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Citation:

Stephanie Markowitz, Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection, 14 *Cardozo J.L. & Gender* 705 (2008)

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Thu Feb 7 21:53:22 2019

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CHANGE OF SEX DESIGNATION ON TRANSSEXUALS' BIRTH CERTIFICATES: PUBLIC POLICY AND EQUAL PROTECTION

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INTRODUCTION

In granting him the civic status of a woman we are satisfying the most profound desire of his being while consolidating his psychic and moral equilibrium; at the same time we are facilitating his social adaptation by permitting him to lead a more normal type of life than heretofore. The personal interest which urges him to ask for a change of civic status is thus not opposed to the interests of public order and morality [but] quite the contrary.¹

It may come as a surprise that some same-sex marriages currently exist in the United States. These marriages are not the result of judgments declaring the denial of same-sex marriage unconstitutional nor are they Vermont civil unions or marriages in Massachusetts: they are the result of a man marrying a male-to-female transsexual or a woman marrying a female-to-male transsexual. These marriages are only same-sex in the sense that both the husband and the wife had the same sex marked on their birth certificate at the time of their birth. However, the transsexual partners in these relationships have undergone extreme psychological and medical treatments and surgeries and eventually had their birth certificates amended or reissued to reflect the “new” sex, the original sex on the birth certificate being deemed a “mistake.”²

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¹ re Leber, Swiss Cantonal Court, July 2, 1945, *in* Eugene de Savitsch, *HOMOSEXUALITY, TRANSVESTISM, AND CHANGE AND SEX*, Appendix A, at 105 (Charles C. Thomas 1958).

² U.S. States and Canadian Provinces: Instructions for Changing Name and Sex on Birth Certificate, *available at* <http://www.drbecky.com/birthcert.html> (last visited Mar. 18, 2008).

Although some of these marriages are later held invalid by courts as a result of a divorce,³ Wrongful Death action,⁴ declaratory judgments,⁵ probate,⁶ or child custody proceeding,⁷ there are cases that uphold the marriage as a valid union of a man and a woman.⁸ Though cases upholding the marriage possibly represent a step forward in the battle for same-sex marriage rights, they provide significant validation of a transsexual's' life-long struggle towards acceptance in the gender they felt they were born into, even though their bodies did not match.⁹ Many states currently allow for the amendment of the original birth certificate to reflect a person's status after sex reassignment surgery ("SRS"),¹⁰ but the numerous court decisions invalidating the marriage of a person with an amended birth certificate to a person of the opposite sex—though a member of the original sex—seem to eradicate all meaning behind the amended birth certificate. The incentive to amend a birth certificate is severely weakened if the amended birth certificate is an empty formality, signifying nothing more than appeasing the postoperative transsexual whom a judge or society at large may likely view a "psychologically ill" person.¹¹

This Note examines the current inconsistencies existing in the United States relating to the amendment of birth certificates for postoperative transsexual persons and the legal meaning they do or do not carry. I intend to examine how these inconsistencies create problems under the Equal Protection Clause, particularly because the standards for change in birth certificates for male-to-female ("MTF") transsexuals and female-to-male ("FTM") transsexuals differ. According to the Supreme Court in *City of Cleburne v. Cleburne Living Center*, the Equal Protection Clause requires that "all persons similarly situated should be treated alike."¹² Following Equal Protection Clause doctrine, both MTF and FTM transsexual persons should be subjected to the same rules and granted the same legal rights. However, many FTM transsexual persons are given an advantage over MTF

³ See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

⁴ See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

⁵ See *In re Ladrach*, 32 Ohio Misc.2d 6 (Ohio Prob. Ct. 1987).

⁶ See *In the Matter of the Estate of Marshall G. Gardiner*, 273 Kan. 191 (Kan. 2002).

⁷ See *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

⁸ See, e.g., *Vecchione v. Vecchione*, No. 95D003769, (Orange County, Cal. 1996) (unpublished); *M.T. v. J.T.*, 140 N.J. Super. 77 (N.J. Sup. Ct. App. 1976).

⁹ Transgender Marriage Legal Resources, available at: <http://www.ismsandsuch.com/TM/legal.html> (last visited Mar. 18, 2008).

¹⁰ States that currently provide for any change to the sex designation on the birth certificate are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See *Instructions for Changing Name on Birth Certificate*, *supra* note 2.

¹¹ *Hartin v. Director of Bureau of Records and Statistics*, 347 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1973).

¹² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

transsexuals regarding birth certificate amendments: very often, FTM transsexuals are not required by the courts to undergo complete genital reassignment surgery, i.e., the removal of the vagina and subsequent surgery to create an “ersatz penis.”¹³ This “loophole”¹⁴ is often justified by doctors and judges because of the extraordinarily high costs and risks associated with the surgeries,¹⁵ which are understandable. However, it is inherently unfair that MTF transsexual persons would have to undergo complete genital reassignment surgery, i.e., removal of the penis and subsequent labiaplasty¹⁶ and vaginoplasty¹⁷ surgeries to create a working vagina, in order to change their sex on their birth certificates to “female.”¹⁸

Equal protection jurisprudence often links one’s status as determined by the existence of unchangeable traits that link to a definitive suspect class, i.e., race, disability, or sex, while embracing a more fluid definition of gender identity and sexuality.¹⁹ One scholar has suggested that the characteristics that trigger judicial sympathy are immutable.²⁰ Postoperative transsexual persons must rely on a hybrid of immutable and mutable characteristics to succeed in convincing a court that they are a member of their new sex for purposes of amending a birth certificate or qualifying for a spouse’s Social Security benefits. As reflected in case law, it seems as though gender is an immutable trait, while sex is mutable; a person can be born a male, grow up identifying as female, and eventually undergo sex reassignment surgery to become legally female. This person’s gender was always female but her sex changed from male to female.²¹

The standards used to determine a postoperative transsexual person’s sex vary from state to state. Within each state, the standards tend to be more lax relating to the issuance of an amended birth certificate reflecting change in sex and more stringent when determining sex for purpose of deciding the validity of a marriage between a postoperative transsexual and person of the opposite sex—for example, a MTF and a male.²² The law in the United States is very inconsistent

¹³ Paul Vitello, *The Trouble When Jane Becomes Jack*, N.Y. TIMES, Aug. 20, 2006, §9, at 1.

¹⁴ Dan Savage, *Savage Love*, Aug. 30, 2006, available at <http://www.avclub.com/content/savagelove> (last visited Mar. 18, 2008).

¹⁵ James Green, *Getting Real About FTM Surgery*, CHRYSALIS QUARTERLY no.9, 1994, available at http://gender.org/resources/getting_real.html, 1994 (last visited Mar. 18, 2008).

¹⁶ Labiaplasty is plastic surgery of the Labia majora or Labia minora to change the shape of the labia; Dan Childs, *Intimate Operations: OB-GYN Organization Issues Warning*, ABC NEWS, Aug. 31, 2007, available at <http://abcnews.go.com/Health/WomensHealth/Story?id=3547373&page=1> (last visited February 26, 2008) [hereinafter *Intimate Operations*].

¹⁷ Vaginoplasty is a surgical procedure that addresses vaginal defects, including construction or reconstruction of a vagina. See <http://www.cosmeticsurgery.com/research/cosmetic-surgery/Vaginoplasty/> (last visited Mar. 18, 2008).

¹⁸ THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION’S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, 6th Version (Feb. 2001), at 8.

¹⁹ Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge For Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 9 (2003).

²⁰ *Id.*

²¹ See *Vecchione*, No. 95D003769 (Orange County, Cal. 1996) (unpublished).

²² See Instructions for Changing Name and Sex on Birth Certificate, *supra* note 2; Littleton, 9

with regard to transsexual legal rights. Though a birth certificate can be amended by getting the requisite surgeries and therapies, these changes usually do not hold up when involved in court proceeding relating to the validity of a marriage involving a postoperative transsexual.²³ Courts are producing contradictory decisions, and eventually the time will come when courts will need to approach these kinds of cases evenly and consistently.

After discussing the approach several foreign jurisdictions take with the legal status of postoperative transsexuals, particularly the standard for birth certificate amendments, I will turn to two foreign cases that have taken the position no court in the United States has yet taken: a postoperative transsexual has the same legal standing as those born into the sex into which they were reassigned.²⁴ United States' jurisprudence should evolve with the modern era, taking approaches emphasizing reliance on medical and psychological facts.

In light of the lower standards for FTM transsexuals and the higher standards usually applied to MTF transsexuals, in order to avoid equal protection violations, legislatures and courts should not require complete genital reconstruction for transsexuals to amend the sex on their birth certificates. Courts need to recognize that human beings do not always falls into the strict male-female dichotomy,²⁵ even excluding those who are transsexual.

THE SEX REASSIGNMENT PROCESS

The terms "sex" and "gender" can be synonomous and interchangeable, but this is not always accurate. In this note, I use "sex" as biological, identifiable through genitalia.²⁶ Gender identity is more complex; it is "an internal experience . . . the sense of being male or female."²⁷ It is probably the case that most people experience their gender identity to be the same as their biological sex: most persons born with female genitalia have a female gender identity and vice versa.²⁸ This is an example of gender identity and biological sex being harmonious with one another. Gender expression is the external experience: it is how society perceives the external characteristics and behaviors that are identified as masculine and feminine.²⁹

S.W.3d at 231.

²³ See *Anonymous*, 325 N.Y.S.2d at 501; *Littleton*, 9 S.W.3d at 231; *Gardiner*, 273 Kan. at 215; *Kantaras*, 884 So.2d at 161.

²⁴ For example, recognizing a MTF transsexual as someone who was born female.

²⁵ The intersexed do not fall into this dichotomy because they are born with both male and female physical traits. Because people do not always fit into clean "male" or "female" characteristics, marriage should not require a defined sex.

²⁶ See, e.g., *Kantaras*, 884 So.2d at 155.

²⁷ Samantha J. Levy, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 143 (2002).

²⁸ *Id.*

²⁹ *Id.*

Transgendered persons are those who feel a disconnect between their gender identity and their biology, from conventional expectations of masculinity or femininity.³⁰ There are two categories of transsexual: the male-to-female transsexual and the female-to-male transsexual. The male-to-female transsexual is a person born with a male body but has predominantly female gender identity.; The female-to-male transsexual is a biological female but has a male gender identity. Many transsexual persons seek medical intervention in order to alter their body to reflect their gender identity and expression. These persons are classified as having “gender identity disorder”³¹ or “gender dysphoria.”³²

There are various steps that a transsexual person may take to alleviate the nonconformity between their gender identity and their sex. The changes begin with inexpensive, exterior changes like hairstyle and clothing changes that are identifiable with the respective gender identity. For men, this includes dressing like a woman, growing their hair long, and shaving all facial and bodily hair. FTM transsexuals may cut their hair short and wear men’s clothing.³³ Nearly all transsexuals will take male or female hormones to assist in their masculinization or feminization. Sex reassignment surgery is the ultimate step in aligning the transsexual’s’ physical sex characteristics with their gender identity.³⁴ Complete sex reassignment surgery will leave a person permanently sterile.

Before SRS can even take place, the transsexual must typically undergo at least two years of preparation and extreme time-consuming and financial commitments. Three months of psychotherapy are required to obtain an evaluation for hormone therapy and one or two years spent living twenty-four hours a day as the target gender while continuing hormone therapy. The procedures and operations themselves, can add up to \$50,000 and sometimes more than \$100,000.³⁵ According to a study conducted about ten years ago, one in 11,000 men and one in 30,000 women undergo complete gender reassignment surgery.³⁶ Some of the surgeries pursued by transsexual persons include “bilateral mastectomy, orchiectomy,³⁷ phalloplasty,³⁸ hysterectomy, vaginoplasty³⁹ . . .

³⁰ *Id.*

³¹ *Id.* at 3, 4. The Diagnostic and Statistical Manual of Mental Disorders Fourth Edition identifies persons who are “dissatisfied” with their sex as suffering from a gender identity disorder. Transsexualism has three criteria: the desire to live and be accepted as a member of the opposite sex, usually accompanied by the desire to have their body conform with the preferred sex through surgery and hormone treatment; the identity being present for at least two years; and the disorder is not caused by a chromosomal abnormality or another mental disorder.

³² Levy, *supra* note 27, at 145. “Gender dysphoria causes intense feelings of conflict and deep emotional pain.”

³³ *Id.* See also Anne Lawrence, *Transsexual Surgery: Pros and Cons*, available at <http://www.annelawrence.com/prosandcons.html> (last visited Mar. 18, 2008).

³⁴ Levy, *supra* note 27, at 145.

³⁵ *Id.*; see also Vitello, *supra* note 13, at 3.

³⁶ Vitello, *supra* note 13, at 3.

³⁷ Orchiectomy is another word for castration, or any action which causes a biological male to lose use of his testes or a female loses the functions of her ovaries. See <http://www.healthsquare.com/mc/fgmc0817.htm>.

brow reduction, facial implants, vaginal closure, voice surgery, metoidioplasty,⁴⁰ augmentation mammoplasty,⁴¹ tracheal shave,⁴² and liposuction . . .⁴³ as well as oophorectomy⁴⁴ and vaginectomy.⁴⁵ For FTM transsexuals, the most common surgery undergone in New York City is chest surgery. Fewer than ten percent of FTM transsexuals undergo any reconstructive genital surgery due to the medical risks and costs associated with the surgery.⁴⁶ Many FTM transsexuals see no reason to have complete genital reconstruction, or “bottom surgery.”⁴⁷ The fact that some courts will grant amended birth certificates to FTM postoperative transsexuals who have not undergone complete genital reconstruction discourages FTM transsexuals from going through the extreme risk and expense of genital reconstruction surgery. However, should MTF transsexuals have to undergo complete genital reconstruction surgery to receive an amended birth certificate if FTM transsexuals do not have to? It is unfair to say that they do. It is not proper for a state to prefer FTM transsexuals over MTF transsexuals; this illustrates a preference for maleness over femaleness. Making it legally easier for a woman to become a man than for a man to become a woman is a violation of the Equal Protection Clause and will be addressed later on in this Note.

LEGAL DETERMINATION OF SEX DIFFERS FROM STATE TO STATE

Legal determination of a transsexual person’s sex varies from state to state and also differs when amending a birth certificate or determining the validity of a marriage.⁴⁸ Some states, such as Idaho and Ohio, refuse to change the sex on a birth certificate.⁴⁹ In the case of Christie Lee Littleton, a Texas court amended her birth certificate to change the sex from male to female. The Texas Court of Appeals, however, refused to acknowledge her as female for the purposes of an action under the Wrongful Death and Survival Statute and held her marriage to her

³⁸ See Green, *supra* note 15. Phalloplasty is the construction of penis through surgery.

³⁹ See Intimate Operations, *supra* note 16, and accompanying text.

⁴⁰ See Green, *supra* note 15. Metoidioplasty is the release of the suspensory ligament of the hypertrophied clitoris and placement of testicular prostheses in the centrally-approximated labia majora resulting in a micro-penis.

⁴¹ Augmentation mammoplasty is another phrase for breast augmentation.

⁴² Tracheal shave, or chondrolaryngoplasty, is a surgical procedure in which the thyroid cartilage is reduced in size by shaving down the cartilage through an incision in the throat in order to reduce the size of the Adam’s apple. <http://www.tsroadmap.com/physical/face/trachea.html>.

⁴³ Birth Certificate Sex Designation: An Overview of the Issues, *available at* <http://www.srlp.org/node/94> (last visited Oct. 4, 2008).

⁴⁴ See Green, *supra*, note 15. Oophorectomy is surgical removal of the ovaries resulting in sterilization.

⁴⁵ *Id.* Vaginectomy is a medical procedure to removal all or part of the vagina.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., *Anonymous v. Mellon*, 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1977); *M.T. v. J.T.*, 140 N.J.Super. 77 (N.J. Super. Ct. App. Div. 1976).

⁴⁹ Instructions for Changing Name on Birth Certificate, *supra* note 2, at 6, 17.

deceased spouse a nullity.⁵⁰ Why allow the amendment of a birth certificate to reflect a change in sex if it has no significance in a court proceeding? The court acknowledged that Christie Littleton had the capacity to function sexually as a female and was medically a woman, but the “words contained in the amended certificate [were] not binding on [the] court.”⁵¹ The *Littleton* court transformed the birth certificate from a legal document needed to get a driver’s license or passport to a piece a paper used only to satisfy a transsexual person’s need for verification of the new gender classification, while having no legal significance.

Factors Used to Determine Sex

Scholars use up to eight factors that may be relevant in determining gender: internal morphologic sex—i.e., prostate or uterus; external morphologic sex—genitalia; gonadal sex—testes or ovaries; chromosomal sex—presence or absence of Y chromosome; hormonal sex—predominance of androgens or estrogens; phenotypic sex—secondary sex characteristics, i.e., facial hair, breasts, assigned sex and gender of rearing; and personal sexual identity—gender identity.⁵² This approach is more sophisticated than the British court’s ruling in *Corbett v. Corbett*, holding that “the biological sexual constitution of an individual is fixed at birth—at the latest—and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means,” and “the only cases where the term ‘change of sex’ is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.”⁵³ The *Corbett* court acknowledged four criteria for determining sexual identity: chromosomal factors, gonadal factors, genital factors, and psychological factors.⁵⁴ In the year following the *Corbett* decision, a New York court declared a marriage between man and a preoperative transsexual man to be invalid as a matter of fact because the union was not between a male and a female, so no marriage had taken place.⁵⁵ The court in *Littleton v. Texas* gave heavy weight in its decision to *Corbett*.⁵⁶

⁵⁰ *Littleton*, 9 S.W.3d at 231.

⁵¹ *Id.*

⁵² In re Heilig, 372 Md. 692, 699 (2003). See Julie A. Greenberg & Marybeth Herald, *You Can’t Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 825 (2005).

⁵³ *Corbett v. Corbett*, (1970) P. 83 at 14. See *Anonymous*, 325 N.Y.S.2d at 499. It is arguable that a mistake as to sex was made at birth in the case of transsexuals, i.e., identifying a FTM at birth as a female was the mistake and should be corrected. This argument raises implications for including sex at all on the birth certificate at the moment of delivery; perhaps sex should be filled in after the person develops gender identity, years later. This scenario is extremely unlikely, except perhaps in the case of intersex babies in which the parents must choose the sex of the child since it is unclear by physical appearance. See also Phyllis Randolph Frye, *Genital Surgery NOT Required for Legal Change of Sex: Freedom From the “Have-To” of the Scalpel*, 3 NAT’L J. OF SEXUAL ORIENTATION L. 30, available at <http://ibiblio.org/gaylaw/issue5/frye2html> (last visited March 20, 2008).

⁵⁴ *Corbett*, (1970) P. 83 at 11.

⁵⁵ *Anonymous*, 325 N.Y.S.2d at 499.

⁵⁶ *Littleton*, 9 S.W. 3d at 226-27.

Most courts will allow amendment of birth certificates if there is a factual mistake made at birth which is “subsequently revealed by further medical investigation.”⁵⁷ According to Phyllis Frye of the International Conference on Transgender Law and Employment Policy, designating sex on the birth certificate at the moment of birth involves more than just observed medical fact.⁵⁸

The observed medical fact concerns the structure of neonatal genitalia as falling within a range of typically male or female. The prediction—so often true that its contingent and problematic aspect has in the past not usually been recognized—is that as the infants [sic] grows further into childhood and then into adulthood, there will almost always be a congruence between the anatomical indicia of sex—male and female—already noted, and an emerging subject gender identity, yet to develop. One might therefore say, in cases of transsexual gender . . . dysphoria, that in filling out an infant’s birth certificate the physician made a mistake . . . in predicting the emerging congruence of psyche⁵⁹ and soma.⁶⁰ From this point of view revision of legal documents of a transsexual, such as a birth certificate, involves not a sex change but a documentary correction of an error, an error in prediction.⁶¹

Embracing the concept of “official documentary error” would eradicate the conservative stance taken by the courts in *Corbett* and *Littleton*, that sex is solely determined by the chromosomal makeup at birth, because they would no longer be in direct conflict.⁶² However, the courts must first be convinced that congruence of the chromosomal makeup and gonadal and genital tests at birth⁶³ are not dispositive of sex determination.

Effects of the Factors of Sex Determination in Judicial Proceedings

One court has upheld the validity of a marriage between a male and a postoperative MTF transsexual wife, based on the wife’s status as a legal female.⁶⁴ The wife, who was a postoperative transsexual female, filed a complaint for support and maintenance, and the husband alleged that the wife was male and the marriage was void. The Superior Court of New Jersey held that where a

⁵⁷ *Corbett*, (1970) P. 83 at 12.

⁵⁸ *See id.*; Frye, *supra* note 53, at 34. In the case of Phyllis Frye’s birth certificate amendment, the court found she was a complete transsexual female and the original birth certificate listing Frye as a male was revealed to the court to be a non-negligent misstatement and the birth certificate should be corrected to read female. It is important to note that Ms. Frye never underwent complete genital reconstruction, which will be addressed later. *See also* de Savitsch, *supra* note 1, at Appendix A.

⁵⁹ Psyche is the Greek concept of the self, the individual. <http://www.merriam-webster.com/dictionary/psyche>.

⁶⁰ Soma is the Greek work for body. <http://www.merriam-webster.com>.

⁶¹ Frye, *supra* note 53, at 34.

⁶² *See* Frye, *supra* note 53; *Corbett*, (1970) P. 83; *Littleton*, 9 S.W.3d at 231.

⁶³ *Corbett*, (1971) P. 83.

⁶⁴ *M.T.*, 140 N.J.Super. at 77.

transsexual was born with the physical characteristics of one sex, but successful sex reassignment surgery harmonized gender identity and genitalia so he or she becomes physically and psychologically unified and fully capable of sexual activity as a woman or man, the transsexual thereby becomes a member of the female or male sex for marital purposes.⁶⁵ Thus, the subsequent marriage of a postoperative transsexual female to a male was not void, and absent fraud, the husband had a legal obligation to support her as his wife.⁶⁶ This court did not follow the cases that came before it. Instead it held that there are several criteria that may be relevant in determining the sex of an individual, rejecting *Corbett's*' analysis, which used the moment of birth as the sole determinant of sex.⁶⁷ The court said it is important to recognize that the sexual capacity of the person requires the physical ability and psychological orientation to engage in sexual intercourse as a male or a female.⁶⁸ Therefore, the man trapped in a woman's body cannot be truly female, even at a young age, because the physical does not match the psychological.⁶⁹

The court in *M.T. v. J.T.*, which ordered the change on the birth certificate, addressed the public policy issues often raised in the context of transsexual name changes or birth certificate amendment proceedings: prevention of fraud against the public.⁷⁰ The court found that "the transsexual is not committing a fraud upon the public. In actuality she is doing her utmost to remove any false façade."⁷¹ In the several cases preceding *M.T. v. J.T.*, most courts had refused to allow amending the sex designation on a birth certificate or name changes.⁷² In the New York case *Anonymous v. Weiner*, the court sustained the refusal by the New York City Board of Health to amend the sex designation on a birth certificate.⁷³ It held that MTF transsexuals are still "chromosomally males" while appearing to be females, and

⁶⁵ *Id.*

⁶⁶ *Id.* at 88.

⁶⁷ *Id.* at 86.

⁶⁸ *Id.* at 87.

⁶⁹ THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, *supra* note 18, at 3.

⁷⁰ *M.T.*, 140 N.J.Super. at 88. See also *In re Matter of Anonymous*, 314 N.Y.S.2d 668, 670 (N.Y. Civ. Ct. 1970); *Darnell v. Lloyd*, 395 F.Supp. 1210, 1215 (D. Conn. 1975); *Hartin v. Director of Bureau of Records and Statistics et al.*, 347 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1973); *In re Gena Michele Daniels*, 773 N.Y.S.2d 220, 221 (N.Y. Civ. Ct. 2003).

⁷¹ *M.T.*, 140 N.J.Super. at 88.

⁷² See *In re Matter of Anonymous v. Weiner*, 270 N.Y.S.2d 319, 324 (Sup. Ct. N.Y. 1966); *Hartin v. Director of Bureau of Records and Statistics et al.*, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973).

⁷³ *Weiner*, 270 N.Y.S.2d at 324. See Louise H. Schwartz, *Updated Look at Legal Responses to Transsexualism: Especially Three Marriage Cases in U.K., U.S. and New Zealand*, INT'L J. OF TRANSGENDERISM (1997), available at <http://www.symposium.com/ijt/ijtc0201.htm>. (In the mid-1960s, the Board of Health of the City of New York requested the opinion of the Committee on Public Health of the New York Academy of Medicine as to whether birth certificate sex designations should be changed pursuant to applications by transsexuals—mostly MTF transsexuals. The Committee concluded that MTF transsexuals are chromosomally male while appearing female, so it is unclear whether records such as birth certificates should be changed "and thereby used as a means to help psychologically ill persons in their social adaptation" so the Committee opposed change in sex designation. As a result of this report, the New York City Board of Health adopted a resolution banning a change in sex designation on birth certificates in the case of transsexuals.)

the desire to protect the public against fraud outweighs the desire of the transsexual for “concealment of a sex change.”⁷⁴ The court in *Hartin v. Director of the Bureau of Records* affirmed the rejection of a transsexual’s right to amend a birth certificate because the “mutilating surgery” does not change the chromosomal makeup of the person.⁷⁵ The Oregon Supreme Court in *K. v. Health Division* held that no authority under state law existed to change the birth certificate for a change in name or sex designation because the birth certificate represented a historical record of birth and the facts existing at that time.⁷⁶ In contrast, the *M.T.* court held that if a person undergoes successful sex reassignment surgery, and the postoperative transsexual is sexually functional as a male or female, there is no legal barrier, “social taboo,” or “reason grounded in public policy to prevent that person’s identification . . . to the sex finally indicated.”⁷⁷ Similarly, the *In re Anonymous* court rejected the *Anonymous v. Weiner* standard as “unrealistic and inhumane . . .,” explaining that:

Where . . . with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made.⁷⁸

The court held that recognition of the individual’s sex promotes the internal harmony he or she has spent a lifetime trying to achieve and does no disservice to public policy or the interests of society.⁷⁹

In *Vecchione v. Vecchione*, the California Superior Court acknowledged the marriage between a woman and a transsexual man. In a child custody proceeding, the wife attempted to annul the marriage as invalid since her husband was born female and California does not recognize same-sex marriage.⁸⁰ Although the annulment was originally granted, it was overturned; California recognizes sex reassignment surgeries, so the annulment, not the marriage, was invalid. *Vecchione* represents one of the very few cases that uphold the validity of transsexual marriage.⁸¹

⁷⁴ *Weiner*, 270 N.Y.S. 2d at 324. The City of New York leaves sex designation blank on amended birth certificates following sex reassignment surgery.

⁷⁵ *Hartin*, 347 N.Y.S.2d at 517.

⁷⁶ *K v. Health Div.*, 277 Or. 371, 375 (Or. 1977). See Jody Lynee Madeira, *Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities For, Protecting Transsexuals’ Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 148 (2002).

⁷⁷ *M.T.*, 140 N.J.Super. at 89.

⁷⁸ *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968). Compare *Anonymous v. Weiner*, 270 N.Y.S. 2d 319 (N.Y. Sup. Ct. 1966).

⁷⁹ See *M.T.*, 140 N.J.Super. 77.

⁸⁰ *Vecchione v. Vecchione*, No. 95D003769, (Orange County, Cal.) (1996) (unpublished). See also Transgender Marriage Resources, available at <http://ismsandsuch.com/tm/legal>. (last visited Mar. 20, 2008).

⁸¹ See *Kantaras*, 884 So.2d at 155.

The effect of invalidating the amended or new birth certificate of a postoperative transsexual man or woman resonates on their legal rights for the rest of their lives, specifically in their right to marry. Denying postoperative transsexual persons the right to marry due to the sex of their gender identity is damaging; they have had to struggle their entire lives to become the physical sex that matches their gender identity and expression. They deserve to have their sex recognized by society and the law.⁸² To deny postoperative transsexuals the fundamental right to marry as a result of their gender identity and new physical sex would be to marginalize and ostracize a class of people who have been stigmatized their entire lives because they do not fit into the same clean-cut gender category as the majority of people.⁸³ Promoting the emotional well-being of all citizens is undoubtedly a public policy issue. It is important for the law to promote public policy as long as other justice values are not subordinated.⁸⁴ To allow postoperative transsexuals to marry as their self-identified sex would promote beneficial consequences without conflicting with any other policy interests.⁸⁵ Those cases that have allowed postoperative transsexuals to marry in their self-identified sex have emphasized the importance of the social and psychological aspects of sex and gender identification.⁸⁶

Birth Certificate Amendments

Most states in the U.S. will issue either amended or new birth certificates for persons who want a name change or a change in sex designation on their birth certificates. An amended birth certificate is one that notes the change in sex or name but does not replace the original birth certificate.⁸⁷ For example, the state of Alabama will issue an amended birth certificate noting the change in sex and name but will not issue a new birth certificate replacing the old one. Obtaining the amended birth certificate in Alabama includes a paying a \$15 fee and submitting an original or certified copy of the court order for the name change, as well as an original or certified copy of the court order for change of sex.⁸⁸ In order to obtain an amendment to a birth certificate, the individual must file a "petition to amend a vital record," state what is to be amended, provide documentation of the reason to file the petition, and name the "Center for Health Statistics" as defendant.⁸⁹

⁸² See Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745, 766 (2000).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 767.

⁸⁶ *Id.*; see *M.T.*, 140 N.J.Super. at 77; *Attorney-General v. Otahuhu Family Court*, [1995] 1 N.Z.L.R. 603, 606 (H.C.).

⁸⁷ See Instructions for Changing Name and Sex on Birth Certificate, *supra* note 2.

⁸⁸ *Id.* at 1-2.

⁸⁹ *Id.*

Section 22-9A-19(d) of the Alabama Vital Statistics Law deals with sex reassignment:

upon receipt of a [certified copy of a court order] . . . indicating that the sex of an individual born in this state has been changed by surgical procedure and that the [individual's name has been changed], the certificate of birth . . . shall be amended as prescribed . . . to reflect the changes.⁹⁰

It is important to note that change of sex by surgical procedure is not necessarily complete genital reassignment, since many courts will grant the change of sex without evidence of the applicant having undergone complete genital reassignment.⁹¹

Louisiana will change both name and sex designation on a birth certificate by issuing a new one. In order to obtain a new birth certificate, the individual must provide an original letter from the SRS surgeon and an original or certified copy of the order for the name change, which must have been approved by the district attorney. Louisiana has an interesting provision acknowledging the existence of persons currently in a heterosexual marriage who undergo SRS: the spouse must give written consent of the changes.⁹² This provision acknowledging the existence of marriages that were once heterosexual but became same-sex through the sex reassignment process also acknowledges the validity of such marriages. It gives no warning that the marriages may later be held invalid because of its same-sex status. People in marriages in which one spouse undergoes a sex change do run into legal difficulties because of the ban on same-sex marriage. However, Louisiana's acknowledgment of such marriages should prove beneficial for postoperative transsexuals who marry to a member of their original sex—for example, a MTF transsexual marrying a man—if the validity of their marriage should ever come into question.⁹³

In contrast, Idaho will not change sex on the birth certificate. The Idaho legislature rejected a bill to allow amendment of the birth certificate for change in sex designation but it will allow changing the name on the birth certificate.⁹⁴ Tennessee and Ohio also will not change sex on birth certificates,⁹⁵ but an individual in Ohio can change the sex designation on an Ohio driver's license with

⁹⁰ *Id.* at 2.

⁹¹ See Frye, *supra* note 53.

⁹² See Instructions for Changing Name and Sex on Birth Certificate, *supra* note 2.

⁹³ See TRANSGENDER LAW CENTER, TRANSGENDER PEOPLE AND THE FEDERAL MARRIAGE AMENDMENT: FREQUENTLY ASKED QUESTIONS at 2, available at <http://www.transgenderlaw.org/resources/transmarriagefaq.pdf> (last visited Mar. 18, 2008). (If a person is in a marriage in which a spouse came out as a transsexual and transitioned after getting married with the result that both spouses are now men or are now women, the Federal Marriage Act should not affect the validity of the marriage. Generally, the validity of a marriage is determined by the status of the couple at the time the marriage was performed. If one spouse later transitions, as long as the spouses were of different genders at the time the marriage was performed, the marriage should remain valid.)

⁹⁴ See Instructions for Changing Name and Sex on Birth Certificate, *supra* note 2, at 6.

⁹⁵ *Id.* at 17, 21.

a letter from the SRS surgeon.⁹⁶ Florida and Mississippi will issue an amended birth certificate but will not erase the old name and sex designation; Mississippi will simply type the new name and sex designation in the margin.⁹⁷

Some states' rules regarding amendments of birth certificates are pro-transsexual. After the individual provides an original or certified copy of the letter from the SRS surgeon, Hawaii will issue a new birth certificate to change name and sex designation rather than amending the old certificate. No court order is required.⁹⁸ In Indiana, there is no sex designation listed on birth certificates, so no change in sex designation on the birth certificate is ever necessary for transsexuals born in that state.⁹⁹

Amendment of the birth certificate is necessary for postoperative transsexuals who are struggling to achieve legal recognition in their new physical sex.¹⁰⁰ However, transsexuals do not currently have a liberty interest in defining their own sex; no U.S. court in cases involving transsexual legal rights has officially held that transsexual individuals have a universal right to identify their sex on the official birth certificate.¹⁰¹ "Although courts have allowed postoperative transsexuals to self-identify their sex on a case-by-case basis, these base-by-case determinations do not translate into a universal right for transsexuals to self-identify their own sex."¹⁰² A few limited liberty interests have been granted to transsexuals, like the interest to dress as their self-identified sex for purposes of therapy. However, the few liberty interests the law has granted to transsexuals do not translate into a broader liberty interest in defining their legal sex.¹⁰³

Full Faith and Credit and Sex Determinations by State

In total, twenty-nine U.S. jurisdictions—twenty-eight states and the District of Columbia—specifically authorize a legal sex change for transsexuals by statute or administrative ruling.¹⁰⁴ Twenty-two states do not have legislation specifically authorizing or banning legal sex changes for transsexuals. Some of these states have a general birth certificate amendment statute, and courts are left to determine the legal sex for purposes of marriage, etc.¹⁰⁵ One U.S. state legislature specifically outlaws a legal change of sex.¹⁰⁶

⁹⁶ *Id.* at 17.

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 8.

¹⁰⁰ Madeira, *supra* note 75, at 145.

¹⁰¹ *Id.*

¹⁰² *Id.* Cf. Rhonda Smith, *Changing Birth Gender Varies State to State*, WASHINGTON BLADE, Dec. 6, 2002, <http://www.tgcrossroads.org/news/archive.asp?aid=524>.

¹⁰³ *Id.*

¹⁰⁴ Greenberg & Herald, *supra* note 52, at 838.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 845. (Tennessee has an articulated public policy against amending birth certificates.)

Transsexual individuals may be legally considered male in about one-half of the states and female in the other half because of differing state requirements for sex changes. Therefore, when a transsexual person crosses state borders, it is possible that his or her legal sex status will change as well, thus modifying who he or she can legally marry.¹⁰⁷ Transsexual individuals seek amendment of their birth certificates so that their legal identity will comport with their gender identity. It is reasonable to expect that when traveling from state to state, each state will recognize the sex indicated on the official birth certificate. However in some circumstances, states will refuse to recognize the legal sex as listed on a birth certificate from another state.¹⁰⁸ This refusal to recognize an official amended birth certificate violates the Full Faith and Credit Clause.¹⁰⁹ Article 4 of the Constitution states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."¹¹⁰

Full faith and credit requires states to honor the judgments of other states. A judgment rendered in one state by a court of proper jurisdiction must be recognized in every other state.¹¹¹ Courts have drawn distinctions between judgments and records. State judgments are entitled to complete deference by other state courts if the state rendering judgment had proper jurisdiction. The court must grant full faith and credit even if the judgment violates the state's public policy.¹¹² Acts and records of other states are accorded less deference; full faith and credit is not accorded if the recognition would violate a strong public policy of the state.¹¹³ Therefore, a state's decision on whether it should recognize a transsexual's amended birth certificate may depend upon whether the sex designation amendment is accorded the weight of a judgment or that of an act or record, which will essentially determine the amount of deference that must be accorded to it. A court-ordered amendment to a birth certificate should be entitled to full faith and credit in other states as it is the judgment of another state—as long as the authority to do so has been granted by the legislature.¹¹⁴ Birth certificates that are amended without a court order should be entitled to recognition unless the state legislature has a strong public policy argument against recognition. A non-court-ordered amended birth certificate will have the status of an act or record if the state legislature does not allow recognition of amended birth certificates.¹¹⁵ Only two

¹⁰⁷ *Id.* at 859.

¹⁰⁸ *Id.* at 844.

¹⁰⁹ *Id.* at 845.

¹¹⁰ U.S. CONST. art. IV, § 1.

¹¹¹ Greenberg & Herald, *supra* note 52, at 846.

¹¹² *Id.* at 871.

¹¹³ *Id.* at 846.

¹¹⁴ *Id.* at 848.

¹¹⁵ A public record is a record a government unit is required by law to keep. BLACK'S LAW

courts that heard cases on the effect of a postoperative transsexual's marriage have discussed the effect of full faith and credit implications concerning out-of-state amended birth certificates: *In re Estate of Gardiner* and *In re Marriage License for Nash*.¹¹⁶

The case of *In re Estate of Gardiner* involved a postoperative transsexual female, J'Noel Gardiner, who obtained an amended birth certificate from Wisconsin, her state of birth, and married Marshall Gardiner in Kansas. The action was litigated in Kansas.¹¹⁷ Since the marriage took place in Kansas, the only full faith and credit issue in the case was whether Kansas was obligated to recognize the amended birth certificate from Wisconsin, identifying J'Noel as a female.¹¹⁸ The trial court in *Gardiner* did not address the validity of the Wisconsin birth certificate, but rather, determined that it was not bound by the sex designation on the Wisconsin birth certificate.¹¹⁹

The Ohio Court of Appeals in *Nash* considered whether the trial court had accorded the same full faith and credit to the birth certificate to the extent that Massachusetts would.¹²⁰ The amended birth certificate created a rebuttable presumption that the husband was male. However, it was rebutted by evidence including the original birth certificate and prior marriage and divorce as a female. Although there was nothing in Ohio public policy prohibiting the change of sex designation, the evidence proved that Nash was a female under the Ohio common law definition. The Ohio trial court was not required to give full faith and credit to the Massachusetts conclusion that Nash was male.¹²¹ The court cited a strong public policy against same-sex marriage as its justification for refusing to recognize Nash's Massachusetts birth certificate.¹²²

Both courts in these cases engaged in a full faith and credit analysis but neither court determined that it was required to give full faith and credit to a sister state's issuance of an amended birth certificate.¹²³ However, neither court performed an in-depth analysis of full faith and credit principles, and it is unclear how a court conducting a similar analysis of full faith and credit principles would

DICTIONARY 1300 (8th ed. 2004). An act is considered an "act in the law," which is an act that is intended to create, transfer, or extinguish a right and that is effective in law for that purpose, or the exercise of legal power. *Id.* at 26.

¹¹⁶ Julie A. Greenberg, *When Is a Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289, 302 (2005); *see also* *In the Matter of the Estate of Marshall G. Gardiner*, 273 Kan. 191 (Kan. Sup. Ct. 2002); *In the Matter of Application for a Marriage License for Nash*, 2003 Ohio 7221, 1 (Ohio Ct. App. 2003).

¹¹⁷ *Gardiner*, 273 Kan. 191 (Kan. 2002).

¹¹⁸ Greenberg, *supra* note 116, at 302.

¹¹⁹ *Gardiner*, 273 Kan. 191 (Kan. 2002).

¹²⁰ *In the Matter of Application for a Marriage License for Nash*, 2003 Ohio 7221, P49 (Ohio Ct. App. 2003).

¹²¹ *Id.* at P46.

¹²² *Id.* at P48.

¹²³ Greenberg, *supra* note 116, at 306-07.

resolve the issue of amended birth certificates in the future.¹²⁴ These courts limited the determination of the full faith and credit analysis with regard to a transsexual marriage license, which essentially defeated the possibility of granting full faith and credit to the amended birth certificate.

SEX REASSIGNMENT IN THE INTERNATIONAL CONTEXT

Legal Effect of Sex Reassignment Abroad, Generally

A significant number of courts and legislatures abroad have made more progress than the United States in recognizing postoperative transsexual persons' new legal status as a member of the now opposite sex.¹²⁵ Germany adopted legislation in 1981 providing for the legal recognition of the acquired sex by permitting the courts to decide that a person should be a member of the opposite sex.¹²⁶ If the German court decides the individual is now a member of the acquired sex, the birth certificate may be amended to reflect only the acquired sex, and the person can now marry a person of the now-opposite sex.¹²⁷ France also allows postoperative transsexuals to marry a person of the opposite sex after legal recognition of their sex reassignment, though the changes of name and sex on the birth certificate will be recorded in the margins of the document, rather than replacing the original information.¹²⁸ Transsexuals in Finland need only undergo hormonal treatment for one year before applying to change their PIN number;¹²⁹ there is no requirement for surgery for changing legal sex, and following the change of the PIN number, they will have the same legal status as the rest of their acquired sex and can marry.¹³⁰ Italy allows for amendment of birth certificates after a court-stipulated "operation," though the legislature did not distinguish between hormonal treatment and surgery. Italian law considers the sexual-psychological characteristics as most important.¹³¹ Italy's Constitutional Court exhibited empathy and understanding for the transsexual condition when rationalizing the law:

¹²⁴ *Id.* at 307.

¹²⁵ See GOVERNMENT WORKING GROUP, HOME OFFICE OF SECRETARY, REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSEXUAL PEOPLE, Annex 4 (April 2000), available at: <http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf> (last visited Mar. 20, 2008).

¹²⁶ *Id.* at 64. (In Germany, in order to obtain a court determination, the person must have lived for three years belonging to the opposite sex, be unmarried, an adult, permanently sterile, and have undergone SRS).

¹²⁷ *Id.* at 64-65.

¹²⁸ *Id.* at 64.

¹²⁹ PIN numbers are Finnish government identification numbers, similar to a Social Security Number.

¹³⁰ See GOVERNMENT WORKING GROUP, *supra* note 125, at 63-64. (In Finland, treatment of transsexuals or changes of legal gender are not addressed by legislation but by interpretations of different established practices.)

¹³¹ *Id.* at 65.

Since transsexual people are not making a free choice when opting for gender reassignment, but are forced to do so by their very nature, the legislator's role is to guarantee that the case is examined properly, to ensure that appropriate treatment is provided and the individual's records changed accordingly. Another purpose of the law, which is inspired by the values of the freedom and dignity of the individual, is to overcome the isolation, hostility and humiliation to which these 'diverse' individuals are often subjected.¹³²

The Constitutional Court's declaration of the transsexual's lack of choice in his or her status as a transsexual illustrates a common theme in foreign court decisions supporting the legal rights of transsexuals: there are no important factors of public interest that weigh against the interest of a transsexual in obtaining legal recognition of gender reassignment.¹³³ Also, because most of these countries do not have a strict requirement for complete genital reconstruction surgery, FTM and MTF transsexuals remain in similarly situated: there does not appear to be differing standards based on the acquired sex.

Significant Developments in Foreign Case Law

Two particularly groundbreaking cases in the last twelve years that recognized the legal status of postoperative transsexuals in their acquired sex are both from the Australian continent and represent a significant progression in the steps courts may use to determine the legal sex of a postoperative transsexual.

Attorney-General v. Otahuhu Family Court

The dangers of the surgical procedures facing transsexuals—particularly FTM—were addressed by the New Zealand High Court in *Attorney-General v. Otahuhu Family Court*.¹³⁴ This case was brought on application of the Attorney-General on behalf of the Registrar of Births, Deaths, and Marriages for a declaration as to whether two persons of the genetically same sex may lawfully enter into a valid marriage where one of the parties has adopted a sex opposite to the other by means of sex reassignment surgery.¹³⁵ The court answered this question in the affirmative and discussed what factors may determine if two parties are of opposite sex. It rejected the traditional notions of the ability to procreate or perform sexually and recognized that the law of New Zealand had shifted away from a standard focusing on the ability for sexual performance. Instead, it

¹³² *Id.*

¹³³ See *Attorney-General v. Otahuhu Family Court*, [1995] 1 N.Z.L.R. 603 (H.C.); See re Kevin (2001) 28 Fam. L.R. 158; de Savitsch, *supra* note 1, at Appendix A.

¹³⁴ See *Otahuhu*, 1 N.Z.L.R. at 603.

¹³⁵ *Id.* at 604.

emphasized the psychological and social aspects of sex.¹³⁶ The court framed its decision in terms of society's needs:

[s]ome persons have a compelling desire to be recognised [sic] and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfill that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex . . . Where two persons present themselves as having the apparent genitals of a man or a woman, they should not have to establish that each can function sexually.¹³⁷

According to the *Otahuhu* court, once a FTM or MTF transsexual has undergone sex reassignment surgery, for purposes of appearance and function, they will no longer be a woman or a man but a member of the assigned sex.¹³⁸ There is no social advantage for the law to not recognize the postoperative transsexual's marriage as valid, and doing so will simply bring the law to conform with the "factual reality" once the person has undergone physical changes.¹³⁹ The court also emphasized that recognizing a postoperative transsexual in the assigned sex will not cause societal harm, and that it is important to keep the law consistent with societal behaviors.¹⁴⁰

The *Otahuhu* court addressed the difficulties in deciding on a system to determine whether a transsexual has completed the sex reassignment process, and in doing so, implicated the differences between MTF and FTM reassignment. Unfortunately, the difference between male and female can be determinative when a postoperative transsexual tries to marry in the reassigned sex. Because the surgical procedures required for males are usually less expensive and require less modification to the anatomy, postoperative MTF transsexuals may find it easier to marry and live legally as women. According to the *Otahuhu* court, it is not as easy to categorize a female-to-male transsexual, because many FTM transsexuals choose not to undergo phalloplasty but still undergo hormone therapy, mastectomy, and hysterectomy.¹⁴¹ In New Zealand at the time *Otahuhu* was decided, more MTF transsexuals were eligible to marry the opposite sex than FTM transsexuals. Unfortunately, the *Otahuhu* decision did not alleviate this additional burden placed on FTM transsexuals. If FTM transsexuals want to exercise their fundamental right to marry in New Zealand, they must put themselves at greater risk by undergoing complete genital reconstruction.¹⁴² For this reason, *Otahuhu's* focus on genital

¹³⁶ *Id.* at 606. *see also* M.T. v. J.T., 140 N.J.Super. 77 (N.J. Sup. Ct. App. Div. 1976).

¹³⁷ *Otahuhu*, 1 N.Z.L.R. at 607.

¹³⁸ *Id.* The postoperative transsexual can no longer enter into a sexual relationship as the birth sex or procreate.

¹³⁹ *Id.*

¹⁴⁰ *Id.* Since society allows people undergo medical and physical reassignment then the law should allow people to function in the reassigned sex.

¹⁴¹ *Id.* at 614-15.

¹⁴² Leslie I. Lax, *Is the United States Falling Behind? The Legal Recognition of Post-Operative*

construction severely limits the legal rights of the postoperative transsexual for marital purposes, while the genital factors remain less important for other legal purposes.

Re Kevin

Contrary to *Corbett v. Corbett*, the 1970 United Kingdom case that held that the “biological constitution of an individual is fixed at birth (at the latest), and cannot be changed,”¹⁴³ the Australian Family Court held in 2001 that “for the purpose of ascertaining the validity of a marriage . . . the question of whether a person is a man or a woman is to be determined as of the date of marriage.”¹⁴⁴ Kevin, a FTM postoperative transsexual whose legal status as a man was before the court, chose not to undergo complete genital reconstructive surgery because of the complexity, cost, and risk of failure and complications.¹⁴⁵ Despite the lack of male genitalia, his development of male secondary sex characteristics and lack of female sex organs sufficed to obtain a new birth certificate, showing his sex as male.¹⁴⁶ The *Kevin* court looked beyond traditional notions of sex and biology¹⁴⁷ to notions of “social sex” and its harmonization with psychological and anatomical sex. Social sex is sex as perceived by society; Kevin was perceived as male by his family and peers after his medical and surgical procedures.¹⁴⁸ The court identified Kevin as having been a male his entire life, a groundbreaking declaration for a modern court.

An interesting aspect of the *re Kevin* decision is that the Australian Family Court used a Swiss case from 1945 as persuasive authority.¹⁴⁹ The case, *re Leber*, concerning the petition of postoperative MTF transsexual Arnold Leber, focused on the ability of postoperative transsexuals to amend the sex designation on their birth certificate.¹⁵⁰ The *Kevin* court, citing *Leber*, wrote:

[We are inclined to] attribute to the psychic element, in the determination of sex, an importance at least equal to that of the physical element . . . It is not only the body which determines the sex of the individual, it is also the mind. When there is a discord between body and mind, one must see which of these two elements predominates. Leber, being neither a perfect man or a perfect woman, must be placed in the category of human beings which he most resembles In the unanimous opinion of doctors and

Transsexuals' Acquired Sex in the United States and Abroad, 7 QUINNIPIAC HEALTH L.J. 123, 136 (2003).

¹⁴³ *Corbett* (1970) P. 83 at 14.

¹⁴⁴ *re Kevin* (2001) 28 Fam. L.R. 158, 161.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.* at 9.

¹⁴⁷ Traditional notions of sex are chromosomal, genital, and gonadal sex.

¹⁴⁸ *re Kevin* (2001) 28 Fam. L.R. at 1; see Lax, *supra* note 142, at 138.

¹⁴⁹ *re Kevin* (2001) 28 Fam. L.R. at 20.

¹⁵⁰ Lax, *supra* note 141, at 139; de Savitsch, *supra* note 1, at Appendix A.

experts he is nearest, as a whole, to a woman In granting him the civil status of a woman we are satisfying the most profound desire of his being while consolidating his psychic and moral equilibrium; at the same time we are facilitating his social adaptation by permitting him to lead a more normal type of life than heretofore.¹⁵¹

The *Leber* court granted Leber's application to change the sex designation on her birth certificate from male to female as a result of MTF sex reassignment surgery. It is rather astounding that a court in the 1940s made such a progressive decision, especially because there were few of the medical technologies available today that make the transsexual's journey through the sex reassignment process more "complete."¹⁵² According to the *Leber* court, "The personal interest which urges [Leber] to ask for change of [sex on his birth certificate] is . . . not opposed to the interests of public order and morality [but] quite the contrary."¹⁵³

The United States courts should be more willing to look to courts abroad when addressing the legal status of postoperative transsexuals and adapt the progressive approach illustrated by the *Leber* and *Kevin* courts.

EQUAL PROTECTION AND SEX REASSIGNMENT

Systems of Sex-Classification in the Courts

The Equal Protection Clause of the Constitution requires that all people similarly situated be treated similarly.¹⁵⁴ Unless a suspect class or fundamental right is involved, the government's action must meet the standard of rational review, which provides that the government only bears a rational relationship to a legitimate state interest. Where laws or government practices differentiate based on gender, the state must meet the standard of intermediate scrutiny, showing at least that the classification serves important governmental objectives, and that the discriminatory means employed are substantially related to those objectives. One scholar has interpreted the case law under the Equal Protection Clause as promoting the concept of a unified "citizenry," *not* different sexes comprising that "citizenry."¹⁵⁵ According to Equal Protection Clause jurisprudence, no state shall deprive any "person" within its jurisdiction of equal protection of the laws, regardless of sex. The Equal Protection Clause has been interpreted to ban governmental discrimination on the basis of sex and, in particular, the United States Supreme Court has interpreted equal protection to mean that the "government may

¹⁵¹ *re Kevin* (2001) 28 Fam. L.R. at 20 (citing *re Leber*, Swiss Cantonal Court, July 2, 1945, *in DE SAVITSCH*, *supra* note 1, at 105).

¹⁵² I say "complete" because there were genital reconstructive surgeries very rare at the time.

¹⁵³ *DE SAVITSCH*, *supra* note 1, at 105. After the court proceeding, the Swiss government went so far as to refund some of the taxes that Leber had paid while still classified as a male. *Id.* at 65.

¹⁵⁴ U.S. CONST. amend. XIV, § 2. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

¹⁵⁵ David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1022 (2002).

not rely on stereotypes or ‘overbroad generalizations’ about the proper roles of men or women when it allocates rights and responsibilities.”¹⁵⁶

According to the Supreme Court in *City of Cleburne*, the Equal Protection Clause functions to make certain that the government does not subject its citizens to arbitrary classifications.¹⁵⁷ However, when a court determines the validity of a marriage between a postoperative transsexual male and a female couple, it engages in making a sex determination of the postoperative transsexual. In doing so, the court is necessarily distinguishing between males and females and deciding what is male and what is female, thus creating a system of classification. Inherent in this sex determination is a legal right: if the postoperative transsexual man is determined to be a man by the court, he will be able to legally marry; if the court determines he is female, he will not be able to marry his girlfriend. The system the court uses to determine the sex of a postoperative transsexual is integral to this assessment. Courts often reject scientific evidence and the opinions of knowledgeable medical professionals for those factors that they believe to be determinative of sex: chromosomal and gonadal sex, the ability to reproduce, and sex at birth—the “God-given” sex.¹⁵⁸ This is in stark contrast to *Re Kevin* and *re Leber*, where the court considered factors like perceived sex and psychological sex to be determinative.¹⁵⁹ A sex-based classification system that utilizes sex and gender stereotypes—for example, instead of scientific fact or medical opinion—is subject to being declared unconstitutional under the Equal Protection Clause. The argument can be made that there is no important state interest in supporting a system of sex classifications based on gender stereotypes—for example whether a FTM transsexual has had the vagina reconstructed into a penis¹⁶⁰—and the state probably would be unable to demonstrate a substantial relationship between the means of accomplishing that state interest and the state interest itself.¹⁶¹

A state may try to legitimize its sex-based classification system by providing an important state interest and proving that the means with which the state accomplishes this interest have a substantial relationship to the interest provided. States have denied postoperative transsexual persons the right to legally identify themselves as their self-identified sex for state interests such as the public policy interest against same-sex marriage,¹⁶² the postoperative transsexual’s inability to reproduce,¹⁶³ preventing a fraud upon the public,¹⁶⁴ the “God-given” sex is

¹⁵⁶ *Id.*

¹⁵⁷ *City of Cleburne*, 473 U.S. at 446.

¹⁵⁸ See Greenberg & Herald, *supra* note 52, at 863; See generally In the Matter of the Application for a Marriage License for Nash, 2003 Ohio 7221 (Ohio Ct. App. 2003).

¹⁵⁹ *re Kevin* (2001) 28 Fam. L.R. 158; de Savitsch, *supra* note 1, at Appendix A.

¹⁶⁰ I use this example because “maleness” is not defined solely by having male genitalia, and intersexed persons’ genitalia often fall between male and female.

¹⁶¹ Greenberg & Herald, *supra* note 52, at 863.

¹⁶² *Nash*, 2003 Ohio 7221 at P48.

¹⁶³ In the Matter of the Estate of Marshall G. Gardiner, 273 Kan. 191 (Kan. 2002). There is no proof of fertility requirement for marriage, and since transsexuals are always infertile, the court is

permanent,¹⁶⁵ and the state's need to discourage the "mentally ill" from engaging in the sex reassignment process.¹⁶⁶ In the case of *In re Marriage License for Nash*, the court prevented the marriage between a postoperative transsexual man—with an amended birth certificate reflecting the assigned sex as male—and a woman, citing Ohio's public policy against same-sex marriages as the reason.¹⁶⁷ Strangely, the court in *Littleton* held that a MTF transsexual could not be a woman because regardless of law and science, the sex is "immutably fixed by our Creator at birth."¹⁶⁸ It is unconstitutional for a court to make a decision based on religion and wholly contrary to what the Founding Fathers intended for this country. In the absence of secular grounds for a decision, the state cannot cite religion as a justification.¹⁶⁹ Citing faith and religious references as a determinant for sex reflects a perspective that is limited to traditional and outdated gender stereotypes as well as one that conflicts with modern science and is unconstitutional under the Equal Protection Clause.¹⁷⁰

A state's refusal to recognize a postoperative transsexual in the sex of their gender identity, expression, and anatomy and may violate the Equal Protection Clause's guarantees even under the loosest standard of review.¹⁷¹ When a state defines "male" and "female" in a manner contrary to current medical science and places a disability on transsexuals by refusing to acknowledge their self-defined sex, the state is running the risk of evidencing a "bare . . . desire to harm a politically unpopular group . . . [which] cannot constitute a legitimate governmental interest."¹⁷² The denial of transsexuals' right to identify their own sex based on their gender identity, expression, and anatomy inhibits their personal relationships, particularly the right to marry. The state would be exhibiting an animus toward postoperative transsexuals who want to marry people of the opposite sex. Their desired marriages would not constitute a same-sex marriage, and the state cannot deny equal protection to a politically unpopular group.

*Can the State Decide Transsexuals "Have-To-Have" Complete Genital
Reconstructive Surgery?*

Integral to the equal protection and transsexual issue is how courts determine who qualifies as male and who qualifies as female. As discussed earlier, when

identifying them as neither male nor female but other. See Greenberg & Herald, *supra* note 52, at 867.

¹⁶⁴ *In the Matter of Anonymous v. Weiner*, 270 N.Y.S.2d 319 (Sup. Ct. N.Y. 1966).

¹⁶⁵ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

¹⁶⁶ *Hartin v. Director of Bureau of Records and Statistics*, 347 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1973).

¹⁶⁷ *Nash*, 2003 Ohio 7221, at P48; Greenberg & Herald, *supra* note 52, at 866.

¹⁶⁸ *Littleton*, 9 S.W.3d at 231.

¹⁶⁹ Greenberg & Herald, *supra* note 52, at 867.

¹⁷⁰ *Id.* at 870.

¹⁷¹ *Id.* at 871.

¹⁷² *Romer v. Evans*, 517 U.S. 620, 634 (1996).

faced with amending a transsexual's birth certificate to reflect the self-identified sex, courts apply different factors to determine if the transsexual meets the "criteria" for the self-identified sex. However, because these factors are mostly subjective, decisions can be made quite inconsistently.

Phyllis Randolph Frye, an FTM attorney and founder of the International Conference on Transgender Law and Employment Policy, believes that transpeople should not "have-to-have" complete genital reconstructive surgery just so they can legally live as their self-identified sex.¹⁷³ Frye argues that if transpeople must have genital reconstructive surgery to be legally male or female, then they are coerced into the decision of having the surgery, which is very costly and risky. If transpeople do not have to have genital reconstructive surgery before they can change their birth certificate, passport, and other legal documents, then the decision of whether to have genital reconstructive surgery will be more of a personal choice, rather than one based on pressure from the state.¹⁷⁴

If the state requires that some people undergo complete genital reconstructive in order to be legally recognized as their assigned sex while others do not have to, a potential equal protection violation arises. Similarly situated persons—transsexuals—are being treated differently based on their original sex. Courts are more likely to forego complete genital reconstruction in the case of a FTM because the surgery is expensive with a high risk of complications.¹⁷⁵ Though this seems to be a sympathetic act of the court, it is inherently unfair: if some FTM transsexuals are excused from undergoing complete genital reassignment, then no FTM transsexual should be *required* to have the surgery in order to be legally recognized as male. Furthermore, if some FTM transsexuals are not required to undergo complete genital reconstruction, then MTF transsexuals should be afforded the same leniency. The surgery for MTF transsexuals is significantly less costly than surgery for FTM transsexuals,¹⁷⁶ and nearly three times as many MTF transsexuals undergo complete sex reassignment than women.¹⁷⁷ However, the frequency and lesser complication of the MTF genital surgery cannot justify the surgery as a prerequisite for legal rights. I feel the leniency afforded to FTM transsexuals in terms of the sex reassignment process could arguably result from—and possibly represent—the courts' and society's preference for "maleness" over "femaleness."

¹⁷³ Frye, *supra* note 53, at 3.

¹⁷⁴ *Id.* at 31, 32.

¹⁷⁵ See Vitello, *supra* note 13; Savage, *supra* note 14; Vecchione v. Vecchione, No. 95D003769, (Orange County, Cal.) (1996) (unpublished).

¹⁷⁶ MTF complete genital reconstruction surgery costs range from \$7,000 to \$24,000. FTM complete genital reconstructive surgery costs range from \$50,000 to \$150,000. Green, *supra* note 15, at 4.

¹⁷⁷ Vitello, *supra* note 13, at 2.

Maybe It Is a Non-Negligent Misstatement

The states have jurisdiction to determine the qualifications for allowing a postoperative transsexual to amend his or her birth certificate. Because the changes leading to the amendment result from medical changes and personal experiences, I feel that states should give deference to the options of SRS professionals and the transsexual in question. Many of the states that allow birth certificate amendments for change of sex require that petitions to amend birth certificates for change of sex are accompanied by an affidavit or a letter from the SRS surgeon stating that the petitioner has undergone sex reassignment.¹⁷⁸ Undoubtedly, surgeons who specialize in the sex reassignment procedures are better qualified to determine if a transsexual has fully transitioned to his or her self-identified sex. These doctors have witnessed the patient's long-term hormonal treatments and its effects on the body, the patient's experience living as the self-identified sex, and other people's perceptions of the patient. These doctors understand the irreversible surgical procedures which make the patient's physical appearance conform to the self-identified sex. These surgical procedures may or may not include complete genital reconstruction.

Amending a birth certificate to reflect a change in sex is a legal decision, but it would be good public policy for the state to rely on the opinions of medical professionals to determine if a birth certificate amendment is appropriate. The risk of arbitrary decisions—for example, those based on stereotypes or religion—made by courts unfamiliar with the SRS process will be minimized by these medical opinions. Arbitrary decisions should be rare as few people actually decide to seek a change in sex.¹⁷⁹ Society's best interests are promoted when its citizens enjoy psychological and physical well-being; allowing transsexuals to obtain a change of sex designation on their birth certificates helps a historically unaccepted group of people better assimilate and live as they wish.

Phyllis Randolph Frye, the judge who amended the sex designation on her own birth certificate, relied on the opinions of medical professionals that the original birth certificate contained a "non-negligent misstatement" and needed to be corrected.¹⁸⁰ Framing the change in sex designation not as a change in legal status but as a documentary correction of a publication error, seems to avoid the potentially controversial decision of whether a transsexual satisfies the male/female dichotomy. If the change in sex designation is approached as a correction, there is no need to delve into the question of whether sex is fixed at birth, by anatomy, by chromosomes, etc. When Frye's birth certificate was amended to read "female," the ruling judge had been informed that Frye had not undergone complete genital

¹⁷⁸ See, e.g., Alaska, California, Hawaii, Nevada, New Jersey, North Dakota and Texas. Instructions for Changing Name on Birth Certificate, *supra* note 2.

¹⁷⁹ Vitello, *supra* note 13, at 2. Ten years ago, only about 13,000 men and 5,000 women had undergone sex reassignment surgery.

¹⁸⁰ Frye, *supra* note 53, at 33-34.

reconstruction. The court's order stated that she had undergone "long-term irreversible hormonal alteration" and surgical intervention would be needed to return her back to her birth gender.¹⁸¹ The court found that Frye was a "complete transsexual female" and that the original birth certificate listing Frye as a male was a non-negligent misstatement and should be amended.¹⁸² Frye did not need to undergo complete genital reconstruction surgery to be deemed "male" by the court. Although this method of birth certificate amendment dances around the issue of whether a postoperative transsexual is technically a member of the assigned sex, it is effective in states that allow this approach. However, because three states still do not allow amendments to birth certificates, this course is not always an option.¹⁸³

CONCLUSION

Amending the sex designation on a birth certificate is a very important part of the sex reassignment process. Transsexuals experience a lifelong struggle for acceptance in their assigned sex while their bodies often express the contrary. The sex reassignment process is a long, complicated, and expensive journey for the transsexual, transforming the body to match the psyche. Most states allow for the amendment of the birth certificate to change the sex designation¹⁸⁴, but many of these amendments falter when the postoperative transsexual's legal rights are in question. Most American courts have not upheld the validity of the amended birth certificate when it relates to a marital issue, but even those courts that have followed the amended sex designation on the birth certificate do not always use legal reasoning that is most beneficial to transsexuals' long term interests, like in *M.T. v. J.T.*¹⁸⁵ American courts should try to follow the example of the Australian Family Court in *Re Kevin*, emphasizing the congruence of the social and psychological sex of the transsexual where there is incongruence between the psychological and anatomical sex.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated similarly but MTF and FTM transsexuals are treated differently in the courts when seeking an amendment to the sex designation on birth certificates. Some courts require FTM transsexuals to undergo complete genital reconstructive surgery and other courts do not. To resolve this inconsistency and prevent equal protection violations, the state should not require complete genital reconstructive surgery for a change in sex designation on birth certificates for neither FTM transsexuals nor MTF transsexuals.

¹⁸¹ *Id.* at 34.

¹⁸² *Id.*

¹⁸³ Idaho, Ohio, and Tennessee will not change the sex designation on birth certificates. See Instructions for Changing Name on Birth Certificate, *supra* note 2.

¹⁸⁴ See *supra*, note 10.

¹⁸⁵ *M.T. v. J.T.*, 140 N.J. Super. at 87 (emphasizes being able to perform in a sexual capacity as the sex, because she couldn't sexually perform as a man.). *Id.*

When states impose systems of stereotype-based sex determination and force transsexuals to live as the sex that conflicts with their self-identity, the Equal Protection Clause is violated. As the science of sex and gender continues to develop, the determination of a person's sex must take into account constitutional issues as well as concepts of social sex and psychological sex. Until the state is able to compose a nondiscriminatory, non-arbitrary system of determining sex for purposes of birth certificate amendments, public policy will be best served by having the courts rely on the opinions of knowledgeable medical professionals and the transsexuals themselves.