ENGENDERING SEX: BIRTH CERTIFICATES, BIOLOGY AND THE BODY IN ANGLO AMERICAN LAW

SARU MATAMBANADZO[*]

"Wake up, young people, from your illusory pleasures; strip off your disguises and recall that every one of you has a sex, a true sex."[1]

I. INTRODUCTION

In the United States, before babies get a name they get a sex.[2] Immediately after birth the sexing begins as Josephine is wrapped in a pink blanket and Joseph is wrapped in a blue one, as a doctor or midwife declares the child's sex to its parents. For many individuals this event represents a ritual that is beautiful and natural. For others, however, this is the beginning of their troubles with legal sex. What happens if a baby swaddled in blue and declared a boy later decides that he was given the wrong blanket or maybe even the "wrong" body? What about those pink clad princesses who will grow to be real men? What is the "true" sex of a person and how should the law determine it?

The dichotomous sexual tradition constructs the Anglo-American legal landscape.[3] Historian Alice Domurat Dreger notes that many legal distinctions depend on there being two and only two sexes.[4] In the past it determined who

---

[*] Ph.D Candidate, University of California, Los Angeles (expected 2008), J.D. Harvard Law School 2004, B.A., University of Pittsburgh 1999. Saru would like to thank the UCLA Center for the Study of Women and the Williams Project at UCLA Law School for their generous funding that made this research possible. She would also like to thank Professor Brenda Cossman, Professor Sandra Harding and Professor Christine Littleton for their invaluable comments and support on this project. She would also like to thank Michael Matambanadzo for believing and her classmates at Harvard Law School and the University of Pittsburgh for listening, particularly Brian T. Carney, Benjamin Cook, Rhonda Stewart, Kwaku Akowauh, Erin McGladrey, Yen Nguyen, John Williams, Megan Davis, Shannon Young, Tony Phillips, Ann Marie Blaylock and Robert Wolfe. For Camille Walsh, her intellectual appreciation and personal adoration knows no bounds. Burn, burn, burn.

[1] HERCULINE BARBIN, BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH CENTURY FRENCH HERMAPHRODITE (Michel Foucault ed., Richard McDougall trans., Pantheon Books 1980) (1978).

[2] For the purposes of this essay, I have followed the "uniquely twentieth century Western" convention of using sex to refer to "biological" or "natural" traits (physiology and anatomy), gender to refer to social or cultural traits, and sexuality to refer to sexual desires or acts. ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 88 (1998); Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in European American Law and Society*, 83 CAL. L. REV. 1 (1995).

[3] DOMURAT DREGER, *supra* note 2, at 18.

[4] *Id.*

could own property,[5] who could vote,[6] and who could legally engage in sexual intimacy.[7] Under the current legal regime, legal sex determines many other aspects of one's life including whom one can marry[8] and whether one can be drafted for military service.[9] As Domurat Dreger notes, legal sex also shapes social aspects of life:

> My mother often told me I could do or be anything I wanted, yet I knew very well that even day-to-day things depended on my sex; which bathroom I would use, whether I could wear dresses or be seen crying, what my friends or family would say if I linked arms with a boy or girl . . . . [T]his body [would] shape my life?[10]

Legal sex labels bodies and encodes them with legal and social attributes that shape our lives.

In this paper, I will explore the legal ramifications of gender/sex trouble for transgender individuals. I will argue that the current difficulties and deficiencies of legal sex for transgender people are due to the way that this legal regime has conceptualized legal sex as a historical ideal and utilized it as a regulatory concept. Then I will examine the ways in which feminist theory of the body has complicated sex and gender arguing that the U.S. legal regime should respond to these insights and complications by re-conceptualizing legal sex in a way that recognizes not only the "lived gender" of individuals but the culturally constructed nature of legal sex. I will show that the legal regime should use lived gender to inform and reform legal sex so that the concept of legal sex is mindful of considerations and conversations occurring in feminist theory that focuses on the sexed/gendered body.

I begin this paper by focusing on transgender subjectivity and existence in Part II, defining terms and concepts that will be important in the discussion. Part III offers a survey of the current laws regarding legal sex recognition for transgender individuals with a focus on Anglo American common law countries. In Part IV, I will use feminist theory of the body to interrogate and complicate the notion of biological sex that informs legal sex. In Part V, I will present a brief history of legal sex as it has functioned in Anglo American law, focusing on the ways in which legal sex has historically been shaped by the medical establishment and how

---

[5] The Married Woman's Property Act gave women the right to own property, sue and be sued, and work outside the home without their husband's permission. Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. Rev. 79, 91 (1994).

[6] *See* U.S. Const. Amd. XIX (granting women the right to vote).

[7] *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding Texas statute criminalizing same sex intimacy unconstitutional).

[8] *See, e.g.*, Standhart v. Superior Ct., 77 P.3d 451 (Ariz. App. Div. 2003) (holding that Arizona's prohibition of same-sex marriages does not violate the constitutional rights of same-sex individuals). *But see,* Goodridge v. Dept. of Pub. Health, 440 Mass. 309 (2003) (holding that exclusion of same sex couples from the institution of marriage violated the state constitution).

[9] Rotsker v. Goldberg, 453 U.S. 57 (1981) (holding that men and women were not similarly situated in terms of registration for the draft).

[10] DOMURAT DREGER, *supra* note 2, at 16.

it has adapted—or not—for intersexual individuals and transgender individuals, persons whose bodies do not necessarily fall into the strict male/female dichotomy that is generally assumed in law. Finally, I will conclude by advocating lived gender, a test to determine legal sex recognition for transsexual/transgender individuals. Lived gender strives to account for the various complexities of transgender/transsexual subjectivity by acknowledging individual perceptions and preferences in the legal determination of sex.

II. TRANSNATION TRANSLATIONS: AN OVERVIEW OF DEFINITIONS AND FRAMEWORKS[11]

The Supreme Court has held that no statutory prohibitions can be made on the "basic civil rights of [men]."[12] It is not clear, however, that the right to obtain legal recognition of one's status after sexual reassignment surgery, aligning gender identity with legal sex, is such a basic civil right. Transgender individuals are one of the most marginalized groups in the United States.[13] Without the federal protections and civil rights obtained by women and racial minorities, and the scant state protections that gay and lesbian individuals have recently obtained,[14] transgender people exist in a precarious position.[15] Outside of a patchwork of decentralized and sometimes unreliable civil rights ordinances offered by some state and local governments,[16] most legal protections available to transsexual persons lie in the possibility that they will be able to "pass" as heterosexual "bio-

---

[11] The following discussion is highly problematic because it reifies and essentializes transsubjectivity in ways that do not capture the actual experiences or existences of many people. I am aware of these problems. I have tried to articulate a multiplicity of experiences within the limitations of a legal framework and I am fully aware that I have essentialized certain aspects of transsexual existence in doing so. *See generally,* Angela Harris, *Race and Essentialism in Legal Theory*, 42 STAN. L. REV. 581 (1990).

[12] Skinner v. Oklahoma, 316 U.S. 535 (1942) (declaring a statute that mandated sterilization of prisoners unconstitutional because it involved one of the "basic civil rights of man").

[13] There are many areas in life where transgender people face discrimination or victimization. *See e.g.*, Kari E. Hong, *Categorizing Exclusions: Exploring Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER. & L. 88 (2002) (claiming that private insurers use the sexual reassignment surgery exclusion contained in most insurance policies to discriminate against transgender people); Elizabeth Loeb, *Walking While Trans*, 27 N.Y.U. REV. L. & SOC. CHANGE 73 (2002) (describing the victimization of transgender women who are frequently arrested for prostitution and severely abused by the New York City Police Department).

[14] There are some states that offer protections against discrimination for gay men and lesbians, particularly in the context of employment. *See, e.g.*, MASS. GEN. LAWS, ch. 151B, § 4(1) (1989); Conn. Gen. Stat. § 46a-81c (1991) (protecting gay and lesbian individuals from discrimination in the employment context).

[15] This comparison is not meant to discount the current difficulties that women, minorities, gays and lesbians struggle with in negotiating the legal protections that the law provides. I merely wish to highlight the unique position of transgender persons who seem to exist outside of the intelligibility of the law in many cases.

[16] According to the Transgender Law and Policy Institute, transgender people and transsexuals have some state protections under sex discrimination laws (particularly in NY, MA and NJ) and under disability laws (MA and NJ). Various county and city ordinances also provide transgender persons with legal protection from discrimination. Washington D.C., for example, protects transgender persons under statutes that prohibit discrimination based on "personal appearance." Transgender Law and Policy Institute Homepage, *at* http:www.transgenderlaw.org/cases/index.htm (last visited Apr. 13, 2002).

males" or "bio-females."[17] Before turning to the larger questions at hand, it is useful to briefly discuss the current social, medical and technological construction of transidentity.[18]

This paper takes issue with the way that courts determine the legal sex of transgender people, focusing particularly on the plight of transsexual individuals.[19] Transgender individuals are those who push the boundaries and cross the line of what is generally considered "acceptable" gender expression.[20] As an umbrella term and a movement, transgender identity includes diverse groups of people, sometimes including intersexual people, drag queens, cross-dressers, and even bearded ladies.[21] It is difficult to ascertain the number of transgender people that live in the United States because of the diversity of expression within each community and as a result of gender identity disorder is frequently misdiagnosed.[22] By, one recent estimate there are 25,000 people in the United States who have undergone sexual reassignment surgery and 60,000 individuals who consider themselves to be candidates for such surgery.[23] Another recent statistic reported that at least 1,500 transsexual individuals are living in the United Kingdom.[24]

Transsexuals are transgender people who ultimately seek to reassign their physical and hormonal sex in order to align with their gender identity or psychological sex.[25] According to the *American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition*, transsexuality is a gender identity disorder:

---

[17] Although this is changing with the politicization of transgender communities, the goal of transgender identity is often to pass unnoticed as heterosexual. If a transgender person is successful in this goal, then he or she may suffer from an isolation that is both personal and political, making any action or unity costly to his or her personal life. *See, e.g.* KATE BORNSTEIN, GENDER OUTLAW 63 (1994); Jillian Todd Weiss, *The Gender Caste System: Identity, Privacy, and Heteronormativity*, 10 LAW & SEX. 123, 162 (2001) (claiming that heteronormativity requires transsexual people to conceal their past in order to live an "undetected" life). In this essay, I use the term "bio-male" and "bio-female" to destabilize the notion that male and female is a seamless biological legal construction.

[18] This discussion does not attempt to provide a detailed scientific account of the medical and cosmetic processes that are part of sexual reassignment surgery but instead strives to situate transsexual individuals in a broader social, medical and technological framework that seems more applicable to the legal recognition of gender. Other writers have done a better job of addressing the detailed medical and scientific aspects of sexual reassignment surgery. *See generally* Jennifer Marie Albright, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. REV. 593 (2002); BERNICE HAUSMAN, CHANGING SEX (1995). There are also practitioner's guides to representing transgender individuals that provide similar information. *See, e.g.* Phyllis Randolph Frye and Katrina C. Rose, *Responsible Representation of Your First Transgender Client*, 66 TEX. B.J. 558 (July 2003).

[19] I recognize the political difficulties that arise by focusing on transsexual existence; however, the current legal landscape does not seem to recognize the existence of individuals who are "between" sex or of a "third sex." As I claim below, I believe that this is because the Anglo-American legal tradition is wedded to fixed dichotomous notions of legal sex. *See* discussion, *infra* pp. 33-35.

[20] *See* LESLIE FEINBERG, TRANSGENDER WARRIOR, X (1996); Weiss, *supra* note 17, at 142.

[21] *See* FEINBERG, *supra* note 20; Weiss, *supra* note 17.

[22] Weiss, *supra* note 17, at n9.

[23] *Id.* at 139 (highlighting the long waiting lists for sexual reassignment surgery).

[24] Anne Barlow, Case Commentary: *A New Approach to Transsexualism and a Missed Opportunity?*, CHILD FAM L.Q. 225 (June 2001).

[25] Weiss, *supra* note 17, at 143 ("Transsexuals dress in the attire of the other gender solely as an outward expression of their core identity.").

> Adults with Gender Identity Disorder are preoccupied with their wish to live as a member of the other sex. This preoccupation may be manifested as an intense desire to adopt the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation.[26]

The medical community generally classifies transsexuals as post-operative or pre-operative.[27] Post-operative transsexuals are often individuals who have had constructive genital surgery while pre-operative transsexuals have not undergone constructive genital surgery.[28] Post-operative transsexuals are often classified again into two groups that depend on their particular gender identity orientation; male-to-female ("MTF") transsexual people, biologically and legally recognized males who chose/require reassignment as women because their gender identity is female, and female-to-male ("FTM") transsexual people, biologically and legally recognized females who chose/require reassignment as men because their gender identity is male.[29]

For MTF transsexuals, sexual reassignment surgery involves castration, hormonal treatment, construction of functioning female genitalia, breast implants, electrolysis, and in some cases, cosmetic reconstruction to feminize facial features. The process for FTM transsexuals involves hormonal treatments, mastectomy, hysterectomy, and in some cases the construction of a phallus. Before the physical treatment, which is initially painful, expensive and involves a lifetime commitment, transsexual persons go through psychological evaluation and counseling to establish that they are "true" transsexuals.[30] They must also go through a period of time where they must pass, living and working in their "future" gender. The technology surrounding the reassignment of MTFs has advanced more quickly,

---

[26] Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J.L. & FEMINISM 51 (1999) (citing Am. Ass'n Diagnostic and Statistical Manual of Mental Disorders-IV 533 (4th ed. 1994)). While I am not necessarily comfortable with defining transsexual existence as a "mental disorder," this definition has been included for its cultural significance only. I prefer to see transgender subjectivity in its proper historical context as a variation of gendered human existence and not as a "disorder." Leslie Feinberg provides a historical account of the existence of transgender people throughout history. FEINBERG, *supra* note 20.

[27] Kevin Tallant, *My "Dude Looks Like a Lady": The Constitutional Void of Transsexual Marriage*, 36 GA. L. REV. 635, 638 (Winter 2002).

[28] The medicalization of transgender people, a medicalization that in theory renders "transsexuals" possible, has been the subject of fierce criticism. *See* JANICE RAYMOND, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHEMALE (1994) (characterizing transsexual individuals as part of a medically constructed "socio-political program" that stems from patriarchal society); ANDREW N. SHARPE, TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW (2002) (critiquing transgender law within the context of the law's relationship to medicine).

[29] HAUSMAN, *supra* note 18; FEINBERG, *supra* note 20.

[30] Although transsexuals can be homosexual, heterosexual or bisexual, the current psychological examinations often require heterosexual orientation, meaning that MTF transsexuals must exclusively seek relationships with bio-males and FTM transsexuals must exclusively seek intimate relationships with bio-females if they wish to receive treatment. HAUSMAN, *supra* note 18 (examining the heterosexual assumption in transsexual narratives that is required by the medical community that performs the surgery).

making their reassignment a more successful process than it is for FTMs. MTF transsexuals often receive more attention that their FTM counterparts.[31]

While the roots of transgender identity are embedded in human history,[32] transsexuality is a phenomenon that is heavily dependent on medical technology and social contexts developed during the 20th Century.[33] Transsexual identity is a fairly new and highly contested territory. Some transsexual activists see their identity as inherently deconstructive and radical because it rejects notions of fixed gender in what they view to be productive ways.[34] Other transsexual activists see their identity and their sexual re-assignment surgery as a means to realize their "true sex" by creating a cohesive individual whose mind and body reflect a uniform sex.[35] As we will later see, there is no unified position on the theoretical implications of transsexuality. Despite the fact that the theoretical and political territory surrounding transsexual identity is highly contested within the transgender community and beyond, it cannot be argued that the application of the law to transsexuals is uncomplicated. Whether one views transsexual individuals as radical or reactionary, the Anglo American legal system has not dealt with the experiences of transgender people and their desire to change their legal sex in a consistent or sensitive way.

III. CHECKING YOUR BOX: THE INDETERMINACY OF LEGAL SEX FOR POST-OPERATIVE TRANSSEXUAL PEOPLE

"So you think only a woman can truly love a man? You buy me the dress I'll be more woman than a man like you can stand."[36]

Anglo-American law constitutes/is constituted by a conception of legal sex that assumes that sex is gendered, dichotomous, easily determined and fixed. The current state of the law surrounding this conception, however, is non-existent in some jurisdictions and unpredictable in others. While many states have statutory or judicial means for transsexual individuals to legally change sex by altering their

---

[31] Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law,* 75 DENVER UNIV. L.R. 1321 1336-42 (1998) (providing narratives and history of FTM transsexuals who have often been silenced even within transgender communities). One could make the claim that the disregard for FTM individuals stems from a certain amount of male privilege that MTF women retain, even when their gender identity is female. Perhaps the technology derived for MTF operations was found because medicine is more sensitive to the needs of men, even when those needs are answered by becoming a woman. *See generally,* JANICE RAYMOND, *supra* note 28. One could also argue that FTMs often do not pursue surgery because there is not as much need for a full transition to male. Perhaps gender roles for women are more fluid and there is more space for masculine women than for feminine men. Women after all can wear men's suits and short hair more easily than men can adopt women's clothing or hairstyles.

[32] FEINBERG, *supra* note 20; Cain, *supra* note 31, at 1336.

[33] HAUSMAN, *supra* note 18 (arguing that transsexuality can only be understood in reference to the medical and social conditions that enable it); *See also* Keller, *supra* note 26, at 57.

[34] FEINBERG, supra note 20; BORNSTEIN, *supra* note 17.

[35] *See, e.g.,* MARIO MARTINO, EMERGENCE: A TRANSSEXUAL AUTOBIOGRAPHY (1977).

[36] HEDWIG AND THE ANGRY INCH (New Line Productions 2001).

birth certificates or other identification documentation,[37] some others either prohibit such changes or have not addressed the issue. Even with formalistic methods of legally changing sex on identification documentation, legal sex is not necessarily determined by such changes. One of the contexts in which such changes are questioned and undermined is in the realm of transsexual marriage. In this section, I will attempt to map the legal landscape that transgender persons must traverse if they wish to receive legal recognition of their gender identities in legal documentation and marriage.[38]

A. Gender Identity Rules: Pro-Recognition Opinions at Home and Abroad

Court opinions that address the legal sex of transsexuals can generally be categorized in two ways; pro-recognition opinions and anti-recognition opinions.[39] In pro-recognition opinions, the court grants legal recognition to the "post-operative" sex of the transsexual person. The courts often acknowledge that the legal sex of the transsexual person must take into account factors outside of biological gender, particularly gender identity and often publicly lived gender, and thus the transsexual individual will be recognized by his or her gender identity. As we will see, however, in every case the men and women in question have undergone irreversible surgical procedures to bring their "biological sex" into line with their gender identity. Often pro-recognition opinions are narrow, perhaps allowing a change in legal sex on identification documentation, and other times such opinions allow transsexual individuals to realize their legal sex through marriage to an individual of the "opposite" legal sex. Anti-recognition opinions refuse to change the transsexual individual's legal sex in accord with his or her gender identity.

1. Legal Documentation

In many jurisdictions, changing the legal sex on birth certificates or identification documentation is done through statutory means, so there are few pro-

---

[37] *See, e.g.*, ALA.CODE § 22-9A-19 (1997); ARIZ. REV. STATE. ANN. § 36-326(a)(4) (West 1993); Colo.Rev.Stat.Ann.§ 25-2-115(4) (West 1999); D.C. CODE ANN. § 6-217(d) (1995); GA. CODE ANN. § 31-10-23(e) (Harrison 1998); 10 GUAM CODE ANN. § 3222 (1998); HAW. REV. STAT § 338-17.7(4)(b) (1993); COMP. STAT. ANN. § 535(d)(17) (West 1997); IOWA HEALTH-GEN. I, § 4-214 (b)(5) (1999); MASS.GEND. LAWS ANN. ch. 46 § 13(e) (West 1993); MICH. COMP. LAWS § 333.2891(a)(9) (1998); MO. ANN. STATE. § 193.215(a) (West Supp. 1999); NEB. REV. STAT. § 71-604.01 (1999); N.J. STAT. ANN. § 26:8-40.12 (West 1999); N.M. STATE. ANN. § 24-14-25(A) (Michie 1997); N.C. GEN. STAT. § 130A-118(b)(4) (1997); OR. REV. STAT. § 432.235(4) (1999); UTAH COD ANN. § 26-2-11 (West Supp. 1998); WIS. STAT. ANN. § 69.15(1)(a) (West 1990).

[38] I have chosen to focus on documentation and marriage to the exclusion of employment discrimination cases and cases involving transsexuals in prison. Transsexuals in prison, however, are treated to a complicated and unpredictable range of possibilities depending on the state, jurisdiction or county in question. I have done so because in most jurisdictions in the United States, marriage and legal documentation highlight the legal requirement that one is possessed by/in possession of a documented legal sex. The federal definition of marriage, for example, is one between dichotomous legal sexed figures. *See* Defense of Marriage Act, Pub. L. No. 104-199 (codified at 1 U.S.C. 7 (2005); 28 U.S.C. 1783C (2005)).

[39] Cain, *supra* note 31.

recognition opinions dealing with this question.[40] In *Darnell v. Lloyd*, a Connecticut District Court addressed the issue of changing the legal sex of a birth certificate.[41] In this case, plaintiff Diane M. Darnell sued the Connecticut Commissioner of Health for his refusal to change the sex on her birth certificate from male to female in order to reflect her status after sexual reassignment surgery. Ms. Darnell brought suit under 42 U.S.C. § 1983, claiming that the Commissioner's refusal to make this change violated her constitutional rights. The court dismissed the commissioner's motions for summary judgment and failure to state a claim, holding that Ms. Darnell's case should not be dismissed. The court suggested "that the Commissioner must show some substantial state interest in his policy of refusing to change birth certificates to reflect the current sexual status . . . ."[42] The opinion did not establish a constitutional right to have one's gender identity recognized as one's legal sex, and in many cases the state could probably justify its position sufficiently. However, the decision suggested that there is something substantial at stake in a refusal to change an individual's legal sex after sexual reassignment surgery. Such a suggestion seems to recognize that there is something more to explain about legal sex than merely a reflection of status at birth, even if the court does not name it.

In *In re Robert Hellig*, the Court of Appeals of Maryland provided guidance regarding what was meant by "something more." In March of 2001, Janet Hellig Wright filed a petition in the Circuit Court for Montgomery County to change her name from Robert Wright Hellig to Janet Hellig Wright and to change her Pennsylvania birth certificate so that it would read female instead of male.[43] According to the court, the issue in question was whether Ms. Hellig could seek a change in gender not a change in her sex.[44] Although the Circuit Court granted her request for a name change, it denied her request to change her birth certificate. The court denied this request on the grounds that it had no jurisdiction over Ms. Hellig's request because it had no jurisdiction to enter "declaratory relief."[45] The court also claimed that there was no statutory or common law authority to issue the sort of gender-change that Ms. Hellig requested.[46] After composing a thorough history of transsexuality and an account of medical and legal literature regarding intersexual individuals and transsexuality, the Court of Appeals held that the Circuit Court did have jurisdiction to enter a determination and declaration that would change the legal sex on Ms. Hellig's birth certificate. The court also noted three "relevant" propositions that it derived from its literature review:

---

[40] Katrina C. Rose, *Sign of a Wave? The Kansas Supreme Court Rejects Texas Simplicity in Favor of Transsexual Reality*, 70 UMKC L. REV. 257 (Winter 2001) (characterizing opinions as pro-recognition or anti-recognition).

[41] *Darnell*, 395 F. Supp. 1210, 1210 (D.Conn 1975).

[42] *Id.* at 1214.

[43] *In re* Robert Hellig, 372 Md. 692, 693 (Ct. App. Md. 2003).

[44] *Id.* at 695.

[45] *Id.* at 694.

[46] *Id.*

> (1) gender itself is a fact that may be established by medical and other evidence, (2) it may be, or possibly may become, other than what is recorded on the person's birth certificate, and (3) a person has a deep personal, social and economic interest in having the official designation of his or her gender match what, in fact, it always was or possibly has become.[47]

The court held that to warrant amending a birth certificate, Maryland requires by statute a finding that gender *has been changed* "by surgical procedure."[48]

In 2003, the Superior Court of the District of Columbia held in *In re Taylor* that the D.C. Code permits a transsexual person to change the legal sex on his or her birth certificate.[49] The court found that in all cases the issue of whether a transsexual person can amend his or her birth certificate is a matter for the legislature.[50] Under the D.C. Code Title 7-217(d), this change requires that an individual has undergone a surgical procedure. [51] The court granted Ms. Carolyn Ann Taylor's request for change of sex on her birth certificate under this provision.[52]

2. Marriage

The leading pro-recognition opinion in the United States, *M.T. v. J.T.*,[53] was decided by the New Jersey Appellate Division in 1976. Even as a small child, M.T., who was born a male, always thought of herself as female. M.T. and J.T. met in 1964 and quickly moved in together. In 1971, M.T. underwent sexual reassignment surgery, for which J.T. helped to pay, and M.T. and J.T. were married in 1971. After two years of living together as man and wife, the couple separated, and J.T. refused to support M.T.[54] When M.T. petitioned for support, J.T. argued that there had never been a marriage because M.T. was a male for the purposes of marriage. The court solidly rejected this argument, holding that in a case where a transsexual individual has "become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled attributes of gender and anatomy," then "[c]onsequently, plaintiff should be considered a member of the female sex for marital purpose."[55] Basically, when gender identity and anatomy are coherent, then legal sex should reflect this coherence. While the fact that M.T. and J.T. had sexual intercourse seemed to play a large part in the court's

---

[47] *Id* at 710 (citing Goodwin v. United Kingdom, 2 FCR 577 (Grand Chamber) (2002)).

[48] *In re* Robert Helig, 372 Md. at 718.

[49] *In re* Taylor, 2003 WL 22382512 (D.C. Super. 2003) (memorandum) (citing D.C. Code § 7-217(d)).

[50] *Id.* at 5.

[51] *Id.* at 1.

[52] *Id.* at 6.

[53] M.T. v. J.T., 140 N.J. Super. 77 (1976).

[54] *Id.* at 79.

[55] *Id.* at 89-90.

decision,[56] one cannot help but notice the prominent role that gender identity and psychological sex played. The court made its decision by recognizing M.T.'s "female psychic gender"[57] and referred to the notion that M.T's birth sex did not coincide with her gender identity. This opinion acknowledged "lived gender" because it realized the connection between sex and gender identity and used it to determine M.T.'s legal sex for the purpose of marriage.

In February of 2003, the Sixth Circuit in Pasco County Florida handed down a pro-recognition opinion concerning the dissolution of Michael Kantaras' marriage to Linda Kantaras.[58] Michael Kantaras, a post-operative male transsexual sought primary custody of the two children from the marriage. Linda Kantaras sought to keep Michael from seeing the children, claiming that Michael was not a fit father for the children and that the marriage was void because Michael Kantaras was not male. In an 809-page decision containing detailed medical records, interviews and testimony regarding transsexuality and the couple's sexual practices, Judge Gerard O'Brien held that the marriage was valid under Florida law, despite the fact that Michael did not undergo phalloplasty.[59] The decision also recognized Michael Kantaras as the legal father of Matthew and Irina and gave him primary custody of the children. Judge O'Brien wrote that "[c]hromosomes are only one factor in the determination of sex and they do not overrule gender or self-identity which is the true test or identifying mark of sex. Michael has always for a lifetime had a self-identity as male."[60] This case analyzed sex in a way that takes self-identification into consideration and did not necessarily bind post-operative transsexuals to a legal model that privileged "biological" factors like chromosomes or "functional" genitalia.

While the pro-recognition opinions concerning the legal sex of transsexuals in the context of marriage in the United States are few and far between, there have been pro-recognition opinions in the international community. In *Secretary, Department of Social Security v. S.R.A.*,[61] a New Zealand court addressed the question of whether a pre-operative transsexual woman could be a *de facto* spouse for the purposes of receiving a wife's pension. S.R.A., who lived as a woman and

---

[56] *See* Lawrence Drew Bolton, Note, *Sex. Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002) (arguing that the assumption that marriage is essentially sexual has become passé as extramarital sex, birth control and reproduction privacy become more culturally acceptable). The act of consummation in marriage has often been an issue in cases concerning transsexual marriages. *See, e.g.*, Littleton v. Prange, 9 S.W.3d 223 (1999); *cert. denied*, 531 U.S. 872 (2000) (citing Anonymous v. Anonymous, 67 Misc. 2d 982 (N.Y. Sup. Ct. 1971), in which a marriage was void because a pre-operative transsexual woman could not consummate the marriage). *See also*, S. v. J., 1 All E.R. 431 (2001) (concerning the dissolution of a marriage between a pre-operative transsexual male and his legally female wife).

[57] *M.T.*, 140 N.J. Super. at 79.

[58] Kantaras v. Kantaras, 884 So.2d 155 (2004).

[59] Kantaras underwent other FTM surgical procedures including a mastectomy, a hysterectomy and hormone therapy. *Id.*

[60] *Florida transsexual granted custody of children, at* http://www.courttv.com/trials/kantaras/verdict_ctv.html (last visited Apr. 24, 2004).

[61] Secretary, Department of Social Security v. S.R.A., 43 FCR 299 (New South Wales, 1993).

was accepted by those in her community, had received the wife's pension until the Department of Social Security discovered that she was legally male.[62] Although the court refused to grant the plaintiff relief, due to her pre-operative status, the court held that when the external genital features and the psychological sex of a transsexual person are in harmony, that the person may be said to have undergone a sex change. If S.R.A. had undergone the sexual reassignment surgery, she would have been eligible for the pension as a *de facto* spouse. While this opinion's focus on genitalia as a strict measure of harmony is deeply problematic,[63] it does recognize that gender identity should be taken into account in the determination of legal sex.

An Australian court took a decidedly pro-recognition stance on the legal sex of transsexual individuals as it relates to marriage in *In re Kevin*.[64] Kevin and his wife Jennifer applied to the court for a declaration that their marriage was valid. Although Kevin was an FTM transsexual, and had not undergone any type of genital construction surgery or phalloplasty, the court granted a declaration that the marriage was valid and held that Kevin should be treated as a man for the purposes of marriage.[65] The court made this determination after offering an extensive survey of the medical and legal status of transsexual people around the world and thoroughly examining personal testimony from Kevin's family and co-workers.[66] The court, in surveying evidence from friends, coworkers, family members and Kevin himself, created a test for legal sex in which one's perception of one's own gender identity and the external perceptions of others make a difference in the determination.[67] And while the court claims that it will restrict legal recognitions of a transsexual person's sex to post-operative transsexuals only, the court redefines what it means to be post-operative. Instead of focusing on genitals, the court determines that a permanent operation with the removal of gonads is key to post-operative status. In doing so, the court expanded the traditionally narrow definition of post-operative status to include some of the individuals that other tests might exclude.

Australia and New Zealand are not alone in their pro-recognition stance concerning the right to legal recognition of transsexual persons' gender identity. In 1992 the European Court of Human Rights ordered France to pay damages to a transsexual woman because the government refused to change her legal status to recognize her gender identity.[68] Then in July 2002, the court ordered the United

---

[62] *Id.* at 304 -5.

[63] *Id.* The emphasis on genital surgery privileges a rather reactionary and reductive determination of sex as it plays out in terms of the body. Requiring that genitals and gender identity be in harmony will exclude certain transsexuals from ever obtaining legal recognition of the gender identity.

[64] *In re* Kevin, 28 FAM. L. R. 158 (2001).

[65] *Id.* (holding that the law in Australia need not conform to Corbett v. Corbett, 2 All E.R. 33 (1970), an early anti-recognition case from England holding that sex should be determined by genitals, gonads and chromosomes). *See infra* p. 19 for a discussion of *Corbett.*

[66] *See supra* note 63, and accompanying text.

[67] *Id.*

[68] B. v. France, 16 E.H.R.R. 1 (1993).

Kingdom to pay damages to a transsexual woman because she was unable to change the legal sex on her official government documents.[69] In many other countries, transsexual people can obtain statutory recognition of their gender reassignment.[70] While some members of the international community have moved toward the recognition of transsexual person's gender identity in the realm of legal sex, this recognition is not universal and it may not even represent a shift in thinking about legal sex that moves beyond the legal preference for biological sex. In the next section I will examine the anti-recognition side of the debate, presenting cases in which courts refuse to recognize the legal sex of post-operative transsexual persons in legal documentation and in marriage.

B. Anti-Recognition Opinions: What is Fixed by the Creator at Birth, Let No Doctor or Judge Tear Asunder

The majority of reported U.S. court opinions concerning transsexual persons and the right to change one's legal sex are decidedly anti-recognition in nature. These opinions tend to reduce legal sex to strictly biological determination and consider the issue as a matter of law and not fact. These anti-recognition opinions fail to really acknowledge lived gender or the particular situations of the transsexual persons involved.

1. Legal Documentation

Many important anti-recognition opinions in the United States involve petitions by transsexuals to change their designated sex on their birth certificates. In *Anonymous v. Weiner*,[71] a post-operative transsexual woman applied to the Department of Health of the City of New York to have her legal sex on her birth certificate changed to "consummate so far as possible [her] change in gender."[72] After inquiry, the Board of Health opposed an amendment to provide for a change of sex on birth certificates for transsexual individuals. In addition, the board endorsed the recommendation of the Committee of Public Health of the Academy of Medicine, which opposed the change of sex on birth certificates in cases of transsexualism because, "[t]he desire of concealment of sex by the transsexual is outweighed by the public interest for protection against fraud."[73] The court refused the transsexual woman's petition for an order directing the director of the Bureau of

---

[69] Goodwin v. United Kingdom, 35 E.H.R.R. 18 (2002); *see also Transsexual Marriage gets Thumbs up in Europe, at* http://iafrica.com/loveand sex/news994474.htm (posted July 11, 2002).

[70] *See supra S.R.A.*, 43 FCR at 466 (citing such statutory provisions in Canada, South Africa, Israel, Singapore).

[71] Anonymous v. Weiner, 270 N.Y.S.2d 319 (1966). Despite the fact that they cannot necessarily amend their birth certificates, transsexual individuals in New York are entitled to change their names to reflect their gender identity. *See* In the Matter of Anonymous, 293 N.Y.S.2d 834 (1968) (holding that a post-operative transsexual was entitled to change their name from an obviously "male" name to an obviously "female" name). However, changing one's legal name explicitly does not change one's gender in New York. Matter of Rivera, 627 N.Y.S.2d 241, 244 (1995).

[72] *Weiner*, 270 N.Y.S.2d at 321.

[73] *Id.* at 323.

Records and Statistics of the Department of Health of the City of New York to change the sex on her birth certificate, particularly because it claimed that such an order "would constitute an usurpation of the function of the executive branch of government."[74]

An anti-recognition stance was also taken by the Supreme Court of Oregon in *K. v. Health Division, Department of Human Resources*.[75] The court in this case suggested in dicta that a birth certificate is a "historical record of the facts as they existed at the time of birth,"[76] as opposed to the appellate court's determination that it is a "record of facts as they presently exist and . . . [is] a record subject to change."[77] The court ultimately determined that this was a question for the legislature, but that the director did not act arbitrarily or unreasonably in denying the transsexual woman in question the right to change the legal sex on her birth certificate.[78] A similar result was reached in *Anonymous v. Mellon*, where the court held that the director of the Bureau of Vital Records did not act arbitrarily in its refusal to alter the sex on a transsexual individual's birth certificate.[79]

Some anti-recognition cases have taken a distinctly different turn and have denied transsexuals legal recognition of both their male and female sex.[80] These decisions place transsexual individuals outside of dichotomous legal sex.[81] They are neither male nor female. In *Hartin v. Directors of the Bureau of Records Statistics*, Debra Hartin sued the New York City Board of Health in order to obtain a new birth certificate that said she was female.[82] Analyzing the minutes from the Board of Health's meeting, the court claimed that the Board intended to omit the legal sex of transsexual persons who have received name changes on their birth certificates.[83] Hartin was issued a birth certificate without a legal sex and she was left "essentially genderless for legal purposes."[84]

2. Marriage

Most of the anti-recognition opinions in the U.S. rely heavily on *Corbett v. Corbett*,[85] a 1970 opinion concerning the dissolution of a short marriage between a post-operative transsexual woman, April and a male, Arthur. The court in this

---

[74] *Id.* at 324.

[75] K. v. Health Division, Department of Human Resources, 560 P.2d 1070 (1977).

[76] *Id.* at 1072.

[77] *Id.*

[78] *Id.* at 1072.

[79] Anonymous v. Mellon, 398 N.Y.S.2d 99 (1977).

[80] *See* Rebecca J. Moskow, *Broader Legal Implications of Transsexual Sex Determination Cases*, 71 U. CIN. L. REV. 1421, 1426-31 (Summer 2003) (discussing Hartin v. Dirs., Bureau of Records & Statistics, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973)). *See also*, Ulane v. Eastern Airlines, 742 F.2d 1081, 1081-82 (7th Cir. 1984) (holding that Title VII intended only to protect individuals from discrimination on the basis of biological male or female sex and not transsexuality).

[81] Cain, *supra* note 31, at 1427.

[82] *Hartin*, 347 N.Y.S.2d at 515.

[83] *Id.*

[84] Cain, *supra* note 31, at 1427.

[85] *In re* Gardiner, 22 P.3d 1086, 1101 (quoting *Corbett*, 2 All E.R. 33).

opinion took a hard-line approach to legal sex, holding that marriage was an inherently heterosexual relationship between a man and a woman and that in order to determine legal sex, one must examine genitals, chromosomes and gonads without surgical intervention.[86] The court held that April, a post-operative transsexual woman, remained legally male for the purposes of marriage. Furthermore, the court held that the marriage between April and Arthur could never have been consummated using her medically constructed "artificial" vagina, and it declared the marriage void.[87] While courts in the United States have relied on this decision to deny transsexual persons the right to change their legal sex, and while it is still the law in Great Britain, many commentators have harshly criticized this case for its outcome.[88]

Recently in the United Kingdom, the courts reaffirmed the validity of *Corbett* in *B. v. B.*[89] In *B.*, Mr. and Mrs. B. sought a declaration that their marriage was valid. Mrs. B. argued, with the support of her husband, that courts should re-examine *Corbett* in light of changes in medical technology and social conditions.[90] She charged that pursuant to Section 11(c) of the Matrimonial Causes Act 1973, she was validly married because she was female at the time of the marriage.[91] Relying on precedent and the parliamentary process, the court reaffirmed *Corbett* and denied Mrs. B. legal recognition of her gender and her marriage.[92]

Canadian courts have also taken an anti-recognition stance when dealing with transsexual individuals in the context of marriage, although they do not adhere to the strictly "biological" requirements. According to Shauna Labman, the courts in Canada have required a combination of biological and psychological evidence, a combination that transcends the legal standards present in *Corbett* and its progeny.[93] In Canada, courts have refused to recognize the legal sex of post-operative transsexual men. In two cases, *B. v. A.* and *C(L) v. C(C)*, Canadian courts held that men who had undergone hormone therapy, a hysterectomy and a mastectomy were still legally women because they did not undergo the procedures

---

86 *Id.*

87 *Id.*

88 This case also presented an odd set of facts for analysis, especially since the couple lived together for only 14 days of their marriage. In addition, Arthur was allegedly a gay transvestite who was "prone to all kinds of sexual fantasies and practices." *Id.*

89 *B. v. B.*, 2002 Fam. 150 (Eng. CA).

90 Barlow, *supra* note 24.

91 *Id.*

92 *B.* has been compared to the recent case W. v. W., Case No. 4119 (1996), *available at* http://www.pfc.org.uk/legal/w-v-w.htm. In *W.*, an intersexual woman who went through a sex change operation and married a man. W, who has a condition known as partial androgen insensitivity and who possesses XY chromosomes, was born with "indeterminate" sex and legally registered as a boy. The court in this case decided not to apply *Corbett*, instead citing Article 12 of the European Convention and applyied a test of legal sex that included five medical factors (chromosomes, gonads, genitals, psychological sex, and hormonal sex). Under this test, W's marriage was valid.

93 *See* Shauna Labman, *Left in Limbo: Transsexual Identity and Law*, 7 APPEAL 66 (2001).

to receive surgically constructed penises.[94] The courts reasoned that the men in question were not legally male because they did not have penises.[95]

There are three major anti-recognition marriage opinions in the United States. In *In re Ladrach*,[96] Elaine Ladrach and her fiancé brought an action for declaratory judgment in order to obtain a marriage license. The court, already assuming that Elaine and her husband were biologically and legally the same sex at birth,[97] interpreted the statutory scheme governing marriage and determined that it had no authority to issue a marriage license to Ms. Ladrach as a female. In this opinion, the court framed the issue as a matter of law, stating that "[t]he determination of a person's sex in regard to his birth certificate and marital status are legal issues."[98] The court also stated that "it is generally accepted that a person's sex is determined at birth by anatomical examination by the birth attendant."[99] The court completely ignored Ms. Ladrach's lived gender, with scant reference to her psychological sex or gender identity. It discussed her sexual re-assignment surgery almost exclusively in terms of genitalia and assumed a biological predisposition to male sex without thoughtful inquiry.

Decided by the Court of Appeals of Texas, *Littleton v. Prange*[100] concerns a wrongful death and survival suit brought by Christie Lee Littleton against her husband's attending physician. Christie Lee and Jonathan Mark Littleton were married in Kentucky in 1989. Until Mark's death in 1996, the Littletons lived together as man and wife. The court held that Mrs. Littleton lacked standing to bring a malpractice suit under the wrongful death and survival statutes in Texas because a ceremonial marriage between a man and a post-operative transsexual "created and born a male" was not valid.[101] After offering a brief explanation of what it means to be transsexual, the opinion analyzed the other opinions concerning transsexual people and marriage.[102] Relying heavily on *Corbett*[103] and *In re Ladrach*,[104] the court ultimately concluded that while medical surgery can make a transsexual individual look more like a woman, it does not create the internal organs of a female or change her chromosomal makeup. As such, a transsexual woman remains biologically male, and as a matter of law, the court concluded that Christie Littleton remained legally male. According to the court, "[t]here are some things we cannot will into being. They just are."[105] And because same-sex

---

94 *Id.* at 69.

95 *Id.*

96 *In re* Ladrach, 513 N.E.2d 828 (Ohio Misc. 1987).

97 *Id.* (stating that "the issue is whether two individuals biologically and legally the same sex at birth, may contract to marry each other").

98 *Id.* at 10.

99 *Id.*

100 Littleton v. Prange, 9 S.W.3d 223 (1999).

101 *Id.* at 231.

102 *Id.* at 226-29.

103 *Corbett*, 2 All E.R. 33.

104 *Ladrach*, 513 N.E.2d 828.

105 *Littleton*, 9 S.W.3d at 231.

marriages are prohibited in Texas, a marriage between a post-operative transsexual woman who is legally male and a male is one of those things that cannot be willed into being.[106]

One of the most fascinating aspects of this opinion is the way in which it frames the legal issues of the case. The court begins by asking the philosophical and legal question, "can a physician change the gender of a person with a scalpel, drugs and counseling or is a person's gender immutably fixed by our Creator at birth?"[107] In its framing, the court uses gender to refer to what is often thought of as sex, and reduces the long and expensive process of sexual reassignment surgery to "scalpel, drugs and counseling."[108] It also invokes the authority and will of a divine force that determined Ms. Littleton's gender before birth and reifies the notion that biological sex may just be fixed, eternal and unchanging even after surgical and psychological intervention. Then the court re-frames the issue in another interesting fashion, characterizing transsexuality in a way that completely ignores the subjectivity of transsexual people. The court asks, "[c]an there be a valid marriage between a man and a person born as a man but surgically altered to have the physical characteristics of a woman?"[109] This second framing, once again, trivializes the complexity of sexual reassignment surgery as "surgical alteration," invoking images of simple cosmetic procedures. This also ignores the fact both that the gender identity journey of a transsexual person is a lifelong one, and the existence of opinions that hold that sexual reassignment surgery is not cosmetic surgery.[110] In addition to ignoring transsexual subjectivity, this question defines a transsexual as an individual that was "born a man" and merely has the physical or cosmetic appearance of a woman. Transsexual individuals often feel that they have been born women or men in the wrong body and view what this court deems a "surgical alteration" to be a correction that aligns their bodies with their "true sex." It is no surprise that as the court ignored gender identity and self-definition, invoked divine law and mis-characterized transsexual subjectivity, reducing sexual reassignment surgery to cosmetic alterations resulting in the

---

[106] The twist to the *Littleton* decision is that it has allowed marriage between post-operative lesbian women and biological females. *See* John W. Gonzalez, *Lesbians Exchange Vows*, HOUSTON CHRONICLE, Sept. 17, 2000, *available at* http://chistielee.net/same14.htm; *See also* John Guitierrez-Mier, *2 More Women Obtain Marriage License*, EXPRESS NEWS 9/20/2000, *available at* http://christielee.net.same15.htm; Julie A Greenberg, *When is a Man a Man and When is a Woman a Woman*, 52 FLA. L.R. 745, 757-67 (2002) (discussing the possible legal reactions to transsexual persons publicly same-sex marriages that would arise in the aftermath of the *Littleton* decision).

[107] *Littleton,* 9 S.W.3d, at 224.

[108] *Id.*

[109] Interestingly enough, the court also prefaces this description with a disclaimer, "Christie is medically termed a transsexual, a term not often heard on the streets of Texas or in a courtroom." *Littleton,* S.W.3d, at 225. Such a description places transsexual people in an awkward position. The court characterizes the transsexual person *qua* transsexual as a creature outside of the community and the law.

[110] Davidson v. Aetna Life Insurance, 420 N.Y.S.2d 450 (1979) (holding that sexual reassignment surgery is not merely cosmetic for the purposes of health insurance).

appearance of a woman, it held as a matter of law that post-operative transsexual woman was male for the purposes of marriage.

In re Gardiner[111] is the most recent anti-recognition statute in the United States. When Marshall Gardiner died intestate he left two heirs: J'Noel, his widow, and his estranged son, Joe.[112] In a petition for letters of administration, Joe named himself and J'Noel the heirs to Marshall's 2.5 million dollar fortune and claimed that his father's widow waived her rights to the estate.[113] J'Noel filed an objection, claiming that the waiver she signed was only applicable to her engagement period with Marshall.[114] Joe hired a private detective who informed him that his father's widow had a sex change operation in 1995 in Wisconsin. He filed for leave to amend his petition, claiming that the marriage between Marshall and J'Noel was void because same sex marriages are prohibited in Kansas.[115] Despite surgery and a name change, he claimed that J'Noel was still a man for the purposes of marriage.[116] Therefore, J'Noel did not have a right to a spousal share of the estate.[117] Joe also claimed that Marshall, "too religious and too concerned about social standing in his tight-knit hometown," had not known that J'Noel had undergone sexual reassignment surgery. J'Noel argued that she was a biological female, and that the district court was required to give full faith and credit to the Wisconsin court order changing her sex to female on her birth certificate and to the birth certificate itself, which listed her sex as female.[118] The district court, upon Joe's motion for summary judgment, found that the marriage had not been valid because J'Noel was a male for the purposes of marriage under Kansas law.[119] J'Noel appealed the grant of summary judgment and brought her case before the Kansas Court of Appeals.[120]

Like the *Littleton* Court before it, the Supreme Court of Kansas determined that legal sex is immutable and that transsexual women are legally male.[121] The Supreme Court of Kansas affirmed the District Court's decision and rejected the

---

111 *In re* Gardiner, 273 Kan. 191 (2002).

112 *Id.* at 192.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Gardiner*, 273 Kan at 192.

117 *Id.*

118 Ultimately this argument was rejected by the appellate court and the Kansas Supreme Court. When it was appealed to the United States Supreme Court, it was denied certiorari. Some commentators have criticized the Kansas Courts' handling of this argument. While I find this an interesting and important part of the case, my main concern is the test established for the recognition of legal sex for transsexuals. For commentary on the Full Faith and Credit Issues of this case, *see* Shana Brown, *Comment: Sex Changes and "Opposite Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgender Persons Amended Sex for Marital Purposes*, 38 SAN. D. L. REC. 1113 (Fall 2001).

119 *Gardiner*, 273 Kan. 191.

120 *Id.* at 158.

121 *Id.* at 213.

eight-prong test that the Court of Appeals advocated.[122] It determined that the Court of Appeals mischaracterized the issue of J'Noel's legal sex as a matter of fact when the court should have considered it as a matter of law. Then, the Supreme Court of Kansas analyzed the question as a matter of law, interpreting the statute 2001 K.S.A. Supp 23-101 to determine that J'Noel remained legally male for the purposes of marriage.[123]

The Supreme Court of Kansas began its opinion by reproducing the facts and the relevant case law directly from the Court of Appeals' opinion.[124] It recognized that the cases concerning the legal sex of transsexual persons or marriages between transsexual persons and biological males or females frame the question in two different ways. Anti-recognition decisions determine legal sex as a matter of law, while pro-recognition decisions determine legal sex as a matter of fact. "[T]he essential difference between the line of cases, including *Corbett* and *Littleton*, that would invalidate the Gardiner marriage and the line of cases, including *M.T.* and *In re Kevin*, that would validate it is that the former treat a person's sex as a matter of law and the latter treats a person's sex as a matter of fact."[125] Like other pro-recognition opinions, "[t]he Court of Appeals opined that there are a number of factors that make sexual identification at birth less than certain . . ."[126] and that the determination of legal sex presents a matter of fact as determined by Professor Greenberg's eight-prong test.

The Supreme Court claimed that legal sex should not be determined as a question of fact but as one of law. Since "[s]ummary judgment is appropriate when there is no genuine issue of material fact,"[127] and because "the parties ha[d] supplied and agreed to the material facts necessary to resolve the issue," the court resolved the issue on appeal as a question of law. For support, the Supreme Court

---

[122] There are many additional factors to "biological sex." Julie A. Greenberg, *Defining Male and Female: Interssexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1992). The court of appeals looked to Professor Greenberg's work on the legal sex of interssexual people. In her article, Professor Greenberg discusses instances of sexual differentiation in interssexual people. She provides eight factors that the medical community uses to determine an individual's sex including: genetic or chromosomal sex (XY, XX, XXX, XYY . . .); gonadal sex (reproductive organs like testes and ovaries); internal morphological sex (seminal vesicles/prostrate or vagina/uterus/fallopian tubes); external sex (genitalia); hormonal sex; secondary sex characteristics (body hair, facial hair, breasts); assigned sex of rearing, and gender identity. Detailing the variety of biological ways that people can be sexed, from chromosomal variations like XXX, XXY, XYY and so on; gonadal sex disorders (in which some individuals have a male and a female set of gonads or may have the external characteristics of a female and male gonads); hormonal disorders (where the body cannot process sex hormones) external organ anomalies (making genitalia difficult to distinguish); gender identity disorder. Greenberg argues that such cases exemplify the difficulty that law and medicine have in determining sex. Greenberg also claims that as the scientific community has questioned their long-held beliefs about sex, establishing various criteria responsive to the diversity that exists within biological sex, so must the legal community question its assumptions about what sex and gender mean, and what it means to be male or female.

[123] *Gardiner*, 273 Kan. at 192-210.

[124] *Id.*

[125] *Id.* at 208.

[126] *Id.* at 209.

[127] *Id.* at 212 (citing Bergstrom v. Noah, 974 P.2d 531 (Kan. 1999)).

of Kansas also cited Gardiner's oral argument at the District Court level.[128] Gardiner argued that the issue for the court was not the validity of her marriage, because she was a legal female in Wisconsin, but rather whether Kansas needed to give full faith and credit to the Wisconsin statute, court orders and birth certificate that made her legally female.[129] When asked if the Wisconsin law in fact made J'Noel into a woman, counsel replied, "[N]o, not technically speaking, but we're not talking technically. We're talking about that as a matter of law, not technically, not talking [sic] scientifically . . . ."[130]

The question of law/question of fact trend acknowledged by the court led to an anti-recognition result. The court began its review by determining the intent of the legislature, looking not only to the language in the statute, but also to the historical background and circumstances surrounding its enactment, its purpose, and effect.[131] According to the Supreme Court of Kansas, the question of J'Noel's legal sex and the validity of her marriage to Marshall, must be resolved by interpreting 2001 K.S.A. Supp. 23-101.[132] Statutory interpretation, like other questions of law, allows the court "unlimited appellate review."[133] K.S.A. Supp. 23-101 limits marriage to two parties of the opposite sex and according to its legislative history, it was meant to affirm the traditional view of marriage.[134] The law also limits its recognition of marriages from other states to only those marriages between a man and a woman.[135] It declares that "[a]ll other marriages are declared to be contrary to the public policy of this state and are void."[136]

The court began by examining the words used in the statute. In Kansas, "[w]ords in common usages are to be given their natural and ordinary meaning."[137] To ascertain the natural and ordinary meaning of the words in the statutes, the Kansas Supreme Court used Black's Law Dictionary and Webster's New Twentieth Century Dictionary.[138] "Sex" is defined as "[t]he sum of peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female."[139] Then the court offered a definition of female as "designating or of the sex that produces ova and bears offspring: opposed to male," and a definition of male as "designating or of the sex that fertilizes ovum and begets offspring: opposed to female." [140] These definitions highlight the importance of biological, particularly reproductive, factors to the "ordinary" notion

---

128 *Gardiner*, 273 Kan. at 212.

129 *Id.*

130 *Id.*

131 *Id.* at 135 (citing Sowers v. Tsamolias, 23 Kan. App.2d 270, 273 (1996)).

132 *Id.*

133 *Gardiner*, 273 Kan. At 135 (citing State v. Lewis, 953 P.2d 1016 (Kan. 1998)).

134 *Id.* at 136 (citing 2001 K.S.A. 23-101).

135 *Id.*

136 *Id.*

137 *Id.* at 135 (citing State v. Heffelman, 886 P.2d 823 (Kan. 1994)).

138 *Gardiner*, 273 Kan. at 135.

139 *Id.* (quoting BLACK'S LAW DICTIONARY 1375 (6th ed. 1999)).

140 *Id.* (quoting WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY (2d. Ed. 1970)).

of male and female, and the court's notion of legal sex. Transsexual women do not have the capacity to produce ovum or bear offspring, a capacity that the court deems necessary for the ordinary meaning of a female person. Given the central nature of biological and reproductive factors to these ideas, the word "female" in everyday understanding does not encompass transsexuals, and therefore "J'Noel does not fit the common meaning of female."[141]

IV. BODIES OF LAW AND BODIES OUTSIDE THE LAW: FEMINIST THEORY OF THE BODY AND TRANSSEXUAL EXISTENCE

"We are all transsexuals. There are no transsexuals."[142]

In this section, I will examine "biological sex" and transsexuality through the lens of the feminist theory of the body. The current conception of legal sex in Anglo American law is based mostly on physiology, anatomy and chromosomes and has its roots in medical sex and in the ideal of a biological body that somehow exists naturally outside of law. The law defers to this medical conception of sex because, as the courts stated in *Corbett*, *Littleton*, and *In re Gardiner*, it is natural and fixed. Feminist theory of the body reveals that "biological" sex is a myth, a powerful and pervasive myth that has been historically forged by the forces of medical, psychiatric, legal and social forces, but still a myth. According to the theoretical insights of feminist theorists of the body, biological sex is just as constructed by social, psychological and cultural forces as gender.

Feminist scholars have established that individuals and institutions are steeped in gendered language and norms. From medicine[143] and science[144] to law,[145] the cult of dichotomous gender is powerful, pervasive and rigid, and most individuals believe that there is something "natural" about it. For many people, the naturalness of gender can be attributed to the notion that it is essentially the product of an immutable "biological sex" that can be easily determined for medical, social and legal purposes. "Biological sex," and the legal sex that is derived from it, function as a regulatory ideal[146] that provides legal viability for individuals in their

---

141 *Id.*

142 Judith Halberstam, *F2M: The Making of Female Masculinity*, *in* THE LESBIAN POSTMODERN (Laura Doan ed. 1994).

143 *See generally* ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN (1986) (offering a feminist critique of science and medicine and claiming that cultural and social norms of gender may inform many scientific theories). Emily Martin, *The Egg and the Sperm: How Science has Constructed a Romance Based on Stereotypical Male-Female Roles*, 16 SIGNS (NO. 3) 485 (1991).

144 *See generally* LUDMILLA JORDONOVA, NATURE DISPLAYED: GENDER, SCIENCE AND MEDICINE 1760-1920 (1999).

145 *See, e.g.*, Carol Smart, *The Woman of Legal Discourse*, 1 SOC. & L. STUDIES 29 (1992) (describing three phases of feminist critique in the law as "law is sexist," "law is male," and "law is gendered").

146 JUDITH BUTLER, BODIES THAT MATTER 1 (1993).

personal and public lives. This biologically derived legal sex is not simple and seamless, and for many, the experience of lived gender is not so easily explained or determined by biological constructions of sex or the cultural constraints of legal sex.

So what is feminist theory of the body? In order to thoroughly answer this question here is a definition of feminist theory. Rosemarie Garland Thompson, in her book *Extraordinary Bodies*, offers a characterization of feminist theory that captures its general flavor and highlights some of the more nuanced aspects of the discipline. Feminist theorists, Thompson claims, insist that standpoint shapes politics.[147] However, it is not always clear what direction politics point feminists in, as feminist theory is highly diversified in its methods and criticisms. Feminist theory is essentially self-critical, and debates continue between those theorists that strive for equality within the framework and those who struggle to eliminate the framework that would make such equality desirable or necessary.[148] Despite its highly self-critical nature, feminist theory, in its complex modern form, can be historically characterized as the combination of "the highly political civil rights and accompanying identity politics of the 1960s and 1970s with poststucturalism's theoretical critique of the liberal humanist faith in knowledge, truth, and identity . . . ."[149] It is a product of Post-Enlightenment political movements, from abolition and first wave feminism to the Civil Rights Movement and the Women's Movement, and the theoretical influence of thinkers like Foucault, Derrida, Lacan, and Freud. Combine all of this with a handful of Marxist materialism and a pinch of Nietzsche and one can come close to understanding feminist theory.

Feminist theorists are in constant disagreement over many issues surrounding gender, sex and sexuality. Transgender subjectivity and transsexual existence inspires different reactions among feminist scholars. Some feminists believe that transgender individuals, and transsexuals specifically, perpetuate the oppressive aspects of patriarchal gender norms and serve as a reactionary force in feminist efforts to eliminate gender inequality.[150] Janice Raymond even argues that feminists should make efforts to "morally mandate transsexualism out of existence."[151] Other feminists view transgender existence and transsexual subjectivity as a subversive and transformative way of living gender.[152] Sandy Stone claims that transsexuals embody the "varieties of performative gender" and that these varieties provide the potential to disrupt and reconstitute gender.[153]

---

147 ROSEMARIE GARLAND THOMSON, EXTRAORDINARY BODIES 21 (1997).

148 *Id.* Thompson briefly touches on this tension between equality feminists and difference feminists here. She claims that these debates challenge the notion of woman in itself.

149 *Id.*

150 *See, e.g.*, JANICE RAYMOND, *supra* note 28 (claiming that "all transsexuals rape women's bodies" in their efforts to change sex).

151 *Id.* at 179.

152 *See, e.g.*, Halberstam, *supra* note 142.

153 Sandy Stone, *The Empire Strikes Back: A Post-Transsexual Manifesto*, *in* BODYGUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY (Julie Epstein and Kristina Straub, ed. 1991).

Feminist theory of the body is a reaction to the dualist conception of persons that dominates western thought. As such, it strives to reconceptualize the body and challenge pervasive negative attitudes toward the body. It recognizes and criticizes the historical link between anti-somatic attitudes and attitudes about women. According to this traditional conception the self is not a unified whole but instead is comprised of two parts; a soul (or mind) and a body. [154] Traditionally this school of thought privileges the soul (mind) over the body, claiming that the soul constitutes the "real" self, and at best, the body merely houses the soul. The "real" self is considered separate from the needs and peculiarities of the body, and some believe that the body often hinders the progress and development of the soul. But why is it that feminist theorists have reacted to dualism so vehemently through feminist theory of the body? Why are anti-somatic attitudes problematic for feminist theorists? The answer to these questions lies deep in the origins of dualism.

Although some theorists see the Enlightenment and Cartesian dualism as the origin of anti-somatic mind/body dualism in the Western tradition,[155] its origins can be traced to Platonic philosophy.[156] Since dualism's introduction into Western Civilization, its anti-somatic attitudes have often been misogynistic. Western thought has associated women with the body and men with the soul. In her discussion of ancient philosophy, Elizabeth Spelman focuses on the overlapping negative attitudes toward the body and women in Plato's philosophy. The Platonic attitude toward the body exemplifies the way traditional dualists often conceptualize the mind/body distinction, and Spelman's analysis shows how the privileging of the mind over the body coincides with the privileging of the masculine over the feminine. Within the Platonic conception of virtue the soul is essential while the body remains inessential to the individual, much like men are essential to the dialogues while women are rarely depicted at all, and even then they are seen as dancing girls or servants.[157] The body is merely a hindrance as it

---

[154] This is a common notion held by many philosophers, including Kant, Aristotle and Plato. It is also an aspect of Judeo Christianity, where freedom from the body is sought in order to achieve grace or enlightenment for the soul. The body/mind dichotomy is so embedded in culture that individuals generally speak of bodies as separate from their person. The Viagra commercials of recent fame provide an excellent example of how dualism is embedded in our language, as men in commercials say things like, "I was willing but my body wasn't . . ." or "my body wasn't cooperating . . . ."

[155] *See generally* SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE AND THE BODY (1993) (discussing the ways in which Cartesian dualism structures bodies).

[156] Margrit Shildrick and Janet Price claim that the rejection of the body in Cartesian dualist philosophy is unique, in that this is when the body is really depicted as an obstacle to pure rational thought. Margrit Shildrick and Janet Price (ed.), *Opening on the Body: A Critical Introduction, in* FEMINIST THEORY OF THE BODY (1999). Other scholars claim, however, that the origin of the body as abject, at least in the acknowledged western tradition, is Platonic in its origins. This is particularly apparent in the Plato's *Symposium* and *The Apology*. *See* Elizabeth Spelman, *Woman as Body: Ancient and Contemporary Views,* 8 FEMINIST STUDIES 109 (Spring 1982).

[157] *Id.* I make this claim about the representation of women in the dialogues while acknowledging the presence of the priestess who informs Socrates about the true nature of love; however, she is not depicted speaking with her own voice among the men, which is quite important. Allowing Socrates to speak her wisdom essentially denies her a voice of her own, a practice that is hardly unheard of in the western philosophical tradition.

clouds the soul's judgments with needs and desires. Likewise women, who are associated with cowardice and frivolity, also distract men from the pursuit of the good life. Spelman argues that Plato's attitudes toward the body and women ultimately coincide to form a misogynistic anti-somatic view of virtue where everything that is part of the bad life is associated with women and the body. Feminists are concerned by the "malestream" interpretation of dualism, as anti-somatic attitudes toward the body often give rise to misogynistic attitudes.[158]

Many early feminist theorists made their critiques of women's oppression from within the framework of mind/body dualism. Theorists like Simone de Beauvoir broke ground by criticizing the oppression of women, claiming that women's bodies held them back in particular ways specific to sex and that if given the chance women were just as capable of transcending the body as men were.[159] Such criticisms maintained the superiority of the mind over the body, reiterating the notion that body is a powerful fixed factor of human existence, while critiquing the "natural" connection between women and the body. These early feminist theorists failed to criticize the framework of dualism that privileged the mind and soul as the true self while the body was seen as an inescapable prison that contains the soul. Feminist theory of the body reacts to the body/mind dichotomy by criticizing not only the anti-somatic attitudes that it entails but also by attempting to re-conceptualize beings as embodied persons and not merely persons who happen to have bodies. The lives of women could be said to exemplify the conception of the embodied person, as women's lives are mediated through and underpinned by the specific experiences of their bodies as mothers, wives, sisters and caregivers.[160] Some feminist theorists use the embodied aspects of lived experience as a way of theorizing about bodies in opposition to traditional attitudes about women and the body.

As a reaction to the traditional western attitudes about women and the body, feminist theory of the body strives to answer many questions that are essential to re-conceptualizing the body. These questions essentially serve to clarify the common cultural conceptions surrounding the body and explain how and why we conceptualize the body in the ways we do.[161] Feminist theory of the body asks questions that deal with how bodies are constructed and conceptualized. Are we merely our bodies or is there an "I" that remains separate from the body? If there is an "I" that is "separate" from the body, how do we account for its existence? Are bodies created, and if so, how? Is there anything "natural" to this creation or has everything been constructed? If we accept that the body has been culturally constructed then what do we make of these constructions? And what about

---

158 *Id.*

159 *See* SIMONE DE BEAUVOIR, THE SECOND SEX (1953).

160 Denise Riley claims that women's bodies have been historically imprinted by their experiences and that their identities, especially motherhood and sexuality, are underpinned by a female body. *See* DENISE RILEY, "AM I THAT NAME?" FEMINISM AND THE CATEGORY OF WOMEN IN HISTORY (1988).

161 Other sorts of feminist theory, including feminist phenomenology and epistemology, also answer many of these questions.

difference? How do issues of race, gender, sexuality and disability affect the body? Are they inscribed on the body by culture or is it the case that difference stems from the body? Feminist theory of the body works to answer these questions in a thoughtful way, striving to take account of the body and its particulars in a way that acknowledges the complexities that lay beyond the simple framework that dualism constructs.

One the most influential and prominent scholars working in the genre of feminist theory of the body and queer theory is Judith Butler. Butler argues that the gender of the body is performative, i.e., that the essence or identity that gender expresses is fabricated.[162] This fabrication is the product of gestures and acts that are meant to perform or express an inner essence that is not really there. Her notion of gender as performativity is probably one of the most influential and controversial claims in feminist theory of the body. Butler's notion of performativity means to preserve the "reality" of sex and gender while leaving open possibilities for reconfigurations of the body through alternative constructions. Butler gleans her conception of performativity, in some ways, from the art form of Drag. Drag, according to Butler, illuminates the nature of gender in various ways, representing the fluidity of gender through parody. Butler claims that, "[i]n imitating gender, drag implicitly reveals the imitative structure of gender itself—as well as its contingency."[163]

If one accepts the notion that gender is performative it can resolve some of the difficulties and conflicts that divide various camps in feminist theory. Butler argues that gender is merely, "[t]he disciplinary production of the figures of fantasy through the play of presence and absence on the body's surface."[164] If it is the case that gender is performative in this way, then an individual's gender is not the manifestation of some inner psychic essence that is inherently female or male. Instead gender is the manifestation of the disciplinary practices that strive to maintain a hegemonic position in relation to other disciplinary practices. This ideal manifestation, inaccessible to even the *uber*butch and the *uber*femme, is the product of a political environment where compulsory heterosexuality and a hierarchy of gender instate certain norms. As such the ideal condones certain regulatory practices that ensure that it retains its hegemonic status, and gender is the product of these practices. Butler claims that gender is not "real" but is like a "*corporeal style*" that is both intentional and performative.[165] It is performative in so far as it is a fabrication, a "stylized repetition,"[166] and intentional in so far it is unobtainable and must be acted and reiterated continually in order to maintain its delicate stability.

---

162 *See* JUDITH BUTLER, GENDER TROUBLE (1990).

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

Now if gender is both performative and intentional then what place does the materiality of the body have in this picture? What happens to biological notions of the body? And how do we account for the lived gender experience of those who feel "trapped" in the wrong sexed body? Many would hypothesize that if the gendered body is performative, then it is necessarily the case that the materiality of the body has been lost. Butler addresses the way that the materiality of the body is constructed by the same type of act and reiteration that produces performative gender. In her book *Bodies that Matter,* Butler claims that the materiality of the body will not be thinkable apart from the materialization of the regulatory norm of gender.[167] For a body or a subject to be viable it is necessary that she be inscribed by the norms of sex, and the body is only possible through the reiteration of these norms. The materiality of the body is a product of construction and as such there is no Eden when it comes to the body. There is no going back to the "pre-constructed" state of the body, for the body is only possible through construction. Since the construction of the material body necessarily entails sex, it is clear to see how gender can be performative and intentional while still imposing rigid and seemingly natural standards of conformity on certain individuals and their bodies.

If sex and the body were constructed, then notions of rigid, dichotomous biological sex in law would not necessarily stem from a natural place. It is mostly likely the case that the rigid, dichotomous notion of biological sex, the notion that underlies legal sex in the Anglo American tradition, stems from a particular historical place and time. The next section focuses on the historical evolution of legal sex in the Anglo American tradition, claiming that the legal definition of sex in this tradition has not always been as dichotomous or rigid as the anti-recognition courts would have us believe. If one examines the historical evolution of legal sex, an evolution that parallels the medical establishment's path to professionalization and its construction of "biological sex," then the insights of Butler and other feminist theorists of the body become impossible for the law to ignore.

V. THE EVOLUTION OF A REVOLUTION: TOWARD A HISTORY OF LEGAL SEX IN ANGLO AMERICAN LAW[168]

The current state of legal sex in most Anglo American jurisdictions is one in which fixed, dichotomous legal sex is "easily" determined by medical professionals.[169] The assignment of legal sex is further dependent on concern for "penis functionality with males and for reproductive functionality in females."[170] For all practical purposes, legal sex is initially assigned in line with one's perceived

---

[167] BODIES THAT MATTER, *supra* note 146.

[168] This is not a history of transsexuality in the Anglo-American tradition but a history of the conception of legal sex. There are several interesting and effective historical accounts of transsexuality. *See supra* note 28, and accompanying text.

[169] *See* DOMURAT DREGER, *supra* note 2, at 13 (discussing the ways in which medical science constructed current notions of biological sex).

[170] *Id.* at 37.

genital sex at birth, even though this is not explicit in case law or in common law.[171] This determination is made at birth through a brief examination of external genitalia, often without regard to any other factors that may be present.[172] If genital sex is questionable or ambiguous within the cultural confines of medical sex, often a legal sex is chosen based on many factors and the genital sex is surgically altered to conform.[173] Generally, except in certain circumstances and in particular jurisdictions, one remains bound by this initial determination of legal sex throughout one's life.[174] In some jurisdictions, particularly, one can change one's legal sex only after a long process of surgical procedures and therapy. Such changes can only be accomplished by individuals who can afford a long expensive process[175] and individuals whose sex can be easily, publicly determined through the cultural markers of gender. In order to obtain legal recognition of one's changed sex, transgender women must adhere to proper feminine gender and transgender men must adhere to proper masculine gender. For the determination of legal sex, the men are men and the women are women and everyone is heterosexual. In practice, however, some boys will be girls and some girls will be men. Furthermore, we know that some girls desire other girls and some boys desire other boys. So how can we tell the real boys from the real girls from the real men?

This section examines the roots of legal sex in the Anglo American tradition, claiming that dichotomous legal sex evolved parallel to the professionalization of medicine and the medicalization of sex. Using the work of historians who focus on the history of individuals who have been categorized as members of a "third sex," I will claim that the Anglo American conception of legal sex, a conception in which sex is dichotomous, fixed, rigid and biological, can be traced to the historical evolution of the medical profession. Earlier conceptions of legal sex were slightly more flexible than the current ideal.

---

171 RAYMOND, *supra* note 28, at 7.

172 *Id.*

173 *See* SUZANNE KESSLER, LESSONS FROM THE INTERSEXED (1998) (attributing the construction of gender and medical sex to a dimorphic conception of genitalia).

174 Cases of mistake can often lead to a change in legal sex. For example, Lynn Edward Harris, an interssexual individual who was a "[mal]assigned 'female'" until age 29 received a new birth certificate from the Vital Statistics Branch in California in 1983. His birth records from 1950 were "permanently frozen and sealed for life." *See, BORN TRUE HERMAPHRODITE - Pictorial Profile, at* http://www.angelfire.com/ca2/BornHermaphrodite/. *See also*, Lynn Harris, *Legal Sex Change, No Surgery, at* http://www.isna.org/newsletter/spring95/spring95.html. These cases often happen at unreported administrative hearings, these records may be sealed and frozen after the fact. Transgender activists also circulate information on how one can amend or change one's name and birth certificate. Dr. Becky Allison has compiled an entire list of statutes and regulations that allow individuals to change their sex in various jurisdictions. *See* Becky Allison, *U.S. States and Canadian Provinces: Instructions for Changing Name and Sex on Birth Certificate, at* http://www.drbecky.com/birthcert.html. Despite these provisions, it is uncertain whether this change of sex will stand up to legal scrutiny in the event of a dispute concerning one's legal sex. *See, e.g., Gardiner*, 22 P.3d 1086 (holding that a post-operative MTF transsexual was male despite the fact that she held a Wisconsin birth certificate that said she was legally female).

175 One internet source of information on sexual reassignment surgery noted that the entire operation, including cosmetic surgery, hormone treatments, counseling, and vaginoplasty can cost between $30,000 – 40,000 in the United States. Vaginoplasty: Male to Female Sexual Reassignment Surgery, *at* http://ai.eecs.umich.edu/people/conway/TS/SRS.html.

The history of legal sex can be traced through an examination of the ways in which the law sexes individuals who occupy a "third sex," particularly the sex of the "hermaphrodite."[176] According to historian Alice Domurat Dreger, "[t]he hermaphrodite body forces us to ask what exactly it is—if anything—that makes the rest of us unquestionable."[177] Domurat Dreger's research on the history of medical sex, hermaphrodites and the invention of rigid dichotomous sex reveals that the real key to "being" male or female is not biological but historical.[178] Today in the United States, medical professionals, particularly physicians, possess "the vast share of say [about] what a person's [legal] sex is/and or will be,"[179] and it is this medical determination that often carries the day in the courtroom. The legal landscape has not always looked this way.

Legal sex in the Anglo American tradition has not always been dichotomous, rigid and linked to "biological sex."[180] According to Randolph Trumbach, the current dichotomous gender system founded on two "biological" sexes has not always dominated the Anglo American law or the Western Tradition.[181] In the thirteenth century, English law divided individuals into three legal sexes.[182] Hermaphrodites were further classified as male or female according to the predominance of their sexual organs.[183] In the seventeenth century, there were two genders populated by three "biological sexes:" man, woman and hermaphrodite.[184] Under the common law, hermaphrodites were both male and female.[185] Legal and cultural status as a hermaphrodite often had no basis in genitalia or chromosomes.[186] Hermaphrodites could be "effeminate men" who were interested in having sex with other men, cross-dressing women, individuals with "ambiguous genitalia," or any number of individuals who transgressed gender roles, flouted convention or engaged in "deviant" sex acts.[187] The fluidity of a hermaphrodite's identity did not, however, permit them to engage in a freewheeling and fluid sexual

---

176 I use the term hermaphrodite in its historical sense. It does not refer to the current political identity movement of intersexual individuals.

177 DOMURAT DREGER, *supra* note 2.

178 *Id.*

179 *Id.* at 13.

180 It is essential to note that biological sex itself is a highly contested notion. Queer feminist theorist Judith Butler, for example, has highlighted the socially constructed nature of "sex" as a regulatory framework that constructs material bodies. *See supra* discussion pp. 35-36.

181 Randolph Trumbach, *London's Sapphists: From Three Sexes to Four Genders in the Making of Modern Culture, in* BODYGUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 111 (Julie Epstein and Kristina Straub, ed. 1991). According to Michel Foucault, this legal scenario was mirrored in France under the canon law and the civil law. During the Middle Ages, individuals "in whom the two sexes were juxtaposed . . ." were hermaphrodites. Hermaphrodites could decide for themselves whom they waned to marry; however, once an individual chose a sex, he or she must keep it until the end of his or her life. HERCULINE BARBIN, *supra* note 1, Introduction.

182 Bracton: Thorne Edition: English Vol. 2 p. 31, *available at* http://hls15.law.harvard.edu/bracton/unframed/English/v2/19.htm (last visited on Mar. 31, 2006).

183 *Id.*

184 DOMURAT DREGER, *supra* note 2.

185 *Id.* at 119 (citing Edward Coke on Common law).

186 *See generally* Trumbach, *supra* note 181.

187 *Id.*

life style. Hermaphrodites could not, for example, live as both men and women.[188] They were obligated to choose one gender and adhere to it forever.[189] This obligation required that hermaphrodites take only sexual partners from the "opposite" gender or else face the legal and social consequences of being labeled sodomites.[190]

Trumbach traces the dominant dichotomous notions of sex in the English legal tradition to the Enlightenment.[191] According to Trumbach, it was during the Enlightenment that western thought became preoccupied with classifying and categorizing all manners of things including people. In the 18th century, dichotomous gender, based on "biology" began to take hold in the English consciousness and law.

The nineteenth century brought a shift in the way that the law conceptualized the legal sex of hermaphrodites for the purposes of marriage. This shift was due mostly to the professionalization of medicine and the shifts in cultural notions of sex that these changes entailed. During the nineteenth century, medical doctors began to use licensing boards and the support of lawmakers to become more established as a profession.[192] As part of this establishment, medical professionals gained authority over sexual activity, childbirth and morality.[193] This rendered the medical establishment the absolute authority over gender, sex and sexuality.[194] This shift rendered legal sex immutable, dichotomous and rigid in its current incarnation in comparison to earlier conceptions of legal sex which were slightly more flexible than the current notion.

In the 19th century, medical sex was still open to doubt and the concepts of male and female were shrouded in ambiguity.[195] These influences had a profound effect on the nature of legal sex in the Anglo-American tradition in the United States. In the early nineteenth century, a U.S. court recognized hermaphrodites as a class of individuals who were distinct from males or females. The Court of Appeals of South Carolina held in *State v. Scion Barefoot*, that an aunt and her nephew might lawfully wed.[196] In clarifying the issues surrounding the question at hand, Judge Richardson suggested that hermaphrodites, like children, or eunuchs, might not be mentally or corporeally able to contract into marriage.[197] He wrote: "What is the meaning of the words 'able to contract' quoted from Blackstone? They mean mentally and corporeally able to contract . . . . Why may not a child, hermaphrodite or eunuch contract binding marriage . . . ? Such instances illustrate

---

188 *Id.* at 115

189 *Id.* at 119.

190 *Id.* at 115.

191 Trumbach, *supra* note 181, at 112.

192 *See* SHARON E. PRESSES, INTERSEX AND IDENTITY: THE CONTESTED SELF (2003).

193 DOMURAT DREGER, *supra* note 2, at 13.

194 *Id.*

195 *Id.*

196 State v. Scion Barefoot, 1845 WL 2580 (S.C.App.L.).

197 *Id.* at 12.

well what are the kind of marriages absolutely void in law . . . ." Although this case does not form a seamless vision of legal sex, it does indicate that in 1845 American courts in the United States recognized hermaphrodites as a separate sex with separate legal capacities. This conception of legal sex soon changed.

In *Ardsdalen v. Ardsdalen*, the Court of Chancery of New Jersey held that a wife whose husband alleged that she was a hermaphrodite was entitled to maintenance.[198] Similarly, in *Peipho v. Peipho*, the Supreme Court of Illinois denied a bill for a divorce for impotency brought by a husband who alleged that his wife was a hermaphrodite.[199] The husband sought divorce because he allegedly discovered that his wife was a hermaphrodite and "when sexually excited no male could have sexual intercourse with her . . . ."[200] The court held that this bill was insufficient to constitute impotency, particularly since her impotency was not alleged until thirteen years after the parties married. In this case, the court held that "in absence of strong rebutting facts, [Mr. Peipho] must be taken to have accepted the situation, and could not be heard to complain."[201] Although neither of these cases presents any sort of medical evidence that the wives involved were "actually" hermaphrodites, both courts failed to articulate the legal principle formulated in *Scion Barefoot*. Even if the women in question belonged to a "third" legal sex, recognized by law a mere thirty-five years before, the courts were unwilling to claim that they were categorically incapable of contracting into marriage. For all purposes, the courts in these cases treated wives like legal females.

As these cases reveal, in the later half of the 19th century, this ambiguity and doubt surrounding legal sex became rigid certainty due to medical conventions. Despite a "virtual explosion" of human hermaphroditism, consensus in the medical community "began to solidify that the single reliable marker of true sex in doubtful cases was the gonad."[202] In many cases, sex became a matter of whether one had ovaries or testicles. Sex was determined in an "either or" fashion, a fashion that mapped onto a bi-gendered paradigm.[203]

The bi-gendered paradigm and the scientific fetish for classification were well established by the beginning of the twentieth-century. It was when the medical profession established a bi-gendered, medically determined sex, that the hermaphrodite disappeared as a separate medical classification and legal sex.[204]

---

198 Ardsdalen v. Ardsdalen, 1879 WL 6757 (N.J.Ch.). Mrs. Ardsdalen testified that the "physical defects imputed to her" have never existed and that she was willing to "do her duty, her whole duty as a wife." Mr. Ardsdalen told her father, however, that she was a hermaphrodite and that "she [was] no woman." The court noted that other than Ardsdalen's testimony, there was no evidence that Mrs. Ardsdalen was a hermaphrodite.

199 Peipho v. Peipho, 1878 WL 9902 (Ill.).

200 *Id.*

201 Kirschbaum v. Kirschbaum, 111 A. 697 (N.J.Ch. 1920) (discussing *Peipho*, 1878 WL 9902, in relation to a "platonic" marriage).

202 DOMURAT DREGER, *supra* note 2, at 30.

203 *Id.* at 153. Dreger connects the disappearance of the hermaphrodite with the appearance of homosexual individuals.

204 *Id.*

Hermaphrodites were now explicitly associated with ambiguous genitalia.[205] Furthermore, hermaphrodites began to be classified in terms of "male pseudo-hermaphrodites," "female pseudo-hermaphrodites," and "true hermaphrodites" based upon whether they possessed testicles, ovaries or some combination of both "types" of gonads. All this classification led the medical profession to follow a strict "[o]ne body, one sex . . ." rule in which one of the two possible sexes described the anatomy of each body.[206] If a body did not conform to this one sex, the medical profession would use surgical tools and social pressures to mold the individual in question into the binary sexual classification system.[207] Following the trends in medical classification of sex, the law lost sight of the hermaphrodite. Legal sex became "biologically" based and dichotomously gendered.

VI. CONCLUSION: LIVED GENDER AS AN ALTERNATIVE TO BIOLOGICAL DEFERENCE

"You make me feel like a natural woman."[208]

The current legal landscape for the determination of legal sex is riddled with inconsistencies and landmines for transgender individuals. As we have seen, these inconsistencies in various jurisdictions are further problematized by a construction of legal sex that stems from a notion of sex that has been invented by certain scientific and medical discourses that are historically situated and culturally constructed. The biological conception of sex that the legal system relies upon to determine legal sex is not natural, pre-discursive or ahistorical. Like gender, it has been shaped and molded by the forces of culture and history. As such, it is a dangerous default in a legal system where pluralism rules and where culture is shifting. This conclusion brings the discussion into focus by defining and advocating the concept of "lived gender" and arguing that this is the view of legal sex that the Anglo American tradition should focus on in its determinations of legal sex.

The Anglo American landscape surrounding legal sex has not taken the insights of feminist theorists on the body, particularly Judith Butler, into consideration in their determinations of legal sex. Whether an opinion concerning a change in legal sex is pro-recognition or anti-recognition, the court in question will generally defer to "biological" factors of sex (anatomy, physiology, and chromosomes) over other factors. Anti-recognition opinions often defer to biological sex, claiming that immutable characteristics like chromosomes or gonads

---

[205] *Id.* (presenting numerous examples in which interssexual individuals were photographed, monitored and studied by a medical profession obsessed with classifying the ambiguously sexed body in a way that conforms to the bi-gendered system. Herculine Barbin, for example, was the object of such studies during his life and after his death.).

[206] *Id.* at 109.

[207] Bernice L. Hausman, *Do Boys Have to Be Boys? Gender Normativity and the John/Joan Case,* 12.3 NWSA J. 114 (2000) (examining the nature versus nurture debate in light of a case where one twin was sexually reassigned after a botched circumcision).

[208] ARETHA FRANKLIN, A NATURAL WOMAN (YOU MAKE ME FEEL LIKE) (Atlantic 1967).

(even after they are removed) reveal an individual's "true" sex for the purposes of law. Pro-recognition opinions differ only in so far as they take "biological" aspects of sex that are more mutable into account. Despite a tendency to take gender and other social factors into account, pro-recognition opinions like *Kantaras, In re Kevin,* and *M.T.* rely heavily on the post-operative status of the men and women in question.[209] Mastectomies, hysterectomies, vaginoplasties and hormone therapy all figure prominently into the reasons that courts grant recognition of legal sex to the men and women in these cases. These opinions give some weight to the court's perception of gender as well as to the way that others perceive gender.[210] However, very rarely do these opinions devote equal time or weight to an individual's self-perception of their own gender identity.[211] Research uncovered no case law in which a transgender person gained legal recognition of his or her sex without some medical intervention. In order for a transgender person to receive legal recognition of his or her sex, he or she must conform medically through anatomy, physiology and cultural perception, to the "biological" norm.

While some scholars advocate a position in which the law recognizes sex, gender and sexual orientation as individual concepts,[212] such a position does not really reflect the way that individual persons live sex, gender and sexual orientation.[213] The determination of legal/biological sex not only informs one's gender but also creates the boundaries of sexual orientation. Gender and sexual orientation, through the hegemony of medical and social norms, influence the determination of legal/biological sex. Therefore it would seem that sex, gender and sexual orientation, for most people, are intertwined in ways that make it difficult and narrow-minded to create legislation that addresses only sex, only sexual orientation, or only gender. The problems that arise in creating legislation that refers to sex in merely biological terms can clearly be seen in the fact that "sex" discrimination does not provide any protection for gays, lesbians or transsexual persons, as courts have contorted and narrowed definitions of sex to exclude those individuals who fall outside the approved categories of appropriate persons who deserve protection. Feminists should advocate a position in which sex, as a legal concept, must reflect and consider "lived gender."

"Lived gender" attempts to guide courts beyond biology. Determining legal sex by examining lived gender is meant to encompass a more complicated notion of sex identity for the purposes of law, a notion where biology, culture, psychology, and social interactions converge on equal ground to denote an existence that more

---

209 *See supra* discussion pp. 12-16.

210 *Id.*

211 *See* Janine M. de Manda, *Comment: Our Transgressions: The Legal System's Struggle with Providing Equal Protection to Transgender and Transsexual People*, 71 UMKC L. REV. 507, n.524 (2003) (claiming the legal system does not provide equal protection for transgender people in part because it refuses to recognize or honor the self-definitions of transgender people).

212 *See supra* note 180, and accompanying text.

213 *See* GENDER TROUBLE, *supra* 162. Consistent with Foucault's notion of modern power and Judith Butler's conception of the materiality of the body, I believe that the sex/gender dichotomy is a false one because social and biological norms inform one another in various ways.

accurately reflects the way that people experience "sex" and "gender" as a normative force in their lives.[214]

The law has a problem with sex and gender.[215] Although the difference between sex and gender has been well noted and theorized in feminist literature, judges and legislators often use the terms interchangeably and without clearly defining whether they are addressing biological or social factors.[216] When sexual orientation is brought into the picture, it becomes even more confused. In some recent cases, issues of gender and sexual orientation, through the rejection of sex stereotypes, have been the main focus.[217] Generally, however, the law does not recognize anything but a conflated notion of sex that sometimes encompasses gender and sexual orientation and sometimes does not.[218] The problem with conflating sexual orientation, gender and sex in the law is one of inconsistency and scope. It allows the law, and individual judges and legislators, to pick and choose what they will recognize under the large looming rubric of "sex" and when they will do so. When does sex mean gender? When does sex encompass sexual orientation? The answer to this is uncertain and can be manipulated by the courts. Lived gender, in its deference not only to social perceptions of an individual's gender but also to the individual's perceptions of his or her own gender, may be a solution to this dilemma.

"Lived gender" is a concept that strives to answer many of the problems that arise around sex in the law by taking into account the numerous factors and complexities that determine gender and sex. It reflects not only the way individuals commonly think about sex and gender as intertwined and embedded in one another, but also the way that gender is commonly experienced for most individuals, particularly women. Ideally, lived gender goes beyond sex, beyond gender and beyond sexual orientation in order to interpret and create the law in a way that is actually responsive to the way that gendered and sexed individuals exist.

"Lived gender" is meant to surpass gender as a mere social construction and strives to account for multiple aspects of living sexed in a gendered body with a gender identity. The term is meant to encompass the reality and materiality of the body's sex,[219] both medically and biologically, the individual's psychological or

---

214 I believe generally, however, that this convention does not necessarily reflect the ways in which "biological sex" is constructed by cultural conceptions of gender. *See* BODIES THAT MATTER, *supra* note 146, at 1 ("[S]ex not only functions as a norm but is part of a regulatory practice that produces the bodies it governs . . .").

215 Often the literature refers to the biological component as sex and the social component as gender. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST THEORY 162 (1999).

216 *Id.*

217 *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (using sex stereotyping as the basis for a Title VII claim); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) (holding that same sex harassment among "straight" men is actionable under Title VII).

218 Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in European American Law and Society*, 83 CAL. L. REV. 1 (1995).

219 Traditionally, the realities of the body have been very important for feminist theorists, particularly those that see women's lives as "embodied." *See, e.g.*, RILEY, *supra* note 160 (claiming that

social gender[220] as perceived by the individual in question, and the imposition of gender norms on the body and psyche from external sources. It is this concept through which the law should view legal sex and all issues related to sex or gender, because it is only lived gender that encompasses the reality of gendered existence, a reality that the law should take into consideration.

As we have seen, legal sex matters. "'Sex' is, thus, not simply what one has, or a static description of what one is: it will be one of the norms by which the 'one' becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility."[221] In a legal regime where dichotomous legal definitions of sex rule, it provides the basic framework of existence for individuals. This basic framework determines the way that one lives. One's legal sex is too important to be left to biology, law or culture alone. Sex is a deeply personal matter, and as such, the legal determination of one's sex must take personal perceptions into account. "Lived gender" attempts to make legal sex a personal matter as it wrests some of the power that courts and doctors have over legal sex and places it in the hands of the individuals for whom the determination of legal sex matters most: the transgender men and women seeking legal recognition of their gender identity.

women's bodies have historically been imprinted by their experiences and that their identities, especially those concerning motherhood and sexuality, are underpinned by a female body). This can also be seen in the issues that are generally characterized as "women's issues," like those concerned with sex and reproduction (particularly abortion, child custody, motherhood, and rape). And while some legal scholars have made strides to expand the notion of women's issues to encompass more traditionally "male" issues, many people still think of women's legal issues as those heavily tied to sex and reproduction.

220 The business of gender is inherently social. Jillian Todd Weiss goes so far as to claim that "the idea that we can choose or change our gender fails to take into account that gender is not a solitary experience, individually and subjectively determined, but one that is had by everyone and is culturally and objectively observed." Weiss, *supra* note 17, at 113.

221 *Id.* at 6.