Sex Determination for Federal Purposes: Is Transsexual Immigration Via Marriage Permissible Under the Defense of Marriage Act?

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SEX DETERMINATION FOR FEDERAL PURPOSES: IS TRANSSEXUAL IMMIGRATION VIA MARRIAGE PERMISSIBLE UNDER THE DEFENSE OF MARRIAGE ACT?

John A. Fisher*

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* Harvard University, A.B., 1999; Columbia Law School, J.D. 2004, editor Columbia Law Review. Associated with Cleary, Gottlieb, Steen & Hamilton. I dedicate this Article to Professor Eva Hanks. Her integrity, sincerity, and ability to guide students through the first year of law school are unmatched. I would also like to thank the staff of the Michigan Journal of Gender & Law for their excellent contributions, and to warmly acknowledge Alejandro for his timely distractions during the writing process.
INTRODUCTION

In 1993, Hawaii became the first state to suggest that it may be unconstitutional to deny gay and lesbian couples the right to marry. For many, this declaration was seen as the logical culmination of a civil rights movement characterized by a struggle for recognition and acceptance. For others, it was a clear warning that gay and lesbian marriage could spread across the nation and eventually place homosexual relationships on equal footing with heterosexual relationships. In response to this concern, Congress passed the Defense of Marriage Act ("DOMA") in 1996.

DOMA accomplishes two things. First, it allows states to "defend" their marriage standards by permitting them to withhold legal recognition from same-sex marriages that take place in other states. Second, it defines marriage for all federal purposes as a "legal union between one man and one woman" and spouse as "a person of the opposite sex who is a husband or a wife." However, even though the second prong of DOMA essentially sets forth a marriage standard applicable in all federal contexts, it does not define "man," "woman," or "opposite sex."

This shortcoming is problematic for individuals not easily classified as male or female, individuals such as post-operative transsexuals (trans-
sexuales who have undergone hormone therapy, sex-realignment surgery, and other procedures to reconcile some or all of their physical sexual attributes with their psychological sex). Since DOMA provides no guidance whether post-operative transsexuals would be considered male or female, it remains an open question whether they can take advantage of federal benefits available to married couples, or whether DOMA would characterize transsexual marriages as same-sex, and hence preclude their legal recognition.

This Article addresses this question through an examination of post-operative transsexual immigration via marriage. Part I describes the federal immigration benefits available to spouses of most U.S. citizens and presents the historical and contemporary obstacles that prohibit these benefits from being extended to gays and lesbians. It then addresses DOMA’s failure to define “opposite sex,” and hence DOMA’s failure to indicate whether post-operative transsexuals, or their partners, should be given “spousal status” under current U.S. immigration law.

Part II examines traditional and modern notions of sex. It traces state legal approaches to transsexual marriage and ultimately disentangles the formalistic rhetoric that obfuscates the reasoning in those cases. In particular, Part II focuses on a 2002 Kansas case that attempts to make sense of the conflicting positions states have taken with respect to

6. Since these procedures are expensive and often risky, many transsexuals elect to forgo them. Given judicial concern that homosexuals could claim marital status by fraudulently declaring one spouse is transsexual, evidence of transsexualism beyond mere self-identification as a transsexual is universally required. The adjective post-operative signals only that some level of readily quantifiable evidence of transsexualism is available; an “operation” is not a prerequisite for classification as post-operative. In fact, many male-to-female post-operative transsexuals only undergo hormone therapy and hair removal. For a definition of transsexual, see infra note 51 and accompanying text.

7. DOMA’s applicability to post-operative transsexuals remains an open question in large part because attorneys working with transsexual clients seek practical solutions to DOMA’s failure to define “man,” “woman,” and “opposite sex.” See, e.g., Elise Keppler, Transgender Asylum & Immigration, May 15, 2001 at 18–19 (recommending that transsexuals who seek to immigrate via marriage to a U.S. citizen should first attempt to obtain documentation that reflects “the person and their partner [as] a male-female couple.” If this documentation cannot be obtained, the author suggests filing a fiancé petition and attaching a letter “that adequately explains that this person will, in fact, transition to a gender that enables them to marry their partner once in the state they will reside in the United States. In such cases, letters from doctors that can document the foreign national’s current gender will greatly strengthen the petition.”) (unpublished paper, on file with the Gay and Lesbian Immigration Rights Task Force).

8. This Article was suggested by Pradeep Singla, former Legal Director of Immigration Equality, in response to this legal uncertainty.
transsexual marriage. That case draws a misleading distinction between sex determination "as a matter of law," and sex determination "as a matter of fact," and hence adds to, rather than detracts from, the confusion. Part II demonstrates that sex determination in the absence of a legislative standard is inherently a mixed question of law and fact. Courts addressing transsexuals must establish sex-determination standards to define as a matter of law what it means to be male or female, and then must determine as a matter of fact whether post-operative transsexuals are male or female under those standards.

Part III addresses transsexual immigration via marriage. Looking behind the veil of formalism pierced in Part II, Part III takes a comparative law approach to transsexual sex determination. It examines the positions that federal courts, state courts and legislatures, foreign governments, and the European Court of Human Rights have taken on the underlying determinations that unify the transsexual marriage cases brought forth in Part II.

I. IMMIGRATION VIA MARRIAGE

The Immigration and Nationality Act ("I.N.A."), which governs admission of all immigrants to the United States, enables family members of U.S. citizens to obtain permanent resident status. Of the various family relationships recognized by the I.N.A., the spousal relationship is among the most privileged. Foreign national spouses, for example, can be naturalized more quickly than can other immigrants, and there is no annual limit to the number of visas available to spouses of U.S. citizens.

In order to receive an immigrant visa via marriage to a U.S. citizen, a foreign national must demonstrate that he or she intends to live in-

10. See infra Part II.B.
11. See infra Part II.B.1.
12. The Gardiner court implied that taking a matter-of-law approach to sex determination meant applying as a matter of law a pre-existing legislative sex-determination standard. In fact, the court crafted and applied its own standard. See infra Part B.I.2.
13. The I.N.A. is codified in Title 8 of the United States Code.
15. Immigration and Nationality Act §§ 319(a), 319(b) [hereinafter I.N.A.], 8 U.S.C. §§ 1430(a), 1430(b) (2000).
definitely in the United States and must qualify as a “spouse” under section 201(b) of the I.N.A.  

17 Although the I.N.A. does not define spouse, courts interpreting the term have determined that a wide variety of marital relationships—including those that do not conform to American customs—are sufficient to confer spousal status under the Act.  

18 However, despite this broad interpretation of spouse, and despite a long history of family reunification in U.S. immigration policy, a same-sex marriage between a U.S. citizen and a foreign national does not confer spousal status under the I.N.A.  

A. Gay and Lesbian Immigration via Marriage

The need to adopt a sex-determination standard for transsexuals in the context of immigration via marriage, discussed infra, is necessitated by a prohibition against gay and lesbian immigration via marriage. This prohibition provides a backdrop for any court or government agency addressing transsexual immigration and attaches significant consequences to any sex-determination standard ultimately adopted.

1. Adams v. Howerton

Decided in 1982 by the Ninth Circuit, Adams governed gay and lesbian immigration via marriage before the 1996 passage of the DOMA.  

Adams, a male American citizen, and Sullivan, a male alien,

18. See, e.g., Gee Chee On v. Brownell, 253 F.2d 814, 817 (5th Cir. 1958) (determining that “[i]n order to be legitimate a marriage need not conform to American customs.”). See also In re T, 1 I & N Dec. 529, 531 (B.I.A. 1960) (declaring that “[t]he presumption of the validity of a marriage duly celebrated is a very strong one and should be overturned reluctantly, and then only by persuasive specific evidence requiring a contrary finding.”).
20. Although spousal status is not conferred for immigration purposes, the I.N.S. may not have the power to deport selectively foreign same-sex partners civilly united to U.S. citizens. See Victor C. Romero, The Selective Deportation of Same-Gender Partners: In Search of the “Rara Avis,” 56 U. MIAMI L. REV. 537 (2002).
21. 673 F.2d 1036 (9th Cir. 1982). No other federal circuit has departed from the precedent established in Adams. DOMA defines spouse for federal purposes and hence eliminates the need for judicial inquiries into whether “spouse” as used in the I.N.A. encompasses same-sex couples. Therefore, it is likely that Adams will remain
challenged the Board of Immigration Appeals' decision denying classification of Sullivan as an immediate relative of Adams. Interestingly, the court began its analysis not by examining the validity of Adams' same-sex marriage to Howerton under Colorado law, but by examining the intent of Congress with respect to the conferral of spousal status under section 201(b) of the I.N.A. The court, relying on *Boutilier v. INS*, concluded that:

Even if the Adams-Sullivan marriage were valid under Colorado law, the marriage might still be insufficient to confer spouse status for purposes of federal immigration law. So long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued. Therefore, the intent of Congress governs the conferral of spouse status under section 201(b), and a valid marriage is determinative only if Congress so intends.

The court then deduced that it was "unlikely that Congress intended to give homosexual spouses preferential admission treatment under section 201(b) of the Act when, in the very same amendments adding that section, it mandated their exclusion [gays and lesbians were considered to have 'psychopathic personalities' and hence ineligible for immigration]." The court concluded that Congress's decision to confer spousal status only upon heterosexuals has a rational basis and is therefore constitutional.

By refusing to overturn the Board of Immigration Appeals' decision to deny Sullivan status as an immediate relative, *Adams* established federal precedent that is frequently cited as a judicial barrier to gay and

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22. *Id.* at 1036.
23. *Id.* at 1039.
24. In *Boutilier v. INS*, 387 U.S. 118, 120 (1967), the Supreme Court determined that the "legislative history of the [Immigration and Nationality] Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals."
25. *Adams*, 673 F.2d at 1039.
26. *Id.* at 1040-41 (mandating gay and lesbian exclusion through the phrase "psychopathic personality").
27. *Id.* at 1042.
lesbian immigration via marriage. This barrier was reinforced by the passage of the DOMA in 1996.

2. The Defense of Marriage Act: A Statutory Barrier to Gay and Lesbian Immigration via Marriage

Since the Supreme Court has not spoken on the issue of gay and lesbian immigration via marriage, it is possible that other federal circuits could deviate from the precedent set by the Ninth Circuit in Adams. However, this scenario is unlikely because in 1996, Congress passed the DOMA in response to state developments regarding same-sex marriage. DOMA defines marriage for any "[a]ct of Congress" and "any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States" as a "legal union between one man and one woman" and defines spouse for the same purposes as "a person of the opposite sex who is a husband or a wife." Therefore, the Immigration and Nationality Act's use of "spouse" is directly regulated by DOMA, and reliance on judicial interpretation of the term "spouse" with respect to gay and lesbian inclusion is no longer necessary.

DOMA, however, fails to define "opposite sex," "man," or "woman." Consequently, post-operative transsexual immigration via marriage may be unconstitutional.

28. Because Adams relied heavily on Boutilier, which in turn relied heavily on homosexual inclusion under the phrase 'psychopathic personality,' many argue that Adams should no longer preclude gay and lesbian immigration via marriage. See supra note 24 and accompanying text. The exclusion ground mentioned in Boutilier was repealed in 1990, and thereafter gays and lesbians were no longer inadmissible simply because of their sexual orientation. See Denise C. Hammond, Immigration and Sexual Orientation: Developing Standards, Options and Obstacles, in 77 Interpreter Releases 113 (2000).

29. See, e.g., Senator Helms, 142 Cong. Rec. S10068 (daily ed. Sept. 9, 1996) (addressing the need for DOMA, Sen. Helms stated, "Indeed, Mr. President, the pending bill—the Defense of Marriage Act—will safeguard the sacred institutions of marriage and the family from those who seek to destroy them and who are willing to tear apart America's moral fabric in the process.").


32. DOMA, may be unconstitutional. See supra note 3 and accompanying text.


34. For definitions of transsexual and post-operative transsexual, see infra notes 51–52 and accompanying text.
marriage remains an open question. Since DOMA serves as a statutory barrier to same-sex marriage, the possibility of transsexual immigration via marriage turns upon whether post-operative transsexual marriages are legally recognized as “same-sex” or “opposite-sex.” That, in turn, depends on whether pre- or post-operative sex is recognized. For example, if transsexuals are recognized as being of their post-operative sex, then male-to-female transsexuals would be legally female and spousal status could be extended to male partners, and vice-versa. On the other hand, if post-operative transsexuals are recognized as their pre-operative physical sex—the standard adopted in a slight majority of the few U.S. transsexual marriage cases—then DOMA would preclude the conferral of spousal status unless male-to-female transsexuals married females, and female-to-male transsexuals married males. Essentially, this sex recognition standard would extend spousal status in marriages where post-operative transsexuals physically are the same sex as their spouses—marriages that for all intents and purposes resemble those which DOMA seeks to prevent—but would not extend spousal status in marriages where post-operative transsexuals physically and psychologically the opposite sex of their spouses. In other words, a sex-determination standard that blinds itself to post-operative changes could lead to immigration via gay marriage, while one that recognizes these changes could lead to immigration via marriages that are physically and psychologically between individuals of the “opposite sex.”

DOMA, by blocking recognition of same-sex marriages for federal purposes, sets the stage for an unfortunate, but nonetheless interesting, judicial inquiry into what it means to be male and female, and hence what it means to be in a legally cognizable marriage between individuals of the “opposite sex.”

35. For simplicity’s sake, this Article uses as examples marriages between post-operative transsexual individuals and individuals who are not transsexual. Other marriage combinations are, of course, possible. A male-to-female post-operative transsexual could, for example, marry a female-to-male post-operative transsexual under a sex-determination standard that legally classifies transsexuals as their post-operative sex.

36. See infra note 58 and accompanying text. This Article demonstrates that even though a slight majority of U.S. state courts have adopted pre-operative sex-determination standards, they do so not out of legislative deference, fairness, or precedent; they do so because of an underlying rejection of transsexuals themselves. See infra Part II.B.2.

37. There are additional reasons why a post-operative sex-determination standard instead of a pre-operative standard should be adopted in the context of immigration via marriage. See infra Part III.
II. Defining Man and Woman

A. Traditional and Modern Notions of Sex

DOMA's failure to define "opposite sex," "man," or "woman" is not surprising. Embedded in American consciousness and American jurisprudence is an assumption that the delineation between "man" and "woman" is clear, precise, and intuitive. Phil Hardberger, Chief Justice of the Court of Appeals of Texas, speaks for many when he writes that "[e]very schoolchild, even of tender years, is confident he or she can tell the difference [between a man and a woman], especially if the person is wearing no clothes."38

1. Intersex Individuals

A binary sex paradigm, however, is precarious. Millions of people do not fall neatly into either a male or female category.39 Health professionals recognize that many factors contribute to the determination of an individual's sex:

1. Genetic or chromosomal sex—XY or XX;
2. Gonadal sex (reproductive sex glands)—testes or ovaries;
3. Internal morphologic sex (determined after three months gestation)—seminal vesicles/prostate [sic] or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia)—penis/scrotum or clitoris/labia;
5. Hormonal sex—androgens or estrogens;
6. Phenotypic sex (secondary sexual features)—facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.40

In most cases these factors align, and sex determination is uncontroversial.41 When these factors do not align, however, an intersex

40. Id. at 278.
41. Id.
condition results, and sex determination can be difficult. Examples of intersex conditions include chromosomal ambiguity (XXX, XXY, XXY, XXXY, XYY, XYYY, XYYYY, and XO), gonadal ambiguity (gonads that do not appear to function as either ovaries or testes; ovotestes—a combination of both male and female gonads, or one ovary and one testis), and external morphologic sex ambiguity (external genitalia are neither clearly male nor clearly female). Researchers estimate that intersex conditions may affect up to one out of every 2,000 children born.

Until very recently, it was U.S. medical policy to surgically assign intersex children “to an ‘appropriate’ sex prior to the age of two, if not earlier.” In most cases, physicians believed so strongly that children should be able to be easily classified as male or female that they would recommend immediate sex reassignment surgery. Now, however, “a growing number of physicians and other health professionals are suggesting that, in many cases, surgical revision should wait until the child comes of age and can decide for itself whether to undergo surgery directed towards achieving male or female appearance.” This trend, coupled with DOMA’s failure to address such individuals, emphasizes the need for future courts to adopt sex-determination standards that account for the sexual complexity found in our society.

42. For general information about intersex individuals, see Intersex Society of North America, at http://www.isna.org.
43. See Laura Hermer, Paradigms Revised: Intersex Children, Bioethics & The Law, 11 ANNALS HEALTH L. 195 (exploring the medical and legal communities’ struggle to address the needs of intersex children).
44. Normally, an individual is born with forty-six chromosomes, two of which determine sex. Typically a male is born with XY chromosomes and a female with XX chromosomes.
45. See Greenberg, supra note 39, at 281 (discussing the many circumstances that may lead to an intersex condition).
48. Id. (noting that physicians believed it was “so important for parents to be able to identify a child as male or female at birth, based on the appearance of the child’s sex organs, that they would suggest immediate surgical reassignment”).
49. Id. at 198.
50. This argument is not to suggest that DOMA’s definitional deficit is merely a future problem. See, e.g., Keppler, supra note 7 (suggesting that “DOMA’s applicability to post-operative transsexuals remains an open question in large part because attorneys working with transsexual clients seek practical solutions to DOMA’s failure to define ‘man,’ ‘woman,’ and ‘opposite sex.’”).
2. Transsexual Individuals

Like intersex individuals, transsexual individuals are also not easily classified using a binary approach to sex. Many transsexual individuals are intersex, although some are not. The common characteristic they share is a disconnect between some or all of their physical sexual attributes and their psychological sense of self. Sometimes this disconnect can lead to "[t]he desire to change one's anatomic sexual characteristics to conform physically with one's perception of self as a member of the opposite sex." Anatomic sexual characteristics can be changed through hormone treatment and sex realignment surgery. Transsexual individuals who elect to correct their physical sexual characteristics through this process are often referred to as post-operative transsexual individuals.

In a legal world governed by a binary paradigm of male and female, the status of intersexuals and transsexuals is uncertain, and hence DOMA's failure to clearly define "opposite sex," "man," and "woman" is troubling. Fortunately, there are signs that courts and legislatures will eventually abandon this binary model in favor of one that more accurately reflects the complex nature of sex. In 2002, the Supreme Court of Kansas acknowledged in In re Estate of Gardiner that "sexual identification is not simply a matter of anatomy, as demonstrated by a number of intersex conditions." Likewise, in 1999, Justice Karen Angelini of the Court of Appeals of Texas, noted that "[w]e must recognize the fact that, even when biological factors are considered, there are those individuals whose sex may be ambiguous." Although both the Kansas and Texas cases exhibited legislative assumptions about the nature of sex and although both ultimately relied on "traditional" notions of sex, the judicial notice of research on sex determination bodes well for future cases.

51. See Katrina C. Rose, Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality, 70 UMKC L. Rev. 257, 257 n.2 (2001). See also Holly Devor, Gender Blending: Confronting the Limits of Duality 19 (1989) (defining transsexuals as "persons of one gender mistakenly born into the body of the wrong sex").


53. According to the American Psychiatric Association, approximately 1 per 30,000 adult males and 1 per 100,000 adult females seek sex-reassignment surgery. See Diagnostic and Statistical Manual of Mental Disorders 535 (4th ed. 1994).


in which sex classification is an issue, and will perhaps influence lawmakers to address expressly those individuals who cannot be neatly classified as male or female.

DOMA, however, does not expressly address those individuals. Therefore, in order to adopt a well-informed sex-determination standard for transsexuals in the immigration via marriage context, it is necessary to first examine the various legal approaches that courts have taken to determine transsexual sex for purposes of marriage.

B. Legal Approaches to Post-Operative Transsexual Marriage

Given the binary male/female assumption of sex classification under which most lawmakers operate and the degree to which the transsexual condition is alien and uncomfortable to most individuals, it is not surprising that it has often been left to courts to determine the legal status of post-operative transsexuals. Nor is it surprising that courts have taken a variety of approaches to this issue in the context of marriage. Some courts, for example, lace their opinions with religious

56. See infra Part III.
57. The parallels between a prohibition on gay and lesbian marriage leading to judicial inquiries into the private realm of sex and the pre-Loving v. Virginia, 87 S. Ct. 1817 (1967), prohibition on interracial marriage leading to judicial inquiries into the private realm of race are undeniable. In both situations, the judicial branch is awkwardly placed in the role of determining what an individual is (male, female, black, white) for purposes of permitting, or denying, that person the right to marry. For more information on the judicial quest to define race, see Ian F. Haneys López, White By Law: The Legal Construction of Race (1996).
58. See, e.g., In re Marriage of Michael J. Kantaras, No. 98-5375CA, 511998DR005375xxxWS (Fla. Cir. Ct. Feb. 2003), at http://www.transgenderlaw.org/cases/kantarasonline.pdf (holding that a female-to-male transsexual was legally female for purposes of marriage in Florida); In re Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002) (holding that "[a] male-to-female transsexual does not fit the definition of a female" and is therefore a male for marital purposes in Kansas); M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding that a male-to-female post-operative transsexual's marriage to a male was valid); Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. App. Div. 1971) (holding that post-marital male-to-female operation may have changed sex, but "removal of the male organs would not, in and of itself, change a person into a true female"); B v. B, 355 N.Y.S.2d 712, 717 (N.Y. App. Div. 1974) (holding that female-to-male transsexual did not possess "necessary apparatus" to consummate relationship and therefore requested annulment of "marriage" was granted); In re Ladrach, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (holding that post-operative male-to-female transsexual was legally a male and therefore could not be issued a marriage license to marry another male); Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. Civ. App. 1999) (holding that a
rhetoric and view post-operative sex recognition as thwarting the will of God.\textsuperscript{59} Other cases view post-operative sex recognition as the logical outcome of the medical reconciliation of physical sexual attributes with psychological sex.\textsuperscript{60}

1. The Kansas “Synthesis”

In March of 2002, in \textit{In re Gardiner}, the Supreme Court of Kansas addressed the validity of a marriage between a male and a post-operative male-to-female transsexual and attempted to synthesize a theory that would distinguish those cases which held post-operative transsexual marriage to be valid and those which did not.\textsuperscript{61} In that case, a son sought to invalidate his father’s marriage to his wife, J’Noel (a post-operative male-to-female transsexual), after his father died intestate.\textsuperscript{62} J’Noel was born with male genitalia but considered herself female.\textsuperscript{63} She underwent electrolysis and thermolysis to remove body hair on the face, neck, and chest.\textsuperscript{64} She took hormones and had a tracheal shave to change her voice.\textsuperscript{65} She had a bilateral orchiectomy to remove the testicles, a forehead/eyebrow lift, and rhinoplasty.\textsuperscript{66} J’Noel consulted with a psychiatrist who found “no signs of thought disorder or major affective

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\textsuperscript{59} See, e.g., Littleton, 9 S.W.3d at 224 (framing the issue as: “[c]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”)

\textsuperscript{60} See, e.g., M.T., 355 A.2d at 209 (“[I]f 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.”).

\textsuperscript{61} Gardiner, 42 P.3d at 120.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id.
disorder, that [she] fully understood the nature of the process of transsexual change, and that her life history was consistent with a diagnosis of transsexualism." The psychiatrist recommended "that total sex reassignment was the next appropriate step in her treatment," and in 1994 J'Noel underwent further surgery. Afterwards, her surgeon wrote that she had a "fully functional vagina" and should be considered "a functioning, anatomical female."

The Kansas court acknowledged that many judicial approaches to sex determination within the context of transsexual marriage existed. It concluded, though, that the "essential difference between the line of cases ... that would invalidate the Gardiner marriage and the line of cases ... that would validate it is that the former treats a person's sex as a matter of law and the latter treats a person's sex as a matter of fact." This treatment, according to the court, depended on whether the cases reflected a view that there is a "mental component, as well as an anatomical component, to each person's sexual identity."

In essence, the synthesis offered in Gardiner is correct. The ultimate rejection or acceptance of a marriage involving a post-operative transsexual individual often does depend on whether a court accepts current scientific understanding that there is a mental component as well as an anatomical component to sex determination. However, the court's conclusion that acceptance of the mental component leads to a matter-of-fact approach and that rejection of it leads to a matter-of-law approach is misleading. While the Gardiner court implied that taking a matter-of-law approach to sex determination meant applying as a matter of law a pre-existing legislative sex-determination standard, the court actually crafted and applied its own standard.

Absent both express statutory language classifying transsexuals and an indication of legislative intent, sex determination is inherently a mixed question of law and fact. In such circumstances, a pure matter-

67. Id.
68. Id.
69. Id. at 122–23 (quoting letter from Eugene Schrang, M.D., October 1994).
70. Id. at 124–36.
71. Id. at 132–33.
72. Id. at 124.
73. See infra Part II.B.2.
74. See notes 76–83 and accompanying text.
75. The Family Court of Australia at Sydney stated it this way: "I take it to be a question of law what criteria should be applied in determining whether a person is a man or a woman for the purpose of the law of marriage, and a question of fact whether the criteria exist in a particular case." In re Kevin, [2001] FamCA 1074.
of-law approach to sex determination is a judicial myth. Courts do not simply apply a pre-existing sex-determination standard; they must craft one for themselves and then determine as a matter of fact whether the transsexual in question qualifies under that standard as male or female. What the Gardiner court calls a matter-of-law approach to sex determination translates only into a rejection of the belief that physical sex can be changed through medical procedures such as hormone treatment and surgery, which necessarily leads to a rejection of a factual inquiry into whether that process has been completed. However, a factual inquiry into sex is still necessary.

In Gardiner, for example, the court decided that it would follow the line of cases that rejected a mental component to sex determination and would therefore “view the issue in this appeal to be one of law and not fact.”76 The court proceeded, however, to launch a factual inquiry into J'Noel's sex in order to determine if she was, in fact, the opposite sex of her husband, and therefore to determine whether or not her marriage to him was valid.77 The court began this inquiry by looking up the definitions of “sex” and “marriage” in a 1999 version of Black's Law Dictionary and “male” and “female” in a 1970 version of Webster's New Twentieth Century Dictionary.78 As cited by the court, Webster's Dictionary defined female as “designating or of the sex that produces ova and bears offspring: opposed to male.”79 The court then determined, as a matter of fact, that “J'Noel does not fit the common meaning of a female” because the “ability to 'produce ova and bear offspring' does not and never did exist.”80 In other words, the court declared as a matter of law that a female is someone who produces ova and bears offspring and that as a matter of fact J'Noel did not possess either characteristic and therefore was not a female.

The court attempted to cloak its judicial adoption of a sex-determination standard by couching it in language of legislative deference.81 The court asserted that “[w]ords in common usage are to be given their natural and ordinary meaning” and that “[t]he words 'sex,' 'male,' and 'female' in everyday understanding do not encompass

76. Gardiner, 42 P.3d at 135.
77. Id. at 135-36.
78. Id. at 135.
79. Id. at 135.
80. Id. (quoting BLACK'S LAW DICTIONARY 1375 (6th ed. 1999)).
transsexuals." It came to that conclusion by examining a 1970 version of Webster's New Twentieth Century Dictionary. If it were truly the court's intention to be deferential, it would have considered Kansas' Administrative Regulations, which permit legal amendment of sex in the event of sex realignment, instead of an outdated dictionary. Regardless of the court's language, it clearly adopted a judicial sex-determination standard and then applied that standard to J'Noel.

Likewise, the Court of Appeals of Texas in Littleton v. Prange, cited extensively by the Gardiner court as being indicative of the line of cases that adopt a matter-of-law approach, creates its own sex-determination standard and then conducts a factual inquiry into the sex of the transsexual in question. In Littleton, Christie Littleton, a transsexual who was born with male physical attributes but underwent sex reassignment surgery, brought a medical malpractice action in her capacity as surviving spouse of a male patient. Two doctors testified that the definition of a transsexual is "someone whose physical anatomy does not correspond to their [sic] sense of being or their sense of gender." They further testified that "in arriving at a diagnosis of transsexualism in Christie, [they were] guided by the guidelines established by the Johns Hopkins Group and that, based on these guidelines, Christie was diagnosed . . . as a . . . transsexual . . . [and was] psychologically and psychiatrically female before and after the sex reassignment surgery. . . ."

Despite this testimony and current medical research on transsexuals, the Littleton court decided that "the case . . . presents a pure question of law and must be decided by this court." In deciding the case, however, the court did not defer to legislative guidance on whether transsexuals were male or female as a matter of law. Instead, the court itself determined as a "matter of law" what it meant to be female in Texas and determined as a matter of fact that Christie did not meet that standard. The court concluded that "[t]ranssexual medical treatment[] does not create the internal sexual organs of a woman (except for the vaginal canal). There is no womb, cervix or ovaries in the post-operative transsexual female." In addition, the court noted that "male chromosomes do not change with either hormonal treatment or sex

82. Gardiner, 42 P.3d at 135.
85. Id. at 224.
86. Id. at 224-25.
87. Id. at 230.
88. Id. at 231.
89. Id. at 230.
reassignment surgery."

Essentially, the court crafted a two-prong test to determine sex: an inquiry into chromosomal makeup and an inquiry into internal sexual organs. It then determined that as a matter of fact, Christie Littleton "was created and born a male." The Littleton court demonstrated once again that absent both express statutory language classifying transsexuals and an indication of legislative intent, sex determination is inherently a mixed question of law and fact. The court crafted its own standard, and then applied it.

2. The Kansas "Synthesis" Reexamined

This Article argues that the only strand unifying the line of transsexual marriage cases that includes Gardiner and Littleton is not a pure matter-of-law approach to sex determination, but a complete judicial rejection of the medical recognition of transsexualism. Or, in the words of the Gardiner court, a rejection of the idea that there is "a mental component, as well as an anatomical component, to each person's sexual identity."92

This judicial rejection was apparent in Littleton when the court dismissed the medical testimony described above and determined instead that "a person's gender [is] immutably fixed at birth by our Creator."93 The court noted that while "[s]ome physicians would consider Christie a female . . . [t]he body that [she] inhabits is a male body in all aspects other than what the physicians have supplied."94 Summarizing its position, the Littleton court stated that "once a man, always a man."95 Other courts have been even more direct. In Hartin v. Director of the Bureau of Records, a New York Supreme Court took the position that sex-realignment surgery is a "form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease."96

The Gardiner court concluded that a matter-of-law approach to sex determination was the logical offspring of this rejection of medical recognition of transsexualism and that a matter-of-fact approach was the logical offspring of its acceptance. As discussed, however, sex

90. Id.
91. Id. at 231.
93. Littleton, 9 S.W.3d at 224.
94. Id. at 231.
95. Id. at 227.
determination is always a mixed question of law and fact. A court must first determine what standard it will use to decide who is a male and who is a female and then conduct a factual inquiry into whether the individual in question qualifies as male or female under that standard. The true offspring of acceptance or rejection of medical recognition of transsexualism is an inquiry, or lack thereof, into how far the transsexual has physically transitioned into his/her psychological sex. Gardiner, Littleton, and other cases that reject medical testimony adopt standards of sex determination consonant with a view that such an inquiry is not necessary, because standards such as chromosomal makeup and/or presence of internal sexual organs, standards that "do not change with either hormonal treatment or sex reassignment surgery." 97

On the other hand, the line of cases that recognizes and gives legal consideration to a transsexual's "conflict between physical anatomy and psychological identity or psychological sex" 98 finds that a factual inquiry into the transition from biological sex to psychological sex is necessary to determine sex and adopt a standard consonant with that view. In M.T. v. J.T., for example, the Superior Court of New Jersey, Appellate Division, held that:

If such sex reassignment surgery is successful and the postoperative [sic] 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. 99

The court was "impelled to the conclusion" by "expert testimony" that "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." 100

97. Littleton, 9 S.W.3d at 230.
99. Id. at 210-11.
100. Id. at 209. See also id. at 206, 211 ("The examination of plaintiff before the operation showed that she had a penis, scrotum and testicles. After the operation she did not have those organs but had a vagina and labia which were 'adequate for sexual intercourse' and could function as any female vagina, that is, for 'traditional penile/vaginal intercourse.' [The] plaintiff had ... silicone injections in her breasts; [had been] treated ... continuously with female hormones to demasculinize her body and to
Similarly, in In Re: The Marriage of Michael J. Kantaras, a highly publicized case argued on CourtTV and decided after Gardiner, a Florida judge was faced with determining the validity of a marriage that involved a female-to-male transsexual as part of an adoption case. Over seven hundred pages into his opinion, Judge O’Brien identified two approaches to transsexual marriage. One he labeled the “traditionalist” approach and the other “reformist.” After analyzing both traditionalist and reformist cases, Judge O’Brien concluded:

It is unmistakably clear the traditionalist viewpoint does not believe that transsexualism as a true medical phenomena, is a matter for the Courts, rather, it is for the Legislature to decide if it deserves much attention or consideration by the courts where marriage is concerned.

O’Brien rejected the traditionalist view and allowed “the medical community [to come] to the aid of the Court” in its attempt to understand transsexualism: “The law has no basis in medical fact to reclassify what science declares. There is no authority given the Courts to practice medicine. And, least of all, the subjective bias of a judge is not to be disguised as legislative intent.” This position contrasts with the Gardiner court’s use of dictionary definitions of man and woman as a means to mask the adoption of a sex-determination standard, and the way in which it did so under the cloak of “legislative deference.” Dismissing the traditionalist approach embodied by Gardiner, O’Brien adopted the position that “the battle of the dictionaries is not an adequate substitute

feminize it at the same time.”). But see Andrew N. Sharpe, Transgender Jurisprudence: Dysphoric Bodies of Law 63–64 (2002) (Sharpe concludes that the creation of a functional vagina in M.T. v. J.T. “proves, in and of itself, to be insufficient for the purposes of legal recognition of sex claims. For law also desires to know MT’s desire, to know that it is heterosexual, and to be assured through that knowledge as to the ‘authenticity’ of her transgender status.” Sharpe posits that “this interrogation of transgender pasts is driven, at least in part, by legal anxiety over the perceived proximity of transgender to the homosexual body.”).

103. See Kantaras, at 722.
104. Id.
105. Id. at 728.
106. Id. at 708.
107. Id.
108. See In re Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002). See also supra Part II.B.1.
for medical knowledge." Ultimately, the acceptance of medical testimony as to who is male and female lead Judge O'Brien to reject chromosomes as the only basis of sex determination in favor of an approach that also considers "gender and self identity."

In summary, there are two legal approaches to transsexual marriage. One approach, stemming from judicial acceptance that there is an underlying disconnect between mental sex and physical sexual attributes in transsexual individuals, validates marriages that involve post-operative transsexuals. Courts following this approach recognize that medical attempts to reconcile physical sexual attributes with psychological sex deserve consideration when determining the sex of a transsexual for purposes of marriage. The other approach, often laced with religious rhetoric, binary notions of sex, and tenuous links to legislative deference, invalidates marriages that involve post-operative transsexuals. Courts following this approach adopt sex-determination standards that make invisible any medical efforts to reconcile psychological sex with some or all physical sexual attributes.

III. Post-Operative Transsexual Immigration via Marriage

As previously mentioned, DOMA prohibits gay and lesbian immigration via marriage. It defines marriage for any "Act of Congress" and "any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States" as a "legal union between one man and one woman" and defines spouse, for the same purposes, as "a person of the opposite sex who is a husband or a wife." Since DOMA fails to define "opposite sex," "man," or "woman," however, it is inevitable that it will fall upon a U.S. federal court or government agency to determine the fate of transsexual individuals and their spouses in the

109. See Kantaras, at 709.
110. Kantaras, at 797.
111. See Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. App. 1999) (framing the issue as: "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?").
112. See supra Part II.A.
113. See Littleton, 9 S.W.3d at 224; see also Part II.B.1.
114. Assuming, of course, that the other partners in the marriages are of the same sex as the original physical sex of the post-operative transsexuals.
116. Id.
117. Id.
SEX DETERMINATION FOR FEDERAL PURPOSES

context of immigration via marriage. The first step in this process is to determine where Congress intended transsexuals to fall within its binary sex classification of "man" and "woman."¹¹⁸

A. A Uniform Sex-Determination Standard Must Be Adopted for DOMA

As explained in Part II, there are two legal approaches to transsexual sex-determination within the marital context. Cases that invalidate marriages reject medical recognition of transsexualism and adopt corresponding sex-determination standards that ignore medical procedures, such as hormone treatment and surgery, aimed at reconciling psychological sex with the sex indicated by some or all physical attributes.¹¹⁹ The chromosomal and "womb, cervix or ovaries" standards used in Littleton,¹²⁰ and the "produce ova and bear offspring" standard for womanhood used in Gardiner,¹²¹ are examples of judicial sex-determination tests that ignore the impact of medical procedures on sex.¹²²

On the other hand, cases that validate transsexual marriages accept medical recognition of transsexualism and adopt corresponding sex-

¹¹⁸. Courts have generally affirmed the rule that "the validity of a marriage is determined by the law of the place where it is contracted or celebrated; if valid there, it is valid everywhere." Matter of H, 9 I & N Dec. 640, 641 (B.I.A. 1962). A federal sex-determination standard that characterizes valid transsexual marriages as "opposite-sex" would merely shift the inquiry to the state level, not preclude immigration via marriage under DOMA. At the state level, marriages would be voidable—not void—even if not recognized by the intended U.S. state of residence. See Matter of M, 3 I & N Dec. 465 (B.I.A. 1948) (holding that legal incestuous Italian marriage was valid for immigration purposes despite the illegality of incestuous marriages in Illinois). However, if marriages between post-operative transsexuals and individuals of the opposite sex would also subject the couple to criminal prosecution by the intended state of residence, then the marriage is void and not cognizable for immigration purposes. See Matter of T, 8 I & N Dec. 529 (B.I.A. 1960) (holding that lack of criminal sanctions for incestuous marriage in Pennsylvania permitted immigration via marriage of legally married Czechoslovakia uncle and niece despite such incestuous marriages being illegal in Pennsylvania). Therefore, despite the aforementioned refusal of a few states to recognize marriages that involve post-operative transsexual individuals, the relevant inquiry remains at the federal level, specifically whether DOMA precludes post-operative transsexual immigration via marriage.

¹¹⁹. See supra Part II.B.

¹²⁰. Littleton, 9 S.W.3d at 230.


¹²². It is currently not possible to change an individual’s chromosomal makeup, nor is it medically possible for a post-operative male-to-female transsexual to produce ova and bear offspring.
determination standards that take account of sex realignment medical procedures. These standards ascribe importance to a factual inquiry into the degree to which psychological sex has been reconciled with some or all physical sexual attributes.

Since this Article demonstrates that sex-determination standards actually flow from an underlying rejection or acceptance of medical understanding of transsexualism, whether Congress intended post-operative transsexuals to be considered "male" or "female" for purposes of DOMA depends on whether Congress intended to reject or accept transsexualism. Specifically, it depends on whether Congress intended to recognize that transsexuals have a disconnect between psychological sex and some or all physical sexual attributes, and therefore whether Congress intended to attribute importance to medical procedures such as hormone treatment and surgery meant to reconcile that sexual disconnect. Since DOMA and its legislative history are silent on this issue, a search for answers must begin elsewhere.

1. Federal Precedent

Although Congress has not expressly addressed whether it accepts medical evidence that there is a mental component to sex, limited case law exists regarding transsexual inclusion under Title VII of the Civil Rights Act of 1964, and in the context of a dispute over a discharge from the United States Army for alleged homosexual activities.

Title VII cases, however, do not speak to congressional intent regarding sex determination. Instead, they essentially determine that discrimination based on one's status as a transsexual does not fall under Title VII because sex, as intended by Congress, includes only one's

123. See supra Part II.B.
124. See supra Part II.B; see also M.T. v. J.T., 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976) (ascribing importance to the fact that "the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy."); see In re Marriage of Michael J. Kantaras, No. 98-5375CA, 511998DR005375xxxxWS, at 793 (Fla. Cir. Ct. Feb. 2003), at http://www.transgenderlaw.org/cases/kantarasopinion.pdf (noting the importance to the decision that the transsexual at issue had taken several medical, social, and legal steps to harmonize psychological and anatomical sex).
125. See supra Part II.B.
status as male or female, not one's status as a transsexual.126 One Title VII case explicitly left open the question of whether Congress intended “female” to encompass a post-operative male-to-female transsexual: “If [the defendant] had considered Ulane [a post-operative male-to-female transsexual] to be female and had discriminated against her because she was female . . . then the argument might be made that Title VII applied.”127 Similarly, another case states that “transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII.”128 However, the case makes no attempt to determine whether the transsexual plaintiff is male or female, and hence it is unclear whether the reference to sex is to pre- or post-operative sex.

Similarly, in 1980, the Fifth Circuit avoided making a determination of sex in *Von Hoffburg v. Alexander*, a case regarding discharge from the United States Army due to alleged homosexual activities.129 In that case, an army enlistee, Marie Von Hoffburg, sought declaratory and injunctive relief and monetary damages after being discharged because of her marriage to Kristian Von Hoffburg, a female-to-male transsexual.130 The Army Administrative Elimination Board based its decision to discharge the plaintiff on a determination that her female-to-male transsexual husband was a biological female and therefore that plaintiff was engaging in a female/female homosexual relationship.131 The Fifth Circuit, however, refused to classify the status of the Von Hoffburg marriage as either heterosexual or homosexual and instead based its decision on Marie’s failure to exhaust all of her administrative remedies. The corresponding question of Kristian’s sex was left unresolved. In an early footnote on the use of pronouns, however, the court noted, “Although

126. See, e.g., *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding that “[a]lthough Title VII does not prohibit discrimination against transsexuals, ‘transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII.’”); *Sommers v. Budget Marketing*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that discrimination against individuals because they are transsexual does not fall under Title VII); *Holloway v. Arthur Andersen*, 566 F.2d 659, 664 (9th Cir. 1977) (holding that “Holloway has not claimed to have treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII and is certainly not in violation of the doctrines of Due Process and Equal Protection.”).
127. *Ulane*, 742 F.2d at 1087.
128. *Holloway*, 566 F.2d at 664.
129. 615 F.2d 633 (5th Cir. 1980).
130. Id.
131. Id. at 636 n.7.
defendants contend that Kristian Von Hoffburg is a biological female, for purposes of clarity we will use masculine pronouns or the name Von Hoffburg to refer to him. We do not know, factually, whether Kristian Von Hoffburg is a biological female, or a biological male, or both.1

Despite the footnote's indication of a judicial unwillingness to delve into sex-determination standards, its acknowledgment that Kristian may in fact possess both male and female characteristics is an interesting departure from the rigid binary sex classifications present in several cases discussed in Part II.2

2. State Precedent

Although DOMA is silent on the sex-determination standard by which post-operative transsexuals should be judged, and although federal courts have done little to fill in that gap, state precedent may be useful. There is clear evidence of states' views on medical reconciliation of psychological sex with physical sexual attributes in the form of statutes that regulate post-operative transsexual birth certificate changes.3

The majority of U.S. states have adopted statutes that specifically allow post-operative transsexuals to be legally recognized as their post-operative sex.4 In Kentucky, for example, a sworn statement by a licensed physician indicating that "the gender of an individual born in the Commonwealth has been changed by surgical procedure and a certified copy of an order of a court of competent jurisdiction changing that individual's name" will suffice to change a transsexual's legal sex.5 Similarly, in Arizona, a sworn statement from a licensed physician in good standing that he has performed a surgical operation or a chromosomal count indicating a different sex than that listed on the

132. Id. at 635 n.4.
133. See supra Part II.A for a critique of binary sex classification.
134. The earliest such statute dates all the way back to 1968. See Rose, supra note 51, at 299 n.284.
135. See LAMBDA LEGAL DEFENSE & EDUCATION FUND, AMENDING BIRTH CERTIFICATES TO REFLECT YOUR CORRECT SEX: STATE-BY-STATE CHART, at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/169.pdf [hereinafter LAMBDA]. See also In re Marriage of Michael J. Kantaras, No. 98-5375CA, 511998DR005375xxxxWS, at 794 (Fla. Cir. Ct. Feb. 2003), at http://www.transgenderlaw.org/cases/kantarasonopinion.pdf (noting that "[t]he gender or sex of a person at birth as evidenced by a birth certificate may be relevant but is not by law dispositive. There is a presumption of correctness for most purposes, but it is a rebuttable presumption in the face of medical evidence.").
original birth certificate will be sufficient to change the legal sex of a transsexual.\textsuperscript{137}

Only two states, Tennessee and Ohio, prohibit post-operative transsexuals from changing their legal sex to correspond with their pre-existing psychological sex and their medically corrected physical sex.\textsuperscript{138} In Tennessee, the statute says simply that “[t]he sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.”\textsuperscript{139} In Ohio, there is no statute expressly prohibiting recognition of post-operative sex, but there is a lower court decision that interprets Ohio’s birth certificate statute as precluding such recognition.\textsuperscript{140}

State lawmakers have clearly spoken, and although not unanimous, the consensus is that the post-operative sex of transsexuals should be given legal recognition.\textsuperscript{141}

3. International Precedent

a. The United Kingdom

Similar to the American transsexual cases discussed in Part II, there are two competing international approaches to transsexual sex determination.\textsuperscript{142} The first approach was developed in the United Kingdom in the early 1970s.\textsuperscript{143} That approach, articulated in \textit{Corbett v. Corbett},\textsuperscript{144} is

\begin{footnotesize}
\begin{enumerate}
\item[138.] For an argument that all states have a constitutional obligation to recognize amended legal sex in states that permit such amendments, see Shana Brown, \textit{Sex Changes and “Opposite-Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes}, 38 SAN DIEGO L. REV. 1113, 1152-54 (2001).
\item[139.] Tenn. Code Ann. § 68-3-203(d)(2001).
\item[140.] See \textit{In re Ladrach}, 513 N.E.2d 828 (Ohio Prob. 1987) (holding that an alteration of the sex designation on a birth certificate should be prohibited because it would lead to a change in the post-operative transsexual’s legal sex for purposes of marriage). This decision cites Ohio Rev. Code Ann. 3705.20. This section of the code has been updated and is now section 3705.15. Ohio Rev. Code Ann. § 3705.15 (Anderson 2002).
\item[141.] See \textit{LAMBDA}, \textit{supra} note 135.
\item[142.] Part III.A.3 will focus on legal approaches used by the United Kingdom and the European Court of Human of Human Rights. For a summary of other international cases that have addressed transsexual sex determination within the context of marriage, see \textit{supra} note 58.
\item[143.] 2 All E.R. 33, 83 (P. 1970).
\item[144.] \textit{Corbett}, 2 All E.R. 33.
\end{enumerate}
\end{footnotesize}
cited by every transsexual marriage case discussed in this Article, and the majority of cases encountered while researching it. The impact *Corbett* has had on transsexual sex-determination jurisprudence cannot be overstated. That said, as with the line of cases that invalidate transsexual marriage examined in Part II, *Corbett* can readily be distilled to an underlying rejection of transsexualism, and the corresponding adoption of a sex-determination standard that erases medical efforts to address it:

[T]he 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. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.\(^\text{145}\)

The court implicitly acknowledges a distinction between physical sexual attributes and psychological sex.\(^\text{146}\) Once it makes that distinction, it rejects psychological sex, and thus transsexualism itself, as inconsequential.\(^\text{147}\) The court does this by labeling biological sex the respondent’s “true sex.”\(^\text{148}\) After the importance of the respondent’s psychological sex is rejected, the court concludes that surgery, hormone therapy, and other medical procedures merely make the respondent an “accomplished female impersonator”\(^\text{149}\) and form no basis for legal recognition of her post-operative sex. The *Corbett* court ultimately adopts a sex-determination standard similar to the one adopted in *Littleton v. Prange*,\(^\text{150}\) a standard based on chromosomal elements and internal sexual organs.\(^\text{151}\)

145. *Id.* at 47.
146. The court also expressly acknowledges that the respondent is “psychologically . . . a transsexual.” *Id.*
147. The hallmark of transsexualism is a disconnect between psychological sex and some or all physical sexual attributes. See note 51 and accompanying text.
148. *Corbett*, 2 All E.R. at 47.
149. *Corbett*, 2 All E.R. at 47.
151. See supra notes 84–91 and accompanying text.
b. European Court of Human Rights

On July 11, 2002, the European Court of Human Rights unanimously held in *Case of Christine Goodwin v. The United Kingdom* that the United Kingdom’s refusal to recognize post-operative transsexuals as their post-operative sex violated Articles 8 (right to respect for private life) and 12 (right to marry) of the European Convention on Human Rights.\(^{152}\) This decision reflects the modern international approach to sex determination\(^ {153}\) and directly impacts forty-four European Convention countries. These countries have a combined population of almost one billion.\(^ {154}\)

The *Goodwin* opinion is particularly noteworthy for several reasons. First, it approaches transsexual sex determination from a human rights perspective.\(^ {155}\) The focus of the court is not so much on chromosomes and external sexual organs as it is on human rights. This shift in focus makes the opinion much less clinical than the ones previously described in this Article, and more in tune with an intuitive understanding of what is fair and just. The court takes judicial notice, for example, of the “stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of gender.”\(^ {156}\) This refusal to legally recognize transsexuals as their post-operative sex,

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152. 35 Eur. Ct. H.R. 18 (2002). This opinion, though final, has not yet been officially released and may be subject to editorial revisions.

153. Id. at Part II.H.55 (citing a 1998 study which found “an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular . . . out of thirty seven countries analysed only four (including the United Kingdom) did not permit a change to be made to a person’s birth certificate in one form or another to reflect the re-assigned sex of that person.”); Id. at Part II.H.56 (citing a follow-up study submitted on Jan. 17, 2002, that showed a trend in countries outside Europe of giving full legal recognition to sex re-assignment). See also *In re Kevin*, [2001] FamCA 1074 (holding that to follow the reasoning set forth in Corbett would be to take Australia “in a direction that is generally contrary to development in other countries”).


155. *Goodwin*, 35 Eur. Ct. H.R. at Part I.B.6.90 (articulating that the “very essence of the Convention is respect for human dignity and human freedom” and that “[i]n the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustain-

156. Id. at Part I.B.2.77.
the court concludes, results in "[a] conflict between social reality and law . . . which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety." The court is also "struck by the fact" that although the sex-realignment surgery was provided for by the United Kingdom's national health service to medically reconcile physical sexual attributes with psychological sex, it was "not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone." The court's approach clearly emphasizes equity, not formalism.

The second thing worth noting about *Goodwin* is that in a section called "Medical and scientific considerations," the court expressly addresses, and then accepts, the "wide international recognition" that transsexualism has "as a medical condition for which treatment is provided in order to afford relief." Unlike the American marriage cases discussed in Part II, which accept or reject scientific understanding without expressly doing so, this court more or less makes explicit its sex-determination standard is the natural extension of an underlying acceptance of transsexualism:

The United Kingdom national health service, in common with the vast majority of Contract States, acknowledges the existence of the condition [of transsexualism] and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. . . . Given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

157. *Id.*
158. *Id.* at Part I.B.2.78.
159. *Id.* at Part I.B.3.
161. *Id.* at Part I.B.3.81.
In other words, the court acknowledges that transsexualism exists, that its precise causes are unknown, and that despite the lack of medical certainty various procedures are utilized to ameliorate the condition. Legal recognition, the court reasons, logically flows from this medical intervention.

The final thing worth noting about Goodwin is that the court clearly identifies chromosomal elements as the primary biological factors that medical science cannot change.\(^\text{16}\) As discussed in Part II.B.2, courts that invalidate transsexual marriages do so because they reject the underlying disconnect between physical sexual attributes and psychological sex in transsexuals, and therefore adopt sex-determination standards that make invisible medical procedures such as surgery and hormone therapy, procedures that seek to eliminate that disconnect. The Goodwin court identifies that "a transsexual cannot acquire all the biological characteristics of the assigned sex," but notes that "with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element."\(^\text{163}\) Perhaps tacitly acknowledging that other courts have used chromosomal standards as a pretext to undermine medical efforts to address the sexual disconnect in transsexuals, the Goodwin court declares that "[i]t is not apparent to the [c]ourt that the chromosomal element, amongst all others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals."\(^\text{164}\)

The European Court of Human Rights did not create a transsexual sex-determination standard for contract states in Goodwin.\(^\text{165}\) Rather, the court mandated that they give legal recognition to the post-operative,
not the pre-operative, sex of transsexuals. It was left to individual states to implement this mandate by crafting their own standards.

CONCLUSION

The delineation of man from woman, and woman from man, is not clear, precise, or intuitive when transsexuals are involved. A court faced with this delineation in the shadow of DOMA's silence must determine, as a matter of law, what Congress intended "men" and "women" to be.

State court marriage cases provide a place to begin. These cases illustrate two competing approaches to sex determination. One approach, engendered by the acceptance of a disconnect between physical and psychological sex, views legal recognition of the post-operative sex as the logical offspring of medical efforts to address that disconnect. The other approach, brought about by judicial rejection of transsexualism, legally recognizes pre-operative sex. That approach is often characterized by religious rhetoric, binary notions of sex, and tenuous links to legislative deference. Both approaches, however, indicate sex determination can only be realized through an examination of whether

166. See Goodwin 35 Eur. Ct. H.R. at Part III.A.20 (holding that "it is the lack of legal recognition of the gender re-assignment of post-operative transsexuals which lies at the heart of the complaints in this application.").

167. See Goodwin 35 Eur. Ct. H.R. at Part III.A.20. There are many standards by which the post-operative sex of transsexuals can be recognized. The most well-reasoned standard encountered while researching this Article is the standard used by Australia. That standard, worth repeating in its entirety, holds that:

To determine a person's sex for the purpose[s] 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 . . . 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.

Kevin, [2001] FamCA 1074.


169. See supra notes 39–57 and accompanying text.

170. See supra notes 81–83 and accompanying text.
Congress intended to accept, or reject, transsexualism itself. Unfortunately, federal case law does not elucidate that intent. A comparative-law analysis, though, reveals that state legislatures have clearly signaled an intent to recognize transsexuals as their post-operative sex. It also reveals that the unmistakable international trend is to do the same.

At the end of the day, however, a court deciding whether post-operative transsexuals are "men" or "women" under DOMA will only have to ask itself one question: Do transsexuals, in fact, exist? If it accepts medical evidence and testimony that they do, then a sex-determination standard consonant with efforts to reconcile psychological sex with some or all physical sexual attributes should be adopted. Alternatively, if it views transsexualism as some sort of medical trickery, then it should adopt a standard based on a characteristic untouchable by physicians and scientists—chromosomal makeup, ability to produce sperm or bear children, or composition of internal sexual organs. Regardless of the standard adopted, judicial honesty demands that the underlying acceptance or rejection of transsexualism itself be explicit.

171. See supra note 167 and accompanying text.
## Appendix
### Statutes Regulating Birth Certificate Changes after Sex-Realignment Surgery

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>Proof Required</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Ala. Code 22A-19</td>
<td>Certified copy of an order from a court of competent jurisdiction indicating a change of sex by surgical procedure.</td>
</tr>
<tr>
<td>Alaska</td>
<td>Alaska Stat. § 18.50.290-360</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
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<tr>
<td>Arizona</td>
<td>Ariz. Rev. Stat. Ann. § 36-326(a)(4)</td>
<td>Sworn statement from licensed physician in good standing that he has performed a surgical operation or a chromosomal count indicating a different sex than that listed on the original birth certificate. The state registrar reserves the right to require more proof or independent professional evaluation before creating the new birth certificate.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Ark. Code Ann. § 20-18-307(d)</td>
<td>A certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed.</td>
</tr>
<tr>
<td>California</td>
<td>Cal. Health &amp; Safety Code § 103430</td>
<td>The petition for birth certificate change must be accompanied by an affidavit of a physician documenting the sex change.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Colo. Rev. Stat. Ann. 25-2-115(4)</td>
<td>A certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed.</td>
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<td>State</td>
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<tr>
<td>Delaware</td>
<td>Del. Code Ann. Tit. 16 § 3131</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
</tr>
<tr>
<td>D.C.</td>
<td>D.C. Code Ann. § 7-217(d)</td>
<td>&quot;Upon receipt of a certified copy of an order of the Court indicating that the sex of an individual born in the District has changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation.&quot;</td>
</tr>
<tr>
<td>Florida</td>
<td>Fla. Stat. Ch. 29, § 382.016</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery. However, the Florida Attorney General has issued an opinion that amendatory legislation is required in order to permit state registrars to amend birth certificates issued for individuals who have undergone sex reassignment surgery. Op. Atty. Gen., 076-213, Nov. 10, 1976. (Kantaras at 763)</td>
</tr>
<tr>
<td>Georgia</td>
<td>Ga. Code Ann. § 31-10-23(e)</td>
<td>A certified copy of a court order indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Haw. Rev. Stat. § 338-17.7(4)(b)</td>
<td>Affidavit of a physician that the physician has examined the birth registrant and determined that the sex designation on the birth certificate is no longer correct. The director of health may further investigate and require additional information.</td>
</tr>
<tr>
<td>Idaho</td>
<td>Id. APA 16.02.08 § 201.06</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
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<tr>
<td>Illinois</td>
<td>410 Ill. Comp. Stat. Ann. § 535/17</td>
<td>Affidavit of a physician that he has performed an operation on a person and that by reason of the operation, the sex of the person listed on their birth certificate is no longer correct and should be changed. The state official reserves the right to investigate or require further information.</td>
</tr>
<tr>
<td>Indiana</td>
<td>Ind. Code § 16-37-2-10</td>
<td>Mentions that changes based on DNA evidence are admissible for paternity, but does not address sex-realignment surgery.</td>
</tr>
<tr>
<td>Iowa</td>
<td>Iowa Code Ann. § 144.23.3</td>
<td>Notarized affidavit by a licensed physician and surgeon, or osteopathic physician and surgeon stating that by reason of surgery or other treatment, the sex listed on the birth certificate is no longer correct. Further investigation may be required.</td>
</tr>
<tr>
<td>Kansas</td>
<td>Kan. Admin. Regs. 28-17-20 (b)(1)(A)(i)</td>
<td>Changes are available through an administrative process. The items recording the registrant's sex may be amended if the amendment is substantiated with the applicant's affidavit that the sex was incorrectly recorded or with a medical certificate substantiating that a physiological or anatomical change occurred.</td>
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<tr>
<td>Kentucky</td>
<td>Ky. Rev. Stat. Ann. § 213.121(5)</td>
<td>A sworn statement by a licensed physician indicating that the gender of an individual born in the Commonwealth has been changed by surgical procedure and a certified copy of an order of a court of competent jurisdiction changing that individual's name.</td>
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<td>Louisiana</td>
<td>La. Rev. Stat. Ann. § 40:62</td>
<td>Must petition for birth certificate change in court of competent jurisdiction. The court may require any proof that it &quot;deems necessary to be convinced that the petitioner was properly diagnosed as a transsexual or pseudo-hermaphrodite, that sex reassignment or corrective surgery has been properly performed upon the petitioner . . .&quot; making the person's current sex inconsistent with that listed on their birth certificate.</td>
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<tr>
<td>Maine</td>
<td>Md. Code Ann., Health-General § 4-214 (b)(5)</td>
<td>A certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual's name has been changed.</td>
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<tr>
<td>Massachusetts</td>
<td>Mass. Gen. Laws Ann. Ch. 46 § 13 (e)</td>
<td>An affidavit must be given to the town clerk, executed by the person to whom the record relates, and accompanied by a physician's notarized statement that the person named on the birth record has completed sex reassignment surgery, so-called, and is not of the sex recorded on said record. Said affidavit shall also be accompanied by a certified copy of the legal change of name aforementioned above.</td>
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<tr>
<td>Michigan</td>
<td>Mich. Comp. Laws § 333.2831 (c)</td>
<td>Affidavit by a physician certifying that sex realignment has been performed.</td>
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<tr>
<td>Minnesota</td>
<td>Minn. Stat. § 144.218 (4)</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery. Mentions that &quot;vital statistics&quot; may be changed.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Miss. Code Ann. § 41-57-21</td>
<td>State registrar may change the sex listed on the birth certificate at their discretion based on two affidavits from reputable persons having knowledge of the facts of the case.</td>
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<tr>
<td>Missouri</td>
<td>Mo. Ann. Stat. § 193.215 (9)</td>
<td>A certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed.</td>
</tr>
<tr>
<td>Montana</td>
<td>Mont. Code Ann. § 50-15-204</td>
<td>Department has discretion over what type of proof will be required for amending vital statistics.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Neb. Rev. Stat. § 71-604.01</td>
<td>A notarized affidavit from the physician that performed sex realignment surgery on an individual born in this state and a certified copy of an order of a court of competent jurisdiction changing the name of such person.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. Stat. Ann. 26:8-40.12 (a)</td>
<td>The State registrar shall issue the amended certificate of birth upon receipt of (1) a certified copy of an order from a court of competent jurisdiction which indicates the name of the person has been changed and (2) a medical certificate from the person's licensed physician which indicates the sex of the person has been changed by surgical procedure.</td>
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<td>New Mexico</td>
<td>N.M. Stat. Ann. § 24-14-25 (D)</td>
<td>A duly notarized statement from the person in charge of an institution or from the attending physician indicating that the sex of an individual born in this state has been changed by surgical procedure, together with a certified copy of an order changing the name of the person, the certificate of birth of the individual shall be amended as prescribed by regulation.</td>
</tr>
<tr>
<td>New York</td>
<td></td>
<td>A notarized statement by the physician who performed the surgery, or from a licensed physician who examined the individual and can certify that the person has undergone sex-realignment surgery.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. Cent. Code § 23-02.1-25</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
</tr>
<tr>
<td>Oregon</td>
<td>Or. Rev. Stat. § 432.235(4)</td>
<td>A certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>R.I. Gen. Laws § 23-3-21</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
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<tr>
<td>South Carolina</td>
<td>S.C. Code Ann. § 44-63-150</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>S.D. Codified Laws § 35-25-51</td>
<td>Authorizes birth certificate amendments but does not specifically address sex-realignment surgery.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Tenn. Code Ann. § 68-3-203 (d)</td>
<td>&quot;The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.&quot;</td>
</tr>
<tr>
<td>Utah</td>
<td>Utah Code Ann. § 26-2-11</td>
<td>Order of a Utah district court or a court of competent jurisdiction of another state or a province of Canada recognizing the sex change.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Va. Code Ann. § 32.1-269 (E)</td>
<td>A certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure.</td>
</tr>
<tr>
<td>Washington</td>
<td></td>
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</tr>
<tr>
<td>Wisconsin</td>
<td>Wis. Stat. Ann. § 69.15 (1)(a)(b)</td>
<td>A court or administrative order issued in this state, in another state or in Canada or under the valid order of a court of any federally recognized Indian tribe, band or nation if the order provides for an name change with sex change.</td>
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</tbody>
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