

TRANSLATING TRANSSEXUALS: A PROPOSAL FOR A COMPROMISE SOLUTION TO
THE “PROBLEM” OF TRANSSEXUAL MARRIAGE

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INTRODUCTION

Question: What do Estonia, Latvia, Slovakia, and Turkey have in common? Answer: They all give more progressive marriage rights to transsexuals than do Florida, Kansas, Ohio, or Texas.¹ In those nations, a transsexual may marry someone who is the opposite of the transsexual's self-identified sex.² However, in Florida, Kansas, Ohio, and Texas, a person may only marry someone belonging to the opposite of the sex that the attending medical professional identified at the person's birth.³

Transsexuals are a severely misunderstood segment of American society, which may be due in part to the caricatures seen on the Jerry Springer show and similar portrayals. One very common misunderstanding is that transsexuals are an especially deviant subset of homosexuals. This is incorrect. Simply put, a transsexual is a person who feels as if his body is the wrong sex for his personal identity, whereas a homosexual is a person whose sexual identity matches her body and is attracted to people of the same sex. Transsexuality involves sexual *identity*; homosexuality involves sexual *orientation*.

The transsexual phenomenon is well-known, albeit not perfectly understood, in the medical world.⁴ Psychiatry knows transsexualism as "Gender Identity Disorder," or GID.⁵ As I will discuss below, medical research suggests that sexual identity may be determined by the presence or absence of certain hormones *in utero*.⁶

Although medicine forges slowly ahead in its understanding of nontraditional sexual identities, the law lags far behind. Courts that have confronted the issue of the validity of a marriage involving a transsexual generally tend to ignore recent scientific developments in favor of superficial, arbitrary, bright-line rules. When the law states that

¹ See Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 297 (2005) [hereinafter Greenberg, *Full Faith and Credit*]. Seventeen other European countries also allow liberal marriage rights to transsexuals. See *id.*

² *Id.*

³ See *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004) (marriage between female-to-male transsexual and woman void ab initio); *In re Gardiner*, 42 P.3d 120 (Kan. 2002) (same); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (male-to-female transsexual could not obtain marriage license to marry man); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (marriage between male-to-female transsexual and man invalid).

⁴ See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed., text revision 2000) [hereinafter DSM-IV-TR].

⁵ See *id.* at 535.

⁶ See Jiang-Ning Zhou, et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 70 (1995) (suggesting that there are certain biological similarities between male-to-female transsexuals' brains and those of biological women); William G. Reiner & John P. Gearhart, *Discordant Sexual Identity in Some Genetic Males with Cloacal Exstrophy Assigned to Female Sex at Birth*, 350 NEW ENG. J. MED. 333 (2004) (hormone levels *in utero* affect developing brain and begin formation of gender identity).

the sex of a transsexual is fixed at birth by the observation of a doctor, a post-transition transsexual's apparently heterosexual relationship may be seen as a same-sex relationship and therefore ineligible for marriage in most states.

I argue for a more flexible rule of sex determination that would better comport with the lives of transsexuals and the evolving medical understanding of GID. In Part I, I describe generally what transsexualism is, how it is defined by medicine, and the treatments usually employed. In Part II, I discuss the important cases and statutes that govern the validity of the marriage of a transsexual and I identify some common themes. In Part III, I offer a new way to determine the sex of a person for the purpose of marriage—a way that takes into account recent medical advances, the intent of anti-same-sex marriage laws, and the human cost of denying a transsexual the right to marry as a member of her post-transition sex. Although my compromise is not a perfect solution, it is a realistic solution for a nation obsessed with preventing same-sex marriage.

I. WHAT IS A TRANSSEXUAL, ANYWAY?

The general dictionary definition for “transsexual” is “a person who strongly identifies with the opposite sex and may seek to live as a member of this sex esp[ecially] by undergoing surgery and hormone therapy to obtain the necessary physical appearance (as by changing the external sexual organs).”⁷ A more precise definition is “a person with the external genitalia and secondary sexual characteristics of one gender, but whose personal identification and psychosocial configuration are that of the opposite gender....”⁸ Somewhere between 1 in 37,000 and 1 in 11,900 biological males⁹ and 1 in 107,000 and 1 in 30,400 biological females are transsexual.¹⁰ Given a population of approximately 298 million for the United States,¹¹ there are between 10,800 and 34,800 transsexuals in the country.

One commentator has offered more complex method to conceptualize sex based on eight factors: (1) genetic or chromosomal sex (XX or XY); (2) gonadal sex (testes or ovaries); (3) internal morphological sex (seminal vesicles/prostate or vagina/uterus/fallopian tubes); (4) external morphological sex (penis/scrotum or clitoris/labia);

⁷ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2005).

⁸ STEDMAN'S MEDICAL DICTIONARY (28th ed. 2006).

⁹ I use the term “biological male” or “biological female” to refer to the apparent physical sex of a person, as compared to the psychological or self-identified gender. See *infra* note 11.

¹⁰ THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASS'N'S STANDARDS OF CARE FOR GENDER DISORDERS 2 (6th ver. 2001) available at <http://www.hbigda.org/Documents2/socv6.pdf> [hereinafter HBIGDA STANDARDS OF CARE]. The numbers may be even higher, but there is not enough data available to know for sure. *Id.*

¹¹ United States Census Bureau, U.S. Population Clock, <http://www.census.gov/population/www/popclockus.html> (last accessed April 20, 2006).

(5) hormonal sex (androgens or estrogens); (6) phenotypic sex (facial and chest hair or breasts); (7) assigned sex and gender of rearing;¹² and (8) sexual identity.¹³ Usually all eight factors are unambiguous and congruent; however, if the final factor does not match the previous seven, the person is a transsexual.¹⁴

A simpler chromosomal definition of sex may seem appealing to a society agape at the emerging wonders of genetic science, but it is not as precise or as useful as it first appears. At least *nine* different sex chromosome configurations have been detected in humans: XX, XY, XXX, XXY, XXXY, XYY, XYYYY, XYYYYY, and XO.¹⁵ XX and XY are obvious (the usual configurations for female and male, respectively), but how is one to classify the sex of an individual with an XXY configuration, for example?

Another concern about the chromosomal definition is that it is sometimes just plain wrong in every way that matters. A woman with Androgen Insensitivity Syndrome (AIS) may not have any idea that her chromosomes are XY—her external morphology, phenotype, and gender identity are aligned and are all female.¹⁶ An even odder possibility is a person that apparently changes sex at puberty. An individual with a condition known as 5-Alpha-Reductase Deficiency will have a female phenotype at birth despite having XY chromosomes and undescended testes.¹⁷ Because the person's body appears completely female, the person will likely be raised as a girl. However, at puberty the testes descend, the voice deepens, muscle mass increases, and the clitoris elongates and becomes a functional penis; gender orientation also generally becomes male at that time.¹⁸ Should this person be classified as male before puberty, when all visible evidence is to the contrary?

¹² “Sex” generally refers to biological status of male or female. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999) [hereinafter Greenberg, *Defining Male and Female*]. “Gender” generally refers to cultural or attitudinal qualities characteristic of a particular sex (masculine or feminine). *Id.* at 274.

¹³ *Id.* at 278.

¹⁴ *Id.* If the other factors are not in accord with each other or are ambiguous, the person is considered to be intersexed. *Id.*

¹⁵ Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box by Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL, & TRANSGENDER LEGAL ISSUES 1, 10 (1999).

¹⁶ Greenberg, *Defining Male and Female*, *supra* note 12, at 273. A well known instance of this problem is that of Maria Patiño, a Spanish hurdler who wanted to compete in the 1985 World University Games. She failed her sex verification test because she unknowingly had AIS and an XY chromosome pattern. *See id.*

¹⁷ *Id.* at 287.

¹⁸ *Id.*

A. Transsexualism as a Mental Disorder

Psychiatry has developed a rubric for diagnosing “Gender Identity Disorder.”¹⁹ There are four criteria for diagnosing Gender Identity Disorder (GID): “a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex”; “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex”; there must be no concurrent physical intersex condition; and “clinically significant distress or impairment in social, occupational, or other important areas of functioning.”²⁰

The DSM-IV-TR further specifies the diagnosis with a notation about the sexual orientation of the individual—Sexually Attracted to Males, Sexually Attracted to Females, Sexually Attracted to Both, or Sexually Attracted to Neither.²¹ Interestingly, “[m]ales with Gender Identity Disorder include substantial proportions with all four specifiers.”²² On the other hand, nearly all females receive the Sexually Attracted to Females specifier, although a few extraordinary cases receive the Sexually Attracted to Males specifier.²³ To clarify, this means that male-to-female (MTF) transsexuals span the spectrum of sexual orientation, while female-to-male (FTM) transsexuals are nearly always attracted to the opposite of what they perceive their sex to be.

What little research has been done in the field suggests that sexual identity may be determined by biological differences in the brain caused by the presence or absence of various sex hormones during fetal development.²⁴ Because the cause of transsexualism is likely rooted in the development of the person’s brain, sexual identity is probably immutable.²⁵ In a very real sense, a transsexual is a brain of one sex trapped in a body of the other.

B. Treatment for Gender Identity Disorder

The world’s leading authority on transsexual issues, The Harry Benjamin International Gender Dysphoria Association, publishes Standards of Care that suggest the proper way for medical professionals to treat

¹⁹ See DSM-IV-TR, *supra* note 4, at 576-82.

²⁰ *Id.* at 576.

²¹ *Id.* at 578.

²² *Id.*

²³ *Id.*

²⁴ Zhou et al., *supra* note 6; see also Frank Kruijver, et al., *Male-to-Female Transsexual Individuals Have Female Neuron Numbers in the Central Subdivision of the Bed Nucleus of the Stria Terminalis*, 85 J. OF CLIN. ENDOCRINOLOGY AND METABOLISM 2034 (2000).

²⁵ Greenberg, *Defining Male and Female*, *supra* note 12, at 271 n.25.

transsexuals.²⁶ The Standards of Care state that the goal of treatment is “lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment.”²⁷

That goal is usually accomplished through the use of “triadic therapy,” which includes a real-life experience in the desired role, hormone treatments, and surgery to change the genitalia or other physical characteristics.²⁸ The usual order is hormones, real-life experience, and then surgery; sometimes, it is real-life experience, hormones, and then surgery.²⁹ In the case of a FTM, the preferred order might be hormones, breast surgery, and then the real-life experience.³⁰ However, complete triadic therapy is not desired or required in all cases.³¹ In fact, the Standards of Care note five concerns that mandate against prescribing triadic therapy merely on the diagnosis of GID:

1) some carefully diagnosed persons spontaneously change their aspirations; 2) others make more comfortable accommodations to their gender identities without medical interventions; 3) others give up their wish to follow the triadic sequence during psychotherapy; 4) some gender identity clinics have an unexplained high drop out rate; and 5) the percentage of persons who are not benefited from the triadic therapy varies significantly from study to study.³²

Although psychotherapy often accompanies treatment for GID, it “is not intended to cure the gender identity disorder. Its usual goal is a long-term stable life style with realistic chances for success in relationships, education, work, and gender identity expression.”³³ Psychotherapy is used to help people “find comfortable, effective ways of living that do not involve all the components of the triadic treatment sequence.”³⁴

1. Hormone Therapy

Hormone therapy is often the beginning of a transsexual’s treatment.³⁵ However, a doctor should abide by some requirements before prescribing hormones for a transsexual patient. First, the patient should be at least

²⁶ HBIGDA STANDARDS OF CARE, *supra* note 10.

²⁷ *Id.* at 1.

²⁸ *Id.* at 3.

²⁹ *Id.* Although a transsexual may wish to begin living full time as a member of his perceived sex before beginning hormone treatments, the physical changes wrought by hormone therapy often help the transsexual to better fit into the new role. That is why many transsexuals begin hormone therapy before or at the same time as beginning the real-life experience.

³⁰ *Id.* A FTM may desire breast surgery before beginning the real-life experience because his breasts are difficult to conceal or because an effective method of concealment (such as binding) may be painful.

³¹ *Id.* Some transsexuals experience self-fulfillment from less than all of the components of triadic therapy—treatment is highly individualized for each patient.

³² HBIGDA STANDARDS OF CARE, *supra* note 10, at 3.

³³ *Id.* at 12.

³⁴ *Id.* at 11.

³⁵ *Id.* at 3.

eighteen years old.³⁶ The reason for this seems to be that the effects of hormones are only partially reversible and GID often spontaneously remits when it manifests in childhood.³⁷ The second requirement is that the patient must be able to demonstrate “knowledge of what hormones medically can and cannot do and their social benefits and risks.”³⁸ This simply ensures that the patient understands the effects, both beneficial and detrimental, that the treatment is likely to have. The final requirement is that the patient either has had three months of real-life experience or has had some specified duration of psychotherapy (usually not less than three months).³⁹ This requirement is further insurance that the patient will truly gain a net benefit from a form of treatment that is only partially reversible.

Hormone therapy may take as long as two years to reach its maximum physical effects.⁴⁰ Biological males can expect: “breast growth, some redistribution of body fat to approximate a female habitus, decreased upper body strength, softening of skin, decrease in body hair, slowing or stopping the loss of scalp hair, decreased fertility and testicular size, and less frequent, less firm erections.”⁴¹ These changes are largely reversible, although the breasts will not completely revert upon discontinuation of treatment.⁴² Biological females can expect some permanent changes, including “a deepening of the voice, clitoral enlargement, mild breast atrophy, increased facial and body hair and male pattern baldness.”⁴³ Reversible changes in biological females include “increased upper body strength, weight gain, increased social and sexual interest and arousability, and increased hip fat.”⁴⁴

2. The Real-Life Experience

The real-life experience involves the transsexual patient living as a member of the desired gender. For example, the patient will likely cross-dress, acquire a gender-appropriate name, and attempt to relate to the world at large as a member of the intended post-transition sex. This experience is a chance for the patient to see firsthand

³⁶ *Id.* at 13.

³⁷ *Id.* at 8-10 (discussing the unpredictable nature of adolescent gender identities). Because an adolescent’s gender identity is subject to unknowable future shifts, it is considered better to wait to administer treatment causing irreversible physical changes to an adolescent’s body.

³⁸ HBIGDA STANDARDS OF CARE, *supra* note 10, at 13.

³⁹ *Id.*

⁴⁰ *Id.* at 14.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ HBIGDA STANDARDS OF CARE, *supra* note 10, at 14.

how society reacts to him or her in the new role.⁴⁵ “The real-life experience tests the person's resolve, the capacity to function in the preferred gender, and the adequacy of social, economic, and psychological supports.”⁴⁶

3. Surgery

There are many types of surgical treatment that may be used to help a transsexual more easily physically fit into the new role. The types of surgery available range from general cosmetic surgery for adjusting the secondary sexual characteristics of the patient (breast removal/augmentation, liposuction, face lift, etc.), to genital amputation and reconstruction.⁴⁷ Genital surgery for the MTF patient might include orchiectomy (removal of the testicles), penectomy (removal of the penis), vaginoplasty (construction of an artificial vagina), clitoroplasty (construction of an artificial clitoris), and labiaplasty (construction of artificial labia).⁴⁸ Genital surgery for the FTM patient might include hysterectomy (removal of the uterus), salpingo-oophorectomy (removal of the fallopian tubes and ovaries), vaginectomy (removal of the vagina), metoidioplasty (removing some of the connective tissue surrounding the clitoris so that it looks more like a penis), scrotoplasty (construction of an artificial scrotum), urethroplasty (reconstruction of the urethra), placement of testicular prostheses, and phalloplasty (construction of an artificial penis).⁴⁹

Sex-reassignment surgery (SRS), although well outside the experience of most people, is accepted medicine. It “is not ‘experimental,’ ‘investigational,’ ‘elective,’ ‘cosmetic,’ or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID.”⁵⁰ “Hormonal treatment and sex reassignment surgery (SRS) are both considered the treatment of choice for transsexual persons.”⁵¹

C. “Sex Change”

A person can medically change sex by following the above procedures. Although the transsexual feels as if he or she is finally wearing the proper body for his or her gender identity, other people will perceive the various treatments described above as more of a “change.” The way that a person seems to change sex is fairly shocking to someone for whom gender identity and sex have never been in conflict. However, that shock is not an excuse for

⁴⁵ *Id.* at 17.

⁴⁶ *Id.* at 18.

⁴⁷ *See id.* at 21.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 18.

⁵¹ Griet De Cuypere et al., *Sexual and Physical Health after Sex Reassignment Surgery*, 34 ARCHIVES SEXUAL BEHAV. 679, 679 (2005).

the law to discriminate against someone who has received appropriate medical treatment for a recognized mental disorder.

II. THE SAME-SEX MARRIAGE PROHIBITION FORCES THE LAW TO TREAT TRANSEXUALS INCONSISTENTLY AND IRRATIONALLY (EXCEPT IN NEW JERSEY)

Many cases, statutes, and administrative provisions control the extent to which a transsexual is recognized as having changed sex. This paper is concerned primarily with marriage law, but a brief description of procedures allowing a birth certificate to be amended will further the discussion by showing that most states have no issue with “sex changes” as long as marriage is not involved.

A. Amending the Birth Certificate

Amending a birth certificate is an important step in “legalizing” a transsexual’s new sex status. An amended birth certificate can be used to obtain other identification documents and can furnish proof to skeptics that the transsexual really is the sex she says she is. However, at least one group of skeptics remains largely unconvinced—courts considering the validity of marriages involving transsexuals.

Currently, forty-seven American jurisdictions allow a change to the sex designation on a birth certificate.⁵² Of those, thirty-two states and the District of Columbia have a specific statute or administrative rule allowing a change to the birth certificate after sex reassignment.⁵³ Fourteen states have a general statute or administrative rule that allows birth certificate amendments and no law, rule, or policy prohibiting amendment to reflect a change in the sex designation.⁵⁴ Finally, three states have laws or internal policies forbidding a birth certificate amendment in the event of sex reassignment.⁵⁵

⁵² See LAMBDA LEGAL, AMENDING BIRTH CERTIFICATES TO REFLECT YOUR CORRECT SEX (2002), http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/169.pdf.

⁵³ *Id.*; see ALA. CODE § 22-9A-19(d) (2004); ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2004); ARK. CODE ANN. § 20-18-307(d) (2003); CAL. HEALTH & SAFETY CODE § 103425 (West 2004); COLO. REV. STAT. § 25-2-115(4) (2004); CONN. GEN. STAT. § 19a-42 (2003); DEL. CODE ANN. tit. 16, § 3131 (2004); D.C. CODE § 7-217(d) (2004); GA. CODE ANN. § 31-10-23(e) (2004); HAW. REV. STAT. § 338-17.7(a), (4)(B) (2003); 410 ILL. COMP. STAT. 535/17(1)(d) (2004); IOWA CODE § 144.23(3) (2004); KAN. ADMIN. REGS. § 28-17-20(b)(1)(A)(i) (2004); KY. REV. STAT. ANN. § 213.121(5) (West 2004); LA. REV. STAT. ANN. § 40:62(A) (2004); MD. CODE ANN., HEALTH-GEN. § 4-214(b)(5) (2004); MASS. GEN. LAWS ch. 46, § 13(e) (2004); MICH. COMP. LAWS § 333.2831(c) (2004); MO. REV. STAT. § 193.215(9) (2004); MONT. ADMIN. R. 37.8.106(6) (2004); NEB. REV. STAT. § 71-604.01 (2003); NEV. ADMIN. CODE § 440.130 (2004); N.H. CODE ADMIN. R. ANN. [He-P] 7007.03(e) (2004); N.J. STAT. ANN. § 26:8-40.12 (2004); N.M. STAT. § 24-14-25(D) (2004); N.C. GEN. STAT. § 130A-118(b)(4) (2004); N.D. ADMIN. CODE 33-04-12-02 (2004); OR. REV. STAT. § 432.235(4) (2003); UTAH CODE ANN. § 26-2-11 (2004); VA. CODE ANN. § 32.1-269(E) (2004); WIS. STAT. § 69.15 (2003); WYO. R. & REG. HLTH VR Ch. 10 § 4(3)(iii) (2004).

⁵⁴ See ALASKA STAT. § 18-50-290 (2003); FLA. STAT. § 382.016 (2004); IND. CODE § 16-37-2-10(b) (2004); ME. REV. STAT. ANN. tit. 22, § 2705 (2004); MINN. STAT. § 144.218 (2004); MISS. CODE ANN. § 41-57-21 (2004); N.Y.

Interestingly, Kansas and Florida permit an amendment to a birth certificate's sex designation even though those states do not allow a post-transition transsexual to marry in the post-transition sex. One potential reason for treating an amendment to a birth certificate (and therefore to other identifying documents) differently than a change of sex for the purpose of marriage might be that the state wishes for identification to reflect a person's appearance to better serve as identification. Allowing a change of sex for the purpose of marriage may be seen as too deep a foray into the wilderness of nontraditional sexual identities.

B. Transsexual Marriage Law

Unsurprisingly, relatively few courts have considered the validity of a transsexual's marriage to a member of the newly opposite sex. What comes as somewhat of a surprise, given the ubiquity of jurisdictions permitting amending a birth certificate to reflect sex reassignment, is that nearly all courts confronting the issue have held that a person remains whatever sex he was assigned at birth.⁵⁶ Of course, the effect of such a holding is that what the parties originally thought of as a heterosexual marriage turns out to have been a void same-sex union all along. What follows is a brief tour of the highlights of the development of transsexual marriage law and an analysis of the commonalities of the various courts' analysis.

The first case in the common-law world to adjudicate the validity of a transsexual's marriage arose in England. The husband petitioned to have his marriage to a MTF declared void because his "wife" was the same sex that he was.⁵⁷ It should be noted that the parties had lived together for only 14 days out of a three-month marriage and that the husband knew of the wife's former sex.⁵⁸ The court held the marriage void because the wife could not

PUB. HEALTH LAW § 4138 (MCKINNEY 2001); OKLA. STAT. tit. 63, § 1-321 (2004); 35 PA. CONS. STAT. § 450.603 (2003); R.I. GEN. LAWS § 23-3-21 (2004); S.C. CODE ANN. § 44-63-150 (2003); S.D. ADMIN. R. 44:09:05:02 (2004); VT. STAT. ANN. tit. 18, § 5075 (2003); W. VA. CODE § 16-5-24 (2003). Texas has a general amendment statute, TEX. HEALTH & SAFETY CODE ANN. § 192.011 (2004), but dicta from the Texas Court of Appeals suggests that birth certificates should no longer be changed for sex reassignment. *See Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

⁵⁵ *See In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987); TENN. CODE ANN. § 68-3-203(d) (2004). Although the policy is not codified anywhere, Idaho simply does not amend or reissue birth certificates for transsexuals. LAMBDA LEGAL, *supra* note 52.

⁵⁶ *See, e.g., In re Ladrach*, 513 N.E.2d 828; *Littleton v. Prange*, 9 S.W.3d 223; *In re Gardiner*, 42 P.3d 120 (Kan. 2002); *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

⁵⁷ *Corbett v. Corbett*, [1971] P. 83, 88 (Eng. Prob., Divorce & Admiralty Div. 1970).

⁵⁸ *Id.* at 94-95.

perform the “essential role of a woman in marriage.”⁵⁹ Although the court did not elaborate as to what the “essential role of a woman in marriage” might be, it stands to reason that the role was at least traceable to bearing children.

The inherent, but unstated presumption underlying the opinion is that the purpose of marriage is procreation. Fulfilling the spouses’ desire for companionship (sexual or otherwise) or living a shared life are—at most—secondary objects of marriage. However, placing such a heavy emphasis on the procreative aspect of marriage fails to take into account changing public views about marriage. For example, many couples marry without intending ever to have children. Some couples find out after getting married that they are infertile. These childless couples, if of opposite chromosomal sex, are considered no less married than a couple that chooses to have several children. Relying so much on the procreative rationale for marriage simply does not make sense in the modern world.

The *Corbett* court eventually adopted a simplistic biological test of sex depending on the individual’s chromosomes, gonads, and genitals.⁶⁰ The test using biological factors seems to have been based on the notion that biological sex is immutable, even if outer appearance can be changed. Because the court did not recognize even the possibility of a change in sex, it was only logical that the “wife” in the marriage must be considered a man. As the court pointed out, the wife’s sex immediately before undergoing SRS was male.⁶¹ If sex is immutable, then the wife’s sex immediately following SRS (and at all times thereafter) was still male. The court gave what it considered to be a “bizarre” example that would follow if a person’s sex could be reassigned following SRS: “if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as female and capable of marrying a man.”⁶² This is precisely the result for which transsexuals now advocate (and it is not terribly unusual for a 50 year old man, married and the father of children, to seek sex reassignment).

Corbett has been very influential in the United States. American cases have cited *Corbett* as recently as 2002.⁶³ The thinking behind the English court’s decision persists in most American decisions as well. The rule that a person’s sex is to be determined by reference to the apparent physical sex at birth and the genetic/chromosomal

⁵⁹ *Id.* at 106.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (internal quotes omitted).

⁶³ *See In re Gardiner*, 42 P.3d 120, 124 (Kan. 2002).

sex has survived advances in medical research that demonstrate that human sexuality is not amenable to such superficial categorization.

A New Jersey appellate court had the opportunity to consider the validity of a transsexual marriage only six years after *Corbett* was decided.⁶⁴ In a support action by a MTF transsexual against her husband,⁶⁵ the court framed the issue as “whether the marriage between a male and a postoperative transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman.”⁶⁶ Unlike some other cases,⁶⁷ there was no fraud about the transsexual’s status—the husband not only knew of his wife’s past sex, but had also paid for her sex reassignment.⁶⁸

The court held that the sex of a transsexual for marital purposes is governed by the congruence of anatomical or genital features and “gender, psyche or psychological sex.”⁶⁹ The court implicitly assumed that the most important factor for determining the sex of a transsexual in marriage is the “sexual capacity” of the transsexual; if the transsexual has the physical ability to function sexually as the sex with which she self-identifies, then she should be considered to be of that sex and able to marry someone of the opposite sex.⁷⁰ The New Jersey court “perceive[d] no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent ... identification at least for purposes of marriage to the sex finally indicated.”⁷¹

This conception of marriage as a sexual union between two individuals stands in stark contrast to *Corbett*’s view of marriage as merely a setting for procreation. Looking at marriage as a sexual union is more in line with how many people seem to view marriage. It focuses on the coming together of two people and their decision to share their lives. At the same time, it does not discount the importance of children in a marriage. Viewing marriage as a sexual union also does not call into question the marriages of infertile or otherwise childless couples. Perhaps the very different ways of understanding the institution of marriage account for the opposite results in the contemporaneous *Corbett* and *M.T.* decisions.

⁶⁴ *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

⁶⁵ *Id.* at 205.

⁶⁶ *Id.* at 208.

⁶⁷ *E.g.*, *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971) (husband did not find out until the wedding night that “wife” was a pre-operative transsexual).

⁶⁸ *M.T.*, 355 A.2d at 205.

⁶⁹ *Id.* at 209.

⁷⁰ *See id.*

⁷¹ *Id.* at 210-11.

M.T. is the only reported (and not later reversed) American case to recognize a change in sex for the purpose of marriage.⁷²

Nine years later, in an application for a marriage certificate for a MTF and a male, an Ohio probate court considered the issue to be “whether a post-operative male to female transsexual is permitted under Ohio law to marry a male.”⁷³ The court foreshadowed its ultimate conclusion in a somewhat condescending way; it decided to refer to the MTF petitioner with masculine pronouns “for purposes of clarity.”⁷⁴

A medical exam found Ladrach, the petitioner, to appear to be female.⁷⁵ No chromosomal test was performed.⁷⁶ However, the court refused to issue a marriage license because the legislature had not manifested any intent to allow transsexuals to marry people of the same birth sex; in what would become a familiar refrain in this sort of case, the court stated that it could only interpret existing statutes, not make new law.⁷⁷ As described below, this elaborate deference to the legislature is common. Perhaps it is simply a way for a court to rid itself of a troublesome case that cannot be cleanly resolved either way.

Although the Ohio court did not discuss the nature of marriage at all, it did cite *Corbett* with approval, quoting the language about a woman’s essential role.⁷⁸ This suggests that this court believed marriage to be primarily a setting for procreation, rather than a sexual union of two individuals. However, this court’s result did not rest on any lofty considerations of the character of the marital relationship, but rather on the failure of the legislature to set forth Ohio’s policy regarding the marriages of post-transition transsexuals.

⁷² See Teresa A. Zakaria, Note, *By Any Other Name: Defining Male and Female in Marriage Statutes*, 3 AVE MARIA L. REV. 349, 377 (2005). However, a California trial court held that a marriage between a FTM and a female was valid under California law because the FTM was legally a male. *Vecchione v. Vecchione*, Civ. No. 96D003769, reported in L.A. DAILY J., Nov. 26, 1997, at 1. Of course, the unreported decision of a trial court does not represent an authoritative statement of California law.

⁷³ *In re Ladrach*, 513 N.E.2d 828, 828 (Ohio Prob. Ct. 1987). Although this decision was rendered by a trial court and therefore not entitled to any statewide precedential value, it has apparently been treated as authoritative at least by the Ohio agency in charge of determining whether birth certificates may be amended. See LAMBDA LEGAL, *supra* note 52, at 4.

⁷⁴ *Ladrach*, 513 N.E.2d at 829.

⁷⁵ *Id.* at 830.

⁷⁶ *Id.*

⁷⁷ *Id.* at 832.

⁷⁸ *Id.*

Finally, the court would not allow Ladrach to change her birth certificate to reflect a female sex because it understood the state statute allowing birth certificate amendments to be “corrective” only.⁷⁹

The next court to be confronted with the legality of a marriage with one transsexual spouse was the Texas Court of Appeals.⁸⁰ The question arose in the MTF wife’s wrongful death action against a doctor.⁸¹ In order to have standing to sue for wrongful death, Christie (the plaintiff MTF) had to establish that she was the deceased’s surviving spouse.⁸² If Christie was legally declared a man, she would not be allowed to recover from the defendant doctor under a wrongful death theory. The issue came up for appeal on the trial court’s grant of summary judgment to the doctor.⁸³

As in previous cases, there was no issue of fraud here. The deceased husband was fully aware of Christie’s past sex.⁸⁴ The couple had even had normal sexual relations throughout their seven year marriage.⁸⁵

This court’s statement of the issue to be decided had an overtly religious tone: “The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”⁸⁶ Rather than examining any of the science showing that gender identity is fixed in the womb and that making the body match the brain is the best treatment,⁸⁷ the court simply referred to the “Creator.”

The court held that Christie was a male and that the marriage was consequently invalid because the partners were the same sex.⁸⁸ In affirming summary judgment for the defendant doctor, the court relied heavily on the chromosomal definition of sex and also claimed that it was required to defer to the legislature to determine what guidelines should govern the recognition of marriages involving transsexuals.⁸⁹ The court stated, “We cannot make

⁷⁹ *Id.* at 831. One commentator has suggested that a holding that an amendment statute is corrective need not foreclose the possibility of changing a transsexual’s sex designation; such an amendment could be understood as correcting the mistaken designation the physician made at birth by determining gender based solely on an inspection of the baby’s genitalia. Rose, *supra* note 15, at 12-13.

⁸⁰ Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999).

⁸¹ *Id.* at 225.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 227.

⁸⁶ Littleton, 9 S.W.3d at 224. Also note that the court misused the term “gender.” Transsexuals generally do not perceive themselves as changing gender, but rather sex. See *supra* note 12.

⁸⁷ See Zhou et al., *supra* note 6.

⁸⁸ Littleton, 9 S.W.3d at 231.

⁸⁹ *Id.* at 230.

law when no law exists: we can only interpret the written word of our sister branch of government, the legislature,”⁹⁰ which prompted one commentator to respond that “law surely did exist that allowed only marriages between one man and one woman. The courts are required to interpret the meaning of the terms ‘man’ and ‘woman’ used in the statute, a responsibility of all judicial authorities, recognized by the court in *Littleton* itself, but definitely ignored.”⁹¹ The Texas Court of Appeals was not interested in such a task any more than it was interested in examining the scientific research about transsexualism writing, “[t]here are some things we cannot will into being. They just are.”⁹²

Interestingly, the court also did not seem to want to consider the nature of marriage. It “recognize[d] that there [were] many fine metaphysical arguments lurking about,” but did not want to “wander too far into the misty fields of sociological philosophy.”⁹³ The court noted that “[m]atters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores.”⁹⁴ However, the majority simply considered those matters to be beyond the scope of the court’s consideration.⁹⁵

One justice dissented from the majority opinion. Justice López argued that Christie’s original birth certificate, showing a male sex designation, was the only evidence the defendant produced to show the marriage’s invalidity, but Christie produced plenty of contrary evidence tending show femaleness sufficient to raise a genuine issue of material fact—summary judgment was inappropriate.⁹⁶ The absence of controlling law from the legislature or higher courts should not require judgment as a matter of law, but rather *preclude* it.⁹⁷

Kansas was the next state to consider whether a transsexual may marry in her self-identified gender.⁹⁸ In an estate case, the son of the deceased husband filed for letters of administration and alleged that he was his father’s sole heir because his stepmother, a MTF transsexual, was a man.⁹⁹

⁹⁰ *Id.*

⁹¹ Brianna Lynn Morgan, Note, *The Use of Rules and Standards to Define a Transsexual’s Sex for the Purposes of Marriage: An Argument for a Hybrid Approach*, 55 HASTINGS L.J. 1329, 1350 (2004).

⁹² *Littleton*, 9 S.W.3d at 231.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 232.

⁹⁷ *Id.*

⁹⁸ *In re Gardiner*, 42 P.3d 120 (Kan. 2002).

⁹⁹ *Id.* at 123.

The Kansas Supreme Court began by noting that there are two ways to look at the validity of a marriage: using the sex classifications of the spouses at their births or viewing medical procedures as a “means of unifying a divided sexual identity”—determining sex at the time of the marriage.¹⁰⁰ The essential difference between the views, according to the court, is “the latter’s crediting a mental component, as well as an anatomical component, to each person’s sexual identity.”¹⁰¹

To determine which view of the marriage’s validity was correct, the Kansas court recognized that it would be proper and necessary to interpret the terms of the marriage statutes.¹⁰² Sex determination was seen as a question of law and the court looked to the legislative intent of the marriage statutes to determine their meaning.¹⁰³ Because the words “sex,” “male,” and “female” were words in common usage, the court decided to turn to Black’s Law Dictionary and Webster’s New Twentieth Century Dictionary to ascertain the meanings of the terms.¹⁰⁴ Because those authorities did not mention transsexuals in the definitions of “sex,” “male,” or “female,” the court concluded that “persons who are experiencing gender dysphoria” do not fit within the common meaning of “persons of the opposite sex,” the relevant phrase from the Kansas marriage statute.¹⁰⁵

Interestingly, the court did not look to any definition of “transsexual.” If it had looked to the common definitions found in medical literature, it might have noted that a post-operative MTF is female in all the ways that matter—only internal sex organs and chromosomal configuration differ from a biological female. However, the court explained that “the transsexual still ‘inhabits ... a male body in all aspects other than what the physicians have supplied.’”¹⁰⁶ Apparently, the court’s idea of “all aspects” was chromosomes and lack of a uterus and fallopian tubes.

Finally, the legislative history’s silence on the question of transsexuals was held to indicate that the legislature intended to exclude transsexuals from the statute—after all, the court can only interpret, not legislate.¹⁰⁷ This court’s (and the *Littleton* and *Ladrach* courts’) conclusion about the meaning of legislative silence on a fairly obscure topic is troublesome. If the legislature passed a statute concerning the proper side of the road on which

¹⁰⁰ *Id.* at 124.

¹⁰¹ *Id.*

¹⁰² *Id.* at 135.

¹⁰³ *Id.*

¹⁰⁴ *Gardiner*, 42 P.3d at 135.

¹⁰⁵ *Id.* It is unclear whether this logic would allow transsexuals to marry *anyone* in Kansas.

¹⁰⁶ *Id.* (quoting *Littleton*, 9 S.W.3d at 231).

¹⁰⁷ *Gardiner*, 42 P.3d at 136.

vehicles must travel, but failed to define “vehicle” or even deliberate on bicycles, it seems unlikely that the court would hesitate to hold that bicycles operated on the road must be operated on the right side of the road. The mere silence of the legislature would not prompt the court to hold that bicycles are not included in the statute. Similarly, the mere silence of the legislative history should not compel the court to hold that transsexuals have no place in the marriage statute. It seems incredibly unlikely that the legislature even considered the effect of the statute on transsexuals; the legislative silence in this case should not have foreclosed interpretation, but rather required it.

The court did not directly address the nature of marriage. However, it did state that the legislature had declared that the public policy of the state was to allow only marriages between persons of the “opposite sex” and that other sorts of marriages were against public policy and void.¹⁰⁸ This reliance on “sex” can probably be traced back to a *Corbett*-like view of marriage as a setting for procreation.

Most recently, Florida had occasion to consider the question of a transsexual’s sex for marriage in a divorce case.¹⁰⁹ The wife was a biological female and the husband was a FTM transsexual.¹¹⁰ The wife argued that there should not be a divorce, but rather a declaration that the marriage was void ab initio.¹¹¹ The distinction only mattered because the couple had children together; Linda, the wife, was pregnant by a former boyfriend when she met Michael, the FTM husband.¹¹² Michael later adopted that child.¹¹³ After marrying Michael, Linda became pregnant again by artificial insemination using Michael’s brother’s sperm.¹¹⁴ If Michael was a woman, then his adoption of the first child would have violated Florida’s ban on homosexual adoptions and he would have no biological or legal relationship (other than aunt) to the second child.¹¹⁵ Although Linda’s motivation in arguing that her children had no father was unclear, it seems likely that she was simply using the argument as a device to obtain a more favorable custody arrangement.

After examining *M.T.*, *Ladrach*, *Littleton*, and *Gardiner*, the court held that postoperative transsexuals may not marry in the reassigned sex.¹¹⁶ The court noted agreement with the *Ladrach*, *Littleton*, and *Gardiner* courts as to

¹⁰⁸ *Id.*

¹⁰⁹ *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 156.

¹¹² *Id.* at 155.

¹¹³ *Id.* at 156.

¹¹⁴ *Kantaras*, 884 So. 2d at 156.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 158-60, 161.

the definitions of “male” and “female” referring to “immutable traits determined at birth.”¹¹⁷ This view of sex is probably related to a procreative view of marriage.

As seen in previous cases, the Florida court also came to the disingenuous conclusion that the legislature had foreclosed the possibility of allowing transsexuals to marry in “the reassigned sex” by not mentioning transsexuals at all.¹¹⁸

Given this apparent hostility to Michael’s status as a husband, the court’s final pronouncement is somewhat startling—the invalidity of the Kantaras marriage did not terminate the inquiry into the custody of the children.¹¹⁹ On remand, the trial court was to examine the legal status of the children “in the first instance.”¹²⁰ This at least suggests the possibility that Michael could be entitled to some parental rights even though the court had just held him not to legally be a parent to either of the children. Of course, the trial court on remand could simply cite Florida’s prohibition on same-sex partner adoption and award full custody to Linda, the only legal parent before the court.

The cases holding that a transsexual cannot marry someone of the same birth sex seem to have two things in common. First, they rely to some degree on a view of marriage as primarily a procreative undertaking. Procreation is certainly an important piece of marriage for many couples, but it is not the *sine qua non* of a modern marriage. People marry for many reasons, such as a desire for companionship, access to various legal benefits related to marriage, or even for money. Those marriages are not ever called into question simply because the woman fails perform the “essential role” of bearing children—so long as the spouses were born to opposite sexes.

The second common ground among the cases is that the court declares that it cannot say whether a post-transition transsexual can be defined as a member of the post-transition sex. The courts give almost exaggerated deference to the legislatures, which have probably never considered the issue. It is an odd result to give effect to a specific legislative intent where the legislature probably never intended anything at all on the issue.

Because the cases denying transsexuals the right to marry as members of the post-transition sex rest on such questionable support, they should be overruled or the various legislatures should act to restore some logic to the treatment of the issue. In Part III below, I offer a legislative solution.

¹¹⁷ *Id.* at 161.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Kantaras*, 884 So. 2d at 161.

C. Same-Sex Marriage Law

The sex to which a person is assigned for the purpose of marriage only matters because there is a strong resistance to the practice of same-sex marriage in the United States. In fact, forty-four of the states have some sort of statute or constitutional amendment restricting marriage to a man and a woman.¹²¹ Additionally, Congress has enacted the Defense of Marriage Act (DOMA), which defines marriage for federal purposes as between one man and one woman¹²² and directs that states need not recognize same-sex marriages from other states¹²³. If same-sex marriages were permitted, it would not matter whether someone is held to be man, woman, or something else entirely. For example, the issue of whether a marriage involving a transsexual is valid will not now come before a Massachusetts court.¹²⁴ The intricacies of the debate about same-sex marriage are far beyond the scope of this paper, but the need to devise a clear, consistent, and just rule for determining the marital sex of transsexuals will grow as the battle over same-sex marriage intensifies.

III. **LAW CHANGE FOR SEX CHANGE**

“Even if traditional notions of justice require the rejection of multi-sexual categories in favor of a binary system, how the categories male and female are defined must be reexamined.”¹²⁵

A. The Odd Aftermath of *Corbett* and Company

The federal and state Defense of Marriage Acts typically require that marriage be between one woman and one man as wife and husband, but leave the terms “man” and “woman” undefined.¹²⁶ The various legislatures can probably be forgiven for this oversight as transsexualism is not widely known and is even less widely understood. However, it does tend to leave transsexuals to the sometimes capricious whims of the courts (who claim that they must defer to the legislatures, which have not even considered the issue).

¹²¹ *E.g.*, KAN. STAT. ANN. § 23-101 (2002) (“The marriage contract is ... between two parties who are of opposite sex”); MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose”). *See also* Zakaria, Note, *supra* note 72, at 366.

¹²² 1 U.S.C. § 7 (2000).

¹²³ 28 U.S.C. § 1738C (2000).

¹²⁴ *See* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts state constitution requires the state to allow same-sex marriages).

¹²⁵ Greenberg, *Defining Male and Female*, *supra* note 12, at 294.

¹²⁶ *E.g.*, 1 U.S.C. § 7; MICH. COMP. LAWS ANN. §§ 551.1-.2, .271-.272 (2005).

When Congress enacted the federal DOMA, its purpose included protecting heterosexual marriage.¹²⁷ It seems reasonable to conclude that the states that have enacted DOMAs had similar aims in mind, although state legislative histories are much scantier. However, the courts in England, Ohio, Kansas, and Florida have undermined that legislative intent.

In England, two self-identified lesbians were able to legally wed because one of them was a postoperative MTF.¹²⁸ Ohio has witnessed a similar union.¹²⁹ The inherent logic of the controlling court opinions practically mandates this result. Transsexuals may not marry as if they were members of their post-transition sex; so, in order to preserve their fundamental right to marry *someone*,¹³⁰ they must be allowed to marry as members of their pre-transition sex. One commentator has suggested that transsexuals may be denied the right to marry *anyone* because they are considered not to have changed sex, but are also not the original sex because their anatomy does not match up.¹³¹ This position may seem somewhat alarmist, but the validity of a marriage between a woman and a MTF or a marriage between a man and a FTM has never been judicially tested. There is really no way to know how a court would treat that sort of marriage.

This result seems to be completely at odds with what the legislatures must have intended in restricting marriage to one man and one woman. The question is really whether the legislature is more concerned with requiring opposite-sex marriage partners or prohibiting same-sex marriage partners. If the legislature wants to prohibit same-sex marriage, it makes little sense to allow two people who appear to be the same sex to marry, but to prohibit a marriage that appears to involve a “man” and a “woman.” On the other hand, if the legislature is really interested in requiring opposite-sex marriage partners, perhaps to maintain the illusion that marriage is primarily for procreation, then it may make some small sense to allow a MTF and a woman to marry, for example.¹³²

¹²⁷ H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2906; see Greenberg, *Defining Male and Female*, supra note 12, at 307.

¹²⁸ Greenberg, *Defining Male and Female*, supra note 12, at 300 n.266 (citing Jilly Beattie & Sara Lain, *The Wedding with Two Brides...and One Is a Man!*, THE PEOPLE, June 11, 1995, at 2).

¹²⁹ Greenberg, *Defining Male and Female*, supra note 12, at 303 (citing Afi-Odelia E. Scruggs, *Tying Legalities into Tangled Knot*, PLAIN DEALER (Cleveland), Oct. 7, 1996, at 1B).

¹³⁰ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

¹³¹ Kevin Tallant, Note, *My “Dude Looks Like a Lady”*: *The Constitutional Void of Transsexual Marriage*, 36 GA. L. REV. 635 (2002).

¹³² Assuming one buys into the chromosomal definition of sex. See supra text accompanying notes 15-18.

B. The Missing Harm

The courts that have confronted transsexual marriages have not deigned to explain the sort of policy to which they were adhering or the harm that would follow recognizing that medicine has succeeded in changing some individuals' sexes. Legal scholars have attempted to fill this gap.¹³³

One harm relied on by academics is that recognizing a change in sex following sex-reassignment surgery (SRS) would encourage mentally ill people to undergo surgery on healthy organs.¹³⁴ The transsexual who desires SRS to change his or her body to match his or her identity is compared to an anorexic seeking liposuction to cure her "obesity" or to an apotemnophilic (a person who seeks surgical removal of a healthy limb to feel "complete").¹³⁵ GID differs from anorexia and apotemnophilia in at least two respects: First, a transsexual who undergoes SRS is not likely to be brought closer to death by the results of the surgery (not merely the surgery itself); clearly, such a danger exists in surgical intervention to make an anorexic slimmer. Second, SRS is not a disabling treatment—a transsexual can live a reasonably complete life (often including sex life) after SRS, even sometimes passing as a "normal" man or woman. In contrast, an apotemnophile who finds a doctor to "treat" his condition will be disabled. I do not mean to suggest that amputees cannot live full lives, but only that they usually suffer from an inability to do some common tasks that were possible before the amputation. Transsexuals may have a similar difficulty to some extent, but not as much as an amputee. In short, SRS, although as dangerous as any other major surgery, is not really similar to other body-altering surgery requested by mentally ill patients.

Another harm that is put forward is that gay men and lesbians may have "partial sex-change operation[s]" in order to be able to marry their homosexual partners.¹³⁶ There is absolutely no reason to believe this. Gender Identity Disorder "is not an elaborate scheme by homosexuals to evade proscriptions against same-sex marriage."¹³⁷ The idea that someone would suddenly decide to become a member of one of the most misunderstood minorities in America by having painful and expensive surgical and hormonal treatments, risking losing the affection of friends and family, and becoming subject to hate crimes and discrimination—just to walk down the aisle—is frankly

¹³³ See Zakaria, Note, *supra* note 72.

¹³⁴ *Id.* at 362.

¹³⁵ *Id.* at 362-63.

¹³⁶ *Id.* at 389 n.210 (quoting Stephan Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 280 (1995)).

¹³⁷ Rose, *supra* note 15, at 6.

ridiculous.¹³⁸ There is simply little possibility that lesbians and gays would fraudulently make use of laws intended to allow a transsexual to marry as a members of his self-identified sex.¹³⁹

Those who oppose allowing a transsexual to legally change sex for marriage also suggest that recognizing a change in sex would pose a threat to traditional marriage. The expression of concern for that perceived threat ranges from subtle¹⁴⁰ to frantic¹⁴¹. This idea seems to stem from the concept that there are now and have only ever been two immutable sexes. For example, one commentator writes that “for all recorded history human beings have recognized that there are two sexes.”¹⁴² Chief Justice Hardberger of the Texas Court of Appeals answered the question “is a person’s gender immutably fixed by our Creator at birth?” in the affirmative.¹⁴³ This argument is inextricably tied to the view of marriage as a procreative institution. This is not a complete view of modern marriage and should not be given too much weight. Of course, such an argument could be as easily applied to the same-sex marriage debate. It is not my purpose to comment on same-sex marriage, but this is one place where the interests and arguments regarding same-sex marriage and transsexual marriage overlap.

Further, the argument from tradition proves too much—until *Brown v. Board of Education*,¹⁴⁴ tradition in the United States was to deny African-American students access to the educational opportunities enjoyed by whites. Until the enactment of the Thirteenth Amendment,¹⁴⁵ slavery was an important American tradition. Until the women’s movement of the 1960s, women were traditionally considered inferior to men. Until *Loving v. Virginia*,¹⁴⁶ the tradition was to prohibit couples comprised of a white partner and an African-American partner from marrying. Although the plight of transsexuals is not perfectly analogous to that of African-Americans, slaves, women, or even mixed-race couples (and those groups are certainly not perfectly analogous to each other), the point is: What has

¹³⁸ See *id.* at 6 n.8. Ms. Rose points out that there is a perception that this is a possibility, perhaps reinforced by pop culture. *Id.*

¹³⁹ See Greenberg, *Defining Male and Female*, *supra* note 12, at 307-08.

¹⁴⁰ *Corbett v. Corbett*, [1971] P. 83, 106 (Eng. Prob., Divorce & Admiralty Div. 1970) (“[M]arriage is essentially a relationship between man and woman, [so] the validity of the marriage in this case depends ... upon whether the respondent is or is not a woman.”).

¹⁴¹ Zakaria, Note, *supra* note 72, at 350 (“[C]alling a man a woman or vice-versa for purposes of marriage would destabilize all of marriage law.”).

¹⁴² *Id.* at 352 (citing the Bible, Code of Hammurabi, the Qur’an, and Mark Twain).

¹⁴³ *Littleton v. Prange*, 9 S.W.3d 223, 224, 231 (Tex. App. 1999) (“There are some things we cannot will into being. They just are.”).

¹⁴⁴ 347 U.S. 483 (1954).

¹⁴⁵ U.S. CONST. amend. XIII.

¹⁴⁶ 388 U.S. 1 (1967).

been historically recognized by humanity may not be the best yardstick for determining the proper *future* treatment of a particular group.

In any case, there is no logical reason that people who want to enter into “traditional” marriage (monogamous heterosexual marriage) would be at all deterred, discouraged, or somehow prevented from doing just that. In other words, the number of “traditional” marriages would not likely decline; the *total* number marriages would likely rise.

If the argument is rather that the “value” of traditional marriages (whatever that might mean) would be degraded by allowing transsexuals to marry in their new gender role, then opponents of allowing a legal change of sex have simply insulted everyone who is “traditionally” married; whether other groups of people are marrying or not, a husband and a wife have made a sacred commitment to each other. Suggesting that their commitment is somehow debased because someone like Christie Littleton is recognized as a wife to a willing husband seriously undervalues that commitment.

C. Positive Reasons to Change the Law

Aside from the issue of the lack of a clear harm from recognizing that transsexuals change sex, there are positive reasons for making that recognition. As discussed above, sex identity is probably determined during the fetal brain’s development.¹⁴⁷ Because sex identity is linked to the way that the brain develops, it is unlikely that sex identity can truly change, although it can certainly be repressed.

Psychiatry has as objective a method as possible for determining whether a person is “truly” a transsexual, or whether his gender identity is truly at odds with his physical sex. In the hands of a competent professional, the DSM-IV-TR diagnostic criteria¹⁴⁸ can separate those who may merely be confused or manifesting symptoms of another mental disorder¹⁴⁹ from those who really do have a permanent sexual conflict between body and brain.

The most effective method for treating GID at present is triadic therapy, which includes hormonal therapy and SRS.¹⁵⁰ Psychotherapy does have an intermittent track record for being able to send GID into remission,¹⁵¹ but

¹⁴⁷ See *supra* Part I.A.

¹⁴⁸ See *supra* Part I.A.

¹⁴⁹ The DSM-IV-TR section on Gender Identity Disorder includes a subsection entitled “Differential Diagnosis” that provides guidance to distinguish GID from, inter alia, nonconformity to stereotypical sex-role behavior and schizophrenia. DSM-IV-TR, *supra* note 4, at 580.

¹⁵⁰ See *supra* Part I.B and accompanying notes.

statistically significant data about the effectiveness of psychotherapy and other forms of counseling alone are hard to come by due to the relative rarity of GID and the difficulties inherent in trying to quantify psychological data. Data about the effectiveness of triadic therapy is also somewhat mixed,¹⁵² but it is recognized at this time to be the most medically appropriate treatment for GID.¹⁵³

The law currently treats chromosomes, gonads, and genitals as fixed and objective biological indicators of sex. However, modern medicine can now alter or remove genital and gonadal indicators of sex. Similarly, secondary sexual characteristics (such as body hair or breasts) are rather easily modified by readily available procedures (such as electrolysis or breast augmentation/reduction surgery). Given that the current theory of the etiology of GID involves fetal brain development and maintains that sexual identity is set before birth, the only fixed indicators of sex are, ironically, chromosomes and self-identity. Of those two, only self-identity is likely to make any difference in a person's day-to-day life or the lives of those around her.

What all of the above really means is that—after triadic therapy—transsexuals' bodies and brains are in harmony as to sex. Usually, the only remaining indicator of the birth sex is chromosomes (and possibly some internal morphology). Without somewhat involved testing, it is impossible to know whether someone is chromosomally male or female (or, for that matter, whether that person has male or female internal morphology). Naturally, some transsexuals, in consultation with their doctors, choose not to undergo all possible reassignment procedures. However, it is likely that a transsexual has more in common with the new sex than the old after whatever level of reassignment is prescribed. Determining when a transsexual has legally “changed” is then a comparatively simple job of line-drawing.

D. A Fair and Accurate System for Allowing Transsexuals to Change Sex for Purposes of Marriage

1. Need for Such a System

It is pretty clear that the “one man, one woman” model of marriage is probably not going to change anytime soon in most parts of the country. It also seems reasonable that legislatures in most states did not intend to

¹⁵¹ See Bernd Meyenburg, *Gender Identity Disorder in Adolescence: Outcomes of Psychotherapy*, 34 *ADOLESCENCE* 305 (1999) (discussing case studies of adolescent sufferers of GID, some of which benefited from psychotherapy and some of which did not).

¹⁵² See, e.g., Gunnar Lindemalm, et al., *Long-Term Follow-Up of “Sex Change” in 13 Male-to-Female Transsexuals*, 15 *ARCHIVES SEXUAL BEHAV.* 187 (1986) (finding that, six to twenty-five years after SRS, nine of thirteen MTFs (69%) did not regret the surgery). However, the sample size was extremely small and the results therefore difficult to generalize.

¹⁵³ De Cuyper, et al., *supra* note 51, at 679.

allow apparently homosexual marriages just because one of the partners happens to be a transsexual. A way of defining who is a man and who is a woman must be developed to balance the interests of giving effect to the legislative intent to restrict marriage to fundamentally heterosexual unions and preventing transsexuals from losing their fundamental right to marry. Such a definition could theoretically come from the courts or from the legislature. However, a legislative act would probably give more protection to the people most affected by the determination—transsexuals themselves. A legislature can deliberate on the issue for as long as necessary to achieve a workable resolution. A legislature never feels as if it ought to restrain itself from legislating, unlike a court. Finally, many legislatures have demonstrated at least a basic understanding of the legal hurdles confronting transsexuals during and after treatment,¹⁵⁴ again unlike the courts.¹⁵⁵ Finally, a legislative act would be less subject to arbitrary change than a judicial determination for the simple reason that the legislature would not likely revisit the issue unless there was a perceived need to do so; a court would revisit the issue anytime someone managed to gain standing to challenge the definition. On the other hand, a court may be able to ignore any potential political backlash against engaging in compassionate treatment of transsexuals' marriage rights. Overall, however, it would be best, at least from a symbolic standpoint, for the representative branch of government to recognize post-reassignment transsexuals as the reassigned sex for the purpose of marriage.

2. The Players and the Process

A system to determine when a transsexual has switched sex should include medical professionals, such as psychologists, psychiatrists, counselors, surgeons, doctors, endocrinologists, etc., who treat transsexuals and the vital records agency of the jurisdiction. It should avoid the use of court orders to avoid the expense associated with appearing in court and to avoid any extra strain on judicial resources.

The first step in legally changing sex would be the transsexual obtaining some sort of medical documentation stating that the transsexual has reached the point of treatment where a sex change for marital purposes should be recognized. The documentation should be something more than a letter to the vital records agency. An affidavit, perhaps on a standardized form, would be sufficient. The affidavit should require attestation by at least two of the medical professionals treating the transsexual. For example, the transsexual's psychologist and

¹⁵⁴ See *supra* notes 53-54 and accompanying text (discussing the prevalence of states that allow a transsexual to change his or her birth certificate after reassignment therapy).

¹⁵⁵ See *supra* Part II.B (discussing court decisions that have not recognized that transsexuals may change sex for the purpose of marriage).

surgeon could aver that the transsexual has reached the stage of treatment where the change becomes legally sufficient to marry in the new gender role. Requiring more than one medical professional to verify the transsexual's treatment would help to avoid the uncomfortable possibility that a sympathetic counselor could give in to an insistent patient's demands to obtain the documentation. Another safeguard against this scenario could be to make the attestation subject to penalty of perjury.¹⁵⁶

The second step would be for the transsexual to register the medical documentation with the appropriate state agency to make it official. This would probably require taking the form to a vital records agency office and submitting it with the appropriate fee, somewhat like applying for a marriage license or driver's license. Registration could be coupled with changing other vital information, such as a name change or a birth certificate amendment, if state law on those issues would allow it. The vital records agency also should not have any discretion to deny the change if the documentation is all in order and the fee is paid. Allowing administrative discretion here could result in transsexuals being denied their right to legally change sex by an unelected official. Such a determination would be very difficult and expensive for the transsexual to challenge and would likely bring the controversy into the court system—precisely the result this system is supposed to avoid.

The filing should not be a public record. The transsexual should be entitled to privacy in such a profound life change. On the other hand, there might be a feeling that potential spouses of transsexuals should have the right to know of their future spouses' pasts. While arguing the merits of such a right is beyond the scope of this paper, the transsexual's spouse's right could be vindicated by not giving effect to the filing if the spouse can show that he or she reasonably did not know about the transsexual's past as the other sex and that the spouse would not have married the transsexual had he or she known.

This two-step process would help to prevent any fraudulent use of the system. Furthermore, it would hopefully prevent messy and painful litigation later if the validity of the marriage were to be called into question in a divorce, support, estate, wrongful death, or other action. Having a system in place to allow a transsexual to change sex for the purpose of marriage in a clearly defined way would take that issue out of any future litigation, leaving it in the state where it would have been without involving a transsexual.

¹⁵⁶ I do not mean to suggest that gender counselors, or any other medical professional who treats GID for that matter, are at all likely to engage in fraud or perjury. The overwhelming majority of such medical professionals probably would find falsifying this sort of documentation abhorrent and unethical. However, if this system is to provide a rigorous framework for changing sex, then the possibility must be guarded against.

3. The Substance: When the Change Is Recognized

A pure self-identity test would probably be best medically or scientifically for determining when a transsexual has reached the point that he should be recognized as having “changed” sex.¹⁵⁷ A self-identification would allow transsexuals the most freedom to live as the gender into which they feel they should have been born and would aid transsexuals in overcoming the significant distress accompanying having a nontraditional sex identity. However, courts are uncomfortable with allowing people to self-define sex for the purpose of marriage.¹⁵⁸ Politically sensitive legislatures might also be reluctant to allow people to self-identify sex for any purpose.

Some sort of physical manifestation of the change should be required to ease the concerns of courts and legislatures about self-identification. Although SRS is an accepted treatment for GID, it may not be the best line to draw. The state requiring people to have surgery in order to marry goes too far. A better turning point would be when the physical changes become substantially irreversible. Surgery would then be sufficient, but not necessary. Hormonal therapy and other less-intrusive forms of changing the body might also suffice to cause substantially irreversible physical changes. This sort of test is not without precedent; the *M.T.* court held that sexual capacity was what determined sex for the purpose of marriage,¹⁵⁹ which is similar to my requirement of substantially irreversible physical change. In any case, medical professionals could only certify that the transsexual should be legally recognized as the new sex after reaching the required point of treatment.

After undergoing the above procedure and after there has been some substantially irreversible physical change, a transsexual should be considered a full member of the post-transition sex with the right to marry a member of the now opposite sex.

V. CONCLUSION

Forbidding transsexuals to marry as members of their post-transition sex results in unnecessarily harsh scenarios. The non-transsexual spouse has a steep advantage in power in the marriage; after all, the non-transsexual spouse can always argue that the marriage was void ab initio in the event of a divorce or other proceeding in which the validity of the marriage plays a role. Additionally, the transsexual is denied an important societal affirmation of

¹⁵⁷ See Zhou, et al., *supra* note 6; Greenberg, *Defining Male and Female*, *supra* note 12.

¹⁵⁸ See *Corbett v. Corbett*, [1971] P. 83 (Eng. Prob., Divorce & Admiralty Div. 1970); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999); *In re Gardiner*, 42 P.3d 120 (Kan. 2002); *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

¹⁵⁹ *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976).

her deepest identity—something that most people take for granted when they enter a men’s or women’s restroom or locker room. The low incidence of transsexualism is simply not an excuse for marginalizing and discriminating against transsexuals.

There is no clear harm in recognizing that transsexuals were born with the wrong bodies. A rational system for the state to take notice of medicine’s correction of Nature’s oversight would not be a large burden. Even if one is not entirely convinced that transsexuals can “change” sex, one must admit that not allowing someone who is female to all but the most intrusive of inspections to marry a biological male, but allowing that “female” to marry a biological female violates the spirit of the prohibition against same-sex marriage. Legislatures surely did not intend to allow lesbians to marry simply because one of the lesbians used to be a male.

Medicine has long since realized that sex is not completely obviously determined. It is time for the law to catch up.