1 (Jan. 1, 2007), https://perma.cc/2VB6-UJQA.

153. Although there is some in-group use of these terms in common parlance, use of such terms by those outside of the group remains deeply offensive and indicates a continued lack of respect and failure to give legitimacy toward trans identities.

154. For example, in the majority opinion in *Bostock*, the Court's discomfort with language around trans identity was amply evident. Justice Gorsuch attempted to use trans-inclusive language by stating, "a transgender person who was identified as a male at birth but who now identifies as a female." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020). In the current widely accepted terminology, "assigned" is preferred to acknowledge that infants may not "identify" as any gender, whereas Justice Gorsuch's "now" indicates that there is a change—that someone was one thing but now has changed presumably to the other side of the binary rather than recognizing a transgender person may identify (or may not, depending on the fluidity of their gender) as having always been the gender they identify as. This assumes that someone's gender is not integral and intact regardless of how they may (or may not) choose to outwardly present, and whether or not they take any steps at all to medically transition. *See also* United States v. Varner, 948 F.3d 250, 252 (5th Cir. 2020) (denying appeal by transgender woman in motion to be addressed using "female pronouns").

155. Hernandez-Montiel v. INS, 225 F.3d 1084, 1087 (9th Cir. 2000).

group formulation was reified in *Reyes-Reyes v. Ashcroft*, where the Ninth Circuit described the appellant as a "homosexual male with a female sexual identity" who "ha[d] not undergone sex reassignment surgery."[156] Similarly, in *Ornelas-Chavez v. Gonzales*, the Ninth Circuit couched the appellant's identity in terms of "homosexuality and female sexual identity," rather than identifying the appellant as a transgender woman.[157] In all three cases, the Ninth Circuit, the BIA, and the IJ used masculine pronouns to refer to each appellant without raising the issue of gender identity.

These cases erase the potential gender identity of the asylum seeker, discredit their gender expression, and frame the asylum claim in the perhaps more palatable terms of sexual orientation. These early precedential cases had an outsize impact on the narratives and language used by later courts and adjudicators,[158] as well as the framing of asylum claims by advocates, through the sheer force of their precedential weight.

Despite the increased visibility of trans issues in recent years and broader cultural acceptance of transgender identities and appropriate forms of address, immigration courts have continued to discount the identities of the people who come before them, even those with corroborating evidence. We see this unease and disbelief in the individuals' asserted entities not only in courts' flagrant misgendering of trans people, but also in the illuminating language the courts use when describing them.[159] Courts—both EOIR and Article III federal courts—as well as

156. Reyes-Reyes v. Ashcroft, 384 F.3d 782, 785 (9th Cir. 2004).

157. Ornelas-Chavez v. Gonzales, 458 F.3d 1052, 1054 (9th Cir. 2006).

158. Adjudicators include asylum officers and the AAO under USCIS as well as immigration courts and the BIA under EOIR.

159. Cazares-Zandre v. U.S. Att'y Gen., 791 F. App'x 96, 97 n.1 (11th Cir. 2019) ("Cazares-Zandre, born biologically male, identifies as female. The parties and the immigration courts use female pronouns to refer to Cazares-Zandre. *For ease of reference*, we do the same.") (emphasis added); Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1075 (9th Cir. 2015) ("The IJ failed to recognize the difference between gender identity and sexual orientation, refusing to allow the use of female pronouns because she considered Avendano-Hernandez to be 'still male,' even though Avendano-Hernandez dresses as a woman, takes female hormones, and has identified as woman for over a decade. Although the BIA correctly used female pronouns for Avendano-Hernandez, it wrongly adopted the IJ's analysis, which conflated transgender identity and sexual orientation"); Medina v. Sessions, 734 F. App'x 479, 482 (9th Cir. 2018) (remanding where BIA failed to consider respondent's transgender identity as to her claim for asylum); Jeune v. U.S. Att'y Gen., 810 F.3d 792, 802 (Eleventh Cir. 2016) (dismissing appeal where neither BIA nor IJ considered respondent's transgender identity, where respondent had identified themself as a "gay man. . . who also dresses as woman"; the Eleventh Circuit makes further linguistical missteps, including referring to respondent as a "homosexual" and making reference to respondent's "transgenderism."); Mondragon-Alday v. Lynch, 625 F. App'x 794, 795 (9th Cir. 2015) ("The BIA erred in its consideration of Mondragon–Alday's evidence of likely future persecution by assuming that legal protections for gay and lesbian persons would benefit Mondragon–Alday, a transgender woman"); Ramos v. Lynch, 636 F. App'x 710, 711 (9th Cir. 2016), (as amended Feb. 18, 2016) ("The immigration judge improperly conflated Ramos's gender identity and sexual orientation. . . Although the BIA acknowledged that Ramos is transgender, its opinion offers no indication that it actually considered whether she is entitled to withholding or CAT relief as a result."); Stephens v. U.S. Att'y Gen., 853 F. App'x 788, 790 (3d Cir. 2021) (demonstrating that the Third Circuit has no idea how to refer to trans women: "his current boyfriend, Leyton Ramsay, a transgender female," whom they refer to with she/her pronouns); *In re*: [Redacted], 2017 Immig. Rptr. LEXIS 26299 (BIA 2017) ("In view of the respondent's

advocates continue to conflate any indication of gender or sexual difference under a single umbrella of a queer "other."[160]

B. THE HISTORY OF USCIS POLICY ON GENDER MARKERS SHOWS AGENCY LAGS BEHIND WIDELY-ACCEPTED MEDICAL PRACTICES FOR ESTABLISHING GENDER IDENTITY

Like other immigration agencies, USCIS has struggled to classify and adequately address the needs of transgender people. The current USCIS Policy Manual's gender marker guidance[161] largely follows the April 2012 USCIS Policy Memorandum.[162] This policy limits gender markers to M and F and requires a court order or a gender confirmation letter from a licensed healthcare professional to recognize the "change [sic]".[163] Yet ample Administrative Appeals Office (AAO) decisions demonstrate that USCIS repeatedly failed to follow its own guidance for years after the 2012 Policy Memo was issued.[164] There is no reason to think that a new policy, with more lenient evidentiary requirements, would be any different in practice.

In 2004, William Yates, then Associate Director for Operations of USCIS, issued the agency's first guidance on the adjudication of petitions for transgender people. The memorandum included clunky, offensive language, focusing on surgical procedures, and indicating that someone was "born" a man or woman and

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claim that he now identifies as a transgender woman, and new precedential case law in the United States Court of Appeals for the Ninth Circuit which addresses the rebuttal of a finding that an applicant's life will be threatened based on a finding of past persecution, remand is warranted to consider the respondent's arguments and additional evidence with respect to his claim to be transgender.").

The frequency with which courts misgender and use language that confuses the gender identity of the trans people before them is astounding. This demonstrates the skepticism that trans asylum seekers must face – that the adjudicators of their cases do not accept their identities as valid, even where that identity was the basis of persecution.

160. *See*, *e.g.*, K.S. v. U.S. Att'y Gen., No. 20-3368, 2022 WL 39868 (3d Cir. Jan. 5, 2022) (noting cross-dressing as evidence of bisexuality); *see* Cory, *supra* note 30 for a detailed approach of centering client identity to legitimize variety of lived experience across members of queer and trans communities.

161. USCIS POLICY MANUAL, Vol. 11, Ch. 2, *supra* note 137.

162. USCIS Policy Memorandum PM-602-0061, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 10, 2012), https://perma.cc/6NES-CXAV.

163. USCIS POLICY MANUAL, Vol. 11, Ch. 2, *supra* note 137.

164. *In re* [Redacted], 2013 WL 5176035, at *1 (AAO Apr. 9, 2013) (denying application for replacement naturalization certification that sought to correct applicant's gender where applicant's counsel argued that, while she had identified as male at time of naturalization, she had undergone sex reassignment surgery and "changed her gender"; the record included her uncorrected birth certificate and evidence of "subsequently changed gender."); *In re* C-L-N-, ID# 1920629, 2018 WL 7046678, at *2 (AAO Dec. 18, 2018) (acknowledging that applicant identified as a transgender woman, but nevertheless referring to applicant with male pronouns because she had initially identified as male on her U visa application that had been filed approximately five years earlier; and noting the decision of the Vermont Service Center's Director, which referred to the applicants "choice of sexuality"); *cf.* N.Y. Times Style Guide (2013). ("[S]exual orientation. Never *sexual preference*, which carries the disputed implication that sexuality is a matter of choice.").

then "changes" sex.[165] Regardless of whether a transgender applicant had corrected the gender marker on their state birth certificate, which was a much more involved process then than is the case in most jurisdictions today, the Yates Memo "disallows recognition of a change of sex so that a marriage between two persons born of the same sex can be considered bona fide for the purpose of spousal immigrant petitions."[166] Noting that different states had differing procedures permitting gender marker correction of birth certificates which "resulted in inconsistent adjudications within the INS and [US]CIS offices of cases involving transsexual applicants," the Yates Memo erred on the side of intolerance and reified existing policies prohibiting trans applicants to correct gender in USCIS systems absent a federal court order.[167] "[US]CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so."[168] The Yates Memo also directed USCIS officers to investigate a person who previously used "a name that would normally be used by the opposite sex" by issuing a "a request for evidence (RFE) to establish that person's identity" by requesting that person's birth certificate.[169] For petitions where the sex or gender of the applicant is not relevant to the application or petition, the Memo directs "[US]CIS personnel [to] consider the merits of the application without regard to the applicant's transsexuality."[170]

After the BIA's 2005 decision in *Lovo-Lara*, tension arose between existing USCIS guidance and BIA precedent. The Interregui Memo, issued in 2009, resolved this tension by directing that a marriage in which one of the parties was transgender was a valid heterosexual marriage for immigration purposes where "sex reassignment surgery" had been undergone, all legal requirements were met for a recognized "sex change," and the marriage was recognized as an otherwise legal heterosexual marriage.[171]

Following advocacy from queer and trans organizations, USCIS issued its April 2012 Memo, which updated guidance on recognition of gender correction for transgender people involved in the immigration system and brought USCIS policy in line with the then-existing requirements for U.S. passport gender correction. The 2012 Memo remains the governing policy for USCIS today. The guidance requires a corrected "birth certificate, passport, or court order recognizing

165. William R. Yates, *Interoffice Memo. for Reg'l Dirs. et al, Adjudication of Petitions and Applications Filed by or on Behalf of, or Doc. Requests by, Transsexual Individuals* 2 (Apr. 16, 2004), https://perma.cc/LNS3-M88P [hereinafter *Yates Memo*].

166. *Id.* (citing W. Yates, *Memo. for Regional Dirs. et al, Spousal Immigr. Visa Petitions* (AFM Update AD 2-16) (Mar. 20, 2003)).

167. *Id.*

168. *Id.* at 3.

169. *Id.*

170. *Id.*

171. *Iturregui Memo*, *supra* note 42.

the new gender[]; or [m]edical certification of the change in gender from a *licensed* physician (a Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.)"[172] for federal immigration benefits under DOMA.[173]

Merely a year after USCIS issued the 2012 Memo, it violated its own policy by refusing to issue a replacement naturalization certification correcting the applicant's gender after her gender transition.[174] This was not anomalous behavior by the agency—a 2018 AAO decision demonstrated USCIS's reticence in following its own policies when it repeatedly misgendered a U visa applicant who had transitioned in the period between filing her application and the instant decision.[175] USCIS has not issued additional guidance regarding requirements to correct gender markers on USCIS documents since 2012. In Spring 2016, the National Center for Transgender Equality and Immigration Equality urged USCIS to adopt clearer standards for medical provider certificates of gender and to broaden the range of healthcare professionals who could certify beyond M.D. and D.O. providers.[176] The letter also encouraged USCIS to accept additional evidence providing gender. USCIS never adopted these recommendations.

It has been over a decade since USCIS revisited its guidance on requirements for gender corrections with USCIS documents. In the intervening years, medical and cultural understanding of gender has made significant strides. Although trans and nonbinary people may have some limited increase in social acceptance, the community continues to face escalating levels of horrific state and individual violence.

1. *USCIS Forms Remain Outdated Years After* Windsor *and* Obergefell

Despite the numerous changes to provide more inclusion for queer and trans immigrants, USCIS nevertheless reveals its assumptions in its forms.

USCIS processes immigration petitions on forms, all of which are publicly available on the agency's website. A marvel of bureaucratic failure, USCIS

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172. *Adjudication of Immigration Benefits for Transgender Individuals,* U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 10, 2012), https://perma.cc/KYK3-AKD5 [hereinafter *2012 Memo*]. The USCIS Policy Manual is currently the agency's guiding document for gender markers, having partially superseded the 2012 Memo.

173. United States v. Windsor, 570 U.S. 744, 745 (2013) (holding section 3 of the Defense of Marriage Act unconstitutional).

174. Applicant: (identifying Information Redacted By Agency) Application: Application For Replacement Naturalization/Citizenship Document Under Sections 338 and 343 of the Immigration and Nationality Act, 8 U.S.C. § § 1449 and 1454, 2013 WL 5176035, at *1 (AAO Apr. 9, 2013). The District Director denied application for replacement naturalization certificate that sought to correct applicant's gender. Her counsel argued that, while she had identified as male at the time of naturalization, she had undergone "sex reassignment surgery" and "changed" her gender. The record included a birth certificate (not corrected) and evidence of the applicant's "subsequently changed gender."

175. *In re* C-L-N-, ID# 1920629, 2018 WL 7046678, at *2 (AAO Dec. 18, 2018).

176. Letter from Harper Jean Tobin, Dir. Pol'y, Nat'l Ctr. for Transgender Rts., & Aaron Morris, Exec. Dir., Immigr. Equal., to Dir. León Rodriguez, U.S. Citizenship & Immigr. Servs., Recommendations Rev. [sic] to USCIS Pol'y for Doc. Issuance Involving Status & Identity for Transgender Individuals (Apr. 12, 2016), https://perma.cc/SL28-4BBQ.

struggles to provide coherent guidance to immigration practitioners as well as its own staff as to how forms should be completed.[177] All USCIS forms with gender marker questions limit gender to two boxes: Male or Female. Although USCIS has updated some forms to note "Parent 1" and "Parent 2,"[178] its practice is not uniform, and other forms continue to require entry of information regarding a "Mother" and "Father."[179]

The failure of USCIS to update its forms to reflect the possibility of non-straight and non-cisgender parents nearly a decade after *Windsor* demonstrates the agency's resistance to, or apathy towards, the existence of gender-troubling partnerships and illuminates the agency's underlying anti-queer and anti-trans biases.

C. THE REAL ID ACT SUBJECTS TRANSGENDER ASYLUM SEEKERS TO BURDENSOME EVIDENTIARY REQUIREMENTS TO PROVE THEIR GENDER

Asylum and related immigration relief, including withholding of removal and relief under the United Nations Convention against Torture, are anomalous within the legal system. Queer and trans asylum seekers who were targeted in their home country and fled to the U.S. to seek protection must not only prove that they suffered persecution in their home country and that there is a reasonable likelihood that they will be persecuted if they return, but must also prove their identity and that their identity was one central reason they were persecuted.[180]

The REAL ID Act, passed under the George W. Bush Administration in 2005, changed the corroborating evidence standard for non-citizens seeking asylum. The REAL ID Act noted that "testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[181]

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177. From 2018 to 2020, immigration attorneys spent significant time, money, sweat, and tears filling out "Not Applicable," "N/A," or "None" on thousands of pages of immigration forms that the USCIS mailroom would nevertheless reject.

178. U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS FORM I-485 (July 15, 2022); U.S. CITIZENSHIP & IMMIGR. SERVS., PETITION FOR ALIEN FIANCE(E) FORM I-129F (Mar. 21, 2022); U.S. CITIZENSHIP & IMMIGR. SERVS., PETITION FOR ALIEN RELATIVE FORM I-130 (July 20, 2021); U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION FOR RELIEF UNDER FORMER SECTION 212(C) OF THE IMMIGRATION AND NATIONALITY ACT (INA) FORM I-191 (July 20, 2021).

179. U.S. CITIZENSHIP & IMMIGR. SERVS., FREEDOM OF INFORMATION/PRIVACY ACT REQUEST FORM G-639 (July 25, 2022); U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION TO REPLACE PERMANENT RESIDENT CARD FORM I-90 (Feb. 27, 2017); U.S. CITIZENSHIP & IMMIGR. SERVS., PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT FORM I-360 (July 15, 2022); U.S. CITIZENSHIP & IMMIGR. SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (July 26, 2022).

180. INA § 208(b)(1)(B)(ii), 8 U.S.C. § 1158(b)(1)(B)(ii) (2005). There has been ample scholarship on the effect of the REAL ID Act on queer and trans asylum applicants.

181. *Id.*

The corroboration requirement imposed by the REAL ID Act all but requires asylum seekers to prove their gender by a third-party medical provider. Even where the applicant testifies credibly regarding their gender identity, best practice post-REAL ID requires that asylum applicants submit this corroborating evidence in support of their asylum application.[182] In practice, even where trans asylum applicants have submitted corroborating evidence of their gender, USCIS asylum officers have still required that these corroborating statements adhere to precise phrasing and certify that the medical professional has administered appropriate treatment for the applicant's gender transition in conformance with the April 2012 policy memo.[183]

D. REIMAGINING AN ANTI-ASSIMILATION APPROACH TO GENDER MARKERS

USCIS and DOS may adopt third gender markers for immigrants and allow self-attestation of gender, as is current DOS passport policy. This revision to current policy will likely be slow moving, given the failure of USCIS to update its forms to reflect same-gender marriages, as discussed above. Yet should USCIS adopt the current U.S. passport policy for gender markers, transgender asylum seekers could become the only instance in U.S. immigration law where external corroborating evidence must prove their gender. The Biden Administration notes that requiring medical certification of gender is a burden, yet it will continue to all but require it for trans asylum seekers.

A better approach would be to adopt a truly gender-neutral immigration system, in which gender is not collected. Decreasing government scrutiny and regulation of gender by removing gender markers could de-essentialize gender as a crystallized and static identity and, more broadly, de-emphasize gender as a central defining characteristic of state regulation. By removing gender as a site of government regulation, evidentiary requirements for gender marker corrections would become obsolete. It would also allow greater leeway for gender fluidity and exploration without opening the door to state scrutiny for fraud and national security threats—two outcomes that would be especially beneficial to transgender immigrants.

Abolishing gender markers would not, however, solve the trans asylum seeker's REAL ID problem, which requires them to prove the validity of their gender with external corroborating evidence. Removing gender as a defining biometric data point on identification could benefit the trans asylum seeker in several ways. First, it could reduce the instances of gender marker discrepancy, making

182. *See* Victoria Neilson, *Practice Advisory: LGBTI DACA Recipients and Options for Relief Under Asylum Law*, CATH. LEGAL. IMMIGR. NETWORK, INC. 34–36 (June 25, 2020), https://perma.cc/YM3M-B3QC.

183. *2012 Memo*, *supra* note 172. In practice, I have received Requests for Evidence for transgender asylum applicants who have submitted ample corroborating evidence of their gender identity but which evidence did not strictly adhere to the requirements outlined in the *2012 Memo*.

the asylum seeker's testimony regarding attestation of their gender more reliable. Second, it could reduce concerns regarding incongruent gender presentation between one's stated gender and the gender presented on an ID, form, or other documentation. This would allow greater leeway for trans, nonbinary, and gender fluid applicants to present their identities.

Even better would be for Congress to rescind the evidentiary requirements of the REAL ID Act and abolish gender markers on government identification documents, which would alleviate some of the disproportionate gender burdens between trans asylum seekers and U.S. citizens. This would not only increase gender freedom for trans asylum seekers to a similar level as U.S. citizens, but would also free other asylum seekers from the onerous corroboration requirements and free everyone—trans and cis alike—from government regulation of gender.

There is a growing push to remove gender markers altogether rather than adding a third gender marker. In 2018, the Centers for Medicare and Medicaid reportedly removed gender markers from all Medicare cards, a move that likely went unnoticed for most recipients of the new cards.[184] In 2021, the American Medical Association recommended that, "[t]o protect individual privacy and to prevent discrimination, U.S. jurisdictions should remove sex designation on the birth certificate."[185] Other scholars, such as Heath Fogg Davis, have persuasively argued to abolish gender markers.[186] These arguments are particularly compelling in the immigration context, where agency precedent exists for not including gender markers on identification documents.[187] Take, for instance, the reentry certificate of Chae Chan Ping, the plaintiff in the Chinese Exclusion Case from 1889.[188] Although the document detailed the plaintiff's physical characteristics, including age, height, eye color, and physical description, it did not include any description of gender or have any space that could act as a gender marker.[189] DOS didn't add gender markers to U.S. passports until 1977—before then, passports did not include a gender designation.[190] Forty-five years later, it is time to reconsider. De-centering gender markers, just as in the de-centering of marriage discussed in Section I, results in greater freedom for queer and trans immigrants and greater access to immigration benefits for all.

184. Harper Jean Tobin, *Why Does the Government Need to Know Your Gender?*, ADVOCATE (Apr. 11, 2018), https://perma.cc/Y4GG-5HQ4.

185. Bd. of Trustees, Am. Med. Ass'n, *Removing the Sex Designation from the Public Portion of the Birth Certificate* 15 (2021), https://perma.cc/ZJ9U-LPY6.

186. DAVIS, *supra* note 122, at 52.

187. *See id.*

188. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1882).

189. Chae Chan Ping's Reentry Certificate (photograph), *in* Law and Border, https://perma.cc/X2FT-V9QW.

190. Alex Bollinger, *U.S. Issues First Passport with Non-Binary "X" Gender Marker in Historic Move*, LGBTQ NATION (Oct. 27, 2021), https://perma.cc/Z4HP-TZD2.

CONCLUSION: RESISTING ASSIMILATION

In a post-marriage equality U.S., assimilation and its attendant splintering of interests occurs along multiple axes of privilege. Marriage equality provided a vehicle for assimilation that, in the immigration context, benefitted cisgender gay men from European countries the most. The current structure of the international marriage equality landscape, coupled with the criminalization of queer and trans lives in many parts of the world (including some places in the U.S.)[191] functions to severely limit the benefits of marriage-based immigration to a privileged constituency of cisgender gay and lesbian immigrants from Europe and select countries in the Americas.

Meanwhile, mainstream U.S. culture is beginning to recognize nonbinary gender identities in some jurisdictions, while queer and trans people face an increasing onslaught of political and physical violence throughout the country. One solution advocacy groups have presented for nonbinary people reifies an essentialist model of gender that simply creates a new bucket, turning the dyad of M/F into an essentialized triad of M/F/X. This triad aligns with DOS's passport policy as well as other state-level Gender Rights Acts. The addition of a third option to the gender dropdown menu reinforces an essentialist paradigm of gender normativity. Rather than re-evaluating the place of gender in law and society, third-gender policies increases its importance and can widen already existing disparities in standards between citizens and noncitizens.

Where DOS's passport policy contemplates that a U.S. citizen's understanding of their gender is the only necessary evidence, a noncitizen is not given the same benefit. A noncitizen is stuck in a static gender binary, which takes ample evidence to prove when their gender differs from what they were assigned at birth. There is no indication that this will change any time soon. Current USCIS policy requires noncitizens to provide corroborating medical documentation of a gender transition to correct the gender marker on any document issued by USCIS. In contrast, a citizen needs only self-attest. Even if USCIS and DOS update their policies to permit self-attestation and include options for a third gender marker for noncitizens, queer and trans asylum seekers will nevertheless be required to present substantial evidence of their sexuality and gender identity to an unreceptive adjudicator, where the slightest variation in narrative can result in the loss of their case.[192]

De-centering institutional validation of relationships and gender not only provides greater freedom to the individual, but also offers opportunities to invest in

191. Azeen Ghorayshi, *Florida Restricts Doctors From Providing Gender Treatments to Minors*, N.Y. TIMES (Nov. 4, 2022), https://perma.cc/9L2B-SB23.

192. *See* K.S. v. U.S. Att'y Gen., No. 20-3368, 2022 WL 39868, at *2 (3d Cir. Jan. 5, 2022) (discussing that the plaintiff is not credible in part because of his identity as a bisexual man, indicating suspicion of fluid queer identities).

structures that prioritize authenticity of connection and identity over the narrow pre-drafted boxes that limit and essentialize the broad diversity of human experience. In centering the needs of those most marginalized—here, queer and trans noncitizens—rather than pushing open the door to allow an assimilated minority to access institutionalized validation and power, we could subvert these power structures and expand opportunities for all.