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## Transsexuals, Intersexuals, and Same-Sex Marriage

*Terry S. Kogan\**

### I. INTRODUCTION

One assumption shared by virtually every commentator who addresses same-sex marriage, irrespective of the position taken on that issue, is that we know what constitutes a same-sex and what constitutes an opposite-sex marriage. I want to challenge that assumption by examining a series of marriage cases involving one partner who is either a transsexual or an intersexual.

The irony of the cases I will explore is this: In every case the judge is committed to upholding the statutory principle that marriage is the union of one man and one woman. Yet, in the struggle to apply this principle, these cases illustrate the difficulty and even foolishness in looking to a person's sex as a criterion for marriage. Accordingly, the cases offer insights into why society should extend marriage rights to same-sex couples.

These cases raise a fundamental question: For purposes of marriage, why do we care how a person's body is configured? To be blunt, why do we insist that one marriage partner have a penis and the other a vagina, as opposed to a penis and an artificial vagina, or a vagina and an artificial penis, or two vaginas or two penises? This question becomes stark when one considers intersexuals (persons who have *both* male and female sexual characteristics).

Part II examines cases dealing with transsexual marriage. I explore what I consider to be three waves of such cases.<sup>1</sup> The first-wave begins

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1. The three waves do not necessarily progress chronologically, but rather in terms of what I consider to be approaches that are more respectful and sensitive to the plight of the transsexual individuals involved.

with *Corbett v. Corbett*,<sup>2</sup> where a British court concluded that a person's physiological characteristics at birth should be the exclusive criteria for determining sex for purposes of marriage. In the second-wave cases, courts struggle to introduce psychological factors into the determination of a person's sex. Finally, in the third-wave, psychological factors gain a certain degree of ascendance over biological factors in determining a transsexual's sex for purposes of marriage.

Part III then explores intersexuality and the very few cases dealing with intersexuals and marriage. In so doing, I examine the way courts struggling with transsexual marriage look to the hypothetical case of an intersexual as a touchstone to assist in their determination. Intersexuality entirely confounds the question of why a person's physiological characteristics (genitals, gonads, and chromosomes) have any bearing whatsoever on who should be allowed to marry. The intersexual cases represent a transcendence of psychology over physiology in the marriage realm.

Finally, Part IV offers insights that one can gain from the transsexual and the intersexual marriage cases in confronting the question of extending marriage rights to same-sex couples.

Throughout this article, I will test the requirements that courts impose on transsexuals and intersexuals in marriage cases against what I describe as the goals of marriage. Without engaging in extended discussion, I view the goals of marriage as fostering stable, long-term, mutually supportive, committed relationships between two people in a financially sound environment that are conducive to rearing children.<sup>3</sup>

## II. TRANSSEXUALITY AND MARRIAGE

In contrast to the first-wave cases, discussed below, that dealt with transsexuality and marriage, more recent decisions have taken a direction that has important implications for our society's struggle with same-sex marriage. These later cases move away from mandating what body parts are "naturally" meant to interact with other body parts and inquire instead into what emotional and psychological goals the marriage relationship is meant to foster. Though consideration of physiology has by no means been eliminated, it has been forced to move over and allow for greater consideration of the psychological aspects of the marriage relationship.

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2. 2 All E.R. 33 (P. 1970) [hereinafter "*Corbett*"].

3. See, e.g., Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Law and Ordinances*, 2001 BYU L. Rev. 1023, 1024 (2001). Of course, if a couple chooses not to have children, then the last goal will drop out of the picture.

*A. The First-wave Cases: Corbett and its Progeny*

The starting point for transsexual marriage cases is the 1970 British case *Corbett v. Corbett*. Before turning to *Corbett*, however, certain terms need to be defined. A transsexual is a person with the physical characteristics of one sex who experiences his or her sexual identity as being of the other sex.<sup>4</sup> This dissonance between one's body and one's sexual identity is described as "gender dysphoria" or "gender identity disorder." Many transsexuals undergo hormonal and surgical treatments to conform their physical bodies more closely to the sex of their sexual identity. Transsexuals who have undergone such surgical treatment are often referred to as "post-operative."

One judge has described *Corbett* as "the 'watershed' decision . . . that influenced the British Empire on transsexualism and its impact on the marriage law and all common law jurisdictions in Western society. . . . The *Corbett* case is so profound and pervasive that it has divided the judiciary of the world, wherever, transsexualism presents itself as a societal issue."<sup>5</sup>

In *Corbett*, April Ashley was a post-operative male-to-female transsexual.<sup>6</sup> She married Arthur Corbett and, within a few months after the wedding, her husband sought an annulment asserting that April was actually "a person of the male sex" and, therefore, that the marriage was invalid. A secondary issue in the case related to allegations by both sides that the marriage was never consummated.

The judge found the law to mandate that "marriage . . . is and always has been recognised as the union of man and woman . . . in which the capacity for natural hetero-sexual intercourse is an essential element."<sup>7</sup> Thus, the issue in the case was whether the "true sex" of April Ashley

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4. While there is no uniformity of usage, medical science often refers to a person's own sense of their identity as male or female as a person's "sexual identity." See, e.g., Milton Diamond, *Sexual Identity and Sexual Orientation in Children with Traumatized or Ambiguous Genitalia*, 34 JOURNAL OF SEX RESEARCH 1999 (1997). Others refer to a person's sense of their own identity as male or female as a person's "gender identity." See for example, testimony of Dr. Walter Bockting, Ph.D., a Clinical Psychologist at the University of Minnesota, in *Kantaras v. Kantaras*, No. 98-5375CA, at 268 (Fla. 6th. Cir. Ct. Feb. 23, 2003) ("Gender identity is a basic conviction of being a man or a woman") [hereinafter *Kantaras*].

According to Dr. Bockting, "Based on studies in the Netherlands they found that one in 11,900 persons is a male to female (M to F) transsexual. And one in every 30,400 is female to male." *Id.* at 270. See generally, Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 237 (1998).

5. *Kantaras*, No. 98-5375CA at 535.

6. Hereinafter, I will on occasion use the term "M-T-F" to refer to a male-to-female transsexual, and the term "F-T-M" to refer to a female-to-male transsexual.

7. *Corbett*, 2 All E.R. 33, 48 (P. 1970).

was male or female and, accordingly, whether she could engage in “natural hetero-sexual intercourse” as a woman.

The judge, a medical doctor himself, considered extensive testimony from medical experts, who agreed that there were five possible criteria for determining April’s “true sex”:

- (i) Chromosomal factors.
- (ii) Gonadal factors (i.e., presence or absence of testes or ovaries).
- (iii) Genital factors (including internal sex organs).
- (iv) Psychological factors.

Some of the witnesses would add:

- (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc., which are thought to reflect the balance between the male and female sex hormones in the body).<sup>8</sup>

After reviewing the medical evidence, the judge concluded:

It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent’s operation, therefore, cannot affect her true sex.<sup>9</sup>

In other words, the law should adopt, in the first place, the first three of the doctors’ criteria, ie the chromosomal, gonadal, and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.<sup>10</sup>

Accordingly, the judge refused to consider any social or psychological evidence as relevant to determining April Ashley’s “true sex.” In attempting to justify his insistence that birth biology be the exclusive determinant of sex, the judge stated:

Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment be, biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot

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8. *Id.* at 44.

9. *Id.* at 47.

10. *Id.* at 48.

reproduce a person who is naturally capable of performing the essential role of a woman in marriage.<sup>11</sup>

Applying this standard, the judge concluded that April was a man for purposes of marriage law and that the marriage was invalid.

*Corbett* has been harshly criticized by courts and commentators alike,<sup>12</sup> in particular, its reliance on the notion of “a person who is naturally capable of performing the essential role of a woman in marriage,” a concept to which I will return below. Nonetheless, *Corbett*’s conclusion that a person’s sex is determined at birth based exclusively on physiological criteria of genitals, gonads and chromosomes has been followed by other courts.<sup>13</sup> I want to briefly review two such first-wave cases, recent decisions of the Texas Court of Appeals and the Kansas Supreme Court, before critiquing *Corbett* and its progeny.

In its 1999 decision in *Littleton v. Prange*,<sup>14</sup> the Texas Court of Appeals confronted a medical malpractice suit against a doctor by a decedent’s transsexual wife pursuant to Texas’ wrongful death statute. The doctor defended by asserting that the plaintiff was a man and therefore could not be the decedent’s surviving spouse and wrongful death beneficiary. The trial court agreed, granting summary judgment to the defendant.

On appeal, the court framed the issue as follows: “Can 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?”<sup>15</sup> In responding to this, the court deferred to the legislature for guidelines dealing with transsexuals and marriage. Determining that no such guidelines existed,<sup>16</sup>

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11. *Id.*

12. Commentaries criticizing the *Corbett* decision include: Alec Samuels, *Once a Man, Always a Man; Once a Woman Always a Woman - Sex Change and the Law*, 24 MED., SCI. & L. 163-66 (1984); Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 253 (1971) (“refusal to reclassify the sex of a post-operative transsexual seems inconsistent with the principles of a society which expresses concern for the privacy and dignity of its citizens”); H. R. Hahlo, *Sex Change Operations and the Law*, 1970 S. AFR. L. J. 239 (1970); David Green, *Transsexualism and Marriage*, 120 NEW L. J. 210 (1970); John Dewar, *Transsexualism and Marriage*, 15 KINGSTON L. REV. 58 (1985); Margaret Otlowski, *The Legal Status of a Sexually Reassigned Transsexual: R v. Harris and McGuiness and Beyond*, 64 Australian L.J. 67 (1990).

13. For courts following *Corbett*, see for example *Bellinger v. Bellinger*, 1 All E.R. 311 (C.A. 2002), *aff’d*, *Bellinger v. Bellinger*, 2 All E.R. 593 (H.L. 2003) and *In re Ladrach*, 32 Ohio Misc. 2d 6, 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

14. 9 S.W.3d 223 (Tex. Ct. App. 1999).

15. *Id.* at 225.

16. *Id.* at 230.

the court found there to be no disputed issues of fact and upheld the grant of summary judgment.<sup>17</sup>

Given that it found there to be no disputed question of fact, how did the *Littleton* court determine that the plaintiff remained a male despite reassignment surgery? It did so by concluding as a matter of law that because the plaintiff's external female anatomy was "all man-made," and because sex reassignment surgery could not give plaintiff "the internal sexual organs of a women [sic] . . . no womb, cervix or ovaries," then "[b]iologically a post-operative female transsexual is still a male."<sup>18</sup> Without directly saying so, the *Littleton* court fully embraced *Corbett's* conclusion that a person's sex is, as a matter of law, determined at birth and cannot be changed by subsequent surgery.<sup>19</sup> Like *Corbett*, it gave no consideration whatsoever to recent medical evidence that has emphasized the importance of social and psychological factors in determining a person's sex.

In its 2002 decision in *Estate of Gardiner*,<sup>20</sup> the Kansas Supreme Court refused to recognize a marriage between a man and an M-T-F transsexual as valid. The case involved a dispute between the transsexual widow and the decedent's estranged son, who challenged the widow's right to inherit, claiming she was a man for purposes of the Kansas marriage statute. The trial court granted summary judgment to the son, basing its decision on *Littleton v. Prange*. The Court of Appeals overturned the grant of summary judgment, criticizing the reasoning in *Littleton* as "a rigid and simplistic approach."<sup>21</sup> It remanded the case for the determination of the widow's sex, ruling that the trial court must consider multiple criteria considered relevant by modern medicine in addition to chromosomes.<sup>22</sup>

In reversing the Court of Appeals and reinstating the trial court's grant of summary judgment, the Kansas Supreme Court relied in large part upon Webster's Dictionary to determine that, as a matter of law, the transsexual widow was not a woman:

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17. The dissent harshly criticized the majority for its refusal to recognize the existence of disputed material facts concerning the plaintiff's gender. *Id.* at 231.

18. *Id.* at 230.

19. *Id.* at 230-31.

20. 42 P.3d 120 (Kan. 2002).

21. 22 P.3d 1086, 1110 (Kan. App. 2001).

22. *Id.* ("On remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.")

The words “sex,” “male,” and “female” in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of “persons of the opposite sex” contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. . . . As the *Littleton* court noted, the transsexual still “inhabits . . . a male body in all aspects other than what the physicians have supplied.” J’Noel does not fit the common meaning of “female.”<sup>23</sup>

The truth of the matter is that, “in everyday understanding,” J’Noel also does not fit the common meaning of male, which the court concluded she was as a matter of law. There simply is no everyday understanding concerning the sex of transsexuals, and the court’s feeble attempt to rely on such an understanding provided weak justification for overturning the intermediate appellate court’s well-reasoned decision.

The Kansas Supreme Court, however, seemed to venture beyond *Corbett* in suggesting that an M-T-F transsexual is neither male nor female for purposes of the Kansas marriage statute: “We view the legislative silence to indicate that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so.”<sup>24</sup> Having undergone irreversible sex reassignment surgery, the post-operative transsexual inhabits a netherworld between male and female, a world in which marriage is not an option. The Court however backs away from this conclusion in the last paragraph of the opinion where it states that “J’Noel remains a transsexual, and a male for purposes of marriage under [the Kansas statute].”<sup>25</sup>

First-wave cases, including *Corbett*, *Littleton*, and *Gardiner*, all conclude that a person’s sex is irreversibly determined at birth based exclusively on physical attributes (genitals, gonads, and chromosomes). Every first-wave case concludes this as a matter of law, a disturbing judicial result in light of the extensive medical testimony elicited suggesting that a person’s psychological attributes are a very significant factor in determining an individual’s sex. Each of these cases raises directly the question of why, for purposes of marriage, do we care how a person’s body is “naturally” configured at birth? A clue to the answer is given by the *Corbett* court when it notes that “the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and

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23. 42 P.3d 120, 135 (Kan. 2002).

24. *Id.* at 136.

25. *Id.*



male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.”<sup>26</sup> In other words, only a person born with those bodily characteristics traditionally associated with being a woman will be “naturally capable” of fulfilling a woman’s essential role in marriage. What is that essential role that requires so specific a bodily configuration at birth, and what is required to be able to perform that role “naturally?”

Let us examine this question:

1. Perhaps the essential role of a woman in marriage is to procreate. But, procreation cannot offer a justification for insisting that two bodies be configured from the time of birth in a particular way in order to marry one another. To begin with, a post-operative transsexual is always sterile, so the individual’s procreating biologically is never a possibility. Yet this fact alone cannot preclude a transsexual from marrying, since we do not require that anyone else commit to or be capable of procreating as a precondition for marriage. Many couples choose not to have children. Some infertile couples have children through adoption, surrogacy, or alternative reproductive technologies.<sup>27</sup> In fact, in several cases the transsexual in the marriage had adopted the children of his or her partner.<sup>28</sup> Therefore, the ability to procreate biologically cannot justify a requirement that two people be born with particular body parts in order to marry.

2. Perhaps the essential role of a woman in marriage relates to the ability to engage in sexual intercourse as a woman.<sup>29</sup> But this justification also fails. To begin with, the evidence at trial established that April Ashley was able to engage in intercourse with her post-

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26. *Corbett*, 2 All E.R. 33, 48 (P. 1970).

27. The Australian appeals court in *Kevin v. Attorney-General (Cth)* (2001) 165 F.L.R. 404 [hereinafter “*Re Kevin*”], *aff’d Attorney-General (Cth) v. Kevin* (2003) 172 F.L.R. 300 [hereinafter “*Re Kevin* appeal”]), stated: “Like the trial judge, we reject the argument that one of the principal purposes of marriage is procreation. Many people procreate outside marriage and many people who are married neither procreate, nor contemplate doing so. A significant number of married persons cannot procreate either at the time of the marriage or subsequently — an obvious example being a post-menopausal woman. Similarly, it is inappropriate and incorrect to suggest that consummation is in any way a requirement to the creation of a valid marriage.” *Id.* at 328.

28. *See, e.g., Kantaras*, No. 98-5375CA at 421 (Cir. Ct. 6th Dist. Fla. 2003).

29. The *Corbett* judge suggested this directly when he stated:

[S]ex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.  
*Corbett*, 2 All E.R. 33, 48 (P. 1970).

operative body.<sup>30</sup> Other first-wave cases elicited similar evidence.<sup>31</sup> Thus, the ability to fulfill a woman's role in sexual intercourse cannot be the reason that the *Corbett*, *Littleton*, and *Gardiner* judges refused to recognize the M-T-F transsexuals as women.

3. Perhaps the reason first-wave cases refuse to recognize M-T-F transsexuals as women is because they are not born with vaginas. The *Corbett* judge seems to conclude that engaging in intercourse with a surgically-created vagina is not "natural hetero-sexual intercourse." Throughout the opinion the judge displays continuing discomfort in choosing nouns to refer to April's surgically-created body. Though he opts to refer to her "so-called artificial vagina,"<sup>32</sup> at one point he states that his preferred referent is "cavity which opened onto the perineum."<sup>33</sup>

Imposing a requirement that, to marry as a woman, one must have been born with a vagina would disqualify many chromosomal women from marrying who, for medical reasons, need surgery to enable them to engage in intercourse.<sup>34</sup> In fact, an earlier British case, *S. v. S. (otherwise W.)*,<sup>35</sup> concluded that a woman born without a vagina or uterus who had a surgically-created vagina was eligible to marry. In that case, the husband argued that the marriage was a nullity because the wife's artificial vagina would not allow for natural heterosexual intercourse.<sup>36</sup> In rejecting this argument, the court stated:

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30. *Id.* at 41 (A medical witness testified: "[April Ashley's] vagina is of ample size to admit a normal and erect penis. The walls are skin covered and moist. There is no impediment on 'her part' to sexual intercourse.").

31. *See, e.g.*, Estate of Gardiner, 22 P.3d 1086, 1092 (Kan. App. 2001) ("J'Noel has a 'fully functional vagina' and should be considered a functioning, anatomical female.").

32. *See, e.g.*, *Corbett*, 2 All E.R. 33, 49-50 (P. 1970).

33. *Id.* at 36 ("I have been at some pains to avoid the use of emotive expressions such as 'castration' and 'artificial vagina' without the qualification 'so-called', [sic] because the association of ideas connected with these words or phrases are so powerful that they tend to cloud clear thinking. It is, I think, preferable to use the terminology . . . a 'cavity which opened onto the perineum.'").

34. The trial court in *Re Kevin*, (2001) 165 F.L.R. 404, 422 stated: "Given that marriage is a social and legal institution which includes people who are infertile or by reason of illness or otherwise are unable to engage in genital penetrative intercourse, it seems to me odd, rather than self-evident, to treat capacity for genital intercourse as 'the essential' role of a woman (or a man) in marriage." *See also* Attorney-General v. Otahuhu, (1995) 1 NZLR 603, 612 ("There are . . . circumstances in which reconstructive surgery has enabled a woman to achieve heterosexual intercourse which would not otherwise have been possible for her without such intervention either because of a congenital abnormality or because of injury. It has never been suggested that merely by some injury or abnormality of her vagina a woman ceases to be a woman.").

35. *S. v. S. (otherwise W.)*, 3 All E.R. 55 (C.A. 1962).

36. *Id.* at 59-60 ("In order to constitute true coitus, there must [the husband argues]. . . be full penetration by way of a vaginal passage. Here, it is claimed, the wife in her present condition has no vaginal passage, and the effect of the operation would not be to create a true vagina but merely an artificial cavity. . . . [C]oition by means of an artificial vagina, created where there was none before . . . could not be held to amount to "vera copula.").

If neither the ability to conceive nor the degree of sexual satisfaction to be obtained is a determining factor, what else, it may be asked, remains to differentiate between intercourse by means of an artificial vagina and intercourse by means of a natural vagina artificially enlarged? In either case full penetration can be achieved, and there is thus complete union between the two bodies.<sup>37</sup>

Having in effect adopted the very same argument relied upon by the unsuccessful husband in *S. v. S. (otherwise W.)*, the *Corbett* judge attempted to distinguish that case by suggesting that it “could be dealt with as [a case] of incapacity, and, therefore, it has not been necessary to call in question the true sex of the respondents . . . .”<sup>38</sup> However, he never even tried to explain why April Ashley’s surgery to create a vagina could not also be described a case of “incapacity.” Instead, he abandoned the discussion of April’s inability to engage in “natural heterosexual intercourse” and jumps to the broader question of April’s “true sex.” The judge’s only attempt to explain why April could not be deemed capable of engaging in natural sexual intercourse occurred in a somewhat flippant, yet very revealing, comment near the end of the decision:

I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity . . . can possibly be described . . . as “ordinary and complete intercourse . . . of the natural sort of coitus.” In my judgment, it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres.<sup>39</sup>

The *Corbett* judge’s concerns become clear. Because of his commitment to freezing a person’s sex at birth, and his refusal to take psychological testimony into account, he cannot “see” April Ashley as anything other than a man. Accordingly, despite her bodily configuration at the time of marriage, the judge views any sexual intercourse in which she engages with a man as homosexual. Thus, her “cavity which opened onto the perineum” was in the judge’s eyes a second anus and not a vagina. Having determined that, despite her reassignment surgery, April remained a man because she was born a man, the judge concludes that

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37. *Id.* at 62.

38. *Corbett*, 2 All E.R. 33, 47-50 (P. 1970).

39. *Id.* at 49.

April's engaging in intercourse with a man was unnatural because, in his eyes, it was homosexual.<sup>40</sup>

In the end, it appears that the first-wave judges in *Corbett*, *Littleton*, and *Gardiner* rely upon birth biology to the total exclusion of psychological and social criteria in determining a person's sex to assure that they not condone same-sex marriage. All assume that the only way to be certain a marriage is between opposite-sexed partners is for one partner to have male body parts at birth and the other partner to have female body parts at birth.

The court's discussion of whether April could engage in "natural heterosexual intercourse," however, is totally beside the point. Our society has never required that two individuals be able to prove their ability to engage in genital-penetrative intercourse as a prerequisite for marriage.<sup>41</sup> Why then should that ability be a criterion for determining the sex of a transsexual for purposes of marriage? If a couple is content with the form of sexual expression they choose, society has no place policing whether they engage in traditional heterosexual intercourse.

4. There first-wave cases suggest that to depart from a reliance on birth biology will defy more than mere logic; it will defy the Lord's natural plan for the universe. The *Littleton* court made this clear when it framed its discussion by posing the following question: "The deeper philosophical (and now legal) question is: 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?"<sup>42</sup> In so framing the issue, the court betrayed its underlying belief that determining the sex of a transsexual for purposes of marriage has religious dimensions. In effect, to determine that a person's sex can change after birth would be a form of heresy. It would defy the Lord's plan in creating people with male or female chromosomes, genitals, and gonads at birth. Accordingly, the meaning of the term "natural" in *Corbett* and the other first-wave cases is, in many respects, as much a determination of theology as one of fact or law.

In the end, the first-wave cases portray a desire to punish transsexuals for attempting to fool Mother Nature. Ignoring the realities of post-operative transsexuals' lives — in particular, the fact that their

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40. See also Leo Bersani, *Is the Rectum a Grave?*, in AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM 197 (Douglas Crimp ed., 1988) (discussing the cultural discomfort with anal sex).

41. Though historically the inability to consummate a marriage was grounds for annulment (and not an automatic basis for invalidity of a marriage), more and more jurisdictions are deeming that failure to be one ground for divorce based on incompatibility. See, e.g., *Re Kevin*, (2001) 165 F.L.R. 404, 465-66.

42. *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. Ct. App. 1999).

bodies exist irreversibly in their reassigned genders — these courts are unwilling to set aside social and theological assumptions about the inherent nature of the world. According to first-wave courts, there are two and only two sexes; a person's sex is determined at birth and is immutable; we should not surgically fool around with the Creator's natural way of things; and, finally, the natural order mandates that only people of different sexes (determined at birth) should be allowed to marry.

5. One additional concern emerges among first-wave courts — the need for clear, certain criteria by which to determine a person's sex. Unlike *Corbett*, several recent first-wave courts have given greater credence to medical testimony concerning psychological sex. Nonetheless, these courts ultimately rely on *Corbett's* physical criteria out of a fear of what might result absent such clear criteria. For example, in *Bellinger v. Bellinger*,<sup>43</sup> though the English court recognized the advances in medical science since *Corbett* was decided in 1971,<sup>44</sup> it ultimately followed *Corbett's* strict reliance on birth biology. “To choose, however, to recognise a change of gender as a change of status would require some certainty and it would be necessary to lay down some pre-conditions which would inevitably be arbitrary.”<sup>45</sup> The only safe way to settle this question is to rely upon the certainty of a person's physical configuration at birth.

Being able to adjudicate cases using clear criteria is indeed important for courts. However, as illustrated by the second and third-wave cases discussed below, courts are perfectly capable of dealing with less than a bright line rule in determining a person's sex for purposes of marriage. The suggested fear of social chaos is a poor excuse for the first-wave court's failure to accept the complex realities, uncertainties, and indeed, ambiguities of transsexuals' lives.

6. The extreme irony of *Corbett*, *Littleton*, *Gardiner*, and other first-wave cases is clear. In their zeal to prohibit same-sex marriage, the judges reach a truly bizarre result: An individual who on the day of her wedding has the sexual identity of a woman, and has irreversibly altered

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43. 1 All E.R. 311 (C.A. 2002), *aff'd*, *Bellinger v. Bellinger*, 2 All E.R. 593 (H.L. 2003).

44. The trial judge concluded:

There is now a distinct possibility that were it possible to do so, examination of the brain of a living individual would reveal further indications of gender. But that is not yet possible and the practical reality is that whatever may ultimately emerge from advances in medical science, the only criteria for determining the gender of an individual remain those identified in *Corbett's* case.

1 All E.R. at 314.

45. *Id.* at 334.

her body into that of a woman, is legally allowed to marry only another woman.

This irony is intensified in light of the understanding of medical science that there is no necessary connection between sexual identity and sexual orientation. That is, some M-T-F transsexuals who are sexually attracted to women. They self-identify as women for purposes of their sexual identity, and as lesbian for purposes of their sexual orientation. Under the first-wave cases, such an individual who deemed herself a lesbian would legally be allowed to marry only another woman.<sup>46</sup>

In their zeal to assure that marriage remain a heterosexual institution, first-wave judges have reached a conclusion that, to any outside observer, would appear to condone same-sex marriage. The very result that they struggled to avoid — same-sex marriage — is ironically, the only one remaining open to April Ashley and the other transsexual litigants in the first-wave cases.

### *B. The Second-wave Cases – Rejecting Corbett*

The second-wave cases, explored below, shift the relevant time for determining a transsexual's sex for marriage purposes from birth to the time of marriage. But why should a person's bodily configuration on the date of marriage be more relevant to marriage than birth biology? This question must be confronted in exploring the second-wave cases.

The first transsexual marriage case to depart from *Corbett* was the 1976 New Jersey case of *M.T. v. J.T.*<sup>47</sup> In that case a post-operative, male-to-female transsexual was seeking support and maintenance from her husband after separation. In response, her husband claimed that, because she was a male at the time of marriage, the marriage was void.

Accepting that marriage requires that partners be of opposite sexes, the court explicitly rejected *Corbett's* conclusion that, for purposes of marriage, sex is determined at birth and, moreover, that biology is all that matters in determining a person's eligibility for marriage. Instead, the

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46. This happened in Texas after the *Littleton* decision. Sharon E. Preves explains:

Upon learning about the newly established legal definition of sex in their state, a Texas lesbian couple, . . . decided to give legal marriage a try because [one] is a male-to-female transsexual like Littleton and Gardiner. Since Texas had defined legal sex on a chromosomal basis, the two women figured their XX and XY status would give them a shot at legal marriage in the state . . . [T]hey traveled to Bexdar County, Texas, where the Littleton case was heard. One September 16, 2000, the two women legally married.

SHARON E. PREVES, INTERSEX AND IDENTITY: THE CONTESTED SELF (2003) 38 [hereinafter, "PREVES, INTERSEX"].

47. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). In fact, an earlier New York case was the first to recognize a transsexual's post-operative sex as legally valid. See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971) (dealing with a transsexual's right to change a birth certificate and the first to adopt the harmonization test relied upon by the second-wave cases).

court embraced the importance of a person's psychological sex.<sup>48</sup> In directly rejecting the analysis of *Corbett*, the *M.T. v. J.T.* court adopted a hybrid determination based on both anatomy and psychology. Specifically, the court concluded that if an individual's anatomy is harmonized through surgery with that individual's sexual identity, that individual will be considered to be a member of his or her reassigned sex for purposes of marriage.<sup>49</sup> But the court required more than just surgery. It also considered "the sexual capacity" and "emotional orientation" of the transsexual "to engage in sexual intercourse as either a male or a female."<sup>50</sup> Thus, "harmonization" entails more than just the surgical alignment of the transsexual's body with her sexual identity. It also requires the capacity to sexually function in the reassigned sex. The court makes clear that the transsexual must be able to sexually function as a heterosexual, in an opposite-sexed relationship. Thus, the court set forth its test for determining a transsexual's sex for marriage purposes as follows:

If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.<sup>51</sup>

Applying this test, the court concluded that the "plaintiff should be considered a member of the female sex for marital purposes."<sup>52</sup>

Following *M.T. v. J.T.*, other second-wave cases also shifted the time of inquiry into a person's bodily configuration from birth to marriage.<sup>53</sup> In looking to the day of marriage, these second-wave courts impose two requirements on a transsexual for that individual to be recognized in the reassigned sex for purposes of marriage. First, the individual's external physical characteristics must harmonize through surgery with the person's sexual identity. Second, the transsexual must have the full capacity to perform heterosexually in the reassigned sex. Again, we

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48. *M.T.*, 355 A.2d. at 209 ("The evidence and authority which we have examined, however, show that a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character.").

49. *Id.* ("We are impelled to the conclusion that for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.").

50. *Id.*

51. *Id.* at 210-11.

52. *Id.*

53. See for example the New South Wales case of *Harris v. McGuinness*, (1988) 35 A. Crim. R. 146 (rejecting *Corbett* and applying the harmonization principle of *M.T. v. J.T.* to the criminal law).

return to the fundamental question: Why should a person's physical characteristics or sexual capacity on the date of marriage matter?

I will first explore the second requirement, capacity to perform sexually, and then return to the surgery requirement. As argued above, procreation cannot offer any justification for requiring that a person be able to function sexually to be eligible for marriage. Most significantly, all transsexuals are sterile and procreation is a non-issue. Moreover, we require that no one else be capable of procreating in order to marry.

The sole justification for requiring that a transsexual be capable of functioning sexually in the reassigned sex is a belief that, if the transsexual can perform sexually in the reassigned sex, the marriage must be heterosexual.

But is it fair for the state to insist that a transsexual perform sexually in any particular way to allow the individual to marry? We never insist that others seeking a marriage license prove their sexual prowess. Though in some states and other countries inability to consummate a marriage may be grounds for either annulment or divorce, it is never a prerequisite to a marriage license. If a couple decides to marry and the partners are content with their chosen forms of intimacy, that is all that should matter.<sup>54</sup> It is entirely unfair to impose a requirement on transsexuals imposed on no one else.

There is a second unfairness inherent in requiring a transsexual to function sexually in the reassigned sex. Given the current state of medical technology, the standard is highly discriminatory against female-to-male transsexuals. Many F-T-M transsexuals choose not to undergo phalloplasty both because of the complications often associated with the surgery and because of the extraordinary costs. Moreover, even if such surgery is undertaken, it does not result in the individual's having male genitals that can function sexually. The second-wave cases all involved M-T-F transsexuals where, as a practical matter, engaging in intercourse as a woman is a simpler proposition. The courts rarely considered the impact of the sexual function standard on F-T-M transsexuals.

However, one second-wave court did recognize this unfairness and, accordingly dispensed with the requirement that transsexuals be able to

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54. In *Kantaras v. Kantaras*, No. 98-5375CA (Fla. 6th Cir. Ct. Feb. 23, 2003), a third-wave case involving an F-T-M transsexual discussed below, an expert witness explained that intercourse is not necessary for a fulfilling sexual relationship:

People for other health reasons or as a result of an accident, lose their sexual function, as a sex therapist, "I try to point out that sexuality is a continuum, its not just intercourse, it's not just a penis. There are all sorts of other sexual behaviors . . . I've known many who've had great sex lives, they just don't have a penis or they don't have intercourse. I mean, that's not necessary . . . .

*Id.* at 389-90.



function sexually in their reassigned sex in order to marry. In the New Zealand case of *Attorney-General v. Otahuhu Family Court*,<sup>55</sup> the judge recognized that neither the ability to procreate nor the ability to have sexual intercourse is essential for a marriage. Rather “the law of New Zealand has changed to recognise a shift away from sexual activity and more emphasis being placed on psychological and social aspects of sex, sometimes referred to as gender issues.”<sup>56</sup> What matters is “[t]he capacity for nurturing, support, and companionship.”<sup>57</sup>

However, the *Otahuhu* court does not eliminate consideration of biological characteristics in favor of psychological characteristics in determining a transsexual’s sex. Rather, it adopted the following requirement for recognition of a marriage involving a transsexual partner: “[I]n order to be capable of marriage two persons must present themselves as having what appear to be the genitals of a man and a woman but not necessarily have to prove that each can function sexually.”<sup>58</sup> The physical appearance of a transsexual’s body replaces sexual function as a critical determinant of the transsexual sex for purposes of marriage. The court justifies this appearance standard as follows:

A male to female transsexual will have had his penis and testes removed, and have had a vagina-like cavity constructed, and possibly breast implants. She can never appear unclothed as a male, or enter into a sexual relationship as a male, or procreate. A female to male transsexual will have had her uterus and ovaries and breasts removed, have a beard growth, a deeper voice, and possibly a constructed penis. He can no longer appear unclothed as a woman, or enter into a sexual relationship as a woman, or procreate. There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality.<sup>59</sup>

The *Otahuhu* court, therefore, abandons the sexual capacity requirement and shifts to a requirement of appropriate surface appearances and the reaction of others to those appearances.<sup>60</sup> What matters is the “social advantage” that results when other people see the

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55. [1995] 1 NZLR 603.

56. *Id.* at 606.

57. *Id.* at 611.

58. *Id.* at 612.

59. *Id.* at 629.

60. See ANDREW N. SHARPE, TRANSGENDER JURISPRUDENCE – DYSPHORIC BODIES OF LAW 126-30 (2002) (describing the *Otahuhu* case as setting forth an aesthetic requirement for transsexual marriage).

naked body of the transsexual and accept the individual as a member of his or her reassigned sex.<sup>61</sup>

But what possible relevance does the meaning given by others to a transsexual's naked body in a locker room have to the goals of marriage? What matters is that each partner to a marriage is content and accepting of the other's physical appearance, whatever that happens to be. The aesthetic requirement that the two partners to the marriage, when naked, appear to others as being of opposite sexes is ridiculous.

Were the court to drop the "locker room" aspect of the test and merely require social acceptance in her reassigned sex, the appearance requirement would not necessarily require invasive surgery, as evidenced by the success of many drag queens in presenting themselves as women. The requirement that a transsexual pass the locker room test is far more stringent than merely requiring that acceptance in public as a member of the reassigned sex. The *Otahuhu* court evidences no willingness to dispense with the requirement of surgery. Like the sexually functioning test, the "locker room" appearance test attempts to police against the threat of a same-sex marriage in order to assure that marriage remain a heterosexual institution. Our society can feel safe that it has not condoned same-sex marriage so long as the bodies of the individuals entering into the marriage appear to be of opposite sexes.

But is it fair to demand that a transsexual pass a locker room test to marry? We never inquire into the bodily configuration of anyone else to determine whether they should be able to marry; the sex determination on a birth certificate is enough to satisfy the state licensing requirement. Even if some injury or medical condition would create questions in a locker room as to whether the person "appeared" to be male or female, nonetheless we never subject any genetic male or female to an appearance test prior to marriage. The *Otahuhu* appearance test has no relationship to the goals of marriage, and is no fairer than the requirement imposed by *M.T. v. J.T.* that the transsexual is capable of functioning heterosexually in the reassigned sex in order to marry as a member of that sex.

Let us turn then to the requirement imposed by second-wave courts that the transsexual harmonize his or her body with the individual's

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61. The court reinforced the social advantage argument by noting:

A major factor in marriage is that socially each partner is able to hold him or herself out as a person married to a member of the opposite sex. If the complete physical appearance of the partners is of persons of the opposite sex then it is difficult to argue that just because the appearance of one partner can be attributable in part to surgical intervention, that that person should be disqualified from being an appropriate legal marriage partner of the other.

*Otahuhu*, [1995] 1 NZLR at 612.

sexual identity. Why require surgical harmonization? The harmonization requirement is a major improvement over the *Corbett* standard that looked exclusively to birth biology. For the harmonization requirement recognizes the preeminence of the transsexual's sexual identity in determining the individual's sex for marriage purposes. The requirement takes seriously the conclusion of medical evidence that a transsexual's psychological sense of his or her sexual identity is unchangeable, and may override the individual's genetic identity. Accordingly, the individual's only mutable feature is the configuration of his or her body (altering internal and/or external genitals and gonads; chromosomes cannot be altered). The second-wave-courts see clearly that to not recognize a post-operative transsexual as a member of the reassigned sex is inhumane:

[I]f the new sexual status of the individual is not recognised, that person remains in a legal and social limbo as he or she has not acquired legal status as a member of the chosen sex but in every other way must operate socially and psychologically as a person of that chosen sex.<sup>62</sup>

But if in fact a person's psychological sexual identity is immutable and the overwhelming determinant of the individual's sex, why even require that the individual harmonize his or her body to that identity. Why require that a person undergo extraordinarily invasive and expensive surgery<sup>63</sup> in order to be recognized in the sex of the individual's sexual identity.<sup>64</sup> Why not simply allow pre-operative transsexuals, who may decide for financial or other reasons not to undergo surgery, to marry as members of the sex that accord with his or her sexual identity?<sup>65</sup>

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62. *Id.* at 611.

63. See the testimony of Dr. Bockting in *Kantaras*, No. 98-5375CA at 274: "The medical costs of the surgery are generally not covered by insurance, except for 'evaluation' and possibly hormone therapy. The cost of female to male genitalia surgery at minimum is \$25,000 and goes up to \$100,000. The other procedures such as 'chest surgery' and 'hysterectomy' are less expensive but several thousands of dollars."

64. The *Otauhu* court asked this question directly: "[T]he question must be asked why it is necessary that a transsexual should have to go through a risky surgical procedure before he or she can be eligible to marry as a person of his or her chosen sex." *Otauhu*, [1995] 1 NZLR at 614. This question is pertinent not only to the second-wave cases, but also to third-wave cases discussed in the next section, which also require some irreversible surgery. See, e.g., *Re Kevin* appeal, [2003] 172 FLR 300, at 365 ("Kevin has always perceived himself to be a man. One then asks the rhetorical question as to why he must subject himself to radical and painful surgery to establish this fact.").

65. See, e.g., appellate court in the third-wave case *Re Kevin* appeal, [2003] 172 FLR at 365 (inquiring directly about pre-operative transsexuals, "[The requirement of irreversible surgery] has the effect of leaving [pre-operative transsexuals] as the only persons in the community who are prevented from marrying a person who they legitimately regard as a person of the opposite sex, while remaining free to marry a person of their own sex.").

Courts offer a number of explanations for the refusal to allow pre-operative transsexuals to marry in accord with their sexual identity. Some courts assert that they need clear criteria such as irreversible surgery when trying to determine sexual identity.<sup>66</sup> The fear is that without such criteria, an individual may attempt to abuse the system by fraudulently portraying himself as transsexual, when in fact he is not.<sup>67</sup> In order to guard against such fraud, a transsexual must undergo full surgery that changes the individual's genitals; hormone therapy alone, which may alter some aspects of the transsexual's body, is not enough.<sup>68</sup> Alternatively, some courts refuse to rely solely on psychological criteria to determine sex out of a fear that, absent irreversible surgery, a person may on a whim move back and forth between one sex and the other.<sup>69</sup> Courts are terribly vague, however, as to what actual damage might result from such fraud.

Accordingly, irreversible surgery is viewed as an indicator of authenticity and commitment. It is the one determinative step taken by a transsexual that can exhibit to the world the seriousness of his inner

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66. The appellate court in *Re Kevin* appeal, 172 F.L.R. at 365, explains: "The reluctance of courts to enter this area seems to be based upon something of the same logic as that of *Corbett*, namely an inability to be able to make a physical or scientific examination in order to determine the sex of a person." Similarly, in *Re Kevin*, the trial court noted that "whatever might be the position with pre-operative transsexuals, the irreversible surgery that completes the sex-reassignment process provides a convenient and workable line for the law to draw. No significant difficulties are posed by including post-operative transsexuals in their reassigned sex." *Re Kevin*, (2001) 165 F.L.R. at 474.

67. *See, e.g.*, In re Harris, (1988) 35 A. Crim. R. 146, 181 (Austl.). The court rejected a suggestion that it "should also treat biological factors as entirely secondary to psychological ones" and that "where a person's gender identification differs from his or her biological sex, the former should in all cases prevail," stating:

I could not subscribe to this approach. It goes far beyond anything which has so far been suggested by even the most progressive of reviews. It would create enormous difficulties of proof, and would be vulnerable to abuse by people who were not true transsexuals at all.

68. *See, e.g.*, Otahuhu, [1995] 1 NZLR 603, 615 (addressing the question of F-T-M transsexuals): "If the social and psychological factors are met and the person has undergone hormone therapy to produce the secondary male sexual characteristics of body hair and deeper voice, and the person has had a mastectomy and a radical hysterectomy, that may be sufficient to establish his identity as a male for most purposes but not necessarily marriage."

69. *See Re Kevin*, [2001] 165 F.L.R. 404, 467.

For most people, being a man or a woman has nothing to do with any election or choice by themselves: they just are one or the other, and will be male or female for their whole lives. Because of this, and because marriage is a matter of status with legal consequences, there may be much to be said for the view that it would be wrong for marriage law to embrace a definition that would make one's sex a matter of personal preference or choice. One of the reasons that the three-point biological criterion in *Corbett* has found favour is, I think, that it provides a permanent and clear answer to the question whether a transsexual is a man or a woman, and avoids any risk that the law might enable a person to change from a man to a woman at will. This is also, I think, why some judges have been reluctant to incorporate "psychological" criteria, lest the person's sex vary according to his or her feelings or beliefs at particular times.

psychological conviction that he is transsexual. It is a form of trial by fire. Only if a person is willing to subject himself to the expense, pain, and emotional turmoil of such surgery can a court be comfortable with the trustworthiness of medical evidence concerning the person's assertion of transsexuality. Absent so drastic a step, a court could not be sure that the person was a "true" transsexual. Equally importantly, irreversible surgery assures that, irrespective of a person's current sense of sexual identity, that person will not at some point in the future decide to return to his original sex.

Perhaps most importantly, irreversible surgery assures a court that it will not condone a same-sex marriage by allowing two individuals with matching genitals to marry. Absent some visible, tangible evidence that the transsexual is a member of the opposite sex from his partner, the courts fear that they might be condoning same-sex marriage. Even third-wave courts (discussed below) that do not require that F-T-M transsexuals undergo phalloplasty, nonetheless require some irreversible surgery for this reason. Third-wave courts realize that it may be unfair to require that a transsexual be able to function sexually in the reassigned sex; it may also be unfair to require F-T-M transsexuals to have accurate physical appearances of the reassigned sex given the difficulties of phalloplasty. Yet, despite the lip service that second- and third-wave courts give to the centrality of a person's psychological characteristics in determining a person's sex, in the end, all of these courts revert to a *Corbett*-like standard that relies heavily on external bodily configuration. Irrespective of the psychological sexual identities of two people who wish to marry, under no circumstances will courts condone the marriage of a couple with matching physiologies.<sup>70</sup>

The second-wave cases move beyond *Corbett* in two important respects. First, they shift the time of inquiring into the transsexual's sex from birth to the date of marriage, when it is far more relevant. Second, in contrast to *Corbett*, which looked exclusively to birth features of a transsexual's body, the second-wave cases place central importance upon the transsexual's psychological characteristics as relevant to determining sex for purposes of marriage. Yet the courts add one additional requirement: the post-operative transsexual either must be able to function sexually in the reassigned sex or, alternatively, must be able to

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70. In fact, recognizing the irony of first wave cases, the trial court in *Re Kevin* made clear that one reason for allowing a post-operative transsexual to marry in his reassigned sex is to avoid the specter of same-sex marriage: "Failing to do so would lead to the odd result that a person who appears to be a man, who functions in society as a man, and whose body can never function as a woman's body and has most of the characteristics of a man, would be entitled to marry a man." *Id.* at 474.

appear unclothed as a member of that sex, irrespective of the ability to function sexually.

As noted above, both the sexual capacity and the appearance requirements pose special difficulties for, and are highly discriminatory to F-T-M transsexuals. Moreover, imposing either requirement on transsexuals is not only unfair (given that it is imposed on no one else), but ultimately bears no necessary relationship to the goals of marriage to foster stable, long-term, mutually supportive, and committed relationships. Third-wave cases, to which I now turn, take on the challenge of dealing with F-T-M transsexuals.

### *C. The Third-Wave Cases – The Rise of Psychology*

The two cases that I include in the third-wave — *Kantaras v. Kantaras*<sup>71</sup> in Florida and *Re Kevin*<sup>72</sup> in Australia — are unique in that each deals with a female-to-male transsexual. In each case, the F-T-M transsexual had lived for many years as a man, was fully accepted in his community as a man, and was married to a woman. A critical fact in each case was that, though the transsexual had undergone reassignment surgery in the form of a mastectomy and a total hysterectomy, neither individual had undergone a phalloplasty. In other words, each F-T-M transsexual seeking to marry as a male still had a vagina.

Accordingly, neither transsexual could fully satisfy the “harmonization test” required by second-wave courts because the individual’s body was not “in harmony” with the individual’s psychological sex. Similarly, neither seemed capable of satisfying the sexual function nor the sexual appearance test since each test turns on the post-operative male transsexual having a penis. *Kantaras* waffled as to whether these tests have any continuing applicability. The court in *Re Kevin* rejected both tests. Nonetheless, both courts required that a transsexual undergo some irreversible surgery in order to be recognized as a member of the reassigned sex for purposes of marriage.

*Re Kevin* went further than any previous case by taking seriously medical evidence concerning “brain sex,” the theory that transsexuality may have a biological basis in the pre- and post-natal development of sexual identity in a human’s brain. Accepting the reality of “brain sex” directly challenged the distinction between biology and psychology relied upon by first-wave courts. Moreover, the evidence reviewed by the *Re Kevin* court suggested that an individual’s “brain sex” has a far

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71. *Kantaras v. Kantaras*, No. 98-5375CA (Fla. 6th Cir. Ct. Feb. 23, 2003).

72. *Kevin v. Attorney-General (Commonwealth) [Re Kevin]* (2001) 165 F.L.R. 404, *aff’d*, *Attorney-General (Commonwealth) v. Kevin* (2003) 172 F.L.R. 300.

greater impact on a person's sexual identity than genitals, gonads, or chromosomes. Thus, *Re Kevin* attacks *Corbett* for ignoring the most important *biological* basis for determining a person's sex: one's brain.<sup>73</sup>

In *Kantaras v. Kantaras*, Michael Kantaras, a F-T-M transsexual, petitioned to dissolve his marriage. His wife responded by claiming that, because Michael was born a woman, their marriage was void. Custody of the couple's two children was a hotly contested issue, and the wife attempted to use Michael's transsexuality against him on that issue.<sup>74</sup> Though Michael underwent reassignment surgery including a mastectomy and total hysterectomy, after careful deliberation Michael decided not to undergo phalloplasty because of both cost and infection risks.<sup>75</sup> Nonetheless, testimony was elicited at trial to the effect that Michael had an enlarged clitoris as a result of taking male hormones,<sup>76</sup> which Michael considered to be his penis and which he testified he used on occasion to penetrate his wife's vagina.<sup>77</sup> At other times, however, Michael testified that he used a prosthetic device during intercourse.<sup>78</sup>

In determining that Michael was a male for purposes of marriage, the judge relied heavily on testimony from three medical experts: a

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73. It is important to point out a critical difference between *Kantaras* and *Re Kevin*. In *Kantaras*, because the F-T-M transsexual's former wife claimed that her husband was not a male in part because he lacked a penis, the court was forced to undertake extensive exploration into the fact that Michael Kantaras still had a vagina. *Kantaras*, No. 98-5375CA (Fla. 6th Cir. Ct. Feb. 23, 2003). *See, e.g., id.* at 280-82, 339-41, 347-50, 359-60, 373-74, 392-95, 409-416, 715, 760-762, 771. In contrast, in *Re Kevin*, the Attorney General (the adversary party) did not challenge Kevin's assertion and the supporting medical evidence that, despite not undergoing phalloplasty, his reassignment surgery was complete. Accordingly, little evidence was elicited regarding the fact that Kevin continued to have a vagina after sex-reassignment surgery. Thus the *Re Kevin* court was not distracted from its forceful discussion of the centrality of "brain sex" to the legal determination of a person's sex.

74. One child was born before the couple met, and was adopted by Michael after the marriage; the other was conceived during marriage through artificial insemination by way of Michael's brother. *Kantaras*, No. 98-5375CA at 5.

75. The court noted:

At meetings of transsexuals who gather from all over the country at least twice a year at the Rosenberg Clinic, [Michael] talked to men who had gone through gender reassignment surgery and the few who had phalloplasty, about three at most. After talking to them, his impression was not to have it done. Because of the risks, extreme financial stress it creates and one man had such infections he lost several inches of his penis that had to be removed. Not one of them recommended it.

*Id.* at 47-48; *see also id.* at 51. A clinical psychologist testified that in his practice "the percentage of female to male transsexual [sic] who have phalloplasty are 10% and 90% do not make that election." *Id.* at 284.

76. The medical expert Dr. Bocking testified that male hormones taken by F-T-M transsexuals "do enlarge the clitoris and the clitoris is erectile tissue. It's out of the same developmental structures as the glands of the penis. And the hormones will result in an enlargement of that tissue . . . . It looks like a little penis." *Id.* at 278.

77. *Id.* at 49-50. His wife stated that, in her view, Michael did not have a "penis," nor had he used his enlarged clitoris for intercourse. *Id.* at 132-34.

78. *Id.* at 50.

psychologist with 28 years experience working with and writing about transsexuals, the plastic surgeon who had performed reassignment surgery on Michael, and the clinical psychologist who evaluated Michael as transsexual. In particular, the judge concluded that “Michael Kantaras accomplished all that medical science required to succeed in the transition from female to male,”<sup>79</sup> including satisfying psychological tests that he was transsexual, completing the 14-month “real life experience” of living as a male, and finally undergoing hormonal therapy and reassignment surgery.<sup>80</sup> All experts testified that medical science did not recommend phalloplasty as a necessary procedure for sex reassignment.

Despite such medical testimony, the judge was deeply concerned that Michael had a vagina and not a penis and devoted many of the 800-plus pages in his decision to that issue.<sup>81</sup> But the judge made clear that his concern was not simply that Michael’s body did not aesthetically appear to be male. The judge expressed direct concern that sex between Michael and his wife might be considered homosexual.<sup>82</sup>

79. *Id.* at 760.

80. *Id.* at 760; *see also id.* at 341 (quoting the testimony of the plastic surgeon who performed Michael’s reconstructive surgery).

In your opinion, do you believe a female-to-male transsexual who has been diagnosed with gender identity disorder or transsexualism who has received the hormone therapy, has had chest reconstructive surgery, has had a hysterectomy including the removal of the ovaries and all of this was performed in accordance with the Harry Benjamin International Gender Dysphoria Association’s Standard of Care, do you believe, in your opinion, that person should be legally considered a male?” He replied, “In answer to your question, yes. I think he should be considered as legally male.”

81. *See, e.g., id.* at 282:

THE COURT: If their sexual organs are left as they were, you’ve removed by hysterectomy all the internal sexual organs, but we’re now dealing with the external, they are untouched?

A: Yes, Your Honor. If they maintain their vagina they technically could receive a penis, could have intercourse with a man.

THE COURT: Yes. Correct. They could reverse roles and now become a woman?

A: Technically, yes. But we find that most FTMs, . . . are attracted to women and are identified as heterosexuals and most FTMs would not allow that. You know, they would feel horrified just by the thought of being penetrated.

*See also supra* note 75.

82. *See, e.g., id.* at 349 (in a section of the opinion labeled “Lesbian Activity”):

Dr. Cole was next asked “When a transsexual man has intimate sexual relations with a woman is he engaging in a lesbian relationship?” He replied, “Absolutely not.” Then he was asked, “How would you classify the sexual orientation of a transsexual man who is attracted to women?” The response was “Heterosexual.” By way of explanation he testified: “We are dealing with different elements, i.e., one has a gender identity; one has sexual orientation; one has an anatomy; one has chromosomes, one has sexual roles,” and “I mean sexuality encompasses a whole realm of factors that need to be taken into consideration.”;

*see also, id.* at 292:

Q. So a female-to-male transsexual who completes the process, they’re not lesbian?



To allay such concern, the judge adopted a two-pronged approach. First, to justify Michael's choosing not to undergo phalloplasty, he quotes extensively from testimony to the effect that, at the current time, that procedure is less than successful in terms of producing a functioning, aesthetically normal-looking penis.<sup>83</sup> Second, the judge paid great attention to the fact that Michael's enlarged clitoris could be considered to be a small penis, and actually was used by some F-T-M transsexuals for penetration during sex.<sup>84</sup> The former wife's attorney continually objected to any reference to Michael's body as having a penis.<sup>85</sup>

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No, they're not.

Q. If they're attracted to women?

A. No.

Q. So, they're a male and they're attracted to a woman and that makes them heterosexual?

A. Correct.

Q. If a person begins the sex reassignment process but for whatever reason stops the process, does not complete the sex reassignment process and opts to stay a woman and that person remains attracted to women, would that person then be a lesbian?

A. Yes, indeed.

Q. . . . So even pre-transition, a "female to male" transsexual, some people might consider that person prior to their transition since they're a woman, they might consider that person to be a lesbian if they're attracted to women?

A. Yes, sometimes.

Q. Sometimes. And the "female to male" transsexual themselves, is it common, in your experience, that although the female-to-male transsexual has a female anatomy and they are attracted to women, that they don't consider themselves to be a lesbian, that they consider themselves heterosexual, just in the wrong body?

A. That's right. I mean, in the process of attempting to make it work they might try to take it on and say, well, maybe I'm a lesbian, but they very quickly find out that - - - that's not it for me. I don't belong there. That's not my identity.

Q. So is there any basis whatsoever for labeling a transsexual man or a "female to male" transsexual as a lesbian.

A. No.

83. *See, e.g., id.* at 290. The judge noted:

When asked would it be consistent with medical ethics to require that type surgery (phalloplasty) in order to complete sex reassignment? He replied: "I think it would be unethical to require that - - - a still questionable procedure because it could worsen the patient's adjustment."

*Id.*; *see also id.* at 288, where, the court states:

Finally, in response to the question "After FTM has undergone chest surgery and total hysterectomy, is the sex reassignment process considered complete at that point?" Dr. Bockting replied that "for a female to male who is taking hormones, who has had chest surgery and the internal organs removed, that would be complete sex reassignment . . . because many do not go on and have the phalloplasty because of the limited results."

84. *See id.* at 280-81, where the judge notes:

Dr. Bockting said the enlarged clitoris would look like a small penis and the genitals of that person would not resemble the genitals of a typical female, "you could tell the difference." "It does swell up during sexual excitement, it is erectile tissue. Some patients reported they're able to have intercourse with it but I think that's not the norm, but some patients do report that." What about orgasm? "Yes, all of that is retained and actually it is a result of the testosterone and the enlargement of the erectile tissue they have - its easier for them to reach orgasm. So we find in research that they are quite orgasmic and sexually active."

The *Kantaras* judge's opinion is somewhat schizophrenic. He seems to adopt a reformist approach that relies heavily on testimony that Michael was psychologically and socially regarded as a male, irrespective of the configuration of his body. It was enough that Michael had undergone irreversible surgery.<sup>86</sup> The judge made statements that move in the direction of accepting that psychology transcends physiology when it comes to determining a person's sex for purposes of marriage.<sup>87</sup>

On the other hand, the judge could not seem to abandon the sexual function and sexual appearance tests adopted by second-wave courts. He tried to satisfy those tests by, in effect, converting Michael's enlarged clitoris into a functioning penis. In confronting the ex-wife's assertion that Michael could not be considered a man because his "sex reassignment surgery did not harmonize Michael's gender and genitalia,"<sup>88</sup> the judge found as follows:

It is true Michael still has a vagina. The fact is the clitoris in the vagina has enlarged and elongated to form a small penis. The tissue that composes the penis is biologically the same tissue in the clitoris. Michael testified his penis does erect, sufficient to penetrate and that he

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*See also id.* at 347:

Dr. Cole was asked "in your professional opinion, can a transsexual man whose genitals have been altered as a result of hormone therapy be said to have a penis, albeit a small one?" He answered, "Most definitely." He was further asked, "in your clinical experience do most transsexual men view their genitalia as consisting of a small penis after undergoing hormone therapy? He said in reply: "That's correct. After six months or more of hormone therapy the clitoris itself is lengthened, enlarged much to the size of a small phallus, almost the size of a small finger.

85. *See, e.g.*, quoted in *id.* at 373:

Q. Well, Dr. Cole, there had been some suggestion in this case that because phalloplasty is not currently very successful and because most transsexual men do not obtain it and are therefore forced to deal with the reality of having only a very small penis as a result of hormones –

MS. WHEELER: Judge, I'm going to object to counsel's terminology. It's not a penis. It has the same similar tissue as the plastic surgeon in this case so eloquently and articulately described. It is not a penis. This hormone treatment does not turn a clitoris into a penis. It turns it into an elongated and enlarged – excuse me. I strike that. The clitoris does not have the same function as a penis. The tissue is similar to a penis and that is all. It doesn't urinate like a penis. It doesn't have a urethra and it's not a penis and I object. He keeps saying that a transgender FTM has a penis and it is not a penis.

Similarly, see *id.* at 359:

MS. WHEELER: Judge, I'm going to object to the witness' characteristic that it became a small phallus unless he can tell us what the measurements are. That's absolutely, I think misleading this record.

86. *See id.* at 761.

87. *See id.* at 766-67 ("Marriage is fundamentally a state of mind, where two individuals pledge their love and devotion to each other, in sickness and in health, hopefully, until death do them part . . . . If marriage does not rise to the level of an honorable commitment, then the marriage is doomed regardless of the sexual aptitude of the couple.").

88. *Id.* at 715.

has orgasms. This was the natural result of hormonal therapy — and not a constructed phallus. The medical experts covered this subject at trial and declared Michael to be physically and psychologically male.<sup>89</sup>

In the end, the judge reverts to the approach of second-wave cases. In determining that Michael was male, he attempted to cover all bases. He fully acknowledged the centrality of the medical testimony that Michael was psychologically a male, and that he had undergone the requisite reassignment surgery. At the same time, the judge felt an obligation to satisfy the second-wave tests of function and appearance. Though Michael had a vagina, the judge determined that it “was not typically female because it now had a penis or enlarged, elongate clitoris”<sup>90</sup> which was used heterosexually to penetrate his wife.

In *Re Kevin*,<sup>91</sup> a F-T-M transsexual and his wife filed an action seeking a declaration as to the validity of their marriage. The Attorney General intervened, opposing the marriage on the grounds that Kevin was not a male for purposes of Australian marriage law. The appellate court relied upon and quoted extensively from the decision of the trial judge, and thus we begin with that decision.

As was true of every other court facing the issue of transsexual marriage, the judge in *Re Kevin* began with the assumption that a valid marriage requires the union of a man and a woman, though he briefly explored the view that transsexuals might be considered a third sex.<sup>92</sup> Though Kevin had taken hormones to masculinize his body, and had a mastectomy and total hysterectomy, he did not undergo a phalloplasty. Like Michael Kantaras, Kevin still had a vagina. Nonetheless, an expert testified that this surgery constituted “sex reassignment surgery,” and the court concluded that “Kevin’s body was no longer able to function as that of a female, particularly for the purposes of reproduction and sexual intercourse.”<sup>93</sup>

It is not clear from the decision why Kevin could not function as a female for purposes of sexual intercourse (other than, of course, his psychological identification as a male and his sexual attraction to

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89. *Id.* at 715. The judge concludes: “As a post operative transsexual Michael Kantaras, is, by virtue of all his medical treatment, possessed of the capacity to function sexually as a heterosexual male.” *Id.* at 760; *see also id.* at 770-71 (“[Michael] was a female transsexual who’s [sic] gender and genitalia were once discordant, but now harmonized through medical treatment and who had become physically and psychologically unified and fully capable of heterosexuality consistent with his reconciled sexual attributes of gender and anatomy as a ‘male.’”).

90. *Id.* at 795 (reciting the Conclusions of Law from the opinion). Also, the judge determined that Michael had a “naturally developed penis.” *Id.*

91. [2001] 165 F.L.R. 404; *aff’d*, *Re Kevin* appeal, [2003] 172 F.L.R. 300 (Full Court).

92. *Re Kevin*, [2001] 165 F.L.R. at 408-409 (quoting experts who noted that post-operative transsexuals themselves wish to be viewed in their reassigned sex, not as a third sex).

93. *Id.* at 411.

women). Perhaps most importantly, the Attorney General did not assert “that the sex-reassignment surgery was in any way incomplete or unsuccessful.”<sup>94</sup> Thus, the court was able to avoid having to impose the three tests applied by second-wave courts: harmonization, sexual function and genital appearance. Unlike *Kantaros*, the judge in *Re Kevin* was able to deemphasize the importance of genital criteria in determining a transsexual’s sex.<sup>95</sup> Having set aside the fact that Kevin had a vagina, the judge moved social and psychological criteria onto center stage.

The judge began by reviewing social evidence — evidence as to how others reacted toward Kevin. He recounted extensive testimony of Kevin’s wife,<sup>96</sup> family, friends, and work colleagues, and placed great significance on the fact that they had always perceived Kevin to be a man. He also noted Kevin’s testimony that “as of the date of the marriage his male secondary sexual characteristics were such that he would have been subject to ridicule if he had attempted to appear in public dressed as a woman, that he could not have entered a women’s toilet.”<sup>97</sup> Based on the testimony of thirty-nine such witnesses, the judge stated that the evidence shows Kevin

... living a life that those around him perceive as a man’s life. They see him and think of him as a man, doing what men do. They do not see him as a woman pretending to be a man. They do not pretend that he is a man, while believing he is not.<sup>98</sup>

The judge then turned to an extensive critique of the *Corbett* case. Without reviewing his entire impressive critique, one section stands out in particular. In a passage closely aligned with critical gender studies, the judge suggested that *Corbett* adopted an “essentialist” view of sexual identity, “the view or assumption that individuals have some basic essential quality that makes them male or female.”<sup>99</sup> He rejected this approach:

In the majority of newborns, there is congruence between all relevant matters, and the baby is unproblematically male or female. It does not follow that there is some further entity beyond or underlying these matters that is the person’s underlying sex. In a minority of people, various incongruities arise: sometimes within the chromosomes, gonads or genitals, sometimes among them; sometimes between the self-image

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94. *Id.*

95. *See supra* note 75.

96. *See, e.g., id.* at 411 (“Jennifer interacted with Kevin as a man and observed that others did the same. She supported him in his desire ‘to bring his body into harmony with his mind.’ It was ‘obvious’ to her that he was a man.”).

97. *Id.* at 412.

98. *Id.* at 417.

99. *Id.* at 424.

and some or more of these facts. Where there are incongruities, by definition the person has some characteristics normally associated with each sex.<sup>100</sup>

Accordingly, the judge elevates psychological self-image to a level of importance equal to chromosomes, gonads, and genitals. This presages the weight he will ultimately give to brain sex. He then continues:

The situation presents a question to the individual, and to various social systems, as well as to the law, namely how that person's identity should be defined and managed. In other words, the task of the law is not to search for some mysterious entity, the person's "true sex", but to give an answer to a practical human problem . . . .<sup>101</sup>

After rejecting *Corbett*, the judge then sought an alternative approach to dealing with transsexuals and marriage, and ultimately turned to the extensive medical evidence elicited at trial that "attribute[s] to the psychic element, in the determination of sex, an importance at least equal to that of the physical element . . . . It is not only the body which determines the sex of the individual, it is also the mind."<sup>102</sup> More specifically, he concluded that "the evidence about the experience of transsexuals, and the strength and persistence of their feelings, fits well with the view that 'transsexuals have a sexual brain development contrary to their other sex characteristics such as the nature of their chromosomes, gonads and genitalia.'"<sup>103</sup> In so doing, the judge took the far-reaching step of considering transsexuality to be an intersexed condition:

The argument advanced by the applicant in the present case is that recent discoveries show that the traditional understanding, by which transsexuals as seen as biologically of one sex but psychologically of another, is mistaken. The argument is that transsexuals are as much biologically inter-sex as cases of the kind I have mentioned. This is because the traditional accounts omit an important component of sexual identity, namely a development in the brain.<sup>104</sup>

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100. *Id.* at 424-25.

101. *Id.*

102. *Id.* at 426 (quoting the Australian case, *Secretary, Dept. Of Social Security v. State Rail Authority* (1993) 43 F.C.R. 299).

103. *Id.* at 462.

104. *Id.* at 457; *see also id.* at 462-63:

For Ormrod J and for many of the experts at the time, transsexuals suffered from a discontinuity between their biology and their psychology, whereas intersexed people experienced inconsistencies within or among their biological qualities. But I am satisfied that the evidence now is inconsistent with the distinction formerly drawn between biological factors, meaning genitals, chromosomes and gonads, and merely "psychological factors", and on this basis distinguishing between cases of intersex (incongruities among biological factors) and transsexualism (incongruities between

What distinguishes transsexuals from intersexuals born with ambiguous genitals is that, unlike intersexuals, medical science cannot determine the incongruity between the transsexual's brain and other bodily features at birth.<sup>105</sup> As will be seen in the next section, judges in previous transsexual marriage cases have viewed intersexuals sympathetically and in a favored position from the viewpoint of law. By converting all transsexuals into intersexuals, the *Re Kevin* judge restructures the entire landscape of transsexual cases.

Though the judge takes the medical evidence seriously, in the end, he decides the case by simply determining that the term "man" in the Australian marriage law includes a post-operative F-T-M transsexual.<sup>106</sup> The judge explicitly requires that a transsexual have undergone irreversible surgery, justifying his conclusion as follows: "[W]hatever might be the position with pre-operative transsexuals, the irreversible surgery that completes the sex-reassignment process provides a convenient and workable line for the law to draw. No significant difficulties are posed by including post-operative transsexuals in their reassigned sex."<sup>107</sup> After setting forth the criteria that he deemed relevant

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biology and psychology). . . [I]n my view the evidence demonstrates (at least on the balance of probabilities), that the characteristics of transsexuals are as much "biological" as those of people thought of as inter-sex. The difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally "biological" characteristics of the brain that are present in transsexuals.

105. The judge quotes from the testimony of medical expert Louis Gooren, a renowned endocrinologist who works with patients dealing with gender identity disorder:

Like other people afflicted with disorders in this process of sex differentiation, transsexual people need to be medically rehabilitated so that they can live acceptable lives as men or women. This decision is not essentially different from the one made in cases of intersexed children where assignment takes place to the sex in which they in all likelihood will function best. In the case of an intersexed child it is often possible to tell at birth, or shortly after birth, that the sexual differentiation process has not taken place in a conventional way and so it is possible to make that decision to (re)assign a sex through medical intervention shortly after birth. The decision to recommend hormonal and surgical treatment for a transsexual person takes place much later in life and is based on the conclusion of a thorough psychodiagnostic process that concludes that a disorder has occurred in the process of sexual differentiation and that the person will benefit from hormonal and surgical sex reassignment.

*Id.* at 453.

106. *See id.* at 475:

It is true that this judgment canvasses some interesting new medical evidence, and that the discussion of legal principle has been wide-ranging. While I have made findings about the medical evidence and offered a view about the underlying basis for such decisions as *Corbett*, the end result does not depend on acceptance of either of these matters. Ultimately, the basis for this judgment is very simple and mundane. It is that no good reasons have been shown why the ordinary legal meaning of the word 'man', which includes post-operative female to male transsexuals, should not also apply to marriage.

107. *Id.* at 474.

to determining a person's sex for purposes of marriage,<sup>108</sup> the judge concluded "that post-operative transsexuals will normally be members of their reassigned sex."<sup>109</sup>

On appeal, the Attorney General argued that the trial court erred by not accepting the *Corbett* criteria that required exclusive reliance on genitals, gonads, and chromosomes in determining a person's sex for purposes of marriage; moreover, he argued that the court erred in even considering evidence about brain sex.<sup>110</sup> In affirming the lower court's ruling, the appellate court quoted extensively from trial judge's opinion and applauded his reasoning.<sup>111</sup>

Perhaps most significantly, the appellate court strongly adopted the trial court's view that transsexuals should be viewed as intersexed individuals:

[If] there is substance in the view that brain sex is one of the most significant determinants of gender, then the distinction between inter-sex and transsexual persons becomes meaningless. . . . This is because an inter-sex person appears to be defined as someone with at least one sexual incongruity. If brain sex can give rise to such an incongruity then, legally, we think that there may be no difference between an inter-sex person and a transsexual person.<sup>112</sup>

In the end, the appellate court affirmed the trial court's conclusion that the terms "man" and "woman" should be given their "ordinary current meaning" for purposes of the Australian marriage act, and that a post-operative F-T-M transsexual should be included as a member of their reassigned sex for purposes of marriage.<sup>113</sup>

Let us examine these two third-wave cases:

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108. *Id.* at 475:

To determine a person's sex for the purpose of the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list, or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she is brought up and the person's attitude to it; the person's self-perception as a man or woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex reassignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex.

109. *Id.*

110. *Re Kevin* appeal, [2003] 172 F.L.R. 300, 312.

111. The court also made clear what was *not* in issue before it: "The issue of whether a marriage can occur between people of the same sex is not an issue in this case. Similarly, the status of pre-operative transsexual persons is not directly in issue." *Id.* at 313.

112. *Id.* at 340.

113. *Id.* at 364.

1. Because of the difficulty of an F-T-M transsexual's complying with either the sexual function or genital appearance tests, *Re Kevin* eliminated those tests as relevant to the determination of a transsexual's sex. *Kantaros* adopts reasoning that would support the elimination of such tests, but in the end, in a stretch of logic, concludes that Michael Kantaras could also satisfy those tests. Elimination of such tests is an important step toward fair treatment of all transsexuals, in particular F-T-M transsexuals who have not undergone phalloplasty. For purposes of marriage, if a couple is happy with the way they function together sexually and with the appearance with one another's bodies, those issues should be beyond the purview of the state.

2. Both third-wave cases delve deeply into the social situation of the transsexual, not only in terms of his own perception of himself as a male, but also the perceptions of family, friends, and work colleagues. These courts find that social perception of the transsexual by others is an important factor in the courts' determining whether an individual should be deemed a member of his reassigned sex for marriage purposes. But why should acceptance by others be a criterion for whether a court allows a post-operative transsexual to be recognized in his reassigned sex? Of course, it cannot be denied that, psychologically, it matters greatly to the transsexual that his community accept him as a member of his reassigned gender. However, it may well be easier for F-T-M transsexuals to pass as male than for M-T-F transsexuals to pass as female, given that our society subjects male bodies to much less scrutiny than female bodies when it comes to deciding what is an acceptable body type. Imagine a tall, large-boned M-T-F transsexual. Reassignment surgery may not be able to mask the individual's transsexuality, which may cause discomfort to others. If a person has been diagnosed by a psychiatric professional as transsexual, has completed the "real life" experience of living openly for some period in the reassigned gender, and has then undergone surgery, why should the response of others to that individual's credibility as a member of the reassigned gender matter? A genetically-born woman who is perceived by others as exhibiting extremely masculine gender characteristics will never be denied a marriage license on that basis. Why should a transsexual be subject to a test of social acceptance in order to gain recognition as a member of his or her reassigned gender?

3. We return to the fundamental question: Why should a person, who has been diagnosed by a psychiatric profession as transsexual, be required to undergo irreversible surgery to marry in accord with that individual's sexual identity? In discussing the second-wave cases, I explored the requirement of surgical harmonization between psychology



and physiology, and courts' refusal to recognize pre-operative transsexuals in accord with their sexual identity.<sup>114</sup> Though the third-wave cases can be viewed as an improvement in terms of fairness by not requiring a post-operative transsexual to have any particular bodily configuration, these cases still require some irreversible surgery.

But why? The judge in *Re Kevin* noted “[i]t seems illogical that the courts can decide that marriage can extend to inter-sex persons, who can adopt the sex of their choice, but not to post-operative transsexual people.”<sup>115</sup> If the *Re Kevin* court is truly committed to the position that transsexuals are intersexed, why allow other intersexed people with ambiguous genitals to choose their sex, but require irreversible surgery of transsexuals?<sup>116</sup> Why discriminate against transsexuals simply because their biological conflict is not purely physiological, but instead between physiology and brain sex. If third-wave courts truly believe brain sex to be more important than physiology in determining a person's sexual identity, transsexuals should have as compelling a claim as *other* intersexuals for being recognized in accord with their sexual identity for purposes of marriage.

In the end, the only explanation for requiring irreversible surgery is that suggested above — courts cannot tolerate allowing two individuals with identical physiologies to marry, no matter how much lip service is given to brain sex. The requirement of irreversible surgery has nothing to do with the purposes of marriage — deep emotional commitment between two persons — and everything to do with broader social concerns about condoning same-sex marriage.

### III. INTERSEXUAL MARRIAGE CASES: THE ASCENDANCE OF PSYCHOLOGY

Virtually every court considering transsexual marriage, irrespective of outcome, has relied upon the hypothetical case of an intersexual seeking to marry as a touchstone for determining whether it should allow a transsexual litigant to marry as a member of the reassigned gender. First-wave cases attempt to distinguish transsexuality from intersexuality, and in so doing refuse to recognize a transsexual in accord with his or her psychological sexual identity. In contrast, second- and

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114. *See supra* section II. B.

115. *Re Kevin*, 172 F.L.R. at 340.

116. In *Bellinger v. Bellinger*, Lord Nicholls recognized the important similarities between intersexed and transsexual individuals: “[T]he application of the Corbett approach leads to a substantially different outcome in the cases of a post-operative inter-sexual person and a post-operative transsexual person, even though, post-operatively, the bodies of the two individuals may be remarkably similar.” 2 All E.R. 593 (H.L. 2003) at ¶13.

third-wave cases analogize transsexuality to intersexuality as a justification for recognizing the transsexual in accord with sexual identity. Irrespective of the outcome concerning transsexuality, every court suggests that, were it faced with an intersexual seeking to marry, it would probably recognize that individual in accord with his or her sexual identity, *irrespective of bodily configuration*.<sup>117</sup>

Because the intersexual's gonads, genitals and/or chromosomes are incongruous and therefore do not clearly point to ascribing any one sex to the individual, courts imagine themselves as having little choice but to look to psychological characteristics to determine sex for marriage purposes. In so doing, intersexuals are given a privileged position, for courts make no mention of requiring an intersexual to undergo irreversible surgery in order to marry.

It is estimated that between one and two percent of births involve an intersexed child.<sup>118</sup> Sharon Preves explains what intersexuality entails:

[A] conservative estimate is that about two to four thousand babies are born per year in this country with features of their anatomy that vary from the physical characteristics typically associated with females and males. Some are born with genitalia that are difficult to characterize as clearly female or male. Others have sex chromosomes that are neither XX nor YY, but some other combination, such as X, XXY, or chromosomes that vary throughout the cells of their bodies, changing from XX to XY from cell to cell. Still others experience unexpected physical changes at puberty, when their bodies exhibit secondary sex characteristics that are surprisingly "opposite" their sex of assignment.

Preves describes the causes of intersexuality as follows:

Some forms of sexual ambiguity are inherited genetically, while others are brought on by hormonal activity during gestation, or by prescription medication women take during pregnancy. Regardless of its particular manifestation or cause, most forms of physical sexual anatomy that vary from the norm are medically classified and treated as forms of intersexuality, or hermaphroditism.<sup>119</sup>

Let us explore why the hypothetical intersexual receives privileged treatment in the transsexual marriage cases.

Once again, the court that blazed the trail for discussion of the hypothetical intersexual was *Corbett*. That court distinguished between

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117. Whether or not these same courts would actually apply this principle to an actual case before it is a very different question.

118. PREVES, INTERSEX, at 3.

119. *Id.* For a more detailed discussion of the variations of intersexuality and the medical causes, see *id.* at 23-59. See also Julie A Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265, 278-92 (1999).

transsexuality and intersexuality by viewing the former as a psychological anomaly, as opposed to the latter, which it considered an anatomical anomaly.<sup>120</sup> After an extended discussion of the physiology of intersexuality, the judge rejected testimony that April Ashley might be considered intersexual because her chromosomes, gonads and genitals at birth were congruent.<sup>121</sup> The judge admitted, however, the hypothetical case of an intersexual would be more difficult to deal with:

The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that the greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision.<sup>122</sup>

“Great difficulties” would arise for the *Corbett* judge in dealing with intersexuality because that condition challenges basic social assumptions about sex — that every person is born either male or female, and that sex is easily determined at birth and cannot be altered thereafter. Intersexuality defies the common assumptions that sex is dimorphically predetermined and that psychological characteristics are irrelevant to determining an individual’s sex.

*Corbett* provided the basis for two decisions that dealt directly with intersexuality. In the 1979 Australian case, *In Marriage of C and D*,<sup>123</sup> the court relied heavily on *Corbett* in refusing to uphold the marriage between an intersexual male and a woman: “I am satisfied on the evidence that the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word as within the definition referred to above could not have taken place and does not exist.”<sup>124</sup> In effect, the judge concluded that because of a feature of birth biology, a person is denied the opportunity to marry. The inhumanity of this decision is patent, and no later court has followed the case.

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120. *Corbett v. Corbett*, 2 All E.R. 33, 42 (P. 1970) (“Anomalies of sex may be divided into two broad divisions, those cases which are primarily psychological in character, and those in which there are developmental abnormalities in the anatomy of the reproductive system (including the external genitalia).”).

121. *Id.* at 46 (“It follows that it has not been established that the respondent should be classified as a case of inter-sex on the basis of hormonal abnormality.”).

122. *Id.* at 48-49.

123. (1979) 35 F.L.R. 340.

124. *Id.* at 345. The trial judge in *Re Kevin* responded that: “In relation to his Honour’s conclusion that the individual was in law neither a man nor a woman, it is enough to say that I cannot imagine any circumstances in which I would be persuaded to accept such a conclusion.” *Re Kevin*, 165 F.L.R. at 439.

A more significant case dealing with intersexual marriage is the British case, *W. v. W.*<sup>125</sup> In that case, the wife's chromosomes, genitals and gonads were not congruent at birth,<sup>126</sup> though she was registered as a boy and treated as such growing up.<sup>127</sup> She had subsequent surgery to align her body to that of a woman.<sup>128</sup> Her husband sought to nullify the marriage based on the assertion that his wife was not a female at the time of marriage.<sup>129</sup> Rather than accept an invitation to reconsider *Corbett* in light of recent medical discoveries, the court chose to follow that case but viewed the facts as falling within the *Corbett* exception carved out for intersexuals, where an individual's biological criteria of sex (chromosomes, genitals and gonads) are not congruent.<sup>130</sup> The *W. v. W.* court noted "[o]n a purely external genital test the respondent was not, and was not close to being, a normal man or normal woman."<sup>131</sup> Accordingly, the genital factor that the *Corbett* judge speculated might be helpful in an intersexual case (and which has proven so important to courts dealing with transsexual cases) was of limited use to the court's resolution in *W. v. W.*<sup>132</sup>

The court turned to testimony that genetic evidence would not be helpful, and that "psychological matters and the interaction of the developing brain and sex hormones . . . could provide points of discrimination."<sup>133</sup> The court briefly considered but rejected the possibility of concluding that Ms. W. was neither male nor female but

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125. [2001] Fam. 111 (Fam. 2000).

126. Based on medical testimony, the court concluded that "the inter-sex state which underlies the background to Ms W. is most likely due to the partial androgen insensitivity syndrome. Her genetic sex and gonadal sex are male. Her genitalia were ambiguous and her body habitus and gender orientation appear female." *Id.* at 119.

127. *Id.* at 114-15.

128. Reference is made to "reassignment" surgery, *see id.* at 117, in all likelihood because the intersexual had been raised as a boy from birth. Nonetheless, it is conceptually unclear why this term should apply to an intersexual, whose body is not truly male or female. Perhaps such surgery is best described as "assignment" surgery.

129. *Id.* at 135.

130. *Id.* at 145 ("In my judgment, I am concerned with a case in which the biological test set and applied in [*Corbett*] is not satisfied and does not provide the answer to the question whether the respondent is a female for the purposes of marriage. Thus it follows that, in my judgment, I am concerned with a case which [the *Corbett* judge] stated . . . must be left until it comes for decision and in respect of which he accepted there were difficulties over and above those he had to deal with in *Corbett's* case.").

131. *Id.* at 121.

132. The court recognized this directly in its conclusion that "when the genital criteria are ambiguous and it cannot be said that they are approaching male or female, sex should not be decided by a decision as to which side of the line the genital criteria (internal and external) fall even if they would fall on the same side of the line as the other two criteria." *Id.* at 141.

133. *Id.* at 120.

rather a third category.<sup>134</sup> In rejecting this approach, the court determined that “it was the view and intention of Parliament that everyone is either male or female for the purposes of marriage. . . .”<sup>135</sup>

In attempting to decide which category Ms. W. fell into, the court placed importance on the intersexual’s psychological characteristics, in particular “her desire from an early age to live as a girl and her final choice to live as a woman before she starting taking estrogen and had her surgery.”<sup>136</sup> In doing so, it clearly went beyond *Corbett*, which refused to even consider psychological testimony. The court, however, did not ignore physiological evidence. The court considered it important that Ms. W. had undergone irreversible surgery and could no longer live as a man.<sup>137</sup> Moreover, the court deemed it relevant that Ms. W. was capable of consummating her marriage as a woman, and that without surgery would have been incapable of even engaging in sexual intercourse.<sup>138</sup>

*W. v. W.* adds little to second and third-wave transsexual marriage cases in that it looks to the state of Ms. W.’s body at the time of marriage and considers her psychological characteristics in addition to her physiology. Nonetheless within the decision are seeds of a radical vision of sexual identity. In his conclusions of law, the judge states:

[P]eople with partial androgen insensitivity can develop physically and socially in a range of ways. Their assignment to a sex or gender in which they are to be brought up and live is a difficult one and it seems to me that in such cases (and in other cases where a decision as to the sex or gender in which a child should be brought up falls to be made by doctors and others) there is considerable force in the argument that it would be best to “wait and see”. How long it would be appropriate to

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134. *Id.* at 144 (“Further, in my judgment such a result [that a person was neither a man nor a woman for the purposes of marriage] would create as many problems as it solved in the difficulties that already exist in defining a woman or a man, or a male or a female, for the purposes of marriage by creating a third category the boundaries of which would not be clear.” Moreover, the court determined that “it was the view and intention of Parliament that everyone is either male or female for the purposes of marriage. . . .”).

135. *Id.* at 145.

136. *Id.* at 146.

137. Andrew Sharpe points out that the *W. v. W.* court treated the fact of reassignment surgery very differently than did the *Corbett* court: “[W]hile Mrs. W’s surgery is viewed in terms of a process of ‘naturalisation’, predicated upon a problematic view of the intersexed body a nature’s ‘mistake’, post-operative status in the case of April Ashley is viewed as a flight from ‘nature.’” ANDREW N. SHARPE, *TRANSSEXUAL JURISPRUDENCE – DYSPHORIC BODIES OF LAW* 49 (2002).

138. *W. v. W.*, [2001] Fam. 111, 144 (Fam. 2000). In the end, the court determined that an intersexual’s sex for marriage purposes must be determined in accord with the criteria set forth in *Corbett*, albeit an extended list: chromosomal factors; gonadal factors; genital factors; psychological factors; hormonal factors; and secondary sexual characteristics. Applying these factors, the judge concluded that Ms. W was a female for marriage purposes.

wait, and what tests would be appropriate, would vary from case to case.<sup>139</sup>

An explanation of the “wait and see” approach is necessary before examining the implications for law. Upon the birth of an intersexed child with ambiguous genitals, the traditional medical approach stressed the importance of deciding upon and surgically determining a child’s sex shortly after birth for the child’s psychological well-being. “[P]sychologists who first recommended surgery on interested infants and children in the 1950s had a similar goal in mind: to prevent the social stigma and isolation that was thought to accompany intersexual ‘difference.’”<sup>140</sup> This medical approach complemented the view of psychologists such as John Money that a person’s sexual identity is malleable — so long as an intersexed child is assigned to a sex at an early moment in life, the child can grow up psychologically stable in the chosen sex.<sup>141</sup> Accordingly, the birth of an intersexed child was treated as a medical emergency and parents were encouraged to allow the child to undergo appropriate surgery within a short while after birth to render the child’s sex unambiguous.<sup>142</sup>

Recent medical research, in particular the work of Dr. Milton Diamond, has challenged the traditional approach. Diamond has questioned the assumption that a person’s sexual identity is malleable.<sup>143</sup> His research regarding “brain sex,” the very same research relied upon in the third-wave transsexual marriage cases, strongly suggests that a person’s sexual identity is imprinted on the brain from birth and is unchangeable.<sup>144</sup> Moreover, recent studies of intersexuals who underwent early surgery to “correct” their genitals have revealed that later sexual function and psychological health may be seriously impaired by early medical intervention.<sup>145</sup> In light of this research, serious opposition has now arisen to early medical intervention. Political movements spearheaded by adult intersexuals have advocated for delaying corrective surgery until the intersexed individual has the emotional maturity to

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139. *Id.* at 146.

140. PREVES, INTERSEX, at 52.

141. *See id.* at 53.

142. *See* PREVES, INTERSEX at 58. *See also* SUZANNE KESSLER, LESSONS FROM THE INTERSEXED (1998), at 12-32 (dealing with the medical construction of gender).

143. Milton Diamond, *Sexual Identity and Sexual Orientation in Children With Traumatized or Ambiguous Genitalia*, 34 THE JOURNAL OF SEX RESEARCH 199 (1997).

144. If in fact human sexual identity is not malleable but imprinted from birth, it is possible that parents and physicians can make a mistake in choosing one sex rather than the other as the goal of an infant’s surgery.

145. *See* PREVES, INTERSEX, at 60-86 (reviewing stories of intersexed persons who view themselves physically and emotionally injured by early medical intervention).

participate in the decision whether to elect such surgery, unless surgery is necessary for the infant's physical health.<sup>146</sup>

This "wait and see" approach, applauded by the *W. v. W.* court, has far reaching social implications. To admit that any decision as to the sex of an intersexual child should not be made until the individual can participate in that decision and that such decision will ultimately turn on the individual's self-perception of his or her sexual identity is to allow that, at any one time, there may be individuals in our society who are not clearly male or female. Moreover, it is to admit that a person's psychological choice as to his or her sex will be determinative for legal purposes.

Intersexuality has profound implications for marriage in general and transsexual marriage in particular:

1. Every marriage case we have examined is founded on the assumption that marriage is by its nature opposite-sexed — i.e., that it is the union of a man and a woman. The existence of intersexuals who have not undergone surgery presents the possibility of individuals being allowed to marry who are neither clearly male nor female. Intersexuality challenges the legal insistence that marriage be opposite-sexed.

2. In discussing intersexuality, courts accept that a person's psychological sex is more important than bodily configuration to determining sexual identity. In *Otahuhu*, the court stated:

This evidence [concerning intersexuals who delay surgery until they are older] supports the view that the psychological and social factors which go to make up a person's gender identity are very powerful, so powerful that where there is physical ambiguity they may override the chromosomal fact.<sup>147</sup>

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146. *Id.* at 144-58. (discussing intersex political mobilization). See also the testimony of a medical expert in *Bellinger v. Bellinger*, [2002] 1 All E.R. 311, 321-22 (2001), discussing the movement to delay surgery on intersexed infants until later in life:

Psychological factors cannot be considered at birth because they do not yet manifest. They may become an overriding consideration subsequently as the individual develops. Physical differences in the brain are as yet not measurable at birth, if at all later in life. They may ultimately override all other criteria. Thus, though not apparent at birth, this would influence the ultimate developmental outcome with respect to a newborn . . . . [T]here is considerable sentiment for delaying any surgical modification of the genitalia which had been thought to help preset the evolving gender identity. Now there is more of a wait-and-see approach until the individual is old enough to express its own wishes. . . . There is growing acceptance of findings of sexual differences in the brain that are determined prenatally. They are seen as influencing sex-typed and sexual behaviors.

147. *Otahuhu* [1995] 1 NZLR at 610; see also *Kantaras*, No. 98-5375CA at 569:

Abnormalities make categorical determination of sexual identity ambiguous. In such an instance "the psychological" and "social" is accepted by the medical and scientific community when dealing with persons who have chromosomal, gonadal, genital or hormonal abnormalities. Medical science responds. The usual treatment in such cases is

Accordingly, intersexuality forces the legal system to rely primarily on an individual's psychological characteristics and self-perception to determine sex for marriage purposes. The biological features of a person's body can no longer provide any bright line assistance in this determination. But courts' recognition of intersexuals has important implications for dealing with transsexuals.<sup>148</sup> In the House of Lords decision in *Bellinger v. Bellinger*, Lord Nicholls noted:

Recognition of gender reassignment will involve some blurring of the normally accepted biological distinction between male and female. Some blurring already exists, unavoidably, in the case of inter-sexual persons. When assessing the gender of inter-sexual persons, matters taken into account include self-perception and style of upbringing and living. Recognition of gender reassignment will involve further blurring. It will mean that in law a person who, unlike an inter-sexual person, had all the biological characteristics of one sex at birth may subsequently be treated as a member of the opposite sex.<sup>149</sup>

3. Perhaps most importantly, intersexuality forces courts to allow an individual to choose his or her sex for purposes of marriage. The *Re Kevin* appeals court made this explicit, in referring to *W. v. W.*: "It seems to us that the important things about this judgment is that it clearly recognizes that inter-sex persons can, in effect, choose their sex and marry."<sup>150</sup>

Why do intersexuals receive such privileged treatment? Unlike transsexuals, whose bodies enable them to be classified as male or female at birth, the intersexual body does not provide a clear baseline from which sex can be determined. In the case of intersexuals with ambiguous genitals at birth, this uncertainty exists from the beginning. But even where an individual's intersexuality is discovered later in life, at the time of marriage, the physiological ambiguity gives a court no clear physical criteria for determining sex. As a result, courts must turn to psychological criteria, which involve reliance upon the individual's statements as to their sexual identity. Only then will a court be in a

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to assist the person surgically or hormonally to consolidate the sex into which they are most psychologically and socially adjusted."

148. Of course, there may be little difference between the bodies of a post-operative transsexual and a post-operative intersexual. Nonetheless, courts appear more willing to rely on the intersexual's self-perception of sexual identity because the condition that led to reassignment surgery in the intersexual resulted from a "natural" defect of birth for which the intersexual is not responsible.

149. *Bellinger v. Bellinger*, 2 A.C. 467, 477 (H.L. 2003).

150. *Re Kevin* appeal, [2003] 172 F.L.R. 300, at 339. See also *id.* at 329 ("If . . . a person falls into the category of being an inter-sex person, then it would appear that the law permits them to choose their "true sex."").



position to know how to uphold the statutory requirement that marriage is the union between a man and a woman.

Yet courts fail to recognize the irony that if they are willing to rely on an intersexual's choice as to the sex in which s/he wishes to marry, why not extend a similar choice to transsexuals, including pre-operative transsexuals? Because intersexuality undermines the very notion of "opposite-sexed," intersexual individuals are beyond the state's ability to police opposite-sex marriage. In a curious way, the concern expressed by some courts that pre-operative transsexuals might flip back and forth between male and female is the least of concerns when it comes to intersexuals. Given that they are not firmly in either the male or the female "camp" to begin with, flipping back and forth is not an issue.

4. To the extent that some courts now recognize that the decision as to an intersexual's sex may have to wait until later in life, these cases strongly undermine the first-wave cases' insistence that birth be the critical moment for sex determination.<sup>151</sup> If one can allow an intersexual's sex to be determined or re-determined at a later moment in life, *irrespective of what is written on a birth certificate*, should this same approach be taken for transsexuals?

5. One reason that courts favor intersexuals over transsexuals is that intersexuals are not responsible for the incongruities among their genitals, gonads, and chromosomes — they were born that way. In contrast, courts seem to blame transsexuals for creating their own situations. Having chosen surgery, the post-operative transsexual is responsible for his or her reassigned body's being in conflict with his or her "natural" chromosomal make-up.

But one can also surmise a parallel theological explanation that may underlie the favored treatment given to intersexuality. Because the intersexual condition exists from birth, courts may well view the Lord as directly responsible for the intersexual's physical ambiguities, i.e., it is *natural*. Accordingly, it would be wrong to deny intersexuals any marriage rights accorded others. In the end, if one accepts that brain sex is as important as physiological characteristics in determining a person's sexual identity, then the transsexual should also be deemed intersexed.

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151. See for example the testimony of an expert witness in *Bellinger v. Bellinger*, [2002] 1 All E.R. 311, 322, discussing how "brain sex" can be discovered:

At present there is probably no method within neuroscience to make such a determination. Rather it may be best to abide by the person's gender identity, which is the psychological manifestation as mediated by the brain . . . If a biological sexual condition of an individual is conceptualised to include psychological sex, perhaps reflective of brain sex differentiation, this status does not express itself until several years postnatally. Therefore it is not possible to say that the biological sexual condition of an individual is fixed at birth in that not all of the bases of the biological sexual condition can be determined at birth . . . As a psychiatrist I am biased towards psychological factors.

The only difference is that an individual born with incongruent physical features has more prominent evidence of intersexuality than does a transsexual, where the incongruity resides within the brain.<sup>152</sup>

7. Perhaps the most fascinating question is how a court would deal with an intersexual who had not undergone corrective surgery if that individual sought to marry. (This was not the case in *W. v. W.*) Would a court actually allow such an individual to choose his or her sex for marriage purposes?

First-wave courts seemed genuinely uncomfortable with an intersexual not clearly falling on either side of the sex divide. Thus, in contrast to their treatment of transsexuals, one can reasonably speculate that first-wave courts might welcome, if not require, an intersexual to undergo surgery to clarify his/her body as either male or female. The discomfort of acknowledging an individual who defies the dimorphic gender divide is extreme.

But what about progressive courts that relied upon intersexuality to support allowing post-operative transsexuals to be recognized in their reassigned sex?<sup>153</sup> Would such courts require an intersexual to undergo *any* surgery in order to marry in accord with his/her psychological sexual identity? No court has yet faced a case in which it must determine for marriage purposes the sex of an intersexual with ambiguous genitals that outwardly appear female, but whose sexual identity is male (or vice-versa). In the recent Pulitzer Prize-winning novel by Jeffrey Eugenides, *Middlesex*,<sup>154</sup> the protagonist Cal (Calliope) Stephanides was reared female. However at the age of fourteen, Cal's menstrual cycle had not begun, his/her chest remained flat, his/her voice became husky, and facial hair began to grow. His/her parents took him/her to an endocrinologist who determined that s/he was intersexual because of 5-

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152. Courts nonetheless distinguish between intersexuals and transsexuals. For example, the Appeals Court in *Bellinger* attempted to distinguish *W. v. W.* in the following way:

Miss Cox argued that the petitioner and Mrs W were, after surgery, physiologically the same. That similarity does not change the essential fact that Mrs W was, at birth, of uncertain sex, and assigned by the choice of her parents to male, whereas the petitioner was indisputably male at birth. We cannot see how *W v W (Physical Inter-sex)* helps the petitioner's case.

1 All E.R. 311, 326 (C.A. 2001). Obviously, courts are not predisposed to viewing the brain as simply another physiological fact about a person.

153. *See, e.g. Otahuhu* [1995] 1 NZLR at 610 ("If in cases of 'inter-sex' the psychological factors should be determinative of the sex to be assigned to that individual, surely the same reasoning should be used in the case of a post-operative transsexual. The evidence before the Court is that the psychological desire to be able to function in the opposite sex to the sex the person was born into is absolutely compelling in the case of a transsexual. Once a transsexual person has undergone hormone treatment and surgical intervention in order to make his or her genitals congruent with the sex of choice, it is difficult to understand how that person should be treated differently from a person who has a physical sexual abnormality such as pseudo hermaphroditism.").

154. JEFFREY EUGENIDES, *MIDDLESEX* 435-27 (2002).

alpha-reductase deficiency syndrome. Cal had XY chromosomes and high plasma testosterone levels; and hidden within her female-appearing genitals was a micro-penis. After extensive physiological and psychological investigation, the doctor concluded in his medical notes:

In speech, mannerisms, and dress, the subject manifests a feminine gender identity and role, despite a contrary chromosomal status. It is clear by this that sex of rearing, rather than genetic determinants, plays a greater role in the establishment of gender identity. . . . To leave the genitals as they are today would expose her to all manner of humiliation. Though it is possible that the surgery may result in partial or total loss of heretosexual sensation, sexual pleasure is only one factor in a happy life. The ability to marry and pass as a normal woman in society are also important goals, both of which will not be possible without feminizing surgery and hormone treatment.”<sup>155</sup>

These events take place in the novel in the mid-1970s, and it is clear that Eugenides fashions the doctor in accord with the now challenged view that sexual identity is totally malleable.<sup>156</sup> Before surgery could occur, however, Cal runs away, writing a note to his/her parents stating, “I am not a girl. I’m a boy.”<sup>157</sup> Changing his dress and hair style to male, he goes to live in San Francisco.

Eugenides’ novel makes clear that an individual’s self-perception of their sexual identity is no simple matter, highly influenced by the social facts in which the individual is raised. Cal explains:

My psychological makeup doesn’t accord with the essentialism popular in the intersex movement. . . Unlike other so-called male pseudo-hermaphrodites who have been written about in the press, I never felt out of place being a girl. I still don’t feel entirely at home among men. Desire made me cross over to the other side, desire and the facticity of my body.

. . .

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155. *Id.* at 437.

156. Eugenides is extremely perceptive as to changes in modern medical understanding: It’s no surprise that [the doctor’s] theory of gender identity was popular in the early seventies. . . . The consensus was that personality was primarily determined by environment, each child a blank slate to be written on. . . . Women were becoming more like men and men were becoming more like women. For a little while during the seventies it seemed that sexual difference might pass away. . . . [The doctor’s] theory has come under attack by the 1990s. The child was no longer a blank slate; every newborn had been inscribed by genetics and evolution.

*Id.* at 478-79.

157. *Id.* at 439.

And so a strange new possibility is arising. Compromised, indefinite, sketchy, but not entirely obliterated: free will is making a comeback. Biology gives you a brain. Life turns it into a mind.<sup>158</sup>

Eugenides steers a careful course between the theories of the malleability of sexual identity generally accepted in the 1970's, and the views of more recent medical theorists that sexual identity is imprinted in the brain. It's not all nature and it is not all nurture. This novel brilliantly illustrates how extremely complex the realm of sexual identity actually is.

For purposes of this article, the lesson of Eugenides' *Middlesex* is this: In the case of hypothetical intersexuals, progressive courts assert that they cannot rely on physiology as a determinant of sex for marriage purposes. Instead, they suggest they would rely on the individual's psychological sexual identity to determine the intersexual's sex. *Middlesex* teaches that sexual identity itself is not a solid evidentiary fact about an individual; it is highly influenced by the cultural milieu in which the individual is raised. Accordingly, intersexuality raises the specter that, for legal purposes, the entire concept of two sexes may be no more than a cultural construct. In attempting to police same-sexed versus opposite-sexed marriage, courts may be aiming at an extremely ephemeral target.

8. In contrast to the transsexual who will have to present extensive psychological evidence that he or she is actually transsexual and has undergone the requisite surgery, the intersexual is in the privileged position of merely having a doctor testify as to the physical ambiguity. Such evidence is far simpler to elicit than psychological evidence of transsexuality. How is a court to enforce the legal prohibition against same-sex marriage when faced with an intersexual? Does a court simply allow the intersexual to marry anyone he or she wishes? Or does a court ask first what the individual's sexual identity is, and only if the sex of the proposed partner is the opposite of that identity does the court permit the marriage? What if the professed sexual identity is contrary to other physical and social indicators of gender? The individual likes to dress in pants, play football, and repair automobiles, but self-identifies as a woman. Does the court refuse to believe the professed sexual identity?

The entire edifice crumbles the moment that one recognizes that sexual identity does not automatically accord with sexual orientation. An extremely feminine intersexual with female-appearing genitals who self-identifies as a woman may be attracted to women. Does a court allow her to marry another woman? The same feminine intersexual with female-

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158. *Id.* at 479.

appearing genitals may self-identify as a heterosexual man. Does the court allow that individual to marry a woman? What if the intersexual self-identifies as androgynous and perhaps bisexual, what does a court do then?

9. In the end, intersexuality flatly confounds the underlying assumption of every court that sex is dimorphic and that every litigant before it is either a man or a woman. The existence of intersexuals undermines the very enterprise that these courts have undertaken so exhaustively — to police the legal prohibition against same-sex marriage.

#### IV. INSIGHTS FOR SAME-SEX MARRIAGE

Let us recap what the transsexual and intersexual marriage cases demonstrate. The first-wave transsexual cases revealed that the configuration of a person's body at birth has little to do with the goals of marriage. Moreover, relying on a person's body at birth does not enable a court to enforce the legal prohibition against same-sex marriage. To insist that a person marry as a member of the sex determined at birth is to allow an M-T-F post-operative transsexual with a woman's body and a woman's psyche to marry only another woman. The first-wave courts' resolute reliance on birth biology led to the ironic result that, in the fervor to avoid same-sex marriage, these courts effectively relegated all post-operative transsexuals only to a same-sex marriage.

The second-wave transsexual courts correctly recognized that looking to a person's bodily configuration at the time of marriage was more relevant to the goals of marriage than looking to the time of birth. Having said that, these courts imposed the highly discriminatory requirements that the transsexual either be able to function sexually in the reassigned sex or at least pass the appearance test as a member of the reassigned sex. In addition, all second-wave courts required that the transsexual's body surgically harmonize with the transsexual's sexual identity. Yet imposing any of these requirements is highly discriminatory. The sexual function, appearance, and harmonization requirements are never imposed on non-transsexuals wishing to marry. Moreover, all prove highly problematic for F-T-M transsexuals who have not undergone phalloplasty.

The third-wave courts eliminated the sexual function and appearance requirements. In terms of fairness, this was a clear improvement over previous cases. Yet these courts continued to require that a transsexual undergo some irreversible surgery in order to marry in the reassigned sex. As argued above, this requirement has little to do with the goals of

marriage, and much more to do with alleviating the anxiety of the courts that they might be condoning same-sex marriage.

Finally, the hypothetical case of the intersexual seeking to marry is, in a sense, the straw that broke the camel's back in terms of the courts' attempt to police against same-sex marriage. What insights can be learned from the transsexual and intersexual cases about same-sex marriage?

1. These cases offer a simple, yet profound, insight. Were the law to drop the requirement that marriage be opposite-sexed and, instead, extend marriage rights to all consenting adults, the difficulties confronted in these marriage cases would disappear. For purposes of marriage, courts would no longer need to struggle to determine the sex of intersexuals or transsexuals, whether postoperative or preoperative. The expense of parties having to engage medical experts and the extraordinary time that courts have to devote to such testimony would be eliminated. Moreover, such a move would finally eliminate the unfairness of prohibiting couples who identify themselves as same-sexed to marry.

2. The cases make clear that even if one *is* committed to the principle that marriage should be limited to the union of a man and a woman, pinning down exactly who is a man and who is a woman is not always an easy task. With respect to transsexuals and intersexuals, the medical evidence elicited in the cases suggests that there is simply no bright line between male and female, i.e., that sex is not a binary category. Accordingly, the unquestioned assumption that the opposite-sex marriage requirement is easily enforced is, in reality, highly problematic.

3. In discussing hypothetical cases, intersexuality forced courts to give up the hope trying to pin down a person's sex for purposes of marriage by turning to clear, settled criteria. The seemingly solid, irrefutable evidence used daily to determine a newborn's sex loses its power to determine an intersexual's sex. Given the inconclusive nature of this physical data, rather than conclude that intersexuals cannot marry, most courts have suggested that they have little choice but accede to the intersexual's choice of sex as the determining factor for marriage. But recent studies of intersexuals suggest that many do not in fact construct their identity as dimorphically male or female. Instead, many intersexuals choose to respect his/her birth body and thus consider themselves to be androgynous.<sup>159</sup> In such a case, the law's requirement that marriage be opposite-sexed would leave the intersexual little choice but to announce their sex as supportive of their sexual orientation,

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159. See anecdotal interviews with transsexuals in PREVES, INTERSEX, at 1-22; 125-143.

thereby enabling them to marry the person of their choice by declaring their sex as opposite to that person.

4. This article has questioned why bodies matter to the institution of marriage. I have suggested that given the modern, companionate goals of marriage, it should be irrelevant to the state how a person's body is configured in terms of what genitals one partner has compared to the other. I do not mean to suggest, however, that a person's physical body is irrelevant to marriage. For, without bodies, a couple cannot engage in a satisfying, intimate sexual relationship that, for so many, is at the core of a successful marriage. Thus, the bodies that a couple brings to marriage do have an important relationship to the success of a marriage.

What matters to a successful marriage, however, is not that each partner's genitals be arrayed in any particular way in relation to the genitals of the other partner. What matters is how a person's body enables him or her to give and to receive sexual and emotional satisfaction from an intimate relationship with a partner. Giving and receiving sexual satisfaction is not limited to bodies that are opposite-sexed or same-sexed or transsexed or intersexed. What the transsexual and intersexual marriage cases teach is that if the state is truly interested in fostering the institution of marriage, it should stop trying to police the body parts that a couple must have in order to marry.

5. Much of this article has approved the direction of recent transsexual and intersexual cases, away from a focus on purely physiological criteria, to a focus on psychological criteria in determining a person's sex for marriage purposes. But I am now forced to ask one final question. Are the courts that have placed greater reliance on psychological criteria correct to look to "brain sex" and sexual identity as that particular brain state most relevant to marriage?

What these cases reveal is that, if one is interested in successful marriage, the most relevant psychological characteristic is *not* "brain sex." Rather, the psychological characteristic that most matters to a couple's physical and emotional satisfaction is sexual orientation. If our society is truly committed to successful marriages, we need to respect whatever sexual orientation a consenting, adult couple may have. Relying on "brain sex" and sexual identity simply focuses on the wrong psychological state.

This is further supported by the understanding that sexual identity and sexual orientation may not be congruent. A court's reliance on a person's sexual identity as male or female simply does not assure that they will fulfill the social requirement that they be opposite-sex oriented. Persons born male, F-T-M transsexuals who view themselves as male, and intersexed individuals with a male sexual identity may all be

attracted to females. But this is by no means assured. Each of these persons may also be same-sex oriented, and be attracted to men. Our society conflates sex, gender, and sexual orientation, assuming all integrates, in one particular way; this is simply not the case.<sup>160</sup>

Once we give up the requirement that marriage must be limited to two people who can biologically procreate with one another (as opposed to procreating through adoption or alternative reproductive technologies) and focus on the fact that modern marriage is fundamentally about companionate goals (and for some, but not all, couples about procreation), any inquiry into sexual identity should be irrelevant as a gate-keeper for marriage. If two people are going to be successful in marriage, the brain state that matters most is that they be sexually attracted to one another.

6. The cases we have explored also teach that the world of sexual orientation is far more complex than the simplistic division into heterosexuality, homosexuality, and bisexuality. The world of sexual orientation includes people who are attracted to transsexuals and intersexuals who may or may not have undergone surgery. In Eugenides' *Middlesex*, is the woman who falls in love with Cal straight or gay? She is attracted to an individual who in his teens adopts a male sexual identity, but continues to have female-appearing genitals. What about Kevin's wife in *Re Kevin*? She has fallen in love with an F-T-M transsexual who has a male sexual identity, some male body features (e.g., chest musculature and hair), but also a vagina. Is she gay, straight, or bisexual? Though one can try to force each case into one of these boxes, these cases make clear that sexual orientation is far more complex than generally assumed.

In the same way that determining what is meant by a same-sex or an opposite-sex marriage is complicated by the transsexual and intersexual cases we have reviewed, similarly the notion of heterosexual versus a homosexual marriage is equally problematic. Natural human variance defies any attempt to divide the world into these dualities and, in turn, to structure marriage based on these supposed opposites.

7. In the end, the state should give up its concern about the sex of partners to a marriage. What is critical for the success of a marriage is that two people be physically and emotionally attracted to one another in such a way that they are motivated to make a long-term commitment to

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160. See, e.g., Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161 (1996); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1 (1995).



supporting and nurturing each other; and that is not necessarily related to either partner's sex or sexual identity.

The ultimate lesson we can derive from the transsexual and intersexual marriage cases is this: Marriage should be available to all couples — those who experience themselves as opposite-sex, those who experience themselves as same-sex, and those who experience themselves as some variation thereof.