

BY ANY OTHER NAME: DEFINING MALE AND FEMALE IN MARRIAGE STATUTES

Teresa A. Zakaria[†]

What is marriage? Over the past thirty years, laws have been periodically enacted to define explicitly what was previously understood by all. Before this period, the average citizen would have viewed a statement such as “marriage is the union between a man and a woman” as self-evident and, frankly, superfluous. Who is a man? Who is a woman? These questions, if posed to our ancestors, would similarly have seemed inane. And yet, our culture has reached a point where not only is the meaning of marriage hotly contested, but the very nature of the sexes as well. Indeed, the meaning of the terms “man” and “woman,” or “male” and “female,” is now susceptible to drastic alteration by the courts. The consequences of this development require serious examination. Permitting a person born a man to become a woman in the eyes of the law, and vice-versa, will significantly impact society, especially the institution of marriage.

A clash over the definition of male and female is evidenced by increasing litigation involving the legal sex of transsexuals for purposes of marriage.¹ Transsexuals, people whose sex is unambiguous at birth but who later feel that they are trapped in the wrong body and desire to be the other sex, are becoming increasingly visible in our culture.² Traditionally, sex has been viewed as binary

[†] Juris Doctor Candidate, Ave Maria School of Law, 2005; B.S. Chemical Engineering, Purdue University, 2002. I am grateful to those who commented on earlier drafts of this note, especially Professor James Sonne, Professor Kevin Lee, and Jeremy Chisholm. I alone, of course, am responsible for any remaining errors.

1. The question of the legal sex of a transsexual has also surfaced in several other diverse areas of the law, such as employment discrimination, athletics, insurance and social security benefits, and prison housing.

2. See, e.g., *In a First, Transsexual Plays in Women's Pro Event*, WASH. POST, Mar. 5, 2004, at D2 (reporting on a professional golfer, who was born male, yet was allowed to play in the Women's Australian Open in Sydney); Carolyn Y. Johnson, *For the First Time, Transsexuals May Compete in the Games*, BOSTON GLOBE, Aug. 3, 2004, at C4 (reporting on the decision of the International Olympic Committee that transsexuals who have had surgery and two years of hormone therapy may compete in the Olympics beginning with the 2004 Summer Games in Athens).

(i.e., male and female), immutable, and biologically determined, not socially constructed. Because of this common understanding, there has never been any perceived need to define man and woman explicitly in the law. New alternative views on the definition of sex, however, are challenging the meaning of the terms “man” and “woman.” Some theorists maintain that sex is binary, but assert that one can change sex either by undergoing hormonal treatments and surgery, or by psychologically identifying oneself as a member of the opposite sex. Others deconstruct binary sex categories, arguing that sex exists as five categories,³ an infinite continuum of categories,⁴ or even “points in multidimensional space.”⁵

The consequences of such theories are profound in many areas. Given the current controversy surrounding marriage, which has even led to the proposal of a federal constitutional amendment to define marriage as between one man and one woman,⁶ the definition of male and female *for the purposes of marriage* is particularly germane. Marriage is an integral part of our society. The efforts of states to protect traditional marriage by enacting marriage recognition statutes or constitutional amendments would be undermined by an arbitrary or subjective definition of male and female. Because two persons of the same biological sex of birth lack the capacity to enter into marriage, calling a man a woman or vice-versa for purposes of marriage would destabilize all of marriage law.

Nearly all cases involving transsexuals in the context of marriage have agreed that the statutory terms “man” and “woman” refer to the biological sex of birth, and that any changes in marriage law must be left to the legislature. Most recently, the Florida Court of Appeal

3. “[T]here are many gradations running from female to male; and depending on how one calls the shots, one can argue that along that spectrum lie at least five sexes” Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are Not Enough*, SCIENCES, Mar.-Apr. 1993, at 20, 21. The five categories are male, female, herms, merms, and ferms. *Id.* at 21.

4. “[S]ex is a vast, infinitely malleable continuum that defies the constraints of even five categories.” *Id.*

5. This is Fausto-Sterling’s later position: “But male and female, masculine and feminine, cannot be parsed as some kind of continuum. Rather, sex and gender are best conceptualized as points in a multidimensional space.” Anne Fausto-Sterling, *The Five Sexes, Revisited*, SCIENCES, July-Aug. 2000, at 19, 22.

6. See H.R.J. Res. 106, 108th Cong. (2004); S.J. Res. 26, 108th Cong. (2003). The proposed federal marriage amendment did not have enough support in the Senate to survive a procedural device designed to defeat it. The vote in the Senate on July 14, 2004, was 48 to 50. Lauren Shepherd, *48-50 Vote Ends Debate for a While*, HILL, July 15, 2004, at 1.

stated in the *Kantaras v. Kantaras*⁷ decision that “a change in the meaning commonly attributed to the terms male and female as they are used in the Florida marriage statutes is a question that raises issues of public policy that should be addressed by the legislature.”⁸ Thus far, no state legislature has expanded the definition of sex for purposes of marriage beyond the traditional and common sense meaning. One state appellate court in 1976, however, did drastically alter the definition by adopting “a fundamentally different understanding of what is meant by ‘sex’ for marital purposes.”⁹

State legislatures should explicitly define the terms “man” and “woman” in their marriage statutes as the biological sex of birth in order to prevent courts from redefining those terms at will by regarding sex reassignment surgery or gender self-identity (the sense of being male or female) as effectuating a change of sex. Part I of this note shows that the traditional understanding of male and female is rooted in scientific reality by examining the evidence that sex is immutable and dimorphic and that transsexualism is a psychological disorder. Part II demonstrates that current marriage law, as expressed in marriage statutes and most cases which involve a transsexual as one party to an alleged marriage, recognizes that the definition of male and female for the purposes of marriage is the biological sex of birth. There is a danger, however, that more courts will misinterpret the terms “man” and “woman” if state legislatures do not elucidate the definitions of these terms in marriage statutes. Part III argues that maintaining the definition of legal sex for purposes of marriage as the biological sex of birth is the best public policy because redefining sex based on either surgical procedures or gender self-identity would entail numerous problems and would undermine the ability of states to protect traditional marriage.

I. MALE AND FEMALE

The conceptualization of legal sex, that is, the designation of one’s sex for legal purposes, should be premised on the reality of how human beings actually exist. The underlying reality is that human beings exist immutably as either male or female. Not only is this

7. 884 So.2d 155 (Fla. Dist. Ct. App. 2004), *review denied*, No. SC04-1953, 2005 Fla. LEXIS 373 (Fla. Feb. 23, 2005).

8. *Id.* at 161.

9. *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (1976).

thoroughly supported by modern scientific evidence, but for all of recorded history human beings have recognized that there are two sexes.¹⁰ Yet, today there is a push by those who desire to change their sex to have the state recognize their “sex change” for all legal purposes, including marriage. Transsexuals, as acknowledged by the psychiatric literature, are physically normal at birth, but later suffer from a psychological disorder in which they desire to be the opposite sex. While some do not seek surgery and merely live “in a full-time cross-gender role,”¹¹ many transsexuals are driven to undergo radical hormonal and surgical procedures in an attempt to change sex. The law should not recognize these procedures, which are dangerous and inappropriate treatments for a mental disorder, as effectively changing a person’s sex.

A. *Sex is Biologically Determined, Dimorphic, and Immutable*

The sex of human beings is determined,¹² and sexual development is directed, by genes contained in the “sex chromosomes,” two of the forty-six chromosomes in human cells.¹³ At fertilization, the embryo inherits an X chromosome from the mother, and either an X or a Y chromosome from the father.¹⁴ Therefore, the structure of the sex chromosomes of a male is typically XY.¹⁵ A gene on the Y chromosome leads to the formation of testes, which produce

10. See, e.g., *Genesis* 1:27 (“God created man in his image, in the divine image he created him; male and female he created them.”); THE CODE OF HAMMURABI 45 (Robert Francis Harper ed., Univ. of Chicago Press 2d ed. 2001) (giving only male and female as options, for example: “If a man take a wife and do not arrange with her the contracts, that woman is not a wife.”); AN INTERPRETATION OF THE QUR’AN: ENGLISH TRANSLATION OF THE MEANINGS 538 (Majid Fakhry trans., 2002) (“He has created the pairs, both male and female . . .”); MARK TWAIN, MARK TWAIN’S NOTEBOOK 235 (Albert Bigelow Paine ed., 1935) (“Love seems the swiftest, but it is the slowest of all growths. No man or woman really knows what perfect love is until they have been married a quarter of a century.”).

11. RICHARD F. DOCTER, TRANSVESTITES AND TRANSEXUALS: TOWARD A THEORY OF CROSS-GENDER BEHAVIOR 26 (Richard Green ed., 1988).

12. “Sex determination is the developmental decision that directs the orientation of the undifferentiated embryo into a sexually dimorphic individual.” Eric Vilain, *Anomalies of Human Sexual Development: Clinical Aspects and Genetic Analysis*, in NOVARTIS FOUNDATION, THE GENETICS AND BIOLOGY OF SEX DETERMINATION 43, 43 (2002).

13. D. PETER SNUSTAD & MICHAEL J. SIMMONS, PRINCIPLES OF GENETICS 126, 137 (3d ed. 2003).

14. See Amanda Swain & Robin Lovell-Badge, *Mammalian Sex Determination: A Molecular Drama*, 13 GENES & DEV. 755, 755 (1999).

15. SNUSTAD & SIMMONS, *supra* note 13, at 126. For a discussion of rare conditions of abnormal sex chromosomes, see *infra* Part I.B.2 and accompanying notes.

hormones that promote the development of male sexual characteristics.¹⁶ The absence of this gene in females, whose sex chromosomes have an XX structure, leads to the development of ovaries, which produce hormones promoting the development of female sexual characteristics.¹⁷ This scientific data “support[s] the conclusion that human sexuality is a dichotomy, not a continuum.”¹⁸

In the traditional view, the terms “male” and “female” encompass more than the physical characteristics resulting from genetic differences.¹⁹ A person’s existence as a man or woman also relates to his or her psychological and spiritual characteristics. One group of researchers examining the effect of genes on sex differences concluded: “Men and women, then, *are* different from each other in a number of important respects. These differences go far beyond the basics of anatomy, and are manifested in many aspects of cognition, behaviour, and disorders thereof.”²⁰ Another group of scientists, reporting the discovery of additional genes on the male sex chromosomes, stated: “Translating this knowledge [of genetic differences between human males and females] into an understanding of the myriad differences between the sexes in anatomy, physiology, cognition, behaviour and disease susceptibility presents a monumental challenge, but surely one of broad significance and interest.”²¹ Indeed, a large body of scientific evidence has revealed that many differences between the two sexes are rooted in human nature, not socially constructed.²²

16. Research indicates that the SRY (sex-determining region Y) gene on the Y chromosome controls male sexual development. *Id.*

17. *See id.*; see also JOHN RINGO, FUNDAMENTAL GENETICS 238-39 (2004).

18. Leonard Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RES. 174, 177 (2002).

19. A shift from this traditional view can be seen in the following statement from a 1979 psychology journal article: “[P]sychologists have traditionally assumed a close correspondence between maleness and masculinity and femaleness and femininity. This assumption is now being questioned.” Rhoda Kesler Unger, *Toward a Redefinition of Sex and Gender*, 34 AM. PSYCHOLOGIST 1085, 1086 (1979), reprinted in 4 THE PSYCHOLOGY OF GENDER 449, 450 (Carol Nagy Jacklin ed., 1992).

20. Ian W. Craig et al., *The Genetic Basis for Sex Differences in Human Behaviour: Role of the Sex Chromosomes*, 68 ANNALS OF HUMAN GENETICS 269, 280 (2004).

21. Helen Skaletsky et al., *The Male-Specific Region of the Human Y Chromosome is a Mosaic of Discrete Sequence Classes*, 423 NATURE 825, 836 (2003).

22. *See, e.g.*, KINGSLEY R. BROWNE, BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY (2002) (examining the empirical evidence on the differences between men and women in temperament and cognition, such as with respect to competitiveness, aggressiveness, risk taking, nurturing, and spatial ability); STEVEN E. RHOADS, TAKING SEX DIFFERENCES SERIOUSLY (2004) (compiling a large amount of empirical evidence showing that differences between men

Yet, some disregard the biological evidence that human beings exist as male or female, arguing that the “binary sex paradigm” recognized in traditional jurisprudence “does not reflect reality” because “sex and gender range across a spectrum.”²³ Although the terms “sex” and “gender” are often used interchangeably in legal contexts,²⁴ the word “gender” was actually “borrowed from grammar to designate the sexes viewed as social rather than biological classes.”²⁵ According to an influential 1979 journal article:

The term *gender* may be used to describe those nonphysiological components of sex that are culturally regarded as appropriate to males or to females. . . . The use of the term *gender* serves to reduce assumed parallels between biological and psychological sex or at least to make explicit any assumptions of such parallels. *Gender* may be broadened to include both attributions made by others and

and women regarding aggression, dominance, sexuality, and nurturing are determined by human nature, not society); Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 331, 333-39 (1995) (discussing behavioral differences between the two sexes). “The practice of comparing the sexes in scientific data has been hotly debated by feminists in recent years. The controversy stems, at least in part, from the failure of the findings of empirical research to tell the story that we hoped that they would.” Alice H. Eagly, *On Comparing Women and Men*, 4 FEMINISM AND PSYCHOLOGY 513 (1994), reprinted in THE GENDER AND PSYCHOLOGY READER 159, 159 (Blythe McVicker Clinchy & Julie K. Norem eds., 1998).

23. Julia A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 275, 293 (1999) (footnote omitted); see also, e.g., MARTINE ROTHBLATT, *THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER* 102 (1995) (advocating a paradigm shift from “sexual dimorphism” to “sexual continuum”); Leane Renée, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343, 362 (1997) (“[O]ur legal system views the sexuality of individuals in terms of rigid bipolar and arbitrary classifications schemes”); Mark Strasser, *Harvesting the Fruits of Gardiner: On Marriage, Public Policy, and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 208 (2003) (“It is not at all clear that it makes sense to think of sexuality and sexual identity as involving two exclusive categories rather than a continuum. . . . [I]t may be neither accurate nor fair to pigeon-hole them as male or female.”) (footnote omitted).

24. “[Justice Ruth Bader Ginsburg] was in large part responsible for the fact that the words ‘sex’ and ‘gender’ are now used interchangeably in the law” Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

25. RICHARD A. POSNER, *SEX AND REASON* 24-25 (1992). “The use of gender in contexts other than discussions of grammar is quite recent. Gender was appropriated by American feminists to refer to the social quality of distinctions between the sexes” Rachel T. Hare-Mustin & Jeanne Maracek, *The Meaning of Difference: Gender Theory, Postmodernism, and Psychology*, 43 AM. PSYCHOLOGIST 455 (1988), reprinted in THE GENDER AND PSYCHOLOGY READER, *supra* note 22, at 125, 127.

assumptions and suppositions about one's own properties (gender identity).²⁶

Those who view gender differences as more numerous and significant than sex differences conclude "that because masculinity and femininity are constructed by social forces, they can also be 'deconstructed' en route to a more just society."²⁷ Critical gender theorists "attack the assumption that every human being naturally belongs to one of two discrete gender categories (masculine or feminine), which is determined by biologically-given sexual characteristics (male or female)," and hold that "there is no necessary connection between biological sex and a person's gender presentation."²⁸ This argument, however, cannot bear the weight of the scientific evidence that human beings are male or female from fertilization and that men and women have innate differences. Not only is the genetic basis of sex determination standard textbook knowledge, but it has long been recognized that a "large and growing body of psychological, biological, and anthropological literature suggests that differences between men and women exist in temperament and cognitive functioning."²⁹

The reality that a human being exists immutably as one of two sexes should be reflected in the concept of legal sex for purposes of

26. Rhoda Kesler Unger, *Toward a Redefinition of Sex and Gender*, 34 AM. PSYCHOLOGIST 1085, 1086 (1979), *reprinted in* 4 THE PSYCHOLOGY OF GENDER 449, 450 (Carol Nagy Jacklin ed., 1992).

27. RHOADS, *supra* note 22, at 15 (describing the view held by most feminists). In contrast to the social constructionist viewpoint, Dale O'Leary notes that society does "transmit[] certain expectations to children, but these expectations are hardly arbitrary, nor can they be arbitrarily removed and other expectations substituted for them." DALE O'LEARY, THE GENDER AGENDA: REDEFINING EQUALITY 161 (1997). One writer describes the limitations of social constructionism as follows: it "cannot adequately account for the few universal sex differences that have been consistently documented," it is "unwilling[]" to take seriously the fact that we are embodied, that we have genes, and that we are subject to the same natural processes as the rest of creation . . . [and] cannot avoid, nor can we infinitely shape our physical creatureliness," it generally holds "that there simply is no human nature" and "[e]verything is relative, [and] modifiable," and it is deterministic with culture being the "cause that determines us." Heather Loody, *Sex Differences: Evolved, Constructed, and Designed*, 29 J. PSYCHOL. & THEOLOGY 301, 308 (2001).

28. Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1228-29 (1997) (footnote omitted); *see also, e.g., The International Bill of Gender Rights* (July 4, 1996) (listing among "gender rights" the "right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role"), at <http://www.transgenderlegal.com/ibgr.htm> (on file with the Ave Maria Law Review).

29. Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, SW. L.J. 617, 618 (1984).

marriage. Therefore, the legislature should define the terms “man” and “woman” for purposes of marriage as birth sex, excluding the possibility of legal sex change based on surgical procedures or psychological gender self-identity.

B. *Transsexualism is a Psychological Disorder*

1. *Transsexualism Defined*

Transsexuals are persons who have a strong desire to become the opposite sex of their unambiguous birth sex. They suffer not from a biological condition, but from a psychological disorder.³⁰ The standard psychiatric diagnostic reference in the United States, the Diagnostic and Statistical Manual of Mental Disorders (DSM), recognizes transsexualism (gender dysphoria) as a mental disorder, categorizing it as Gender Identity Disorder (GID).³¹ GID is characterized by “a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex,” accompanied by a “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.”³²

30. “Normally, what makes a disorder a mental disorder is its symptoms, not its cause or etiology.” Bernard Gert, *A Sex Caused Inconsistency in DSM-III-R: The Definition of Mental Disorder and the Definition of Paraphilias*, 17 J. MED. & PHIL. 155, 157 (1992). The exact etiology (the cause and origin of a disease or abnormal condition) of transsexualism is unknown. DOCTER, *supra* note 11, at 57.

31. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text revision 2000) [hereinafter DSM-IV-TR]. The DSM defines gender identity as “an individual’s self-perception as male or female.” *Id.* at 535. Transsexualism first appeared in the psychiatric nomenclature in 1980. KENNETH J. ZUCKER & SUSAN J. BRADLEY, GENDER IDENTITY DISORDER AND PSYCHOSEXUAL PROBLEMS IN CHILDREN AND ADOLESCENTS 6-9 (1995) (giving a “historical background” of GID). However, some now argue that GID and the paraphilias such as pedophilia, should be removed from the DSM. See Ken Hausman, *Controversy Continues to Grow Over DSM’s GID Diagnosis*, PSYCHIATRIC NEWS, July 18, 2003, at 25, <http://pn.psychiatryonline.org/cgi/content/full/38/14/25> (on file with the Ave Maria Law Review).

32. DSM-IV-TR, *supra* note 31, at 576. In addition, “there must be evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning.” *Id.* The DSM also describes coexisting mental disorders with GID and associated descriptive features:

Children with [GID] may manifest coexisting Separation Anxiety Disorder, Generalized Anxiety Disorder, and symptoms of depression. Adolescents are particularly at risk for depression and suicidal ideation and suicide attempts. In adults, anxiety and depressive symptoms may be present. In clinical samples, associated Personality Disorders are more common among males than among females.

Because transsexualism is a psychological disorder, it is distinguished from conditions of abnormal physical sex differentiation, known as hermaphroditism or intersex conditions.³³ The distinction between transsexualism and congenital sexual ambiguities is important because some theorists use the existence of the latter, often combined with an overbroad definition of intersex conditions or inflated estimates of the prevalence of intersex conditions,³⁴ to argue that sex is a continuum. The implication, they argue, is that the traditional legal definitions of male and female should be changed. This deconstruction of binary sex is seen as the “long-term strategy that would benefit all sexual minorities.”³⁵

Id. at 578.

33. It is only in rare cases that “variations [in genitalia] are so far from the normal anatomic standards that they are referred to as ambiguous genitalia or intersex conditions.” Vilain, *supra* note 12, at 44. I agree with Zucker that when using the term “abnormal,” it is important to distinguish between the person who has the condition and the condition itself. For example, hermaphroditism should be viewed as “an abnormality or serious deviation in the growth or structure of an organism,” but the person with this condition should not be viewed as a “monster.” See Kenneth J. Zucker, *Intersexuality and Gender Identity Differentiation*, 10 ANN. REV. SEX RES. 1 n.1 (1999).

34. See, e.g., Greenberg, *supra* note 23, at 281-84 (mistakenly categorizing Klinefelter Syndrome, Turner Syndrome, and others as “intersex”); see also Christine Gorman & Wendy Cole, *Between the Sexes*, TIME, Mar. 1, 2004, at 54, 55 (“One estimate [of intersexual conditions] from a scientific review published in 2000 is that they represent 0.2% to 2% of live births.”); Laura Hermer, *Paradigms Revisited: Intersex Children, Bioethics, & the Law*, 11 ANNALS HEALTH L. 195, 204 n.42 (2002) (including conditions caused by surgical mistake in the category of “intersex”); 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, 17 (2000) (“a broader interpretation [of intersex] includes those with neither XX nor XY chromosome patterns”); Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 963 n.2 (1971) (mistakenly categorizing Klinefelter Syndrome, Turner Syndrome, and others as “intersex”).

35. Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 941 n.126 (2002); see also Janie Allison Sitton, *Introduction to the Symposium: (De)constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law*, 7 WM. & MARY J. WOMEN & L. 1, 3 (2000) (“Transgenderism and intersexuality force us to rethink many of the basic assumptions and constructs on which our society and laws are based. That knowledge can then be used to enhance the ability of all people to express their gender and sexuality as they choose. Additionally, it can foster the development of a gender jurisprudence which recognizes that such expression comes not in one of two forms, but rather in a myriad of forms.”). The term “transgender” has been defined to include “people who identify as transsexual and who seek or have undertaken sex (genital) reassignment surgery, people seeking other surgical procedures and/or hormonal treatments, and people whose permanent or temporary gender crossings are unaccompanied by medical intervention [I]t is a term of self-description.” ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW* 1-2 (2002).

A transsexual's biological sex at birth is not ambiguous.³⁶ According to the DSM, "[i]ndividuals with Gender Identity Disorder have normal genitalia."³⁷ By contrast, intersex conditions occur when an individual's phenotype (genitalia and gonads) cannot be classified as either male or female and when an individual's sex chromosomes are inconsistent with phenotype.³⁸ Intersex conditions include true hermaphroditism, defined by the presence of both testicular and ovarian tissue,³⁹ as well as less severe sexual ambiguities.⁴⁰ These extremely rare pathologies caused by genetic and/or hormonal abnormalities before birth⁴¹ have a prevalence of approximately 0.018%.⁴² The sex of an individual with an intersex condition can ordinarily be determined by various tests conducted by a team of medical specialists.⁴³

36. "GID occurs in individuals who are unambiguously assigned at birth to the male or female sex." Zucker, *supra* note 33, at 52.

37. DSM-IV-TR, *supra* note 31, at 579. The diagnosis of GID cannot be "made if the individual has a concurrent physical intersex condition." *Id.* at 576. "Invariably, youngsters with gender identity disorder show no signs of physical hermaphroditism, including hormonal anomaly." ZUCKER & BRADLEY, *supra* note 31, at 153.

38. Sax, *supra* note 18, at 175.

39. Stephen S. Wachtel, *XX Sex Reversal in the Human*, in MOLECULAR GENETICS OF SEX DETERMINATION 267, 274 (Stephen S. Wachtel ed., 1994).

40. The most common intersex conditions are Complete Androgen Insensitivity Syndrome (CAIS), Congenital Adrenal Hyperplasia (CAH), and mosaicism (true hermaphroditism). Individuals with CAIS have XY chromosomes, but because their cells are unable to recognize the male hormone androgen, they typically have external female genitalia, internal testicles, and no ovaries or uterus, and the diagnosis is not suspected until puberty. Sax, *supra* note 18, at 175. An individual with CAH has XX chromosomes and female gonads, but an enzyme deficiency causes excess male hormones to be produced, which results in genitalia which are completely masculine or ambiguous. *Id.* at 175-76. One who has mosaicism has some cells that have XX chromosomes and some cells that have XY chromosomes, leading to ambiguous sexual characteristics. *Id.* at 175.

41. Intersex conditions are caused by an "abnormality in chromosomes or sex hormones, or in the unborn baby's response to the hormones." Carol A. Turkington, *Intersex States*, in 3 GALE ENCYCLOPEDIA OF MEDICINE 1636, 1637 (Jacqueline L. Longe ed., 2d ed. 2001).

42. Leonard Sax has shown that because several conditions included in Anne Fausto-Sterling's high estimate of 1.7% are *not* recognized by clinicians as intersex, such as Klinefelter Syndrome, Turner Syndrome, and late-onset congenital adrenal hyperplasia, a more accurate estimate of the prevalence of intersex conditions is 0.018%. Sax, *supra* note 18, at 175-77. Therefore, more than 99.98% of human beings do not suffer from an intersex condition. *Id.* at 177. Individuals with Klinefelter Syndrome (usually XXY) are phenotypically male, and those with Turner Syndrome (usually XO) are phenotypically female. SNUSTAD & SIMMONS, *supra* note 13, at 144-45.

43. "Medical practice is now very cautious and does not use surgery without at least a specialized team of people from various disciplines, including endocrinologists, urologists, psychologists and geneticists, to make the most precise diagnosis" concerning the sex of an infant born with ambiguous genitalia. Vilain, *supra* note 12, at 54.

The scientific community recognizes that intersex conditions are not biologically normal,⁴⁴ but are an extremely rare pathology.⁴⁵ Furthermore, the “tragedy of congenital deformities does not prove there are more than two sexes . . . any more than the fact that some babies are born blind proves that it isn’t natural for human beings to see.”⁴⁶ In other words, the existence of abnormalities does not undermine human sexual dimorphism any more than other types of biological abnormalities, such as conjoined (Siamese) twins, undermine typical human physiology. Conflating physical abnormalities caused by a genetic anomaly with the psychological disorder of transsexualism does not establish that sex is malleable or exists on a continuum.

2. *Sex Reassignment Surgery as Treatment*

Unlike other psychiatric or medical conditions, GID is the only pathology for which “the patient makes the diagnosis and prescribes the treatment.”⁴⁷ The treatment requested can be very severe—many transsexuals “perceive a driving need to align their genitals with their gender identity” through the “ultimate step” of surgical procedures.⁴⁸ Sex reassignment surgery (SRS) aims to relieve a psychological

44. Normal is defined as “that which functions in accordance with its design.” Zucker, *supra* note 33, at 1 n.1 (citation omitted).

45. The medical community generally considers the rare instances of intersex conditions as exceptions to the rule of sex differentiation. See, e.g., Ursula Mittwoch, *Genetics of Sex Determination: Exceptions That Prove the Rule*, 71 *MOLECULAR GENETICS & METABOLISM* 405, 406 (2000) (“One of the exceptions that proves the rule of the genetics of sex determination is the existence of individuals with both testicular and ovarian tissue.”); Zucker, *supra* note 33, at 1 n.1 (“Given our understanding of the processes that govern normal physical sex differentiation and the processes that go awry in the differentiation of physical intersex conditions, it is hard to argue that such conditions are simply variants from the norm.”). Some do argue, however, that the physical intersex conditions are not abnormal but are “simply variants of typical or normal physical sex differentiation in ordinary biological males and females.” *Id.* (citing Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 *AM. J. HUM. BIOLOGY* 151 (2000)); see also Alice Domurat Dreger, “*Ambiguous Sex*” or *Ambivalent Medicine?*, *HASTINGS CENTER REP.*, May-June 1998, at 24, 30 (“‘Ambiguous genitalia’ do not constitute a disease. They simply constitute a failure to fit a particular (and, at present, a particularly demanding) definition of normality.”).

46. O’LEARY, *supra* note 27, at 70.

47. Richard Green, *Reflections on “Transsexualism and Sex Reassignment” 1969-1999*, 4 *INT’L J. TRANSGENDERISM* (Jan.-Mar. 2000), at <http://www.symposion.com/ijt/green/presidential/green00.htm> (on file with the Ave Maria Law Review).

48. Kogan, *supra* note 28, at 1227.

disorder by surgically removing healthy organs,⁴⁹ a radical and irreversible step.⁵⁰ Furthermore, SRS “has distracted effort from genuine investigations attempting to find out just what has gone wrong for” those suffering from GID.⁵¹ Instituting completion of SRS, a dangerous and inappropriate “remedy,” as the requirement for a legal sex change for purposes of marriage might only encourage the false notions that it is possible to change sex and that the solution to psychic pain is surgical.⁵²

49. Surgical procedures for male to female could include all of the following: penectomy, orchiectomy, vaginoplasty, breast enlargement, facial surgery, and voice modification surgery. Some of the procedures for female to male are the following: phalloplasty, mastectomy, hysterectomy, salpingo-oophorectomy, vaginectomy, metoidioplasty, scrotoplasty, and urethroplasty. Walter Meyer III et al., *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version*, 13 J. PSYCHOL. & HUM. SEXUALITY 1, 11 [hereinafter *HBIGDA Standards of Care*]. Hormone treatment precedes genital surgery. *Id.* at 4. Removal of sexual organs means that reproduction is impossible. *Id.* at 23. One of the first to undergo SRS was the American soldier George Jorgensen, who changed his name to Christine after the operation in Denmark. HARRY BENJAMIN, *THE TRANSEXUAL PHENOMENON* 14-15 (1966).

50. “[N]ot everyone is satisfied with surgery and, indeed, some tragic outcomes have been noted, due in part to the irreversibility of the process.” David H. Barlow et al., *Gender Identity Change in Transsexuals: Follow-Up and Replications*, 36 ARCHIVES GEN. PSYCHIATRY 1001, 1006 (1979) (footnotes omitted). Dr. Paul McHugh, Psychiatrist-in-Chief and Director of the Department of Psychiatry and Behavioral Sciences at Johns Hopkins, explained, “The zeal for this sex-change surgery—perhaps, with the exception of frontal lobotomy, the most radical therapy ever encouraged by twentieth-century psychiatrists—did not derive from critical reasoning or thoughtful assessments[,]” but from the spirit of the seventies that “if you can do it and he wants it, why not do it?” Paul R. McHugh, *Psychiatric Misadventures, reprinted in THE BEST AMERICAN ESSAYS* 1993, at 187, 194 (Joseph Epstein ed., 1993).

51. McHugh, *supra* note 50, at 194. “We need to know how to prevent such sadness, indeed horror. We have to learn how to manage this condition as a mental disorder when we fail to prevent it.” *Id.* at 194-95.

52. See Sira Dermen et al., Letter to the Editor, *Transsexuals Need Therapy, Not Surgery*, DAILY TELEGRAPH (London), July 15, 2002, at 19, 2002 WL 23526425. Renée Richards (born Richard Raskind) competed in tennis as a man during college at Yale and then at Wimbledon before undergoing SRS in 1975 and suing the United States Tennis Association for the right to play in the women’s division. See *Richards v. United States Tennis Ass’n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977). Richards is held out as a “classic example” of the failure of psychotherapy and the subsequent success of SRS. RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 104 (1992). However, Richards “sometimes regrets having had the operation at all.” Cindy Shmerler, *Regrets, She’s Had a Few*, TENNIS, Mar. 1999, at 31, 31. Richards comments that “I get a lot of letters from people in their 40s who are considering having this kind of operation . . . And I discourage all of them. . . . [I]f you’re a 45-year-old man and you’re an airline pilot and you have an ex-wife and three adolescent kids, you better get on Thorazine or Zoloft or Prozac or get locked up or do whatever it takes to keep you from being allowed to do something like this.” *Id.* Interestingly, Richards also disagreed with the decision to allow transsexuals to compete in the Olympic Games, stating that it “defies fairness.” Selena Roberts, *I.O.C. Enters a New World and Stumbles*, N.Y. TIMES, May 20, 2004, at D1 (“As Richards noted, hormone treatments for

Marriage laws should not promote SRS as a vehicle for altering legal sex for purposes of marriage because SRS can result in serious health problems. Even proponents of SRS admit that the surgery should be approached with caution. The standards of care developed for SRS by an international organization focused on transsexualism proscribe that “[a]ny surgical intervention should not be carried out prior to adulthood, or prior to a real-life experience of at least two years in the gender role of the sex with which the adolescent identifies.”⁵³ SRS and hormonal treatments cause many medical complications.⁵⁴ One study reported that an average of six years after undergoing SRS, three of twenty-nine male patients had committed suicide.⁵⁵ Medicare does not cover SRS because it is experimental and has a high rate of serious complications.⁵⁶ Furthermore, some courts adjudicating issues of reimbursement for SRS by federal agencies⁵⁷

transgender athletes might diminish muscle mass differences between a man and woman, but the skeletal advantages—and possibly lung and heart capacities—are left unchanged.”).

53. *HBIGDA Standards of Care*, *supra* note 49, at 14-15.

54. *See, e.g.*, Walter Futterweit, *Endocrine Therapy of Transsexualism and Potential Complications of Long-Term Treatment*, 27 *ARCHIVES SEXUAL BEHAV.* 209 (1998) (describing many medical side effects of cross-sex hormonal treatment, including cardiovascular disease, liver abnormalities, and cancer); L. Jarolím, *Surgical Conversion of Genitalia in Transsexual Patients*, 85 *BRIT. J. UROLOGY INT’L* 851, 855 (2000) (“Among the usual postoperative complications are infection, herniation, and early thrombo-embolic complications.”); S. Krege et al., *Male-to-Female Transsexualism: A Technique, Results and Long-Term Follow-Up in 66 Patients*, 88 *BRIT. J. UROLOGY INT’L* 396, 396 (2001) (reporting major complications such as severe wound infections, rectal lesion, and necrosis in 14% of 66 patients and minor complications such as meatal stenosis in 36% of patients).

55. T. Sørensen, *A Follow-Up Study of Operated Transsexual Males*, 63 *ACTA PSYCHIATRICA SCANDINAVICA* 486, 490 (1981). “[I]t is quite evident that the three who committed suicide regretted the operation.” *Id.* at 502. A study of eight female transsexuals by the same author revealed that an average of five years after SRS, two patients believed their psychic condition was worse and three that it was unchanged as a result of the operation. T. Sørensen, *A Follow-Up Study of Operated Transsexual Females*, 64 *ACTA PSYCHIATRICA SCANDINAVICA* 50, 53, 57 (1981).

56. Medicare Program National Coverage Decisions, 54 *Fed. Reg.* 34,555, 34,572 (Aug. 21, 1989) (“Transsexual surgery for sex reassignment of transsexuals is controversial. Because of the lack of well controlled, long-term studies of the safety and effectiveness of the surgical procedures and attendant therapies for transsexualism, the treatment is considered experimental. Moreover, there is a high rate of serious complications of these surgical procedures. For these reasons, transsexual surgery is not covered.”).

57. *See, e.g.*, *Smith v. Rasmussen*, 249 F.3d 755, 761 (8th Cir. 2001) (holding that “the State’s prohibition on funding of sex reassignment surgery is both reasonable and consistent with the Medicaid Act” and is not arbitrary); *Rush v. Parham*, 625 F.2d 1150 (5th Cir. 1980) (reversing summary judgment to allow defendants to show that their ban on paying for experimental treatment was based on the classification of such treatment as not medically necessary); *Rush v. Johnson*, 565 F. Supp. 856, 868 (N.D. Ga. 1983) (“[T]he court finds that the State could reasonably determine that transsexual surgery is experimental. The evidence demonstrates that it is neither

and private insurance carriers⁵⁸ have denied the reimbursement on the grounds that SRS is not medically necessary.⁵⁹ The experimental procedure of surgically removing healthy organs should not supply the basis for courts to change the definition of man and woman.

SRS is an inappropriate, permanent physical solution to a psychological disorder. One psychiatrist compared a man who feels that he is a woman trapped in a man's body to an anorexic who feels that she is obese: "We don't do liposuction on anorexics. Why amputate the genitals of these poor men? Surely, the fault is in the mind, not the member."⁶⁰ Another example of a false surgical treatment for a psychological disorder is the requested treatment for apotemnophilia, the desire to amputate one's healthy body parts.⁶¹ The same reasons given by those who want to amputate genitals are given by those who want to amputate limbs.⁶² Two men desiring

generally accepted as a proven and effective treatment nor is there authoritative evidence that the surgery is safe and effective."). *But see, e.g.*, *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) (holding that the Medicaid statute could not absolutely exclude sex reassignment surgery); *J.D. v. Lackner*, 145 Cal. Rptr. 570, 572 (Cal. Ct. App. 1978) (holding that Medi-Cal benefits would cover SRS because it was "medically reasonable and necessary").

58. *See, e.g.*, *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758 (2d Cir. 2002) (holding that an employer food market was not required to pay for the SRS of an employee, who sought reimbursement of double mastectomies, a hysterectomy, and hormone therapy through his employer's healthcare plan).

59. The variance in rulings on the medical necessity of SRS has led some to conclude that the "so-called 'standard' of medical necessity often leads to inconsistent rulings within the courts, and sometimes leads to absurd results, such as sex reassignment surgery being paid for with public funds, and reflects the need for Congress—not the courts—to decide what types of services are 'medically necessary' under the Medicaid program." Carole L. Stewart, Comment, *Mandated Medicaid Coverage of Viagra: Raising the Issues of Questionable Priorities, the Need for a Definition of Medical Necessity, and the Politics of Poverty*, 44 LOY. L. REV. 611, 626 (1998) (footnote omitted). The availability of hormonal therapy and sex reassignment surgery for prisoners has also been heavily litigated. *See, e.g.*, *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997) (holding that a prison's failure to provide estrogen therapy to transsexual prisoner did not constitute cruel and unusual punishment because the prison system was not required to provide radical and expensive procedures).

60. McHugh, *supra* note 50, at 193-94.

61. John Money coined the term apotemnophilia (Greek for "amputation love"). John Money et al., *Apotemnophilia: Two Cases of Self-Demand Amputation as a Paraphilia*, 13 J. SEX RES. 115, 115 (1977). Money was one of the early researchers on transsexualism, co-editing an early book on the subject. *TRANSSEXUALISM AND SEX-REASSIGNMENT* (Richard Green & John Money eds., 1969). There are very few case reports of apotemnophilia in medical literature. *See* J. Mike Bensler & Douglas S. Paauw, *Apotemnophilia Masquerading as Medical Morbidity*, 96 S. MED. J. 674, 674-75 (2003) (reporting the first case of a patient with apotemnophilia in his twenties).

62. *See* Carl Elliott, *A New Way to Be Mad*, ATLANTIC MONTHLY, Dec. 2000, at 73, 82 ("Clinicians and patients alike often suggest that apotemnophilia is like gender-identity disorder, and that amputation is like sex-reassignment surgery.").

amputation of one leg “perceived a relationship between amputation and transsexualism in the sense that both involve self-demand[ed] surgical alteration of the body.”⁶³ Another sufferer of apotemnophilia explained, “Just as a transsexual is not happy with his own body but longs to have the body of another sex, in the same way I am not happy with my present body, but long for a peg-leg.”⁶⁴ The law should not promote SRS by allowing change of legal sex for purposes of marriage upon completion of the amputation of genitals, while viewing the amputation of healthy limbs as “unlawful practice of medicine.”⁶⁵

It becomes even more apparent that SRS is an inappropriate surgical treatment which should not be encouraged by the law when SRS is considered as a permanent solution to a disorder which can remit. For example, one man suffering from GID was notified the day before his scheduled SRS that the hospital had discontinued such surgeries, and subsequently his gender dysphoria ended.⁶⁶ Another report tells of a patient experiencing a four-year remission of gender dysphoria, stating that there are “a few parallels in the literature, despite the common notion that adult GID is fixed and persistent once it develops.”⁶⁷ Furthermore, after demonstrating that the impact of GID on adolescents may vary widely,⁶⁸ another researcher discouraged premature sex reassignment measures and encouraged

63. Money et al., *supra* note 61, at 124 (“Transsexualism is one manifestation of a transposition of gender identity A lesser degree of transposition was evident in the two [reported] cases . . .”).

64. Walter Everaerd, *A Case of Apotemnophilia: A Handicap as a Sexual Preference*, 37 AM. J. OF PSYCHOTHERAPY 285, 286 (1983). Everaerd commented that in one respect his sessions with this man were “very much like” those with transsexuals; at first the man “emphatically stated that he did not want psychotherapy. He wanted his body to adapt to the image that he is convinced will make him happy.” *Id.* at 292.

65. *People v. Brown*, 109 Cal. Rptr. 2d 879, 886 (Cal. Ct. App. 2001). In *People v. Brown*, the California Court of Appeals upheld the conviction of Dr. Brown for the unlawful practice of medicine and for second degree murder. Dr. Brown had previously had his California medical license revoked, but continued to perform “transgender reassignment surgeries” in Mexico. *Id.* at 881. In this case, Dr. Brown had amputated a healthy leg of an apotemnophile, Bondy, in Mexico, who then died of gangrene when Dr. Brown brought him back to California for postoperative treatment. *Id.* at 882-83, 886-87. The court stated, “Surgeons in the United States will not amputate the limbs of apotemnophiliacs.” *Id.* at 881.

66. Elsie R. Shore, *The Former Transsexual: A Case Study*, 13 ARCHIVES SEXUAL BEHAV. 277, 280-82 (1984).

67. Isaac Marks et al., *Adult Gender Identity Disorder Can Remit*, 41 COMPREHENSIVE PSYCHIATRY 273, 273 (July-Aug. 2000).

68. Bernd Meyenburg, *Gender Identity Disorder in Adolescence: Outcomes of Psychotherapy*, 34 ADOLESCENCE 305 (1999).

psychotherapy.⁶⁹ The few follow-up studies on SRS⁷⁰ report patients' regrets and dissatisfaction after SRS.⁷¹ This radical and irreversible procedure is not a suitable treatment for a mental disorder that can remit.

SRS is not a medically accepted procedure and should not form the basis of a dramatic shift in the law allowing for a change of legal sex for purposes of marriage. Because of the myriad problems and dangers associated with SRS, clinics which perform the surgery are no longer affiliated with academia,⁷² but are independent "client-centered programs [that] cater to the diverse interests and personal goals inherent in gender-variant peoples and populations."⁷³ By contrast, legitimate medical institutions exist to diagnose and heal diseases, not to cater to self-destructive personal interests.⁷⁴ Unlike SRS, proper treatment for those suffering from the mental disorder of GID aims to restore mental health in accord with the person's

69. *Id.* at 312.

70. "Psychosocial research into transsexualism is in its infancy because of 30 years of poor quality research." Kenny Midence & Isabel Hargreaves, *Psychosocial Adjustment in Male-to-Female Transsexuals: An Overview of the Research Evidence*, 131 J. PSYCHOL. 602, 611 (1997). Bradley and Zucker, two of the small number of investigators in the area of GID, report that "[t]here have been no systematic follow-up studies of adolescents with GID." Susan J. Bradley & Kenneth J. Zucker, *Gender Identity Disorder: A Review of the Past 10 Years*, 36 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 872, 875 (1997).

71. A Swedish study reported that of 13 male patients, after six to 25 years after the surgery, four regretted the surgery. Gunnar Lindemalm et al., *Long-Term Follow-Up of "Sex Change" in 13 Male-to-Female Transsexuals*, 15 ARCHIVES SEXUAL BEHAV. 187 (1986). For other studies following-up on the results of SRS and finding a percentage of cases that regretted the procedure, see, for example, Owe Bodlund & Gunnar Kullgren, *Transsexualism—General Outcome and Prognostic Factors: A Five-Year Follow-Up Study of Nineteen Transsexuals in the Process of Changing Sex*, 25 ARCHIVES SEXUAL BEHAV. 303 (1996); M. Landén et al., *Factors Predictive of Regret in Sex Reassignment*, 97 ACTA PSYCHIATRICA SCANDINAVICA 284 (1998).

72. After Johns Hopkins, the first medical facility in the United States involved in SRS, discontinued transsexual operations, many of the other university-affiliated clinics in the U.S. followed suit. Anne Bolin, *Transcending and Transgendering: Male-to-Female Transsexuals, Dichotomy and Diversity*, in THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 447, 463 (Gilbert Herdt ed., 1994).

73. *Id.* at 464.

74. The HBGDA Standards of Care acknowledges that "[m]any persons . . . object on ethical grounds to surgery for GID." *HBGDA Standards of Care*, *supra* note 49, at 25. It goes on to suggest that "[i]t is important that professionals dealing with patients with gender identity disorders feel comfortable about altering anatomically normal structures" and that the "resistance against performing surgery on the ethical basis of 'above all do no harm' should be respected, discussed, and met with the opportunity to learn from patients themselves about the psychological distress of having profound gender identity disorder." *Id.*

physical reality, enabling the person to accept his or her birth sex.⁷⁵ The discredited radical procedure of SRS should not cause the traditional understanding of sex as immutable from birth to be eradicated from the law.

The sex of a transsexual at birth is unambiguous, but he or she later suffers from a mental disorder in which he or she desires to become a member of the opposite sex. However, it is not possible for a person to “change sex” because human beings exist immutably as either male or female. SRS is an inappropriate, permanent response to transsexualism; for purposes of marriage, the law should not consider a man who has undergone SRS to be a woman, or a woman who has undergone SRS to be a man. Surgical removal of healthy organs and construction of sexual organs of the other sex does not result in a change of sex, and therefore should not result in the legal capacity to marry a person of the same birth sex.

II. MARRIAGE LAW AND LEGAL SEX FOR PURPOSES OF MARRIAGE

The legal community has not previously addressed the question of how to define the terms “man,” “woman,” and “sex.” These terms were simply understood according to their common and traditional meaning. The majority of cases examining the validity of a “marriage” where one party was a transsexual have correctly interpreted marriage statutes and case law by holding that a transsexual cannot marry a person of the same birth sex, and that only the legislature can make changes to marriage law. As will be discussed in Part III, the definitions of man and woman for purposes of marriage have tremendous public policy implications. Given the possibility that courts could redefine the terms “man” and “woman” at will, state legislatures should make explicit the hitherto common

75. Meyenburg describes several studies which reported successful psychotherapy in individuals who at one time desired SRS. Meyenburg, *supra* note 68, at 306. See also DOCTER, *supra* note 11, at 26 (stating that it is a myth that transsexualism “is unremitting and irreversible” and that “[i]n clinical settings . . . it is common to see such individuals change their minds and their behavior”); Barlow et al., *supra* note 50, at 1006-07 (“A viable psychotherapeutic alternative [to surgery] is needed . . . psychosocial intervention for transsexualism can be effective . . .”); Dermen et al., *supra* note 52 (“Through years of psychoanalytic psychotherapy, some patients begin to understand the origins of their painful conflicting feelings and can find new ways of dealing with them, other than by trying to alter their bodies.”). With respect to children with GID, researchers have reported their “experience that a sizable number of children [with GID] and their families achieve a great deal of change. In these cases, the gender identity disorder resolves fully, and nothing in the children’s behavior or fantasy suggests that gender identity issues remain problematic.” ZUCKER & BRADLEY, *supra* note 31, at 282.

and traditional definition of male and female as the immutable biological sex of birth.

A. *Laws Defining Marriage*

To date, thirty-nine states have passed laws stating explicitly that only marriage between a man and woman can be performed in the state, and that foreign marriages between two people of the same sex will not be recognized.⁷⁶ These laws are either statutes passed by state legislatures, known as Defense of Marriage Acts (DOMAs),⁷⁷ or constitutional amendments.⁷⁸ Five additional states have laws predating DOMAs that recognize marriage as the union of a man and a woman.⁷⁹ Furthermore, a federal DOMA provides that states are not required to accept same-sex marriages from other states:

76. The exact language of these laws varies; they allow marriage of “only a man and a woman,” prohibit marriage between “persons of the same sex,” or do both. David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the “Same-Sex Marriage” Debate*, 32 CREIGHTON L. REV. 3, 11 (1998). Currently, only the Massachusetts judiciary has legalized same-sex marriage. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

77. See ALA. CODE § 30-1-19 (Supp. 2003); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. §§ 9-11-107, -109, -208 (Michie 2002); CAL. FAMILY CODE §§ 300, 308.5 (2004); COLO. REV. STAT. ANN. § 14-2-104 (West Supp. 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19-3-3.1 (1999); HAW. REV. STAT. ANN. § 572-1, -3 (Michie 1999); IDAHO CODE § 32-201, -209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West Supp. 2003); IND. CODE ANN. § 31-11-1-1 (Michie 1999); IOWA CODE ANN. §§ 595.2, .20 (West 2001); KAN. STAT. ANN. § 23-101 (1999); KY. REV. STAT. ANN. § 402.020, .045 (Michie 1999); LA. CIV. CODE ANN. arts. 89, 3520 (West Supp. 2004); ME. REV. STAT. ANN. tit. 19-A, § 701 (West 1964 & Supp. 1998); MICH. COMP. LAWS ANN. §§ 551.1-2, .271-.272 (West Supp. 2004); MINN. STAT. ANN. § 517.01 (West Supp. 2004); MISS. CODE ANN. § 93-1-1(2) (1972); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-401 (2003); N.C. GEN. STAT. § 51-1.2 (2003); N.D. CENT. CODE § 14-03-01, -08 (Supp. 2003); OHIO REV. CODE ANN. § 3101.01 (2000); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2000); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-1-1, -38 (Michie Supp. 2003); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 6.204 (Vernon 1998); UTAH CODE ANN. § 30-1-2 (Supp. 2003); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.020 (West Supp. 2004); W. VA. CODE ANN. § 48-2-603 (Michie 2001). On March 14, 2005, a California judge tentatively ruled that sections 300 and 308.5 of the California Family Code are unconstitutional. Dean E. Murphy, *Judge in California Voids Ban on Same-Sex Marriage*, N.Y. TIMES, Mar. 15, 2005, at A16, 2005 WLNR 3971758.

78. ALASKA CONST., art. I, § 25; ARK. CONST. amend. LXXXIII; GA. CONST. art. I, § IV; HAW. CONST. art. I, § 23; KY. CONST. § 233a; LA. CONST. art. 12, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263-A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29.

79. See CONN. GEN. STAT. ANN. § 45a-727a (West 2004) (“the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman”); MD. CODE

No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.⁸⁰

The authors of these DOMAs and constitutional amendments did not include the terms “man,” “woman,” or “sex” in the definition section of the legislation. It would not have been necessary to explicitly define words whose definitions were universally recognized. Yet, in the context of writing about transsexuals, some now argue that this is a “failure” of the legislation,⁸¹ and that the meaning of those terms is open to debate. They state that these “legislative enactments . . . fail to define the terms ‘male’ and ‘female’ so that determining who is now legally permitted to marry is unclear,”⁸² and that the federal DOMA is unclear “with respect to whether a marriage between a post-operative transsexual and his or her spouse will be recognized for federal purposes.”⁸³

However, in applying the rules of statutory interpretation⁸⁴ to marriage statutes, the words “male,” “female,” and “sex” must be understood according to their ordinary and natural meaning, which is

ANN., FAM. LAW § 2-201 (2004) (“between a man and a woman”); N.H. REV. STAT. ANN. § 457:1-2 (1992) (“No man shall marry . . . any other man” and “No woman shall marry . . . any other woman”); WIS. STAT. ANN. § 765.01 (West 2001) (“husband and wife”); WYO. STAT. ANN. § 20-1-101 (2003) (“a male and a female person”). Although Vermont permits same-sex civil unions, it also statutorily defines marriage as the “union of one man and one woman.” VT. STAT. ANN. tit. 15, § 8 (2002).

80. 28 U.S.C. § 1738C (2000). The first part of the federal DOMA states that under federal law, “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.” 1 U.S.C. § 7 (2000).

81. John A. Fisher, *Sex Determination for Federal Purposes: Is Transsexual Immigration Via Marriage Permissible Under the Defense of Marriage Act?*, 10 MICH. J. GENDER & L. 237, 245 (2004) (“DOMA’s failure to define ‘opposite sex,’ ‘man,’ or ‘woman’ is not surprising. Embedded in American consciousness and American jurisprudence is an assumption that the delineation between ‘man’ and ‘woman’ is clear, precise, and intuitive.”).

82. Greenberg, *supra* note 23, at 268.

83. Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL’Y 301, 301 (2003).

84. “When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.” *Smith v. United States*, 508 U.S. 223, 228 (1993). “A basic principle of statutory construction provides that where words in a statute are not defined, they ‘must be given their ordinary meaning.’” *United States v. Granderson*, 511 U.S. 39, 71 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 462 (1991)).

the traditional understanding of sex as the biological sex of birth.⁸⁵ Furthermore, this traditional understanding of sex as immutable has been acknowledged by the Supreme Court numerous times, mostly in sex discrimination cases. For example, the Supreme Court stated in *Frontiero v. Richardson* that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth.”⁸⁶ In *Caban v. Mohammed*, the Court also stated that “[g]ender, like race, is a highly visible and immutable characteristic,”⁸⁷ and in *City of Los Angeles Department of Water and Power v. Manhart*, it stated that “sex [is] the one acknowledged immutable difference between men and women.”⁸⁸

The majority of state courts addressing transsexual “marriage” have adhered to this understanding and have held such “marriages” to be void. There is a real possibility, however, that in the future, courts will take it upon themselves to redefine the meaning of “man” and “woman” in marriage statutes. This is most directly evidenced by the holdings of lower courts in Kansas and Florida, which were subsequently reversed on appeal, and by the New Jersey Appellate Court. Additional evidence includes the criticism of the idea of

85. The dictionary definition of “sex” is “[t]he property or quality by which organisms are classified as female or male on the basis of their reproductive organs and functions. . . . The condition or character of being female or male; the physiological, functional, and psychological differences that distinguish the female and the male.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1595 (4th ed. 2000). “Female” is defined as a “member of the sex that produces ova or bears young.” *Id.* at 650. “Woman” is defined as an “adult female human.” *Id.* at 1978. “Male” is defined as a “member of the sex that begets young by fertilizing ova.” *Id.* at 1058. “Man” is defined as an “adult male human.” *Id.* at 1061.

86. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

87. *Caban v. Mohammed*, 441 U.S. 380, 398 (1979).

88. *City of Los Angeles Dep’t. of Water and Power v. Manhart*, 435 U.S. 702, 727 (1978) (Burger & Rehnquist, JJ., concurring in part and dissenting in part); see also, e.g., *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 330 (1993) (Stevens, J., dissenting) (“[T]he capacity to become pregnant is the inherited and immutable characteristic that ‘primarily differentiates the female from the male.’”) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting)); *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (recognizing “immutable characteristic[s] such as race, gender, or ethnic background”); *Michael M. v. Superior Court*, 450 U.S. 464, 467 (1981) (upholding the California statutory rape law against equal protection challenge and agreeing with the California Supreme Court that “the immutable physiological fact that it is the female exclusively who can become pregnant”) (quoting *Michael M. v. Superior Court*, 601 P.2d 572, 574 (Cal. 1979)); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (noting that gender is one of the “immutable human attributes”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (“[G]ender . . . is an immutable characteristic which its possessors are powerless to escape or set aside.”).

binary immutable sex by gender theorists,⁸⁹ growing litigation concerning the issue of legal sex,⁹⁰ and the increasing tendency of judges to usurp the role of the legislature.⁹¹ To preempt misinterpretation of the terms “man” and “woman” by courts, state legislatures should explicitly define these terms in their marriage statutes as the biological sex of birth. As a corollary, many state legislatures must also address another potential source of confusion surrounding legal sex for purposes of marriage, by evaluating their policy on birth certificate amendments. Many states permit a transsexual who has undergone SRS to change the sex designation of his or her birth certificate.⁹² These document amendments have *not*

89. See *supra* Part I.A.

90. As shown in Part II.B., from 1999 to 2004, the issue has been addressed by the appellate or supreme courts of four states.

91. For a discussion of the trend of judicial activism, see ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003). “The nations of the West have long been afraid of catching the ‘American disease’—the seizure by judges of authority properly belonging to the people and their elected representatives.” *Id.* at 1.

92. These states allow a change of birth certificate sex/gender based on SRS by either amending the certificate or granting a new one. An amended certificate shows the original sex designation and the “new sex.” In the case where a new certificate is issued, the original certificate can be seen only by court order. See ALA. CODE § 22-9A-19(d) (1997); ARIZ. REV. STAT. ANN. § 36-326(A)(4) (West 2003); ARK. CODE ANN. § 20-18-307(d) (Michie 2000); CAL. HEALTH & SAFETY CODE § 103425 (West 1996) (petition); COLO. REV. STAT. ANN. 25-2-115(4) (West 2001); CONN. GEN. STAT. ANN. § 19a-42(c) (West 2003); D.C. CODE ANN. § 7-217(d) (2001); GA. CODE ANN. § 31-10-23(e) (2001); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (Michie 2004); 410 ILL. COMP. STAT. ANN. 535/17(d) (West 1997); KY. REV. STAT. ANN. § 213.121(5) (Michie 1998); LA. REV. STAT. ANN. § 40:62 (West 2001); MD. CODE ANN., HEALTH-GEN. § 4-214(b)(5) (2000); MASS. GEN. LAWS ANN. ch. 46, § 13(e) (West 1994); MICH. COMP. LAWS ANN. § 333.2831(c) (West 2001); MO. ANN. STAT. § 193.215(9) (West 2004); NEB. REV. STAT. ANN. § 71-604.01 (Michie 1998); N.J. STAT. ANN. § 26:8-40.12 (West 1996); N.M. STAT. ANN. § 24-14-25(D) (Michie 1978); N.C. GEN. STAT. § 130A-118(b)(4) (2003); OR. REV. STAT. § 432.235(4) (2003); UTAH CODE ANN. § 26-2-11 (1998); VA. CODE ANN. § 32.1-269(E) (Michie 2004); WIS. STAT. ANN. § 69.15(4)(b) (West 2003). Tennessee has explicitly designated in a birth certificate statute that the sex designation on the certificate cannot be changed due to SRS. See TENN. CODE ANN. § 68-3-203(d) (2001).

This issue has also been litigated. See *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975) (denying a motion for summary judgment against a plaintiff suing to seek a change of sex on her birth certificate); *In re Heilig*, 816 A.2d 68 (Md. 2003) (finding that the Maryland Circuit Court had jurisdiction to rule on a petition for change of sex designation on the birth certificate); *In re Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515 (Sup. Ct. 1973) (denying petition for the issuance of a new birth certificate with a designation of the opposite sex); *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (Sup. Ct. 1966) (denying an application to change sex on a birth certificate); *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) (stating that the Ohio birth record statute “is strictly a ‘correction’ type statute” that permits changes when the original entry had an error such as spelling); *K. v. Health Div.*, 560 P.2d 1070 (Or. 1977) (denying a petition for the issuance of a new birth certificate with a designation of the opposite sex). The *Weiner* court discussed the report of the New York Academy of Medicine that was submitted to

been held to change one's legal sex for purposes of marriage.⁹³ They do, however, encourage transsexuals to undergo the dangerous and inappropriate procedures of SRS and to propagate the lie that a post-operative transsexual has actually changed sex.⁹⁴ As discussed in Part I, sex is immutable and any attempt of the legislature to deny this is misguided.

B. *Marriage Case Law Where One Party is a Transsexual*

Only a few courts in the United States have been faced with the issue of the validity of a marriage where one party is a transsexual. The majority, including most recently the Florida Court of Appeal in July 2004, have applied the traditional meaning of legal sex for purposes of marriage. Because, however, some lower courts and one appellate court thus far have misinterpreted the definition of man and woman in state marriage statutes, the state legislatures should explicitly define sex in their marriage statutes as the immutable biological sex of birth.

the Board of Health. In finding that the New York Health Code should not be amended in order to provide for change of sex on birth certificates, the report stated:

1. male-to-female transsexuals are still chromosomally males while ostensibly females;
2. it is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.

The Committee is therefore opposed to a change of sex on birth certificates in transsexualism.

270 N.Y.S.2d at 322 (quoting Report of the Committee on Public Health of the New York Academy of Medicine entitled *Change of Sex on Birth Certificates for Transsexuals*).

93. See Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 745, 746 n.5 (2000) ("Whether such an amendment to one's official documents will change the transsexual's legal sex for purposes of marriage is unclear."). In dicta, the Court of Appeals of Maryland in *In re Heilig* stated, "Most cases in which the gender of a transsexual is at issue have arisen in the context of marriage, and the prevailing sentiment in the United States seems to be that, absent legislation to the contrary, marriage between a transsexual and a person of the transsexual's initial assigned gender is not permitted, even when the transsexual has undergone surgery." 816 A.2d at 85.

94. See, e.g., KY. REV. STAT. ANN. § 213.121(5) (Michie 1998) ("Upon receipt of a sworn statement by a licensed physician indicating that *the gender* of an individual born in the Commonwealth *has been changed* by surgical procedure . . .") (emphasis added); N.M. STAT. ANN. § 24-14-25(D) (Michie 1978) ("Upon receipt of a duly notarized statement from the person in charge of an institution or from the attending physician indicating that *the sex* of an individual born in this state *has been changed* by surgical procedure . . .") (emphasis added).

1. *Cases Upholding the Traditional Definition of Male and Female*

Many of the transsexual marriage cases in the United States mention *Corbett v. Corbett*,⁹⁵ a 1970 English case that was the first in the world to rule on the validity of a marriage where one party was a post-operative transsexual.⁹⁶ The court in *Corbett* ruled that the marriage between April Ashley, a male who underwent sex reassignment surgery, and Arthur Corbett, another male, was void because Ashley “is not a woman for the purposes of marriage but is a biological male and has been so since birth” and “marriage is essentially a relationship between man and woman.”⁹⁷ The court clearly stated that “the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed.”⁹⁸ *Corbett*’s holding was later summed up by the Texas Court of Appeals: “In short, once a man, always a man.”⁹⁹

The first cases in the United States involving the validity of marriage where one party is a transsexual occurred in New York. In 1971, the court held in *Anonymous v. Anonymous*¹⁰⁰ that no marriage could legally have occurred between one male and a transsexual male, who, *subsequent* to the “so-called marriage ceremony,” underwent surgery to have his male organs removed.¹⁰¹ The court noted in dicta that even if the surgery had occurred before the alleged marriage, “it would appear . . . that mere removal of the male organs would not, in and of itself, change a person into a true female.”¹⁰²

95. *Corbett v. Corbett*, 2 All E.R. 33 (P. 1970).

96. See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 124 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2000); *M.T. v. J.T.*, 355 A.2d 204, 208 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (1976); *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987); *Littleton v. Prange*, 9 S.W.3d 223, 226 (Tex. Ct. App. 1999), *cert. denied*, 531 U.S. 872 (2000) (also noting that *Corbett* is “routinely cited in later cases, including those cases from the United States”).

97. *Corbett*, 2 All. E.R. at 48-49. In the alternative, the court held that the marriage was void because it had not been and could not be consummated. “[E]ven the most extreme degree of transsexualism in a male . . . cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.” *Id.* at 48. Arthur Corbett was asking for the marriage to be nullified because Ashley “at the time of the ceremony was a person of the male sex,” or in the alternative, because the marriage was never consummated. *Id.* at 34.

98. *Id.* at 47.

99. *Littleton*, 9 S.W.3d at 227.

100. 325 N.Y.S.2d 499 (N.Y. App. Div. 1971).

101. *Id.* at 500-01. The unusual facts of this case revealed that one male did not discover that the other was a male until the wedding night. *Id.* at 499.

102. *Id.* at 500.

Similarly, in 1974, the *B. v. B.*¹⁰³ court declared invalid a “marriage” between two females, where Marsha/Mark, a transsexual who had undergone SRS, had fraudulently represented to the other woman that she was a man.¹⁰⁴

The next American court to decide whether a transsexual could marry a person “biologically and legally of the same sex at birth” was an Ohio probate court in 1987.¹⁰⁵ It answered, in the declaratory judgment action of *In re Ladrach*, that a male who went through surgical procedures “that resulted in the removal of the penis and testicles and creation of a vagina” could not marry another male.¹⁰⁶ Since the determination of a person’s sex in regard to marital status is a legal issue, the court looked to the marriage statute.¹⁰⁷ There was no evidence that “at birth [the plaintiff Ladrach] had any physical characteristics other than those of a male” or any “other than male chromosomes,” so he was denied a “marriage license as a female person.”¹⁰⁸ The court stated that if it was “to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals,” it would fall within the realm of the legislature, not the courts, to make that change.¹⁰⁹

In 1999, the Texas Court of Appeals decided in *Littleton v. Prange*¹¹⁰ that the “marriage” between a man and Christie/Lee, a male transsexual who had undergone SRS,¹¹¹ was void, and therefore

103. 355 N.Y.S.2d 712 (N.Y. App. Div. 1974).

104. *Id.* at 713-16 (stating that “marriage is and always has been a contract between a man and a woman”). “Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage. . . . [Marsha/Mark] cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship.” *Id.* at 717. See *infra* Part III.B for the argument that it is impossible for a biological woman, even after a “complete” sex reassignment surgery, to unite in a one-flesh marital union with another woman.

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

106. *Id.* at 830.

107. *Id.* at 832.

108. *Id.* (“[T]here is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person.”).

109. *Id.*

110. 9 S.W.3d 223 (Tex. Ct. App. 1999).

111. Christie/Lee received female hormones, had his “penis, scrotum and testicles . . . surgically removed,” had a “vagina and labia . . . constructed,” and “underwent breast construction surgery.” *Id.* at 224. The *Littleton* court stated, “Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.” *Id.* at 231. Although Christie/Lee amended his original birth

Christie/Lee could not be a surviving spouse in a medical malpractice suit.¹¹² The court asked, “[C]an a physician change the gender of a person with a scalpel, drugs and counseling”?¹¹³ The answer was an emphatic no, gender cannot be changed: “There are some things we cannot will into being. They just are.”¹¹⁴ The court recognized that it had “no authority to fashion a new law on transsexuals,” and explained that “it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals.”¹¹⁵ As a “pure question of law,”¹¹⁶ the court concluded that Christie/Lee was still a male, as he had been at the time of birth.¹¹⁷ Although “[t]hrough surgery and hormones, a transsexual male can be made to look like a woman . . . [b]iologically a post-operative female transsexual is still a male.”¹¹⁸ Therefore, the court saw its mandate to interpret the law as “deceptively simplistic in this case: Texas statutes do not allow same-sex marriages,”¹¹⁹ and therefore the alleged marriage was void.¹²⁰

Similarly, the Kansas Supreme Court in 2002 held in *In re Estate of Gardiner*¹²¹ that a post-operative male transsexual was not legally a

certificate “during the pendency of [the] suit,” the court explained that with respect to the Texas provision allowing amendments to birth certificates that were “incomplete or proved by satisfactory evidence to be inaccurate,”

the legislature intended the term ‘inaccurate’ . . . to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth. At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court.

There are some things we cannot will into being. They just are.

Id. (quoting TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992)).

112. *Id.* at 225 (“In order to have standing to sue under the wrongful death and survival statutes, Christie must be Jonathon’s surviving spouse.”).

113. *Id.* at 224. The court also framed the issue in this way: “Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?” *Id.* at 225.

114. *Id.* at 231.

115. *Id.* at 230.

116. *Id.*

117. *Id.* at 231 (“Christie was created and born a male. . . . We hold, as a matter of law, that Christie Littleton is a male.”). “The only pre-operative distinction between Christie Lee Littleton and a typical male was her psychological sense of being a female.” *Id.* at 232 (Angelini, J., concurring).

118. *Id.* at 230.

119. *Id.* at 231.

120. *Id.* (“As a male, Christie cannot be married to another male.”).

121. 42 P.3d 120 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2000).

woman under the marriage statute.¹²² J'Noel Gardiner was born male in Wisconsin, later underwent SRS,¹²³ and then "married" another male, Marshall, in Kentucky.¹²⁴ When Marshall died intestate, Marshall's son challenged J'Noel's claim to the estate, arguing that the marriage was void because J'Noel was a male for the purposes of the Kansas marriage statute.¹²⁵ The Kansas Supreme Court viewed the question of the sex of J'Noel as an issue of law, not an issue of fact dependent upon J'Noel's mental state or the result of surgical procedures.¹²⁶

The Kansas marriage statute provides that marriage is a "contract between two parties who are of opposite sex" and that "[a]ll other marriages are declared to be contrary to the public policy of this state and are void."¹²⁷ In determining the intent of the Kansas legislature, the Kansas Supreme Court looked to the natural and ordinary meaning of the terms contained within the statute:

The words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female.¹²⁸

122. *Id.* at 136.

123. J'Noel testified that he was "born with a 'birth defect'—a penis and testicles." *Id.* at 122. The process of "sex reassignment" for J'Noel involved electrolysis and thermolysis to remove body hair, hormone injections, a tracheal shave (surgery to change the voice), facial plastic surgery, and genital surgery. *Id.*

124. J'Noel had the sex designation on his Wisconsin birth certificate amended before the "marriage." *Id.* The Kansas Supreme Court did not discuss the birth certificate other than to note that the "Court of Appeals found no error in the district court's not giving the Wisconsin birth certificate full faith and credit." *Id.* at 124. The Court of Appeals stated that "to the extent the regulation [K.A.R. 28-17-20(b)(1)(A)(i)] appears to allow for the change of a sex designation on a Kansas birth certificate to respond to anatomical changes, it oversteps. It is highly unlikely that a fundamental change of that nature was contemplated by the legislature when it passed K.S.A.2000 Supp. 65-2422(c) on 'minor corrections.'" *In re Estate of Gardiner*, 22 P.3d 1086, 1108 (Kan. Ct. App. 2001).

125. *Gardiner*, 42 P.3d at 123. Two other issues, waiver and fraud, were not before the Kansas Supreme Court. *Id.*

126. *Id.* at 135.

127. *Id.* at 125 (citing KAN. STAT. ANN. § 23-101 (Supp. 2001)).

128. *Id.* at 135. The court also noted that this view was supported by the silence regarding transsexuals in the legislative history of the marriage statute. "If the legislature intended to include transsexuals, it could have been a simple matter to have done so. We apply the rules of statutory construction to ascertain the legislative intent as expressed in the statute. We do not

Since J'Noel did "not fit the common meaning of female," he was male for the purposes of the marriage statute, and thus his marriage to a male was declared void and against public policy.¹²⁹ Like the *Littleton* court, the *Gardiner* court held that sex is fixed at birth as a matter of law, and that only the legislature, if it wishes, can change public policy to permit change of sex for purposes of marriage.¹³⁰ In doing so, the Kansas Supreme Court overruled the decision of the Court of Appeals that J'Noel's sex should be determined as of the date the marriage license was issued, taking into account many factors (including "gender of rearing" and "sexual identity"), rather than "simply what the individual's chromosomes were or were not at the moment of birth."¹³¹ The Kansas Supreme Court correctly performed its duty "to interpret" the marriage statute "and not to rewrite it."¹³²

Next, in 2003, the Court of Appeals of Ohio in *In re Nash*¹³³ denied a marriage license to Nash, a post-operative¹³⁴ female-to-male transsexual, and another female,¹³⁵ explaining that "a marriage between a post-operative female-to-male transsexual and a biological female is void as against public policy."¹³⁶ The court agreed with the holdings in *Ladrach*, *Littleton*, and *Gardiner* that any change in "public policy concerning transsexuals and marriage or expanding the definition of male and female" must come from the legislature.¹³⁷

read into a statute something that does not come within the wording of the statute." *Id.* at 136 (citation omitted).

129. *Id.* at 135-37.

130. *Id.*

131. *In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002) ("On remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.").

132. *Gardiner*, 42 P.3d at 136.

133. *In re Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 Ohio App. LEXIS 6513 (Ohio Ct. App. Dec. 31, 2003).

134. "Upon the advice of counsel, however, Nash refused to answer any of the trial court's questions pertaining to Nash's sex reassignment surgeries." *Id.* at *4.

135. *Id.* at *26-27.

136. *Id.* at *25; see also *Gajovski v. Gajovski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991) ("Ohio law permits marriage only between members of the opposite sex. . . . This requirement applies even in a situation where one party has obtained such gender status by means of transsexual surgery; in the contemplation of Ohio jurisprudence, one's gender at birth is one's gender throughout life.") (citations omitted); *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) ("there is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person").

137. *Nash*, 2003 Ohio App. LEXIS 6513, at *24-25.

The words “male” and “female” in the marriage statute are “to be given their common and ordinary meaning absent a contrary legislative intent.”¹³⁸ Thus, “it cannot be argued that the term ‘male,’ as used at that time [of the enactment of the statute in the early 1900s], included a female-to-male post-operative transsexual.”¹³⁹

The next and most recent case to consider the issue of transsexual marriage was *Kantaras v. Kantaras*.¹⁴⁰ In July of 2004, the Florida Court of Appeal held that a post-operative transsexual cannot marry a member of the same birth sex in Florida.¹⁴¹ In doing so, it overturned the trial court’s holding¹⁴² that Margo/Michael, a woman who had a masectomy, hysterectomy, and hormone treatment,¹⁴³ was a man for the purpose of “marriage” to Linda Kantaras.¹⁴⁴ The appellate court stated,

The controlling issue in this case is whether, as a matter of law, the Florida statutes governing marriage authorize a postoperative transsexual to marry in the reassigned sex. We conclude they do not. We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.¹⁴⁵

The Court of Appeal went on to say that unless the legislature amends the marriage statute, the court “must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological

138. *Id.* at *16 (citing *Moore Pers. Servs., Inc. v. Zaino*, 784 N.E.2d 1178, 1180 (Ohio 2003)).

139. *Id.* at *17.

140. 884 So. 2d 155 (Fla. Dist. Ct. App. 2004), *review denied*, No. SC04-1953, 2005 Fla. LEXIS 373 (Fla. Feb. 23, 2005).

141. *Id.* at 155.

142. *Id.* at 161 (declaring the marriage void *ab initio* and remanding to determine primary residential custody of the two children, which was dependent on the trial court’s determination that the marriage was valid).

143. *Id.* at 155. Near the end of an opinion more than 800 pages long, the trial court described SRS as “a type of metamorphosis of leaving one body and entering into another,” which results in “a man indistinguishable from a genetic male even though the metamorphosis started with all the accoutrements of a woman.” *Kantaras v. Kantaras*, No. 98-5375CA, slip op. at 770 (Pasco County Cir. Ct. Feb. 21, 2003), <http://www.transgenderlaw.org/cases/kantarasopinion.pdf> (on file with the Ave Maria Law Review). The trial court continued by saying that Margo/Michael “is unable physically or psychologically to ever revert back to the body he departed.” *Id.* at 771.

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

145. *Id.* at 161.

sex at birth."¹⁴⁶ Therefore, it declared the "marriage" void *ab initio* and remanded for determination of child custody.¹⁴⁷

As the courts in the line of cases ending with *Kantaros* have held, legal sex for marital purposes is a question of law and is determined at birth.

2. Cases Rejecting the Traditional Definition of Male and Female

In only one reported United States case has the definition of "female" been altered and thus a transsexual been permitted to marry a person of the same birth sex.¹⁴⁸ This occurred in 1976, when the appellate court of New Jersey in *M.T. v. J.T.* upheld the marriage of a male and a post-operative male-to-female transsexual, declaring that the latter "should be considered a member of the female sex for marital purposes."¹⁴⁹ The court in *M.T.* disagreed with the court in *Corbett* "that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard."¹⁵⁰ Rather, *M.T.* adopted the position that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."¹⁵¹

The *M.T.* court required two elements for a change in legal sex for the purposes of marriage—sex reassignment surgery and ability of the individual to "function sexually" as a member of the opposite sex.¹⁵² In light of current arguments that courts should allow change of legal sex based on a person's self-determination that he or she is of the opposite sex, *M.T.*'s requirements appear stringent. The court

146. *Id.*

147. *Id.*

148. An unreported trial level case from California also held that a post-operative female to male transsexual was a male for purposes of marriage. See Greg Hernandez, *Judge Rules Transsexual in Custody Case Is Male*, L.A. TIMES, Nov. 26, 1997, at A27, LEXIS, News Library (reporting on *Vecchione v. Vecchione* (Cal. Sup. Ct. Nov. 25, 1997)).

149. *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (1976). There are no reported cases which follow *M.T. v. J.T.*'s holding.

150. *Id.* at 209.

151. *Id.*

152. *Id.* at 210-11.

stated that “successful” SRS was necessary¹⁵³ and that a *pre-operative* transsexual “should be classified according to biological criteria.”¹⁵⁴ In terms of sexual capacity, the court required “the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.”¹⁵⁵ The *M.T.* court acknowledged that it was adopting “a fundamentally different understanding of what is meant by ‘sex’ for marital purposes.”¹⁵⁶

The above cases demonstrate that nearly all of the states that have ruled on the issue have held that a transsexual cannot marry a person of the same birth sex. Interpretation of marriage statutes, as well as common sense, dictates that legal sex for purposes of marriage is one’s biological sex of birth. However, other state courts in the future may fashion their own laws, as did the appellate court in *M.T. v. J.T.* and the lower courts, subsequently reversed on appeal, in *Gardiner* and *Kantaros*. Therefore, although the definitions of man and woman were previously commonly understood and respected, state legislatures should explicitly define these terms to prevent courts from announcing that a man is a woman or vice-versa for purposes of marriage, on the basis of amputation of healthy body parts, psychological gender self-identity, or for any other reason.

III. PUBLIC POLICY AND THE TRADITIONAL DEFINITION OF MALE AND FEMALE FOR PURPOSES OF MARRIAGE

The definition of male and female involves “important matters of public policy for the state.”¹⁵⁷ The majority of the courts examining transsexual marriage have stated that any changes in the state’s public policy concerning marriage or in the definition of male and female must come from the legislature, not the courts. For example, the court in *In re Nash* declared,

153. *Id.* at 210; *see also id.* (“In sum, it has been established that an individual suffering from the condition of transsexualism is one with a disparity between his or her genitalia or anatomical sex and his or her gender, that is, the individual’s strong and consistent emotional and psychological sense of sexual being. A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person’s gender.”).

154. *Id.* at 209.

155. *Id.*

156. *Id.*

157. *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. Ct. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

Like the courts in *Ladrach*, *Gardiner*, *Littleton*, and *Ulane*, we must emphasize that any change to Ohio's public policy concerning transsexuals and marriage or expanding the definition of male and female . . . to permit a post-operative transsexual to marry someone who has the same biological sex as the transsexual must come from the legislature.¹⁵⁸

Similarly, according to the Supreme Court, "[m]arriage . . . has always been subject to the control of the legislature."¹⁵⁹ By explicitly stating the traditional definition of man and woman in their marriage laws, state legislatures would prevent the innumerable problems caused by alternative definitions and would strengthen their states' public policy of promoting traditional marriage.

A. *Practical Problems Associated with Expanding the Definition of Male and Female*

As seen in some lower court opinions discussed in Part II, which were subsequently overturned on appeal, some judges have ruled that a man was a woman or vice-versa for purposes of marriage based on hormonal and surgical treatments, or subjective gender self-identity. The addition of the definition of male and female as referring to the biological sex of birth in statutes and constitutional amendments relating to marriage by the state legislature would ensure that the courts would not expand the meaning of these terms.

158. *In re Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 Ohio App. LEXIS 6513, at *24-25 (Ohio Ct. App. Dec. 31, 2003). For the cases referred to, see *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) ("Congress had a narrow view of sex in mind when it passed the Civil Rights Act . . . For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating."); *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2000) ("We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret [the Kansas marriage statute] and not to rewrite it."); *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) ("[T]here is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person."); *Littleton*, 9 S.W.3d at 230 ("In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals.").

159. *Maynard v. Hill*, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."); *see also Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (citing the same passage from *Maynard*).

1. *Surgery as Determining Factor for Sex Change*

Some argue that upon completing SRS, people should be able to change their sex legally for purposes of marriage. For example, counsel for the transsexual plaintiff in *Littleton v. Prange* suggested that the court “write a protocol for when transsexuals would be recognized as having successfully changed their sex . . . perhaps using the surgical removal of the male genitalia as the test . . . [because] ‘amputation is a pretty important step.’”¹⁶⁰ Moreover, the New Jersey appellate court in *M.T. v. J.T.* required both sex reassignment surgery and the ability to “function sexually” as the opposite birth sex for legal change of sex for purposes of marriage.¹⁶¹

The adoption of SRS by the courts as a bright line test for change of legal sex for purposes of marriage by the courts would be detrimental for several reasons. First, as demonstrated in Part I, SRS only alters outward physical characteristics and cannot actually change sex because sex is immutable.¹⁶² Second, as discussed in Part I, SRS is medically dangerous and an inappropriate permanent physical treatment for the psychological disorder of GID (which can also remit).¹⁶³ The law should not legitimize a procedure rejected by the mainstream medical community and should not encourage those suffering from a mental disorder to remove healthy body parts surgically by allowing legal sex for purposes of marriage to change based on SRS. Third, a bright line test of SRS would be very arbitrary. Even proponents of SRS do not prescribe it as the treatment for every patient suffering from GID.¹⁶⁴ Also, because there are various degrees of surgical changes, defining the precise boundaries “with respect to how much and what kind of surgery must be performed” as well as when “that surgery must be performed also poses difficulties.”¹⁶⁵

Finally, a redefinition allowing SRS to effect a legal change of sex would likely not satisfy those advocating for transsexual rights. Although legal counsel for a transsexual suggested that SRS be a determining factor for sex change, and the only court permitting a sex

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

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

162. *See supra* Part I.A.

163. *See supra* Part I.B.2.

164. *See, e.g., HBIGDA Standards of Care, supra* note 49, at 14-15 (“Any surgical intervention should not be carried out prior to adulthood, or prior to a real-life experience of at least two years in the gender role of the sex with which the adolescent identifies.”).

165. Strasser, *supra* note 23, at 207.

change required it, some transsexual advocates have commented that “[r]estricting the definition of a [female-to-male transsexual] to someone who requests a risky, costly, often technologically inadequate surgery, is unrealistic.”¹⁶⁶ They indicate that a transsexual may “not want to have sex reassignment surgery for any number of reasons, e.g., questions of efficacy, safety, side effects, cost, or whatever.”¹⁶⁷ Others argue that “some full-timers decide that with their completed full-time gender correctional crossovers, some or all of the various surgeries are not important to them.”¹⁶⁸ In addition, theorists who hold that sex is a continuum advocate against SRS because it “underscores the Euro-American principles of gender that are regarded as natural and inevitable: that is, that there are only two sexes and that these are inviolable and are determined by genitalia.”¹⁶⁹ Therefore, adoption of SRS as a test for change of legal sex for marital purposes would likely be a step towards the acceptance of self-determination of sex as the critical factor.

2. *Gender Self-Identity as Determining Factor for Sex Change*

Some have suggested that gender self-identity, rather than SRS, should form the basis for legal sex change. Their rationale is that not all transsexuals want SRS or can afford it. Another reason is that they believe convincing legislatures to adopt a subjective definition of legal sex for purposes of marriage is easier than persuading legislatures to deconstruct the binary sex system altogether.¹⁷⁰ The latter is desired because the “transgender community,” which sees “gender and sex

166. Katherine Rachlin, *Factors Which Influence Individual's Decisions When Considering Female-to-Male Genital Reconstructive Surgery*, 3 INT'L J. TRANSGENDERISM (July-Sept. 1999), at <http://www.symposion.com/ijt/ijt990302.htm> (on file with the Ave Maria Law Review).

167. Strasser, *supra* note 23, at 228 (citations omitted) (referring to pre-operative female-to-male transsexuals).

168. Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 161 (2000).

169. Bolin, *supra* note 72, at 454.

170. “Supporting a binary system in which sex is based on gender self-identity is probably the most effective way to promote transgendered marital rights. For purposes of marriage, it may be important to emphasize that gender self-identity . . . is just as valid an indicator of sex as are chromosomes.” Greenberg, *supra* note 35, at 941. “The long-term strategy that would benefit all sexual minorities, including gays and lesbians, would be to push for a deconstruction of the categories man and woman so that legal marriages could not be limited to members of the opposite sex.” *Id.* at 941 n.126.

systems as relativistic structures,” believes that it is “in the process of creating not just a third gender but the possibility of numerous genders and multiple social identities.”¹⁷¹ This deconstruction of binary sex and basing of legal sex on one’s mental state would have far-reaching consequences, many of them as yet unforeseeable.

A self-determining standard for determining legal sex would be impossible to apply and would allow for fraud in our legal system. A subjective gender identity standard “is really no standard at all.”¹⁷² The only way to ascertain gender identity, the sense one has of being male or female, would be to engage in “subjective forays into a person’s psyche.”¹⁷³ Legal sex for purposes of marriage should be recognized as immutable, not susceptible to change based on the subjective desires of those suffering from the mental illness of GID.

The ability to change one’s legal sex periodically will undermine all laws that make distinctions based on sex.¹⁷⁴ In discussing change of legal sex based on gender self-identity, commentator Mark Strasser argues that “a sex-reassignment requirement would not be necessary if courts would exercise ‘reasoned judgment’ to figure out whether an individual is irreversibly committed to his or her identification with a particular sex.”¹⁷⁵ If, however, legal sex was defined by what a person is “irreversibly committed to,” legal sex could not be recorded accurately at birth.¹⁷⁶ Then either the classification of people as male or female would disappear from the law altogether, or the original indication of sex at birth would always be subject to change later based on a psychological desire to be the opposite sex. It is not in the

171. Bolin, *supra* note 72, at 447 (including “preoperative, postoperative and nonsurgical transsexuals as well as male and female cross-dressers and transvestites” as part of the transgender community). A contrasting view holds that transsexuals are the “conservative wing of the transgender community because they do not challenge the notion that there are two sexes and two genders which match them, only their individual place within that framework.” Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219, 238 n.95 (1998).

172. David Lee Mundy, *Hitting Below the Belt: Sex-Ploitive Ideology & the Disaggregation of Sex and Gender*, 14 REGENT U. L. REV. 215, 231 (2001).

173. *Id.*

174. Examples of laws making distinctions based on sex include those laws requiring separation of males and females in prison housing, laws mandating that strip searches be performed by a person of the same sex as the arrestee, laws against sex discrimination, and laws dealing with equal protection and marriage.

175. Strasser, *supra* note 23, at 229 (citation omitted).

176. “Obviously, gender identity at birth is impossible to determine and cannot be considered when officials establish the sex that originally will be indicated on an infant’s birth certificate.” Greenberg, *supra* note 93, at 754 n.87.

realm of the courts to modify public policy so drastically by declaring that a man can become a woman or vice-versa for purposes of marriage.

Additional far-reaching implications of legislation permitting legal change of sex based on gender self-identity have been pointed out in the United Kingdom with respect to the radical *Gender Recognition Act 2004* passed on July 1, 2004.¹⁷⁷ The core of the Act is self-determination of one's sex. In general, a "Gender Recognition Panel" will grant an applicant who is at least eighteen years old a "gender recognition certificate" if he or she can show that he or she "has or has had gender dysphoria," has "lived in the acquired gender" for the previous two years, "intends to continue to live in the acquired gender until death," and complies with other requirements, including presenting a report by a medical practitioner or psychologist practicing in the field of gender dysphoria.¹⁷⁸ Surgery is not required.¹⁷⁹ The effect of this Act is:

Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, *the person's sex*

177. Gender Recognition Act, 2004 (Eng.). In the parliamentary debates, one member of the House of Lords commented,

So far as I know, there is no law nor any known medical procedure that can change the sex of a human being. The Bill purports to do so. It is therefore an objectionable farce. . . . The Bill requires members of a gender recognition panel, on the production of certain evidence, in broad terms to certify that a person who was born a woman, lived as a woman, married as a woman and has borne children is, despite all that, entitled to be issued with a birth certificate falsely professing that she was born as a male child. That cannot be anything other than a lie.

Lord Tebbit, House of Lords' Second Reading Debate (Dec. 18, 2003), at <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/31218-04.htm> (on file with the Ave Maria Law Review).

178. Gender Recognition Act, 2004, c. 7, §§ 1-4 (Eng.). Gender dysphoria is defined by the Act as "the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism." *Id.* § 25. If the "Gender Recognition Panel" denies an application, which seems highly unlikely considering that the standard is gender self-identity, the applicant can appeal the decision and/or apply again after six months. *Id.* § 8.

179. With respect to hormonal or surgical treatment, the Act only states that if the applicant "has undergone or is undergoing treatment for the purpose of modifying sexual characteristics" or "treatment for that purpose has been prescribed or planned for the applicant," one of the reports required in the application should include details of this treatment. *Id.* § 3.

*becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).*¹⁸⁰

This legal fiction will lead to many unfavorable consequences, including innumerable unforeseeable situations, especially with respect to its effect on third parties and on religious freedom.¹⁸¹

Under the Act, revealing the birth sex of a transsexual is a criminal offense.¹⁸² Although a “clergyman is not obligated to solemnise the marriage of a person if the clergyman reasonably believes that the person’s gender” has changed under the Act, ministers are not included among those granted a special right to access original birth certificates.¹⁸³ Religious groups fear that their freedom of association will be threatened and they will be subject to malicious or frivolous lawsuits as a result of their unwillingness to recognize sex changes.¹⁸⁴ For example, they are concerned about a lack of protection for those who “resist insistence of transsexual people (both those who have and have not undergone surgery)” in using facilities such as bathrooms.¹⁸⁵

Furthermore, the Act imposes substantial difficulties on the spouse and children of one who changes his or her sex. An “interim” certificate granted to an applicant who entered into marriage before the sex change becomes a “full” certificate only if a “decree of nullity” is granted, the marriage is dissolved, or the spouse dies within six months.¹⁸⁶ A man who becomes a woman remains the father and a

180. *Id.* § 9 (emphasis added). One of the few exceptions under the Act involves “gender-affected” sports. A body which regulates such sports may “prohibit or restrict the participation as competitors in the event or events of persons whose gender has become the acquired gender under this Act.” *Id.* § 19.

181. For a concerned response to the Act by a group of Christian churches, see The Evangelical Alliance, *A Response by the Evangelical Alliance to the Lord Chancellor's Department's Invitation to Respond to the Government's Statement on Its Policy Concerning Transsexual People* (Mar. 3, 2003), at <http://www.eauk.org/contentmanager/Content/PoliticsandSociety/currentissues/Transsexual1.cfm> [hereinafter *Response*] (on file with the Ave Maria Law Review).

182. Gender Recognition Act, 2004, c. 7, § 22 (Eng.).

183. *Id.* c. 7, § 11, sched. 4.

184. *Response, supra* note 181 (“The Alliance is concerned about potential threats to the internal autonomy of all religious groups faced with legally sanctioned social trends which encourage lifestyles and conduct which are directly opposed to their beliefs.”).

185. *Id.*

186. A married applicant who “changed gender” subsequent to the marriage can obtain an “interim” gender recognition certificate. The interim certificate will become a “full” gender recognition certificate if a decree of nullity (or decree of divorce in Scotland) is granted on the ground that an interim certificate was issued to a party to the marriage, or if the marriage is dissolved or annulled or the spouse dies within six months of the day the interim certificate was issued. Gender Recognition Act, 2004, c. 7, §§ 4-5 (Eng.).

woman who becomes a man remains the mother of their children under a marriage entered into prior to the sex change.¹⁸⁷ Finally, the Act enables a legal female to become the biological father of a child or a legal man to give birth to a child.¹⁸⁸ The same undesirable ramifications, and more as yet unforeseen, could be expected in the United States if the courts rewrite the law to allow change of legal sex for purposes of marriage based on subjective gender self-identity, or if similar legislation were enacted.

The definition of male and female as these terms are used in marriage statutes should not be altered to reflect a psychological definition of sex. As one gender theorist stated, if sex categories are based on gender identity, “then the man and woman, masculine and feminine, and heterosexual and homosexual dichotomies necessarily become blurred.”¹⁸⁹ The distortion of these terms would significantly interfere with the public policy of states to protect traditional marriage.

B. *Traditional Definition Supports Public Policy on Marriage*

The meaning of man and woman is important because marriage is vital to society as an institution that contributes extensively to the well-being of men, women, and children. An explicit definition of male and female as the biological sex of birth, which was previously unnecessary, is especially important for states whose public policy supports traditional marriage. Traditional marriage requires that the two parties to a marriage be a male and a female, which is more than

187. The Act declares that “[t]he fact that a person’s gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child.” *Id.* § 12. With respect to this clause, Lord Tebbit stated in the parliamentary debates,

[A]lthough a woman may be certified as having been born a man, he or she—I do not know which—remains the mother of her children. What an extraordinary mess; it defies logic. . . . [I]t is clear that the problem, which is very real for some, is a psychological illness, not a physical one. . . . The Bill is so bad that it should be taken away, and the Government should think of another way to help people who suffer this acutely distressing psychological illness.

Lord Tebbit, House of Lords’ Second Reading Debate (Dec. 18, 2003), at <http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/31218-05.htm> (on file with the Ave Maria Law Review).

188. See *Response*, *supra* note 181 (stating that under the Gender Recognition Act, “a pre-surgical transsexual male to female will legally be a woman whilst biologically a man, but may nevertheless still legally become the biological father of a child whilst performing a mother’s role”).

189. Greenberg, *supra* note 35, at 939.

a matter of words—it reflects a deeper reality. A law that calls a biological man a woman, permitting him to marry another man, enters into a lie by not conforming to reality and undermines the states' promotion of traditional marriage.¹⁹⁰

Marriage offers “great and irreplaceable benefits to society.”¹⁹¹ Writers in classical Greece and Rome “regarded marriage as a natural institution that served the couple, the children, and the community at once.”¹⁹² A modern scholar describes marriage as “foster[ing] a certain kind of sexual union between men and women characterized by caretaking, sharing of resources, procreation, and long-term commitment in order to encourage the protection of children and the reproduction of society.”¹⁹³ Data from the social sciences on the benefits of marriage confirms ideas on the “goods and goals” of marriage underlying Western law. One group of scholars derived twenty-one conclusions from this significant body of research, including that marriage “increases the likelihood that fathers have good relationships with their children” and that marriage “is associated with better health and lower rates of injury, illness, and disability for both men and women.”¹⁹⁴

There are many state interests in protecting and promoting marriage. Those most commonly articulated include procreation, child rearing, tradition, and interstate uniformity.¹⁹⁵ Others include the well-being of children, the complementary differences between

190. “When law is untruthful, ultimately it fails in its ultimate purpose—to promote the common good. . . . [T]he content of the law remains important. This is particularly true today since the content of the positive law is often understood to be the most widely-accepted statement of our common beliefs.” Teresa Stanton Collett, *Foreword: Marriage, Family and the Positive Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 467, 469-70 (1996) (arguing that the content of positive law with respect to marriage and family does matter, although this law is necessarily limited because the reality of marriage and family is much more primary than law).

191. Gerard V. Bradley, *Law and the Culture of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189, 196 (2004).

192. John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1022 (2001) (giving examples from such thinkers as Plato, Aristotle, Cicero, and Plutarch).

193. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 791 (2002).

194. WILLIAM J. DOHERTY ET AL., WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES 7, 14 (2002). For further discussion of scientific studies demonstrating the benefits of marriage, see LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000).

195. See William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154-61 (2004).

men and women, social order, and family integrity.¹⁹⁶ As argued elsewhere, there are numerous reasons why states want to retain the traditional understanding of marriage as the union of one man and one woman.¹⁹⁷ The purpose of DOMAs and similar laws would be completely undermined if the courts redefined sex from an immutable characteristic to a trait that can be changed based on surgery or psychological gender self-identity.

The appellate court of New Jersey in *M.T. v. J.T.* mistakenly declared that its recognition of legal sex change for purposes of marriage would “promote the individual’s quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.”¹⁹⁸ As Professor Robert George has explained, the law cannot be “neutral” on the issue of marriage; either the law will teach that marriage is an intrinsic human good that “people can choose to participate in, but whose contours people cannot make and remake at will,” or that marriage is “a mere convention which is malleable in such a way that individuals, couples, or, indeed, groups, can choose to make it whatever suits their desires, interests, subjective goals, and so on.”¹⁹⁹ Redefining male and female based on a mental disorder which drives some to have healthy organs removed would teach that both the existence of humans as male or female and the institution of marriage are mere conventions.

Neither announcing that one self-identifies as the opposite sex nor undergoing surgical procedures will result in the capacity to enter into marriage with a person of the same biological birth sex. This is clearly seen by examining the nature of marriage, in which a couple unites in “a one-flesh communion.”²⁰⁰ Two of the foremost legal theorists defending traditional marriage, Professors George and Gerard Bradley, define marriage as follows:

196. *See id.* at 164-78.

197. *See, e.g.*, George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 *BYU J. PUB. L.* 419 (2004) (discussing the social goods resulting from traditional marriage).

198. *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976), *cert denied*, 364 A.2d 1076 (1976).

199. Robert P. George, *Marriage and the Illusion of Moral Neutrality*, in *TOWARD THE RENEWAL OF CIVILIZATION: POLITICAL ORDER AND CULTURE* 114, 125 (T. William Boxx & Gary M. Quinlivan eds., 1998). On the question of marriage recognition statutes, “both sides increasingly see that neutrality is impossible and that normative answers are inescapable.” Coolidge & Duncan, *supra* note 76, at 22.

200. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 *GEO. L.J.* 301, 320 (1995).

Marriage, considered not as a mere legal convention, but, rather, as a *two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type*, is an intrinsic (or, in our parlance, 'basic') human good; as such, marriage provides a noninstrumental reason for spouses, whether or not they are capable of conceiving children in their acts of genital union, to perform such acts.²⁰¹

Furthermore, they define reproductive-type acts as "acts of inseminatory union of male with female genital organs" which are "marital in that they actualize and enable the spouses to experience their interpersonal communion, of which such acts are the biological matrix."²⁰² A sterile man and woman, unlike two people of the same biological sex of birth, *can* engage in "reproductive-type" acts because it is not their behavior which makes them different from fertile couples, but only nonbehavioral conditions of reproduction.²⁰³

Even if a surgically constructed sexual organ could be functional,²⁰⁴ a transsexual could not achieve a one-flesh interpersonal union with a member of the same birth sex.²⁰⁵ Sexual organs are not

201. *Id.* at 301-02 (citations omitted) (emphasis added). Given this definition of marriage, a "huge variety of prudential considerations enter into the questions of whether and how the state should act against" conduct which is contrary to this definition. *Id.* at 319-20.

202. *Id.* at 301 n.4.

203. "[A]cts which fulfill the behavioral conditions of reproduction are acts of the reproductive-type even where the nonbehavioral conditions of reproduction do not happen to obtain." George, *supra* note 199, at 123. See also Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 150 (1997) ("The difference between sterile and fertile married couples is not a difference in what they do. Rather, it is a difference in a distinct condition which affects what may result from what they do.").

204. See James Barrett, *Psychological and Social Function Before and After Phalloplasty*, 2 INT'L J. TRANSGENDERISM (Jan.-Mar. 1998), at <http://www.symposion.com/ijt/ijtc0301.htm> (stating that patients who have undergone phalloplasty might be disappointed that the surgery does not result in an "ability to have sexual intercourse without the use of prostheses") (on file with the Ave Maria Law Review).

205. "[S]exual acts which are not reproductive in type cannot unite persons organically: that is, as a single reproductive principle." George, *supra* note 199, at 117. Similarly, a post-operative transsexual and a person of the opposite birth sex cannot unite in sexual acts of the reproductive type. There have been no litigated cases on the issue of a marriage between a post-operative transsexual and a person of the opposite birth sex, although it is likely to come before the courts at some point. Greenberg, *supra* note 93, at 761. Some commentators are concerned that transsexuals might be precluded from marrying anyone. Strasser, *supra* note 23, at 198 (citing Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism"*, 4 MICH. J. GENDER & L. 275, 292-93 (1997); Kevin Tallant, Note, *My "Dude Looks Like A Lady": The Constitutional Void of Transsexual Marriage*, 36 GA. L. REV. 635, 637 (2002)). However, analyzing this type of marriage under current constitutional jurisprudence with respect to the fundamental right to marry is a topic for a different paper.

merely instruments to be “‘used’ by persons considered as somehow standing over and apart from these and other aspects of their biological reality.”²⁰⁶ Rather, “their biological reality is part of, not merely an instrument of, their *personal* reality.”²⁰⁷ Through bodily union in marital acts, husband and wife are united biologically,²⁰⁸ emotionally, and spiritually—not only biologically.²⁰⁹ The biological reality is part of the personal reality of a person, and they cannot be separated.

The contrary view, that sexual organs are equipment which can be removed and replaced with artificial organs of the opposite sex,²¹⁰ is based on the philosophy of dualism.²¹¹ The philosopher Rene Descartes was the most famous proponent of this theory that mind and body are completely distinct.²¹² Mind-body dualism implies “that one’s very life, the life of an organism, is extrinsic, and merely instrumental, to personal full-being.”²¹³ Dualism was embraced by the *M.T. v. J.T.* court when it stated that as a result of surgery that removes healthy sexual organs and constructs artificial organs of the opposite sex, a transsexual “become[s] physically and psychologically

206. George, *supra* note 199, at 124. Treating the body of oneself or another as an instrument damages the “basic human good of [personal (and interpersonal)] integrity” that “provides a conclusive moral reason not to engage in . . . nonmarital sex acts.” George & Bradley, *supra* note 200, at 302.

207. John M. Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1066 (1994).

208. John Finnis writes that some have reached the

arbitrary conclusion that a man and a woman can never be biologically united But it would be more realistic to acknowledge that the whole process of copulation, involving as it does the brains of the man and woman, their nerves, blood, vaginal and other secretions, and coordinated activity . . . is biological through and through.

John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 128 (1997) (citation omitted).

209. See Finnis, *supra* note 207, at 1066; George, *supra* note 199, at 117.

210. “If the presence of nonworking equipment of the ‘right’ sort is a crucial distinguishing feature of permissible sexual relationships, artifice might supply what nature has not. One gay male might have a partial sex-change operation, having his penis removed and a vagina installed.” Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 280 (1995).

211. George & Bradley, *supra* note 200, at 311 n.32 (noting that Macedo “slips into person-body dualism” in his comment on sex change operations).

212. THE OXFORD COMPANION TO PHILOSOPHY 206 (Ted Honderich ed., 1995).

213. JOHN FINNIS ET AL., NUCLEAR DETERRENCE, MORALITY AND REALISM 309 (1987). “A more adequate account of the complex human individual will recognize two or more irreducible dimensions of personal reality, but with both (or all) of them intrinsic to the original unity of the human self and so sharing in the personal dignity of that self.” *Id.*

unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy."²¹⁴ But this dualistic view of the human person is now discredited.²¹⁵ The claim of the *M.T. v. J.T.* court that sex reassignment surgery could result in the "full capacity to function sexually"²¹⁶ as the opposite birth sex is erroneous.

Thus, if the states wish to continue their public policy of supporting traditional marriage, the definition of male and female as the immutable biological sex of birth must be upheld. Because the content of marriage law is so vital, it is important for the definitions of man and woman to be clear, leaving no room for courts to usurp legislative functions and to redefine legal sex for purposes of marriage. Furthermore, permitting a man to become a woman or vice-versa based on surgical procedures or an individual's current mental state would have numerous other negative ramifications in the law.

CONCLUSION

The American legal system does not "blindly cling[] to a binary sex and gender paradigm."²¹⁷ The existence of human beings as male and female is a reality supported by the biological evidence of sex determination and sexual differentiation. Men and women are born as men and women. One cannot change this by simply declaring that one is now a member of the opposite sex or by amputating body parts. Not only is SRS ineffective in changing sex, it is a harmful procedure that is not supported by the mainstream medical community as a "treatment" for GID and that should not be supported in law.

The traditional understanding of sex underlies current marriage law, as evidenced by statutes and state constitutional amendments, discussion of sex by the Supreme Court, and case law. The vast majority of cases dealing with transsexual "marriage" have not permitted a person to change from male to female or from female to male for the purpose of marriage. The courts have also emphasized

214. *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 364 A.2d 1076 (1976).

215. FINNIS ET AL., *supra* note 213, at 309 ("[T]he inherent rational indefensibility of dualism . . . is widely recognized among philosophers today.").

216. *M.T.*, 355 A.2d at 210.

217. Greenberg, *supra* note 23, at 275.

that the authority to change the definition of male and female belongs to the legislature, not to the courts. Because there is likely to be further litigation on this issue, to prevent courts from drastically altering the definition of sex at will, the legislature should explicitly define the terms “man,” “woman,” and “sex” in marriage statutes and constitutional amendments concerning marriage as the immutable biological sex of birth.

This explicit reaffirmation of the traditional definition of male and female in marriage statutes and constitutional amendments relating to marriage is the best public policy. It will prevent many negative consequences of allowing sex change for purposes of marriage based on SRS or gender self-identity, such as those associated with the recent Gender Recognition Act in the United Kingdom. Furthermore, maintaining the definition of male and female as the sex of birth is essential to upholding the states’ public policy of promoting traditional marriage. When states define marriage as the union of one man and one woman, they intend that “man” and “woman” refers to a person born of that sex.

The law has always recognized that sex is immutable, and the fact that some people today suffer from a condition where they are confused about their sex in no way imposes on the law a burden of accommodation. To alter the definition of sex for purposes of marriage would defy common sense and would start us down the road of removing the concepts of male and female from our legal system altogether.