TRANSSEXUALITY, MARRIAGE, AND THE MYTH OF TRUE SEX

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The question of how to analyze the marriage of a transsexual person has been difficult for courts: if a person could be considered either male or female, who may that person marry? Most American jurisprudence follows Corbett v. Corbett, *an English case from 1970, which held that a transsexual person's "true sex" is set at birth for purposes of marriage. However, as medical science and social norms advance, the "true sex" model has become increasingly difficult to justify. Analysis of transsexual marriage cases provides a lens through which to view the policies behind disallowing same-sex marriage. These policies ensure that: (1) homosexual sex does not occur within a marriage; (2) the couple's legal documents do not reflect the same sex; (3) the couple's biological characteristics, such as internal reproductive organs or chromosomes, do not reflect the same sex; or (4) the marriage has the appearance of being between people of opposite sex. This Note shows that application of the "true sex" model is flawed and blind adherence to a male/female dichotomy leads to absurd results. In order to avoid such results in the context of marriage, the most sensible solution would be to allow individuals to marry any otherwise qualified individual, regardless of the parties' sex.*

INTRODUCTION

The same-sex marriage debate rages across the country. Most people think they know what it is about: should men be able to marry men and women marry women? This formulation presupposes only two possible sexes, and most people think they know what those sexes are. Men have penises, women have vaginas, and that is the end of the story. It also assumes that every person can be identified as "male" or "female," and that each individual possesses a "true sex" that can be readily determined, no matter the circumstances.

In recent years, however, this simplistic notion of sex and gender has been called into question.[1] For one thing, not everyone is born with a neat, intact

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* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2011. Thanks to all my editors at the *Arizona Law Review*, particularly Frances Sjoberg, without whose insights and advice this Note might never have seen the light of day. Thanks also to my wonderful wife for her never-ending support and inspiration.

set of identifiable genitalia. Intersexed people, individuals who are biologically neither completely male nor completely female, find themselves in an uncomfortable predicament in a society that traditionally insists on a male/female dichotomy.[2] But, more importantly, male and female may be the genders typically imagined, but they are not the only genders possible in the range of biological experience, making the male/female dichotomy flawed.[3] Transgender and transsexual people—who also do not fit within traditional notions of male and female—are becoming more visible within society, and the law is struggling to find a place for them.[4] Nowhere is this struggle more apparent than in the realm of marriage.

This Note focuses primarily on transsexuality and marriage in light of public policies against same-sex marriage. Part I defines transsexuality and outlines the ways courts have analyzed transsexuality within marriage. With a few notable exceptions, U.S. courts have relied on *Corbett v. Corbett*: a 1970 English case in which, for the first time, a court wrestled with the problem of how to define sex for purposes of marriage.[5] Notably, *Corbett* introduced the "true sex" model of sexuality for purposes of marriage, where each party has a "true sex" of either male or female.[6] Part II posits that continued reliance on *Corbett*, which is based on outdated science and is no longer valid law in its country of origin, should no longer be relied on by U.S. courts. Part III discusses alternative strategies courts have used to determine sex for purposes of marriage. Part IV analyzes what "same-sex marriage" has meant in the various jurisdictions that have addressed the question—and what policy concerns inform decisions to ban same-sex marriage. This analysis highlights the absurd results that stem from adherence to a model that requires everyone to fit into a "true sex" of either male or female. Finally, Part V suggests that in order to rectify the problems created by the "true sex" model, the most sensible solution would be to cease differentiating between sexes for purposes of marriage altogether.

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1. *See, e.g.*, SANDRA L. SAMONS, WHEN THE OPPOSITE SEX ISN'T: SEXUAL ORIENTATION IN MALE-TO-FEMALE TRANSGENDER PEOPLE 45 (2009).

2. For an in-depth look at the legal difficulties facing intersexed people, see Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

3. JOAN ROUGHGARDEN, EVOLUTION'S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE 26–29 (2004).

4. *See, e.g.*, A. Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675 (2008); Anne Bloom, *To Be Real: Sexual Identity Politics in Tort Litigation*, 88 N.C. L. REV. 357 (2010); Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939 (2008).

5. Corbett v. Corbett, [1971] P. 83.

6. *Id.* at 104.

I. TRANSSEXUALITY AND THE MYTH OF MALE/FEMALE DICHOTOMY

A. An Introduction to Transsexuality

Although it is tempting to use "sex" and "gender" interchangeably, the terms are actually quite different. In general, "sex" is a function of biology, while "gender" is a function of perception.[7] "Gender" can be defined as "the way a person expresses sexual identity in a cultural context."[8] Most people's sex and gender are aligned, and the difference is purely academic. For some, however, sex and gender are entirely separate. In addition, neither sex nor gender is binary. Perhaps the best way to think about "sex" is as a continuum between those with all the biological characteristics of males and those with all the biological characteristics of females. Likewise, "gender" is a continuum between those who feel and act entirely within our cultural conception of "male," and those who feel and act entirely within our cultural conception of "female."[9]

Those people whose sense of gender is different from their biological sex are referred to broadly as "transgender." Transgender is an umbrella term that refers to any sex/gender variant, including (among others): crossdressers (usually straight people who temporarily act like the opposite gender in order to express their opposite-gender side, which is usually not linked to sexuality); transvestites (usually men who dress as women as part of their sexuality); intersex people; and transsexuals.[10]

Transsexuals are those transgender individuals whose sense of gender is so diametrically opposed to their sex assigned at birth that they desire to live exclusively as the opposite sex, undergoing hormone treatments to align more closely with the opposite sex and even undergoing surgery to match their sexual organs with their gender identity.[11] This desire is sometimes known as "gender dysphoria."[12]

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7. *See, e.g.*, SALLY HINES, TRANSFORMING GENDER: TRANSGENDER PRACTICES OF IDENTITY, INTIMACY AND CARE 59–60 (2007); ROUGHGARDEN, *supra* note 3, at 23, 27; DEBORAH RUDACILLE, THE RIDDLE OF GENDER, at xvi (2005). In addition, "sex" may be seen to encompass gender as well as biological factors, a definition that may be particularly telling in statutory interpretation of the word "sex." *See infra* Part I.B.

This is by no means a universally accepted view of sex and gender. *See, e.g.*, Mathew D. Staver, *Transsexualism and the Binary Divide: Determining Sex Using Objective Criteria*, 2 LIBERTY L. REV. 459, 459 n.5 (2008). However, it is the view taken by many modern researchers and the view adopted by courts that have analyzed transsexual marriage cases. *E.g.*, *Corbett*, [1971] P. 83 at 107 (differentiating between sex and gender for purposes of marriage). It provides a sound conceptual framework for understanding transsexuality, and therefore it is the view adopted in this Note.

8. ROUGHGARDEN, *supra* note 3, at 27.

9. *See, e.g.*, SHARI L. THURER, THE END OF GENDER: A PSYCHOLOGICAL AUTOPSY 12–17 (2005).

10. *Id.* at 3–4.

11. *E.g.*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, INC., STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 4–5 (6th ver. 2001) [hereinafter STANDARDS OF CARE], *available at* http://www.wpath.org/documents2/socv6.pdf; AM. PSYCHOLOGICAL

The established process for sex reassignment is outlined in the Standards of Care (SOC), published by the World Professional Association for Transgender Health, an international body of scientists and health care professionals specializing in transsexuality.[13] This process begins with a diagnosis of gender identity disorder; it is often followed by a period of living as the opposite gender, hormone treatments, and, finally, surgery.[14] Letters from therapists or psychiatrists are generally required before doctors will prescribe hormone treatments or perform surgery.[15] Surgery can range from relatively minor cosmetic procedures, such as facial hair removal or breast augmentation for male-to-female (MTF) patients, to complete genital reconstructive surgery (GRS, sometimes referred to as "sex reassignment surgery" or SRS) for patients of both sexes.[16] Sex reassignment surgery is generally more effective for MTF patients than for female-to-male (FTM) patients.[17] However, many transsexuals will never undergo surgery, and a desire to do so is not necessary for a diagnosis of transsexuality.[18] The reasons for forgoing surgery vary: some transsexuals cannot afford surgery; some are unwilling or unable to have surgery because of health risks; still others simply object to the idea that the only way to belong to a particular gender is to have anatomy that conforms to that gender.[19] Despite this reality, court opinions that recognize a transsexual person's affirmed sex for purposes of marriage do so only after the person has completed surgery.[20]

Although gender identity disorder is listed in the American Psychological Association's Diagnostic and Statistic Manual of Mental Disorders,[21] a growing number of researchers and health care professionals consider transsexuality "a normal variation of gendered behavior due to a mismatch between the transsexed person's genitals and their mindset regarding their affirmed sex."[22] In other words,

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ASS'N, *Sexual and Gender Identity Disorders*, *in* DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 533–34 (4th ed. 2002) [hereinafter DSM-IV].

12. STANDARDS OF CARE, *supra* note 11, at 2.

13. *About WPATH*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, http://www.wpath.org/about_wpath.cfm (last visited Jan. 27, 2011).

14. STANDARDS OF CARE, *supra* note 11, at 3.

15. *Id.* at 8.

16. *Id.* at 19–22.

17. *See id.* at 21–22.

18. *See id.* at 4–5.

19. *See, e.g.*, *Sex Reassignment Surgery: Sometimes, But Not Always, Necessary or Desirable*, AM. EDU. GEND. INFO. SERV., INC. (Jan. 1995), http://www.gender.org/aegis/index.html (follow "Sex Reassignment Surgery" hyperlink); SAMONS, *supra* note 1, at 6–8.

20. *See infra* Part III.A.

21. DSM-IV, *supra* note 11, at 532–38.

22. *See, e.g.*, RACHEL ANN HEATH, THE PRAEGER HANDBOOK OF TRANSSEXUALITY: CHANGING GENDER TO MATCH MINDSET 79 (2006); ROUGHGARDEN, *supra* note 3, at 284–88 (arguing that the high incidence of transsexuality in the human population suggests that it may be an adaptive trait rather than a disorder); STANDARDS OF CARE, *supra* note 11, at 6 (questioning whether gender identity disorders are mental disorders and suggesting that their inclusion in the DSM-IV serves the purposes of "offering relief, providing health insurance coverage, and guiding research"); Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745, 765 (2000)

transsexuality itself can be considered another variation on human gender, and not a disease or disorder of any kind. Nevertheless, many transsexuals experience great emotional difficulty in coming to terms with themselves and living in a society that insists on gender conformity, and these individuals may need the help of a psychotherapist to achieve peace and wellbeing.[23]

Estimates for population frequency of transsexuality range from 1 in 50,000 to 1 in 500. Around 1000 surgeries are performed each year in the United States alone, which suggests that the latter number is probably more accurate.[24]

B. "Legal" Sex

The U.S. legal system insists upon a male/female dichotomy. Accordingly, babies are assigned either an "M" or an "F" at birth.[25] However, the designation may not reflect reality. If a child's genitalia are ambiguous, doctors base their decision on whether there is an "adequate" penis—that is, one that is at least 2.5 centimeters when stretched.[26] If there is, the child is pronounced male; if not, the child is pronounced female, regardless of chromosomes or internal structures.[27]

For most, "M" or "F" accurately reflects sex, gender, chromosomal makeup, internal and external morphology, or any other biological or psychological measure of masculinity or femininity. However, for some, these factors do not align neatly into one category or the other. The "M" or "F" on the birth certificate is a legal fiction for these individuals.[28]

This fiction seems harmless enough on the surface. After all, most people—even many intersexed people—are comfortable enough living as whatever sex is marked on their birth certificates. However, this legal "fiction" can have a profound effect on the lives of those people whose sex/gender makeup is not perfectly aligned, even if they are comfortable living with their assigned sex. For example, the gender marker on state-issued identification may not accurately reflect the person's gender presentation, leading to awkward situations any time identification must be shown. In addition, the proliferation of "Defense of

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(noting that medical researchers consider gender identity to be an immutable trait, and not a disorder).

23. *See* STANDARDS OF CARE, *supra* note 11, at 12 ("The psychotherapy sessions initiate a developmental process. . . . Psychotherapy is not intended to cure the gender identity disorder. Its usual goal is a long-term stable life style with realistic chances for success in relationships, education, work, and gender identity expression. Gender distress often intensifies relationship, work, and educational dilemmas.").

24. ROUGHGARDEN, *supra* note 3, at 285–86. Multiplying 1000 male-to-female surgeries per year over the forty years and dividing that by the eighty million males between the ages of eighteen and sixty in the United States yields a population density of 1 MTF transsexual for every 2000 supposed males. This number does not take into account those people who do not undergo surgery. *Id.*

25. Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEXUALITY 123, 131 (2001).

26. Greenberg, *supra* note 2, at 271–72 & n.28.

27. *Id.*

28. *See id.* at 308–09.

Marriage" laws at the federal and state levels calls into question who these people may marry.[29] For those people who cannot live as their assigned sex, the implications can be devastating.

Numerous scholars have documented the trials endured by those whose gender expression does not match their assigned sex.[30] In states where IDs include a gender marker, transsexuals risk being "outed" with every police stop, credit card purchase, or bar entry. Because passports also contain a gender marker—which until recently could not be changed without a surgeon's letter proclaiming that GRS has been completed[31]—international travel can be extremely difficult. Until very recently, people who wished to travel overseas in order to obtain GRS found themselves in a particularly troublesome bind: the gender marker could not be changed before surgery, so the traveler's passport in no way matched anatomy. Because of this mismatch, the traveler could potentially be denied entry back into the United States.[32]

Since so much depends on the birth certificate, the easiest way to change a person's legal sex is to change that person's birth certificate. But jurisdictions are divided on how, when, and whether birth certificates may be altered. In Arizona, for instance, a transsexual person's birth certificate will be amended when the court receives a written request accompanied by a physician's note explaining that the person has undergone GRS (or has a chromosome count that indicates that the assigned sex is inaccurate).[33] Arizona's legislature was among the first to adopt a birth-certificate amendment statute specific to transsexuals.[34] In contrast, Ohio statutes allow only for name changes on birth certificates, and even then, the new certificate still refers to the fact of the change.[35] Ohio courts have reasoned that their birth certificates are designed to reflect "an historical record of the facts as they existed at the time of birth."[36] Many states have no specific statutory

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29. *E.g.*, 1 U.S.C. § 7 (2006); OHIO CONST. art. XV, § 11; FLA. STAT. § 741.212 (2010); KAN. STAT. ANN. § 23-101(a) (2002); TEX. FAM. CODE ANN. § 2.001(b) (West 1997).

30. *E.g.*, Weiss, *supra* note 25, at 146–55.

31. In June 2010, the U.S. Department of State issued a new policy that will make obtaining a passport much easier:

> [W]hen a passport applicant presents a certification from an attending medical physician that the applicant has undergone appropriate clinical treatment for gender transition, the passport will reflect the new gender. . . . It is also possible to obtain a limited-validity passport if the physician's statement shows the applicant is in the process of gender transition.

Press Release, U.S. Dep't of State, New Policy on Gender Change in Passports Announced (June 9, 2010), *available at* http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm.

32. Weiss, *supra* note 25, at 150–52.

33. ARIZ. REV. STAT. ANN. § 36-337(A)(3) (2004).

34. *See In re* Ladrach, 513 N.E.2d 828, 830 (Ohio Prob. Ct. 1987) (noting that at that time, only three states—Arizona, Louisiana, and Illinois—had statutes regarding birth certificate changes after GRS).

35. OHIO REV. CODE ANN. § 3705.13 (West 1989).

36. *In re Ladrach*, 513 N.E.2d at 831 (quoting K. v. Health Div., Dep't of Human Res., 560 P.2d 1070, 1072 (Or. 1977)).

provision for amending birth certificates, only administrative procedures in their offices of vital records.[37] All jurisdictions that allow amendments to the sex marker on a birth certificate require a letter from a doctor stating that the person has undergone GRS.[38]

However, the birth certificate will be a factor only in major, life-altering events, such as (in some jurisdictions) marriage. In most routine situations where identification is required, an ID card, such as a driver's license, will suffice. Perhaps because less confusion results from IDs that accurately reflect a person's gender presentation than from ones that insist upon using assigned sex, many state agencies are far more lenient about allowing ID changes. In Arizona, for instance, the Motor Vehicle Division will change the sex marker on a driver's license or ID card if presented with a letter from a healthcare professional stating that the person is "irrevocably committed to the gender-change process."[39] This expedient makes everyday living far easier, and it counts toward the "real-life experience" that the SOC requires for surgery.[40]

C. Sex and Marriage

In 1996, Congress passed the federal Defense of Marriage Act (DOMA) that defines marriage as "*only* a legal union between *one man* and *one woman* as husband and wife."[41] Since that time, many states have followed suit—amending their marriage statutes, and in many cases even their constitutions, to ensure that marriage extends only to "one man" and "one woman."[42] This leaves those people

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37. *See Sources of Authority to Amend Sex Designation on Birth Certificates*, LAMBDA LEGAL, http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html (last visited Feb. 14, 2011).

38. *See id.*

39. ARIZ. DEP'T OF TRANSP., MOTOR VEHICLE DIV., POLICY 3.1.1(Q), CUSTOMER RECORDS (Nov. 8, 2010).

40. *See* STANDARDS OF CARE, *supra* note 11, at 17 ("The act of fully adopting a new or evolving gender role or gender presentation in everyday life is known as the real-life experience. The real-life experience is essential to the transition to the gender role that is congruent with the patient's gender identity. Since changing one's gender presentation has immediate profound personal and social consequences, the decision to do so should be preceded by an awareness of what the familial, vocational, interpersonal, educational, economic, and legal consequences are likely to be.").

41. 1 U.S.C. § 7 (2006) (emphasis added). *But see* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010) (holding that DOMA's restrictions violate equal protection); Mass. v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA violates the Tenth Amendment).

42. *See, e.g.*, TEX. CONST. art. I, § 32 (adopted at the Nov. 8, 2005 election) (defining marriage as a union of one man and one woman, and refusing to recognize "any legal status identical or similar to marriage"); ARIZ. CONST. art. XXX, § 1 (added by 2008 Ariz. Legis. Serv. Sen. Conc. Res. 1042) (defining marriage as only a union of one man and one woman); FLA. CONST. art. I, § 27 (added by general election Nov. 4, 2008) (defining marriage as a union of "only one man and one woman as husband and wife" and denying recognition to other legal unions "treated as marriage or the substantial equivalent thereof"). For a graphical view of how this trend has spread across the nation since 2000, see Maloy Moore et al., *Interactive: Gay Marriage Chronology*, L.A. TIMES,

whose legal sex is an open question in the difficult position of attempting to determine whether they are "men," "women," or another designation not encompassed by the marriage statutes.

Appellate decisions in the United States have dealt with determining the validity of an opposite-sex marriage performed after one member fully transitioned. State courts are divided on how to handle this issue. In New Jersey, a court held that such a marriage was valid; functional sex at the time of marriage controlled.[43] In all other states that have considered this question, though, such unions were declared void, with courts reasoning that sex for purposes of marriage is determined at birth.[44]

Interestingly, this reasoning sanctions de facto same-sex marriages, as long as one spouse is transsexual and has undergone GRS. If sex at birth controls who a person may marry, then a transsexual person who functions as a male could marry another male, having been born female, and vice versa. Marriage licenses have been granted to such couples on several occasions.[45] The logic that allows de facto same-sex marriages to be performed suggests the question: what is the purpose of banning same-sex marriage? If the purpose in banning same-sex marriage is to discourage homosexual sex, homosexual relations, the visibility of homosexual couples on the street, or any other external manifestation of homosexual identity, then that purpose is undermined by the results of these rulings. The sanctioned de facto same-sex marriages are completely homosexual culturally and sexually.

However, these rulings are a step backward for transsexual rights and recognition. Even though some transsexual people are comfortable with being married under such circumstances,[46] these courts are denying transsexual identity. In these jurisdictions, transsexual people may only enter into marriages with people of the same apparent sex because the courts refuse to recognize that their sex has changed. This refusal legally nullifies all the effort put into transition.

Finally, there are a growing number of marriages that start out as opposite-sex but become same-sex when one spouse transitions.[47] The concerns of such couples differ from those of couples who begin their relationship after one partner transitioned. These concerns cover a range of issues, such as whether they

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http://www.latimes.com/news/local/la-gmtimeline-fl,0,5345296.htmlstory (last visited Jan. 27, 2011).

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

44. *E.g.*, Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Marriage of Simmons, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005); *In re* Estate of Gardiner, 42 P.3d 120, 136–37 (Kan. 2002); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

45. *E.g.*, Adolfo Pesquera, *Lesbian Couple Get License to Wed: Transsexual Ruling Clears the Way*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2000, at 1B.

46. *See id.*

47. *E.g.*, Jennifer Finney Boylan, *Is My Marriage Gay?*, N.Y. TIMES, May 12, 2009, at A27 (describing the author's experiences in a post-GRS same-sex marriage); Tina Kelley, *Through Sickness, Health, Sex Change . . .*, N.Y. TIMES, Apr. 27, 2008, at 1 (describing a post-GRS same-sex couple who entered into an opposite-sex marriage in New Jersey).

may continue to file joint federal tax returns, or whether they will still be entitled to hospital visitation rights.[48] Legal commentators have opined that, at least in some jurisdictions, such marriages must still be valid because legal marriages can only be ended by death or divorce.[49] However, some international courts have dealt with this issue by refusing to allow the transitioning spouse's legal sex to change unless the couple first divorces.[50] This result may best promote the interests of recognizing the transsexual spouse's identity. However, for a couple that wishes to remain together, forced divorce is a high price to pay.

For purposes of marriage, a transsexual person's "legal" sex is irrelevant in jurisdictions where no distinction is made between same-sex and opposite-sex marriage. However, even in such jurisdictions, "legal" sex might make a difference. Because the federal DOMA does not allow any same-sex marriage to be recognized for federal purposes, problems could still arise for these couples on the federal level.[51]

The question of "legal" sex is therefore of vital importance for any transsexual person who wishes to marry. Heterosexual transsexual people (that is, those who are attracted to people opposite their affirmed sex) will find, in most jurisdictions, that the question of their sex for purposes of marriage was answered long ago, in England.

D. Corbett v. Corbett *and the Legal Fiction of "True Sex"*

In 1970, an English court heard *Corbett v. Corbett*, one of the first transsexual marriage cases and certainly one of the most influential.[52] Arthur Corbett married April Ashley, a post-GRS transsexual woman.[53] Their relationship could be described as troubled at best: in their nine months of marriage, they spent only fourteen days together and slept apart the entire time.[54] Arthur, himself struggling with gender and sexuality issues, had difficulty accepting April's change in sex; there was some doubt as to whether the marriage was ever

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48. Kelley, *supra* note 47, at 1.

49. *E.g.*, TRANSGENDER LAW CTR., TRANSGENDER FAMILY LAW FACTS: A FACT SHEET FOR TRANSGENDER SPOUSES, PARTNERS, PARENTS, AND YOUTH 1 (2006), *available at* http://transgenderlawcenter.org/pdf/Family%20Law%20Facts.pdf.

50. *See* HEATH, *supra* note 22, at 180 ("In those jurisdictions that do not permit same-sex marriages, a transsexed woman may not remain legally married to her wife . . . . In the UK, . . . same-sex marriages by proxy between a transsexed person and their spouse are null and void.").

51. 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

52. Corbett v. Corbett, [1971] P. 83 at 83; *see also In re* Estate of Gardiner, 42 P.3d 120, 124 (Kan. 2002); M.T. v. J.T., 355 A.2d 204, 208–09 (N.J. Super. Ct. App. Div. 1976); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987); Littleton v. Prange, 9 S.W.3d 223, 226 (Tex. App. 1999).

53. *Corbett*, [1971] P. 83 at 91–93.

54. *Id.* at 93–96.

consummated.[55] The two parted ways, and when April sought spousal maintenance, Arthur brought an action to have the marriage declared a nullity.[56]

Well before the marriage, April legally changed her name, obtained a new passport, and was considered female by England's national health insurance system.[57] Despite this official medical recognition of her change, her "legal" sex was still indeterminate. If she was female, her marriage to Arthur was valid and she would be entitled to spousal maintenance; if she was male, the court would annul the marriage.

At that time, transsexuality and the accompanying procedures for treatment were a new idea in the medical community. Psychiatrists of the day described transsexuality as a "psychiatric anomaly," and doctors had only recently discovered that transition, via hormone treatments and GRS, is the most effective solution for treating transsexual patients' "psychological distress."[58] The *Corbett* court, therefore, faced the difficult task of determining a transsexual person's "legal" sex with no precedent and very little medical information to rely on. Lacking a clear legal definition of "sex," the court turned to medical definitions, which at the time were based on chromosomes, gonads, genitals, and psychology, to determine April's "true sex."[59]

The court ruled that these medical definitions of sex did not necessarily determine the legal definition of sex.[60] To articulate a cognizable test for determining a person's sex for purposes of marriage, the court looked to the congruence of the various physical sex characteristics.[61] If chromosomes, gonads, and genitals (presumably genitals at birth) were all "congruent," then that congruence formed the person's "true sex," which was the person's sex for purposes of marriage despite "operative intervention."[62] In this way, the judge distinguished between *sex* and *gender*.[63] Since April had male chromosomes and male gonads and genitalia at birth, her "true sex" was male. She was therefore legally a man, despite the evidence that her gender was recognized as female socially and medically. The marriage was void.[64] The court recognized the apparent discrepancy between society's treatment of April as a woman and the law's treatment of her as a man by stating that "[m]arriage is a relationship which depends on sex and not on gender."[65] And sex, according to medical testimony at the time, was unchangeable.[66]

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55. *Id.* at 92–94.
56. *Id.* at 96.
57. *Id.* at 93.
58. *Id.* at 98.
59. *Id.* at 100.
60. *Id.*
61. *Id.* at 106.
62. *Id.*
63. *Id.* at 107.
64. *Id.* at 107, 110.
65. *Id.* at 107.
66. *See id.* at 100.

This formulation conflates the ideas of "true sex" and legal sex. While it may be necessary to determine a person's legal sex for some purposes, that does not mean that there must exist an identifiable "true sex." "True sex" is an assumption that springs from acceptance of the male/female dichotomy. The emerging model that decouples sex from gender and views both concepts as a continuum does not support the existence of "true sex."

For all practical purposes, April Ashley was female. She was treated as a female; she functioned sexually as female; the court addressed her using female pronouns. The reason for the law to deviate from practical experience for the purpose of evaluating a marriage is not clear, and yet, that is what the *Corbett* ruling did. The court explained the anomaly by noting that marriage is "obviously" fundamentally different from other social situations.[67] To support the claim, the court postulated a situation where a transsexual woman might have previously been married and had children as a man, saying that a change in sex after such events would be "nothing if not bizarre."[68] In modern society, however, such situations are becoming more common. As of 2007, courts or legislatures in twenty-eight states and the District of Columbia have allowed joint adoptions by same-sex parents.[69] The argument that such situations are "bizarre," that is, "strikingly out of the ordinary,"[70] lacks serious force in this time and place.

II. CONTINUED RELIANCE ON *CORBETT* NO LONGER MAKES SENSE

Corbett was decided in 1970. Now, over forty years later, much more is known about transsexuality. Definitions have changed; culture has changed. In Australia, the logic of *Corbett* has been sharply critiqued based on emerging medical evidence; and in Europe, *Corbett* has been denounced as a violation of human rights.[71] With one exception,[72] courts in the United States still follow the reasoning of *Corbett*,[73] even though the decision is becoming more difficult to defend as scientific understanding of gender and sex progresses. In addition, following *Corbett* leads to a result that many states wish to avoid: marriages that for all practical purposes are between members of the same sex. It is time for courts to stop relying on a case that is no longer good law in its country of origin and focus instead on what is the most practical, and the most fair, solution.

A. Corbett *as an Outdated Decision Based on Insufficient Information*

Corbett was based on the assumption that every person has an unchangeable "true sex" that exists independently from gender, gender identity,

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67. *Id.* at 107.

68. *Id.* at 106.

69. DENIS CLIFFORD ET AL., A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 85–86 (15th ed. 2010).

70. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 118 (10th ed. 1999).

71. *In re* Kevin (2001) 165 FLR 404 (Austl.); Goodwin v. United Kingdom 2002 Eur. Ct. H.R. 558.

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

73. Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Estate of Gardiner, 42 P.3d 120, 136–37 (Kan. 2002); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

social function, or even—in the case of those individuals who undergo GRS—anatomy.[74] However, the medical community and courts worldwide are moving away from this idea.

The *Corbett* court defined "true sex" as a function of biology: the congruence of genitals and gonads at birth, chromosomes, and, to a lesser extent, hormonal state.[75] However, emerging research suggests that the question of biological sex is more nuanced than that definition. For example, researchers have discovered areas of the brain that are different in males and females; in transsexual women, these regions matched those of natal women more closely than those of natal men.[76] In addition, the hormones present in an individual's mother during pregnancy influence sex differentiation independently from the fetus's chromosomal makeup, and affect how genes, including sex-differentiating genes, are expressed.[77] An in-depth medical discussion of all possible biological variations between male and female is beyond the scope of this Note; however, these studies show that determining biological sex is a far more complicated proposition than merely checking a person's gonads, genitals, and chromosomes.[78]

Nor do medical professionals necessarily consider biological sex immutable; at least some disagreement on that point now exists. The *Corbett* court emphasized the testimony of one doctor that "'we [doctors] do not determine sex—in medicine we determine the sex in which it is best for the individual to live.'"[79] Indeed, patients undergoing GRS at that time were required to sign a consent form stating that they understood the surgery "will not alter [their] male sex and that [the surgery] is being done to prevent deterioration in [their] mental health."[80]

Today, the question of whether surgery changes biological sex is in flux. For example, in its definition of "transsexual," Stedman's Medical Dictionary still refers to GRS as a process that changes "external sexual characteristics so that they *resemble* those of the opposite gender."[81] However, Tabers Cyclopedic Medical Dictionary defines "transsexual" as "[a]n individual who has had his or her external sex *changed* by surgery."[82] This suggests that the medical community is moving away from the idea of the immutability of biological sex expressed in

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74. *See* Corbett v. Corbett, [1971] P. 83 at 104.

75. *Id.* at 106.

76. HEATH, *supra* note 22, at 21–32.

77. *See* ROUGHGARDEN, *supra* note 3, at 197–99, 216–17.

78. *See, e.g.*, Greenberg, *supra* note 2, at 278 (describing eight factors that inform medical sexual determination); Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2034 (2000) (reporting that brains of transsexual women have been shown to more closely resemble those of natal women than of natal men, suggesting that transsexuality has a biological basis); *see also* ROUGHGARDEN, *supra* note 3, *passim*; RUDICILLE, *supra* note 7, at 240–76.

79. *Corbett*, [1971] P. 83 at 100.

80. *Id.* at 98.

81. STEDMAN'S MEDICAL DICTIONARY 2021 (28th ed. 2006) (emphasis added).

82. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 2227 (20th ed. 2005) (emphasis added).

Corbett. Researchers today are willing to state plainly that transsexuality encompasses "the behavior of changing one's sex."[83] The Standards of Care are silent on whether GRS truly changes sex, but they do use the term "sex reassignment surgery" interchangeably with such terms as "genital reconstructive surgery" or "gender-confirming surgery."[84] Such terms deemphasize the *assignment* part of the transition process, which could imply that surgery is an artificial change, and suggest instead that surgery corrects a congenital error. These examples signal a possible trend toward recognizing that sex can, in some instances, be changed.

What modern researchers do consider immutable is gender identity. People are born with an innate sense of what gender they belong to, regardless of biological sex.[85] This immutability suggests that if there is a "true sex," then gender identity should inform that determination at least as much as biological factors.

More telling is what courts have started doing with this new medical information. In 2001, the Australian Family Court upheld a marriage between an FTM transsexual man and a natal woman in *In re Kevin*.[86] In a lengthy and detailed opinion, the court rejected *Corbett*'s assumption that there exists a "true sex" determined solely by biological factors at birth.[87] After hearing a large body of medical and anecdotal testimony, the court held that *Corbett*'s "essentialist" idea of sex is inconsistent with current medical and social norms.[88]

Indeed, as the *Kevin* court pointed out, Australian cases dealing with situations other than marriage had already held that post-operative transsexuals were to be considered as belonging to their affirmed sex.[89] The contemporary meanings of "man" and "woman" include post-operative transsexuals.[90] The *Kevin* court could articulate no reason why this idea should not apply to marriage as well—and several good reasons why it should. These reasons boiled down to encouragement of human rights; reduction of confusion resulting from using biological birth sex as the determining factor for marriage; and promotion of consistency in the law.[91] This reasoning led the court to conclude that sex at the time of marriage—under the ordinary usage of the term, which, at least in Australia, is a factual question based on a variety of factors, encompassing gender as well as biological sex—should control.[92]

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83. HEATH, *supra* note 22, at 1.
84. STANDARDS OF CARE, *supra* note 11, at 18–21.
85. Greenberg, *supra* note 22, at 765.
86. *In re* Kevin (2001) 165 FLR 404, 404 (Austl.).
87. *Id.* at 427.
88. *Id.* at 473.
89. *Id.* at 431.
90. R. v. Harris & McGuinness (1988) 17 NSWLR 158, 158 (Austl.); Sec'y, Dep't of Soc. Sec. v. SRA (1993) 43 FCR 299, 299 (Austl.).
91. *In re Kevin*, 165 FLR at 474.
92. *Id.* at 475.

B. Corbett *as a Violation of Human Rights*

In 2002, the European Court of Human Rights held that the United Kingdom's refusal to legally recognize sex changes, including its continued reliance on *Corbett*, violated Articles 8 and 12 of the European Convention on Human Rights.[93] The court held that refusing to allow someone who lived as a woman to marry a man, as required under *Corbett*, denied her the right to marry in violation of the Convention.[94] The court noted that, with modern advances in surgical techniques and hormone treatments, "the principal unchanging biological aspect of gender identity is the chromosomal element."[95] However, the court continued, because chromosomal makeup is naturally variable and, particularly in the case of intersexed individuals, not necessarily related to "legal" sex, it would be illogical to make chromosomes the deciding factor for determining a transsexual person's legal sex.[96] Instead, the court held that individuals have "the right to establish details of their identity as individual human beings," and governments must respect that right.[97]

In response, the United Kingdom rejected the "now infamous decision of *Corbett*."[98] In 2004, the United Kingdom passed the Gender Recognition Act, which allows any individual diagnosed with gender dysphoria to be recognized as their reassigned gender for all legal purposes, including marriage.[99] Under this law, any person over eighteen who is "living in the other gender" may apply for a gender recognition certificate.[100] The application will be granted if the applicant has been diagnosed with gender dysphoria, has lived as the other gender for at least two years, and intends to continue doing so until death.[101] It remains the most progressive transgender legislation in the world, requiring neither surgery nor the ability of the transsexual person to "pass" as their[102] affirmed sex.[103] It requires

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93. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, ¶¶ 93, 104. Article 8 guarantees a right to respect for private life; Article 12 guarantees a right for a man and a woman to marry. *Id.* ¶¶ 59, 98.

94. *Id.* ¶ 103.

95. *Id.* ¶ 82.

96. *Id.*

97. *Id.* ¶ 90.

98. Andrew N. Sharpe, *Gender Recognition in the UK: A Great Leap Forward*, 18(2) SOC. & LEGAL STUD. 241, 241 (2009).

99. *Id.* This legislation deals specifically with the problem of de facto same-sex marriages (or opposite-sex civil unions) by providing that married people (or people in civil unions) can get only an interim certificate. A full certificate is issued only when the marriage or union is dissolved. Gender Recognition Act, 2004, c. 7, § 1 (Eng.).

100. Gender Recognition Act § 1.

101. Gender Recognition Act § 2.

102. Handling third-person singular pronouns is always difficult when referring to hypothetical people, who could be male, female, or otherwise. However, using "he or she" about a transsexual person carries implications that the person could be either. I have attempted to mitigate this problem by using plurals; however, singular hypothetical references are sometimes unavoidable. Although it is ungrammatical, I will substitute the third-person plural pronouns (they/their/them) for inadequate singular ones. This approach comes closest to spoken English and will allow the greatest readability.

103. Sharpe, *supra* note 98, at 242.

only that the person live as a member of their affirmed sex, in a manner echoing the "real-life test" requirement of the Standards of Care for transition.[104] Had this law been in effect in 1970, April Ashley would have been deemed female, and her marriage thus valid.

Corbett is no longer valid in its country of origin, or, indeed, throughout Europe. It would be illogical for courts after 2004 to continue citing to it as support for the position that sex is unchangeable for marital purposes.

C. Corbett *as Unpersuasive Authority for U.S. Courts*

U.S. courts never should have treated *Corbett*, a foreign decision, as the most persuasive authority available. Domestic precedent has existed since 1976. Six years after *Corbett* was decided, a New Jersey appellate court rejected its reasoning.[105] In *M.T. v. J.T.*, the court held that there was no reason to deny transsexual people the recognition they had worked so hard to achieve by ignoring their transition for purposes of marriage, and that therefore the marriage between a transsexual woman and a natal man was valid.[106] This ruling represents a fundamentally different idea about the nature of sex and gender than was previously understood in *Corbett*, and it predated the ruling in *Kevin* and the reforms in British law by nearly thirty years.

M.T., the wife, had transitioned from male to female about one year prior to her marriage to J.T., who was fully aware of his wife's transsexuality. J.T. had even helped pay for her surgeries. The couple remained together for two years before J.T. moved out. M.T. sued him for support and maintenance. J.T. countered with the defense that because his wife was actually male, the marriage was void, and he was not obligated to pay anything.[107] The trial court found that recognizing transsexuality and the difficult road transsexual people must follow is good public policy. Following this policy, the court ruled that sexual anatomy at the time of marriage controls, and therefore, J.T. had to pay spousal support.[108] The court admonished those who would deny such recognition merely because they found the idea of transsexualism "repugnant," and wrote that such squeamishness should not govern the law.[109] Further, the court emphasized that "society has no right to prohibit the transsexual from leading a normal life."[110]

This statement stands in stark contrast with the contention in *Corbett* that recognizing a change in sex for purposes of marriage would lead to "bizarre"

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104. STANDARDS OF CARE, *supra* note 11, at 17.

105. M.T. v. J.T., 355 A.2d 204, 208–09 (N.J. Super. Ct. App. Div. 1976). This was the second transsexual marriage case in the United States. The first one was *Anonymous v. Anonymous*, 67 Misc. 2d 982 (N.Y. Sup. Ct. 1971). However, that case dealt with a pre-operative transsexual woman—who, even now, would be considered "male" in all jurisdictions except the United Kingdom—marrying a natal man. *Id.* This is quite a different situation from *Corbett* or its descendants, and does not fall within the scope of this Note.

106. *M.T.*, 355 A.2d at 211.

107. *Id.* at 205.

108. *Id.* at 207, 211.

109. *Id.* at 207.

110. *Id.* (internal citation omitted).

outcomes.[111] Instead, the *M.T. v. J.T.* appellate court noted that relying on strictly biological factors such as chromosomes is both "unrealistic" and "inhumane."[112] For this court, the bizarre outcome would be failure to recognize a "fait accompli": the irreversible surgery M.T. had undergone made her change of sex an established fact.[113]

D. Corbett*'s Negative Consequences*

1. Cases Following Corbett*'s Reliance on "True Sex" as Either Wholly Male or Wholly Female Could Leave Intersex People Unable to Marry*

Several decisions that follow *Corbett* have in common the idea that sex at birth is a person's "true sex" permanently for purposes of marriage, and that "true sex" comes from a congruence of several factors, usually sexual organs at birth and chromosomes.[114] However, these factors do not take into account people whose sexual organs or chromosomes are neither male nor female. Although this Note does not deal with intersex individuals, the omission of intersex people highlights the inadequacy of the *Corbett* test. While no court has attempted to implement the test in the context of intersex people, it is clear that the *Corbett* test is not universally applicable.

The approach taken in Kansas illustrates this problem. In *Estate of Gardiner*, the appellate court relied on dictionary definitions of "male," "female," and "marriage," and held that "[t]he 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."[115] This sentence almost implies that transsexual people do not fall under "male" or "female" at all; certainly, it implies that intersex people do not. And, since marriage is restricted to being between "a biological man and a biological woman," under this analysis people who are neither may not enter into a legal marriage at all.

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111. Corbett v. Corbett, [1971] P. 83 at 106.

112. *M.T.*, 355 A.2d at 210. Judge Handler based this characterization on an analysis of *In re Anonymous*, 57 Misc. 2d 813, 817 (N.Y. Civ. Ct. 1968), which overturned a previous court's ruling that a transsexual's request for a name change should not be granted because the public would be defrauded. Instead, the *Anonymous* court reasoned, the public would be far less vulnerable to fraud if the person perceived to be female (in this instance) was allowed a female name, and the name change was accordingly granted. *Id.*

113. *M.T.*, 355 A.2d at 211.

114. *Corbett*, [1971] P. 83 at 106 ("[T]he law should adopt . . . the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly."); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) (citing *Corbett*, [1971] P. 83 at 104–06); *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002) ("A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed [but] . . . . [t]here is no womb, cervix, or ovaries, nor is there any change in his chromosomes.").

115. 42 P.3d at 135. *Gardiner* was a probate case wherein the decedent's son contested the wife's right to inherit because she was a MTF transsexual.

2. Following Corbett *Leads to Anomalous Results*

The *Corbett* court considered a situation in which an older transsexual woman had been married and had fathered children before her transition. If the woman were then allowed to marry a man after transition, the result would be "bizarre."[116] The court explained by implication that the converse result, the transsexual woman marrying another woman, is not bizarre because "[m]arriage is a relationship which depends on sex and not on gender."[117] Because sex is unchangeable, according to the *Corbett* court, there is nothing illogical about this result.[118] This concern with maintaining the heterosexual nature of marriage rested in no part on appearances. Of course, this court may not have considered a situation wherein a MTF transsexual might wish to marry a female (or FTM to marry a male) might arise. In the 1960s and 1970s, doctors would not consider people to be transsexual unless they exhibited sexual attraction to people of the other gender (and same birth sex).[119]

Today, however, the medical profession recognizes that transsexual people may be attracted to males, females, both, or neither, regardless of their own gender.[120] And whatever factors sex determinations for marriage should turn on, following *Corbett* has led to cases that have the outward appearance of same-sex marriages in jurisdictions whose public policy is firmly against them.[121] For all practical purposes, these marriages are between people of the same sex. If a transsexual person wished to marry someone of the sex opposite their gender, they would be denied. This result appears to fly in the face of public policy against same-sex marriage.

3. Following Corbett *Requires Dependence on the Flawed "True Sex" Model.*

As the court in *Kevin* pointed out, the idea that "true sex" is necessarily equivalent to "biological sexual constitution" is a fallacy; *Corbett* gave no reason for its exclusion of social and psychological factors.[122] *Corbett* implied that courts should consider only physical factors when determining male-ness or female-ness because marriage is a sexual union between a male person and a female person.[123] However, the sexual nature of marriage alone does not necessitate biological sex at birth and "true sex" being equivalent. Indeed, using the same reasoning that the sexual nature of marriage should inform "true sex" determination, *M.T. v. J.T.* came to the opposite conclusion:

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116. *Corbett*, [1971] P. 83 at 106. This decision referred to a "male transsexual," by which it meant a male-to-female transsexual. *Id.*

117. *Id.* at 107.

118. *Id.* at 106–07.

119. STANDARDS OF CARE, *supra* note 11, at 3–4.

120. DSM-IV, *supra* note 11, at 534.

121. *E.g.*, Pesquera, *supra* note 45; Phyllis Randolf Frye & Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031 (2001).

122. *In re* Kevin (2001) 165 FLR 404, 419 (Austl.).

123. *See Corbett*, [1971] P. 83 at 107 ("Marriage is a relationship that depends on sex, not gender.").

> In the case of a transsexual following surgery, . . . the dual tests of anatomy and genitals are more significant. . . . [W]e are impelled to the conclusion that for marital purposes if the anatomic 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. . . .
>
> . . . [I]t is the sexual capacity of the individual which must be scrutinized.[124]

Post-operative transsexuals can no longer function sexually as members of their birth sex. The reasoning in *M.T. v. J.T.* shifts the focus of the inquiry toward the sex acts that occur within the sexual union of marriage. In contrast, while ostensibly relying on marriage's sexual nature to determine what sex a person belongs to, the reasoning in *Corbett* ignores the actual sex that happens within the marriage. If the sexual nature of marriage informs the sex determination, and if the sex that occurs within the marriage is heterosexual, then the result in *Corbett* was incorrect from the start.

Even if it could be shown that "true sex" and "biological sexual constitution" must be equivalent, "biological sexual constitution" in the case of transsexual or intersex people is difficult to determine. For example, the *Corbett* court recognized that the test for "true sex" did not encompass intersex individuals, and the opinion carefully avoided the issue:

> The real difficulties, of course, will occur if these three criteria [chromosomes, gonads, and genitals] are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to follow from what I have said that the greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision.[125]

The court recognized that the congruence test would be unable to answer the question of the sex of an intersex person for the purpose of marriage, and hinted that unaltered genitals might resolve the issue. This reasoning assumes that any individual's genitalia, without surgery, will appear to be clearly male or female. However, this means that while transsexuals and non-transsexuals alike will be considered male or female based on unaltered genitals, chromosomes, and gonads, intersex people will necessarily have a different set of criteria applied to them.

Several years after *Corbett*, a probate court in Stark County, Ohio stated far more clearly than the *Corbett* court the source of someone's "true sex":

> It is generally accepted that a person's sex is determined at birth by an anatomical examination by the birth attendant. This results in a

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124. M.T. v. J.T., 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976).
125. *Corbett*, [1971] P. 83 at 106.

> declaration on the birth certificate of either "boy" or "girl" . . . . This then becomes the person's true sex . . . .[126]

Researchers today agree, for the most part, that a birth attendant's assessment of a baby's sex is often arbitrary or inaccurate, and it has very little to do with reality.[127] In humans, "sex" may be determined by a number of biological factors, including sexual organs, hormonal state, or chromosomes. Even within the realm of biological sex, possibilities go beyond "male" or "female." Chromosomes can be indeterminate; sexual organs can be differently formed. In humans, XY chromosomes are thought to be "male" and XX chromosomes "female." However, the presence of XY or XX chromosomes in no way guarantees male or female sex organ development.[128] Furthermore, many people have other types of chromosomes, including XXY, XYY, XXX, XXXY, XYYY, XYYYY, or XO.[129] Hormonal state is also not dispositive. Regardless of chromosomes or sexual organs, humans produce a variety of sex hormones out of cholesterol, including progesterone, testosterone, estradiol, and estrogen.[130] Fluctuating hormone levels influence development at different stages of life, regardless of whether a person is "male" or "female."[131]

Moreover, a growing body of research indicates that transsexuality itself may have a biological origin in an area of the brain that develops differently from the rest of the body.[132] If that is the case, then "biological sexual constitution" must necessarily include "psychological" factors. It would make no sense for the law to ignore this fundamental piece of human sexuality.

The line between "male" and "female" behavior has blurred to some extent.[133] Attitudes about sex and gender have changed since 1970—some researchers no longer think there is anything absolute about male-ness or female-ness. To illustrate, the inappropriateness of sex differentiation based on gender stereotypes was recognized in *Price Waterhouse v. Hopkins*, where the U.S. Supreme Court held that a woman should not be discriminated against simply because she did not wear makeup and behaved "aggressively."[134] Further,

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126. *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987). In *Ladrach*, a transsexual woman who wished to marry a man sought a declaration that her sex was female for all legal purposes. This declaration was denied, and no marriage license was issued. *Id.*

127. *See supra* Part I.B.

128. ROUGHGARDEN, *supra* note 3, at 196–215.

129. Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, *in* TRANSGENDER RIGHTS 51, 56 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

130. ROUGHGARDEN, *supra* note 3, at 215–16.

131. *Id.* at 216–18.

132. A very good summary of this research appears in the *Kevin* decision. *In re* Kevin (2001) 165 FLR 404, 457–63 (Austl.).

133. THURER, *supra* note 9, at 1.

134. 490 U.S. 228, 250–51 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .").

according to some researchers, gender has been decoupled from biological sex.[135] A male-gendered person—that is, one whose social presentation and sense of gender identity is male—is not necessarily biologically male, and a female-gendered person is not necessarily biologically female.[136] With these attitudes rejecting the notion of "true sex" as a fundamental absolute of our cultural makeup, it will become increasingly difficult for courts to justify continued reliance on that premise.

U.S. courts have already struggled with the problem that "true sex" may not be definable, and may not even exist. The most common solution the courts use is one of judicial modesty: if the legislatures had wanted "male" and "female" to include post-GRS transsexuals, they would have passed laws to that effect.[137] However, despite appearing to withhold judgment pending legislative action, these decisions do in fact make assumptions about legislative intent. A Florida court pointed out in *Kantaras v. Kantaras* that this reasoning presupposes that these legislatures intended to exclude post-GRS transsexuals from recognition of their affirmed sex for purposes of marriage.[138] This is just as great an assumption as a holding that the legislature did intend for these people to be recognized.

To justify this assumption, these decisions reason that because post-GRS transsexuals do not appear in the dictionary under "male" or "female," they must not be included in the ordinary meanings of the terms.[139] Although sensible on the surface, this argument does not stand up to scrutiny. Under this reasoning, courts would have to revise their opinions if dictionary-makers started including transsexual people under "male" and "female," or even if the courts used a definition that had more to do with external morphological structures or societal

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135. THURER, *supra* note 9, at 2–3 (discussing the wide range of gender-bending behavior that has become the norm in our society, and postulating that "the requirement that a gender identity cohere with . . . genitals" is nearly archaic).

136. *See, e.g.*, HEATH, *supra* note 22, at xi–xii; ROUGHGARDEN, *supra* note 3, at 240.

137. Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) ("Whether advances in medical science support a change in the meaning commonly attributed to the terms male and female as they are used in the Florida marriage statutes . . . should be addressed by the legislature."); *In re* Estate of Gardiner, 42 P.3d 120, 136 (Kan. 2002) ("If the legislature had intended to include transsexuals [in its marriage statutes], it could have been a simple matter to have done so."); *In re* Ladrach, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) ("[T]he legislature should change the statutes if it is to be the public policy of the state of Ohio to issue marriage licenses to postoperative transsexuals."); Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999) ("[I]f the legislature intends to recognize transsexuals as surviving spouses, the statute needs to address the guidelines by which such recognition is governed.").

138. *Kantaras*, 884 So. 2d at 161. In *Kantaras*, a woman and a FTM transsexual obtained a divorce, and the man sought custody of the children born within the marriage via artificial insemination. Because the man was to be considered female, the marriage was void, and the man had no legal claim to custody of the children.

139. *Gardiner*, 42 P.3d at 135; s*ee also Kantaras*, 884 So. 2d at 161; *In re Ladrach*, 513 N.E.3d at 832; *Littleton*, 9 S.W.3d at 230.

function than with ova or sperm.[140] This was surely not the courts' intent. Nor would a system be workable if every change to the dictionary had to be legislatively enacted in order to have any validity in law, as suggested in *Gardiner*.[141] These cases are about deciding which factors make up "male" and "female" for purposes of marriage; they are litigated because dictionary definitions do not answer the question. A dictionary's inability to identify what is included in the common meaning of a term, particularly when dealing with rare or new concepts, does not indicate legislative intent to exclude these concepts from statutes.

Because the dictionary definitions of "male" and "female" are not dispositive in these cases, courts are left with little else to solve the problem. The more we understand about the various and sometimes contradictory components of sex and gender, the more apparent it becomes that if we are to maintain the male/female dichotomy in law, some affirmative definition of "male" and "female" must be reached. A growing body of science and facts indicating that transsexual people function in society as their affirmed sex suggests relying on gender presentation to determine sex for purposes of marriage. Courts continue to struggle with this problem, but their arguments are increasingly difficult to defend.

In *Littleton*, for example, despite strictures against courts delving into philosophical questions,[142] the court justified its assumptions based on religious doctrine.[143] *Littleton* was a medical malpractice case, where the issue was whether the wife, Christie, a MTF transsexual, had standing to sue for the wrongful death of her husband.[144] If Christie was female, the marriage was valid and she had standing to sue, but if she was male, the marriage was void. Rather than relying solely on biological, psychological, or other scientific factors, the court framed the issue as, "[C]an a physician change the gender of a person with scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"[145]

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140. The dictionary definition of "female" cited by *Gardiner* is "designating or of the sex that produces ova and bears offspring." *Gardiner*, 42 P.3d at 135 (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (Jean L. McKechnie ed., 2d ed. 1970)). This definition completely excludes, for example, women with birth defects, even ones not caused by an intersex condition, that render them unable to produce ova or bear children. It is unlikely that the Kansas Supreme Court would exclude these women from the common meaning of the term "female," or that it would assume that their legislature intended to do so. This definition therefore has little to do with the common meaning of the term, and for the court to use it as a basis for assuming what the legislature intended by including the word "female"—in the case of transsexual people only—is questionable.

141. *Id.* at 135.

142. *Littleton*, 9 S.W.3d at 231 ("We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy.").

143. *See id.* at 224, 231.

144. *Id.* at 224–25.

145. *Id.* at 224. Despite the fact that the court confused "sex" and "gender" as the opinion progresses, it is clear the decision is actually referring to the former. Oddly enough, the formulation of *gender* being immutably fixed at (or before) birth is probably accurate.

The added element of a Creator fixing "true sex" at birth here requires the conclusion that "Christie [Littleton] was created and born a male," a condition that can never be altered despite the fact that Christie does not look, act, feel, or perform sexually like a male.[146] With this religious justification, backed solely by the fact that Christie's chromosomes were likely to be XY, no amount of evidence otherwise could convince this court that Christie was anything but male.[147]

III. IF NOT *CORBETT*'S "TRUE SEX," THEN WHAT?

A. Functional Sex at Marriage Controls

If the idea of "true sex" is questionable at best, how else can sex for purposes of marriage be determined? Perhaps the most sensible solution is to look at how the individual functions, sexually or socially, at the time of marriage. This is the approach followed in New Jersey[148] and Australia.[149]

In *M.T. v. J.T.*, unlike *Corbett*, the New Jersey appellate court heard testimony from gender identity specialists that "no person is 'absolutely' male or female," and that the specialists would classify M.T. as her reassigned sex rather than her birth sex.[150] The New Jersey appellate court was sharply critical of *Corbett*'s understanding of sex and gender as separate for marital purposes.[151] Instead, the court described a concept of sex and gender based evidence that "a person's sex or sexuality *embraces* an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character."[152] With this definition in mind, the court held that if physical and psychological sex were congruent at the time of marriage, then the congruency should be honored even if achieved through surgical means.[153]

It probably helped M.T. that at trial, her experts' credentials were better than J.T.'s. M.T. brought her physician, who specialized in gender identity, and an eminent psychologist who was an expert on transsexuality. Both testified that they would consider M.T. female based on her psychological profile, her function in society, and her post-surgery sexual organs.[154] In response, J.T. brought his adoptive father, who was a doctor. If Dr. T. had any special experience with gender identity issues, the opinion does not mention it. Dr. T. testified that without "female organs," presumably uterus, ovaries, and cervix, he would classify M.T. as male.[155] This reliance on physical features at birth was the determining factor in

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See supra text accompanying note 85. However, the *Littleton* court was referring to the biological characteristics of sex, and whether that can change remains an open question.

146. *Littleton*, 9 S.W.3d at 231.
147. *See id.* at 230–31.
148. M.T. v. J.T., 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976).
149. *In re* Kevin (2001) 165 FLR 404, 474 (Austl.).
150. *M.T.*, 355 A.2d at 205–06.
151. *Id.* at 208–09.
152. *Id.* at 209 (emphasis added).
153. *See id.*
154. *Id.* at 205–06.
155. *Id.* at 206–07.

Corbett; however, the court here found that the evidence suggested there is far more to sex than biology at birth.[156]

Similarly, in *Kevin*, the Australian Family Court heard extensive testimony about the nature of sex, gender, and transsexuality, including testimony about research into "brain sex."[157] This emerging research suggests that transsexual people's brains are structured like those of members of their affirmed sex, rather than their birth sex.[158] The court also heard testimony from Kevin's family and friends that Kevin functioned as a male in society.[159] Considering this evidence, the court concluded that

> To determine a person's sex for the purpose of the law of marriage . . . the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; *the extent to which the person has functioned in society as a man or a woman*; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex.[160]

This totality of circumstances test emphasizes societal function and self-perception, as well as actual sexual function via surgical intervention. It is likely that surgical intervention is required under this test, however, because the court noted that the contemporary meanings of "male" and "female" encompass transsexuals who have gone through "complete medical procedures."[161]

The "functional sex" test utilized in both *M.T. v. J.T.* and *Kevin* avoids the anomalous results that arise when courts follow *Corbett*.[162] A person who functions as a male in society can only marry someone who functions as female, and vice versa. In these jurisdictions, there will be no marriage licenses granted to couples who are same-sex for all practical purposes. In addition, those people who do not easily fit into one sex or the other under the *Corbett* reasoning are easily included.[163] Finally, it avoids the problematic philosophical question of whether there is such a thing as "true sex," and provides a more practical framework.

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156. *Id.* at 208–09.

157. *In re* Kevin (2001) 165 FLR 404, 407–08 (Austl.).

158. *Id.* at 459–61.

159. *Id.* at 417 ("[Kevin's family, friends, and coworkers] see him and think of him as a man, doing what men do. They do not see him as a woman pretending to be a man. They do not pretend that he is a man, while believing he is not.").

160. *Id.* at 475 (emphasis added).

161. *Id.* at 431–32.

162. *See supra* Part II.D.2 (discussing de facto same-sex marriages resulting from the *Corbett* rationale).

163. That is, those intersex people who identify socially as either male or female are included. No marriage law adequately encompasses those people who identify as, and

This solution is not without its problems. For instance, in 1976, even though New Jersey had no law specifically stating that marriage must be between a man and a woman, the court in *M.T. v. J.T.* accepted as undisputed that marriage was so understood.[164] Opposite sex in marriage, according to the opinion, has far more to do with sexual function of the parties at time of marriage than arbitrary letters on each party's birth certificate.[165] The public policy against same-sex marriage is not violated so long as the transsexual spouse has had sufficient surgical alteration to allow performance of the opposite-sex sexual role.[166] While this inquiry into sexual activity within a marriage encroaches on marital privacy, it does do more to advance transgender rights than the denial of transsexuality evidenced in *Corbett*.

In 2007, New Jersey enacted a law creating civil unions for same-sex couples.[167] Couples in a civil union are granted "all of the same benefits, protections and responsibilities under law" as are granted in a marriage.[168] This law was enacted in response to *Lewis v. Harris*, New Jersey's primary same-sex marriage case, which held that denying same-sex couples the rights associated with marriage violated the Equal Protection clause of New Jersey's constitution.[169] However, the court held that while "marriage" is a fundamental right, "same-sex marriage" is not.[170] If the definition of "marriage" was to be expanded, the legislature would have to make that change.[171] The legislature opted instead to create civil unions, identical to marriage except in name.[172]

This minor victory for homosexual rights does not change the analysis of whether a couple in which one partner is transsexual can be "married." As Chief Justice Poritz articulated in her dissent in *Lewis*, words are important in society, and civil unions are not the same thing as marriage.[173] The result in *M.T. v. J.T.*, read in conjunction with the result in *Lewis*, yields the formula that couples who engage in penile-vaginal intercourse may marry, and those who do not, cannot. A transsexual person who had obtained genital surgery can marry someone of another sex, but not of the same sex.

This rule, while positive for transsexual rights, still casts a great deal of doubt on the validity of preexisting marriages wherein one partner transitions

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present as, a gender other than male or female; however, that particular form of gender variance is beyond the scope of this Note.

164. M.T. v. J.T., 355 A.2d 204, 207–08 (N.J. Super. Ct. App. Div. 1976) ("Despite winds of change, this understanding of a valid marriage is almost universal.").

165. *See id.* at 211.

166. *See id.* at 210–11.

167. N.J. STAT. ANN. § 37:1-29, -31 (West 2007).

168. *Id.* § 37:1-31(a).

169. 908 A.2d 196, 220–21 (N.J. 2006).

170. *Id.* at 207–08, 211.

171. *Id.* at 221.

172. *See* N.J. STAT. ANN. § 37:1-28(e) to (f) (West 2007).

173. *Lewis*, 908 A.2d at 226–27 (Poritz, C.J., dissenting).

during the marriage, rendering it a de facto same-sex marriage.[174] It also casts doubt on civil unions, where the same situation would create a de facto opposite-sex civil union (also prohibited by statute).[175]

Kevin, the Australian decision, discussed the potentially difficult problem of a transsexual person married before transition to someone who, at the time of marriage, was of the opposite sex.[176] For the court in *Kevin*, that situation posed no problem at all.[177] When the marriage was performed, it was between a man and a woman and is therefore valid.[178] It is of no importance that the marriage becomes one between two people of the same sex after the fact.[179] Should the transsexual person obtain a divorce after transition—that is, dissolve a valid heterosexual union—they may then marry someone who is now of the opposite sex.[180] In the court's opinion, this structure yields a "conclusion that is just, compassionate and sensible."[181] The situation that the *Corbett* court termed "bizarre," the *Kevin* court reasoned, is far less anomalous than the end result of *Corbett*, which would allow a postoperative transsexual to enter into a marriage with someone of the same sex.[182]

The *Kevin* court advanced a sensible suggestion that valid marriages and civil unions remain valid, but the person cannot divorce and then enter into another such contract with a person of the same sex as their previous spouse. However, the effect of this suggestion is vast complication of potential unions.[183] A person could be in a "traditional" marriage; in a same-sex marriage if one spouse transitions; in a civil union; or in an "opposite-sex" civil union if one spouse transitions. Under *M.T. v. J.T.*, change in sex is an actual change in the eyes of the law.[184] Therefore, there is no legal difference between a de facto same-sex marriage and a civil union: both involve two people of the same sex that have all the same benefits and responsibilities of "traditional" marriage. There are simply two different words, depending on the now-irrelevant genitalia of the partners at time of union. Whatever the purpose behind having two separate institutions may have been, it is now lost in a fog of needless redundancy. In addition, any public policy against same-sex marriage or opposite-sex civil unions is undermined, since both same-sex marriage and opposite-sex civil unions are possible under this scheme.

Alternatively, New Jersey could require the dissolution of a marriage or civil union before the state would recognize any transition, and subsequently require the couple to obtain a civil union or marriage if they wish to remain together. This solution would eliminate redundancy, but it creates costly

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174. *See* Kelley, *supra* note 47, at 1 (describing a New Jersey couple who married before the "husband" transitioned, rendering the union a same-sex marriage under New Jersey law).

175. *See* N.J. STAT. ANN. § 37:1-29 (West 2007).

176. *In re* Kevin (2001) 165 FLR 404, 470–71 (Austl.).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 471.

181. *Id.*

182. *Id.* at 470–71.

183. *See id.*

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

bureaucracy, and it conflicts with the policy of helping transsexual people seek happiness and fulfillment via transition, as articulated in *M.T. v. J.T.*[185] These policy interests are ill-served if committed couples are required to choose between dissolving their union and establishing the legal recognition of the transsexual spouse's affirmed sex.

B. Legal Sex at Marriage Controls

Another solution is to hold that a person's legal sex is their sex for purposes of marriage. Of course, "legal sex" is a term with a variety of meanings, and usually indicates a legal fiction of some type. For instance, in England, when individuals are diagnosed with gender identity disorder, they can get a certificate proclaiming them to be the opposite sex for all legal purposes, including marriage and civil unions.[186] Under this proposed solution, whether or not "true sex" exists is irrelevant. It is also irrelevant whether the person can adequately "pass" as a member of their affirmed sex, or even whether they have chosen to undergo surgery. In the eyes of the law, transsexuals would belong to their affirmed sex.

Conversely, some jurisdictions have taken tentative steps toward holding that the designation on an individual's birth certificate is that person's "legal" sex for purposes of marriage.[187] For instance, Ohio's first transsexual marriage case indicated that an individual's birth certificate was to be considered proof of a person's sex for purposes of marriage.[188]

In that case, a couple appeared before an Ohio probate court to request a marriage license. The license was refused because the wife-to-be, Elaine Ladrach, was a MTF transsexual, and her birth certificate still listed her as male.[189] Elaine's subsequent request for the sex on her birth certificate to be changed was also denied.[190] She finally submitted a complaint for declaratory judgment, asking the court to adjudge her female for all legal purposes and grant her a marriage license.[191] However, the judge could find no Ohio statutory authority for changing the sex on a birth certificate. Ohio's statute for amending birth certificates provides for issuance of a new certificate only if "the facts stated in any birth . . . record . . . are not true."[192] The record of male sex on Elaine's birth certificate was not in error at the time of her birth, so it could not be amended under the statute.[193] In

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185. *Id.* at 211 ("[Legal recognition of a transsexual person's sex] will 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.").

186. Gender Recognition Act, 2004, c. 7, § 1 (Eng.).

187. *See In re* Ladrach, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987).

188. *Id.*

189. *Id.* at 829. The opinion stated the issue as whether two people who were "biologically and legally of the same sex at birth" may marry. *Id.* at 828. The judge then went on to describe the facts, using male pronouns to describe Elaine, although acknowledging her name change, presentation, and eventual surgeries. *Id.* at 829–30.

190. *Id.* at 829.

191. *Id.* at 829–30.

192. OHIO REV. CODE ANN. § 3705.22 (West 1989). The statute was renumbered in 1989 but has not been materially changed since 1953.

193. *In re Ladrach*, 513 N.E. 2d at 831.

light of this, the judge noted that Ohio's policy was to maintain a birth record as "an historical record of the facts as they existed at the time of birth."[194]

This "historical" reasoning for refusing to change the sex marker on a birth record justifies the idea articulated in *Corbett* of unchangeable birth sex: historical facts do not change. The *Ladrach* opinion analyzed both *M.T. v. J.T.* and *Corbett*, and found the foreign decision's analysis of sex and gender more convincing.[195] The judge dismissed *M.T. v. J.T.* as "very liberal" and noted that there was no indication that the case would have been decided the same way had New Jersey realized M.T. was transsexual when the marriage license was issued.[196] *Corbett*, on the other hand, articulated the idea that there was a "true sex" decided at birth, which provided a good reason for Ohio's statutory refusal to change the sex marker on a birth certificate.[197]

Even so, the judge suggested that if a state had statutory or administrative provisions for changing sex markers on birth certificates, then marriage licenses should follow the birth certificate designation.[198] This solution relies on legal documentation of sex and avoids the question of whether the indicated sex is a person's "true sex," or even if "true sex" actually exists. However, other courts using *Ladrach* as persuasive authority and even a later Ohio decision did not follow this stricture.[199] This suggests that the idea of relying on birth certificates will not be followed in future U.S. cases.

In addition, birth certificates are an imperfect means of identification because they do not contain any identifying characteristics. As a clerk in a Reno, Nevada court recently pointed out to reporters, it would be inappropriate for an issuer of marriage licenses to rely on anything more than a state-issued driver's license.[200] It would be too intrusive to require marriage applicants to describe their

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194. *Id.* (internal citations omitted).

195. *Id.* at 832.

196. *Id.* This misses the point of *M.T. v. J.T.* That opinion was driven by a more modern approach to sex and gender, and there is no reason to think the sex/gender analysis would have been different had it been written at the beginning of the relationship, rather than at the end.

197. *See id.*

198. *Id.* at 831 ("It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled.").

199. Kantaras v. Kantaras, 884 So. 2d 155, 156, 158 (Fla. Dist. Ct. App. 2004) (discussing *Ladrach* without reference to the idea that changed birth certificates could allow marriages, despite the man in question here having had his birth certificate amended); Littleton v. Prange, 9 S.W.3d 223, 228–29 (Tex. App. 1999) (discussing *Ladrach* but omitting mention of the potential of birth certificate amendments); *In re* A Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *4–5 (Ohio Ct. App. Dec. 31, 2003) (refusing to give weight to Mr. Nash's amended Massachusetts birth certificate because the court had in its possession a copy of his original birth certificate listing him as female).

200. Mark Robison, *Gender Issue Cancels Couple's Reno Wedding Plans*, RENO GAZETTE-JOURNAL, Mar. 15, 2010, http://pqasb.pqarchiver.com/rgj/access/1983958101.html?FMT=ABS&date=Mar+15%2C+2010.

anatomy, and birth certificates, unlike photo identification, contain no information that would allow a clerk to visually verify identity.[201] The clerk therefore denied a marriage license to a couple where one potential spouse was a MTF transsexual and had not undergone GRS, because both partners' state-issued driver's licenses indicated that they were female.[202] Had the transsexual woman in Reno wished to marry a man, she would have been allowed to do so despite anatomical similarities to her potential spouse. The solution of relying on state-issued identification is similar to the English solution of a document proclaiming "legal" sex. This solution, however, is also a minority view; in other states, marriages such as the one that was denied in Reno have been allowed.[203]

IV. WHY DOES SEX FOR PURPOSES OF MARRIAGE MATTER?

In state jurisdictions where anyone may marry, regardless of sex, the question of what sex an individual belongs to is moot.[204] The question arises only in jurisdictions that have a public policy against same-sex marriage. However, as courts cannot agree on what factors determine sex, these jurisdictions do not agree on what constitutes a same-sex marriage, or even on the policy reasons for rejecting same-sex marriage. Decisions indicate a variety of policy interests, such as: avoiding homosexual intercourse within a marriage, avoiding marriages wherein the legal documentation of sex matches, avoiding marriages where some set of biological factors other than external morphology are the same, or avoiding marriages that appear externally to be between members of the same sex.

A. Avoiding Homosexual Sex in Marriage

One of the main policy concerns driving transsexual marriage decisions has been that sex involved in a marriage must be heterosexual, although courts have disagreed on what constitutes heterosexual sex. For instance, in *Corbett*, the court was uncomfortable with the idea that a transsexual woman could ever function sexually as female.[205] It described the idea of post-surgery sex with April, using what the court and doctors termed an "artificial vagina," as "the reverse of ordinary, and in no sense natural."[206] This discomfort reinforced the idea that sex between April and Arthur could not have been heterosexual, and, therefore, April could not have been a woman for purposes of marriage.[207]

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201. *Id.*

202. *Id.*

203. Frye & Meiselman, *supra* note 121, at 1033; Pesquera, *supra* note 45.

204. That is, the question is moot with regards to whether the marriage will be recognized by the individual state. The federal government may insist on a determination of sex, because it will not recognize marriages that are not between people of the "opposite sex." *See* 1 U.S.C. § 7 (2006). The federal government has not decided how it will determine sex for purposes of marriage, but inevitably, it will have to. When it does, it has a variety of precedent to inform its decision.

205. Corbett v. Corbett, [1971] P. 83 at 107.

206. *Id.* at 90, 107.

207. *Id.* at 105, 107. Although a factual question existed as to whether this couple had ever managed to consummate their marriage, undisputed medical testimony indicated

Of course, the medical knowledge and societal norms on which the *Corbett* court relied in reaching this decision have changed significantly since 1970. Most vaginoplasties, April Ashley's included, result in a vagina that responds sexually the same way as that of a natal woman.[208] Perhaps recognizing this—starting with the same premise that sex within a marriage must be heterosexual in nature—the court in *M.T. v. J.T.* reached the opposite conclusion.

In *Corbett*, the court reasoned that because April Ashley's vagina was "artificial," she could not possibly engage in heterosexual sex with a man, and, therefore, she could not be a woman.[209] In contrast, the New Jersey court accepted testimony that: M.T. possessed a vagina and labia, albeit constructed ones, that responded sexually the same way as a natal woman's would; she could not function sexually as male; and she could and did participate in penetrative sex.[210] At the time of her marriage, M.T. functioned sexually as female. The court held that in these circumstances, there was "no legal barrier, cognizable social taboo, or reason grounded in public policy" not to recognize M.T.'s change in sex for purposes of marriage.[211]

An Illinois court reached a similar result in 2005.[212] *In re Marriage of Simmons* arose as a custody dispute between Sterling Simmons, a FTM transsexual, and his wife, over their child who had been born within the marriage as a result of artificial insemination.[213] Sterling had undergone a total hysterectomy, removing his uterus, fallopian tubes, and ovaries. However, he had not undergone surgery to alter external morphological structures, such as breast reduction surgery or phalloplasty.[214] Because his external organs were still female, the court held his sex had never actually changed, despite the fact that he had been issued an amended birth certificate.[215] The marriage, therefore, was void, and Sterling was not legally the father of the child by virtue of being married to the child's mother.[216] This ruling suggests that had Sterling completed reassignment surgery—whereupon he would be able to function sexually as a male—he would be considered male for purposes of marriage.

These decisions view marriage as fundamentally a sexual union, and accordingly look to the type of sex that occurs in the marriage to make determinations of sex.[217] At first blush, this seems like a reasonable and practical way to think about marriage. However, determining the sex of participants in a marriage based on what sexual activities they may engage in is an enormous

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that April was capable of what would be—for all practical purposes—heterosexual sex with a man. *Id.* at 94–97.

208. *Id.* at 96–97; HEATH, *supra* note 22, at 128.

209. *Corbett*, [1971] P. 83 at 107.

210. M.T. v. J.T., 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976).

211. *Id.* at 210–11.

212. *In re* Marriage of Simmons, 825 N.E.2d 303, 308–10 (Ill. Ct. App. 2005).

213. *Id.* at 306–07.

214. *Id.* at 307, 309.

215. *Id.* at 309–10.

216. *Id.* at 310.

217. *See* Corbett v. Corbett, [1971] P. 83 at 105–06; M.T. v. J.T., 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976).

breach of marital privacy. The Supreme Court has held that the "sacred precincts of marital bedrooms" are within a zone of privacy where close inquiry by the law will not be tolerated.[218] In light of such decisions, the federal Constitution probably would not allow the level of intrusion into private sexual practices required by the suggestion that the type of intercourse couples engage in determines whether they may marry. To rest the determination of whether a person is male or female on something so easily challenged as the type of sex engaged in with one's partner is imprudent at best.

B. Avoiding Marriages Wherein the Participants' Legal Documents Match

In Ohio, information on birth certificates may not be changed unless "the facts stated in any birth . . . record filed in the department of health are not true," and birth certificates are prima facie evidence of sex for purposes of marriage.[219] Furthermore, in at least one appellate district, this evidence can be rebutted by evidence of an earlier birth certificate with a different sex marker.[220] Ohio's reliance on birth certificate statutes to decide their transsexual marriage cases suggests that Ohio's public policy against same-sex marriage rests, at least in part, on the idea that the documentation of two people in a marriage should not have the same sex marker.

Similarly, but with the opposite result, at least one court in Nevada relies on state-issued identification as prima facie evidence of sex for purposes of marriage.[221] In this instance, the evidence of the couples' driver's licenses, listing both as "female," was not rebuttable by production of a birth certificate listing the transsexual partner's sex as "male," or by testimony that the partner still possessed male genitalia.[222] In Nevada, then, the public policy is against a married couple having the same gender marker on their state-issued identification.

This particular public policy has the advantage of avoiding the question of what "sex" actually means. However, it is difficult to see what public interest is being served. Certainly, no physical aspect of the marriage is involved if sex for marriage is determined by documentation on a birth certificate or driver's license. Appearance is not an issue; genitals are not an issue; chromosomal anomalies are not an issue. This formalistic approach, while very clean and simple, does not suggest any reason *why* same-sex marriages should be banned.

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218. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the Due Process clause protects individuals' privacy in sexual conduct).

219. OHIO REV. CODE ANN. § 3705.22 (West 1988); *In re* Ladrach, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987).

220. *See In re* A Marriage License for Nash, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at *5 (Ohio Ct. App. Dec. 31, 2003).

221. Robison, *supra* note 200.

222. *Id.*

C. Avoiding Marriages Wherein a Collection of Biological Factors Are the Same in Both Partners

Corbett and subsequent decisions that rely on it are primarily concerned with avoiding marriages wherein the "true sex" of the partners is the same. "True sex," however, is a problematic term: it is extremely complex to determine, and may not even exist.[223] What this really means, then, is that the policy is against two people marrying whose apparent biology at birth was the same.

A variety of physical characteristics factor into determining sex, including chromosomes, gonads, internal and external morphology, hormones, and secondary sex characteristics.[224] Courts have relied on the congruence of a variety of these factors to articulate a test for sex. In *Corbett*, the factors for determining sex were gonads and genitals at birth, and chromosomes.[225] In *Littleton*, factors such as chromosomes were mentioned, but the decision seemed to hinge on how the individual was "created" at birth; distinct biological factors were not spelled out.[226] In *Gardiner*, the primary factors were chromosomes and whether the individual had ever produced ova or sperm.[227] Finally, *Kantaras* cited to these earlier decisions, but ultimately grouped the factors together as "immutable traits determined at birth."[228]

The common theme here appears to be chromosomes and possibly gonads and genitals at birth. The policy in these states, therefore, is at least partially to avoid marriages wherein the chromosomes of the partners indicate the same sex. However, it would be impractical and, indeed, illogical to require every person who wished to marry to submit to a chromosomal test to determine whether they were eligible to marry their partner. Chromosomes are hardly determinative; many people have chromosomes that are neither XX nor XY.[229] Perhaps this means that people with abnormal chromosomes may marry anyone, regardless of whether their partners' chromosomes are XX, XY, or some other combination—provided it is not the same combination as the first person. This does not seem probable. More likely, a marriage license would issue based on the apparent sex of the parties, and no inquiry into chromosomes would be made unless it could be shown that one party had once been considered a member of the opposite sex.

Relying on the appearance of gonads or genitals at birth is problematic for different reasons. A person is not required to have gonads to enter into a marriage; nor is a person required to have genitals or demonstrate ova or sperm production. Here again, it would be irrelevant and improper to inquire about the state of a couple's genitals before they were issued a marriage license. The only reason the gonads and genitals of a couple would make a difference in marriage would be in reference to sexual intercourse or reproductive ability, and modern marriage

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223. *See supra* Part II.D.3.
224. Greenburg, *supra* note 2, at 278.
225. Corbett v. Corbett, [1971] P. 83 at 106.
226. Littleton v. Prange, 9 S.W.3d 223, 230–31 (Tex. App. 1999).
227. *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002).
228. Kantaras v. Kantaras, 884 So. 2d 155, 158–59, 161 (Fla. Dist. Ct. App. 2004).
229. *See supra* Part II.D.3.

requires neither.[230] And, if genitals at birth do not match genitals at time of marriage, the question becomes entirely academic. It is irrelevant to the marriage what the partners' genitals looked like when they were born, because that information does not reflect reality at the time of marriage.

It is difficult to see what tangible public policy is served by insisting that marriages be between people with opposite chromosomes. One policy might be to confine the definition of "marriage" to a union between people with the capacity to reproduce. However, chromosomes are hardly indicative of reproductive ability;[231] indeed, eligibility to marry does not include proof of fertility.[232] The policy cannot have to do with sexual intercourse, because the people in these prohibited marriages engage in heterosexual intercourse.[233] Nor does it have anything to do with apparent sex, because the inquiry in these jurisdictions is not what gonads and genitals the partners have as adults, but rather what they had as babies.[234] The cases are not clear; the judges appear more concerned with preserving traditional ideas about "male" and "female" than about determining coherent public policy.

D. Avoiding Marriages that Appear to Be Between People of the Same Sex

In stark contrast to *Corbett*, both *M.T. v. J.T.* and *Kevin* rely upon the heterosexual appearance of the unions in question.[235] This mode of thinking focuses on the practicalities of the union. Part of this policy's appeal is that it avoids delving into couples' private lives to determine whether they are male or female, or to explain why an apparently homosexual couple is actually legally married, which is a possible result under *Corbett*, *Littleton*, *Gardiner*, and *Kantaras*.[236]

However, this solution is not without its own problems.[237] If one partner transitions within the marriage, the possibility of legal, apparently homosexual unions still exists. Furthermore, as the *Corbett* court pointed out, a person could

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230. At the time *Corbett* was decided, inability to consummate a marriage was grounds for divorce. *Corbett*, [1971] P. 83 at 88. With the advent of no-fault divorce, however, such concerns are moot. In Arizona, for example, a typical marriage may be dissolved if a court finds that the marriage is "irretrievably broken"; no other grounds are listed. ARIZ. REV. STAT. ANN. § 25-316 (2005). Even within contract or "covenant" marriages, where much more stringent grounds are required for dissolution, failure to consummate the marriage or even to engage in sex within the marriage are not among the listed grounds. *Id.* § 25-903.

231. *See supra* Part II.D.3.

232. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-101 (listing a variety of reasons people may not marry, but not requiring fertility).

233. *See supra* Part IV.A.

234. *See, e.g.*, Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) ("We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female . . . to refer to immutable traits determined *at birth*." (emphasis added)).

235. *See* M.T. v. J.T., 355 A.2d 204, 210 (N.J. Super. Ct. App. Div. 1976); *In re* Kevin (2001) 165 FLR 404, 440–42, 471 (Austl.).

236. *See supra* Part II.D.2 (discussing anomalous results under *Corbett* and its progeny).

237. *See supra* Part III.A.

potentially be a father to one set of children and mother to another, which is somewhat anomalous.[238] Finally, because it does allow for a person's sex to legally change, this solution more than the others invites the question, why differentiate between sexes in the first place?

V. DOING AWAY WITH DEPENDENCE ON DEFINING SEX

In each jurisdiction that has wrestled with the problem of what to do with transsexual people and marriage, there is a strong public policy against same-sex marriage.[239] However, as these cases illustrate, the policy varies wildly between jurisdictions.[240] Courts cannot agree on what constitutes "sex" for purposes of marriage or otherwise.[241] Nor can they agree on why same-sex marriage should be banned.[242]

Additionally, many of the policy concerns underlying these decisions are fundamentally inconsistent with one another. If a jurisdiction is primarily concerned with the type of intercourse going on within a marriage, it must not be concerned with chromosomes or gonads and genitals at birth, because people who possessed one set of genitals, gonads, or chromosomes at birth may still engage in intercourse using the other set of genitals or gonads obtained through surgical intervention. It would be possible for a jurisdiction to consider heterosexual intercourse to require something beyond mere penetration. If that is the case, the jurisdiction must not be concerned with the external appearance of the marriage. Marriages between people who have opposing chromosomes, for instance, do not necessarily appear heterosexual.[243] If the jurisdiction is concerned with making sure the marriage functions as a heterosexual union in society, it must not be concerned with the chromosomes of the parties, their gonads or genitals at birth, or what their birth certificates say. It is impossible to adopt one policy concern without foregoing the others, or without excluding a vast number of people from entering into marriage entirely.

It is also impossible to create a system that disallows all same-sex unions because, one way or another, some will mistakenly be admitted. In jurisdictions where external appearances matter, there will be situations where one partner transitions within the marriage.[244] When that happens, the result is a valid marriage between two people of the same sex. In jurisdictions where sex cannot legally change despite GRS, there will be situations where someone transitions before marrying someone belonging to their affirmed sex, creating a de facto same-sex

238. *See* Corbett v. Corbett, [1971] P. 83 at 106.
239. *See supra* Part I.C.
240. *See supra* Part IV.
241. *See supra* Part IV.
242. *See supra* Part IV.
243. *See supra* Part I.C.
244. *E.g.*, Kelley, *supra* note 47, at 1 (describing a post-GRS same-sex couple who entered into an opposite-sex marriage in New Jersey); Boylan, *supra* note 47 (describing the author's experiences in a post-GRS same-sex marriage).

marriage.[245] There is simply no way to avoid having legal same-sex marriages short of denying transsexual people the right to marry altogether.

Reliance on the "true sex" model in marriage, in which every person has an identifiable sex, leads to absurd results. It is all very well to say that marriage must be between two people of the opposite sex,[246] but in reality, sex is not something that always has a clear opposite.[247] If the law recognized that the male/female dichotomy is a flawed portrayal of sexuality, these absurd results would be avoided. In the context of marriage, doing away with the "true sex" model means that laws allowing only opposite-sex marriages are no longer tenable.

CONCLUSION

None of the policy concerns against same-sex marriage that can be gleaned from the transsexual marriage cases justify preventing people of the same sex from marrying. Each policy articulated examines aspects of sex that are irrelevant to marriage. Birth certificates or other legal documents have little to do with the functionality of a marriage, and in any case are based on only a cursory examination at birth and thus are potentially inaccurate.[248] Inquiries into the type of sexual intercourse within a marriage draw entirely too near protected privacy interests and make no sense in an age where sexual function is irrelevant to the validity of marriage.[249] Chromosomal, gonadal, and genital tests ignore social realities in favor of factors that have no bearing on the functionality of marriage. Finally, if sex can legally change and external appearances are the primary factor, any policy where Person A can marry Person B on one day but not the next casts doubt upon the logic of the whole system of heterosexual-only marriage.[250]

In a world where the meaning of sex itself is in flux, it is illogical to rest such an important social function as marriage on the sex of the individuals within it. The only reason "[m]arriage is a relationship that depends on sex"[251] is that

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245. *E.g.*, Frye & Meiselman, *supra* note 121, at 1033; Pesquera, *supra* note 45, at 1B (describing a wedding between a transsexual woman and another woman in Texas post-*Littleton*).

246. In a world where sexuality is a spectrum and not a dichotomy, there is a difference between forbidding marriages between people of the same sex, and forbidding marriages between people who are not of opposite sexes. (To illustrate, imagine four people: two males, M1 and M2; a person whose sex is indeterminate, T; and a female, F. If the rule is that people may not marry those of the same sex, M1 may not marry M2, but may marry T or F. If the rule is that marriages must be between people of opposite sex, M1 may not marry M2 or T, but may marry F.) However, absurd results spring equally from either construction.

247 *See supra* Parts I, II.A, II.D.3.

248. For instance, an intersex condition could exist that is undetectable based on a cursory examination of genitals at birth. *See supra* Part II.D.3.

249. *See supra* Part IV.A.

250. For instance, in New Jersey, a person's sex for purposes of marriage is determined by genitalia at marriage. *See* M.T. v. J.T., 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976). Therefore, had M.T. and J.T. attempted to marry the day before M.T. underwent GRS, they would have been denied, even though their marriage was perfectly valid after M.T. underwent GRS.

251. Corbett v. Corbett, [1971] P. 83 at 107.

people have trouble thinking of marriage as an institution not relating to sex. The idea of "true sex" is a pervasive one. However, "true sex" is a flawed model. It is biologically unsound.[252] Adherence to it in law leads to absurd and inconsistent results.[253] It is time to abandon this model. In the context of marriage, the most sensible solution is for states to stop worrying about the sex of the people within marriages, and simply to allow any two otherwise qualified individuals to marry.

252 *See supra* Part II.A.
253. *See supra* Parts II.D, IV.