TRANSSEXUALISM AND THE BINARY DIVIDE: DETERMINING SEX USING OBJECTIVE RATHER THAN SUBJECTIVE CRITERIA

MATHEW D. STAVER[*]

ABSTRACT: This article deals with the legal status of postoperative transsexuals in terms of marriage and sex-based classifications. Until recently, sex has been assumed to be binary, i.e., male and female. Whether sex is immutable or transitory, objective or subjective, has now become an international concern. This article addresses every case in the world every decided on this issue. The resolution is centrally important to the battle over marriage and sex0based classifications.

The thesis of this article is that sex is an immutable characteristic at the time of birth and must be determined by objective criteria.

Sex must be determined by objective factors such as biology and physiology. A person's sex is determined by chromosomes. When there is harmony between biology and physiology, surgery cannot alter a person's sex merely because that person desires a different gender. If sex is primarily a state of mind and based on subjective mental desires, equal protection for sex-based classifications becomes meaningless. To maintain any stability and meaning to sex-based classification, sex must (and can) be determined by objective factors.

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By

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In 1965, when Jewell Akens debuted the hit song, *The Birds and the Bees*, the American pop culture gave no second thought to the lyric "a girl and a guy." Differentiating between a man and a woman, and the natural attraction to the opposite sex, seemed simple enough. However, in 1969, Johns Hopkins University opened the nation's first clinic to perform so-called sex reassignment surgery (hereinafter "SRS") on males wanting to be females and females wanting to be males.[2] When a follow-up study of transsexuals treated by the clinic severally criticized the legitimacy of SRS,[3] the program was immediately shut down, and other university-sponsored clinics followed suit like dominos.[4] Now, due to the emergence of private clinics performing SRS, a

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[2] Richard Green & John Money, TRANSSEXUALISM & SEX REASSIGNMENT (Baltimore, MD: Johns Hopkins University Press, 1969).

[3] *See* Jon K. Meyer, M.D. et al., *Sex Reassignment: Follow-up*, 36 ARCH. GEN. PSYCHIATRY 1015 (1979). Dr. Meyer served as the Director of the Gender Identity Clinic and Chair of the Gender Identity Committee at Johns Hopkins University, where he developed his research interests in gender and sexual identities. In June 2004, Dr. Meyer was elected to a two-year term as president of the American Psychoanalytic Association.

[4] Ellen Makkai, *The Sex-Change Charade, available at* http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=30442 (last visited June 29, 2006); *see also*

debate has emerged over whether postoperative transsexuals should legally be classified as their desired sex or their birth sex for purposes of marriage.[5]

The legal status of postoperative transsexuals for purposes of marriage is an extremely important issue for both marriage and sex-based classifications. If sex can be changed like clothes, then law defining marriage or granting protected status on account of sex will become meaningless. In addressing the legal status of postoperative transsexuals, section I of this article will begin by addressing the longstanding marriage laws in the United States which sanctions marriage only between one man and one woman. Section II will then discuss in some detail the medical issues involving sex and sexual disorders, and will also discuss whether sex should be defined biologically or psychologically for purposes of marriage.

I. THE LAWS OF THE UNITED STATES REGARDING SAME-SEX MARRIAGE.

The United States Supreme Court has recognized traditional male-female marriage as "the foundation of the family and society, without which there would be

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Garrett Oppenheim, *Hopkins Policy on Sex Change in Fog After Follow-Up Study*, 11 TRANSITION (July/August/September 1979).

[5] The words "sex" and "gender" will be used interchangeably to mean the same thing. Some transsexual advocates have attempted to differentiate between the two, arguing that "sex" refers more to biology and physiology and "gender" refers to the expression of maleness or femaleness. *See e.g.*, Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917 (2002); Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 FLA. L. REV. 725 (2000); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999); Mary Coombs, *Sexual Disorientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 227-28 (1998); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995). *See also* Rebecca Moskow, *Broader Legal Implications of Transsexual Sex Determination Cases*, U. CIN. L. REV. 1421 (2003). Such a distinction lacks merits. *See* David Lee Mundy, *Hitting Below the Belt: Sexploitive Ideology and the Disaggregation of Sex and Gender*, 14 REGENT U. L. REV. 215 (2001); Teresa A. Zakaria, *By Any Other Name: Defining Male and Female in Marriage Statutes*, 3 Ave Maria L. Rev. 349 (2005).

neither civilization nor progress."[6] Justice Holmes observed that "some form of permanent association between the sexes" is one of the rudimentary characteristics of civilization.[7] The "structure of society itself largely depends upon the institution of marriage [which is founded upon the] joining of the man and woman...."[8] In "every enlightened government", marriage "is pre-eminently the basis of civil institutions, and thus an object of the deepest public concern."

A. The Laws Of The Several States Recognize Only Traditional Marriage.

No state has legislatively authorized same-sex marriage.[9] In addition to the general laws and longstanding public policy of the states and territories banning same-sex marriage, 41 states since 1996 have enacted specific Defense of Marriage Acts (hereinafter "DOMA"), expressly limiting marriage to one man and one woman.[10]

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[6] *Maynard v. Hill*, 125 U.S. 190, 211 (1888). The Supreme Court has said that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

[7] Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

[8] *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976).

[9] On November 18, 2003, the Massachusetts Supreme Judicial Court became the first court to sanction same-sex marriage. This decision was implemented 180 days later on May 17, 2004. *See Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

[10] Ala. Code § 30-1-19; Alaska Stat. § 25.05.013; Ariz. Rev. Stat. § 25-101; Ark. Code § 9-11-107, 109 and 208; Cal. Fam. Code § 308.5; Colo. Rev. Stat. § 14-2-104; Del. Code tit. 13 § 101; Fla. Stat. § 741.212; Ga. Code § 19-3-3.1; Haw. Rev. Stat. § 572-1, 1-3 and 1.6; Idaho Code § 32-209; 750 Ill. Comp. Stat. § 5/212 and 5/213.1; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Kan. Stat. § 23-101; Ky. Rev. Stat. § 402.020, 040 and 045; La. Civ. Code Art. 86, 89, and 3520; La. Rev. Stat. § 9:272, 273 and 275; Me. Rev. Stat. tit. 19-A § 701; Md. Code Fam. § 2-201; Mich. Comp. Laws § 555.1 and .271; Minn. Stat. § 517.01 and .03; Miss. Code § 93-1.1; Mo. Ann. Stat. Const. art. § 33; Mo. Rev. Stat. § 451.022; Mont. Code § 40-1-401; N.H. Rev. Stat. § 457:1-2; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code § 14-03-01; Ohio Rev. Code § 3101.01; Okla. Stat. tit. 43 § 3.1; 23 Pa. Const. Stat. § 1102 and 1704; S.C. Code § 20-1-15; S.D. Codified Laws § 25-1-1and 1-38; Tenn. Code § 36-3-113; Tex. Fam. Code § 2.001; Utah Code § 30-1-2; Va. Code § 20-45.2; Vt. Stat. 15 § 8; Wash. Rev. Code § 26.04.010 and 020; W. Va. Code § 48-2-104 and 603; Wis. Stat. § 300; and Wyo. Stat. § 20-1-101. No state legislatively recognizes same-sex marriage. The legislative schemes of the remaining states not listed above also limit marriage to one man and one woman. In 1996, states began passing Defense of Marriage Acts, which expressly ban same-sex marriage. In addition, some

Hawaii in 1998 amended its constitution to provide that marriage is the sole province of the legislative branch.[11] Referenda by Alaska (1998), Hawaii (1998), Nebraska (2000), Nevada (2002), Missouri (2004), Louisiana (2004), Oregon (2004), Kentucky (2004), Michigan (2004), Mississippi (2004), Georgia (2004), North Dakota (2004), Ohio (2004), Oklahoma (2004), Arkansas (2004), Montana (2004), Utah (2004), Kansas (2005), Texas (2005), and Alabama (2006) banned same-sex marriage.[12] Although Vermont does not have a so-called DOMA, its statutory scheme limits marriage to one man and one woman.[13] Several statutes only focus on incestuous marriages.[14] A few merely discuss

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of the above states have also amended their constitutions to ban same-sex marriage, while other states have constitutional bans on same-sex marriage without a corresponding statutory ban. An example of such a state is Nebraska. *See* Neb. Const. art. I, § 29.

[11] *See* Haw. Const. art. 1, § 23. The referendum was in response to the Hawaii Supreme Court's decision which stated that a ban on same-sex marriage must survive strict scrutiny under the Hawaii constitution. *See Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *see also Baehr v. Lewin*, 852 P.2d 44, *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). Following the referendum, the legislature declared that marriage is limited to one man and one woman. *See* Haw. Rev. Stat. § 572-1 (marriage is "only between a man and a woman").

[12] *See* Alaska Const. art. 1 § 25; Haw. Const. Art. 1 § 23; Neb. Const. art. I, § 29; Nev. Const. art. 1, § 21; Mo. Ann. Stat. Const. art. § 33; La. Const. art. 12 § 15; Or. Const. art. XV § 5a; Ky. Const. § 233A; Mich. Const. art. 1, § 25; Miss. Const. Art. 14, § 263A; Ga. Const. art. I, § 4, P I; N.D. Const. art. II, § 28; Ohio Const. art. XV, § 11; Okla. Const. art. II, 35; Ark. Const. Amend. 83 § 1; Mont. Const. Art. XIII § 7; Utah Const. art. I, § 29; Kan. Const. XV § 16; Tex. Const. art. I, § 32 and Ala. Code § 30-1-19(b). The Alaska referendum was in response to the state court's decision in *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Super. Ct. Alaska), which held that a restriction on marriage must survive strict scrutiny under the Alaska constitution. The constitutional amendment overruled the *Brause* decision. In six states, Florida, Georgia, Tennessee, Louisiana, Arizona, and Colorado, courts have held that proposed constitutional amendments defining marriage as "one man and one woman" do not violate the single-subject rule. Although not ruling on the single-subject rule, the Massachusetts Supreme Judicial Court held that the state may proceed with a constitutional amendment defining marriage as "one man and one woman," even if it requires overruling a decision by the state's highest court. *See Schulman v. Attorney General*, 447 Mass. 189 (2006).

[13] Vermont statutes provide for "civil marriage" for opposite-sex partners and "civil unions" for same-sex partners. The statutes expressly state that a "civil union" is not a "civil marriage." *See* Vt. Stat. tit. 15 § 8; Vt. Stat. tit. 15 § 1201(4) (The civil union law specifically states that while "a system of civil unions does not bestow the status of civil marriage, it does satisfy the requirements of the Common Benefits Clause [under the Vermont Constitution]." Vt. H.B. §1(1)(10) (2000)).

[14] *See, e.g.*, Conn. Gen. Stat. § 46b-21 and 25; Mass. Gen. Laws 207 § 1-2; N.J. Stat. §37:1-1; N.M. Stat. § 40-1-1; N.Y. Dom. Rel. Law § 5; Ohio Rev. Code § 3101.01; Or. Rev. Stat. § 106.010 and 020; R.I. Gen. Laws § 15-1-1.

marriage in general terms as a relationship between husband and wife or male and female.[15]

In addition to the overwhelming statutory authority, a number of state courts, even in the absence of an express statute, have rejected same-sex marriage.[16] In 2004, a Florida

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[15] *See* Wis. Stat. § 765.01 (husband and wife); Wyo. Stat. § 20-1-101 (male and female).

[16] *See e.g.*, Alabama: *In re: H.H.*, 830 So. 2d 21, 26 (Ala. 2002) ("homosexual conduct of a parent – conduct involving a sexual relationship between two persons of the same gender – creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others") (Moore, J. concurring); Alaska: *Brause*, 1998 WL 88743 (overruled by constitutional amendment); Arizona: *Standhardt v. Superior Court ex rel County of Maricopa*, 77 P.3d 451 (Ariz. App. 2003); Arkansas: *May v. Daniels*, 2004 WL 2250882 (Ark.); California: *Smelt v. County of Orange, California*, 447 F.3d 673 (9th Cir. 2006); Colorado: *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied,* 458 U.S. 1111 (1982) (male America citizen and male Australian alien who had been ceremonially "married" by a minister in Colorado does not qualify alien as citizen's spouse); Connecticut: *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct.), *cert. granted in part but dismissing case as moot upon death of the party*, 806 A.2d 1066 (Conn. 2002) (a Vermont civil union is not "marriage" recognized under this state because the union was not entered into between one man and one woman); *Kerrigan v. State*, 2006 WL 2089468 (Conn. Super. 2006); Delaware: no cases; District of Columbia: *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (marriage statute prohibited clerk from issuing license to same-sex couple and same-sex marriage is not a fundamental right protected by the Due Process Clause); Florida: *Frandsen v. County of Brevard*, 800 So. 2d 757, 759, 760 (Fla. 5th DCA 2001), *rev. denied*, 828 So. 2d 386 (Fla. 2002) (classifications based on sex are not subject to strict scrutiny, noting that the Constitution Revision Commission refused to add the term "sex" to the Florida constitution so as to avoid any possibility that Florida courts might conclude the provision required recognition of same-sex marriages); *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App.) reh'g denied (2004), review denied (Fla. 2005), (rejecting transsexual marriage based on Florida DOMA which bans same-sex marriage); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); Georgia: *Burns v. Burns*, 560 S.E.2d 47 (Ga. App.), *reconsideration denied, cert. denied* (2002) (a Vermont civil union is not marriage, and even if it were, Georgia would not recognize it as such, because the state authorizes only the union of one man and one woman and prohibits same-sex marriage); Hawaii: *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *aff'd*, 950 P.2d 1234 (Haw. 1997) (authorizing strict scrutiny for marriage classifications but decision was overruled by constitutional referendum); Idaho: no cases; Illinois: *In re Estate of Hall*, 707 N.E.2d 201, 206 (Ill. App. 1998) (challenge to statute proscribing same-sex marriage was moot and petitioner was never legally married – "We cannot retroactively redefine petitioner and Hall's relationship as a lawful marriage or even confer the benefits of a legal marriage upon the relationship. If we did, we would essentially be resurrecting common law marriage . . ."; Indiana: *Morrison v. Sadler*, 2003 WL 23119998 (Ind. Super. Ct.), *cert. denied*, (dismissing challenge to Indiana's DOMA which limits marriage to one man and one woman); Iowa: no cases; Kansas: *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (a post-operative male-to-female transsexual is not a woman within the meaning of the statutes recognizing marriage, and thus a marriage of a male-to-female transsexual to another male is void); Kentucky: *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (a same-sex union is not recognized as marriage); Louisiana: no cases; Maine; no cases; Maryland: no cases; Massachusetts: *Albano v. Attorney General*, 769 N.E.2d 1242 (Mass. 2002) (initiative for constitutional amendment banning same-sex marriage permissible); *Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003) (first court to sanction same-sex marriage); Michigan: no cases; Minnesota: *Baker v. Nelson*, 191 N.W.2d 185, 186, 187 (Minn. 1971) (upholding statute which authorizes marriage between persons of the same sex, stating "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as

court of appeals voided the "marriage" of a postoperative transsexual.[17] The Kansas Supreme Court in 2002 also voided the "marriage" of a man with a male-to-female transsexual.[18] Viewing "the issue in this appeal to be one of law and not of fact" and noting that the "fundamental rule of statutory construction is that the intent of the legislature governs", the court invalidated the transsexual "marriage."[19]

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old as the book of Genesis" and recognizing "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."); Mississippi: no cases; Missouri: no cases; Montana: no cases; Nebraska: *Citizens for Equal Protection v. Bruning*, 2006 WL 1933417 (8th Cir. 2006), ; Nevada: no cases; New Hampshire: no cases; New Jersey: *M.T. v. J.T.* 355 A.2d 204 (N.J. App. 1976) (male transsexual who underwent sex-reassignment surgery may not be considered female for marital purposes); *In re Bacharach*, 780 A.2d 579 (N.J. App. 2001) (change of name to include last name of same-sex partner was not for an inappropriate purpose); New Mexico: no cases; New York: *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y App. Div. 1971) (a marriage between two males was a nullity notwithstanding that "husband" believed "wife" was a female at the time of the ceremony, and notwithstanding that "she" had subsequent sex surgery); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. App. Div. 1996) ("same-sex marriage . . . is not presently recognized under the laws of any state of the Union", the "long tradition of marriage, understood as the union of male and female, testifies to a contrary political, cultural, religious and legal consensus [opposed to same-sex marriage] concluding that New York does not recognize or authorize same-sex marriage and that the City Clerk correctly refused to issue the license."); *In re Estate of Cooper*, 564 N.Y.S.2d 684, 688 (N.Y. Fam. Ct. 1990) ("the state has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values" and thus same-sex marriage is not authorized); *Hebel v. West*, 803 N.Y.S. 2d 242 (N.Y.A.D. 2005); *Hernandez v. Robles, Samuels v. New York, Kane v. Marsolais* and*, Seymour v. Holcomb* (consolidated) 2006 WL 1835429 (N.Y. 2006) North Carolina: no cases; North Dakota: no cases; Ohio: *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (cohabiting same-sex partner of biological mother was not a "parent"); *In re Nash*, 2003 WL 23097095 (Ohio App.) (refusing to recognize transsexual marriage based on statute that authorizes only opposite-sex marriage); *In re Ladrach*, 513 N.E.2d 828 (Probate Court 1987) ("There is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male-to-female transsexual person and a male person"); Oklahoma: no cases; Oregon: *Li v. Oregon*, 110 P.3d 91 (Or. 2005); Pennsylvania: *De Santo v. Barnsly*, 476 A.2d 952 (Pa. Super. Ct. 1984) (two persons of the same sex cannot contract a common-law marriage); Rhode Island: no cases; South Carolina: no cases; South Dakota: no cases; Tennessee: no cases; Texas: *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 870 (2000) (ceremonial "marriage" between a man and a transsexual born as a man, who was surgically and chemically altered to have the physical characteristics of a woman, is not valid); Utah: no cases; Vermont: *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that while the Vermont constitution requires that same-sex couples be afforded the same benefits of traditional marriage, the constitution does not require the state to issue a same-sex marriage license); Virginia: no cases; Washington: *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. App. 1974) (statutory prohibition of same-sex marriage does not violate state constitution); *Anderson v. King County* and *Castle v. State of Washington* (consolidated for decision), 2004 WL 1738447 (Wash. Super. 2004).

[17] *Kantaras*, 884 So.2d 155.

[18] *See In re Estate of Gardiner*, 42 P.3d at 120.

[19] *Id*. at 135.

Rejecting same-sex marriage, a Kentucky court noted that marriage "was a custom long before the state commenced to issue licenses for that purpose," noting that "marriage has always been considered as the union of a man and a woman. . . ."[20] The Minnesota Supreme Court found that its statute, which bans same-sex marriage, did not offend the First, Eighth, Ninth or Fourteenth Amendments to the United States Constitution, holding that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[21] A New York court noted that the state "law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."[22] "Accordingly, the court declares that the so-called marriage ceremony in which the plaintiff and defendant took part . . . did not in fact or in law create a marriage contract in that the plaintiff and defendant are not and have not ever been 'husband and wife' or parties to a valid marriage."[23]

A Texas court refused to recognize the "marriage" of a man and a transsexual born as a man who surgically and chemically altered his physical characteristics to that of a woman.[24] Rejecting the transsexual's claim to a marriage license, the court noted that in "our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals."[25] "[T]his court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister

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[20] *Jones*, 501 S.W.2d at 589.
[21] *Baker*, 191 N.W.2d at 187.
[22] *Anonymous*, 325 N.Y.S.2d at 500.
[23] *Id.* at 501.
[24] *See Littleton*, 9 S.W.3d at 223.

branch of government, the legislature."[26] The court therefore held "as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male."[27] An Ohio court similarly denied the issuance of a marriage license to a transsexual.[28] Noting that the marriage license law required that an applicant should not misrepresent any of the facts required for the license, the court observed the following: It is axiomatic that if a license is inadvertently issued where there has been a material misrepresentation of factual information, such as sex, marital status, or age, then such license would be void.[29]

A Washington court found that marriage was permissible only between one man and one woman.[30] The court held that the same-sex couple was "not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."[31] Refusing to allow same-sex couples to marry is not based upon their same-sex status, but rather it is based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children. This is true even though married couples are not required to become parents even though some couples are incapable of becoming parents and even though not all couples who produce children are married. These, however, are exceptional situations.

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[25] *Id*. at 230.
[26] *Id*.
[27] *Id*. at 231.
[28] *See In re Ladrach*, 513 N.E.2d at 828. The holding in *Ladrach* was reaffirmed by another Ohio court in 2003. *See In re Nash*, 2003 WL 23097095.
[29] *Id*. at 831. The applicant was refused a marriage license after advising the clerk that "she" had been married two previous times to females.
[30] *See Singer*, 522 P.2d at 1191.
[31] *Id*. at 1192.

The fact remains that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.[32]

Therefore, defining "marriage to exclude homosexual or any other same-sex relationships is not to create an inherently suspect legislative classification . . ."[33] Although some may contend that "other cultures may have fostered differing definitions of marriage, marriage in this state, as elsewhere in the nation, has been deemed a private relationship of a man and a woman (husband and wife) which involves 'interests of basic importance to our society.'"[34] "[T]he state has exclusive dominion over the legal institution of marriage [and the] societal values which are involved in this area must be left to the examination of the legislature. . . .[Indeed, traditional] "marriage is now defined as deeply rooted in our society."[35]

B. The Federal Defense Of Marriage Act Recognizes The States' Interest In Traditional Male-Female Marriage.

In response to the failed attempt in Hawaii to judicially recognize same-sex marriage, Congress passed what is known as the Federal Defense of Marriage Act.[36] The Federal DOMA is designed to permit each state to set its own marriage policy and thus is designed to afford a state the right to refuse full faith and credit to any out-of-state same-sex union. Effective September 21, 1996, the law reads as follows:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship

[32] *Id*. at 1195.
[33] *Id*. at 1196.
[34] *Id*. at 1173 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).
[35] *Id*.
[36] *See* Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (hereafter "Original Understanding").

> between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.[37]

"Congress was intended to have broad power to create statutes like DOMA under the Effects Clause" of the Full Faith and Credit Clause.[38] The Full Faith and Credit Clause in Article IV, Section 1, of the United States Constitution, states the following: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effects thereof.[39]

Under the Full Faith and Credit Clause, the Constitution gives the Congress the power to determine the "effects" of an act, record, or judicial proceeding of another state. During the Constitutional Convention the "effects clause" became the subject of controversy. The issue was whether the Full Faith and Credit Clause would include the power to govern the effects not only of state court judgments, but also of the legislative acts of the states.[40] Justice Joseph Story noted in his commentary that the "effects" are "expressly subjected to the legislative power."[41]

The First Congress enacted the Full Faith and Credit Act to "prescribe the mode in which the public Acts, Records and judicial Proceedings in each State, shall be authenticated so as to take effect in every other state."[42] Today the Full Faith and Credit

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[37] 28 U.S.C. §1738C.
[38] Whitten, *Original Understanding*, 32 CREIGHTON L. REV. at 392.
[39] U.S. CONST. art. IV, § 1.
[40] *See* Max Farrand ed., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 488 (1911) (statement of William Samuel Johnson, September 3, 1787).
[41] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 661 (1833) (Ronald D. Rotunda & John E. Nowak, eds. 1987).
[42] Act of May 26, 1790, ch. 11, 1 Stat. 122.

Act remains essentially unchanged and states the following: "Such Acts, Records and judicial Proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."[43]

Pursuant to authority granted by the Constitution to determine the "effects" of acts, records, or judicial proceedings in another state, Congress passed the Federal DOMA.

> Prima facie, every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute or another state by the Full Faith and Credit Clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the Full Faith and Credit Clause. . . .[44]

One commentator stated that the historical evidence "makes it clear that the first sentence of the Full Faith and Credit Clause should not be interpreted to contain broad choice of law commands to the states."[45] Professor Whitten argues that "the evidence is compelling that Congress was intended to have broad power to create statutes like DOMA under the Effects Clause" and the historical evidence of the Full Faith and Credit Clause indicates

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[43] 28 U.S.C. §1738.

[44] *Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.*, 294 U.S. 323, 547-48. *See also Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (Full Faith and Credit Clause does not compel one state to substitute statutes of other states for its own statutes dealing with subject matter within which it is competent to legislate); Jordan Herman, *The Fusion of Gay Rights and Feminism: Gender Identity and Marriage After Baehr v. Lewin*, 56 OHIO STATE L. REV. 985, 991 n.25 (1995) (observing that in family law questions the United States Supreme Court seems to balance the forum state's public policy interests against the interests of comity).

[45] Whitten, *Original Understanding*, 32 CREIGHTON L. REV. at 392.

that DOMA may not even be necessary, but is certainly within Congress's authority.[46] In *Baker v. General Motors Corp.*,[47] "the United States Supreme Court affirmed the constitutionality as well as the continuing vitality of the public policy doctrine and choice of law."[48] Indeed, the Supreme Court stated that the "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with the subject matter concerning which it is competent to legislate.'"[49] Professor Hogue, commenting on Georgia law, stated that "[h]omosexual unions will likely be held violative of the state's public policy..."[50] Recognizing that a number of states have adopted statutes prohibiting the recognition of same-sex unions, Professor Hogue noted that these "statutes will control in states which have them. In instances in which a state lacks a statute, the common law (through the public-policy exception) will continue to supply the appropriate rule."[51] The Supreme Court in *Williams v. North Carolina*,[52] noted that the "necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another state to grant divorces [or recognize marriage] can be left to neither State."[53]

Professor Hogue correctly notes that in "states which have adopted [same-sex] anti-recognition statutes," the state courts will lack jurisdiction to adjudicate rights arising as a result of or in connection with out-of-state same-sex unions.[54] Professor Lynn

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[46] *Id.*
[47] 522 U.S. 222 (1998).
[48] L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 30 (1998).
[49] *Baker*, 522 U.S. at 232 (quotation and citations omitted).
[50] Hogue, *State Common-Law Choice-of-Law Doctrine*, 32 CREIGHTON L. REV. at 30.
[51] *Id.* at 36-37.
[52] 325 U.S. 226, 232 (1945) ("Williams II").
[53] *Id.* at 232.
[54] Hogue, *State Common-Law Choice-of-Law Doctrine*, 32 CREIGHTON L. REV. at 42-43.

Wardle, who testified before Congress during the adoption of the Federal DOMA, stated the following:

> There is no serious doubt that Congress has the power to enact legislation defining the "effect" of one state's laws, records and judgments in other states. Sentence two of the Full Faith and Credit Clause of the Constitution (Article IV, 1) explicitly provides that: "The Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." The Congressional Research Service of the Library of Congress has stated: Congress has the power under the Clause to decree the effect that the statutes of one State shall have in other States." A host of scholarly authority for many decades concurs with this assessment.[55]

Congress has a "substantial interest" in "balancing the interests" of the several states by preventing one state's policy from dictating what the legal policy of other states will be.[56] Even Professor Mark Strasser, who is an advocate of same-sex marriage, has conceded the following:

> Both the First and Second Restatement of Conflict of Laws suggest that a marriage which would be treated as void in the domicile at the time of the marriage need not be recognized, notwithstanding its being valid in the state of celebration. Section 132(d) of the Restatement (First) of Conflict of Laws suggests that a "marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere" if it involves a "marriage of a domiciliary which a statute at the domicile makes void even though celebrated in another state." The Second Restatement suggests a similar policy, as a marriage need not be recognized if "it violates the strong public policy of ... [the] state which had the most significant relationship to the spouses in the marriage at the time of the marriage."[57]

The Supreme Court has explained that "marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered

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[55] Lynn D. Wardle, *Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187, 223 (1998).

into, be recognized as valid in every other jurisdiction."[58] One state does not have to recognize an out-of-state same-sex union or same-sex marriage recognized by another jurisdiction if (1) the out-of-state union is contrary to the state's public policy or (2) the out-of-state union is prohibited by the domicile state's statute and the domicile state has the jurisdiction to enact its own legislation on the matter.

The Federal DOMA evinces a strong nationwide policy of promoting marriage between one man and one woman. The longstanding public policy from the founding of this country to the present has restricted marriage to only one man and one woman. The Federal DOMA is designed to protect state sovereignty with respect to setting marriage policy by allowing states to refuse recognition to any out-of-state same-sex union. The real question the courts must now address is what constitutes a man and a woman for purposes of marriage? The methodology used in answering this question must focus on objective, rather than subjective criteria.

II. SEX FOR PURPOSES OF MARRIAGE MUST BE DETERMINED BY OBJECTIVE BIOLOGICAL RATHER THAN SUBJECTIVE PSYCHOLOGICAL CRITERIA.

A. Sex Is An Immutable Characteristic Determined At The Time Of Birth.

When "sex" was established as a suspect classification under the Fourteenth Amendment, the Supreme Court anchored the class to the crucial similarity that it shares with race and national origin: immutability and determination at birth. In *Frontiero v. Richardson*,[59] the Court explained:

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[56] *See United States v. Edgebroad Co.*, 509 U.S. 418 (1993).
[57] Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 464 (1998).
[58] *Loughran v. Loughran*, 292 U.S. 216, 223 (1934).
[59] 411 U.S. 677 (1973).

> [S]ince *sex*, like race and national origin, *is an immutable characteristic determined solely by the accident of birth*, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ."[60]

"*Gender*, like race, *is a highly visible and immutable characteristic*...."[61] "Sex" is "the one acknowledged immutable difference between men and women. . . ."[62] If one could change sex like changing clothes, every law designed to protect against sex discrimination becomes pointless. In the eyes of the law, sex, like race, is and must be immutable and fixed at birth.

B. Sex Must Be Determined By Objective Criteria.

As with race and national origin, the law recognizes that a person's sex is immutable and therefore it must be determined by objective rather than subjective criteria. Rene Descartes' famous saying, "I think, therefore I am", cannot mean that a person *legally* becomes who they think they are. The law cannot condone a fill-in-the-

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[60] *Id.* at 686. *See also Craig v. Boren*, 429 U.S. 190, 212 (1976) (same) (Stevens, J., concurring) (emphasis added).

[61] *Caban v. Mohammed*, 441 U.S. 380, 398 (1979) (emphasis added).

[62] *City of Los Angeles Dept. of Water and Power*, 435 U.S. 702, 727 (1978) (Burger, J., Rehnquist, J., concurring in part and dissenting in part). The "capacity to become pregnant is the inherited and immutable characteristic that 'primarily differentiates the female from the male.'" *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 330 (1993) (Stevens, J., dissenting) (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting)); *see also Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 466, 471 (1981) (upholding California statutory rape law and agreeing with "the immutable physiological fact that it is the female exclusively who can become pregnant."); *Kahn v. Shevin*, 426 U.S. 351, 359, (1974) (Brennan, J., Marshall, J., dissenting) (sex, like alienage or national origin is "immutable"); *Frandsen v. County of Brevard*, 800 So. 2d 757, 758 (Fla. 5th DCA 2001), *review denied*, 828 So. 2d 386 (Fla. 2002) ("Physical differences between men and women, however, are enduring"). *See also Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (close relatives "do not exhibit obvious, immutable, or distinguishing characteristics"); *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 442 (1985) (mentally disabled are "immutably" different); *Plyer v. Doe*, 457 U.S. 202, 220 (1982) (children of illegal aliens have no control over their status, unlike their parents); *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) (illegitimacy is like race or national origin because the status is not within the control of the illegitimate person). *Se*e also Dean v. District of Columbia, 656 A.2d 307, 349-40 (D.C. 1995) (rejecting Equal Protection challenge to law prohibiting same-sex marriage, stating characteristic of suspect class having "an immutable trait that is beyond a class member's control" is not present with same-sex couples).

blank marriage policy ("I think, therefore I am [male/female]"). Marriage has long been defined as the "Legal union of one man and one woman as husband and wife."[63] In the same way that Michael Jackson remains African-American in spite of surgery or skin bleaching, transsexuals cannot change their birth sex despite cosmetic surgery. Any union other than the binary male and female model is not marriage. If someone can merely think they are African-American, the law cannot permit such a person to claim minority status. If sex is a "continuum" definable only by subjective mental ruminations, then most of our laws (and certainly equal protection) will have no meaning.[64]

1. *The laws of the several states do not recognize sex-change surgery to alter sex for the purpose of marriage.*

a. The majority rule.

The majority rule in America clearly holds that a transsexual may not marry someone of the same birth sex. This majority rule has been historic international rule that began in Great Britain.

(1) Florida.

The Florida Court of Appeal voided the "marriage" between a postoperative female-to male transsexual and another female under the states marriage laws which recognize only the union of one man and one woman.[65] The case involves Margo Kantaras who was born female in Ohio. In 1986, Margo moved to Texas and changed her name to "Michael"(hereafter "MK"), and in 1987 underwent SRS, which

[63] BLACK'S LAW DICTIONARY 876 (5th Ed.).
[64] *See e.g.*, 42 U.S.C. §§ 2000e *et. seq*. (Title VII of the Civil Rights Act of 1964); 20 U.S.C. § 1681 *et. seq*. (Title IX of Education Amendments of 1972 to the Equal Opportunity in Education Act dealing with equal funding of female athletics).
[65] *Kantaras*, 884 So. 2d 155.

involved testosterone treatments, a total hysterectomy and a double mastectomy.[66] In 1988, MK obtained a marriage license in Florida and "married" another female by the name of Linda, who at the time was aware of the SRS, and who also knew that MK still retained her female vagina.[67] After Linda became a Christian and informed MK that their relationship was improper, MK filed for divorce and sought custody of Linda's two children. Linda filed a counter-petition claiming that the "marriage" was void under Florida law.[68] Acknowledging that Florida law explicitly limits marriage to one man and one woman and bans same-sex marriage, the court stated the following: The controlling issue in this case is whether, as a matter of law, the Florida statutes governing marriage authorize a postoperative transsexual to marry in the reassigned sex. We conclude they do not.[69]

The *Kantaras* court stated that the common meaning of "male and female . . . refer to immutable traits determined at birth."[70] The court deferred to the legislature, stating:

> 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 is a question that raises issues of public policy that should be addressed by the legislature. Thus, the question of whether a postoperative transsexual is authorized to marry a member of their birth sex is a matter for the Florida legislature and not the Florida courts to decide. Until the Florida legislature recognizes sex-reassignment procedures and amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must adhere to the common meaning of the statutory terms and invalidate any marriage that is not

[66] *Id.* at 155.
[67] *Id.* at 155-56.
[68] *Id.*
[69] *Id.* at 161
[70] *Id.*

> between persons of the opposite sex determined by their biological sex at birth. Therefore, we hold that the marriage in this case is void ab initio.[71]

(2) Kansas.

The Kansas Supreme Court found that a post-operative male-to-female transsexual is not a woman within the meaning of the marriage statutes, and therefore, such "marriage" is void.[72] Joseph M. Gardiner, III, in the probate proceeding of Marshall G. Gardiner, challenged the right of J'Noel Gardiner's right to receive a spousal share of Marshall's estate on the grounds that the marriage was fraudulent and void, because J'Noel remained a male and same-sex marriage in Kansas was barred by statute.[73] After reviewing domestic and international case law[74], the court observed the following:

> [T]he essential difference between the line of cases, including *Corbett* and *Littleton*, that would invalidate the Gardiner marriage and the line of cases, including *M.T.* and *In re Kevin*, that would validate it is that the former treats a person's sex as a matter of law and the latter treats a person's sex as a matter of fact.[75]

The court therefore stated, "We view the issue in this appeal to be one of law and not fact. The resolution of this issue involves the interpretation of [Kansas Statutes]. The interpretation of a statute is a question of law, and this court has unlimited appellate review."[76] The "fundamental rule of statutory construction is that the intent of the legislature governs." The court continued:

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[71] *Id.*
[72] *See In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).
[73] *See Id*. at 122-123.
[74] The English case of *Corbett v. Corbett*, 2 All E.R. 33 (1970) and the Texas case of *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000), refused to recognize the right of a transsexual to marry a person whose sex was that of the transsexual's birth sex. The case of *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div.) *cert. denied*, 364 A.2d 1076 (N.J. 1976) and *In re Kevin*, Fam.C.A. 1074 (File No. SY8136 Of. 1999, Family Court of Australia at Sydney), ruled that a transsexual may marry a person of the transsexual's birth sex.
[75] *Id.* at 132-33.
[76] *Id*. at 135.

> The words "sex," "male," and "female" are words in common usage and understood by the general population. Black's Law Dictionary, 1375 (6th ed. 1999) defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." Webster's New 20th Century Dictionary (2nd ed. 1970) states the initial definition of sex as "either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively." "Male" is defined as "designating or of the sex that fertilizes the ovum and begets offspring; opposed to *female*." "Female" is defined as "designating or of the sex that produces ova and bears offspring; opposed to *male*."[Emphasis added]. According to Black's Law Dictionary, 972 (6th ed. 1999), a marriage is the legal status, condition, or relation of one man and one woman united in law for life, or until divorce, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."[77]

After discussing the common understanding of the terms sex, male and female, the court continued:

> The words "sex," "male," and "female," in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A female-to-male post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to "produce ova and bear offspring" does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still "inhabits . . . a male body in all aspects other than what the physicians have supplied."[78]

Rejecting the argument that the absence of the word "transsexual" from the same-sex marriage statute made the statute vague, the court declared: "We view the legislative silence to indicate that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so."[79] The court cited to

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[77] *Id*.
[78] *Id*. (citation omitted).
[79] *Id*. at 136.

Ulane v. Eastern Airlines, Inc.,[80] which reversed a federal district court that held that sex included not only chromosomes, but also psychological self-perception. The Seventh Circuit Court of Appeal found that "to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation."[81] Finding *Ulane* "well reasoned and logical", the court held that the legislature clearly viewed "opposite sex" in the narrow traditional sense. . . .We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret [the statute] and not to rewrite it. . . .If the legislature wishes to change public policy, it is free to do so; we are not. To conclude that J'Noel is of the opposite sex of Marshall would require that we rewrite [the Kansas Defense of Marriage Act].[82]

Thus, "J'Noel remains a transsexual, and a male for purposes of marriage under [the Kansas DOMA]. . . . [T]he validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court."[83]

(3) Ohio.

Ohio does not allow a transsexual to obtain a marriage license to marry a person of the same gender as their birth sex. In the case of *In re Nash*,[84] Pamela Nash was born female in Massachusetts. Nash later married a man and subsequently divorced, after which she relocated to Ohio.[85] In Ohio Nash changed her name to "Jacob Benjamin Nash."[86] Nash then applied to change her Massachusetts birth certificate to reflect a change in sex designation from female to male, and the request was granted, so that the

[80] 742 F.2d 1081 (7th Cir. 1984).
[81] *Id*. at 1086.
[82] *In re Estate of Gardiner*, 42 P.3d at 136-37.
[83] *Id*. at 137.
[84] 2003 WL 23097095 (Ohio App.).
[85] *Id.* at *1.

certificate included both the new name and male sex designation.[87] Shortly thereafter, Nash obtained an Ohio driver's license and applied for an Ohio marriage license. During a search of the name, the clerk learned of Nash's prior name change, and Nash was informed that the license would not be issued. In rejecting the transsexual marriage, the *Nash* court noted that Ohio recognizes marriage only between members of the opposite sex.[88] The court noted that "any change to Ohio's public policy concerning transsexuals and marriage or expanding the definition of male and female . . . must come from the legislature."[89] The court concluded that "a marriage between a post-operative female-to-male transsexual and a biological female is void as against public policy."[90]

In the case of *In re Ladrach*,[91] another Ohio court found that a post-operative male-to-female transsexual was not permitted to marry a male. The case began with the filing of a petition for name change by Edward Franklin, who presented himself in female dress and explained that he intended to undergo a "transsexual surgery" later in the year. The applicant asked the court to change his name to Elaine Francis Ladrach, and since the statute allows name changes so long as there is no fraudulent intent to deceive creditors or others, the court granted the request.[92] After the surgery, the applicant came to the courthouse with his "fiancé", acknowledging on the application that he had been previously married twice to females. The clerk refused to issue the license and the applicant filed for declaratory relief, stating that he "considered himself a female and that

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[86] *Id.*
[87] *Id.*
[88] *Id.* at *5.
[89] *Id.* at *9.
[90] *Id.*
[91] 513 N.E.2d 828 (Ohio Probate Ct. 1987).
[92] *Id*. at 829.

he had undergone a 'medical surgical procedure that resulted in the removal of the penis and testicles and the creation of a vagina.'"[93] The court noted that it is "generally accepted that a person's sex is determined at birth by an anatomical examination by the birth attendant."[94] The court then concluded "that there is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male-to-female transsexual person and a male person."[95] The court then observed:

> The determination of a person's sex in regard to his birth certificate and marital status are legal issues and, therefore, the court must look to the statutes. This court is charged with the responsibility of interpreting the statutes of this state and judicial interpretations of these statutes. Since the case at bar is apparently one of first impression in Ohio, it is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.[96]

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[93] *Id*. at 830.
[94] *Id*. at 832.
[95] *Id*.
[96] *Id.* Two states recently enacted legislation that specifically prohibits changing sex or gender on birth certificates. *See* Idaho Code § 39-250; Tenn. Code § 68-3-203(d). A Florida Attorney General opinion states that "mandatory legislation is required in order to permit the State Registrar to amend birth certificates issued to individuals who have undergone sex-reassignment surgery," that it is "irrelevant" whether an individual has allegedly undergone sex-reassignment surgery after birth, and concludes that the Florida State Registrar "is not authorized or empowered to amend birth certificates issued to individuals who have undergone sex reassignment surgery." Fla. Op. Att'y Gen. 076-213. Fla. Stat. § 382.016. A number of states through statutory enactments allow the birth certificate to be changed to reflect a different sex than is listed on the certificate. *See, e.g.*, Ala. Code § 22-9A-19; Ariz. Rev. Stat. § 36-326; Ark. Code § 20-18-307; Cal. Health & Safety § 103430; Colo. Rev. Stat. § 25-2-115; Conn. Gen. Stat. § 19a-42; D.C. Code § 7-217; Ga. Code § 31-10-23; Haw. Rev. Stat. § 338-17-7; 410 Ill. Comp. Stat. § 535/17; Ind. Code § 16-37-2-10; Iowa Code § 144.23; Ky. Rev. Stat. § 213.121; La. Rev. Stat. § 40:62; Md. Code § 4-214; Mass. Gen. Laws 46 § 13(e); Mich. Comp. Laws § 333.2831; Miss. Code § 41-57-21; Mo. Rev. Stat. § 193.215; Neb. Rev. Stat. § 71-604.1; N.J. Stat. § 26:8-40.12; N.M. Stat. § 24-14-25(D); N.C. Gen. Stat. § 130A-118(4); Or. Rev. Stat. § 432.235; Utah Code § 26-2-11; Va. Code § 32.1-269; Wis. Stat. § 69.15(4)(b). While not specified in the statute, several additional states allow for sex changes on the birth certificate through administrative procedures. *See, e.g.*, Kan. Admin. Reg. 28-17-20; Me. Admin. Reg. 10-146 ch.2; Nev. Admin. Code ch. 440 § 130; Wash. Rev. Code § 4.24.130. The statutes of several states are vague and therefore it is unclear how these states handle a request to change sex on the birth certificate. *See e.g.*, Del. Code tit. 16 § 3131; Minn. Stat. § 144.218(4); Mont. Code § 50-15-204; N.H. Rev. Stat. § 126:23-a; N.Y. Civil Rights Law § 61 and 24; R.C.N.Y. Health Code § 207.01; N.D. Cent. Code § 23-02.1-25; Okla. Stat. tit. 63 § 1-321; 35 Pa. Cons. Stat. § 450.603; R.I. Gen. Laws § 23-3-21; S.C. Code § 44-63-150; S.D. Codified Laws § 34-24-51; Tex. Health & Safety Code § 191-028; Vt. Stat. tit. 18 § 5075; W. Va. Code § 16-5-24; Wyo. Stat. § 35-1-424.

The court also noted that there was "no laboratory documentation that the applicant had other than male chromosomes" and therefore, the application "to obtain a marriage license as a female person is denied."[97] Although this case was published, the trial court never referenced this decision.

(4) Texas.

In *Littleton v. Prange*,[98] the Texas court found that a ceremonial "marriage" between a man and a transsexual born as a man, who was later surgically and chemically altered to have the physical characteristics of a woman, was not valid and thus void. The court queried: "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by a Creator at birth?"[99] The court began the discussion by observing the following:

> In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. . . .But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.[100]

The Texas court found that the matter presented a "pure question of law and must be decided by this court."[101] The court then observed that Christie was created and born a male and her original Texas birth certificate clearly so stated. The court acknowledged that Christie amended the original birth certificate to change the sex and name during the pendency of the suit, but then pointed out that the trial court's role in considering the petition is merely a ministerial one, which involves no fact-finding. "At the time of the

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[97] *Id*.
[98] 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 531 U.S. 872 (2000).
[99] *Id*. at 224.
[100] *Id*. at 230.

birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court."[102] "There are some things we cannot will into being. They just are."[103] The court therefore held "as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathan was invalid, . . ."[104]

(5) New York.

New York will not recognize a transsexual "marriage."[105] In this case, the plaintiff was a man who sought a declaration to determine the validity of a "marriage" to another male "who appeared to be a female."[106] The two met at a house of prostitution where, although they spent a short time together, the plaintiff did not see the defendant unclothed or have any sexual relations. When the plaintiff, a non-commissioned officer in the United States Army, was transferred to Fort Hood, Texas, the defendant followed him. A few days later, the two took part in a marriage ceremony and they both returned to the plaintiff's apartment. Being intoxicated, the plaintiff fell asleep. He woke up early in the morning and reached for the defendant, and upon touching him, discovered that the defendant had male sexual organs. He immediately left the bed, "got drunk some more" and the next day, the defendant informed the plaintiff that he intended to undergo an operation to have the male organs removed.[107] The parties continued to live together but never had any sexual relationship. Later, the plaintiff was transferred overseas and

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[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *See Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. App. Div. 1971).
[106] *Id*.

returned the next year. In the interim, the defendant sent numerous letters to the plaintiff along with medical bills for hospital and surgical expenses. These expenses were paid for by the plaintiff. When the plaintiff returned from overseas to San Francisco, he arranged for the defendant's release from jail on a prostitution charge, and the two later traveled to New York for the purpose of arranging a legal divorce or separation. The defendant told the plaintiff on this trip that he had completed a sex surgery and was now a "woman."[108]

The court found that the defendant was not a woman and that "mere removal of the male organs would not, in and of itself, change a person into a true female."[109] The court observed that the "law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."[110] "Accordingly, the court declares that the so-called marriage ceremony in which the plaintiff and the defendant took part . . . did not in fact or in law create a marriage contract and that the plaintiff and defendant are not and have not ever been 'husband and wife' or parties to a valid marriage."[111]

In *B. v. B.*,[112] the court reconfirmed the holding in *Anonymous*, finding that marriage is between one man and one woman. The court quoted a surgeon who had performed more than 700 sex-reassignment surgeries: "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the

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[107] *Id*.
[108] *Id*. at 500.
[109] *Id.*
[110] *Id*.
[111] *Id.* at 501.
[112] 355 N.Y.S.2d 712 (N.Y. App. Div. 1974).

patient's mind."[113] Finding that the female who underwent sex reassignment surgery to be "male" "does not possess a normal penis, and in fact does not have a penis" and in the same way that surgery cannot provide a man "with something resembling a normal female sexual organ, transplanting ovaries or a womb", the court voided the marriage.[114]

(6) Federal.

The Seventh Circuit Court of Appeals in *Ulane v. Eastern Airlines, Inc.*,[115] found that a male-to-female transsexual is not covered by Title VII. In *Ulane*, a male pilot working for Eastern Airlines underwent sex-reassignment surgery, revised his birth certificate and the FAA certified him as a "female." Ulane's own physician, however, explained "that the operation would not create a biological female in the sense that Ulane would 'have a uterus and ovaries and be able to bear babies.'"[116] Holding that Title VII "does not protect transsexuals," the court rejected the district judge who wrote that sex was more than chromosomes and should include psychological and self-perception components. To the contrary, the appellate court stated that its responsibility was "to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex."[117] Beginning with the "maximum of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning," the court found that Title VII banned discrimination based

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[113] *Id*. at 717 (citation omitted).

[114] *Id.* In *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (N.Y. App. Div. 1966) and in *Hartin v. Director of the Bureau of Records and Statistics*, 347 N.Y.S.2d 515 (N.Y. App. Div. 1973), the courts upheld the Board of Health's rules that refuse to allow sex to be changed on birth certificates. One court noted the Board of Health's findings that "surgery for the transsexual is an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality. In the words of one of the medical members of the Board, 'I would think that it would be unsound, if, in fact, there were encouragement to the broader use of this means of resolving a person's unhappy mental state'." *Hartin*, 347 N.Y.S.2d at 518.

[115] 742 F.2d 1081 (7th Cir. 1984).

[116] *Id*. at 1083.

on "sex", which "implies that it is unlawful to discriminate against women because they are women and against men because they are men."[118] A "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."[119] "In our view, to include transsexuals within the reach of Title VII far exceeds mere statutory interpretation. Congress had a narrow view of sex in mind when it passed the Civil Rights Act, . . ." [120] To hold that Title VII protects transsexuals "would take us out of the realm of interpreting and reviewing into the realm of legislating."[121]

(7) Foreign Jurisdictions.

While briefly overviewing international law, we should remember the admonition by Supreme Court Justice Clarence Thomas that courts "should not impose foreign

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[117] *Id*. at 1084.
[118] *Id*. at 1085.
[119] *Id*.
[120] *Id*. at 1086.
[121] *Id.* Other federal courts have similarly found that Title VII does not protect transsexuals. *See Mario v. P& C Food Mkts., Inc.*, 313 F.3d 758, 767(2d Cir. 2002) (citing *Ulane* and *Sommers* and stating it is unclear whether transsexuals are protected Title VII); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (holding that transsexuals are not a protected class, but noting that this legal question may need to be reevaluated); *Sommers v. Budget Mktg.*, 667 F.2d 748, 749 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663-64 (9th Cir. 1977); *Oiler v. Winn-Dixie La., Inc.*, No. CIV.A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002); *Mims v. Carrier Corp.*, 88 F. Supp.2d 706, 714 (E.D. Texas 2000); *Rentos v. Oce-Office Sys.*, No. 95 CIV. 7908 LAP, 1996 WL 737215, at *7 (S.D.N.Y. Dec. 24, 1996)*; Dobre v. National R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993); *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981); *Terry v. EEOC*, No. Civ.A.80-C-408, 1980 WL 334, 25 Empl. Prac. Dec. P 31, 638, at *19, 732-33 (E.D. Wis. 1980); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd mem.*, 570 F. Supp. 354 (9th Cir. 1978); *Grossman v. Board of Educ.*, No. 74-1904, 1975 WL 302, at *4, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D. N.J. 1975), *aff'd mem.,* 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976). *But see, Schwenk v. Hartford*, 204 F.3d 1187, 1200-02 (9th Cir. 2000) (erroneously stating that the loose use of the terms "sex" and "gender" in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), overrules *Holloway* and similar cases which recognized that Congress intended "sex" to encompass only the plain meaning of male and female, which is also indicated by several bills introduced later attempting to extend the scope of Title VII discrimination).

moods, fads, or fashions on Americans."[122] "[I]t is American conceptions of decency that are dispositive, . . ."[123] It is irrelevant how other countries interpret their laws. However, a discussion of the international cases is presented here briefly only because the trial court strayed into these muddy waters. What is to prevent one court from relying on the marriage laws of Saudi Arabia or Afghanistan to support bigamy or to exclude women from power and reduce them to property? One indictment against the King of Great Britain in the Declaration of Independence stated: "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their pretended Legislation."[124] We must not forget that important part of American history, namely the American Revolution. If we learn anything at all from the international cases, we should only note with a nod that the country which most parallels our common law system is Great Britain, and the historical interpretation by these courts have concluded that sex must be determined biologically and that a transsexual may not marry a person whose sex is the same as the transsexual's sex at birth.

The first reported transsexual case in the world is *Corbett v. Corbett*,[125] *Corbett* involved a person whose sex at birth was male, but who later underwent an operation to remove his testicles and most of the scrotum, along with an incision to create an artificial "vagina." Arthur Corbett met this transsexual who presented himself as a woman and the two married. After the marriage, Mr. Corbett learned that his "wife" was actually a man. He filed for divorce, asking the court to declare the "marriage" null and void. After

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[122] *Foster v. Florida*, 123 S.Ct. 470 (2002) (Thomas, J., concurring in denial of certiorari).
[123] *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (plurality) (emphasis in original).
[124] DECLARATION OF INDEPENDENCE, July 4, 1776, The Organic Laws of the United States of America.
[125] 2 All. E.R. 33, 2 W.L.R. 1306 (Probate, Divorce, and Admiralty Div. 1970).

listening to medical testimony, the court noted that there were several possible factors in determining a person's sex, which included (1) chromosomes; (2) gonads (the presence or absence of testes or ovaries); (3) genitalia (including internal and external sex organs); (4) psychological; and (5) hormonal factors or secondary sexual characteristics (such as the distribution of hair and physique). Discussing the inherent problems with hormonal and psychological factors, the court observed the following:

> Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, on whether the respondent is or is not a woman. . . . Having regard to this essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. . . . My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of 10th September 1963 is void.

The court in *Corbett* recognized any other decision incorporating hormonal or biological factors would be fraught with insurmountable difficulties. The court pondered the following questions:

> If a law were to recognize the [sex surgery] "assignment" of the respondent to the female sex, the question which would have to be answered is, what was the respondent's sex immediately before the operation? If the answer is that it depends on 'assignment' then, if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the assignment to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50-year-old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female, and capable of 'marrying' a man! The results

> would be nothing if not bizarre. . . . Marriage is a relationship which depends on sex and not on gender.

The holding in *Corbett* was reexamined and confirmed in England in the case of *Bellinger v. Bellinger*.[126] Until recently, the European Court of Human Rights had routinely upheld England's refusal to recognize the right of transsexuals to marry.[127]

In *W. v. W.*,[128] the court in South Africa followed the decision in *Corbett*. The court found a transsexual marriage to be invalid and stated that the "evidence does not show that the operation converted her into a female. What it did was to artificially supply her with certain of the attributes of a woman, namely, breasts and a vagina-like cavity. . . . Imitation cannot be equated with actual transformation." The court noted that in order to recognize the right of a transsexual to marry, "intervention of the legislature would be necessary."[129] Several Canadian courts have also followed the reasoning in *Corbett*.

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[126] (2001) E.W.C.A. Civ. 1140, (2002) Fam. 150 (C.A. 2001). *See In re Heilig*, 816 A.2d 68, 86 (Md. App. 2003). However, on appeal, this case was overturned because of an intervening opinion by the European Court of Human Rights. *See Bellinger v. Bellinger* (2003) U.K.H.L. 21. The *Bellinger* decision was reversed because the European Court of Human Rights in *Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 18 held that England's Matrimonial Causes Act of 1973 was incompatible with Articles 8 and 12 of the European Convention on Human Rights.

[127] *See Rees v. United Kingdom* (1986) 9 E.H.R.R. 56, *Cossey v. United Kingdom* (1990) 13 E.H.R.R. 622 and *Sheffield and Horsham v. United Kingdom* (1998) 27 E.H.R.R. 163. The European court reversed itself in *Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 18, in which the court held that the United Kingdom was in breach of Articles 8 and 12 of the European Convention on Human Rights referred to by some courts as the Convention for the Protection of Human Rights and Fundamental Freedoms.

[128] (1976) (2) S.A.L.R. 308.

[129] An English court of appeal in *RV. Tan & Ors* (1983) Q.B. 1053, followed *Corbett* in the context of a criminal sex offense, stating that the *Corbett* decision should apply not only for marriage but also for a charge brought under the Sexual Offenses Act. In the case of *In re C. & D.* (1979) 28 A.L.R.524, an Australian court considered the case of a hermaphrodite who was born with one testicle, one ovary, a uterus, breasts and a penis. This person also had a rudimentary vagina. In an attempt to "correct" his anatomical anomalies, this person underwent a series of surgical operations, in the course of which his female attributes were removed. He then married a female for a period of some five years, but he was not able to consummate the marriage. The wife sought a Decree of Nullity. The court found that in Australia, marriage is "the union of a man and a woman to the exclusion of all others" and was satisfied that on the evidence, the "husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word as within the definition referred to above could not have taken place and did not exist." The marriage was therefore void.

In *B.V.A.*,[130] a Canadian court found that a female-to-male transsexual who had a 20-year relationship with a female was not a "spouse" within the meaning of the Family Law Act.[131] The court found that the transsexual who had undergone a hysterectomy, mastectomy and hormonal treatments, but had not yet received an artificially constructed penis, was not a "male" and would "revert" back to her female self once the hormone treatments ceased.

In *C.(L.) v. C.(C.)*,[132] an Ontario court concluded that the marriage between a female and a female-to-male post-operative transsexual was void *ab initio*. The court found that the transsexual had not received an artificially created penis and thus had not changed her sex. In *M. v. M.(A)*,[133] another Canadian court considered a case involving two people who lived together for thirteen years, first as common-law and then as married persons. After they separated, the female spouse began to live as a man and started hormonal treatment, although no surgery had yet been performed. The husband received a Decree of Nullity, even though the attempted sex change occurred after the marriage dissolved. The court found that the wife had latent transsexual characteristics which prohibited her from being capable of being married to a male.[134]

The Singapore courts have also followed the decision in *Corbett*. In *Ying v. Eric*,[135] the court considered a female who underwent sex-reassignment surgery to become male, including a phalloplasty which involved the construction of an artificial

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[130] (1990), 29 R.F.L. (3d) 258 (Ont. S.C. T.D.).
[131] *See also* Lori Johnson, *The Legal Status of Post-Operative Transsexuals*, 2 HEALTH L.J. 159, 166 (1994).
[132] (1992), 10 O.R. (3d) 254 (Ont. Dist. Ct.).
[133] (1984) 42 R.F.L. (2d) 55 (P.E.I. S.C.).
[134] *See also* Johnson, *The Legal Status of Post-Operative Transsexuals*, 2 HEALTH L.J. at 167.
[135] (1992) 1 S.L.R. 184.

"penis." The court noted that "since the respondent's penis was artificial, erection for sexual intercourse was not possible." The court found that "one's sex is fixed at the moment of conception" and that chromosomes should be the primary relevant factor in determining sex. The Singapore court considered relevant law and concluded as follows:

> It is desirable in the interests of certainty and consistency for the word 'man' under the Charter to be given the ordinary meaning that is in contradistinction to woman. A person biologically a female with an artificial penis, after surgery and psychologically a male, must, for purposes of contracting a monogamous marriage of one man and one woman, under the Charter be regarded as a 'woman'.

The court therefore declared the marriage to be a nullity and then concluded: "A person who has undergone a sex-change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for purposes of a monogamous marriage under the Charter."

b. The minority rule.

The minority rule, especially in America, includes a subjective psychological component to the definition of "sex" or "gender." There is only one reported case in America that has followed this treacherous path, along with several international decisions.[136] There are no such rulings internationally among common-law countries.

(1) New Jersey.

In *M.T. v. J.T.*,[137] the court found that a female-to-male post-operative transsexual was permitted to marry a person of the sex of the transsexual at birth. The essence of the court's decision was as follows:

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[136] The Kansas Court of Appeals also embraced this minority rule. *See In re Estate of Gardiner*, 22 P. 3d 1086 (Kan. App. 2001). However, this decision was reversed by the Kansas Supreme Court. *See In re Estate of Gardiner*, 42 P3d at 120. The Kansas Supreme Court adopted the majority rule and thus defined sex biologically rather than psychologically.

[137] 355 A.2d 204 (N.J. App. 1976).

> If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent the person's identification at least for purposes of marriage to the sex finally indicated.[138]

The court found that the transsexual had physiologically become a "female" and should be "considered a member of the female sex for marital purposes."[139] Then the court made the astonishing statement that such "recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle or public order or precept of morality."[140] The court's decision is obviously shortsighted without any understanding of the far-reaching ramifications. There is certainly more at stake than a person's "inner peace and personal happiness"; rather, there are many societal interests at stake. Every court of last resort in America has rejected the reasoning in the New Jersey decision.

(2) Foreign Jurisdictions.

An Australian Family Court found that a female with typical XX chromosomes, female genitalia and gonads, but who surgically removed these female organs, should be considered a "man" for purposes of Australia's marriage law.[141] Instead of focusing on birth to determine sex, the court focused instead on the time of marriage. Although acknowledging that a transsexual is to be distinguished from someone with Klinefelter's Syndrome, hermaphroditism, and Androgen Insensitivity Syndrome, the court nevertheless considered that surgical removal of female gonads and genitalia was

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[138] *Id*. at 210-211.
[139] *Id*. at 211.
[140] *Id*.
[141] *In re Kevin* (2002) 28 Fam.L.R. 158.

sufficient to transform a "female" into a "male." However, this decision on appeal was set aside by the full court of the Federal Family Court on February 21, 2003.[142]

In *Secretary, Department of Social Security v. S.R.A.*,[143] a federal court in Sydney found that for purposes of the Social Security Act, the words "woman" and "female" included a post-operative male-to-female transsexual. The court noted that a person who was only "psychologically" female but who had not undergone sex surgery would not be considered a person of the desired sex.[144]

In *Attorney-General v. Otahuhu Family Court*,[145] a New Zealand court found that for purposes of the New Zealand Marriage Act of 1955, where a person had undergone surgical and medical procedures, such a person could marry another, even though that other person was of the same birth sex as the transsexual. The court noted that the Marriage Act of 1955 did not "refer to man and woman or husband and wife" as a specific union, but the court nevertheless considered marriage to be the union of one man and one woman. In addressing where to draw the line, the court noted that in order "for a transsexual to be eligible to marry in the sex of assignment, the end of the continuum must have been reached and reconstructive surgery done. . . . [T]here must be as complete a transformation as is possible before that person can qualify as a person of his or her chosen sex for the purpose of marriage."[146] The court noted that a "preoperative transsexual" who dresses and behaves in the assigned sex may be accepted in that sex for

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[142] *In re Kevin,* Appeal No. EA/97/2001(unreported). *See also Bellinger v. Bellinger* (2003) U.K.H.L. 21 at ¶ 16.
[143] (1993) 118 A.L.R. 467.
[144] Other Australian courts have disagreed with one another. *See In re C. & D.* (1979) 28 A.L.R. 524 (finding that sex reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex, and therefore the marriage was void).
[145] (1995) 1 N.Z.L.R. 603.
[146] *Id.* at 615.

employment and social purposes, such as a driver's license, but it would "not be appropriate for such a person whose genitals do not correspond with the sex of assignment to be able to marry in that sex."[147] The court realized that its reasoning was on somewhat shaky ground when it artificially drew the line for marriage by requiring the person to actually undergo sex surgery. Once a psychological component is considered, it is incongruent to force a person to undergo surgery, yet this court drew the line with a surgical scalpel.[148]

Although the European Court of Human Rights in Strasbourg, France, upheld on three separate occasions Great Britain's right to deny a marriage license to a transsexual, the court has now receded from that position and found England's position to be in contravention to Articles 8 (right to respect for private life) and 12 (right to marry) of the Convention for the Protection of Human Rights and Fundamental Freedoms.[149]

Ever since the first case in America to affirm transsexual marriage in 1976, every other court of last resort has refused to accept that a person's sex can be changed for purposes of marriage. Sex must be determined by objective rather than subjective standards.

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[147] *Id*. at 617.

[148] If a psychological component is considered important in determining a person's sex, then one cannot easily argue that surgery is necessary to complete the so-called sex transformation. If a psychological component is accepted, then a person may argue for sex-change status on the basis of subjective psychological thoughts alone, stating that it is unfair to require expensive surgical intervention. Consider the person who may suffer from a heart condition and is unable to undergo the sex-change surgery. Will a person who suffers from a disability and who cannot undergo sex-change surgery be told he or she cannot change into the desired sex, when another person who is more physically and financially capable can do so? Including a psychological component to determine sex is fraught with innumerable problems.

[149] *See Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 18. *See also Rees v. United Kingdom* (1986) 9 E.H.R.R. 56 (finding that England's denial of the right of a transsexual to marry did not violate Articles 8 or 12); *Cossey v. United Kingdom* (1990) 13 E.H.R.R. 622 (same) and *Sheffield & Horsham v. United Kingdom* (1998) 27 E.H.R.R. 163 (same).

III. MUTILATING THE BODY'S INTERNAL SEX ORGANS AND EXTERNAL GENITALIA DOES NOT CHANGE A PERSON'S SEX.

Hormone treatment and plastic surgery does not transform a male to female nor a female to male. If that were the case, there will be a lot of surprised females who have undergone surgical mastectomies or hysterectomies. To even assume plastic surgery changes sex is an insult to these women. Since surgery cannot change sex, and "thoughts" are too amorphous to be objective, biology must be the determinate.

A. Chromosomes Determine Sex.

The X and Y chromosomes are the biological drivers that determine sex. A chromosome is one of the threadlike "packages" of genes and other DNA in the nucleus of a cell. Humans have 23 pairs of chromosomes for a total of 46 total; 44 autosomes and two sex chromosomes. Each parent contributes one chromosome to each pair, so offspring get half of their chromosomes from their mother and half from their father.[150] The egg carries the X chromosome while the sperm carries either an X or a Y.[151]

Unless the Y chromosome is present and properly transcribed, the child will develop into a female. In extremely rare cases, genetic mutations or defects cause problems with the normal sexual development process, and the child may be born with ambiguous genitalia (having both male and female characteristics), or, as a result of a mutated or missing receptor gene, the newborn may have the chromosomes of one sex but the gonads or genitalia of another.[152] These conditions are commonly referred to as

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[150] *See, e.g., National Human Genome Research Institute: Talking Glossary*, *available at* http://www.genome.gov/glossary.cfm?key=chromosome (last visited June 29, 2006).

[151] *See, e.g.,* Biology Online, *Chromosomes X and Y and Sex Determination*, *available at* http://www.biology-online.org/dictionary/Sex_Determination (last visited June 29, 2006).

[152] Gonads are the internal sex organs. In females, these include the uterus and ovaries and in males the testes. The genitalia are the external sex organs, which include the vagina and penis. Sometimes infants

intersex.[153] Another condition known as sex chromosome aneuploidies is one where there are an abnormal number of sex chromosomes. The person may be infertile and there may be some abnormal sexual development, but the sex is evident and is consonant with the chromosomes. This condition is therefore not intersex.[154]

Some transsexual advocates claim their bodies do not match their mind's "gender identification", and thus have attempted to compare themselves with intersexuals, who suffer from a biological (rather than psychological) ambiguity with regard to their sex.[155] However, a clinical definition of intersex only includes conditions in which the phenotype, or the visible characteristics, are not classifiable as either male or female (for example, the presence of both male and female genitalia), or chromosomal sex (e.g., XX or XY) is not consistent with phenotypic sex.[156] There is nothing in the definition of intersex that refers to psychology. On the other hand, transsexuals are born with chromosomal and phenotypic consistency. The "inconsistency" they claim is not biological or physiological but psychological, referred to as gender dysphoria or gender

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born with ambiguous genitalia receive genital surgery shortly after birth or in early childhood. *See* Garry L. Warne, *Molecular Endocrinology of Sex Differentiation*, 20 SEMINARS IN REPROD. MED. 169 (2002).

[153] Garry L. Warne, *Molecular Endocrinology of Sex Differentiation*, 20 SEMINARS IN REPROD. MED. 169 (2002).

[154] *Id. See* Appendix A for descriptions of the various intersex conditions, sex chromosome aneuploidies, and conditions that have been mistakenly categorized as intersex.

[155] Some have even gone so far as to attempt to define them under the same umbrella. "Transgenderist' is a term used to describe both transsexuals and intersexuals. A transgendered person is one whose psychological sexual identity is opposite from the biological and physical sex that he/she appeared to be at birth." According to the source, transvestites (cross-dressers) are also included in the definition of "transgender." Shana Brown, *Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1119 (2001).

[156] *See* Leonard Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling,* 39 J. OF SEX RESEARCH 174, 176 (2002). The term "intersex" is usually reserved for individuals of intermediate sexual differentiation, who are most often sterile. *See* William S. Klug, Michael R. Cummings, 3d ed. ESSENTIALS OF GENETICS 155-70 (Prentice Hall: Upper Saddle Back River, N.J. 1999).

identity disorder (hereinafter "GID").[157] The condition of intersex precludes a diagnosis of transsexual or any other GID.[158]

Intersex conditions are not as frequent as some transsexual literature may suggest. While some cite a study that purported to determine the occurrence of intersex in the U.S. population at around 1.7%, a sound critique of that study found that true intersexuals only account for .0018% of the population

B. Biological Definition Of Sex By Chromosome Testing Is Both Possible and Realistic.

Biology can and must be the only measure of sex. The International Olympic Committee used sex chromosome testing from 1966-2000 to verify the sex of female athletes.[159] The most basic test that is used is the Buccal smear test, which involves staining a cell sample and evaluating it for the presence or absence of the Barr body.[160] The Barr body is caused by the inactivation of one of the two X chromosomes in genetic female (XX) cells. Genetic males (XY) do not show this Barr body since they only have one X chromosome, which stays active.[161] One problem that the Olympics Committee

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[157] *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS: DSM-IV-TR, §302.85 (2000) (hereafter "DSM-IV").

[158] *Id*. ("The disturbance is not concurrent with a physical intersex condition.").

[159] Myron Genel, *Gender Verification No More?*, *available at* http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=879 (last visited June 29, 2006), *reprinted from* 5 MEDSCAPE WOMEN'S HEALTH 3 (2000). At the 1992 winter games in Albertville, the IOC replaced sex chromatin with DNA testing methods to detect Y chromosomes, particularly the SRY sex-determining locus on the Y chromosome. *See* A. Serrat and A. Garcia de Herreros, *Determination of Genetic Sex by PCR Amplification of Y-chromosome-specific Sequences*, 341 LANCET 1593-94 (1993). DNA testing has been temporarily discontinued, in part, because the clothing used in athletic competition, as well as the requirement that urine samples be given in the presence of an observer, are sufficient methods to determine sex. *See* L. Elsas, R. Hayes and K. Muralidharan, *Gender Verification in the Centennial Olympic Games*, 86 GA. J. MED. ASS'N, 50-54 (1997).

[160] *See* Douglas R. Stewart, *Medical Encyclopedia: Buccal Smear*, *available at* http://www.nlm.nih.gov/medlineplus/ency/article/003414.htm (last visited June 29, 2006).

[161] Canadian Academy of Sports Medicine, *Position Statement: Sex Testing (Gender Verification) in Sport*, *available at* http://www.casm-acms.org/forms/statements//GendereVerifEng.pdf (last visited June 29, 2006).

had with the Buccal smear was its inability to properly detect intersexuality. For instance, Maria Patino, a female hurdler from Spain, was wrongly excluded from competition because she failed the Buccal smear test. She had an intersex condition known as Androgen Insensitivity Syndrome.[162] While she had XY chromosomes, her body lacked the necessary receptor for the male hormone, so she developed as a woman. Because the male hormone had no impact on her body, she did not have an unfair advantage over the other women in the competition, and was properly considered a female.[163]

With advances in genetic technology, the testis determining factor, or the gene that results in the development of a male, was isolated and determined to be the SRY gene, which in genetic males (XY), is located on the Y chromosome.[164] Karyotyping[165] is systematic while polymerase chain reaction (PCR) analysis of the SRY gene provides information about the presence of a Y chromosome within one day.[166] Since the PCR test

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[162] Other intersex conditions and sex chromosome aneuploidies that result in an incorrect diagnosis of sex using the Buccal smear test are Klinefelter's Syndrome (a male with XXY chromosomes that would be diagnosed as a woman), 46XX males (males that are XX but have the male determining portion of the Y chromosome inscribed on one of their X chromosomes), Gonadal Dysgenesis (women who are XY but do not have testes), and Turner's Syndrome (women who have an XO chromosome makeup. Since they only have one X chromosome, the Buccal smear test would show them to be male.). *See* A. Carlson, *When is a Woman not a Woman?*, WOMEN SPORT FITNESS, 24-29 (March 1991).

[163] Canadian Academy of Sports Medicine, *Position Statement: Sex Testing (Gender Verification) in Sport*, *available at* http://www.casm-acms.org/forms/statements/GendereVerifEng.pdf (last visited April 4, 2005). Unlike Androgen Insensitivity Syndrome, Congenital Adrenal Hyperplasia is an intersex condition that would pass the Buccal smear test for femininity, but would confer an unfair advantage upon the athlete. The athlete would have XX chromosomes, but the adrenal glands produce excess androgen, resulting in masculine characteristics which would inevitably enhance strength and muscle mass. *Id.* Hermaphrodites and pseudohermaphrodites may or may not pass the Buccal smear test, depending on what sex was assigned to them and whether it corresponds with their chromosomal sex. *Id.*

[164] XY females nearly always lack the SRY gene. In rare cases it is present but mutated. XX males have it transcribed onto one of their X chromosomes. Studies have shown that when the gene is added to XX mice, the sex reverses from female to male. Corinne Cotinot, et al., *Molecular Genetics of Sex Determination*, 20 SEMINARS IN REPROD. MED. 157 (2002) *available at* www.medscape.com/viewarticle/444686 (last visited June 29, 2006).

[165] Karyotyping is a photomicrograph of chromosomes arranged according to a standard classification. http://karyotyping.tripod.com (last visited July 18, 2006).

[166] C. Sultan et al., *Ambiguous Genitalia in the Newborn*, SEMINARS IN REPRODUCTIVE MEDICINE, Aug. 2002, *available at* MEDLINE (FirstSearch version), NLM No. 100909394. "The SRY gene has a

is "far simpler and less expensive than previous techniques for duplicating DNA [it has] democratized genetic research, putting it within reach of all biologists, even those with no training in molecular biology."[167]

Chromosome testing remains highly important and relevant. Genetic testing for sex chromosome aneuploidies and intersex conditions is simple and fairly routine in the diagnosis of these conditions. About 900 genetic tests are now being offered by diagnostic laboratories.[168]

Chromosome analysis, referred to as karyotyping, involves looking directly at the chromosomes to determine if there are any abnormalities like a chromosomal rearrangement; and for more subtle genetic disorders, the actual DNA sequence of a particular gene is analyzed.[169] In the rare cases where there happens to be dysgenesis

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fundamental role in sex determination and is believed to be the switch that initiates the testis development. SRY is regulated by genes upstream in the sex determination pathway and exerts its function by interaction with genes downstream in the pathway. Any deregulation of the sex pathway leads to abnormal sex differentiation and, in some cases, to complete sex reversal. Translocations of SRY are known to be associated with 80% of cases of 46, XX maleness. Mutations in the SRY, SOX9, SF1, and WT1 genes are associated with 46, XY gonadal dysgenesis, as are deletions of chromosome 2q, 9p, and 10q, and duplication of chromosome Xp21." http://jcem.endojournals.org/cgi/content/full/85/2/483 (last visited July 18, 2006).

[167] Tabitha M. Powledge, *The Polymerase Chain Reaction*, *available at* http://opa.faseb.org/pdf/The%20Polymerase%20Chain%20Reaction.pdf (last visited June 30, 2006); *see also Polymerase Chain Reaction (PCR): Replicating Millions of Copies From a Single Gene*, *available at* http://www.waynesword.palomar.edu/lmexer3b.htm (last visited June 30, 2006). The inventor of PCR, Karry B. Mullis, was awarded the Noble Prize in 1993. *See Polymerase Chain Reaction (PCR)*, *available at* http://www.genome.gov/10000207 (last visited June 30, 2006); *The Nobel Prize in Chemistry 1993, available at* http://www.nobelprize.org/nobel_prizes/chemistry/laureates/1993/ (last visited June 30, 2006.)

[168] *See* Francis S. Collins, *A Brief Primer on Genetic Testing: World Economic Forum, January 24, 2003*, *available at* http://www.genome.gov/10506784 (last visited June 30, 2006). *See also* Denise Casey, *What Can the New Gene Tests Tell Us?*, *available at* http://www.ornl.gov/TechResources/Human_Genome/publicat/judges/judge.html (last visited June 30, 2006).

[169] For example, Klinefelter's Syndrome is diagnosed with peripheral blood karyotyping to detect an extra X chromosome (The Medical Algorithms Project, *Criteria for the Diagnosis of Klinefelter's Syndrome, available at* http://www.medal.org/visitor/www/Active/ch43/ch43.19/ch43.19.01.aspx (last visited June 30, 2006); Androgen Insensitivity Syndrome is diagnosed by testing for mutations in the AR gene (Leonard Pinsky, Mark A. Trifiro, *GeneReviews: Androgen Insensitivity Syndrome*, *available at* http://www.geneclinics.org/profiles/androgen/details.html (last visited June 30, 2006)); 21-hydroxylase deficiency (the most common cause of congenital adrenal hyperplasia) is diagnosed by testing the CYP21A2 gene for mutations or deletions (Maria I. New, Andrea Putnam, *GeneReviews: 21-Hydroxylase*

between observed sexual characteristics and the results of the Buccal smear test, specialized genetic testing can be utilized. A PCR test can be done to detect the SRY gene. Through this process, a person's sex can be reliably determined, even if the initial Buccal smear does not correctly diagnose a rare condition.[170]

The argument that sex must include a psychological component is specious. The few cases which do not on first blush neatly fit into one category do not undermine the male-female paradigm any more than birth defects undermine normal human physiology. The logic behind the argument for a "gender spectrum" stems from a desire to create a norm from an anomaly. As already noted, transsexuals are not intersex and intersexuals are not transsexuals. An intersex condition is an ambiguity between the chromosomes and the gonads or genitalia. Transsexuals have harmony between the chromosomes, gonads and genitalia, but claim a conflict between the mind and the body.[171]

The transsexual movement is reminiscent of cultural trends in the 1960s to "normalize" schizophrenia by claiming schizophrenics were victims of "psychiatric oppression." As a result of these efforts, thousands of mentally ill people were released from hospitals to the streets, often becoming homeless or incarcerated.[172] Anne Fausto-

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Deficiency, *available at* http://www.geneclinics.org/servlet/access?db=geneclinics&site=gt&id=8888891&key=rx1NKmeGcV253&gry=&fcn=y&fw=jirn&filename=/profiles/cah/index.html (last visited June 30, 2006). Francis S. Collins, *A Brief Primer on Genetic Testing*, *available at* http://www.genome.gov/10506784 (last visited June 30, 2006) (Dr. Collins is the Director of the National Human Genome Research Institute); *see also* http://www.genetests.org (for a list of specific types of tests) (last visited June 30, 2006).

[170] Given the small proportion of intersex in the population (.0018%), and the fact that many of these conditions still yield a recognizable phenotype (see Appendix A), the resulting amount of people requiring additional testing is almost unmeasurable. *See* Appendix B for a diagram of the testing process.

[171] *See* DSM-IV-TR §302.85. "Individuals with Gender Identity Disorder have normal genitalia (in contrast to the ambiguous genitalia or hypogonadism found in physical intersex conditions)." *Id.* at 579.

[172] *See* Paul McHugh, *Psychiatric Misadventures*, Joseph Epstein and Robert Atwan, eds., THE BEST AMERICAN ESSAYS 1993 188-91(Ticknor & Fields, New York 1993); Sax, *How Common is Intersex?,* 39 J. OF SEX RESEARCH at 181.

Sterling, the author of the study erroneously claiming intersex conditions affect 1.7% of the population, argued that all possible combinations of sexual anatomy should be considered normal, and that classifications of normal and abnormal sexual anatomy are "mere social conventions, prejudices which can and should be set aside by an enlightened intelligentsia."[173] One advocate wrote that "transsexualism [is] a socially constructed problem created by the medical establishment . . ."[174] Harry Benjamin opined that "[i]nstead of treating the patient, might it not be wiser and more sensible to treat society. . . ?"[175] The currently fashionable movement toward "tolerance" and freedom from "oppressive" social constraints becomes absurd when it ignores reality. Binary sex is more than just a paradigm – it is a medical reality, and it must remain a legal reality in order to preserve the integrity of the law.[176]

1. *Surgically and chemically mutilating the body to alter sexual appearance is experimental and controversial medical treatment*.

Plastic surgery and hormone therapy may alter a person's physical characteristics but cannot alter the person's sex. A woman who had a hysterectomy and mastectomy is a woman. A woman who thinks she's a man is a woman. Therefore, a woman who's had a hysterectomy and mastectomy and thinks she's a man remains a woman.

Radical surgical procedures on male-to-female transsexuals include removal of the penis and scrotum, bilateral orchiectomy (removal of the testicles), vaginoplasty (creation of artificial vagina), estrogen hormone injections, and perhaps a tracheal shave

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[173] Sax, *How Common is Intersex?,* 39 J. OF SEX RESEARCH at 181.
[174] *Id.*
[175] Leah Cahan Schaefer and Connie Christine Wheeler, *Harry Benjamin's First Ten Cases (1938-1953): A Clinical Historical Note*, 24 ARCHIVES OF SEXUAL BEHAVIOR 83 (1995).

(reducing the tracheal cartilage commonly called the Adam's apple). Female-to-male surgery includes a radical mastectomy, a total hysterectomy (removal of the uterus and ovaries), testosterone injections, and in rare cases, an artificial construction of a penis (phalloplasty) or enlargement of the clitoris (metaidoioplasty). Phalloplasty merely creates an imitation penis that lacks sensitivity and will not become erect without a stiffening device.[177] Studies indicate that many who undergo a phalloplasty are unhappy with their resulting imitation organ.[178] When a patient chooses not to undergo a phalloplasty, another surgical option is a metaidoioplasty. This technique allows the clitoris to extend further out, and it shapes the enlarged clitoris to look more like a small penis.[179] The length of the metaidoioplasty-enlarged clitoris would still be insufficient for intercourse.[180]

Hormonal treatment of the female-to-male and male-to-female transsexuals can cause a number of dangerous side effects.[181] Some research shows that female-to-male transsexuals who have been treated with hormones for 4-5 years, but have not had a

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[176] *Id.*

[177] *See* Janice Raymond, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE 160-161 (Teachers College Press 1994) (1979*)*.

[178] *See* James Barrett, *Psychological and Social Function Before and After Phalloplasty*, 2 INT'L J. TRANSGENDERISM 1 (1998)*,available at* http://www.symposion.com/ijt/ijtc0301.htm (last visited June 30, 2006). The study notes that as few as 39% having phalloplasty are happy with result, leaving 61% dissatisfied.

[179] *See* Carlo Trombetta, et. al., *Total Sex-Reassignment Surgery in Female-to-Male Transsexuals: a One-Stage Technique*, 90 BJU INT'L 754, 758 (2002).

[180] *Id.*

[181] Walter Futterweit, *Endocrine Therapy of Transsexualism and Potential Complications of Long-term Treatment*, 27 ARCHIVE OF SEXUAL BEHAVIOR 209-18 (1998). Some complications include water and sodium retention, increased erythopoiesis, decreased carbohydrate tolerance, decreased serum high-density lipoprotein (HDL) cholesterol, liver enzyme abnormalities occur, obesity, emotional or psychiatric problems, and sleep apnea.

hysterectomy, have developed "intrauterine complications."[182] Hormone treatment substantially increases risk of cardiovascular disease and liver complications.[183] Long-term, high-dose androgen therapy is associated with impaired vascular reactivity in genetic females, independent of the effects of androgens on lipoprotein levels or vessel size.[184] Androgen treatment in a male-to-female transsexual can cause recurrent myocardial infarction.[185]

"The number of deaths in male-to-female transsexuals was five times the number expected, due to increased numbers of suicide and death of unknown cause."[186] Based on a study of 303 male-to-female transsexuals undergoing estrogen hormone treatment, pulmonary embolism, cerebral thrombosis, myocardial infarction, prostatic metaplasia, and breast cancer were not uncommon side effects of the hormones.[187]

"Sex-reassignment" surgery is an experimental and likely unethical treatment because it dramatically increases health risks while showing no objective evidence of curing the mental disorder, gender identity disorder. A recent study revealed that major complications can occur during, immediately and some time after sex-reassignment surgery.[188] One of the most common and gruesome risks of a male-to-female SRS is a

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[182] Shadow Morton et al., *Notes on Gender Transition, FTM 101 – The Invisible Transsexuals* (last revised 1997) *available at* http://www.avitale.com/FTM101.htm (last visited June 30, 2006) (ranging from fibroid cysts, to endometriosis, to fibrous scar tissue that formed around reproductive organs).
[183] *Id.*
[184] *See* Robyn J. McCredie et al., *Vascular Reactivity is Impaired in Genetic Females Taking High-Dose Androgens*, 32 J. AM. COL. OF CARDIOLOGY 1331-1335 (1998).
[185] *See* Jose' Biller, et al., *Ischemic Cerebrovascular Disease and Hormone Therapy for Infertility and Transsexualism*, 45 NEUROLOGY 1611, 1612 (1995); H. Asscheman et al., *Mortality and Morbidity in Transsexual Patients with Cross-Gender Hormone Treatment*, 38 METABOLISM 869 (1989).
[186] *Id*.
[187] *Id*.
[188] S. Krege et al., *Male-to-female Transsexualism: A Technique, Results and Long-term Follow-up in 66 Patients*, 88 BJU INTERNATIONAL 396-402 (2001). Fourteen percent had major complications during, immediately, and some time after, surgery. This includes "severe wound infections in six, a rectal lesion in three, necrosis of the glans in three and necrosis of the distal urethra in one."

rectovaginal fistula which also includes a very high risk of infection.[189] In addition, minor complications are frequent.[190] The female-to-male transsexual faces some unique problems after a double mastectomy and/or mastopexy if they are taking testosterone hormones.[191] Therefore, because of the dangers surrounding the surgery, the validity of the treatment should be questioned and certainly the law should not encourage it by granting the patient a new legal sex status.

Furthermore, some patients have refuted the success of the surgical procedures. According to a long-term follow-up of male-to-female transsexuals that underwent SRS, 30% considered retrospectively the SRS a mistake.[192] In particular, there was a case concerning a male-to-female that lived as a female for approximately two and a half years, but the day before his SRS, the hospital stopped performing the procedure.[193] Mickey was born male, but throughout his early life he felt uncomfortable with his sex and longed to be a woman. As a result, when Mickey was 22, he applied for SRS.[194] The doctors evaluated Mickey and approved his sex-reassignment surgery.[195] Mickey began to take hormones and dress and act as a woman, and lived as a female for 2½ years.[196]

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[189] Sarah, *Notes on Gender Transition: Living With a Rectovaginal Fistula* (1996; editor's note 2000) *available at* http://www.avitale.com/Rectovaginal_Fistula.html. (last visited June 30, 2006) "Symptoms include intrusion of intestinal fluids, gases and feces into the vagina, and often intestinal distress."

[190] S. Krege et al., *Male-to-female Transsexualism: A Technique, Results and Long-term Follow-up in 66 patients*, 88 BJU INTERNATIONAL 396-402 (2001). Thirty-six percent had meatal stenosis, i.e. the narrowing of the urethra which can cause difficulty urinating.

[191] Shadow Morton et al., *Notes on Gender Transition, FTM 101 – The Invisible Transsexuals* (revised 1997) *available at* http://www.avitale.com/FTM101.htm (last visited June 30, 2006). "With testosterone comes body hair. The chest hair that grows in around the sutures and incisions can, at the very least, be incredibly annoying, and in the extreme can be ingrown and even cause infection."

[192] *See* Gunnar Lindelmalm, M.D. et al., *Long-Term Follow-Up of "Sex Change" in 13 Male-to-Female Transsexuals*, 15 ARCHIVES OF SEXUAL BEHAVIOR 187, 199-201 (1986).

[193] *See* Elsie R. Shore, Ph.D, *The Former Transsexual: A Case Study*, 13 ARCHIVES OF SEXUAL BEHAVIOR, 277, 280 (1984).

[194] *Id.* at 278.

[195] *Id.* at 279.

[196] *Id.*

Researchers report that, in fact, he was a very convincing female.[197] However, a day before he was to enter the hospital to have his genitals removed, the hospital changed its policy and refused to perform further sex-reassignment surgeries.[198] Disappointed, Mickey continued to live as a female. Through a series of events and therapy, however, his desire to become a woman subsided until it finally disappeared.[199] Mickey fell in love with a woman and repudiated his desire to have his genitals removed and to live as the opposite sex. Researchers report that he now leads a happier and more stable life than he did when living as a woman.[200] Tragically, researchers also tell stories of individuals who have the same recovery only after sex-reassignment surgery has taken place.[201]

In addition to the negative subjective data from patients, there is a lack of evidence showing that SRS grants the recipient an objective advantage in social rehabilitation.[202] Instead, there have been findings that point to the "possibility of psychosocial intervention as an alternative to surgery in the treatment of transsexuals."[203]

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[197] *Id.* at 278.
[198] *Id.* at 280.
[199] *Id.* at 282.
[200] *Id.* at 281-82.
[201] *See e.g.* J. Money & G. Golff, *Sex reassignment: Male to Female to Male*, 2 ARCHIVES OF SEXUAL BEHAVIOR 245-250 (1973); J. Randall, *Indications for Sex Reassignment Surgery*, 1 ARCHIVES OF SEXUAL BEHAVIOR 153-161 (1971). Dr. Robert Spitzer, who once opposed reparative therapy (therapy with a goal to change a person's "sexual orientation), now acknowledges that through such therapy "some gay men and lesbians are able to . . . change the core features of sexual orientation." Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES OF SEXUAL BEHAVIOR 403, 415 (2003). *See also* Elaine V. Siegel, FEMALE HOMOSEXUALITY: CHOICE WITHOUT VOLITION (The Analytic Press, Inc.: Hillsdale, N.J. 1988) (reporting that more than half of the twelve woman who were referred to her for counseling made complete transitions from homosexual to heterosexual).
[202] *See* Jon K. Meyer, M.D. et al., *Sex Reassignment: Follow-up*, 36 ARCH. GEN. PSYCHIATRY 1015 (1979). One follow-up study found that "adoption of the new gender role coincides with the hormonal reassignment and therefore is long before the surgical gender reassignment." Friedemann Pfäfflin, et al., *Sex Reassignment – Thirty Years of International Follow-up Studies After Sex Reassignment Surgery: A Comprehensive Review, 1961-1991*(translated from German into American English by Roberta B. Jacobson and Alf B. Meier) *available at* http://www.symposion.com/ijt/pfaefflin/1000.htm (last visited June 30, 2006) *(IJT Electronic Books).*
[203] David H. Barlow, PhD. et al., *Gender Identity Change in Transsexuals, Follow-up and Replications*, 36 ARCHIVES GEN. PSYCHIATRY 1001, 1002-07 (1979). Conservatively diagnosed transsexuals received

There are cases of adults with GID that persuasively display how gender dysphoria can remit "over the years with or without treatment and in response to various life events and comorbid psychopathology."[204] The law should not grant a new legal sex status based on a mental condition which is subject to change or a surgical procedure that is possibly a mistake.

The American Psychiatric Association made substantial changes to the diagnostic classification of GID in 1994.[205] "These include[d] collapsing the three diagnoses of gender identity disorder of childhood, transsexualism, and gender identity disorder of adolescence or adulthood, nontranssexual type, that were in the DSM-III-R into one overarching diagnosis, gender identity disorder . . . ."[206] Therefore, transsexualism is a subsection of GID. However, unlike the DSM-III-R, the diagnosis of GID cannot be given to persons with physical intersex conditions.[207] The DSM-IV-TR makes a distinction between individuals born with physical ambiguity (intersex), and one who is conflicted mentally.[208] The law should make a distinction as well. If the law grants a new "sex" status for those who have been diagnosed with GID and who undergo SRS, the law undoubtedly will be required to grant a new sex status for all individuals diagnosed with

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psychosocial intervention that proved to be successful in aligning the individual's gender identity with the natural sex of the patient.

[204] Isaac Marks et al., *Adult Gender Identity Disorder Can Remit*, 41 COMPREHENSIVE PSYCHIATRY 273-75 (2000) ("A dramatic cure of apparent transsexualism, by less than 3 hours of exorcism over two sessions, was documented and carefully measured from 7 months before to 2 years after the exorcism." Furthermore, there are additional individual cases where gender dysphoria appeared with other mental illness and while the patient was treated (often with medicine) for the latter mental illness, gender dysphoria subsided or was completely cured. "Adult GID reportedly remitted for up to 10 years in response to sexual relationships and other events in five cases evaluated by the second author (R.G.).").

[205] *See* Susan J. Bradley, M.D. et al., *Gender Identity Disorder: A Review of the Past 10 Years,* 36 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 872, 873 (1997).

[206] *Id*.

[207] *Id*. *See also* DSM-IV-TR §302.85, at 576, 579, 580-81.

[208] *See* DSM-IV-TR §302.85, at 576, 579, 580-81.

GID, even without SRS.[209] There are as many opinions concerning the treatment of GID as there are psychiatrists and psychologists.[210] The lack of uniformity among the field may be due to the rarity of the diagnosis.[211] One study concluded that a variety of interventions involving the parent and the child lowered cross-gender identification.[212] There are three approaches concerning child/parent intervention: behavioral, eclectic and analytic.[213] Literature concerning the treatment of adolescents is rare, however supportive therapy is the general approach.[214] The political movement of the transsexual community has had a profound effect on the field of counseling by causing some extreme counselors to believe that this mental illness should be encouraged.[215]

Many psychiatrists oppose treating adolescence GID with irreversible measures or even hormone administration too quickly because it may be a mistake.[216] Some psychiatrists speculate "a rapid agreement for sex reassignment would signal that the therapist (who should maintain a neutral position) supports the patient's desire for a sex change."[217] Even more concerned, Dr. Paul Mc Hugh, Chairman of the Psychiatry Department at John's Hopkins, criticized SRS as "radical, irreversible surgeries."[218]

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[209] If transsexualism is later declassified as a mental illness, like some are urging for pedophilia, then sex merely becomes a fleeting transitional thought solely dependent on personal whim. Equal protection then becomes a tangled web of meaningless prose.
[210] *See* Bradley, et al., *Gender Identity Disorder: A Review of the Past 10 Years,* 36 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY at 878-79.
[211] *Id* at 878.
[212] *Id*.
[213] *Id.*
[214] *Id.* at 879.
[215] Lynne Carroll et al., *Counseling Transgendered, Transsexual, and Gender-Variant*, 80 J. COUNSELING & DEVELOP. 131 (2002) (advocating that the counselor listen, empathize, assume a "not knowing stance", provide a "safe zone" where "gender diversity is not only accepted but *celebrated*.") (emphasis added).
[216] Bernd Meyenburg, *Gender Identity Disorder in Adolescence: Outcomes of Psychotherapy*, 34 ADOLESCENCE 11, 11-13 (1999).
[217] *Id*.
[218] John Colapino, AS NATURE MADE HIM (2001).

The source of GID is undetermined and therefore, any "treatment" administered to a GID patient is experimental. Some psychologists follow an "instinctual hypothesis."[219] For example, Dr. Pickstone-Taylor proposes that the "sole cause of GID is 'instinctual' and that the pervasive cross-gender behavior of children with GID simply reflects their 'true predilections or interests.'"[220] In contrast, Drs. Bradley and Zucker adhere to the premise that the origin of GID is "multifactorial".[221] Those who follow the latter model generally determine that one must look beyond biology to observe factors such as: "the role of temperament, parental reinforcement of cross-gender behavior during the sensitive period of gender identity formation, family dynamics, parental psychopathology, peer relationships, and the multiple meanings that might underlie the child's fantasy of becoming a member of the opposite sex."[222] Although the exact source of GID is unknown, a prospective study concluded that individuals with a *non*homosexual preference, combined with psychopathology and dissatisfaction with secondary sex characteristics, were more likely to function poorer postoperatively and express more discontentment about the outcome or result SRS had on their lives.[223] This may indicate that homosexuality is an indicator of a better postoperative outcome. Thus, there are many unanswered questions. What is clear, however, is that the law should not jump into this morass to encourage the anomaly as the norm by giving legal marriage status to transsexuals.

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[219] Simon D. Pickstone-Taylor, *Children with Gender Nonconformity,* 42 J. AM. ACAD. OF CHILD AND ADOLESC. PSYCHIATRY 266-68 (2003).
[220] *Id*. at 267.
[221] *Id.*
[222] *Id*.
[223] *See* Yolanda L.S. Smith, et al., SEX REASSIGNMENT: PREDICTORS AND OUTCOMES OF TREATMENT FOR TRANSSEXUALS 85, 105-06 (2002).

2. *There are many mental disorders which are either permanent or where surgery to conform the mind to the body is unethical.*

According to the DSM-IV-TR, the diagnostic criteria for GID include a strong persistent cross-gender identification that is manifested by persistent discomfort with the birth sex or a sense of inappropriateness in the gender role of that sex, and *clinical significant distress* or impairment in social, occupational, or other important areas of functioning.[224] There are various mental disorders associated with GID as coexisting disorders or as associated disorders.[225] Children diagnosed with GID may also have as coexisting mental disorders Separation Anxiety Disorder, Generalized Anxiety Disorder, and symptoms of depression.[226] Adolescents with GID are especially at risk for depression and suicidal ideation.[227] Adults with GID may have anxiety and depressive symptoms.[228] Males with GID may also have a history of Transvestite Fetishism, other paraphilias, and associated Personality Disorders.[229] In addition, there are significant social, personal, and occupational issues which may result from surgical sex changes, and the patient may require psychotherapy or counseling.[230] Major self-mutilation including eye enucleation and amputation of limbs or genitals is also usually associated with severe gender identity disturbances or with psychotic states.[231]

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[224] *See* DSM-IV-TR §302.85, at 576, 579, 580-81.
[225] *See id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] Tero J. Taiminen, *Contagion of Deliberate Self-Harm Among Adolescent Inpatients,* 37 J. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 211 (1998).

Patients diagnosed with borderline personality disorder will typically manifest self-mutilation beginning in adolescence and may continue to manifest self-mutilation for decades.[232] Self-mutilation and the act of "letting of blood" becomes a quick method of relieving anxiety or anger.[233] However, the mere fact that a behavior will relieve anxiety or psychological distress is insufficient to justify the behavior when it involves mutilation. Similarly, SRS is a type of bodily mutilation that is not justified merely because some contend it will relieve psychological distress.[234] Psychological distress is not unique to GID; it is a characteristic of a mental disorder, which is defined in the DSM-IV-TR as "a clinically important collection of symptoms (these can be behavioral or psychological) that causes an individual *distress,* disability, or the increased risk of suffering pain, disability, death, or the loss of freedom."[235] Dr. Tabin, of the National Committee for Research and Therapy of Homosexuality, noted the danger of using the prevention of significant psychological distress as a justification for stress-reducing behavior by pointing out that suicide attempts would then have to be considered normal when desired by the participants.[236]

There are many types of disorders of self-mutilation in which a significant level of cognitive dissonance exists between bodily perception and reality. Theories regarding the appropriate therapy differ. Whether it is amputating a limb or burning oneself, the

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[232] *Id.*
[233] *Id.*
[234] "Some males with Gender Identity Disorder resort to self-treatment with hormones and may very rarely perform their own castration or penectomy." DSM-IV-TR §302.85, at 578.
[235] Richard Irons, M.D. and Jennifer P. Schneider, M.D., Ph.D., *Differential Diagnosis of Addictive Sexual Disorders Using the DSM-IV*, 3 SEXUAL ADDICTION & COMPULSIVITY 7 (1996).
[236] *See* Linda Nicolosi, *American Psychiatric Association Symposium Debates Whether Pedophilia, Gender-Identity Disorder, Sexual Sadism Should Remain Mental Illnesses* NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY FOR HOMOSEXUALITY, *available at* http://www.narth.com/docs/symposium.html (last visited June 30, 2006) (hereafter "NARTH").

proposed manner of treatment for such disorders varies widely depending on the etiology. GID is a mental disorder. As such, GID is analogous to other self-mutilating disorders. Cognitive dissonance between mind and body is insufficient to find SRS as the only solution.

Self-mutilation is defined as an "act that often alleviates pathological symptoms such as a perplexing feeling of numbness, strangeness, and *unreality in regard to one's body, thoughts, and emotions* as well as to persons and objects in the environment."[237] Among the different types of self-mutilation is genital mutilation.[238] SRS is analogous to genital mutilation.

Psychological pain is a common symptom of self-mutilation disorders, in which individuals report that their actions help relieve psychological pain.[239] Some claim that self-injury is a means of promoting a sense of well-being and control.[240] Self-mutilation disorders are often related to life factors and clinical correlates such as childhood sexual abuse and subsequent Post Traumatic Stress Disorder and life conditions such as the loss of a parent, childhood illness, depression, physical abuse, parental alcoholism, or parental marital violence.[241] There is also a strong correlation between sexual abuse and GID.[242]

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[237] Robert T. Waska, *Self-mutilation, Substance Abuse, and the Psychoanalytic Approach: Four Cases*, 52 AM. J. OF PSYCHOTHERAPY 18 (1998).
[238] Victoria E. White, *College Students and Self-Injury: Intervention Strategies for Counselors,* 5 J. OF COLLEGE COUNSELING 105 (2002).
[239] *Id.*
[240] *Id*.
[241] *Id.*
[242] Bradley, et al., *Gender Identity Disorder: A Review of the Past 10 Years*, 37 J. AM. ACAD. CHILD ADOLESC. PSYCH. at 878; Bernd Meyenburg, *Gender Identity Disorder in Adolescence: Outcomes of Psychotherapy*, 34 ADOLESCENCE 2-6 (1999); Max Sugar, *A Clinical Approach to Childhood Gender Identity Disorder*, 49 AM. J. OF PSYCHOTHERAPY 260 (1995).

Treatment for self-mutilating disorders includes learning to manage self-injurious impulses and psychoanalysis.[243] Specifically, self-destructive acts can be understood as resulting from and symbolizing certain intrapsychic phantasies involving wishes, fears, and compromises, in which psychoanalysis provides the optimum vehicle for the modification of the "internal self and object representations."[244] Psychotherapy is often effective in cognitive dissonance between mind and body, like GID, which in essence is an intrapsychic phantasy that one is a member of the opposite sex.[245]

Eating disorders such as anorexia nervosa and bulimia are characterized by the co-occurrence of pathological thoughts and emotions concerning appearance, eating, and food, leading to alterations in body composition and functioning that are the direct result of these symptoms.[246] Similar to disturbances in body image, GID is a disturbance in gender image that often leads to alterations in body composition and appearance.[247] Proposed treatments for anorexia include acute weight restoration and re-feeding as well as individual, family, and group therapy.[248] Treatments for bulimia consist mainly of cognitive-behavioral approaches, as such treatments have been found effective.[249] While both GID and eating disorders are mental disorders in which there is a discrepancy between one's perceived and actual physical body, acceptable treatments for eating

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[243] Bradley, et al., *Gender Identity Disorder: A Review of the Past 10 Years*, 37 J. AM. ACAD. CHILD ADOLESC. PSYCH. at 878.
[244] Waska, *Self-mutilation, Substance Abuse, and the Psychoanalytic Approach: Four Cases*, 52 AM. J. OF PSYCHOTHERAPY at 18.
[245] *Id.*
[246] Hans Steiner and James Lock, *Anorexia Nervosa and Bulimia Nervosa in Children and Adolescents: a Review of the Past 10 Years,* 37 J. AM. ACAD. OF CHILD AND ADOLESC. PSYCHIATRY 352 (1998).
[247] Taiminen, *Contagion of Deliberate Self-Harm Among Adolescent Inpatients,* 37 J. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY at 211.
[248] Steiner, *Anorexia Nervosa and Bulimia Nervosa in Children and Adolescents: a Review of the Past 10 Years,* 37 J. AM. ACAD. OF CHILD AND ADOLESC. PSYCH. at 353.
[249] *Id.* at 354.

disorders consist of changing mental constructs through cognitive therapy, or changing behavior through therapy.[250] Treatment does not consist of validating the skewed body image, no matter how much the patient may truly perceive that mental image to be reality.[251] In the same way, proper treatment for GID should focus on treating the patient's mind in order to develop a healthy self-concept of body through cognitive therapy, rather than through radical surgical mutilation.

Paraphilias are a type of sexual disorder characterized by recurrent, intense sexual urges or behaviors that are considered unusual or deviant by society.[252] Such urges or behaviors also cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.[253] Likewise, GID is also a type of sexual disorder that can be described as a recurring sexual behavior, or a mind set, that causes clinically significant distress or impairment.[254] GID should be treated as any other paraphilia by cognitive therapy and not mutilation.

Another type of sexual disorder is sadomasochism, which is characterized by a relation of dominance and submission, infliction of pain that is experienced as pleasurable by both partners, deliberate humiliation of the other party, fetishistic elements, and one or more ritualistic activities.[255] In some instances, sadomasochism is paraphiliac when it is the *only* way for an individual to get sexually aroused and satisfied.[256] Treatment for sadomasochism includes traditional psychoanalysis and

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[250] *Id.*
[251] *Id.*
[252] Irons, et al, *Differential Diagnosis of Addictive Sexual Disorders Using the DSM-IV*, 3 SEXUAL ADDICTION & COMPULSIVITY at 10.
[253] *Id.*
[254] *Id.*
[255] N. Kenneth Sandnabba and Pekka Santtila, *Sexual Behavior and Social Adaptation Among Sadomasochistically-Orientated Males,* 36 J. OF SEX RESEARCH 273 (1999).
[256] *Id.*

behavior therapy techniques.[257] Sadomasochism is treated as a "mental disorder," characterized by distress, harm, or functional impairment.[258] Even though in some instances sadomasochism may be the *only* means of sexual arousal in an individual, thereby apt to cause a significant amount of psychological distress if the behavior is not permitted, treatment entails modifying the mind and behavior instead of condoning such activity for the sake of easing the mind and decreasing psychological distress.

Pedophilia is a sexual disorder in which adults justify having sex with children by displacing blame onto the infants.[259] Treatment for pedophilia includes negative conditioning, cognitive-behavioral therapy, medication and hormones to decrease the sex drive.[260] In short, treatment focuses on changing the sexual urges. Pedophilia, in its description as a "perversion," implies that there is a "moral normative standard" from which the perversion deviates. The question therefore remains how one defines the normative conception of perversion. Deeply rooted in American culture and public policy is the norm of male and female, man and woman.

As a matter of public policy, in order for consistency to prevail in our jurisprudence, the determination of sex must be independent from the psychological musings. An individual's sex preference can manifest itself at different times in life:

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[257] *See* N. Breslow, *Sources of Confusion in the Study and Treatment of Sadomasochism*, 4 J. SOC. BEHAVIOR AND PERSONALITY 263-74 (1989); *see also Sexual Sadism*, *available at* http://www.psychnet-uk.com/dsm_iv/sexual_sadism_disorder.htm (last visited June 30, 2006) .

[258] *Id*.

[259] Ben Spiecker and Jan Steutel, *Paedophilia, Sexual Desire and Perversity,* 26 J. OF MORAL EDUCATION 331 (1997).

[260] *See Pedophilia,* Psychology Today, *available at* http://cms.psychologytoday.com/conditions/pedophilia.html (last visited June 30, 2006).

childhood, adolescence, or adulthood.[261] If a person's sex were determined by psychological inclinations, sex would become variable, changing throughout the course of life. The diagnosis of GID is itself a changing diagnosis since some children diagnosed with GID may later in life display few, if any, symptoms.[262] In fact, only a very small number of children with GID continue to have symptoms that meet the criteria for GID in later adolescence or adulthood.[263] Most children with GID display less overt cross-gender behaviors as time passes, as parental intervention increases, or as peer response increases.[264]

Treatment for children diagnosed with GID focuses on secondary problems such as depression, anxiety, and self-esteem.[265] Therapeutic modalities for children with GID are for the most part diametrically different than some forms of treatment for adults, since children typically undergo psychosocial therapy sessions only, and the focus of treatment is designed to instill *positive* identification of the child with the child's *biological* sex.[266] Adult males whose overt signs of GID appear later and more gradually in adulthood tend to be more ambivalent about SRS and are also "less likely to be satisfied after surgery."[267] There are reported cases of spontaneous remission of GID in adults who

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[261] *See* George A. Rekers, *Childhood Sexual Identity Disorders*, 15 MED. ASPECTS OF HUMAN SEXUALITY, 141 (1981); George A. Rekers, ed., HANDBOOK OF CHILD AND ADOLESCENT SEXUAL PROBLEMS 3-13 (New York: N.Y.: Lexington Books of Macmillan/Simon & Schuster, 1995).
[262] *Id. See also* George A Rekers, *Gender Identity Disorder of Childhood*, *in* David G. Benner, ed., BAKER'S ENCYCLOPEDIA OF PSYCHOLOGY 446-48 (Grand Rapids, Michigan: Baker Book House, 1985).
[263] George A. Rekers, *Early Detection and Treatment of Sexual Problems: An Introductory Overview*, *in* Rekers, ed., HANDBOOK OF CHILD AND ADOLESCENT SEXUAL PROBLEMS 3-13; George A. Rekers, *Assessment and Treatment Methods for Gender Identity Disorder and Transvestism*, *in* Rekers, ed., HANDBOOK OF CHILD AND ADOLESCENT SEXUAL PROBLEMS 272-89.
[264] Kenneth Zucker and Susan Bradley, GENDER IDENTITY DISORDER AND PSYCHOSEXUAL PROBLEMS IN CHILDREN AND ADOLESCENTS 281-82 (N.Y.: Guilford Press, 1995) (stating that in a sizeable number of cases GID in children resolves).
[265] *See* NARTH, *available at* http://www.narth.com/docs/symposium.html (last visited June 30, 2006).
[266] *Id.*
[267] DSM-IV-TR §302.85, at 580.

develop symptoms later in life.[268] The inconsistency of the diagnosis of GID with the passage of time and other variables, the mistaken confusion of sexual preference with gender confusion, and the possibility of remission of GID underscore the dangerous use of a psychological definition of sex as the basis for a legal definition of sex.

For transsexuals, SRS cannot serve as a bright line to determine sex. SRS is not always the proposed treatment for GID.[269] The *Harry Benjamin International Association Standards of Care for Gender Identity Disorders* noted that some individuals diagnosed with GID neither desired nor were candidates for SRS.[270] A person claiming the same cognitive dissonance between perceived and actual sex could argue that sex should be determined solely by subjective mental thoughts. Such a person may contend that SRS is not desired, is too expensive, or is contraindicated due to some secondary medical condition.[271] Thus, SRS cannot be deemed the threshold over which one must cross to legally change sex. Subjective mental thoughts about sex are too amorphous to use as a baseline to establish sex. The only line to draw must be with the biological and not the psychological pen.

The modern approach to treatment of GID highlights the importance of cognitive styles and nonsurgical psychological treatments, despite the earlier emphasis on SRS, as propagated in 1966 by Harry Benjamin.[272] The use of cognitive-behavioral therapy in

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[268] *See Gender Identity Disorder*, available at http://cms.psychologytoday.com/conditions/genderid.html (last visited June 30, 2006).
[269] HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, 6th Version (2001).
[270] *Id.*
[271] For example, surgery may be impossible due to severe coronary disease or some other medical condition.
[272] Kenny Midence and Isabel Hargreaves, *Psychosocial Adjustment in Male-to-Female Transsexuals: An Overview of the Research Evidence,* 131 J. OF PSYCHOLOGY 602 (1997).

treating GID is important due to the psychological etiology of GID. A 1976 study found that gender dysphoria was caused by an excessive identification of patients with their mothers, and the inability of these mothers to permit their sons to separate from their mother's bodies – resulting in an etiology of mother-infant symbiosis and absent fathers.[273] In the same vein, a study in 1992 proposed that persons with GID seemed to have similar mental dimensions to those who suffered from chronic depressive disorders.[274] Despite 30 years of research on gender dysphoria, there is a marked lack of research on the "broader issues of cognitive style and functioning, thought processes and cognitive maturation as they may be related to the organization and evolution of gender structures."[275]

There are also various ethical concerns that arise in the use of SRS to treat GID. Part of the ethical code of the helping professions is that treatment must have beneficiance and the patient has the right to treatment with the least drastic alternative.[276] Beneficiance or responsible care means that psychologists engage in actions that are "likely to benefit others, or at least do no harm.[277] A study in 1978 showed that those who regretted having SRS shared the following characteristics in common: inadequate family support, inadequate self-support, inappropriate physical build, and heterosexual experience following SRS.[278] A study of transsexual satisfaction in 1965 showed that more than 33% attempted suicide post-surgery, and more than 25% appeared to have a

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[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] Susan Jacob-Timm, *Ethical and Legal Issues Associated with the Use of Aversives in the Public Schools: the SIBIS Controversy,* 25 THE SCH. PSYCHOLOGY REVIEW 190 (1996).
[277] *Id.*
[278] *Id.*

schizoid or personality disorder.[279] A study of male-to-female transsexuals in 1981 showed that 24% of SRS outcomes were unsatisfactory.[280]

Psychiatric diagnoses change over time, as evidenced by the ever-changing Diagnostic and Statistical Manual.[281] For example, multiple personality disorder was recognized in the DSM III-R under its traditional name, but in the manual, DSM-IV and DSM-IV-TR, it appears as disassociative identity disorder.[282] Since psychiatric diagnoses are subject to change, and since the disorder is subject to change during a person's life, it is precarious to rest a legal definition of sex on a constantly moving premise.

Some contend that gender identity is defined by how a person *feels at any given moment*.[283] The fallacy in relying on the subjective is that sex becomes merely a *feeling*. Human feeling, by definition capricious, cannot be a standard upon which our judicial system relies – sex cannot be determined by a balancing of masculine and feminine feelings. Rather, sex must be determined by objective and immutable standards.

The problem of defining sex psychologically is best illustrated by considering another mental disorder, known as Apotemnophilia or Body Integrity Identity Disorder ("BIID").[284] Apotemnophiles feel that they are a disabled person trapped in a nondisabled body (not unlike believing one is a man trapped in a woman's body).[285] Clinicians

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[279] *Id.* at 191.
[280] *Id.*
[281] Ivan Leudar and Wes Sharrock, *Multiplying the Multiplicity: Are Dissociative Identity Disorders 'Real'?,* 90 BRITISH J. OF PSYCHOLOGY 451 (1999).
[282] *Id.*
[283] Kate Bornstein, MY GENDER WORKBOOK: HOW TO BECOME A REAL MAN, A REAL WOMAN, THE REAL YOU, OR SOMETHING ELSE ENTIRELY 8 (Routledge,1998).
[284] A group of clinicians at Columbia University have set up a web site providing information and have sought to rename the disorder as "Body Integrity Identity Disorder" or BIID. *See* http://www.biid.org *(*last visited June 30, 2006).
[285] Richard L. Bruno, *Devotees, Pretenders and Wannabes: Two Cases of Factitious Disability Disorder*, 15 J. SEXUALITY & DISABILITY 243, 251 (1997). *See also* Audie Kao, *The Difficult Appendage, available at*

generally recognize this disorder as a paraphilia, or a displaced sexual desire such as transvestism, voyeurism, pedophilia and bestiality.[286]

Apotemnophilia is a condition where one has an overwhelming desire to amputate his or her own body parts for sexual purposes or be with an amputee sexually.[287] Dr. Greg Furth "is a longtime crusader for increased BIID research. He has also been trying for many years to persuade doctors to cut off his right leg." *Id.* Although a seemingly obscure phenomenon, an entire subculture has developed that advocates and caters to voluntary amputations. All one must do is perform a simple internet search with the term "wannabe" (or "amputee wannabe") for those who wish to have an amputation and "devotee" (or "amputee devotee") for those who wish to have sexual relations with an amputee.[288] Apotemnophilia "is a psychological condition in which the individual requests an elective amputation. Individuals with this condition experience the persistent

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http://www.ama-assn.org/ama/pub/category/3063.html (last visited June 30, 2006); T. Wise and R. Kalyanam, *Amputee Fetishism and Genital Mutilation: Case Report and Literature Review*, 26 J. SEX & MARITAL THERAPY 339 (2000).

[286] Carl Elliott, *Costing an Arm and a Leg: The Victims of a Growing Mental Disorder are Obsessed with Amputation*, (July 10, 2003) *available at* http://slate.msn.com/id/2085402/ (last visited June 30, 2006) ("Baz remembers first seeing an amputee when he was a 4-year old boy in Liverpool. By the time he was 7 he had begun to think, 'This is the way I should be.' It was not until Baz was in his 50s, however, that he actually had his leg amputated. Baz froze his leg in dry ice until it was irreversibly damaged, then persuaded a surgeon to complete the job. When he awoke from the anesthetic and his left leg was gone, he says, 'All my torment had disappeared.'"). The term ending with "philia" identifies this condition as a sexual disorder. The first cataloging of sexual disorders in 1866 referred to self-mutilation. *See* Richard von Kraft-Ebing, PSYCHOPATHIA SEXUALIS (Pioneer Publications, New York,1953); *see also* J. Money, R. Jobaris and G. Furth, *Apotemnophilia: Two Cases of Self-demand Amputation as a Paraphilia*, 13 J. SEX RESEARCH 115 (19777); Carl Elliott, *A New Way to Be Mad*, 283:6 THE ATLANTIC MONTHLY 72-84 (Dec. 2000); Carl Elliott, *Healthy Limb Amputation: Ethical and Legal Aspects*, 2 CLINICAL MED. J. 431 (2002).

[287] *See* Walter Everaerd, *A Case of Apotemnophilia: A Handicap as a Sexual Preference*, 37 AM. J. PSYCHOTHERAPY 285 (Apr. 1983). The disorder was first called Apotemnophilia in 1977, and for a short time was referred to as Amputee Identity Disorder. *See* Greg M. Furth and Robert Smith, AMPUTEE IDENTITY DISORDER: INFORMATION, QUESTIONS, ANSWERS AND RECOMMENDATIONS ABOUT SELF DEMAND AMPUTATION (2000). Dr. Smith performed amputations on apotemnophiles in Scotland until the British Medical Council made him stop. *See* Shanna Liebman, *Off With My Arm*, The New York Observer, *available at* http://web.lexis-nexis.com/universe/document?_m=1fff42b9520103297a6e248f198c2398&_docnum=3&wchp=dGLbVtb-zSkVb&_md5=0b90f316b0aca8102bc856b0503f420b (last visited July 18, 2006).

desire to have their body physically match the idealized image they have of themselves. This desire forces individuals to deal with the paradox of losing one or more major limbs (i.e. arm[s] or leg[s]) to become whole. In their minds, 'Less is more'."[289] According to researchers at Columbia University,

There are several conditions which may cause patients to seek amputation. These include:

1. Transsexuals who usually mutilate only the genitals in order to assume the physical appearance of the opposite sex.

2. Schizophrenics who may self-mutilate in response to voices ordering them to do so or in response to a delusional belief that the body part is defective or bad.

3. Patients with a personality disorder, who appear to mutilate to relieve tension or gain secondary advancement.

4. Confused patients who may injure themselves due to disinhibition, poor judgment or perceptual difficulties.

5. Depressed patients who may mutilate themselves in a failed suicide attempt, or as atonement for perceived sins.

6. Patients with Body Dysmorphic Disorder who seek body modification in response to some perceived physical imperfection.

7. Patients with Factitious Disorder are so eager to enter the sick person's role that they will intentionally produce psychological or physical symptoms.

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[288] Some have classified "wannabes" as apotemnophilia, and "devotees" as acrotomophilia. *See* BIID Basics, available at http://www.biid.org/BIID%20Basics.htm#Is%20there%20a%20sexual%20component (last visited June 30, 2006).
[289] *Id.*

8. BIID patients appear to seek amputation in order to achieve their perceived body image.[290]

The number of people who identify themselves as wannabes has grown significantly in the past few years. One website boasts over 3,600 members.[291] The search returns several hundred results, and not surprisingly, most of these people are affiliated with the transsexual movement. Some even call their desire to remove a perfectly healthy limb transsexual in nature. For example, proponents of amputation as a "cure" insist, much like transsexuals, that the only way to help these mentally ill people is to mutilate their bodies to fit their minds. To date, most of the American medical community still recognizes the amputation of a perfectly healthy limb as unethical and surgeons in the United States will not amputate the limbs of apotemnophiliacs.[292] If the state validates the actions of the mentally ill by legally recognizing their "new" sex, the outcome of such actions has the potential to lead to even more extreme mutilations, such as the amputation of healthy limbs. A psychiatrist that specializes in apotemnophilia cannot guarantee that after surgery to remove a healthy limb the urge will not come back to remove more healthy limbs.[293] Medical ethicist Arthur Caplan of the University of Pennsylvania says, "It's absolute utter lunacy to go along with a request to maim somebody" either sexually

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[290] *Id.*

[291] Carl Elliott, *Costing an Arm and a Leg: The Victims of a Growing Mental Disorder are Obsessed with Amputation*, (August 11, 2004) *available at* http://slate.msn.com/id/2085402/ (last visited June 30, 2006).

[292] *People v. Brown*, 91 Cal.App.4th 256, 259 (2001) (finding the defendant guilty of murder for amputating a perfectly healthy limb of an apotemnophile in Mexico who later died of gangrene).

[293] Gerard Seenan, *Healthy Limbs Cut Off at Patients Request,* (February 1, 2000) *available at* http://www.guardian.co.uk/uk_news/story/0,3604,237010,00.html (last visited June 30, 2006). (If this is eventually allowed, where do we draw the line? Only one limb per customer? Or one arm and one leg only? Or could modern medicine potentially allow one to define his or her own existence by removing all their limbs and becoming a stump if they realized their "true" existence was a stump trapped in a healthy person's body? What if a self-inflicted amputee develops a tattoo or piercing syndrome (where you can never have just one) and finds a surgeon to have the second or third limb removed?).

or physically.[294] He states that when a person is running around convinced they want their leg (or anything else) chopped off, they are hardly competent to make life-altering decisions.[295]

The emergence of apotemnophilia creates one of the strongest arguments against allowing SRS. Indeed, the fact that most practitioners and wannabes argue apotemnophilia is no different than GID and amputation is like SRS [296] "undermines the uniqueness of sex-change surgery and challenges the social value attributed to it".[297] One sufferer of apotemnophilia explains that the desire to remove the limb becomes uncontrollable and the realization of the limb's removal "has become indispensable for my happiness and peace of mind".[298] This is the same basic reason given by transsexuals who desire to "change" their sex by mutilating their bodies.[299] One man who suffered from an amputee fetish severed his penis with a tourniquet, catheter and razor blade following instructions obtained from the internet. He later questioned why he had wanted to do this to himself in the first place.[300] He became even more depressed after the amputation than he was to begin with and cried when he spoke of what he had done.[301]

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[294] Randy Dotinga, *Out on a Limb*, Salon.com (Aug. 29, 2000) *available at* http://dir.salon.com/health/feature/2000/08/29/amputation/index.html (last visited June 30, 2006).
[295] *Id*.
[296] Everaerd, *A Case of Apotemnophilia: A Handicap as a Sexual Preference*, 37 AM. J. PSYCHOTHERAPY at 286 (quoting a patient, "Just as a transsexual is not happy with his own body but longs to have the body of another sex, in the same way I am not happy with my present body, but long for a peg leg").
[297] John Leo, *The Sex-Change Boom*, 130 No. 10 U.S. NEWS & WORLD REPORT, at 20 (March 12, 2001).
[298] Everaerd, *A Case of Apotemnophilia: A Handicap as a Sexual Preference*, 37 AM. J. PSYCHOTHERAPY at 288-89.
[299] "It is not obvious how this patient's feeling that he is a woman trapped in a man's body differs from a feeling of a patient with anorexia nervosa that she is obese despite her emaciated, cachectic state. We don't do liposuction on anorexics. Why amputate these poor men's genitals? Surely the fault is in the mind, not the member." McHugh, *Psychiatric Misadventures* at 193-94.
[300] Thomas M. Wise and Ram Chandran Kalyanam, *Amputee Fetishism and Genital Mutilation: Case Report and Literature Review*, 26 J. SEX & MARITAL THERAPY 339, 341 (2000).
[301] *Id.*

The man who severed his penis was lucky compared to the man who made the only reported case to date in this country dealing with apotemnophilia.[302] The latter did not live to shed tears about his decision. Gregg Furth and Philip Bondy, sufferers of apotemnophilia, each made an appointment to have a leg amputated with an underground surgeon in San Diego known unaffectionately among the transsexual crowd as "Butcher Brown". Dr. John Ronald Brown agreed to the operations as long as they were performed in Mexico. Although Mr. Furth eventually backed out of the operation after seeing an assistant with a large knife, Philip Bondy, a 79-year-old man, decided to go through with the leg amputation. Bondy returned to California minus one leg and checked into a motel where he died shortly thereafter of gas gangrene. At the trial, Dr. Brown was found guilty of unlawful practice of medicine and convicted of second degree murder.[303] The appellate court affirmed the decision.[304]

Regrettable trends in the psychiatric field such as transsexualism and apotemnophilia are not uncommon. The reality of performing these mutilating surgeries "did not derive from critical reasoning or thoughtful assessments" on this mental illness.[305] When it follows cultural fashion, the practice of psychiatry can result in "false, even disastrous, consequences."[306] There have been huge glitches in psychiatric history that provide evidence as to why psychiatry should not follow cultural trends. With respect to transsexualism and apotemnophilia, history is repeating the blunder culturally

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[302] *See People v. Brown*, 91 Cal.App.4th 256 (2001).
[303] *Id* at 259.
[304] *Id*. at 268.
[305] *See* McHugh, *Psychiatric Misadventures* at 194. "The zeal for this sex-change surgery – perhaps, with the exception of frontal lobotomy, the most radical therapy ever encouraged by twentieth century psychiatrists – did not derive from critical reasoning or thoughtful assessments." *Id.*
[306] *Id.* at 188. When a new hysteria arises in popular culture such as the need to release schizophrenics from the oppression of hospitals and free them from psychiatry altogether so they could live their "alternative"

motivated psychiatric fads had on schizophrenics.[307] When the "anti-psychiatrists" convinced the government and society that the schizophrenics were simply misunderstood beings living an alternative lifestyle that needed to escape the oppressive bounds of mental hospitals, they did so under a guise of freedom. They had to convince others it was the social custom that was oppressive. In other words, the schizophrenics were fine. The culture merely needed to accept their alternate lifestyles. Some argued that schizophrenics were created by outdated and nonprogressive cultural norms.[308] Contrary to what those advocating "freedom" predicted, the mentally ill did not function in society; they suffered greatly as a result of this innovative idea.[309] It became evident that schizophrenics really were sick and incapable of functioning in society after most of them ended up homeless. Similarly, there are contemporary efforts to declassify transsexualism as a mental disorder and to transform society into acceptance rather than treating the disorder.[310]

According to one medical ethicist, if the apotemnophiliac movement were to become accepted, as its sister disorder transsexualism is becoming, the law would in fact view voluntary amputation the same as some advocates want the law to view SRS.[311] Professor Mason opined that "as long as you say that people can have a sex change for

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lifestyles in the 60's or the therapy-induced "remembrance" of sexual abuse that allegedly caused so many cases of Multiple Personality Disorder in the 90's, disaster has inevitably followed. *See id*. at 187-202.

[307] *See id*. at 187-202. "This interrelationship of cultural antinomianism and a psychiatric misplaced emphasis is seen at its grimmest in the practice known as sex reassignment surgery." *Id.* at 192.

[308] *Id*. at 187-91.

[309] *Id*. at 498-99.

[310] Lynne Carroll, *Counseling Transgendered, Transsexual and Gender Variant Clients*, 80 J. COUNS. & DEV. 134 (2002) ("We believe clinicians need to rethink their assumptions about gender, sexuality, and sexual orientation and to adopt a "trans-positive" or "trans-affirmative" disposition to counseling. A trans-affirmative approach necessitates that counselors affirm transgendered persons; advocate for political, social, economic rights for the transgendered; and educate others about such issues").

what is a severe psychological disease then it is difficult to say you cannot have an amputation for this form of severe psychological disease."[312] Conferring legal status upon transsexuals opens a Pandora's box which will undermine not only equal protection, but objective law itself.

CONCLUSION

From founding of the country to the present, the public policy, as reflected in the common and statutory law, recognizes marriage exclusively between one man and one woman. For purposes of marriage, sex has always been assumed to be binary – male and female. Sex, like race, is an immutable characteristic. However, some transsexual advocates argue that sex should not be considered static. They argue that sex should not be determined by objective factors such as biology or physiology but by subjective mental desires. This line of reasoning is fraught with problems.

If sex is primarily a state of mind which is subject to change over time, then equal protection for sex-based classifications becomes meaningless. To have any meaning at all, sex must continue to be immutable under the law. Sex must be determined by objective factors based on biology and physiology. While plastic surgery may alter a person's physical appearance, it does not change a person's birth sex. SRS is controversial and cannot be the bright line determinate of a person's sex. If sex were determined primarily by subjective mental musings, then an argument could be made that SRS is not necessary. What should the law do with a transsexual who, after undergoing SRS, decides to revert back to the original birth sex? Moreover, what should the law do with a person suffering from GID when the desire to be the opposite sex remits or

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[311] *See* Seenan, *Healthy Limbs Cut Off at Patient's Request,* (February 1, 2000) *available at*

disappears? If the law recognized that sex is subjective, a person could be born one sex, later acknowledged by the law to become another, and then again later determined by law to revert to the original sex. Such a result is absolutely absurd. Sex can, and must, be determined by objective biological and physiological factors. The law cannot base a person's sex upon subjective mental thoughts.

APPENDIX A

Intersex Conditions

Disorder	Chromosomes	Features	Sex	Testing
Androgen Insensitivity Syndrome	XY	Lacks the androgen receptor gene, so develops as a female may or may not have testes	Female	PCR test will discover a lack of SRY gene or a mutation of it

http://www.guardian.co.uk/uk_news/story/0,3604,237010,00.html (last visited June 30, 2006).
[312] *Id*.

Partial Androgen Insensitivity Syndrome	XY	Androgen receptor there, but doesn't function properly ambiguous genitalia	Probably female but depends	PCR test
Congenital Adrenal Hyperplasia *Progestin Induced Virilization has similar effects, but was caused by the drug progestin, administered in the 50s and 60s to prevent miscarriage - no longer used	XX	Blockage in adrenal pathway causing overproduction of androgen masculinization of a female child in utero ambiguous genitalia	Sometimes genitalia appear more male, sometimes not-depends	PCR test on X chromosome

Gonadal dysgenesis	XY	Have mutations or deletions of the SRY gene, born as normal females but do not have secondary sex characteristics, do not menstruate	Female	PCR test
Mosaicism	XY/XX	Some cells contain XY chromosomes and some cells contain XX chromosomes, results in ambiguous genitalia	?	Peripheral blood karyotyping, testicular biopsy with karyotyping.

Sex Chromosome Aneuploidies

Disorder	Chromosomes	Features	Sex	Testing
Klinefelter's Syndrome	XXY	Overwhelmingly male, though most of the time sterile and there may be some female breast development. Many men with KS are never diagnosed .	Male	Blood karyotyping to detect the extra X chromosome
Turner's Syndrome	XO	Female, sometimes have a webbed neck, generally will not develop breasts or grow to normal height unless given hormone therapy, infertility but can carry a child	Female	Blood karyotyping to detect lack of second X chromosome
Triple X	XXX	Sometimes lower intelligence	Female	Blood karyotyping

	XYY	Above average height, sometimes lower intelligence	Male	Blood karyotyping

Other

Neither intersex nor aneuploidies, but some have erroneously categorized as intersex.

Disorder	Chromosome	Features	Sex	Testing
Late Onset Congenital Adrenal Hyperplasia	Can happen either to XY or XX	Normal XY males at birth - main symptom is scalp hair thinning Normal XX female at birth - symptoms can be infertility, acne, sometimes mild clitoromegaly (enlarging of clitoris), but many affected are asymptomatic	XY- male XX-female	PCR test on X chromosome

Vaginal Agenesis	XX	Normal ovaries, uterus, but third portion of vagina failed to develop and was replaced by fibrous tissue. Is corrected by surgery.	Female	Physical exam
Hypospadias	XY	Urethra located at base of penis, some have chordee (bending of penis with erection)	Male	Physical exam

APPENDIX B

CHROMOSOME TESTING
Buccal Smear (Barr Body Test)
Gene Testing