

# DEFINING MALE AND FEMALE: INTERSEXUALITY AND THE COLLISION BETWEEN LAW AND BIOLOGY

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I. INTRODUCTION

“He was a boy, became a girl, and then a boy again.”<sup>1</sup> This provocative headline sounds like it should have appeared in a supermarket tabloid. This headline actually appeared in the *Los Angeles Times* and cited a critical study that had just been reported in the *Archives of Pediatric & Adolescent Medicine*.<sup>2</sup>

For many decades, the medical and psychological communities have attempted to resolve the issue of how one’s sex (whether an individual is a male or female) should be determined for medical purposes.<sup>3</sup> Until recently, however, legal authorities generally have been blind to the need to define the terms “male” and

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1. Shari Roan, *The Basis of Sexual Identity: He Was a Boy, Became a Girl, and Then a Boy Again. His Case Helps Show the Brain’s Role in Gender*, L.A. TIMES, Mar. 14, 1997, at E1. Many national and international newspapers ran an article discussing the report. See, e.g., GLOBE AND MAIL, Mar. 14, 1997, at A1; SUN SENTINEL, Mar. 14, 1997, at 6A; NEWSDAY, Mar. 15, 1997, at A11.

2. The report concerns a child who had an injury inflicted to his penis as an infant. Medical experts recommended that he be surgically “corrected” to become a girl. He was given female hormones and was raised as a girl. The study reports that his sexual identity was male and that he chose to have reconstructive surgery to again become a male. See Milton Diamond & H. Keith Sigmundson, *Sex Reassignment at Birth: Long-Term Review and Clinical Implications*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED., 298 (1997). For a more detailed discussion of this case see *infra* notes 167–72 and accompanying text.

3. See, e.g., ALICE D. DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* (1998); Daniel Cappon et al., *Psychosexual Identification (Psychogender) in the Intersexed*, CAN. PSYCH. ASSOC. J. (1959). How the medical community determines whether one is a male or a female is currently in a state of change. See *infra* notes 25–32, 167–77 and accompanying text.

"female" for legal purposes. The law typically has operated under the assumption that the terms "male" and "female" are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.<sup>4</sup>

Although the law generally presumes these terms are unambiguous, courts and administrative agencies have been forced to determine an individual's legal sex under some limited circumstances. These cases typically have involved transsexuals—individuals whose biological sex does not conform with their self-identified sex.<sup>5</sup>

The law has largely ignored other medical conditions in which an individual's sex may be ambiguous. Recent medical literature indicates that approximately one to four percent of the world's population may be intersexed<sup>6</sup> and have either ambiguous or noncongruent sex features.<sup>7</sup> Thus, the manner in which the law defines "male," "female," and "sex" will have a profound impact on at least 2.7 million persons in the United States.<sup>8</sup> If, as some experts believe, the number of

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4. See *infra* Parts III, IV.

5. Suits involving transsexuals have been brought to determine a transsexual's sex for purposes of establishing: the validity of a marriage (see *infra* Part IV.A), the ability to change the sex designation on official documents (see *infra* Part IV.B), the ability to sue for employment discrimination under either Title VII or other employment discrimination statutes (see *infra* at Part IV.C), the ability to sue for equal protection violations (see *infra* note 436 and accompanying text), the ability to participate in athletic events as a female (see *infra* notes 33–37 and accompanying text), military obligations and rights (see *infra* note 20 and accompanying text), and liability under criminal sexual offense statutes (see *infra* note 20 and accompanying text).

6. See *infra* Part III for a more detailed discussion of intersexed conditions. The term "transgendered," which is gaining in popularity, is not synonymous with "intersexed." Transgendered is a broader term currently used to describe individuals who do not fit into clear sex and gender categories. It is a term that is generally applied to transsexuals, cross-dressers, intersexed people, and anyone else whose sexual identity seems to cross the line of what is considered "normal." Carey Goldberg, *Shunning "He" and "She," They Fight for Respect*, N.Y. TIMES, Sept. 8, 1996, § 1, at 24.

7. John Money, a professor at Johns Hopkins University and noted expert in the area of intersexuality, estimates that the number of intersexed persons may be as high as four percent. See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCIENCES, Mar.–Apr. 1993, at 20, 21. Anne Fausto-Sterling studied the medical literature between 1955 and 1977 and concluded that the frequency of intersexuality may be as high as two percent of live births. At a minimum, intersexuals constitute at least one-tenth of one percent to one percent of the population. Even if the figure is as low as one-tenth of one percent, that makes intersexuality as common as the well-known conditions of cystic fibrosis and Down's Syndrome. See DREGER, *supra* note 3, at 43. The Intersex Society of North America estimates that about five intersex surgeries are performed each day in the United States. See SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 135 n.4 (1998).

8. The U.S. Department of Commerce listed the U.S. population in 1997 as 266,487,000. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 9 tbl.4 (118th ed. 1998). In addition to affecting the millions of intersexed people, how the law defines these terms will also affect the millions of people who have married or who would like to marry someone who is intersexed.

intersexed people is four percent, approximately ten million people in the United States will be affected.<sup>9</sup>

Whether an individual is classified as a male or female has increased significance now that Congress has passed the Defense of Marriage Act ("DOMA")<sup>10</sup> and state legislatures have passed or are considering passing equivalent state legislation.<sup>11</sup> DOMA and its state equivalents are intended to prohibit marriages between individuals of the "same sex."<sup>12</sup> These legislative enactments, however, fail to define the terms "male" and "female" so that determining who is now legally permitted to marry is unclear.<sup>13</sup>

The problems these ambiguous statutes can create are apparent from three recent marriages in England, Ohio, and Oregon.<sup>14</sup> In each of these jurisdictions, a woman married a male-to-female transsexual. The transsexual "husbands" identify themselves as women and lesbians. Despite the laws in these jurisdictions that prohibit same-sex marriages, these marriages are considered legal in England, Ohio, and Oregon because in these jurisdictions, male-to-female transsexuals are still legally men.<sup>15</sup>

9. The exact frequency of intersexuality is extremely difficult to determine because some intersexed conditions are not apparent at birth and most intersexed individuals are reluctant to publicly acknowledge their condition. This reluctance is based in large part upon society's failure to accept intersexuals. This attitude is best illustrated by a quote from a leading medical text on the medical and surgical approaches to intersexuality, which was written in 1969: "That a newborn should have a deformity...[affecting] so fundamental an issue as the very sex of the child...is a tragic event which immediately conjures up visions of a hopeless psychological misfit doomed to live always as a sexual freak in loneliness and frustration." Fausto-Sterling, *supra* note 7, at 23 (quoting CHRISTOPHER J. DEWHURST & RONALD R. GORDON, *THE INTERSEXUAL DISORDERS* (1969)). This quote still reflects the current attitude of society and many experts toward intersexual conditions. See, e.g., Sally Lehrman, *Woman*, STANFORD, May-June 1997, at 49.

10. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

11. See *infra* Part IV.A.

12. See H.R. Rep. No. 104-664. The Defense of Marriage Act has two primary purposes: to defend the institution of traditional heterosexual marriage and to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions. *Id.*

13. See *infra* Part IV.A.

14. See Jilly Beattie & Sara Lain, *The Wedding with Two Brides...and One Is a Man!; Lesbian Lovers Both Wear a Dress for Britain's Weirdest-Ever Marriage; "I Was a Chick-with-a-Dick—Then I Had My Op and Woke up as a Girl;" Lesbians To Legally Marry Because One is an Ex-Man*, THE PEOPLE, June 11, 1995, at 2; *Oregon Couple Adds Twist to Love Story: The Bride and Groom Plan to Wed Legally, But Then the Man Intends To Have His Gender Altered*, MORNING NEWS TRIB. (Tacoma, Wash.), Dec. 14, 1996, at A3; Afi-Odelia E. Scruggs, *Tying Legalities into Tangled Knot*, PLAIN DEALER (Cleveland), Oct. 7, 1996, at 1B. A male-to-female transsexual who identified as a lesbian and was in the process of undergoing surgical modification was allowed to marry another woman in Utah, a state that also bans same-sex marriage. See Michael Vigh, *Transsexual Weds Woman in Legally Recognized Union*, SALT LAKE TRIB., Feb. 5, 1999, at 1C.

15. For a discussion of the laws in England, Ohio, and Oregon, see *infra* notes 260-72, 293-98, 390-93 and accompanying text.

These statutes create ambiguities for other intersexuals as well. For example, some individuals with an XY chromosomal pattern (male genotype) and testes (male gonads) have a female phenotype (external appearance) and female genitalia.<sup>16</sup> In all senses, these XY women look, feel, and are viewed by society as female. Many of these women are unaware that they carry a Y chromosome and are unaware of their undescended testes. The issue that must be resolved is whether the law will view them as female, based upon their sexual identity and external appearance, or will instead rely on seemingly objective criteria, such as a chromosomal or gonadal analysis, to define them as male. If the law defines sex based on a chromosomal or gonadal analysis, these women would be prohibited from marrying males. Ironically, these same women would be permitted to marry females—a result directly contrary to the legislative intent to prohibit gay and lesbian marriages.

Regardless of the legal, moral, and societal implications of prohibiting same-sex marriages, DOMA highlights the difficulty of using objective laboratory tests to effectuate its prohibitions. A variety of factors could contribute to the determination of whether an individual should be considered male or female for legal purposes. These factors include: chromosomal sex, gonadal sex, external morphologic sex, internal morphologic sex, hormonal patterns, phenotype, assigned sex, and sexual identity.<sup>17</sup> In most individuals, these factors are all congruent.<sup>18</sup> For millions of individuals, however, these factors are incongruent or ambiguous.<sup>19</sup> For these individuals, DOMA and its state equivalents must establish which factor(s) will control.

The manner in which legal institutions define the terms “sex,” “male,” and “female” will also have a significant impact on a variety of areas other than marriage. How the terms “sex,” “male,” and “female” are defined will also affect the ability to control one’s sex designation on official documents such as birth certificates, driver’s licenses, and passports, as well as the ability to claim sex discrimination under employment discrimination statutes.<sup>20</sup>

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16. For a more detailed discussion of this condition, Androgen Insensitivity Syndrome (“AIS”), see *infra* notes 126–42 and accompanying text.

17. See *infra* Part III for a further discussion of these factors.

18. See *infra* Part III.A.

19. See *infra* Part III.B.

20. This Article focuses on the three major areas in which the issue of how the terms “male,” “female,” and “sex” should be defined has been litigated: marriage, official documents, and employment discrimination law. In these areas, the definitions of these terms are crucial. How these terms are defined may affect other legal rights and obligations as well, including the ability to state a gender-based claim for violation of one’s constitutional right to Equal Protection (see *infra* note 436); the ability to participate in athletic competitions as a female (see *infra* notes 33–37 and accompanying text); the obligation to serve in the military; and liability under some criminal statutes. Whether a transsexual is legally defined as a male or female for military purposes may be irrelevant because the military generally discharges transsexuals as physically unfit and psychologically unsuitable for military service. Such a discharge has been upheld by the Ninth Circuit. See *Leyland v. Orr*, 828 F.2d 584 (9th Cir. 1987). No reported U.S. cases have focused on how the terms “male” and “female” should be defined for criminal law purposes. Although most gender based criminal statutes in the United States have been repealed or are no longer enforced, some criminal laws still differentiate

This Article explores how the law has defined and should define the terms “male,” “female,” and “sex.” Part II explains how these terms have been used in varying disciplines and by Western society and other cultures and provides insight into the various legal approaches that could be adopted. Part III provides a detailed explanation of the medical conditions involving ambiguous sexual features that affect millions of people and demonstrates why these terms must be carefully defined. Part IV discusses the statutes and cases that have attempted to define these terms. It expands the transgender jurisprudence discourse by analyzing the issue through the lens of therapeutic jurisprudence. It proposes that the law reject the currently accepted biologically based model for determining sex and instead adopt a more flexible approach that emphasizes gender self-identification. Such a model will benefit the people most affected by these laws and is consistent with principles of justice and other legal values.

## II. A BINARY SEX AND GENDER PARADIGM

A variety of federal and state statutes and regulations differentiate between individuals based upon their sex and gender, or their status as males and females or men and women.<sup>21</sup> Given the prevalence of such regulations, one might assume that these terms have clear legal meanings. In reality, the law defines these terms inconsistently or frequently fails to define them at all.<sup>22</sup> The definition of these terms is critical, however, to the proper enforcement of legislation that seeks to regulate behavior based upon one’s status as a male or female. Legal scholars and scholars in

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between men and women. For instance, in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 464 (1981), the U.S. Supreme Court held that a “statutory rape” law that defined unlawful sexual intercourse as “an act of sexual intercourse accomplished with a female...under the age of 18 years,” was constitutionally valid even though it treated males and females differently. Although no reported cases in the United States have focused on how to determine whether a victim or a perpetrator of a crime is a male or a female, this issue has been litigated in other countries with diverse results. *See, e.g., R v. Harris and McGuiness*, [1989] 17 N.S.W.L.R. 158 (determining that under the laws in Australia, a post-operative male-to-female transsexual was a female while a pre-operative male-to-female transsexual was a male under a statute prohibiting acts of indecency by a “male person”); *R v. Cogley*, [1989] V.L.R. 823 (ruling that under Australian law one’s sex was an issue of fact to be determined by a fact finder rather than an issue of law); *R v. Tan*, [1983] Q.B. 1053 (holding that in England a post-operative male-to-female transsexual was a male under a statute prohibiting males from living off the prostitution earnings of females). How “sex,” “male,” and “female” are defined may affect other areas of life as well, including the right to be admitted into one-sex institutions, the right to social security benefits, the right to certain insurance benefits, the right to protection under some disability statutes, and the right to be incarcerated with inmates of one’s self-identified sex if convicted of a crime.

21. For a detailed discussion of these provisions, see *supra* note 20 and *infra* Part IV.

22. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1, 20 (1995).

other disciplines, such as medicine, sociology, psychology, and gender studies, are investigating and redefining the meanings of these terms.<sup>23</sup>

### A. Sex

Sex is commonly used to denote one's status as a man or woman based upon biological factors.<sup>24</sup> Although sex is a reflection of one's biology, as opposed to gender, which is generally considered to be socially constructed, the biological aspect of one's body that determines one's sex has not been legally or medically resolved.<sup>25</sup>

An individual's sex is established for legal purposes on a person's birth certificate. The sex designation on the birth certificate is determined by the birth attendant.<sup>26</sup> If external genitalia appear unambiguous, the external genitalia typically determine the sex designated on the birth certificate.<sup>27</sup>

If the genitalia appear ambiguous, sex is assigned in part based on sex-role stereotypes. The presence of an "adequate" penis in an XY infant leads to the label male,<sup>28</sup> while the absence of an adequate penis leads to the label female. A genetic

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23. See, e.g., DREGER, *supra* note 3; KESSLER, *supra* note 7; (1998); Diamond & Sigmundson, *supra* note 2; Fausto-Sterling, *supra* note 7; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Justine M. Schober, *Feminizing Genitoplasty for Intersex*, in PEDIATRIC SURGERY AND UROLOGY: LONG TERM OUTCOMES 549 (Stringer et al. eds., 1999); Valdes, *supra* note 22.

24. See Valdes, *supra* note 22, at 20. See also Ruth Hubbard, *Gender & Genitals: Constructs of Sex and Gender*, 2 CHRYSALIS 37 (1996). The term sex in this Article refers only to biological factors even though the term has been used to refer to core gender identity (woman or man), gender role identity (feminine or masculine), and sexual behavior (genital or reproductive behavior) as well. See Franke, *supra* note 23, at 7.

25. See *infra* Parts III, IV. Furthermore, physiological, and anatomical sex features can be hormonally and surgically created or altered. Core sexual identity, however, seems to be immutable. See Diamond & Sigmundson, *supra* note 2; William Reiner, *To Be Male or Female—That is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224 (1997). Therefore, one could argue that sex, to a certain extent, is socially constructed while sexual identity is a fixed status.

26. Alice Domurat Dreger, "Ambiguous Sex"—or Ambivalent Medicine? *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CENTER REP. 24, 27–28 (1998).

27. *Id.* In many intersexed conditions, the external genitalia are not harmonious with other biological factors. The other factors may be ignored because in assigning a sex to the infant the birth attendant is unaware of the incongruence.

28. See Suzanne J. Kessler, *The Medical Construction of Gender: Case Management of Intersexed Infants*, 16 SIGNS 3 (1990). Penile length is often the factor that outweighs all other factors for determining sex assignment to the male sex. Many doctors believe that the length of the penis must be adequate to allow a male to stand while urinating and to penetrate females. Therefore, if a genetically male child (XY chromosomes) is born with a penis that is less than 2.5 centimeters when stretched, medical experts will typically recommend that the child be surgically and hormonally altered and be raised as a girl. See Dreger, *supra* note 26, at 28. If the penis is considered adequate but does not have the appearance of a "normal" penis, surgeons may perform repeated operations to make the penis appear normal. See *id.* Often, infants are subjected to painful invasive surgery to allow the child to stand while urinating. The result of such surgery may be severe scarring and inability to

male with an "inadequate" penis (one that is incapable of penetrating a female's vagina) is "turned into" a female even if it means destroying his reproductive capacity. A genetic female who may be capable of reproducing, however, is generally assigned the female sex to preserve her reproductive capability regardless of the appearance of her external genitalia. If her "phallus" is considered to be "too large" to meet the guidelines for a typical clitoris, it is surgically reduced even if it means that her capacity for satisfactory sex may be reduced or destroyed.<sup>29</sup> In other words, men are defined based upon their ability to penetrate females and females are defined based upon their ability to procreate. Sex, therefore, can be viewed as a social construct rather than a biological fact.<sup>30</sup>

In the presence of ambiguous genitalia, medical professionals generally suggest that surgery be performed to "fix" the genitalia so that they appear clearly male or female.<sup>31</sup> Because one's birth certificate will often be used to obtain other legal documents, an individual's legal sex is generally fixed based upon the appearance of the person's external genitalia at birth.<sup>32</sup>

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experience sexual sensation. See PHYLLIS BURKE, *GENDER SHOCK: EXPLODING THE MYTHS OF MALE AND FEMALE* 221–228 (1996) (discussing case studies).

29. See Dreger, *supra* note 26, at 28.

30. See KESSLER, *supra* note 7, at 12.

31. See, e.g., Lehrman *supra* note 9, at 49. The generally accepted medical advice in cases involving ambiguous genitalia is for the children involved to undergo surgery so that their genitalia appear to be clearly male or female. Some medical professionals believe that sex assignment must be, and remain, unequivocal. R. L. Rothstein & R. M. Couch, *Management of Intersex: Approach to Ambiguous Genitalia*, BRIT. COLOM. MED. J., 493, 495, (Aug. 1992); George Szasz & Stacy Elliot, *Management of Intersex: Psychosexual Considerations*, BRIT. COLOM. MED. J., 500, 501 (Aug. 1992). Although experts agree that genital surgery is less risky after the child is six months old, if parents are extremely uncomfortable with their child's intersexuality, doctors will operate within the first few weeks of life. See KESSLER, *supra* note 7, at 16. The chief of pediatric urology and chair of the department of urology at Stanford University has stated in support of early surgery: "We consider it sort of an emergency, because it is upsetting to parents." Lehrman, *supra* note 9, at 49.

This surgical approach to fixing a child's sex in infancy is currently being questioned. Some intersexuals who were born with male and female features and women born with "enlarged" clitorises are advocating that surgery be delayed until the child is old enough to make an informed decision about whether s/he wants to undergo surgery. See Natalie Angier, *Women Seek to Ban Clitoral Reduction—They See Genital Surgery as Disfiguring; Proponents See it as Essential to Health*, HOUSTON CHRON., May 13, 1997, at B7; Geoffrey Cowley, *Gender Limbo*, NEWSWEEK, May 19, 1997, at 64–66. Some medical professionals also question the need to perform genital surgery at an early age. See DREGER, *supra* note 3; KESSLER, *supra* note 7; Diamond, *supra* note 2; Fausto-Sterling, *supra* note 7; Schober, *supra* note 23.

32. See Dreger, *supra* note 26, at 28. The existence of a penis or vagina at birth has not always been the critical determinant of an individual's sex. The factors that determine one's sex have changed over time. For instance, during the Renaissance, people acknowledged that an individual's genitals may change over the course of one's life. See Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 850 (1995) (citing Druann Pagliasotti, *On the Discursive Construction of Sex and Gender*, 20 COMM. RES. 472, 474–79 (1993)). During the late nineteenth century and until World War I, when a woman's reproductive function was considered one of a woman's essential characteristics, the presence or absence of ovaries was considered the ultimate criterion for



Although the appearance of the external genitalia generally establishes an individual's sex at birth, other criteria may be used later to determine an individual's sex for other purposes. For instance, before 1968, athletic organizations examined a female athlete's external genitalia to determine her right to participate as a female in athletic competitions. In recent years, however, some athletic organizations, including the International Olympic Organizing Committee, have been using a chromosomal test instead.<sup>33</sup> Individuals with XY chromosomes are defined as males and individuals with XX chromosomes are defined as females.<sup>34</sup>

The absurdity of using a test that defines an individual as a woman based on the presence of two X chromosomes is best illustrated by the story of Maria Patiño, a Spanish hurdler.<sup>35</sup> Ms. Patiño planned to compete in the World University Games in 1985. She knew that she would be subjected to a sex verification test, but she had no reason to believe that the test would indicate that she was anything other than a female. Although Ms. Patiño was not aware of it, she had Androgen Insensitivity Syndrome ("AIS").<sup>36</sup> Therefore, she had the chromosomal make-up of a male (XY) even though her external morphologic sex, phenotype, and self-identification were clearly female.

Ms. Patiño failed the sex chromatin test and was banned from the 1985 competition. She was later barred from further competition by the Spanish national team. The irony of using the sex chromatin test to deter unfair competition is that Ms. Patiño's condition may have put her at a competitive disadvantage compared to the typical XX female athlete.<sup>37</sup>

Therefore, although sex is typically defined according to biological factors, the biological factor(s) that control sex determination may vary depending upon the purpose for which sex is being defined. At birth, the appearance of the external

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gender assignment for hermaphrodites. See DREGER, *supra* note 3, at 37; KESSLER, *supra* note 7, at 27.

33. See Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 JAMA 1920 (1986).

34. See *id.* at 1921-22. In reality, the test used does not test for XX versus XY individuals. The test will indicate the presence of two X chromosomes which will in turn qualify an athlete to participate as a female. If the athlete has any chromosomal configuration other than XX, the athlete will fail to qualify as a female and further tests may be performed. The test will not indicate whether an individual is XO, XXY, XY, or any other configuration. See *id.*

35. Ms. Patiño's story is described in Alison Carlson, *When is a Woman Not a Woman*, WOMEN'S SPORTS & FITNESS, Mar. 1991, 24-29.

36. See *infra* notes 126-42 and accompanying text for a detailed discussion of AIS.

37. Although a person with AIS may have a height advantage over the average women, in other aspects the condition does not provide any competitive advantage. In addition, a woman with AIS may be at a disadvantage because her body cannot respond to any male hormones, including the normal levels of testosterone in XX women that help develop muscle tone. See ROBERT POOL, *EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES* 80 (1994).

genitalia typically determine the sex assigned while the right to participate in some athletic competitions as a female<sup>38</sup> may be controlled by the chromosomal structure.<sup>39</sup>

### B. Gender

Gender is generally used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex.<sup>40</sup> Gender, as used in this sense, is socially constructed. Individuals with characteristics that are typically associated with men have a masculine gender while individuals with characteristics that are typically associated with women have a feminine gender.<sup>41</sup> Most legislation utilizes the word "sex," yet courts, legislators, and administrative agencies often substitute the word "gender" for "sex" when they interpret these statutes.<sup>42</sup> Despite the different meanings of the terms "sex" and "gender," they are often used interchangeably.<sup>43</sup>

38. The only reported case involving sex determination for purposes of participating in athletic competitions in the United States is *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977). In *Richards*, the court determined that a post-operative male-to-female transsexual could participate in USTA tennis competitions as a female. The court found that passing a sex chromatin test as the sole prerequisite to competing as a female was grossly unfair, discriminatory, and inequitable. *See id.* at 272. In addition, the court found that it violated Dr. Richard's rights under the Human Rights Law of New York. *See id.* at 273.

39. Sex determination for other legal purposes varies by jurisdiction and by the purpose for which one's sex is being established. *See infra* Part IV.

40. *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994) (Scalia, J., dissenting). "The word 'gender' has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male." *Id.* at 157 n.1 (Scalia, J., dissenting).

41. Valdes, *supra* note 22, at 377 n.51. Traditional norms support the notion that men are supposed to be strong, assertive, virile, macho, and rational. The gender of persons with these traits is traditionally labeled masculine. Women are supposed to be weak, passive, quiescent, and emotional. Persons with these traits are traditionally considered to be feminine or have a female gender. *See id.*

42. *See infra* Part IV. For example, in 1976, the EEOC amended its definition of "sex" for purposes of Title VII to include "a person's gender, an immutable characteristic with which a person is born." Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1169 (1991) (quoting EEOC Dec. No. 76-75, EEOC Dec. (CCH) p. 6495, at 4266 (Mar. 2, 1976)).

43. *See* Valdes, *supra* note 22, for an excellent discussion of the way in which sex, gender and sexual orientation are conflated in law and society. U.S. Supreme Court Justice Ruth Bader Ginsburg is in large part responsible for the interchangeable use of the words sex and gender in the law. According to Ginsburg, when she was an attorney representing sex discrimination clients, her secretary advised her to substitute the word "gender" for the word "sex" in her briefs because "the word sex, sex, sex is on every page. Don't you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don't you use the word 'gender'?" Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

### C. Binary Assumptions

Implicit in legislation utilizing the terms "sex" and "gender" are the assumptions that only two biological sexes exist<sup>44</sup> and that all people fit neatly into either the category male or female.<sup>45</sup> In other words, despite medical and anthropological studies to the contrary,<sup>46</sup> the law presumes a binary sex and gender model.<sup>47</sup> The law ignores the millions of people who are intersexed.<sup>48</sup>

A binary sex paradigm does not reflect reality.<sup>49</sup> Instead, sex and gender range across a spectrum. Male and female occupy the two ends of the poles, and a number of intersexed conditions exist between the two poles.<sup>50</sup> Millions of individuals are intersexed and have some sexual characteristics that are typically associated with males and some sexual characteristics that are typically associated with females.<sup>51</sup>

Although the American legal system blindly clings to a binary sex and gender paradigm, anthropologists who have studied other societies have found cultures that reject binary sex and gender systems.<sup>52</sup> These societies formally recognize that more than two sexes and/or two genders exist.

44. See, e.g., Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 983 (1992). "[S]ociety recognizes only the two disparate sexes." *In re Anonymous*, 314 N.Y.S.2d 668, 669 (N.Y. Civ. Ct. 1970). "[W]ith respect to gender, a person was either male or female, and no three ways about it." *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 100 (N.Y. Sup. Ct. 1977).

45. This binary assumption is not universally accepted. See *infra* notes 52–72 and accompanying text.

46. See THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ed., 1996) [hereinafter THIRD SEX, THIRD GENDER] for a comprehensive historical and anthropological perspective.

47. See Epstein, *supra* note 44. This binary model has existed since the end of the Middle Ages when hermaphrodites were forced to choose an established gender role. The penalty for transgression was often death. For example, in the 1600s, a Scottish hermaphrodite lived as a woman. She was buried alive after impregnating a woman. See Fausto-Sterling, *supra* note 7, at 23.

48. See *infra* Part IV.

49. See Fausto-Sterling, *supra* note 7, at 21. The notion that sex is not binary is supported in feminist literature, scientific research, and by a grass-roots movement called "transgenderism." MARTINE ROTHBLATT, THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER 1 (1995). Rothblatt believes that in the future labeling people as male or female at birth will be considered just as unfair as South Africa's now-abolished practice of stamping black or white on individual's I.D. cards. See *id.*

50. Fausto-Sterling, *supra* note 7 at 21.

51. See *id.* Some intersexuals may have atypical genitalia that do not appear to be clearly male or female at birth. Other intersexuals may appear to be clearly of one sex at birth but sexual ambiguities may become apparent later. See *infra* Part III.B.

52. See THIRD SEX, THIRD GENDER, *supra* note 46. Anthropologists do not agree about whether these gender/sex systems are binary or whether they recognize a third sex and/or gender. Some anthropologists have argued that earlier studies of these societies that assumed a binary system, misinterpreted the native society's view of sex and gender because the anthropologists conducting the studies operated on the Western assumption that only two sexes and two genders exist. Some anthropologists assert that many societies have recognized more than two sex and gender categories. See, e.g., Sue-Ellen Jacobs & Jason Cromwell, *Visions and*

For instance, in several villages in the Dominican Republic, a significant number of children who are chromosomally XY and who develop embryonic testes have external female genitalia at birth and therefore are raised as girls.<sup>53</sup> At puberty, their testes descend, their voices deepen, and their clitorises transform into penises.<sup>54</sup> Anthropologists have reported that the villagers have special terms for these individuals. They are called "guevochoche (balls at twelve)" or "machihembra (male female)."<sup>55</sup> An intersexual condition of the same biological origin exists among several people in Papua, New Guinea. The term used to describe these children is kwolu-aatmwol (hermaphrodite), which signifies that at puberty the child will turn more into a man than a woman. These children are treated as a third sex.<sup>56</sup>

Many Native American cultures recognize a third gender.<sup>57</sup> These individuals are called *two-spirit* (formerly known as *berdache*)<sup>58</sup> and enjoy a special status in their society.<sup>59</sup> They function as neither male nor female.<sup>60</sup>

This third sex/gender status is also recognized in India where intersexed or transgendered people are called *hijras*.<sup>61</sup> *Hijras* are considered neither male nor female but contain elements of both.<sup>62</sup>

*Revisions of Reality: Reflections on Sex, Sexuality, Gender, and Gender Variance*, 23 J. HOMOSEXUALITY 43, 62 (1992).

53. Julianne Imperato-McGinley et al., *Steroid 5 Alpha-Reductase Deficiency in Man: An Inherited Form of Male Pseudohermaphroditism*, SCIENCE, Dec. 27, 1974, at 1213. In one village in the Dominican Republic (Salinas), with a population of 4300 individuals, one out of every 90 males is affected. For a more detailed discussion of this syndrome, see *infra* notes 143-49 and accompanying text.

54. See *id.*

55. See *id.*; Hubbard, *supra* note 24, at 38. Scientists who first studied this society used a binary sex and gender paradigm and reported that these individuals who were of the female sex and gender at birth were transformed into men (based upon their external genitalia) and males (based upon their change of gender identity when the external appearance of their bodies changed). Later, some anthropologists studying similar cultures reported that the earlier reports assumed a binary model and therefore overlooked evidence in the culture that a third sexual and gender category existed. See Gilbert Herdt, *Mistaken Sex: Culture, Biology and the Third Sex in New Guinea*, in THIRD SEX, THIRD GENDER, *supra* note 46, at 419.

56. See Herdt, *supra* note 55, at 420.

57. See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGES: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 28 n.39 (1996); Charles Callender & Lee M. Kochems, *Men and Not-Men: Male Gender-Mixing Statuses and Homosexuality*, in THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR 165 (Evelyn Blackwood ed., 1986) [hereinafter THE MANY FACES OF HOMOSEXUALITY].

58. See Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1242 (1997). Historically, the most common term was *berdache*. In 1994, a group of Native and non-Native anthropologists and other scholars asked authors to update the term *berdache* to *two-spirit*. See *id.* at 1242 n.75.

59. See Valdes, *supra* note 22, at 102. Anthropologists have documented two-spirits in over 130 Native American societies, including the Aleut, Apache, Arapaho, Bering Strait Eskimo, Cheyenne, Crow, Hopi, Mojave, Navajo, and Zuni. See *id.* at 224.

60. See Callender & Kochems, *supra* note 57, at 165.

61. See Serena Nanda, *The Hijras of India: Cultural and Individualized Third Gender Role*, in THE MANY FACES OF HOMOSEXUALITY, *supra* note 57, at 35.

A third sex was also recognized in some ancient cultures. The Greek myths tell the story of Hermaphroditus, who became half-male and half-female when his body fused with the body of a nymph who fell in love with him.<sup>63</sup>

Some religious texts also recognize the existence of intersexuals. For instance, the Talmud and the Tosefta, the Jewish texts that set forth rules that are intended to govern relationships and behavior among Jews, contain detailed rules relating to the legal rights and responsibilities of intersexuals.<sup>64</sup> These texts use the terms "androgynos" and "hermaphrodite" and define androgynos or hermaphrodite as "an animal or individual having both male and female characteristics and organs."<sup>65</sup> Various views exist in the Jewish texts as to whether a hermaphrodite is of uncertain sex (either male or female), is of mixed sex (part male and part female), or is a creature *sui generis* (one who is neither male nor female).<sup>66</sup> These texts regulate hermaphrodites' behavior in a variety of areas and depending on the circumstances, hermaphrodites may be treated as male, female, both or neither.<sup>67</sup>

Other religious texts have also recognized the existence of intersexuals and have established marital rules applying to them. According to one religious tract, a hermaphrodite can contract marriage either with a man or with a woman depending upon which sexual characteristics dominate.<sup>68</sup> Hermaphrodites coming "closer to the male sex than the female that have the signs of virility, a beard and so forth, should be understood to be able to contract marriage with a woman."<sup>69</sup>

It also appears that early English law recognized three classifications of humans. According to Bracton, *On the Laws and Customs of England*, "[m]ankind may also be classified in another way: male, female, or hermaphrodite."<sup>70</sup> Although the law recognized three classifications of humans, it did not recognize three classifications of laws governing human behavior. For legal purposes, "[a] hermaphrodite [wa]s classed with male or female according to the predominance of the sexual organs."<sup>71</sup> In the 16th century, Lord Coke, the renowned jurist, writing about the laws of succession to hereditary wealth and title in England declared, "Every heire is either a male, or female, or an hermaphrodite, that is both male and female.

62. See *id.* Estimates of the numbers of Hijras in India range from 50,000 (1982) to 500,000 (1983). *Id.* at 36.

63. See Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195 (1997).

64. See ENCYCLOPEDIA JUDAICA—CD ROM EDITION (1997).

65. *Id.*

66. See *id.*

67. See *id.*

68. See Henry A. Finlay, *Sexual Identity and the Law of Nullity*, 54 AUSTRALIAN L.J. 115, 120 n.51 (1980) (quoting FREISEN, GESCHICHTE DES KANONISCHEN EHERECHTS 343–45).

69. *Id.*

70. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 31 (Samuel E. Thorne trans., 1968).

71. *Id.* at 32.

And an hermaphrodite (which is also called *Androgynus*) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile."<sup>72</sup>

These historical, religious, and cross-cultural examples illustrate that rules governing intersexuals have existed throughout history in a variety of cultures and religions. Although the United States, other modern societies, and some religions utilize a binary sex paradigm in which intersexuals are classified as either male or female for legal purposes, other societies have recognized a multi-sexual and multi-gender model.

The currently accepted binary model that determines an individual's sex based primarily on the appearance of his/her external genitalia at birth is an inadequate system. As explained in Parts III and IV, it does not reflect reality and it often does not accomplish the legislative intent of the laws that seek to regulate behavior based upon a person's sex.

### III. INTERSEXED MEDICAL CONDITIONS

Medical experts recognize that many factors contribute to the determination of an individual's sex.<sup>73</sup> According to medical professionals, the typical criteria of sex include:

1. Genetic or chromosomal sex—XY or XX;
2. Gonadal sex (reproductive sex glands)—testes or ovaries;
3. Internal morphologic sex (determined after three months gestation)—seminal vesicles/prostate or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia)—penis/scrotum or clitoris/labia;
5. Hormonal sex—androgens or estrogens;
6. Phenotypic sex (secondary sexual features)—facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.<sup>74</sup>

For most people, these factors are all congruent, and one's status as a man or woman is uncontroversial. For intersexuals, some of these factors may be incongruent, or an ambiguity within a factor may exist.

The assumption is that there are two separate roads, one leading from XY chromosomes at conception to manhood, the other from XX chromosomes at conception to womanhood. The fact is that there are

72. The First Part of the Institutes of the Laws of England, 1 E. COKE, INSTITUTES 8.a. (1st Am. Ed. 1812) (16th European ed. 1812).

73. JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES (2d ed. 1994).

74. *Id.* at 4. (Money provides an additional two factors not discussed here). These eight factors could be divided in other ways. For instance, hormonal sex could be divided into fetal hormonal sex and pubertal hormonal sex. In addition, identity could be divided into sexual identity (one's own sense of one's sexual identity), gender identity (the gender society would attribute to an individual), and gender role (the extent to which one chooses to live in one's self-identified sex).

not two roads, but one road with a number of forks that turn in the male or female direction. Most of us turn in the same direction at each fork.<sup>75</sup>

The bodies of the millions of intersexed people have taken a combination of male and female forks and have followed the road less traveled. These individuals have noncongruent sexual attributes. For these individuals, the law must determine which of the eight sexual factors will determine their sex and whether any one factor should be dispositive for all legal purposes.<sup>76</sup>

Because the law has typically looked to biology and the medical community for guidance in determining how an individual's sex should be legally established, the complex nature of sexual differentiation must be understood.<sup>77</sup> Part III-A describes the typical sexual differentiation path. Part III-B describes the various paths that intersexuals' bodies have followed.

#### A. Sexual Differentiation—The Typical Path

During the first seven weeks after conception, all human embryos are sexually undifferentiated. At seven weeks, the embryonic reproductive system consists of a pair of gonads that can grow into either ovaries (female) or testes (male). The genital ridge that exists at this point can develop either into a clitoris and labia (female) or a penis and a scrotum (male). Two primordial duct systems also exist at this stage. The female ducts are called Mullerian ducts and develop into the uterus, fallopian tubes and the upper part of the vagina if the fetus follows a female path. The male ducts are called Wolffian ducts and are the precursors of the seminal vesicles, vas deferens and epididymis.<sup>78</sup>

At eight weeks, the fetus typically begins to follow one sex path. If the fetus has one X and one Y chromosome (46XY), it will start down the male path. At eight weeks, a "master switch" on the Y chromosome,<sup>79</sup> called the testis-determining factor, signals the embryonic gonads to form into testes.<sup>80</sup> The testes begin to produce male

75. JOHN MONEY & PATRICIA TUCKER, *SEXUAL SIGNATURE: ON BEING A MAN OR A WOMAN* 6 (1975).

76. The legislative enactments that regulate behavior based upon an individual's sex have made no attempt to delineate the factor(s) that determine sex. Some courts have begun the process, but the decisions are often inconsistent and not well-reasoned. See *infra* Part IV.

77. As discussed in Part IV, courts typically rely on biological indicators of sex to establish an individual's legal sex. The typical biological factors courts have used to determine legal sex have been some combination of chromosomes, gonads, and genitalia. An understanding of the complicated process of sexual development will illustrate why these three factors are no better indicators of "legal sex" than other sex factors such as hormones, phenotype, or self-identified sex.

78. POOL, *supra* note 37, at 67; Henry Finlay, *International Commentaries: Legal Recognition of Transsexuals in Australia*, 12 J. CONTEMP. HEALTH L. & POL'Y 503, 511-13 (1996).

79. The Y chromosome contains within its gene sequence the Sex-determining Region on the Y (SRY). MONEY, *supra* note 73, at 7.

80. Lehrman, *supra* note 9, at 48. Researchers are unsure exactly how the master switch operates. Today researchers believe it may turn off something on the X chromosome.

hormones. These male hormones prompt the gonads and genitalia to develop male features. Additionally, the testes produce a substance called Mullerian inhibiting factor that causes the female Mullerian ducts to atrophy and be absorbed by the body, so that a female reproductive system is not created.<sup>81</sup>

Because the typical female fetus is 46XX and does not have a Y chromosome, the master switch that leads to the development of male organs is not turned on. The fetus continues on what is considered the default path and in the thirteenth week the gonads start to transform into ovaries. Because no testes exist to produce male hormones, the remainder of the sexual system develops along a female path. During this time, the Wolffian (male) ducts shrivel up. In other words, unless the body is triggered by hormonal production to follow the male path, the fetus will normally develop as a female.<sup>82</sup> Therefore, although chromosomes generally control the hormones that are produced, it is actually the hormones that directly affect sexual development.<sup>83</sup>

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*Id.* Additionally, it is now believed that the X chromosome contains at least two key genes that determine sex. *Id.* A key gene on the X chromosome that may determine sex is *Dax1*. According to a very recent study, in rare cases, embryos get an extra copy of the *Dax1* gene in which case the embryo becomes a female physically even though it is male genetically. *Tug-of-War Between Two Genes May Determine Sex of Embryos*, L.A. TIMES, Feb. 19, 1998, at B2.

81. See MONEY, *supra* note 73, at 25.

82. See *id.*

83. See POOL, *supra* note 37, at 68. The importance of hormonal influence on sex determination has been tested in the laboratory on a variety of animals. Researchers have administered testosterone to pregnant rats early in their pregnancy. When the pups are born, they will all appear externally to be males although some will be genetically female (XX) and will have female internal sex features. The XX rats will not have testes because they had no Y chromosome to influence the gonads to develop into testes. They will have a uterus and fallopian tubes because no Mullerian inhibiting factor was released to stop the development of these female sexual features. Researchers have also been able to manipulate the "sex" of rats by injecting the pregnant rats with a substance that prevents testosterone from masculinizing the body. The litter produced will all externally appear female even though some of the pups have XY chromosomes. Because the XY "females" have testes that produce the Mullerian inhibiting factor, they never develop internal female organs, but externally the sexual features all appear female. *Id.*

Researchers have performed a similar test on sheep. A pellet of testosterone was implanted in a pregnant ewe carrying a female fetus. It was inserted after the genital anatomy of the fetus had already differentiated as a female. The undifferentiated "sexual brain" of the fetus, however, masculinized. At the first mating season after its birth, the sheep displayed behavior that was typical of a ram, despite the presence of two ovaries that secreted female hormones. Its ritual mating behavior and urinary posture were male. In addition, the other ewes and rams in the flock reacted to it as if it were a ram. John Money, *The Concept of Gender Identity Disorder in Childhood and Adolescence After 39 Years*, 20 J. SEX & MARITAL THERAPY 163, 170 (1994).

A number of studies have also been performed involving rhesus macaques that indicate that the administration of testosterone to a pregnant rhesus carrying a female fetus will affect the behavior of the female fetus after she is born. Females exposed in-utero to androgens will display some behavior more typical of male rhesus macaques than female rhesus macaques. See, e.g., R.W. Goy et al., *Behavioral Masculinization is Independent of Genital Masculinization in Prenatally Androgenized Female Rhesus Macaques*, 4 HORMONES &



To summarize, if the typical path is followed, males and females will have the following sexual features:

	MALES	FEMALES
Genetic/chromosomal sex	XY	XX
Gonadal sex: reproductive sex glands	testes	ovaries
External morphologic sex	penis and scrotum	clitoris and labia
Internal morphologic sex	seminal vesicles, prostate	vagina, uterus, fallopian tubes
Hormonal sex <sup>84</sup>	androgens	estrogens
Phenotypic sex (secondary sex features) <sup>85</sup>	facial and chest hair	breasts
Assigned sex/ gender of rearing <sup>86</sup>	male	female
Sexual identity	male	female

### B. Sexual Differentiation—Intersexuals: The Paths Less Followed<sup>87</sup>

Two circumstances may lead to an intersexual condition: (1) failure to meet the typical criteria within any one factor; or (2) one or more factors may be incongruent with the other factors.

#### 1. Ambiguity Within a Factor

a. Chromosomal Ambiguity—Certain individuals have chromosomes that differ from the typical pattern of either XY or XX. Doctors have discovered people with a variety of combinations including: XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO.<sup>88</sup>

BEHAV. 552 (1988).

84. Although androgens and estrogens are referred to as male and female hormones respectively, all human sex hormones are shared by men and women but in different quantities. MONEY & TUCKER, *supra* note 75, at 46.

85. Phenotypic sex characteristics may vary in different cultures. For instance, facial hair on women is more accepted in some cultures and is therefore less associated with maleness. Similarly, the absence of chest and facial hair is not necessarily characterized as female in some cultures in which men typically have less facial and chest hair.

86. Assigned sex and gender of rearing are generally the same. Rare cases have been reported in which parents have raised their child in a gender that did not match the sex that the doctor assigned. *See infra* note 95 and accompanying text. These circumstances occur so infrequently that the two categories are combined in this Article.

87. The following discussion includes only the more common intersexual conditions. For an exhaustive discussion of additional intersexual conditions, see MONEY, *supra* note 73.

88. *See* POOL, *supra* note 37, at 70–71.

b. Gonadal Ambiguity—Some intersexuals do not have typical ovaries or testes. Instead, they have “streak” gonads that do not appear to function as either ovaries or testes. Others have ovotestes, a combination of both male and female gonads. Still others have one ovary and one testis.<sup>89</sup>

c. External Morphologic Sex—Some individuals’ external genitalia are neither clearly male nor clearly female. In addition, some women have clitoral hypertrophy, a clitoris that is larger than the typical clitoris, may more closely resemble a penis, and is sometimes accompanied by an internal vagina.<sup>90</sup>

d. Internal Morphologic Sex—Some individuals have incomplete internal sex organs or a complete absence of an internal sex organ. In addition, some individuals are born with a combination of male and female internal organs.<sup>91</sup>

e. Hormonal Sex—The male hormones are referred to as androgens. The female hormones are estrogen and progesterone. Although they are referred to as male and female hormones, all human sex hormones are shared by men and women. Typically, men and women have hormones of each type, but the levels of production and reception of each hormone are highly variable among all individuals.<sup>92</sup> Different medical disorders further influence levels of hormone production and/or reception.<sup>93</sup>

f. Phenotypic Sex—Individuals may have a variety of combinations of incongruent phenotypic characteristics. In other words, an individual may have characteristics that are typically associated with a male (heavy facial hair) and characteristics that are typically associated with a female (developed breasts).<sup>94</sup>

g. Assigned Sex/Gender of Rearing—Although it occurs rarely, some parents have raised their child as a gender other than the sex that was assigned by the medical attendant at birth.<sup>95</sup> In addition, in some circumstances, doctors have recommended that a child be raised as the sex different from the one assigned at birth.<sup>96</sup>

h. Sexual Identity—Sexual identity refers to how individuals would identify themselves; gender identity refers to how society would identify an individual. Some

89. See Fausto-Sterling, *supra* note 7, at 21. For further discussion, see *infra* notes 120–22 and accompanying text.

90. See MONEY, *supra* note 73, at 49–57.

91. This condition occurs in individuals with persistent mullerian duct syndrome. See *id.* at 31–33.

92. See *id.* at 24.

93. See *id.*

94. See *id.*

95. See Jenni Millbank, *When Is a Girl a Boy? RE A (a child)*, 9 AUSTRALIAN J. FAM. L. 173 (1995). In *In Re A*, (1993) 16 FAM. L.R. 715; [1993] FLC 92-402, a child was born with Congenital Adrenal Hyperplasia. She was chromosomally a female although her genitalia appeared male. The medical advice to the parents was to perform surgery so that the genitalia would appear female, to match the child’s chromosomal sex. Despite the advice of the doctors that A was a girl, the parents persisted in the belief that she was a boy. They registered and named her as male on her birth certificate even though she underwent surgery and partial hormonal treatment to increase her feminization.

96. See *infra* notes 165–75 and accompanying text.

individuals do not consider themselves to be either male or female; they identify themselves as a third sex.<sup>97</sup>

## 2. Ambiguity Among Factors

Some individuals have an incongruence among the eight factors due to a sexual differentiation disorder. In other words, some factors may be clearly male, some may be clearly female, and others may be a mixture of male and female. Incongruity among factors can result from a number of disorders and circumstances including:

- a. Chromosomal sex disorders;
- b. Gonadal sex disorders;
- c. Internal organ anomalies;
- d. External organ anomalies;
- e. Hormonal disorders;
- f. Gender identity disorders; and
- g. Surgical creation of an intersexed condition.

These conditions are described in detail below and summarized in a chart in the Appendix.

### a. Chromosomal Sex Disorders

#### *Klinefelter Syndrome*

Approximately one in 500 to 1000 "males" is affected by Klinefelter Syndrome, a condition in which a mostly phenotypic male does not fall neatly into the XY chromosome complement.<sup>98</sup> Individuals with Klinefelter Syndrome will typically have two or more X chromosomes. The testes, and often the penis, are smaller than in unaffected XY males.<sup>99</sup>

A diagnosis of Klinefelter Syndrome is typically not made before puberty because no easily identifiable sign exists prior to the onset of puberty.<sup>100</sup> The swelling of the breasts (gynecomastia) that occurs in adolescence is typically the first sign of the existence of this intersexual condition.<sup>101</sup> Most individuals with Klinefelter Syndrome report a male psychosexual orientation.<sup>102</sup> Many take supplemental testosterone, which further results in a male phenotype (e.g. facial hair).<sup>103</sup>

97. See, e.g., Angier, *supra* note 31, at D-8.

98. See de la Chapelle, *supra* note 33, at 1922. According to Money, the most frequently quoted figure in the general population is 1:900 male births. See MONEY, *supra* note 73, at 12.

99. See MONEY, *supra* note 73, at 13.

100. See *id.*

101. See *id.*

102. See *id.*

103. See *id.*

### *Turner Syndrome*

Disorders of chromosomal sex also appear in phenotypic females. Turner Syndrome is a condition that affects approximately one in 5000 newborn females.<sup>104</sup> Individuals with Turner Syndrome will typically have an XO<sup>105</sup> chromosomal pattern, not falling neatly into the XX, XY binary system.<sup>106</sup> Individuals with Turner Syndrome typically have bilateral “streak” gonads (unformed and non-functioning gonads) instead of clearly defined ovaries or testes.<sup>107</sup> The absence of complete ovaries or testes in-utero means that the fetus has little exposure to either female or male hormones.<sup>108</sup> In the absence of male hormones, the fetus will follow the female path.<sup>109</sup>

Individuals with Turner Syndrome are typically shorter than XX females. They have female appearing genitalia, but little breast development in the absence of exogenous estrogen administration.<sup>110</sup>

#### b. Gonadal Sex Disorders—Swyer Syndrome

Pure gonadal dysgenesis is a condition sometimes referred to as Swyer Syndrome.<sup>111</sup> This syndrome is similar to Turner Syndrome in that individuals with this syndrome will have only streak gonads.<sup>112</sup> In contrast to Turner Syndrome, in which a chromosome is missing (XO), individuals with Swyer Syndrome have XY (male) chromosomes.<sup>113</sup> Although Swyer Syndrome individuals have a Y chromosome, the chromosome may be missing the sex-determining segment. Without this segment, the embryo cannot develop testes and as a result, the masculinizing hormones are also missing.<sup>114</sup> In the absence of the masculinizing hormones, the fetus will take the “default” female path and will develop a uterus but will not have any ovaries.<sup>115</sup>

This condition is not apparent at birth and the child will be raised as a girl. The syndrome is generally diagnosed at puberty when the absence of a menstruation and breast enlargement causes suspicion.<sup>116</sup>

104. *See id.* at 14.

105. *See id.* The O indicates the absence of either an X or Y chromosome. The lost chromosome could be either X or Y. Other chromosomal patterns may also occur. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 14–15.

110. *See id.* Because women with Turner Syndrome have a uterus, with proper hormonal treatment, they are able to menstruate and carry a child to term. The fertilization must be *in vitro* utilizing an egg from an egg donor because women with Turner Syndrome lack ovaries and eggs. *See id.* at 15.

111. *See id.* at 22. Swyer Syndrome is rare; no one knows the exact incidence. *Id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.* Individuals with Swyer Syndrome are able to carry a child to term in the

c. Internal Organ Anomalies<sup>117</sup>—Persistent Mullerian Duct Syndrome

Individuals with Persistent Mullerian Duct Syndrome have the internal organs typical of males as well as females. These individuals have a male chromosomal pattern (XY) and therefore develop testes which secrete androgen but for some reason fail to secrete anti-Mullerian hormones.<sup>118</sup> The androgens cause the fetus to follow the male path and develop the external appearance and internal organs of a male. However, fallopian tubes and a uterus are also formed because the anti-Mullerian hormones are not acting to stop this development. This condition is generally not diagnosed at birth. Individuals with this syndrome are reared as males and have a male identity.<sup>119</sup>

d. External Organ Anomalies: Hermaphroditism

Individuals who have ambiguous external genitalia (neither clearly male nor female) are commonly referred to as hermaphrodites.<sup>120</sup> Hermaphrodites are often classified into three categories: true hermaphrodites, male pseudo-hermaphrodites, and female pseudo-hermaphrodites.<sup>121</sup> A "true hermaphrodite" has some ovarian and some testicular tissue. So-called "true hermaphrodites" have either one ovary and one testis, two ovotestes (a combination of an ovary and testis in a single gonad) or some combination thereof (e.g. one ovotestes and one ovary). True hermaphroditic conditions are more rare than many of the other intersex conditions described in this section. A male pseudo-hermaphrodite has testes and no ovaries but some aspect of female genitalia. A female pseudo-hermaphrodite has ovaries and no testes and some aspect of male genitalia.<sup>122</sup>

A variety of disorders can lead to hermaphroditic conditions.<sup>123</sup> Hermaphroditic conditions are named according to their etiology (e.g. Partial Androgen Insensitivity Syndrome ("PAIS") or Congenital Adrenal Hyperplasia ("CAH")) unless the etiology of the condition remains unknown.<sup>124</sup>

same way that individuals with Turner Syndrome can carry a child to term. *See supra* note 110.

117. Internal organ anomalies may also occur in combination with other anomalies such as hermaphroditism. *See id.* at 33. For a further discussion of hermaphroditism, see *supra* notes 120–25 and accompanying text.

118. *See id.* at 31. Alternatively it could be that the Mullerian ducts are resistant to the hormone that would obliterate them. *Id.*

119. *See id.* at 31–33.

120. *See id.* at 35–37. Although the term hermaphrodite is commonly used to refer to someone with ambiguous genitalia, hermaphroditism technically is determined based upon the gonads and not based upon the appearance of the genitalia. DREGER, *supra* note 3, at 36.

121. *See* DREGER, *supra* note 3, at 36–37.

122. *See* Fausto-Sterling, *supra* note 7, at 21.

123. *See* MONEY, *supra* note 73, at 38. Some of these conditions are discussed in more detail in other sections. *See infra* notes 143–49 and accompanying text for a discussion of 5-Alpha Reductase Deficiency; *infra* notes 150–56 and accompanying text for a discussion of CAH; *infra* notes 138–42 and accompanying text for a discussion of PAIS.

124. *See* MONEY, *supra* note 73, at 38.

True hermaphroditism is rare and the exact incidence is unknown. The chromosome count may vary but is predominantly 46XX.<sup>125</sup>

e. Hormonal Disorders

*Androgen Insensitivity Syndrome*

Androgen Insensitivity Syndrome<sup>126</sup> ("AIS") affects approximately 1 out of every 20,000 genetic males.<sup>127</sup> AIS can be either complete ("CAIS") or partial (PAIS).<sup>128</sup> Individuals with AIS are born with XY chromosomes and normally-functioning testes, which would otherwise suggest a normal male fetus.<sup>129</sup> Individuals with CAIS, however, have a receptor defect and are unable to process the androgens produced by the testes.<sup>130</sup>

Because the body cannot process the androgens, the fetus will follow the default path of female development. External female genitalia will form.<sup>131</sup> No internal reproductive organs will form because the Mullerian inhibiting factor produced by the testes will inhibit the growth of the uterus and fallopian tubes.<sup>132</sup> The vagina will be shorter than in the typical woman (or may only be a dimple) and will end blindly because there are no female internal reproductive organs with which to connect.<sup>133</sup>

Unlike several other intersex conditions, individuals with CAIS almost always are identified as "normal" females at birth because externally they are indistinguishable from XX females. The disorder is sometimes diagnosed in infancy because of inguinal hernias that contain the testes.<sup>134</sup> Often, however, CAIS is not diagnosed until after the onset of puberty as a result of a failure to menstruate.<sup>135</sup> At puberty, breasts will form because of the estrogen that is produced by the testes.<sup>136</sup> Until puberty, many CAIS women have no inkling that they are other than normal XX women.<sup>137</sup>

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125. See *id.* at 46.

126. This syndrome was formerly called Testicular Feminizing Syndrome. See *id.* at 27.

127. See POOL, *supra* note 37, at 68.

128. See Garry L. Warne, *Complete Androgen Insensitivity Syndrome* 7 (1997).

129. See POOL, *supra* note 37, at 69.

130. See *id.*

131. See MONEY, *supra* note 73, at 29.

132. See *id.*

133. See *id.*

134. See Warne, *supra* note 128, at 15.

135. See *id.* At the time the condition is discovered, the doctor will usually recommend removing the testes either after puberty or during infancy, because they often turn cancerous. Estrogen replacement therapy is used to substitute for the hormones that had been produced by the testes. If the vagina is too short for comfortable intercourse, it can be stretched. POOL, *supra* note 37, at 69.

136. The testes, if still present at puberty, will be producing primarily male hormones but will also be producing female hormones. The receptors are still unable to process the male hormones but the smaller amount of female hormones will cause the body to have breasts and a body shape typical of a female. MONEY, *supra* note 73, at 29.

137. See POOL, *supra* note 37, at 69. See discussion of Maria Patiño *infra* notes 35-

In PAIS, an XY individual with testes will be partially receptive to androgens.<sup>138</sup> Unlike individuals with CAIS, individuals with PAIS may fall anywhere along a spectrum from an almost completely male external appearance and male sexual identity to a completely female external appearance and female sexual identity.<sup>139</sup> The degree to which the individual has male features depends upon the degree to which the receptors are able to process the male hormones the testes produce.<sup>140</sup>

The external phenotype of PAIS individuals will initially be determined by the degree of androgen reception in the body.<sup>141</sup> Thus, a PAIS individual may have genitalia resembling either a clitoris or a penis, the labia may be fused, and during adolescence there may be breast development due to the conversion of testosterone produced by the gonads to estradiol, an estrogen compound.<sup>142</sup>

#### *5-Alpha-Reductase Deficiency*

This condition is similar to the androgen resistance syndromes. Individuals with 5-Alpha-Reductase Deficiency have XY chromosomes and testes but appear phenotypically female at birth.<sup>143</sup> This condition results from the body's failure to convert testosterone to dihydrotestosterone, the more powerful form of androgen responsible for the development of male external genitalia.<sup>144</sup> Despite a female appearance during childhood, by the onset of puberty, the body will masculinize. The testes descend, the voice deepens, muscle mass substantially increases, and a "functional" penis that is capable of ejaculating develops from what was thought to be the clitoris.<sup>145</sup> The prostate, however, remains small and beard growth is scanty. Although the individual is typically raised as a girl, at puberty, psychosexual orientation typically becomes male.<sup>146</sup> In other words, virilization will occur at puberty in the absence of medical intervention.<sup>147</sup>

5-Alpha-Reductase Deficiency is an inheritable condition, and has resulted in a large group of affected individuals in some communities in the Dominican Republic.<sup>148</sup> In some cases, a diagnosis is made in early puberty, male external

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37 and accompanying text. According to researchers, two very famous actresses have AIS. Although many people are aware of their condition, they prefer to keep their condition secret. *See id.* at 69–70.

138. *See* Warne, *supra* note 128, at 7.

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See* Imperato-McGinley et al., *supra* note 53, at 1213.

144. *See* MONEY, *supra* note 73, at 44.

145. *See* Imperato-McGinley et al., *supra* note 53, at 1213.

146. MONEY, *supra* note 73, at 44–45.

147. *Id.*

148. *See* Imperato-McGinley et al., *supra* note 53, at 1213. In 1979, a group of researchers described finding thirty-eight cases in twenty-three interrelated families living in three villages in the Dominican Republic. By the time the villages became aware of the problem, eighteen of the males had been raised as girls. Seventeen switched to a male identity after puberty and most have married or at least lived with a woman. Their sexual organs are

development is arrested, and the individual will take exogenous female hormones to simulate a female puberty. In these cases, the individual will often have a female sexual identity. Other individuals with 5-Alpha-Reductase Deficiency will develop a masculine appearance in conformity with their genotype and will also develop a male psychosexual identification.<sup>149</sup>

### *Congenital Adrenal Hyperplasia*

Some individuals with XX chromosomes, ovaries, and other female internal structures have a more masculinized external appearance and/or demeanor due to an abundance of androgen production in-utero. Typical of this category is 21-Hydroxylase Deficiency Congenital Adrenal Hyperplasia ("CAH").<sup>150</sup> It occurs in approximately one out of 5000 to 15,000 births.<sup>151</sup>

Both the chromosomes and gonads of CAH individuals are indistinguishable from unaffected females. The genitals, however, may be ambiguous and may more closely resemble male genitalia.<sup>152</sup>

Some CAH individuals have been identified as males at birth and are reared as boys despite the presence of XX chromosomes and ovaries.<sup>153</sup> In other cases, the masculinization of prenatal life is interrupted at birth, and the child is surgically and hormonally treated and reared as a girl.<sup>154</sup> These girls often have characteristics that are popularly stereotyped as masculine.<sup>155</sup> In addition, many CAH individuals identify themselves as lesbians.<sup>156</sup>

### *Progesterin-Induced Virilization*

Similar to CAH is Progesterin-Induced Virilization ("PIV"), which results from an abundance of male hormones in an otherwise normal XX female. PIV is

adequate for intercourse but they ejaculate through a small opening between their legs because, in the absence of a penis at birth, the urethra ended up close to the normal female position. *See id.* at 1215.

149. *See id.*

150. *See Money, supra* note 83, at 172. CAH originates in a recessive gene, which if it is present in both the sperm and the egg, induces a malfunction of the adrenocortical glands. The glands of the fetus do not secrete cortisol. Instead, they secrete a precursor hormone possessing the androgenic power of masculinization. If the fetus is female, after its internal genitalia have differentiated as female, the androgenic hormone masculinizes the external genitalia. *See id.*

151. *See id.* Medical statistics from developed countries indicate that one out of every 60 males and females carries the recessive gene that can lead to CAH. MONEY, *supra* note 73, at 38. In an isolated and inbred community of Yupik Eskimos in Alaska, the incidence of female CAH live births is 1:141. *See id.*

152. *See Money, supra* note 83, at 172.

153. *See id.*

154. *See id.*

155. *See id.*

156. *See KESSLER, supra* note 7, at 149-50 n.35. One early study of CAH females indicated a 50-50 chance of being lesbian. Recent research, with more sophisticated methodology, indicates that the incidence of lesbianism is probably not as high as 50%, but lesbianism may be more prevalent among intersexed women than among the general female population. *See id.*



caused by exposure in-utero to progestin that has been taken by the mother during pregnancy.<sup>157</sup> Like individuals with CAH, PIV women will frequently have clitoral hypertrophy.<sup>158</sup> In all other respects, however, they have completely female gonads.

#### f. Gender Identity Disorder

Some individuals may be seemingly harmonious in all of the first six factors,<sup>159</sup> but do not identify themselves with the sex associated with these factors. These individuals may be said to have gender dysphoria or gender identity disorder ("GID").<sup>160</sup> Often these individuals are called transsexuals.<sup>161</sup> Science has yet to definitely isolate a biological common denominator that causes these individuals to feel transgendered. A recent study, however, has determined that a section of the brain area that is essential for sexual behavior is larger in men than in women and that the brain structure of genetically male transsexuals is more similar to female brains than to male brains.<sup>162</sup> Some transgendered individuals choose to undergo hormonal treatment and/or surgery so that their bodies comport with their sexual identity while other transsexuals do not choose to undergo such treatment.<sup>163</sup>

Transsexualism is not necessarily related to sexual orientation. Some transsexuals identify themselves as gays or lesbians while others identify themselves as heterosexuals. In other words, a male-to-female transsexual who has undergone

157. See MONEY, *supra* note 73, at 41.

158. See *id.*

159. The first six factors are chromosomes, gonads, external morphologic sex, internal morphologic sex, hormonal sex, and phenotypic sex. See *supra* notes 73–83 and accompanying text.

160. THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) ("DSM-IV") defines GID as "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex" accompanied by a "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." DSM-IV at 532–38. The diagnosis is limited to individuals who do not have a related intersex condition. Those who have a gender identity disorder with a concurrent congenital intersex condition are classified as Gender Identity Disorder not Otherwise Specified. See DSM-IV at 538. This classification may be considered by some to be oxymoronic given that intersexuals by definition have sexual features typical of males and females. Many transgendered activists are advocating that Gender Identity Disorder be removed from the list of mental disorders in the DSM-IV. See, e.g., *Transsexuals Protest at Psychiatry Meeting*, S.F. CHRON., May 24, 1993, at A13. A similar movement by gay and lesbian activists resulted in homosexuality being removed as a mental disorder from the DSM-III in 1973. See Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 456 (1998).

161. The exact incidence of transsexualism is uncertain. Some estimates indicate that between 3000 to 6000 adults have undergone hormonal and surgical "sex changes" in the United States. Another 30,000 to 60,000 consider themselves candidates. Some estimates indicate that about 10,000 transsexuals currently live in the United States. See DAVID W. MEYERS, *THE HUMAN BODY AND THE LAW* 221 (2d ed. 1990).

162. Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68–70 (1995).

163. See GORDENE OLGA MACKENZIE, *TRANSGENER NATION* 6 (1994).

surgery to acquire female genitalia may still prefer to have sex with another female, and a female-to-male transsexual may still prefer to have sex with another male.<sup>164</sup>

#### g. Surgical Creation of an Intersexed Condition

In addition to cases in which intersexed individuals may be assigned a sex that does not comport with their own sexual identity, some persons have had their sexual features altered either accidentally or purposefully. For instance, some individuals have had their penises removed at a young age because they were mistakenly identified as females and the penis was considered an oversized clitoris that required reduction.<sup>165</sup> Although these cases are rare, they are illustrative of the complex nature of sexual identity.<sup>166</sup>

The most famous surgical alteration case involves a male whose penis was accidentally ablated when he was eight months old.<sup>167</sup> The doctors recommended that his genitals be reconstructed to have a female appearance and that he be raised as a girl even though all other sexual factors were congruent and were male.<sup>168</sup> The doctors also recommended that his "history" as a male be hidden from him.<sup>169</sup>

This surgical alteration case made headlines in 1973.<sup>170</sup> Because the doctors involved in the surgical alteration reported that the child and the parents had successfully adapted to the sex/gender alteration, sociology, psychology, and women's

164. See POOL, *supra* note 37, at 137. In one reported case, a married couple decided they were both in the wrong bodies, and they both had sex-change operations. They remained married and reversed roles. The husband became the wife, and the wife became the husband. *Id.*

165. See, e.g., Fayek Ghabrial & Saa M. Girgis, *Reorientation of Sex: Report of Two Cases*, 7 INT'L J. FERTILITY 249, 252 (1962).

166. See, e.g., Bernardo Ochoa, *Trauma of the External Genitalia in Children: Amputation of the Penis and Emasculation*, 160 J. UROLOGY 1116 (1998) (describing a study of seven children in Colombia that was conducted between 1960–1995).

167. Diamond & Sigmundson, *supra* note 2, at 294–304. Other similar cases have been reported. See, e.g., Ochoa, *supra* note 166 (discussing a case in which a boy who was "turned into a girl" requested reassignment to the male sex 14 years later).

168. See Diamond & Sigmundson, *supra* note 2, at 298–99. This recommendation was based on the advice contained in standard medical texts that a male with an inadequate penis will suffer such psychological trauma that he should instead be surgically altered to become a female and should be raised as a girl. Part of this recommendation is based on the fact that it is surgically easier to construct a functional vagina than it is to construct a phallus that is capable of achieving vaginal penetration. See *id.* at 298.

169. See *id.* at 299. Lying to intersexuals about their condition is still the norm. Medical journals still advise doctors to withhold facts from their intersexed patients and their families. As recently as 1995, a medical student was given a cash prize in medical ethics by the Canadian Medical Association for an article that specifically advocated that AIS patients be deceived about the biological facts of their condition. DREGGER, *supra* note 3, at 188. Intersexual activists vigorously argue that lying to patients is not only unethical but also traumatic to the patients when they inevitably discover the truth. *Id.* at 192, 257 n.4.

170. See Reiner, *supra* note 25, at 224–25. It was reported in innumerable textbooks of pediatrics, psychiatry, and sexuality as an example of successful sex reassignment in early childhood. See *id.* at 224.

study texts were rewritten to argue, "This dramatic case...provides strong support...that conventional patterns of masculine and feminine behavior can be altered. It also casts doubt on the theory that major sex differences, psychological as well as anatomical, are immutably set by the genes at conception."<sup>171</sup>

For more than twenty years, the scientific literature continued to report that the surgical alteration was successful and the child's sexual identity was female. This case made headlines again in 1997 when Milton Diamond and Keith Sigmundson reported in the Archives of Pediatric & Adolescent Medicine that the boy who was turned into a girl was now living as a man.<sup>172</sup>

According to the Diamond and Sigmundson report, John (a pseudonym) had always thought of himself as different from other girls. As a child, he preferred "boy" type toys and preferred to mimic his father's rather than his mother's behavior. He also preferred to urinate in a standing position although he had no penis. Because of the cognitive dissonance, Joan (a pseudonym used by the authors to describe John while he lived a female life) often had thoughts of suicide.

At twelve, Joan was put on an estrogen regimen. She rebelled against the regimen and often refused to take the medication. At fourteen, Joan confessed to a doctor that she had suspected that she was a boy since second grade. At that point, the doctors agreed with Joan that she should be remasculinized and become John once more.

At age fourteen, Joan/John returned to living as a male. He received male hormone shots and a mastectomy. He underwent surgery to reconstruct a phallus at ages fifteen and sixteen. John was eventually accepted as a boy by his peers. He is now married and helping to raise his wife's children.

John was not born an intersexual. He became an intersexual when doctors removed his penis, constructed external female genitalia and administered female hormones. Despite this intervention, John always felt that he was not a female.

In another recently reported similar case, a child's penis was severely damaged during a circumcision that was performed when the child was two months old.<sup>173</sup> A decision was made to "turn" the child into a girl. At seven months, surgery was performed to remove the remainder of the male genitalia and from that point on the child was raised as a girl.<sup>174</sup> She was interviewed by a psychiatrist at ages sixteen and twenty-six. The results of these interviews indicate that she self identifies as a bisexual female whose recreational and occupational interests are more typically identified with males.<sup>175</sup>

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171. Diamond & Sigmundson, *supra* note 2, at 303 (quoting TIME MAG., Jan. 8, 1973).

172. See Diamond & Sigmundson, *supra* note 2, at 298-304. The discussion of the facts from the John/Joan case are all taken from the Diamond and Sigmundson study. See *id.*

173. Susan J. Bradley et al., *Experiment of Nurture: Ablatio Penis at 2-Months, Sex Reassignment at 7 Months, and a Psychosexual Follow-up in Young Adulthood*, 102 PEDIATRICS 1 (1998).

174. *Id.* at 3.

175. *Id.*

The significance of these two reports is that they exemplify the difficulty law and medicine must confront in defining sex. At birth, these infants' sex factors were congruent and were male. After the original intervention, they were turned into intersexuals but were treated by society as if they were females. They had male chromosomes, ambiguous genitalia, and female gender assignment. As adults, one person self-identifies as a heterosexual male while the other self-identifies as a bisexual female.

These studies and other reports about intersexuals<sup>176</sup> have forced the medical and psychiatric communities to question their long-held beliefs about sex and sexual identity. Just as current scientific studies have caused the scientific communities to question their beliefs about sex and sexual identity, the legal community must question its long-held assumptions about the legal definitions of sex, gender, male, and female.

"Anatomy does not necessarily the man make."<sup>177</sup>

#### IV. LEGAL DEFINITIONS OF SEX, GENDER, MAN, AND WOMAN: AN ALTERNATE VIEW THROUGH THE LENS OF THERAPEUTIC JURISPRUDENCE

The legal treatment of transgendered individuals varies by jurisdiction and by the underlying legal issue being resolved.<sup>178</sup> Although some jurisdictions allow individuals to amend their official documents to reflect the person's self-identified sex,<sup>179</sup> intersexuals and transsexuals are typically legally categorized by biological criteria that often do not comport with their self-identified sex.<sup>180</sup> The law's insistence on clinging to a binary system that traditionally ignores the importance of self-identification results in transgendered persons being denied the fundamental right to marry.<sup>181</sup> In addition, they may legally be subjected to employment discrimination and are generally denied the right to equal protection of the laws.<sup>182</sup> The traditional jurisprudential approach in this area has resulted in discrimination against a group of people who have been consistently ignored and marginalized by society.

Although scholars in law and other disciplines are beginning to recognize the complex and nonbinary nature of sexual categories,<sup>183</sup> the law has failed to do so.

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176. John Reiner is currently studying "fifteen 46 XY males who were castrated at birth due to severe genital anomalies." Reiner, *supra* note 25, at 225. He also reports on studies of 46 XX subjects with CAH. All the subjects in both studies were reared as females and all "do not appear to be classically male or female, but display masculine characteristics that are in many cases quite striking." *Id.* Two of the children declared themselves to be male before the age of 12. *See id.* *See also* Milton Diamond, *Sexual Identity and Sexual Orientation in Children With Traumatized or Ambiguous Genitalia*, 34 J. SEX RES. 199 (1997).

177. Reiner, *supra* note 25, at 224.

178. *See* discussion *infra* Part IV.A-C.

179. *See* discussion *infra* Part IV.B.

180. *See* discussion *infra* Part IV.A-C.

181. *See* discussion *infra* Part IV.A.

182. *See* discussion *infra* Part IV.C.

183. *See supra* note 23.

The hare of science and technology lurches ahead. The tortoise of the law ambles slowly behind.... [F]undamental problems include the adaptation of notions of human rights to the potentialities of science and technology at the close of the 20th century.... They also include the capacity of our legal system, its institutions and personnel to produce with anything like appropriate speed and satisfaction the legal responses. New institutions are needed to provide those responses in a prompt and coherent way. Otherwise great injustice will be done and the law will increasingly be seen to be irrelevant, incompetent or obstructive.<sup>184</sup>

Lord Justice Ormrod<sup>185</sup> justified the tortoise-like pace that the law has adopted in this area as follows:

The law, which is essentially an artefact (sic), is a system of regulations which depends upon precise definitions;...the law is obliged to classify its material into exclusive categories; it is, therefore, a binary system designed to produce conclusions of the *yes* or *no* type. Biological phenomena however, cannot be reduced to exclusive categories so that medicine often cannot give Yes or No answers.... [P]eople are not either tall or short, they are taller or shorter or about average. This fundamental conflict lies at the root of all relations between medicine and law.<sup>186</sup>

As Judge Ormrod's writings in the 1970s indicate, traditional jurisprudence requires that individuals be classified into discrete and often binary categories even though such categories do not reflect reality. Legal scholars have criticized this traditional binary jurisprudential system for its failure to adequately protect individuals in a society in which people do not fall neatly into two opposite classifications.<sup>187</sup> The inadequacies of a bi-jurisprudence system have been exposed in a variety of areas including race, sexual orientation, and disability law.<sup>188</sup> In addition, legal scholars have begun to criticize the bi-sexual/bi-gender system that limits the sex/gender categories to only male and female.<sup>189</sup>

Legal scholars are currently engaged in a discourse that is exploring the ramifications of a bi-polar racial classification system.<sup>190</sup> The law's bi-polar racial

184. H.A. FINLAY & WILLIAM A.W. WALTERS, *SEX CHANGE, THE LEGAL IMPLICATIONS OF SEX REASSIGNMENT* 45 (1988).

185. Lord Justice Ormrod is the judge who decided *Corbett v. Corbett*, 2 All E.R. 33 (1970), the most often cited case defining male and female for the purposes of marriage. See *infra* notes 260-72 and accompanying text for a detailed discussion of *Corbett*.

186. The Hon. Sir Roger Ormrod, *The Medico-Legal Aspects of Sex Determination*, 40 MEDICO-LEGAL J. 78, 78 (1972).

187. See, e.g., RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996).

188. See *id.*

189. See *id.*; Case, *supra* note 43; Franke, *supra* note 23; Kogan, *supra* note 58; Valdes, *supra* note 22.

190. See, e.g., Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and*

classification system has traditionally defined an individual's race as black or white based upon the one-drop rule.<sup>191</sup> Although participants in the multi-racial discourse disagree about how people of mixed race should be legally categorized,<sup>192</sup> they do agree that some type of rethinking about and recategorization of peoples of mixed race must occur. One of the goals of such a recategorization is to validate the self-identity of mixed race individuals.<sup>193</sup>

Just as scholars in the multi-racial discourse are calling for a rejection of binary categories that measure race by rules like the one-drop rule but minimize the more important factor of racial self-identification, gender scholars must expand the discourse about sexual categories to include individuals who are not clearly of one sex. The dialogue must focus on whether sexual categories should be limited to the two traditional classifications of male and female or whether sex categorization should be expanded to include intersexuality as a sex category.<sup>194</sup> Even if traditional notions of justice require the rejection of multi-sexual categories in favor of a binary system, how the categories male and female are defined must be reexamined. Legal institutions must explore whether the law should continue to rely on traditional sex criteria such as chromosomes, genitalia, and gonads to define one's legal sex or whether these factors should be subordinated to self-identified sex.

The vast majority of reported cases involving sex classification have rejected self-identification as the critical sex determinant. Instead, the judicial system has relied on biological factors like chromosomes, gonads, and genitalia that it believes are objective and fixed.<sup>195</sup> In stark contrast to the law's approach is the reality of current medical and psychiatric practice. Doctors can now alter or remove all the biological sex indicators, other than chromosomes, by the administration of hormones and surgery. Current psychiatric work with transsexuals, however, indicates that sexual self-identity may be biologically based and probably not mutable.<sup>196</sup> In other words, the only sex indicators that are truly fixed are chromosomes and possibly self-identified sex.

This section adds to the multi-sexual/transgender jurisprudence discourse in three ways: (1) it summarizes the cases that have defined the terms "male," "female"

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*the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); Kenneth E. Payson, Note, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233 (1996);

191. See Hickman, *supra* note 190. The one-drop rule is a colloquial expression for the rule that "one drop of Black blood makes a person Black. In more formal, sociological circles, the rule is known as a form of 'hypodescent.'" *Id.* at 1163.

192. See *id.* at 1165.

193. See *id.* Some scholars argue that one of the goals of creating mixed race categories for the census should be to validate the personal identity of those filling out the census forms. See *id.* at 1265.

194. Terry Kogan has argued for the creation of an additional sex/gender category of "Other," while Martine Rothblatt envisions the use of a sexual continuum. See Kogan, *supra* note 58 at 1252-55; Rothblatt, *supra* note 49, at 22.

195. See cases discussed *infra* Part IV.A-C.

196. See Zhou et al., *supra* note 162, at 68-70.

and "sex"; (2) it analyzes the legislative intent supporting the regulations that differentiate between males and females or proscribe behavior based upon sex to determine whether the traditional jurisprudential approach actually accomplishes the presumed legislative goals; and (3) it utilizes the lens of therapeutic jurisprudence to heighten our understanding of the negative impact the current legal approach has on individuals and our society.

"Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent."<sup>197</sup> It views legal rules as social forces that often produce therapeutic or anti-therapeutic consequences.<sup>198</sup> Therapeutic jurisprudence explores the ways in which the law can achieve therapeutic consequences that are consistent with principles of justice and other legal values.<sup>199</sup> The goal of therapeutic jurisprudence is to reduce the law's anti-therapeutic effects, without subordinating important justice values such as due process.<sup>200</sup>

For the laws relating to sex and gender to have the maximum therapeutic impact, transgendered individuals should be allowed to choose whether they want to be identified as male, female, intersexed, or transgendered. Although many transgendered individuals are hesitant to speak, those that have chosen to do so have spoken in one voice.<sup>201</sup> Their stories are of marginalization, shame, and humiliation. Many intersexuals are forming support groups like the Intersex Society of North America ("ISNA"), the Androgen Insensitivity Syndrome Support Group ("AISSG"), Transgender Menace, Klinefelter Syndrome & Associates, and the Genital Mutilation Survivor's Support Network and Workgroup on Violence in Pediatrics and Gynecology. These groups are advocating that society and the medical and legal communities change the way that intersexuals are treated medically and legally. Intersexuals are calling for the right to self-identify their sex rather than having doctors, society, and the law choose their sex for them. If one listens to the people most affected by the laws, the impact of the current laws are clearly not therapeutic. Furthermore, some therapists believe that androgyny is a "healthier gender model for self-actualization and fulfillment than either of the binary genders."<sup>202</sup>

Although achieving therapeutic consequences is a laudable goal, before the law either rejects a binary system or uses a binary system that adopts self-identification as the most critical determinant of one's legal sex, the current system must be analyzed to determine what principles of justice it advances. The underlying purposes of legislation that categorizes people based upon sex need to be examined to determine whether the current interpretation meets its presumed goal.

197. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 645, 646 (David B. Wexler & Bruce J. Winick eds., 1996).

198. *See id.*

199. *See id.*

200. *See id.*

201. For stories of intersexuals, see DREGER, *supra* note 3, at 173-80; KESSLER, *supra* note 7.

202. Holly Boswell, *The Transgender Paradigm Shift Toward Free Expression*, in *GENDER BLENDING* 53, 55 (Bonnie Bullough et al. eds., 1997).

The remainder of Part IV analyzes the major areas of legislation and case law that categorize individuals based upon their status as males and females.<sup>203</sup> In each section, the legislative intent is explored and the case law is examined to determine whether the courts' traditional jurisprudential approach actually accomplishes the legislative intent. The cases are also analyzed to determine whether the law can be reinterpreted to satisfy the legislative intent and achieve greater therapeutic consequences.

### A. Marriage

*Black's Law Dictionary* defines marriage as the "[l]egal union of one man and one woman..."<sup>204</sup> "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children, is as old as the book of Genesis."<sup>205</sup>

Some states have adopted marriage statutes that incorporate this "universal" understanding that marriage requires a man and a woman or two people of the opposite sex.<sup>206</sup> Even in states in which no legislation exists, the assumption of the courts is that a valid marriage requires a union of one man and one woman.<sup>207</sup> This presumption was originally based upon the courts' belief that the "marriage

203. In addition to the subjects discussed in this Part, other areas of the law have sometimes treated men and women differently. *See supra* note 20.

204. BLACK'S LAW DICTIONARY 972 (6th ed. 1990). *Black's Law Dictionary* does not define "woman," although it does define "married woman." *Id.* at 973. It defines man as "a human being," "a person of the male sex," or "a male of the human species above the age of puberty." *Id.* at 960. It defines male as "of the masculine sex." *Id.* at 956. It defines female as "[t]he sex which conceives and gives birth to young.... The term is generic, but may have the specific meaning of 'woman,' if so indicated by the context." *Id.* at 617.

205. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). *See also* *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973).

206. *See infra* notes 210–36 and accompanying text.

207. *See infra* note 254 and accompanying text. The only appellate court to determine that marriage does not require a man and a woman is Hawaii. In *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the Supreme Court of Hawaii held that the state's failure to recognize same-sex marriages is subject to strict scrutiny under the Hawaii Constitution, and the state would have to show a compelling interest to justify its restriction. It remanded the case to the trial court to determine whether the state could demonstrate such an interest. On remand, the trial court found that the state did not demonstrate a compelling interest. *See Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). This decision was stayed, pending a second appeal to the Hawaii Supreme Court, which has not yet ruled on the issue. The courts' actions were challenged by a referendum. On November 3, 1998, voters in Hawaii approved a legislative act to prohibit same-sex marriages in their state. Arlene Levinson, *Some Ballot Decisions Must Wait*, ASSOCIATED PRESS 1998 WL 21783273, Nov. 5, 1998. Alaska voters passed a similar initiative on the same day. *Id.* The Vermont Supreme Court recently heard oral arguments in a case in which same-sex couples are arguing that a prohibition against same-sex marriage violates the Vermont Constitution. Ross Sneyd, *Vermont Courts Take Up Gay Marriage*, ASSOCIATED PRESS, 1998 WL 23032136, Nov. 22, 1998. Every other court that has considered the same-sex marriage issue has upheld the state's right to limit marriages to couples comprised of one male and one female. *See Franke, supra* note 23, at 42 n.165.



relationship exists for the purpose of begetting offspring<sup>208</sup> or that heterosexual intercourse is an essential element upon which the family is built.<sup>209</sup> Given the number of legal marriages between people who cannot procreate or do not intend to procreate, the current intent of these statutes appears to be to insure that the state does not sanction gay and lesbian marriages.

A majority of states have adopted statutes that either define a marriage as a union between a male and a female or prohibit marriages between individuals of the same sex. None of these statutes, however, define or attempt to define who is a male or who is a female. The jurisdictions that either prohibit same sex marriage or define marriage as a union between a man (male) and a woman (female) include: Alaska,<sup>210</sup> Arizona,<sup>211</sup> Arkansas,<sup>212</sup> California,<sup>213</sup> Colorado,<sup>214</sup> Delaware,<sup>215</sup> Florida,<sup>216</sup> Georgia,<sup>217</sup> Hawaii,<sup>218</sup> Idaho,<sup>219</sup> Illinois,<sup>220</sup> Indiana,<sup>221</sup> Kansas,<sup>222</sup> Louisiana,<sup>223</sup> Maryland,<sup>224</sup> Michigan,<sup>225</sup> Minnesota,<sup>226</sup> Missouri,<sup>227</sup> Montana,<sup>228</sup> New Hampshire,<sup>229</sup> North Carolina,<sup>230</sup> Puerto Rico,<sup>231</sup> South Carolina,<sup>232</sup> South Dakota,<sup>233</sup> Texas,<sup>234</sup> Utah,<sup>235</sup> and Virginia.<sup>236</sup>

The Attorney Generals in Alabama,<sup>237</sup> Alaska,<sup>238</sup> Idaho,<sup>239</sup> Kansas,<sup>240</sup>

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208. *B. v. B.*, 355 N.Y.S.2d 712, 717 (N.Y. Sup. Ct. 1974).  
 209. *See* [1970] *Corbett v. Corbett*, 2 All E.R. 33.  
 210. ALASKA STAT. § 25.05.011 (Michie 1998).  
 211. ARIZ. REV. STAT. ANN. § 25-101 (West 1998).  
 212. ARK. CODE ANN. § 9-11-109 (Michie 1998).  
 213. CAL. FAM. CODE § 300 (West 1994 & Supp. 1999).  
 214. COLO. REV. STAT. ANN. § 14-2-104 (West 1997).  
 215. DEL. CODE ANN. tit. 13, § 101(a) (Michie Supp. 1998).  
 216. FLA. STAT. ANN. ch. 741.04 (West Supp. 1999).  
 217. GA. CODE ANN. § 19-3-3.1 (Michie 1998).  
 218. HAW. REV. STAT. § 572-1 (Supp. 1997).  
 219. IDAHO CODE § 32-201 (Michie 1997).  
 220. 750 ILL. COMP. STAT. ANN. 5/212 (West 1998).  
 221. IND. CODE ANN. § 31-11-1-1 (Michie 1997).  
 222. KAN. STAT. ANN. § 23-101 (Supp. 1998).  
 223. LA. CIV. CODE ANN. art. 86 (West 1993).  
 224. MD. CODE ANN., FAM. LAW § 2-201 (Michie 1991).  
 225. MICH. STAT. ANN. § 25.1 (Law. Co-op. 1992 & Supp. 1998).  
 226. MINN. STAT. ANN. § 517.01 (West Supp. 1999).  
 227. MO. ANN. STAT. 451.022 (West 1997).  
 228. MONT. CODE ANN. § 40-1-103 (Darby 1997).  
 229. N.H. REV. STAT. ANN. § 457:1 (Butterworth 1992).  
 230. N.C. GEN. STAT. § 51-1.2 (1997).  
 231. P.R. LAWS ANN. tit. 31, § 221 (Butterworth 1993).  
 232. S.C. CODE ANN. § 20-1-15 (West 1998).  
 233. S.D. CODIFIED LAWS § 25-1-1 (Michie 1998).  
 234. TEX. FAM. CODE ANN. § 36-3-103 (West 1998).  
 235. UTAH CODE ANN. § 30-1-2 (Michie 1995).  
 236. VA. CODE ANN. § 20-45.2 (Michie 1998).  
 237. 190 Ala. Op. Att'y Gen. 30 (1983).  
 238. 1995 Alaska Op. Att'y Gen. (Inf.) 69 (1995).

Maine,<sup>241</sup> Nebraska,<sup>242</sup> South Carolina,<sup>243</sup> Tennessee,<sup>244</sup> Texas,<sup>245</sup> and Virginia<sup>246</sup> have also issued opinions concluding that their respective states prohibit same-sex marriages. In addition, Attorney Generals in Arkansas<sup>247</sup> and Missouri<sup>248</sup> have issued opinions stating that a marriage in these states requires a man and a woman. None of these opinions defines the terms "sex," "man," or "woman."

The Defense of Marriage Act ("DOMA")<sup>249</sup> also defines marriage at the federal level as a "legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife."<sup>250</sup> According to its legislative history, DOMA has two primary purposes: "to defend the institution of traditional heterosexual marriage; and to protect the rights of the states to formulate their own public policy regarding the legal recognition of same-sex marriages."<sup>251</sup> When Congress adopted DOMA, it failed to define the terms "man," "woman," and "sex."

Because legislators have failed to define the terms "male" and "female" or "man" and "woman," courts in the United States and other countries have been forced to define these terms when two people who are arguably of the same sex either seek a marriage license or when an individual seeks to void a marriage based upon the legislative prohibition against same-sex marriages.<sup>252</sup> Gay and lesbian couples who are not transgendered have brought numerous cases seeking to have their marriages recognized.<sup>253</sup> In these cases, the courts have consistently held that marriage between individuals of the same sex is not allowed.<sup>254</sup> None of these cases, however, raised the

239. 1993 Idaho Op. Att'y Gen. 119 (1993).

240. Kan. Att'y Gen. Op. No. 77-248 (1997).

241. Me. Att'y Gen. Op. No. 84-28 (1984).

242. 1977 Neb. Op. Att'y Gen. No. 170 (1977).

243. 1996 WL 265499 (South Carolina 1996).

244. Tenn. Op. Att'y Gen. No. 88-43 (1988). This opinion held that two people of the same sex could not obtain a valid marriage license. It further opined that a Tennessee court might find that sex change surgery does not alter a person's sex for purposes of obtaining a valid marriage license because a person's sex is determined at birth under Tennessee law.

245. Tex. Op. Att'y Gen. No. M-1216 (1972).

246. 1977-78 Va. Op. Att'y Gen. 154 (1977).

247. Ark. Op. Att'y Gen. No. 95-062 (1995).

248. Mo. Ag. Op. Letter No. 203-96 (1996).

249. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

250. 1 U.S.C. § 7 (Supp. 1997).

251. 28 U.S.C.A. § 1738C (West Supp. 1998); H.R. Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2906.

252. Thus far, all the reported cases have involved one of two scenarios. Either a party to the marriage seeks to have the marriage declared invalid or two individuals who are arguably of the same sex seek state sanction of their marriage. Whether the state or a third party could successfully initiate an action to invalidate a marriage between individuals who are arguably of the same sex is an open question because thus far no such actions have been brought.

253. *See, e.g.,* *Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. 1974).

254. *See Dean*, 653 A.2d at 308-09; *Baker*, 191 N.W.2d at 186; *Jones*, 501 S.W.2d

issue of how to define the critical terms "male" and "female" because the petitioners' sex was not at issue.

A handful of cases involving the validity of a marriage in which one of the parties was a transsexual have been brought and it is in these cases that the courts have struggled to define the terms "male" and "female."<sup>255</sup> In addition to the actions involving transsexuals, one case involving an intersexual was brought in Australia.<sup>256</sup> The courts in these cases have split sharply over how to define the terms. Most have looked to strictly biological criteria at birth and have ignored self-identified sex and medical or surgical intervention.<sup>257</sup> Other courts have given more weight to an individual's self-identified sex.<sup>258</sup> These cases are summarized in detail below. The discussion begins with an English case, *Corbett v. Corbett*,<sup>259</sup> because it was the first case to address this issue. In addition, *Corbett* contains the most detailed analysis of the criteria that should legally determine sex and it is the most often cited case involving the validity of a marriage in which one party was a transsexual. This section continues with an analysis of all the cases in the United States and the major cases in other countries that have attempted to define the terms "male" and "female" for purposes of marriage.

### 1. England

In *Corbett v. Corbett*, a post-operative male-to-female transsexual married a male.<sup>260</sup> After spending only fourteen days together, the husband filed for a declaration that the marriage was void or in the alternative that a nullity should be granted.<sup>261</sup> His petition was based on two claims: (1) the marriage was invalid because it was between two individuals of the same sex; and (2) the marriage could not be consummated because the respondent was incapable of "true" sexual intercourse because respondent had an "artificial" vagina.<sup>262</sup> The court held that the "true sex" of both parties in this marriage was male and "true intercourse" was impossible.<sup>263</sup>

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at 590; *Singer*, 522 P.2d 1187. For a discussion of currently pending cases, see *supra* note 207.

255. See cases discussed *infra* in this Part. None of these cases were brought by transsexuals seeking to have their marriages validated. Instead, these actions were all brought by people married to transsexuals. The petitioners were seeking annulments of their marriages on the grounds that the marriages were not between people of the opposite sex. Although no-fault divorce laws make it easier to obtain a dissolution of a marriage, whether a marriage ever legally existed may be critical to crucial issues such as paternity, child custody, and support obligations.

256. In *In Marriage of C. and D., (falsely called C.)*, 35 F.L.R. 340 (1979). See *infra* notes 304-10 and accompanying text for a detailed discussion of this case.

257. See, e.g., *Corbett v. Corbett*, [1970] 2 All E.R. 33; *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987).

258. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. 1976).

259. See [1970] 2 All E.R. 33.

260. See *id.* at 34.

261. See *id.*

262. See *id.*

263. *Id.* at 49-50.

The court engaged in a lengthy and in-depth analysis of the medical and psychological aspects of transsexualism and intersexuality.<sup>264</sup> Although it acknowledged that medical professionals use more factors to determine the appropriate sex in which an individual should live, the court used only three factors to determine one's sex for the purposes of marriage: chromosomes, gonads, and genitalia.<sup>265</sup> According to the *Corbett* court, chromosomal pattern, gonadal sex, and genitalia define an individual's "true sex."<sup>266</sup>

Because the respondent had male chromosomes (XY) at birth and at the time of the trial, and male gonads (testicles) and genitals (penis) at birth, the court ruled that the respondent was a male.<sup>267</sup> The court opined that an individual's biological sex was assigned at birth and, barring an error, could not later be changed either medically or surgically.<sup>268</sup>

The court acknowledged that an individual's sex may need to be defined differently for different purposes. Given the "essentially heterosexual" character of the marital relationship, however, it found that respondent must be capable of naturally "performing the essential role of a woman in marriage."<sup>269</sup>

Even though the court found that the marriage was invalid because it was between two men, it also discussed the petition for nullity based upon incapacity to consummate the marriage.<sup>270</sup> It found that "sexual intercourse, using the completely artificial cavity," cannot be described as "ordinary and complete intercourse."<sup>271</sup> It

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264. See *id.* at 42–46. The medical evidence in this case was incomplete because no pre-surgical medical reports were available. Some evidence indicates that the respondent may have been an intersexual. One expert testified that respondent may have suffered from partial testicular failure or Klinefelter's Syndrome. Although the evidence was ambiguous, the court ruled that the evidence did not establish that the respondent was an intersexual. The court did concede that some abnormality in androgenization at puberty could not be excluded. *Id.* at 46.

265. *Id.* at 44. In support of the test the court developed, it cited medical professionals who testified that individuals with congruent chromosomes, gonads, and genitalia are not true intersexuals if only their hormones or psychological sex are incongruent with these three factors. Other experts testified that transsexuals should be classified as intersexuals. See *id.* at 45.

266. *Id.* at 48. England continues to apply this three-part test. See, e.g., *J v. S-T* (formerly J), [1998] 1 All E.R. 431; *The Rees Case*, [Eur. Ct. of H.R. 1987] 2 FLR 111; *The Cossey Case*, [Eur. Ct. of H.R. 1993] 2 FLR 492. Because England has held that transsexuals do not acquire their post-operative sex, two self-identified lesbians, one of whom is a post-operative transsexual, have been legally allowed to marry in England. See *Beattie & Lain*, *supra* note 14, at 2.

267. See *Corbett*, 2 All E.R. at 48. In this case, all three factors were congruent so the court held the respondent's sex was unambiguous. In many intersexual conditions, these three factors are not congruent. See *supra* notes 98–158 and accompanying text. The court acknowledged that its test may be difficult to apply in a case of intersexuality. The court stated in dictum that greater weight should be given to genital criteria in such a case. See *id.*

268. See *id.* at 47. The court stated that the only cases in which the term "change of sex" is appropriate are those in which a mistake in sex designation is made at birth and is subsequently revealed by further medical investigation. See *id.*

269. *Id.* at 48.

270. See *id.* at 49.

271. *Id.*

further stated, "When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres."<sup>272</sup>

## 2. United States

Five state courts<sup>273</sup> and one U.S. circuit court<sup>274</sup> have addressed the issue of the legal sex of transsexuals for purposes of determining the validity of a marriage. Courts in New Jersey and California have ruled that post-operative transsexuals legally acquire their post-operative sex. Courts in New York and Ohio have followed *Corbett* and ruled that post-operative transsexuals are legally the sex opposite their self-identified sex.

New Jersey: *M.T. v. J.T.*<sup>275</sup> is the only decision in the United States that contains an in-depth analysis of how to determine an individual's legal sex for purposes of marriage. In *M.T.*, a male married a post-operative male-to-female transsexual.<sup>276</sup> The husband later sought an annulment of the marriage on the ground that the marriage was invalid because it was not between a man and a woman. The

272. *Id.* In this case, the respondent's vagina was constructed by turning in the skin of the penis after removing the muscle and other tissues from it. It formed a cavity occupying approximately the same position as the vagina in a female. *Id.* at 36. Prior to *Corbett*, the Court of Appeal in *S. v. S. (otherwise W.)*, [1962] 3 All E.R. 55, also addressed the issue of physical incapacity. In *S v. S*, the wife's vagina was too short to permit full penetration. According to the medical evidence, it could be enlarged by an operation. The operation would involve removing soft tissues where the normal vagina would be and lining it with skin from another part of the body. The husband petitioned for nullity based upon the wife's inability to consummate the marriage. The court denied the petition and held that creation of an artificial vagina would allow for sexual acts and marital consummation. *Id.* at 55.

In *S. v. S.*, the husband claimed that the wife either had an inadequate vagina or in the alternative no vagina. The court analyzed the wife's physical condition in detail and considered both of the husband's claims. It held that regardless of whether an inadequate vagina or no vagina originally existed, penetration of the surgically created artificial cavity that was in the proper location for a vagina would constitute intercourse for the purposes of consummation of a marriage. *Id.*

The *Corbett* court rejected the language in *S. v. S.*, referring to an artificial vagina, as unnecessary for that decision. In addition, it distinguished the two cases because in *S. v. S.* the wife's status as a woman was not questioned. The *Corbett* court never adequately distinguished its holding from the holding in *S. v. S.* Instead, it avoided the issue by finding "certain dangers in attempting to analyse too meticulously the essentials of normal sexual intercourse...." *Corbett*, 2 All E.R. at 50.

273. *Vecchione v. Vecchione*, Civ. No. 96D003769, reported in L.A. DAILY J., Nov. 26, 1997, at 1; *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976); *B. v. B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

274. *Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980).

275. 355 A.2d 204 (N.J. 1976).

276. *See id.* The surgery was performed after the couple met and was paid for by the husband. Therefore, there was no claim of fraud. The husband sought the annulment to avoid having to pay support and maintenance. *See id.* at 205.

court ruled that the post-operative male-to-female wife was a woman for purposes of determining the validity of the marriage.<sup>277</sup>

The New Jersey court acknowledged that several criteria may be relevant in determining an individual's sex.<sup>278</sup> It also declared that in most instances external genitalia should be the most significant determinant of sex classification at birth.<sup>279</sup> The court distinguished sex classification at birth from other areas and found that for purposes such as public records, service in the military, participation in athletic competitions, and eligibility for certain kinds of employment, other tests in addition to genitalia may be important.<sup>280</sup> The court decided that the most humane and accurate test for "true sex" would be to analyze both anatomy and gender. If the genitalia conform with a person's gender, psyche, or psychological sex, then that will be the true sex for purposes of marriage.<sup>281</sup> According to this court, because sexual capacity is necessary for consummation of a marriage, the genitalia must be capable of sexual intercourse.<sup>282</sup>

California: The California appellate courts have not yet been faced with the issue of the validity of a marriage involving a transgendered person. Recently, however, an Orange County Superior Court, in *Vecchione v. Vecchione*,<sup>283</sup> held that a post-operative female-to-male transsexual was a male and his marriage to a female was valid in California.<sup>284</sup>

New York: New York courts have addressed the issue of the validity of a marriage involving a transsexual on two occasions. In *Anonymous v. Anonymous*,<sup>285</sup> a male married a pre-operative male-to-female transsexual. When the couple married, the husband believed his wife was a female and was unaware that his wife was a transsexual. At the time the husband sought to have the marriage declared invalid, the wife had undergone surgery.<sup>286</sup> The court invalidated the marriage but it did not analyze which factors should determine whether an individual is a male or a female.<sup>287</sup> Although it acknowledged that the defendant's post-marital surgery may have altered the defendant's sex, it also volunteered that "mere removal of the male organs would not, in and of itself, change a person into a true female."<sup>288</sup>

277. *See id.* at 211.

278. *See id.* at 208–10.

279. *See id.* at 208–09.

280. *See id.*

281. *See id.* at 209.

282. *See id.*

283. Civ. No. 96D003769, reported in L.A. DAILY J., Nov. 26, 1997, at 1.

284. *See id.* The issue in this case was whether the marriage between Joshua Vecchione and Kristie Vecchione was valid. Kristie maintained that Joshua should not have custody rights to the child who was conceived during their five year marriage by artificial insemination using sperm from Joshua's brother. If Kristie could successfully void the marriage, Joshua would not be the child's legal father. The court ruled that the marriage was valid and Joshua was the legal father. *Id.*

285. 325 N.Y.S.2d 499 (Sup. Ct. 1971).

286. *See id.*

287. *See id.* at 500–01.

288. *Id.* at 500.

In *B v. B*,<sup>289</sup> a post-operative female-to-male transsexual married a woman who later sought to have the marriage annulled. The annulment was sought based on the husband's inability to perform sexual intercourse as a male. The court conceded that the defendant may function as a male in other situations, but he could not function as a husband by assuming male duties and obligations inherent in the marriage relationship.<sup>290</sup> Specifically, the court found he did not have the "necessary apparatus to enable defendant to function as a man for the purposes of procreation."<sup>291</sup> Because New York law provided that physical incapacity for sexual relations was a ground for annulment, the court found that under the state public policy, the marriage relationship was for the purpose of begetting offspring.<sup>292</sup>

Ohio: The Ohio Probate Court, in *In re Ladrach*,<sup>293</sup> held that a post-operative male-to-female transsexual could not be issued a marriage license to marry a male.<sup>294</sup> The court appeared to base its holding on two factors: (1) the post-operative transsexual was a male at birth based upon all biological factors; and (2) no laboratory evidence indicated that the petitioner had anything other than male chromosomes.<sup>295</sup> Therefore, the court held that the post-operative male-to-female transsexual's legal sex was male.<sup>296</sup>

Because the Ohio court held that post-operative transsexuals do not acquire their post-operative sex, an Ohio probate judge recently allowed Paul Smith, a pre-operative male-to-female transsexual who self-identifies as a lesbian, to marry a woman.<sup>297</sup> Although Paul dresses like a female, identifies as a lesbian, plans to legally change her name to Denise, and plans to undergo sex-modification surgery, her marriage to another female is legal.<sup>298</sup>

Fifth Circuit: In *Von Hoffburg v. Alexander*,<sup>299</sup> Marie Von Hoffburg sought legal redress for her discharge from the United States Army because of her alleged homosexual tendencies. The army discharged her even though she identified herself as a heterosexual.<sup>300</sup> The alleged homosexual tendencies were based on her marriage to Kristian Von Hoffburg, a female-to-male transsexual.<sup>301</sup> The court's disposition was not based upon Von Hoffburg's sexual orientation or her partner's sex.<sup>302</sup> Instead,

289. 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

290. *See id.* at 717.

291. *Id.*

292. *See id.* at 717 (citing *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926)).

293. 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

294. *See id.* at 832. In addition, the court held that the petitioner was not entitled to change the sex designation on her birth certificate. *See discussion infra* notes 394-98 and accompanying text.

295. *See id.*

296. *See id.*

297. *See* Scruggs, *supra* note 14.

298. *See id.* The judge who granted the marriage license would not comment on the fact that the couple will be a "walking, talking, challenge to the state's definition of conjugality." *Id.* at 1B.

299. 615 F.2d 633 (5th Cir. 1980).

300. *See id.*

301. *See id.* at 635.

302. *See id.* at 636. This case is notable because it illustrates how the determination

the court dismissed the case because the plaintiff had failed to exhaust her administrative remedies. In an interesting footnote the court stated: "We do not know, factually, whether Kristian Von Hoffburg is a biological female, or a biological male, or both."<sup>303</sup>

### 3. Australia

*In Marriage of C. and D. (falsely called C.)*<sup>304</sup> is the only reported case to determine an intersexual's sex for purposes of marriage. The husband was a true hermaphrodite with an XX chromosomal pattern and a combination of male and female biological aspects.<sup>305</sup> The parties married in 1967 and lived together for twelve years until 1978.<sup>306</sup> The couple raised two children who were considered children of the marriage although neither was the biological child of the husband.<sup>307</sup> The husband had undergone a number of surgeries to "correct" his external sex organs and to remove both his breasts so that his external appearance would be male. The wife testified that her husband had been unable to consummate the marriage.<sup>308</sup>

The court granted the wife's petition for nullity of marriage on the ground that her consent to the marriage was based upon a mistake as to the identity of the other person.<sup>309</sup> According to the court, the wife believed she was marrying a male, but in fact she had married someone who was neither a male nor a female. Although the husband had male gonads and genitalia, he had the chromosomal configuration typical of a female. Therefore, the court concluded that he was neither a male nor a female. Implicit in the court's ruling is that intersexuals who have incongruent sexual features (a mixture of male and female gonads, genitalia, and chromosomes) may not legally marry anyone at all.<sup>310</sup>

### 4. Canada

Courts in Canada have not reached consistent results in marital annulment cases. For example, in *C v. C*,<sup>311</sup> a female-to-male transsexual, who received hormone treatment, underwent a hysterectomy, and had her breasts surgically removed, married a woman who four years later sought an annulment.<sup>312</sup> The court held that the transsexual had not "changed" her sex to male because her genitalia had not been

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of one person's sex may establish the sexual orientation of his/her partner.

303. *Id.* at 635 n.4.

304. (1979) 35 F.L.R 340.

305. *See id.* at 342.

306. *See id.* at 341.

307. *See id.* One child was adopted and one child was the biological child of the mother but not of the father.

308. *See id.* at 342.

309. *See id.* at 343-44.

310. *See id.* at 345. The court stated: "I am satisfied on the evidence that the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word...could not have taken place and does not exist." *Id.*

311. 1992 Ont. C.J. Lexis 1518 (1992).

312. *Id.* at \*2.



surgically altered.<sup>313</sup> Therefore, the court held the marriage was invalid.<sup>314</sup> In other words, the court held that a transsexual who identifies as a male and has no breasts or internal female organs is a female for purposes of marriage.

In *M v. M*,<sup>315</sup> however, a Canadian court held that a marriage between a male and a non-operative female-to-male transsexual, who had all female attributes except that she self-identified as a male, was also void. The court's interpretation of marital annulment statutes in *M v. M* was completely illogical.<sup>316</sup> Even though the marriage had been consummated and all the wife's physical attributes were still female, except her self-identified sex, the court held that she had a latent inability to engage in heterosexual intercourse with a male. This latent inability to engage in heterosexual sex rendered the marriage voidable.<sup>317</sup> The court ignored the distinction between sexual identity and sexual orientation. The court did not attempt to determine the biological attributes that should define whether one is a male or female. Instead, it jumped to the unsubstantiated and erroneous conclusion that a transsexual was incapable of heterosexual relations and the marriage was therefore voidable.<sup>318</sup>

Although the court's analysis on the nature of transsexuality and its relationship to sexual orientation was not sound, if other Canadian courts follow the holding in *M v. M*, transsexuals should be able to marry in Canada based upon their self-identified sex rather than based upon their chromosomes or pre-operative physical attributes. In other words, the *M v. M* court implicitly held that transsexuals acquire their self-identified sex. To hold otherwise would result in transsexuals being barred from marrying anyone.<sup>319</sup>

### 5. European Court of Human Rights

Transsexuals who, by the laws of their home country, have been denied the right to marry as their post-operative sex have filed complaints with the European Court of Human Rights.<sup>320</sup> They have alleged that a failure to recognize their right to marry in their postoperative sex is a violation of Article 12 of the Convention for the

313. *Id.* at \*4.

314. *Id.*

315. 42 R.F.L. (2d) 55 (1984).

316. Attorney-General v. Otahuhu Family Court, [1995] 1 NZLR 603. This New Zealand court characterized *M. v. M.* as "illogical and difficult to rationalize on any reasonable basis." *Id.* at 618.

317. *M. v. M.*, 42 R.F.L. at 59.

318. *Id.* at 59. The court presumed that a transsexual who acknowledges his/her transsexual identity would find the act of heterosexual intercourse...abhorrent...." *Id.* Therefore, the court found that the marriage relationship, "being heterosexual in nature, was incompatible with the inherent nature" of the transsexual. *Id.*

319. Barring transsexuals and intersexuals from marrying anyone at all is an extreme interpretation of the law. However, courts have reached this conclusion. *See, e.g., supra* notes 304-10 and accompanying text. Given the Canadian court's confusion regarding the relationship between sexual orientation and sexual identity, it is possible that Canadian courts may simply ignore this decision.

320. *See, e.g.,* The Cossey Case, [Eur. Ct. of H.R. 1991] 2 FLR 492; The Rees Case, [Eur. Ct. of H.R. 1987] 2 FLR 111.

Protection of Human Rights and Fundamental Freedoms which provides: "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."<sup>321</sup> The European Court of Human Rights has consistently held that denying transsexuals the right to acquire their post-operative sex identity and engage in what the transsexual identifies as a heterosexual relationship, but what the law of the governing country views as a gay or lesbian relationship, is not a violation of Section 12.<sup>322</sup>

### 6. New Zealand

The High Court of Wellington, in *Attorney General v. Otahuhu Family Court*,<sup>323</sup> ruled that a post-operative transsexual acquires his/her self-identified sex for purposes of marriage. The court recognized that marital law in New Zealand has shifted away from focusing on sexual activity<sup>324</sup> and now places more emphasis on the psychological and social aspects of sex.<sup>325</sup> The court criticized the *Corbett* court's emphasis on chromosomes, genitals, and gonads and its failure to recognize the overriding importance of social and psychological factors.<sup>326</sup>

### 7. Singapore

The Singapore High Court, in *Lim Ying v. Hiok Kian Ming Eric*,<sup>327</sup> granted a petition for nullity of marriage to a woman who had unknowingly married a post-operative female-to-male transsexual. The wife sought the nullity on the grounds that the "husband" was a biological female and non-consummation of the marriage.<sup>328</sup> The court focused its analysis on the definition of male for purposes of Singapore marital law.<sup>329</sup> The court summarized the cases that had thus far resolved the issue and rejected the holdings of courts that allowed transsexuals to acquire their post-surgical sexual identity. Instead, it cited *Corbett* with approval and ruled that a person's sex at birth established the legal sex for purposes of marriage despite any subsequent medical intervention.<sup>330</sup>

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321. Convention for the Protection of Human Rights and Fundamental Freedoms, Article 12.

322. See, e.g., *The Cossey Case*, 2 FLR at 43; *The Rees Case*, 2 FLR at ¶ 51.

323. [1991] 1 NZLR 603.

324. See *id.* at 606. To support this finding, the court analyzed common law and ecclesiastical law. Neither common law nor ecclesiastical law ever required the ability to procreate as a prerequisite to a valid marriage. Although sexual activity (ability to consummate the marriage) used to be a grounds for voiding a marriage, this rule was no longer true in New Zealand at the time that this case was brought. See *id.*

325. See *id.*

326. See *id.* at 607.

327. [1991] SLR Lexis 184.

328. See *id.* at \*8.

329. See *id.* at \*9.

330. See *id.* at \*36.

### 8. South Africa

A South African court held a marriage between a male and a post-operative male-to-female transsexual void in *W v. W*.<sup>331</sup> Although the marriage had been consummated, the court held that the wife only had the "artificial attributes" of a woman and was not a woman for purposes of marriage. The court referred to her as a "pseudo-type" of woman and held that the operation had not converted her into a female.<sup>332</sup>

As indicated above, only two states in the United States, New Jersey and California,<sup>333</sup> and one country, New Zealand, have emphasized the importance of psychological sex in determining an individual's legal sex for purposes of marriage. All the other courts have ruled that criteria other than psychological sex establish an individual's legal sex for purposes of marriage.

The legislative intent of marriage statutes is to limit marriage to heterosexual unions.<sup>334</sup> Given that marital statutes presume that marriage requires two people of the "opposite" sex, binary categories may be necessary. If, however, the law's purpose is to prohibit same-sex marriages, defining sex based upon one's genitals, gonads, chromosomes, or some combination thereof will in many cases frustrate the legislative intent. Utilizing these tests has already resulted in the legal sanctioning of some self-identified gay and lesbian marriages.<sup>335</sup> Furthermore, it could result in the invalidation of many heterosexual marriages involving intersexuals. For instance, individuals with CAIS, who are born with male chromosomes, male gonads, female genitalia, and a female phenotype and sex identity may be barred from marrying a male even though society would clearly recognize them as women.

If the law allows individuals to establish their sex by self-identification, opponents of same-sex marriage may fear that gays and lesbians will fraudulently identify themselves as a person of the other sex so that they can obtain a marriage license and all the legal and societal benefits that are inherent to the marital relationship. This concern is unjustified. Gays and lesbians whose self-identified sex is consistent with their other biological factors are unlikely to disavow their sexual identity. If they were willing to do so, they could currently marry in some jurisdictions because many agencies will issue marriage licenses without requiring the applicants to submit any legal proof of their sex.<sup>336</sup> Therefore, individuals who are willing to

331. [1976] 2 SALR 308.

332. *Id.* at 313.

333. The trial court's ruling in the California case does not establish the law in California.

334. *See supra* notes 249–51 and accompanying text. A critique of the statutes and cases that prohibit gay and lesbian marriages is beyond the scope of this Article and has been thoroughly discussed in other scholarly works. For an overview of these issues, see *SAME-SEX MARRIAGE: PRO AND CON* (Andrew Sullivan ed., 1997). Many thoughtful scholars have provided persuasive critiques of the laws that limit marriages to heterosexual unions. Despite these criticisms, it appears that marriage will continue to be limited to heterosexual unions in most if not all jurisdictions for the foreseeable future. *See supra* note 207.

335. *See supra* note 14 and accompanying text.

336. *See infra* note 341 and accompanying text. The statutes that require identification to obtain a marriage license focus on establishing each applicant's age rather than

present themselves as the "other" sex may already obtain marriage licenses in some states. Furthermore, lesbians and gays are unlikely to fraudulently claim they are of the "other" sex just to obtain benefits that are available only to married couples. Many benefits available only to married couples do not require proof of a valid marriage license. For example, couples who file joint tax returns or who seek to put each other on employee health benefit plans often do not need to provide any proof that a legal marriage has occurred. Therefore, the argument that gays and lesbians will flock to the courthouse and fraudulently claim to be of the other sex is specious. They are no more likely to fraudulently disavow their self-identified sex than they are to fraudulently claim they are already in a heterosexual marriage.

Although modern society bans same-sex marriages to prevent gay and lesbian unions, same sex unions have existed in a variety of cultures.<sup>337</sup> Countless female couples have married because one of the women "passed" as a man.<sup>338</sup> In addition, the unwillingness of some courts to allow transgendered people to marry according to their self-identified sex has resulted in what many would consider to be state-sanctioned gay and lesbian marriages, a result directly contrary to the legislative intent.<sup>339</sup> Blind adherence to criteria like chromosomes, gonads, or genitalia does not achieve the legislative intent to ban same-sex marriages. In addition, use of such factors may not accurately reflect society's concept of sex and gender.<sup>340</sup> Furthermore, identifying intersexuals according to biological criteria that do not comport with their own self-identified sex can only result in their further marginalization. Allowing self-identification to be the controlling factor for determining sex for marital purposes will just as effectively accomplish the legislative intent and will have a much more therapeutic effect for the people involved.

### *B. Official Documents*

Many official documents, including birth certificates, passports and driver's licenses, indicate an individual's sex. These documents are used for a variety of purposes including security clearances, proof of citizenship, proof of age for life insurance and social security, and selective service registration. In addition, these documents are required for identification purposes in a variety of circumstances including crossing at international borders and engaging in financial transactions. If the sex designation on these documents does not match the apparent sex of the holder, embarrassment and other more severe consequences will obviously occur. Whether these documents will also establish an individual's sex for purposes of marriage varies

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his or her sex. *See infra* note 341 and accompanying text.

337. *See* ESKRIDGE, *supra* note 57, at 37.

338. *See id.* at 38. Recently, media attention has focused on Billy Tipton, a jazz player who was raised as a girl but lived his adult life as a man. Billy was assumed to be a man by society and his family (including his four wives and three children) until it was discovered upon his death in 1989 that he was a biological woman. *See, e.g.*, Ann Japenga, *The Great Pretender for 50 Years, Jazz Musician Billy Tipton Passed for a Man*, L.A. TIMES, Sept. 23, 1998, at E-1.

339. *See supra* note 14 and accompanying text.

340. *See supra* note 16 and accompanying text.

among jurisdictions because the identification necessary to obtain a marriage license varies.<sup>341</sup>

### 1. Birth Certificates

Because the birth certificate is the first official document to indicate sex, it usually controls the sex designation on all later documents.<sup>342</sup> As indicated in Part II, sex on the birth certificate is usually established by the medical attendant assisting at the birth. The presence of an adequate penis typically leads to the label male, while the absence of an adequate penis leads to the label female.<sup>343</sup> If the external genitalia are ambiguous, medical officials will typically recommend that the genitalia be modified so that they have a clearly male or female appearance. Then, the official sex indicated on the certificate will comport with the appearance of the genitalia.<sup>344</sup>

If an error is made on the original certificate, a new or amended certificate will generally be issued. Changes in the birth certificate due to a later "change of sex" are not as easily obtained.<sup>345</sup>

The right to obtain a new<sup>346</sup> or amended<sup>347</sup> birth certificate varies by jurisdiction.<sup>348</sup> Several state legislatures have adopted statutes that authorize the

341. See, e.g., IND. CODE ANN. § 31-11-4-6 (Michie Supp. 1998); MISS. CODE ANN. § 93-1-5 (1994). These statutes require the submission of a birth certificate or driver's license or other written evidence to obtain a marriage license. Statutes that require some form of identification are typically used to establish the applicant's age and not the applicant's sex. See, e.g., IND. CODE ANN. § 31-11-4-6 (Michie Supp. 1998); MISS. CODE ANN. § 93-1-5 (1994).

342. See, e.g., Foreign Relations, Evidence of U.S. Citizenship or Nationality, 22 C.F.R. § 51.43 (1999) (requiring the submission of a certified copy of a birth certificate to obtain a passport).

343. See *supra* notes 26–29 and accompanying text.

344. See *supra* note 31 and accompanying text.

345. See *infra* notes 348–97 and accompanying text. Once the birth certificate is amended, it will often be used as proof to obtain other official documents. An amendment to a birth certificate, however, will not necessarily control an individual's sex for other purposes. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. 1976) (holding that the factors that control sex for marriage may be different from the factors used to establish sex on the birth certificate).

346. If a new certificate is issued, the change will not appear as a modification; instead, it will appear as if it was the original entry. In other words, if the original sex designation was male and the change requests an amendment of the sex to female, the new birth certificate will indicate the sex as female.

347. If a birth certificate is amended, the alteration to the birth certificate is indicated along with the original entry. Therefore, if the sex indicated is changed, the birth certificate will show the original assigned sex as well as the new sex designation.

348. See *infra* notes 349–97 and accompanying text. In some jurisdictions in the United States, the right to amend the birth certificate is controlled by statute, and in others it is controlled by court decision. See *infra* notes 349–97 and accompanying text.

Similarly, some legislatures in European countries such as Sweden, Czechoslovakia, Greece, Italy, Holland, Switzerland, and Finland allow a sex change to be made to one's official documents. In those countries in which the legislature has not specifically approved such a change, the ability to amend the sex designation has also been tested in the courts with diverse results. See, e.g., *In re P and G*, 2 FCR (Queens Bench 1996); *B. v. France*, [Eur. Ct. of H.R. 1992] 2 FLR 249; *The Rees Case*, [[Eur. Ct. of H.R. 1987] 2 FLR 111. Some courts will allow

issuance of a new birth certificate indicating a sex other than the one designated on the original certificate.<sup>349</sup> These statutes generally authorize the issuance of a new birth certificate upon presentation of an affidavit from a physician stating that the sex designation on the original birth certificate was incorrect or has changed from the original sex designated at birth.<sup>350</sup> Other states require a court order before the sex designation can be changed.<sup>351</sup> Still other jurisdictions authorize the issuance of an amended certificate rather than permitting the issuance of a new certificate.<sup>352</sup> Some states require a court order prior to allowing an amendment to the birth certificate,<sup>353</sup> while others will amend the certificate based upon a doctor's affidavit.<sup>354</sup> At least one state specifically forbids the changing of a birth certificate to accommodate the results of a change in sex.<sup>355</sup>

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a change of sex designation while others will deny it. The approaches taken in these cases are typical of the approaches taken by the U.S. courts.

Although the reported cases all involve transsexuals, it appears that intersexuals may also have problems amending their birth certificates in some jurisdictions. For instance, in England, it took nine years and 47 pages of evidence to convince the Office of National Statistics to alter a child's birth certificate from male to female. The child was born with a rare medical condition that caused such disfigurement to the lower body that doctors had difficulty determining the appropriate sex. Because the child had XY chromosomes, he was identified as a male on his official documents. On his first birthday, doctors advised the parents to raise the child as a girl, and soon thereafter the child underwent a series of operations to "become a female." The child has been raised as a girl since her first birthday. Although the parents immediately petitioned for an amended birth certificate, it took nine years to convince the authorities to issue one. Stuart Millar, *Joel, 10, Becomes Joella after Lifelong Fight for New Birth Certificate*, LONDON GUARDIAN, Dec. 2, 1998, at 002.

349. See, e.g., ARIZ. REV. STAT. ANN. § 36-326(a)(4) (West 1993); CAL. HEALTH & SAFETY CODE §§ 103,430, 103,425 (West 1997); HAW. REV. STAT. § 338-17.7 (1993); 410 ILL. COMP. STAT. ANN. § 535-17 (West 1997); IOWA CODE ANN. § 144.23.3 (1997); LA. REV. STAT. ANN. § 40:62 (West 1992); MICH. COMP. LAWS § 333.2891 (1998); MISS. CODE ANN. 41-57-21 (1998); N.C. GEN. STAT. § 130A-118(b)(4) (1997).

350. See, e.g., ARIZ. REV. STAT. ANN. § 36-326(a)(4) (West 1993); HAW. REV. STAT. § 338-17.7 (1993); 410 ILL. COMP. STAT. ANN. § 535-17 (West 1997); IOWA CODE § 144.23 (1997); N.C. GEN. STAT. § 130A-118(b)(4) (1997). In Hawaii, Illinois, and Iowa, the administrative official may in his/her discretion require proof in addition to the doctor's affidavit. See HAW. REV. STAT. § 338-17.7(a)(4)(B) (1993); 410 ILL. COMP. STAT. § 535-17 § 17.1(d) (West 1997); IOWA CODE § 144.23(3) (1997).

351. See, e.g., CAL. HEALTH & SAFETY CODE §§ 103430, 103425 (West 1997); LA. REV. STAT. ANN. § 40:62 (West 1999).

352. See, e.g., ALA. CODE § 22-9A-19 (1997); COLO. REV. STAT. ANN. § 25-2-115(4) (1990); D.C. CODE ANN. § 6-217(d) (1995); GA. CODE ANN. § 31-10-23(e) (Harrison 1998); 10 GUAM GOV'T CODE § 3222 (1998); MASS. GEN. LAWS ANN. ch. 46 § 13 (West 1993); MO. ANN. STAT. § 193.215(9) (West Supp. 1999); N.M. STAT. ANN. § 24-14-25 (D) (Michie 1997); UTAH CODE ANN. § 26-2-11 (Supp. 1996); VA. CODE ANN. § 32.1-269 (Michie 1997); WIS. STAT. ANN. § 69.15 (West 1990).

353. See, e.g., ALA. CODE § 22-9A-19.1-269 (1997); GA. CODE ANN. § 31-10-23(e) (Harrison 1998); OR. REV. STAT. § 432.235(4) (1997); UTAH CODE ANN. § 26-2-11 (Supp. 1998); VA. CODE ANN. § 32.1-269(C) (Michie 1997); WIS. STAT. ANN. § 69.15 (West 1990).

354. See, e.g., GUAM GOV'T CODE 10 § 3222 (1998); MASS. GEN. LAWS ANN. ch. 46 § 13 (West 1993).

355. See TENN. CODE ANN. § 68-3-203(d) (1996).

In some jurisdictions that do not have clear statutory guidelines, the right to change the name and sex designation indicated on the original birth certificate has been tested in the courts. These cases have all been brought by transsexuals seeking a name and/or sex change on their birth certificates after sex modification surgery.<sup>356</sup>

As discussed in more detail below, New York, Oregon, and Ohio courts have ruled that a transsexual cannot change the sex designated on the birth certificate. A federal district court has ruled that Connecticut cannot prohibit an amendment to the sex designation unless the state can show a "substantial interest" to justify its refusal to amend the certificate.

New York—*Anonymous v. Weiner*<sup>357</sup> was the first case to test the right to alter the name and sex designation in New York. In *Weiner*, a post-operative transsexual petitioned the Department of Health of the City of New York for a new birth certificate indicating a new name and different sex.<sup>358</sup> The Board of Health consulted with the New York Academy of Medicine and based its denial on the advice of the Academy.<sup>359</sup> It denied the petition because: (1) the chromosomes of the postoperative transsexual are in accord with the original sex designation; (2) it is questionable whether records should be changed to help "psychologically ill persons" in their social adaptation; and (3) the desire of the transsexual to conceal the change of sex is outweighed by the public interest for protection against fraud.<sup>360</sup>

The petitioner sought an order overruling the decision of the Board of Health.<sup>361</sup> The court refused to substitute its views for those of the administrative body charged with maintaining birth records.<sup>362</sup> The *Weiner* court applied an "arbitrary, capricious or otherwise illegal" standard of review and upheld the Board's determination.<sup>363</sup>

Two years later, in 1968, another post-operative transsexual brought an action requesting a change in the name and sex designation on the birth certificate. The court, in *In re Anonymous*,<sup>364</sup> held that it did not have jurisdiction to order the Department of Health to physically alter a birth certificate.<sup>365</sup> It did, however, grant

356. See *infra* notes 357–97 and accompanying text.

357. 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

358. See *id.* at 320.

359. See *id.* at 322.

360. See *id.* The Board of Health cited Article 207 of the Health Code which provided that an amendment will be granted only if an error was made at the time the birth certificate was prepared and filed. In 1971, Section 207 of the New York Health Code was amended, and post-operative transsexuals were allowed to change the names on their birth certificates. The sex designation, however, remained unalterable. See *id.*

361. See *id.*

362. See *id.* at 323.

363. *Id.* Prior to this petitioner's application, three other transsexuals were able to obtain amendments to their birth certificates from the same agency while it was headed by another individual. The court found that estoppel did not apply in these types of matters. *Id.* at 324.

364. 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968)

365. See *id.* at 838.

the request for the name change and ordered that a copy of the court order be attached to the petitioner's birth certificate.<sup>366</sup>

The *Anonymous* court rejected the approach taken by the *Weiner* court and the findings by the New York Academy of Medicine that the court used to support its decision in *Weiner*.<sup>367</sup> It found that the possibility of "so-called fraud" exists to a much greater extent if a post-operative transsexual who presents as a female is classified as a male.<sup>368</sup>

The court refused to recognize transsexuals and hermaphrodites as a third sex.<sup>369</sup> It adopted what it considered to be a "simple" formula for sex determination. According to this court, if disharmony exists between the psychological sex and the anatomical sex, sex will be determined by anatomy.<sup>370</sup> If the psychological sex and the anatomical sex are harmonized, then the sex should reflect the harmonized status of the individual. In other words, if a transsexual undergoes modification surgery, official sex should change as well.<sup>371</sup>

Based upon a 1971 amendment to the New York City Health Code, another post-operative male-to-female transsexual petitioned for a change in the sex indicated on the birth certificate. When the Board refused to indicate the new sex, the transsexual petitioned the court. In *Hartin v. Director of the Bureau of Records*,<sup>372</sup> the court refused to grant the petition.<sup>373</sup> In 1971, the Department of Health had adopted Rule 207 of the New York City Health Code which provided for an amendment to the birth certificate when: "the name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery."<sup>374</sup>

The petitioner argued that the rule should be found invalid because it authorized an alteration of the name but it did not authorize a change in the sex designation.<sup>375</sup> The court followed the rationale used in *Weiner*.<sup>376</sup> It upheld the Board of Health's finding that the "new" sex should not be indicated without the original sex designation just to "resolve a person's unhappy mental state."<sup>377</sup> Once again, the court found that the Board of Health had not acted arbitrarily, capriciously, or in an otherwise illegal manner in refusing to amend the sex designation.<sup>378</sup>

366. *Id.* By agreeing to attach the court order to the certificate, the court indicated that it was willing to accept the petitioner's "change of sex," but it lacked the power to order the amendment. *Id.*

367. *See id.*

368. *Id.*

369. *See id.* The court referred to a standard recognizing a third sex as a "far out theory." *Id.* at 837.

370. *See id.*

371. *See id.*

372. 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973).

373. *See id.*

374. *Id.* at 517.

375. *See id.* at 518.

376. *See id.*

377. *Id.*

378. *See id.*



The *Hartin* court cited with approval the Board's finding that surgery does not change an individual's sex. According to the Board, transsexual surgery is an "experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease...nonetheless, [such surgery] does not change the *body cells governing sexuality*."<sup>379</sup> The court did not specify which of the body cells establish sexuality.

Four years later, in *Anonymous v. Mellon*,<sup>380</sup> the Board of Health denied a post-operative male-to-female transsexual's request to have the sex changed on the birth certificate to female or in the alternative to indicate both the original sex and the later change of sex.<sup>381</sup> The Board chose to leave the sex indicator blank.<sup>382</sup> The court upheld the board's decision because it was not "irrational, arbitrary or without basis."<sup>383</sup>

The court acknowledged that the New York Court in *Richards v. United States Tennis Association*<sup>384</sup> had judicially determined that chromosomal or genetic sex is not the determinative factor in establishing whether a person is male or female for purposes of participation in athletic competitions.<sup>385</sup> It held, however, that the Board's decision not to fix the sex for all legal purposes had a rational basis.<sup>386</sup> The court was concerned that altering the sex on the birth certificate could potentially be used as evidence that the legal sex had also been altered for purposes of marriage, military obligations, and other legal issues. The court decided the best approach would be to establish the legal sex only when an actual controversy arose.<sup>387</sup>

Thus, while the New York courts have begun to acknowledge that chromosomes should not be the sole indicator of sex, they have been hesitant to allow transsexuals to amend the sex indicated on their birth certificates. The New York courts do not want the amended birth certificate to be used to establish a transsexual's legal sex for all purposes.<sup>388</sup>

**Oregon**—Although an Oregon trial court and an Oregon appellate court allowed a post-operative transsexual to change the name and sex designation on her birth certificate and school records, the Oregon Supreme Court reversed the order in *K. v. Oregon*.<sup>389</sup> In denying the request, the court held that birth certificates are

379. *Id.* (emphasis added).

380. 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1977).

381. *See id.* at 102.

382. *See id.*

383. *Id.*

384. 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977). *See supra* note 38 and accompanying text for a discussion of this case.

385. *Mellon*, 398 N.Y.S.2d at 102.

386. *See id.*

387. *See id.* The court acknowledged that the petitioner's gender may be female for legal purposes but held that the respondent's actions did not preclude the petitioner from establishing her gender as female when an actual legal controversy arises. *See id.* at 103.

388. Although New York has addressed the issue of the legal sex of transsexuals in more cases than any other jurisdiction, the determinants of "legal sex" in New York are still unresolved. *See id.*

389. 500 P.2d 1070 (Or. Ct. App. 1977).

intended to be historical records of the facts as they existed at the time of birth.<sup>390</sup> The court acknowledged that the legislative intent was unclear but held that it believed the Oregon legislature did not intend to confer broad powers on the courts to amend birth certificates to reflect sex changes.<sup>391</sup> The court deferred to the legislature on the appropriateness of allowing alterations.<sup>392</sup>

Ohio—In *In re Ladrach*,<sup>393</sup> the court allowed a post-operative transsexual to change her name but upheld the denial of her petition for an amendment to her birth certificate to change the sex designation from boy to girl.<sup>394</sup> The major justification for the court's holding was its concern that an alteration of the sex designation on the birth certificate would automatically lead to a change in the transsexual's legal sex for purposes of marriage.<sup>395</sup> The court was unwilling to allow a post-operative transsexual to marry in her post-operative sex, and it therefore ruled that the legal sex was the sex as indicated at birth.<sup>396</sup> The court noted that the petitioner's physical characteristics at birth were male and her chromosomes were still male.<sup>397</sup>

Connecticut—In *Darnell v. Lloyd*,<sup>398</sup> the Commissioner of Health refused to allow a post-operative transsexual to change the sex indicated on the birth certificate from male to female. The transsexual brought an action in the Federal District Court against the Commissioner claiming that the Commissioner had violated her right to equal protection.<sup>399</sup> Because the government had not shown any substantial state interest to justify its policy, the court denied the government's motion for summary judgment.<sup>400</sup>

390. *See id.* at 1072. The Oregon Court of Appeals viewed a birth certificate as a record of facts as they presently exist and therefore subject to amendment upon proof of any subsequent changes in fact after the birth. *See id.*

391. *See id.*

392. *See id.*

393. 513 N.E.2d 828 (Ohio 1987).

394. *See id.* at 832. The court also denied her petition to be allowed to marry as a female. *See supra* notes 293-96 and accompanying text.

395. *See id.* at 831.

396. *See id.* at 832. The court indicated that it should be the legislature rather than the judiciary that should alter statutes relating to transsexuals if the legislature found it appropriate to do so. *See id.*

397. *See id.*

398. 395 F. Supp. 1210 (D. Conn. 1975).

399. *See id.* The petitioner claimed that the Commissioner violated her right to equal protection by denying her request for an amendment while granting other petitioners' requests. The court held that government-issued identity cards that affect an individual's right to marry and travel outside the country implicate fundamental rights. As long as the government has a monopoly on the ability to control marriage and identity cards, the government must show a substantial state interest in its policy of refusing to amend birth certificates to reflect current sexual status. *See id.* at 1214.

400. *See id.* According to one source, the dispute was settled by an agreement to adopt a new procedure by which post-surgical men and women could obtain a change of sex on their birth certificate. *See* Joanna M. Clark, *Transsexualism: Identity and Identification* (paper presented at conference, 1987) (on file with author).

## 2. Passports

The original sex designated on a passport is based upon the sex designated on the birth certificate.<sup>401</sup> A passport may be amended to show a change of name or to correct the descriptive data on the passport.<sup>402</sup> To change the sex designation, applicants must submit proof that they have either undergone gender reassignment surgery or that they are transsexuals who will soon undergo the surgery.<sup>403</sup> Therefore, individuals may obtain passports that reflect their self-identified sex even if it conflicts with the sex indicated on their birth certificates if they can prove they have undergone or are about to undergo surgery.<sup>404</sup>

## 3. Driver's Licences

The sex designated on a driver's license will depend upon the form of identity the state requires before it will issue the license. If the state requires proof of identity, an applicant will typically provide a birth certificate.<sup>405</sup> Therefore, whatever designators the state uses to establish sex on the birth certificate will also generally control the sex originally designated on the driver's license.<sup>406</sup>

According to a survey of Motor Vehicle Bureaus,<sup>407</sup> thirty-four of the bureaus that responded indicated that they would issue new licenses with new sex indicators for post-operative transsexuals.<sup>408</sup> The majority of these states required a notarized letter from a treating physician attesting to the fact that surgery had occurred.<sup>409</sup> Most states indicated they would not allow the sex designated to be amended to reflect an individual's self-identified sex until surgery had been performed.<sup>410</sup> When asked if their state would issue new driver's licenses to pre-operative transsexuals, only six states indicated they would do so. In each case, a court

401. Foreign Relations, Evidence of U.S. Citizenship or Nationality, 22 C.F.R. § 51.43 (1999) requires that a birth certificate under seal must accompany a passport application.

402. *See id.*

403. *See id.* Department of State Procedures Manual (on file with the author).

404. *See id.* Individuals who have undergone surgery are issued full validity passports showing the new gender. Individuals who are pre-operative are issued temporary passports that are valid for one year and can be extended upon submission of appropriate medical documentation that shows the surgery was completed. *Id.*

405. *See, e.g.*, GA. CODE ANN. § 40-5-102 (Harrison 1998) (requiring applicants for driver's licenses to provide a certified copy of a birth certificate or other satisfactory evidence to establish proof of identity); IDAHO CODE § 49-306(2) (Michie 1997) (same); NEV. REV. STAT. § 483.290 (1998) (same); TENN. CODE ANN. § 55-50-321 (a) (1996) (same).

406. *See, e.g.*, IDAHO CODE § 49-306(2); GA. CODE ANN. § 40-5-102; NEV. REV. STAT. § 483.290; TENN. CODE ANN. § 55-50-321(a).

407. The Erikson Educational Foundation has published the results of a survey it conducted in Information and Guidelines for Transsexuals, which can be found at <<http://www.genderweb.org>>.

408. *See id.*

409. *See id.*

410. *See id.*

order and a doctor's affidavit stating that the person is being treated for transsexualism would be required.<sup>411</sup>

The justifications that have been advanced for refusing to amend an individual's legal documents to reflect self-identified sex are: (1) prevention of fraud;<sup>412</sup> (2) fear that the document could be used to establish one's legal sex for other purposes like marriage;<sup>413</sup> (3) a belief that the legal system should not be used to "help psychologically ill persons" in their social adaptation;<sup>414</sup> and (4) a belief that birth certificates are historical records that should accurately reflect the true facts as they existed at the time of the birth.<sup>415</sup> None of these policy concerns justifies use of the sex indicated at birth as the "official sex" for all legal documents.

The first justification, prevention of fraud, can most effectively be accomplished by using a person's self-identified sex. If a person presents as a female, her official documents should accurately reflect how she appears. Clearly, the status of one's gonads, chromosomes, or genitalia are not inspected to determine identity when one is stopped at an international border or by a traffic officer. Physical appearance, which is generally a reflection of self-identified sex, is the fact that should match the sex indicated on the official document.

The second justification, allowing self-identification to be used on one's official documents will lead to gay and lesbian marriages, can be addressed by the legislature adopting appropriate limiting language. Moreover, the current laws in some states already lead to this result.<sup>416</sup> Many more states appear to allow a sex designation that reflects an individual's self-identified sex on driver's licences than on birth certificates.<sup>417</sup> If a state requires that marriage applicants present some form of identification before it will grant a marriage license, the typical document presented will probably be the driver's license and not the birth certificate.<sup>418</sup> Therefore, it is the Department of Motor Vehicles that appears to be controlling who can legally marry. The ambiguities created by the current law is most evident in Texas. In Texas, non-operative transsexuals can obtain a court order allowing them to amend the sex indicated on their driver's license so that it comports with their self-identified sex.<sup>419</sup> Therefore, transsexuals in Texas can marry someone with similar genitals by showing the corrected driver's license, or can marry someone with dissimilar genitals by showing a passport.<sup>420</sup>

411. *See id.*

412. *See, e.g.,* Hartin v. Director of the Bureau of Records, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973); Anonymous v. Weiner, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966).

413. *See, e.g., In re Ladrach*, 513 N.E.2d 828, 831-32 (1987).

414. *See, e.g., Hartin*, 347 N.Y.S.2d at 517.

415. *See, e.g., K. v. Oregon*, 560 P.2d 1070 (Or. 1977).

416. *See supra* note 14 and accompanying text.

417. *See supra* notes 349-55, 407-11 and accompanying text.

418. States generally require some type of proof of identification. *See supra* note 405. Most individuals are more likely to have their driver's licenses and not their birth certificates readily available to provide proof of identification.

419. Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1375-76 (1997).

420. *See id.*

The third justification, not assisting “psychologically ill people,” clearly does not apply to intersexuals. Intersexuals are not confused about their sexual identity because of a psychological problem; they are intersexuals because their biological sex indicators are a combination of male and female. Furthermore, current medical and psychological research about transsexuals indicates that transsexualism may have a biological basis and cannot be “cured” or “corrected” by therapy.<sup>421</sup> A court’s refusal to allow amendments to birth certificates will not deter transsexuals from living their lives in their self-identified sex. Given the ostracism that they suffer at the hands of society before they choose to adopt a new identity, the legal barriers are minor.

The final justification, maintaining the birth certificate as an historical record, is clearly not an accurate reflection of the legislative intent. Amendments to birth certificates are typically allowed following an adoption, change of name for minors, and acknowledgment of paternity.<sup>422</sup> If legislatures allow amendments in these circumstances, legislators do not intend that the birth certificate should reflect only accurate historical facts. Furthermore, in the case of intersexuals who are misidentified at birth, the sex indicator established at birth is inaccurate.

The rules that limit the right to have the sex indicated on one’s official documents reflect an individual’s self-identified sex are both anti-therapeutic and ineffective at meeting the legislative goals. Forcing persons who appear to be females to carry male identity cards will likely result in embarrassment, ridicule, harassment, and even possible arrest for fraud. The official sex of persons who have modified their genitalia should comport with self-identified and genital sex. Similarly, self-identification should be the determining sex factor for individuals whose genitalia do not match their self-identified sex. Official documents are usually reviewed to make sure that the person presents as the person indicated on the documents. Height, weight, eye color, and general physical appearance—not genitalia, gonads, and chromosomes—are reviewed to make sure they match the person using the official document.

### C. Employment Discrimination

Title VII<sup>423</sup> and numerous state statutes and city regulations<sup>424</sup> prohibit employment discrimination based upon sex, yet the term “sex” is never defined in

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421. See *supra* note 162 and accompanying text.

422. See, e.g., ALA. CODE § 22-9A-12 (1997); ALASKA STAT. § 25.20.050 (Michie 1998); ARIZ. REV. STAT. ANN. § 36-326 (West 1993).

423. See 42 U.S.C. §§ 2000e-2000e-17 (1994), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-106, 105 Stat. 1071. Title VII makes it unlawful for an employer “to fail or to refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to...compensation, terms, conditions, or privileges of employment because of...sex.” *Id.* § 2000e-2.

424. An analysis of all the state statutes prohibiting discrimination based upon sex is beyond the scope of this Article. Most of these statutes utilize the language of Title VII and use Title VII cases as persuasive authority to interpret the state statute. See, e.g., *Wood v. C.G. Studios Inc.*, 660 F.Supp. 176 (E.D. Pa. 1987). One state has specifically rejected the federal courts’ narrow interpretation of Title VII and found that transsexuals are protected under its city and state antidiscrimination statutes. See *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391

Title VII nor is it clarified in its legislative history.<sup>425</sup> This deficiency has caused the courts to struggle with how to interpret the term. Although Title VII prohibits sex discrimination, some courts and administrative agencies use the terms “sex” and “gender” interchangeably when referring to Title VII and other employment discrimination acts.<sup>426</sup>

For transgendered individuals, how the courts define “sex” in Title VII cases is critical. Before 1998, how the terms “male” and “female” were defined would also have been important because courts disagreed about whether same-sex harassment was actionable under Title VII.<sup>427</sup> In 1998, the Supreme Court in *Oncale v. Sundowner*<sup>428</sup> unanimously held that same-sex harassment is actionable under Title VII. Therefore, for purposes of Title VII, whether an intersexual or transsexual is considered to be legally male, female, or intersexed is not critical as long as the victim can prove that the harassment occurred “because of sex.”<sup>429</sup> The important issue for transsexuals and intersexuals will be whether the courts will find that discrimination based upon one’s status as an intersexual or transsexual constitutes discrimination based upon “sex” or whether the term “sex” must be limited to only males and females.

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(N.Y. Sup. Ct. 1995); *Rentos v. Oce-Office Sys.*, 1996 WL 737215 (S.D.N.Y. 1996) discussed *infra* at notes 452–456 and accompanying text.

425. The legislative history of Title VII indicates that the original drafters never contemplated prohibiting sex discrimination. Various commentators have presented different versions of how sex was added to Title VII. According to popular lore, Representative Howard Smith of Virginia, one of the major opponents of the bill, proposed the addition of sex to guarantee the bill’s defeat. Another version of events indicates that Smith was asked to make the motion to add sex to the legislation because of his support of the Equal Rights Amendment. Under this version of the events, Smith proposed the addition of sex because he believed in equal rights for women. If the addition of sex resulted in the bill’s defeat, Smith would still be satisfied with the result because he opposed the type of regulation of private business that Title VII imposed. *See Franke, supra* note 23, at 23–24.

426. *See De Santis v. Pacific Tel. & Telegraph Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (“Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender.”); *Refusal to Hire Homosexual Was Not Discrimination Based on “Sex,”* 1975 WL 4475 (EEOC No. 76-67 1975). (“[W]hen Congress used the word ‘sex’ in Title VII, it was referring to a person’s gender, an immutable characteristic with which a person is born.” *Id.* at \*2). In *Dobre v. Amtrak*, however, the court held that Title VII actions are limited to actions based upon sex discrimination, which is not synonymous with gender discrimination. Sex refers to distinguishing biological characteristics, whereas gender refers to an individual’s sexual identity. *Dobre v. Amtrak*, 850 F. Supp. 284, 286 (E.D. Pa. 1993).

427. *See, e.g., Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997) (determining that claim can be based upon conduct by a harasser that is the same sex as the victim and harasser need not be gay for the claim to be actionable); *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996) (determining that hostile environment claim does not lie when both the alleged harassers and victim are heterosexuals of the same sex); *Wrightson v. Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996) (determining that claim can be based upon conduct by a harasser who is of the same sex as the victim). Same sex discrimination (e.g., a male failing to promote another male employee in favor of a female employee) has always been actionable under Title VII. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

428. 118 S. Ct. 998 (1998).

429. *Id.* at 1003 (Thomas, J., concurring).

As explained in more detail below, thus far, all the federal circuit courts and all the federal district courts except one<sup>430</sup> that have considered the issue have held that discrimination against a transsexual is not discrimination based upon sex for purposes of Title VII.<sup>431</sup> In addition, courts interpreting state employment discrimination statutes generally rely on the Title VII cases and find that discrimination based upon sex does not include discrimination against transsexuals.<sup>432</sup> Only one jurisdiction, New York, has found that state and local ordinances prohibiting discrimination based upon sex protect transsexuals.<sup>433</sup> Only one reported sex discrimination case, *Wood v. C.G. Studios*,<sup>434</sup> has involved an intersexual. In *Wood*, the court found that discrimination against a hermaphrodite did not constitute discrimination based upon sex.<sup>435</sup>

Based upon these holdings, it is clear that most courts will not protect intersexuals or transsexuals from sex discrimination<sup>436</sup> unless they are specifically

430. A district court in Illinois ruled that discrimination against a transsexual constitutes a violation of Title VII in *Ulane v. Eastern Airlines*, 581 F. Supp. 821 (N.D. Ill. 1983). This decision was reversed in *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984). See *infra* notes 441–50 and accompanying text.

431. See *Sommers v. Budget Marketing Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977); *Dobre*, 850 F. Supp. 284; *Doe v. U.S. Postal Serv.*, 1985 WL 9446 (D.D.C. 1985); *Terry v. E.E.O.C.*, 1980 WL 334 (E.D. Wis. Dec. 10, 1980); *Powell v. Read's Inc.*, 436 F. Supp. 369 (D. Md. 1977); *Voyles v. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Ca. 1975), *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978); *Grossman v. Bernards Township Bd. of Educ.*, [1975] 11 E.P.D. (CCH) P10,686 (D. N.J. 1975), *aff'd mem.*, 570 F.2d 319 (3rd Cir. 1985).

432. See, e.g., *Underwood v. Archer Management Serv.*, 857 F. Supp. 96 (D.C. 1994).

433. See *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995); *Rentos v. Oce-Office Systems*, 1996 WL 737215 (S.D.N.Y. 1996). See *infra* notes 452–56 and accompanying text.

434. 660 F. Supp. 176 (E.D. Pa. 1987). See *infra* notes 457–63 and accompanying text.

435. See *id.* at 177. The statute involved in *Wood* was the Pennsylvania Human Relations Act. The court used the reported Title VII cases as persuasive authority and determined that the traditional meaning of sex discrimination does not include discrimination against transsexuals or intersexuals. *Id.*

436. Sex discrimination claims can also be based upon the Equal Protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution if the federal or state government engages in discriminatory treatment. Transsexuals have not made equal protection claims as often as Title VII claims, but the few claims that have been made have generally met the same fate. Courts have generally denied recovery because transsexuality is not considered a suspect or quasi-suspect classification. See, e.g., *Holloway*, 566 F.2d 659; *Terry*, 1980 WL 334. Two courts, however, have refused to dismiss claims by transsexuals. In *Doe v. United States Postal Service*, 1985 WL 9446 (D.D.C. June 12, 1985), the court cited with approval the finding in *Holloway* that transsexuals did not constitute a suspect classification. In *Doe*, however, the government had not yet identified a rational relationship between its discrimination against transsexuals and any legitimate government interest. Therefore, the court found that the complaint stated a claim for denial of equal protection and the issue was one properly before the court. *Id.* at \*4. In *Darnell v. Lloyd*, 395 F. Supp. 1210

included in the statutory language, which is a rare occurrence.<sup>437</sup>

### 1. Title VII and Transsexuals

Courts have consistently refused to include transsexuals in the protected class of individuals under Title VII because they have assumed that "sex" in the statute is used to denote "traditional notions of sex."<sup>438</sup> Traditional notions of sex refer to biological or anatomical facts<sup>439</sup> and are based upon the presumption that only two sexes, male and female, exist.<sup>440</sup>

Most illustrative of this narrow interpretation is *Ulane v. Eastern Airlines*.<sup>441</sup> Ulane had been hired by Eastern Airlines as a male pilot. She later was fired after undergoing sex modification surgery. Her Title VII action against Eastern Airlines alleged that she was fired due to her status as a transsexual.<sup>442</sup>

The District Court held that transsexuals are entitled to Title VII protection.<sup>443</sup> The District Court analyzed the legislative history of Title VII and found:

there is not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term "sex" would include transsexuals. The matter simply was not thought of. It was not discussed. Nothing was discussed that we have any record of that would have any relevance to the question before us. But I believe that...it is my duty to apply [the word sex] in what I believe to be the most reasonable way. I believe that the term, "sex," literally applies to

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(D. Conn. 1975), the court held that transsexuals can state an equal protection claim based upon the government infringing upon their fundamental rights to marry and travel. In *Darnell*, the Commissioner of Health in Connecticut refused to amend a postoperative transsexual's birth certificate. The court held that the state must show a substantial state interest to justify such a denial and denied the state's motion for summary judgment because it had failed to establish any substantial state interest that would justify its refusal to amend the birth certificate. *Id.* at 1214.

437. New Orleans, San Francisco, Seattle, Santa Cruz, and Minnesota have such protective legislation. See Cary Goldberg, *Shunning He and She While Looking for Respect—Transgendered Movement Comes Alive*, SEATTLE TIMES, Sept. 8, 1996, at A-13. In addition, California, Connecticut, the District of Columbia, Hawaii, Massachusetts, New Jersey, Vermont, and Wisconsin have passed laws protecting persons from discrimination based upon sexual orientation. Some of these statutes include "gender," and some include both "gender" and "sex" as protected classifications. Proceedings from the Second International Conference on Transgender Law and Employment Policy A6-2 (1993) (on file with author). Other countries have also passed legislation that prohibits discrimination based upon one's transgendered status. See, e.g., New South Wales Transgender (Anti-discrimination and other Act Amendment) Act of 1996 § 38A (on file with author).

438. See, e.g., *Holloway*, 566 F.2d 659.

439. *Dobre v. Amtrak*, 850 F. Supp. 284 (E.D. Pa. 1993).

440. *Holloway*, 566 F.2d at 662. Sex is "either of two divisions of organisms distinguished respectively as male or female." *Id.*

441. 742 F.2d 1081 (7th Cir. 1984).

442. See *id.*

443. *Ulane v. Eastern Airlines*, 581 F. Supp. 821, 825 (N.D. Ill. 1983).



transsexuals and that it applies scientifically to transsexuals.... [T]here is no room for argument on the question.<sup>444</sup>

The Seventh Circuit reversed the District Court and limited the application of the term "sex" in Title VII to discrimination based upon one's status as a male or female. In other words, if Ulane had suffered discrimination because of her status as a woman, she would have been protected by Title VII. Because the discrimination was not based upon her "sex," but rather her "change of sex," the court held that Title VII was inapplicable.<sup>445</sup>

The Seventh Circuit acknowledged that Congress has not actually considered whether discrimination against transsexuals should be barred under Title VII's ban on discrimination based upon "sex."<sup>446</sup> It found, however, that the same reasons that justified excluding transvestites and homosexuals<sup>447</sup> from Title VII protection should apply equally against providing protection to transsexuals.<sup>448</sup> It limited the definition of "sex" in Title VII to "biological males" and "biological females" and found that any other new definition of sex must come from Congress.<sup>449</sup> The other federal courts that have addressed this issue have consistently agreed with the holding and the reasoning adopted in *Ulane*.<sup>450</sup>

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444. *Id.*

445. *Ulane*, 742 F.2d at 1087. The court's characterization of the discrimination in this case as being based upon "a change of sex" rather than discrimination based upon sex is inconsistent with the Title VII cases based upon religious discrimination. When an employee changes to a new religion and is discriminated against because of his new religious practices, the courts do not characterize the discrimination as "change of religion" discrimination. The cases are treated as discrimination based upon religion, and the courts protect the religious convert. *See, e.g., Cooper v. Oak Rubber Co.*, 15 F.3d 1375 (6th Cir. 1994). Similarly, if a transsexual is discriminated against based upon conduct that is consistent with the transsexual's sexual identity, the courts should not bar recovery by labeling the discrimination "change of sex" discrimination; the discrimination is occurring based upon the employee's sex. When religious converts are discriminated against based upon changes in their work habits that comport with their new religious beliefs, courts have protected their right to change their religion and religious practices. Similarly, transsexuals (who according to the courts are "changing" their sex) should receive protection from discriminatory treatment. Regardless of whether transsexuals are being discriminated against based upon their transsexual status or their change from one sex to another, they should receive Title VII protection just as the religious convert would receive Title VII protection.

446. *Ulane*, 742 F.2d at 1084-85.

447. Courts have referred to proposals to amend Title VII to prohibit discrimination on the basis of "sexual preference." All proposals to amend the statute to include "sexual preference" have been defeated. Three such proposals were presented to the 94th Congress, and seven were presented to the 95th Congress. The courts have therefore reasoned that Congress intended to give sex a traditional definition, rather than an expansive interpretation. *See Holloway v. Arthur Andersen*, 566 F.2d 659, 662 n.6 (9th Cir. 1997). *See also Sommers v. Budget Mktg. Inc.*, 667 F.2d 748, 749 (8th Cir. 1982).

448. *Ulane*, 742 F.2d at 1085.

449. *Id.* at 1087.

450. *See, e.g., Sommers*, 667 F.2d 748; *Holloway*, 566 F.2d 659.

## 2. Other Employment Discrimination Statutes and Transsexuals

State and local employment discrimination statutes are often modeled after Title VII. Generally, courts will rely on the Title VII cases and hold that these statutes are not intended to protect transsexuals from employment discrimination.<sup>451</sup> New York courts, however, have held that state and local anti-discrimination statutes protect transsexuals from employment discrimination. In *Maffei v. Kolaeton Industry, Inc.*,<sup>452</sup> a post-operative transsexual was harassed about his transsexuality. He brought a cause of action alleging violation of a city ordinance that prohibited gender discrimination.<sup>453</sup> The court rejected the narrow interpretation that federal courts have used in defining "sex" and instead found that discrimination based upon one's status as a transsexual violates the employment discrimination statute.<sup>454</sup> Similarly, a federal district court in New York in *Rentos v. Oce-Office Systems*<sup>455</sup> held that transsexuals were protected from discrimination under the New York city and New York state human rights laws.<sup>456</sup>

## 3. Employment Discrimination Statutes and Intersexuals

The only reported case that has determined whether employment discrimination legislation protects intersexuals from sex discrimination is *Wood v. C.G. Studios*.<sup>457</sup> In *Wood*, an employee had undergone surgery to "correct" her hermaphroditic condition before she began her employment with the defendant. Wood maintained that she was fired when her employer learned about the corrective surgery. Wood brought an action claiming discrimination under the Pennsylvania Human Relations Act ("PHRA").<sup>458</sup>

451. See, e.g., *Underwood v. Archer Management Serv.*, 857 F. Supp. 96 (D.D.C. 1994).

452. 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

453. *Id.* at 395. The statute originally prohibited sex discrimination but was later amended to prohibit gender discrimination. *Id.* The reason for the change was not apparent but may be critical to some courts. For instance, the court in *Dobre v. Amtrak*, 850 F. Supp. 284, 286 (E.D. Pa. 1993), determined that transsexuals were not included in the term "sex" for purposes of Title VII but also observed that the result would have been different if the term "gender" had been used. According to the *Dobre* court, "the term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity." *Id.* (quoting *Holloway*, 566 F.2d at 662-63).

454. *Maffei*, 626 N.Y.S.2d at 396.

455. 1996 WL 737215 (S.D.N.Y. 1996).

456. See *id.* at \*9. In *Maffei*, the plaintiff based his claim on a New York City ordinance. Although the *Maffei* court discussed the New York State statute, it did not determine whether the plaintiff would be protected under the state statute as well as the city ordinance. The Federal District Court, in *Rentos*, interpreted the *Maffei* court's allusions to expansive application of the state law as evidence of an equivalent conclusion that the New York state law similarly prohibits discrimination against transsexuals as a form of unlawful "sex" discrimination. See *id.* at \*9 n.3.

457. 660 F. Supp. 176 (E.D. Pa. 1987).

458. See *id.* Although the ruling was based upon the PHRA, the court used the Title VII transsexual cases as persuasive authority to justify its grant of summary judgment to the employer. See *id.* at 177-78.

The court followed the “plain meaning” and “traditional notions of sex” rules and held that the term “sex” encompasses discrimination against women because of their status as females and discrimination against men because of their status as males, but it does not encompass discrimination against hermaphrodites because of their intersexual status.<sup>459</sup> In support of its holding, the court quoted *Webster’s Dictionary*, which defines sex as “one of the *two* divisions of organic (esp.) human beings respectively designated male or female.”<sup>460</sup>

*Wood* is noteworthy because it is the only case that specifically applies sex discrimination rules to an intersexed person who is not a transsexual. One could interpret the refusal to impose liability in the transsexual cases as a reflection of the judiciary’s tacit disapproval of people who “choose” to live outside traditional sexual norms.<sup>461</sup> In *Wood*, the plaintiff chose to live within society’s norms; she did not fit into the binary sex paradigm, so she chose reconstructive surgery so that she would clearly be a female. Although she was discriminated against because of her status as an intersexual, she was denied recovery because she did not fit into either of the “two” traditional sexual divisions.

In support of its grant of summary judgment to the employer, the *Wood* court analyzed the legislative history of the PHRA and the case law interpreting the PHRA. It found that the “clear” purpose of the act was to achieve equality *between* the sexes and to provide men and women the same employment opportunities.<sup>462</sup> According to the court, “there is no showing that the Act was intended to remedy discrimination against individuals because they have undergone gender-corrective surgery. I cannot conclude that the Supreme Court of Pennsylvania would give the term ‘sex’...anything but its plain meaning.”<sup>463</sup>

According to the District Court, because the legislature did not contemplate intersexuals when it adopted the legislation, employers are free to discriminate against intersexuals because they do not fit into a “traditional” definition of either man or woman. In other words, the court has ruled that discrimination based upon a woman’s status as a woman or a man’s status as a man is actionable, but discrimination based upon an intersexual’s status as a nonwoman/nonman is not actionable. Implicit in the court’s ruling is that if *Wood* is not a woman and she is not a man, she must not have a sex.

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459. *See id.* at 177.

460. *Id.* at 177 n.3 (emphasis supplied).

461. The courts’ unwillingness to allow transsexuals to sue for employment discrimination is consistent with the courts’ refusal to allow recovery in employment discrimination suits based on sexual orientation. Both types of cases arguably reflect the judiciary’s reluctance to sanction what it considers to be a choice to live outside society’s accepted sexual norms.

462. *Wood*, 660 F. Supp. at 177.

463. *Id.*

These employment discrimination cases are flawed because they do not take into account the reality that not all individuals are clearly male or female.<sup>464</sup> If courts limit the meaning of the term "sex" to males and females with all congruent biological factors, then intersexuals would be considered to have no sex at all. Furthermore, in defining sex according to biological factors while at the same time denying protection to transgendered individuals, the courts are ignoring the fact that intersexuality is clearly a biological condition. Intersexuality is a biological sex status in the same way that male and female are biological sex statuses. In addition, recent studies show that the exact causes of transsexuality are unknown and may be based upon biological factors.<sup>465</sup>

As the District Court in *Ulane*<sup>466</sup> noted, Congress never considered whether discrimination against intersexuals and transsexuals should be considered discrimination based upon sex for purposes of Title VII.<sup>467</sup> If the purpose of employment discrimination statutes is to ensure that equal employment opportunities are open to all individuals regardless of their biological sex, the employment discrimination acts should protect intersexuals and transsexuals. That Congress did not specifically consider protecting transsexuals and intersexuals when it drafted Title VII does not lead to the conclusion that the wrongs Congress sought to remedy when it adopted Title VII do not affect these individuals.

As the Supreme Court observed in *Oncale v. Sundowner* when it construed Title VII to include same-sex harassment:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concern of our legislators by which we are governed.<sup>468</sup>

Is the evil of discrimination against transgendered people comparable to the evil of discrimination against women in the workplace? Given the number of women as compared to the number of identified intersexuals and transsexuals, the problem is clearly not as pervasive. Numbers alone, however, are not an accurate measure of the harm being inflicted. Transgendered individuals are not out of the closet because they know that society still considers them to be "freaks." Although some intersexuals are

464. See *supra* notes 87–176 and accompanying text.

465. See *supra* note 162 and accompanying text.

466. 581 F. Supp. 821 (N.D. Ill. 1983).

467. *Id.* at 825. Congress has considered whether transsexuals should be protected under other federal legislation. Transsexuals are specifically denied protection under the Americans with Disabilities Act, 42 U.S.C. § 12211 (West 1994) and the Rehabilitation Act of 1973, 29 U.S.C. § 705 (West 1994). Both acts provide that the term "disability" shall not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. See 42 U.S.C. § 12211 (b) (1994); 29 U.S.C. § 705 (20)(F)(i) (1994).

468. *Oncale v. Sundowner*, 118 S. Ct. 998, 1002 (1998).

starting to organize and publicize their intersexual conditions, most transgendered persons still hide their secret out of fear of discrimination.<sup>469</sup>

When transgendered persons suffer employment discrimination because of their transgendered status, the courts have failed to provide them with the comparable protection that males and females receive. They are classified as people who have changed their sex (as in the transsexual cases) or who have no sex at all (as in the case of the intersexual). Intersexuals and transsexuals are a biological reality. The evil of allowing employment discrimination to continue against them is at least as harmful on an individual level as allowing discrimination to continue against women and men. Including intersexuals and transsexuals within the definition of "sex" for Title VII and other employment discrimination statutes would not violate any traditional notions of justice. Furthermore, it would provide an enormous financial and psychological benefit to intersexuals and transsexuals who have suffered from discrimination.

## V. CONCLUSION

The laws that differentiate between men and women or protect individuals from discrimination based upon sex do not require the use of a binary system in which sex determination is limited to chromosomes, genitalia, gonads, or some combination thereof. Use of these rigid tests often defeats the legislative intent of these statutes. Furthermore, it generally results in anti-therapeutic consequences for the people affected. No principle of justice will be undermined if courts adopt a more flexible approach that includes intersexuality as a sex classification and allows transgendered people to self-identify their sex.

The time has come to incorporate human hybrids into the legal world.<sup>470</sup> The law, by ignoring intersexuals and transsexuals, perpetuates their castigation and invisibility.<sup>471</sup> As the court in *M.T. v. J.T.* stated, allowing people to self-identify their sex is "practical, realistic and humane."<sup>472</sup> "Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality."<sup>473</sup>

Transgendered individuals do not fit conveniently into binary systems; they cannot easily be categorized as either males or females. The medical and legal communities have imposed their need to maintain clear distinctions between the sexes on persons who do not fit neatly into distinct groups.

Until recent years, the medical community recommended that intersexuals be surgically and/or hormonally altered at an early age so that they have the physical appearance of only one sex. This recommendation is based on the questionable assumption that obviously intersexed individuals would be so scorned by society that they would suffer severe humiliation and psychological trauma. This assumption ignores a substantial body of case histories, compiled primarily between 1930 and

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469. See *supra* notes 201–02 and accompanying text.

470. COLKER, *supra* note 187, at xii.

471. See *id.*

472. *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. 1976).

473. *Id.* at 211.

1960 before surgical intervention became the norm, that describe well-adjusted intersexuals.<sup>474</sup> Early surgical intervention to alter intersexuals so that they appear to be clearly male or female is currently being seriously questioned by some intersexed individuals<sup>475</sup> and by some medical experts.<sup>476</sup>

Surgical alteration of intersexuals is also based on the assumption that sexual identity can be manipulated easily. Recent medical studies now suggest that sexual identity cannot necessarily be medically controlled via surgery and hormones.<sup>477</sup> How sexual identity is established is as yet unclear.

The medical community is learning that sex and gender cannot be easily defined by biological factors alone. As one sexual identity researcher at John Hopkins recommends:

In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the "correctness" of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.<sup>478</sup>

Just as the medical system's binary sex categories that de-emphasize self-identity are now being questioned by medical authorities, legal institutions must also examine how the law should define sex. Legal authorities must determine whether a binary legal system that typically categorizes people according to their chromosomes or the appearance of their genitalia at birth is appropriate.

If the law chooses to regulate behavior based upon a person's sex, it must clearly define its terms. If it insists on clinging to a binary system, it must find a way to define male and female so that the rights and obligations of intersexuals are as clearly delineated as the rights and obligations of individuals who are not intersexed.

Society, the medical community, and the law must acknowledge the existence of intersexuality. Currently, intersexuality is often viewed as a shameful secret to be hidden and borne in silent suffering. "To share such a secret is to invite ridicule and rejection; to keep such a secret condemns one to a life of loneliness and isolation."<sup>479</sup> The law, by clinging to a binary system that blindly ignores the existence

474. See, e.g., Grace H. Dicks & A.T. Childers, *The Social Transformation of a Boy Who Had Lived His First Fourteen Years as a Girl: A Case History*, AMER. J. ORTHOPSYCHIATRY 508 (1934); Fayek Ghabrial & Saa M. Girgis, *Reorientation of Sex: Report of Two Cases*, 7 INT'L J. FERTIL. 249 (July–Sept. 1962).

475. See generally KESSLER, *supra* note 7; Cowley, *supra* note 31; Dreger, *supra* note 3.

476. See generally KESSLER, *supra* note 7; Diamond & Sigmundson, *supra* note 2; Fausto-Sterling, *supra* note 7; Schober, *supra* note 23.

477. See Diamond & Sigmundson, *supra* note 2.

478. Reiner, *supra* note 25, at 225.

479. MONEY, *supra* note 73, at x.

of intersexuals and the importance of self-identity, reinforces the perception that intersexuality is unacceptable. It also ignores the reality of intersexuality. The law should not continue to force intersexuals farther into the deepest recesses of their closet by failing to acknowledge their existence and their self-identity.<sup>480</sup>

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480. One author has stated,

The trouble is, we're living in a world that insists we be one or the other [man or woman]—a world that doesn't bother to tell us exactly what one or the other *is*.... All my life, my non-traditional gender identity has been my biggest secret, my deepest shame. It's not that I didn't want to talk about this with someone; it's just that I never saw anything in the culture that encouraged me to talk.... When I was growing up, people who lived cross-gendered lives were pressured into hiding deep within the darkest closets they could find. Those who came out of their closets were either studied under a microscope, ridiculed in the tabloids, or made exotic in the porn books, so it paid to hide. It paid to lie.

KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 8 (1994) (emphasis in original).

## APPENDIX: INTERSEXED CONDITIONS DESCRIBED IN PART II-B

	Chromosomes	Gonads	Genitalia	Internal Sex	Hormones	Phenotype	Assigned Sex	Self-Identification
Klinefelter Syndrome	Other <sup>1</sup>	Male	Male <sup>2</sup>	Male	Male	Other <sup>3</sup>	Male	Male
Turner Syndrome	Other <sup>4</sup>	Other <sup>5</sup>	Female	Female	Other <sup>6</sup>	Female <sup>7</sup>	Female	Female
Swyer Syndrome	Male	Other <sup>5</sup>	Female	Female	Other <sup>6</sup>	Female <sup>7</sup>	Female	Female
Persistent Mullerian Duct Syndrome	Male	Male	Male	Both/ No Vagina	Male	Male	Male	Male
CAIS	Male	Male	Female	Other <sup>8</sup>	Other <sup>9</sup>	Female	Female	Female
PAIS	Male	Male	Varies	Other <sup>8</sup>	Other <sup>9</sup>	Female	Female	Female
5 Alpha-Reductase Deficiency	Male	Male	Other <sup>10</sup>	Male	Male	Other <sup>11</sup>	Other <sup>12</sup>	Other <sup>12</sup>
CAH	Female	Female	Other <sup>13</sup>	Female	Other <sup>14</sup>	Other <sup>15</sup>	Varies	Varies
P4V	Female	Female	Varies	Female	Female	Female	Female	Female
GID <sup>16</sup>	Male	Male	Male	Male	Male	Male	Male	Female

1. Individuals with Klinefelter Syndrome have two or more X chromosomes in addition to a Y chromosome.

2. The external genitalia are typically smaller than in unaffected males.

3. Phenotype is male at birth, but at the onset of puberty the breasts will swell.

4. Individuals with Turner Syndrome typically have XO chromosomes.

5. The gonads are "streak" gonads and are unformed and non-functioning.

6. Because the gonads are incomplete, the exposure to hormones is reduced.

7. At puberty little breast enlargement occurs.

8. No internal organs are created and the vagina is often shorter than a typical vagina.

9. Male hormones are present, but a receptor defect results in the body's inability to completely or partially process the male hormones. The body will utilize the estrogen produced by the testes.

10. The individual will appear female at birth but will masculinize at puberty if left untreated.

11. The phenotype at puberty becomes male unless treated by exogenous hormones.

12. If the condition is undiagnosed, the child is raised as a female. At puberty, in some societies the child becomes male or a third gender.

13. The genitals vary and may appear male at birth.

14. Excess male hormones are produced in utero that masculinize the body.

15. The phenotype will vary depending upon hormonal treatment. CAH individuals raised as girls are often stereotyped as "tomboys."

16. The factors indicated here are for a male-to-female transsexual who has not undergone surgical or hormonal treatment. All the indicators would be reversed for a female-to-male transsexual. A transsexual who undergoes surgical and hormonal treatment acquires the external genitalia and phenotype of the desired sex.