

January 2002

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Recommended Citation

Jennifer Marie Albright, Comment, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. REV. 593 (2002)
<https://scholar.smu.edu/smulr/vol55/iss2/7>

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GENDER ASSESSMENT: A LEGAL APPROACH TO TRANSSEXUALITY

Jennifer Marie Albright*

I. INTRODUCTION

IMAGINE living your life every day within a room from which you could not escape. You try to find happiness within the four walls of that room, but each day of your life you grow more miserable than the preceding day. Finally, after a long, thorough search, you eventually find a door, but it is locked. You call out for help, hoping someone with a key will unlock the door, free you from the boundaries of the tiny room, and allow you to attain peace, a state of mind you have never yet been able to achieve. Such is the experience of a transsexual. Since courts now encounter a greater number of transsexual litigants, judges must utilize an approach to resolving the legal disputes of transsexuals that values the struggles and affirms the unique identities of transsexuals.

II. HISTORICAL DEVELOPMENT OF TRANSSEXUALITY AS A LEGAL ISSUE

Transsexualism, the dissatisfaction an individual feels with his/her gender coupled with the desire to become the opposite gender, is not a phenomenon unique to the past few decades, despite the attention it has received from medical researchers, social scientists, journalists, and screenwriters during this time.¹ Evidence of the transsexual phenomenon exists in myths, historical accounts, and cultural anthropology records in many different societies.² These societies have formulated their own ways of reconciling the fact that certain segments of the population are born with characteristics both typically associated with males and with

* A.B., Duke University, 1999; J.D., Southern Methodist University, Dedman School of Law, 2002. I would like to thank Professor Darren Hutchinson and Professor Susan Scafidi, at Southern Methodist University, Dedman School of Law for their comments and suggestions, my fiancé, Steven Huege, M.D., at The University of Texas Southwestern Medical Center, for his support and guidance, and Dianna Stump for her inspiration and friendship. I would also like to thank Professor Kathleen Joyce at the Department of Religion at Duke University for giving me the opportunity to begin this research.

1. HARRY BENJAMIN, M.D., *THE TRANSSEXUAL PHENOMENON* (1966), available at <http://www.symposion.com/ijt/benjamin>.

2. Anne Vitale, *History and Resolution of Sex/Gender Integration Needs As Experienced by Four Male-To-Female Transsexuals* (1982) (unpublished Doctoral Dissertation, Professional School for Psychological Studies, San Diego), at <http://www.avitale.com/MenuPage.html>.

those usually considered female.³ The United States has always adhered to a system of sex binaries as a way of classifying individuals. Sex classification occurs at birth: birth attendants assign the sexes of male or female to infants.⁴ This classification bears legal implications, as the determination is documented in birth certificates.⁵ As children grow and mature, they are expected to conform to the gender roles that correspond to their assigned sexual classifications: men should exhibit characteristics associated with the masculine gender and women should exhibit characteristics associated with the feminine gender.

For most people, including some intersexuals, this system does not pose problems.⁶ For transsexuals, however, this binary system of sex/gender categorization often impedes their ability to lead normal lives. It withholds from them the rights and protections that the law affords to those individuals who were "properly assigned" at birth. This paper attempts to construct a functional approach that courts may use when the resolution of a legal dispute necessitates a determination of a transsexual litigant's gender. Although this paper addresses issues relevant to all members of the transgender community as well as to gays, lesbians, and bisexuals, its primary purpose is to develop an approach that works to effectuate the rights of transsexuals when they present their disputes before the courts in this country.

Transsexuals form one subset of the group of individuals who identify themselves as transgendered ("trans"). Trans individuals choose to express their genders in ways incongruous with the sexes to which they were assigned at birth.⁷ Transsexuals desire to adopt the opposite gender role and to bring their biological sex in conformity with the adopted gender role.⁸ Cross-dressers, drag queens, and hermaphrodites are trans individuals who may defy gender norms but, unlike transsexuals, do not manifest an extreme dissatisfaction with their bodies' sexual characteristics.⁹ In an effort to join political forces with other socially marginalized groups, some trans advocates now use the term "trans" to refer to all types of individuals whose lifestyles and/or behaviors transgress the established boundaries of gender categorization, including feminine men and mascu-

3. Julie A. Greenberg, Symposium: *Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 276-78 (1999).

4. *Id.* at 271.

5. *Id.*

6. HAROLD I. KAPLAN, M.D. & BENJAMIN J. SADOCK, M.D., SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 714 (Robert Cancro, M.D., Med. D.Sc. et. al. eds., 8th ed. 1998). "Intersex conditions include a variety of syndromes in which people have gross anatomical or physiological aspects of the opposite sex." *Id.*

7. JASON CROMWELL, TRANSMEN & FTMS: IDENTITIES, BODIES, GENDERS & SEXUALITIES 23 (1999).

8. *Id.* at 20-21.

9. RIKI ANNE WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER 15-16 (1997) (Wilchins uses the term "trans-identified people" to emphasize the processes of self-identification and social categorization.).

line women of the gay, lesbian, and heterosexual communities.¹⁰

Social and educational interest in transsexuality has peaked at different times in different countries around the world. In the United States, science, medicine, and literature have pondered transgender issues with fervor since the 1950s.¹¹ Legal development regarding these issues, however, seems to have progressed slowly until just this past decade when trans individuals, seeking resolution of their disputes in court, have received much attention from legal scholars.¹² Transsexuality in particular presents a challenge for the courts. Due to the increasing number of sex reassignment surgeries performed within the past thirty-five years, courts are encountering transsexual litigants more frequently. They find themselves grappling with gender determination since “transsexual issues have or will arise in situations involving penal institutions, schools, sports, employment, and every other situation in which perceived gender is important.”¹³ As cultural awareness also continues to increase, the most recent judicial opinions have aroused significant public attention.

III. TRANS ISSUES AS PROBLEMATIC FOR THE COURTS

Social institutions operate under the principle that gender is one of the most important elements that defines one's identity.¹⁴ Courts, however, need to understand the arguments challenging the well-established principle that an individual can be classified either as male or female. Specifically, biological evidence suggests that the principle of sex binaries, relied upon by society for so many years, may be unfounded.¹⁵ Because society still relies upon this system and because legal acceptance of alternative forms of gender expression does not yet exist, the best solution to the issue of gender determination of transsexuals is an approach that respects their newly constructed gender identities within the framework of the sex binary. This paper considers the approaches of sex determination—sex classification of individuals based upon the sex assigned at birth—and gender self-identification—gender classification based upon how the individual defines his or her own gender—and rejects them both as problematic and ineffective for judicial determinations of the genders of transsexual litigants. Instead, this paper advocates a compromise called “gender assessment” that views gender as a continuum of expression, with male and female at ends of the spectrum. Sexual and social charac-

10. *Id.* at 16; see also LESLIE FEINBERG, *TRANS LIBERATION: BEYOND PINK OR BLUE* 10, 47 (1998) (“Trans people are still literally social outlaws.”).

11. See BENJAMIN, *supra* note 1.

12. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied). The court had less than a handful of applicable cases from before 1990 to consider when deciding the issue of whether the marriage between a male and a transsexual female is valid under state law. Both the increase in the number of trans cases and the growth of the trans liberation movement have sparked new legal research in this area. See Greenberg, *supra* note 3, at 292.

13. *In re Estate of Gardiner*, 22 P.3d 1086, 1106 (Kan. Ct. App. 2001).

14. KAPLAN & SADOCK, *supra* note 6, at 711.

15. Greenberg, *supra* note 3, at 292.

teristics function as indicators along the spectrum, and assessment of these indicators is always made in favor of the gender role the transsexual has worked to adopt. Gender self-identification is advocated by the trans liberation movement. Members of the movement challenge objective definitions of sex/gender championed by conservative groups by calling for societal acceptance of nontraditional forms of gender expressions. The conservative groups endorse a sex determination approach because it precludes legal recognition of nontraditional forms of gender expression. Evaluation of the proposals of the trans liberation movement as well as arguments from its opposition will logically lead courts, for now, to the adoption of a middle-ground approach for determining the genders of transsexual litigants that respects the binary sex/gender model yet fosters more expansive definitions of what it means to be male and female.

Transsexuals pose a unique problem for the courts. When transsexuals appeal to the courts seeking resolution of their disputes, often the resolution of their disputes depends upon their classification as either male or female. Since transsexuals defy society's unfounded assumption that individuals must adopt the gender role that corresponds to their assigned sex, a new, flexible approach for dealing with this unique group of people is necessary. Objective approaches to the problem prove unworkable not only for transsexuals but for other trans individuals such as intersex or masculine females and feminine males. The concept that one's phenotypic characteristics should conform to one's genetic structure does not hold true for individuals who have made every effort to bring their sexual characteristics in conformity with their adopted gender role. Courts following a sex determination approach hold that a male to female transsexual is legally a male because of her genetic composition, despite the fact that she may possess a dozen other attributes that society would normally define as feminine.¹⁶ Subjective approaches, advocating sex/gender self-identification, create their own problems as well. If unbridled, subjective approaches open the door to chaos in the legal arenas of sex discrimination, marital rights, and other areas of law that mandate classification of litigants as male or female. Manipulation of the law by individuals who are not trans but who have decided to take advantage of the principles of sex/gender self-identification with the purpose of creating a new identity solely for the purpose of evading legal responsibilities imposed upon them by law or seeking legal protection that does not rightly extend to them is a risk.

IV. MEDICAL CLASSIFICATION OF TRANSSEXUALS

The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV") presents transsexuals as suffering from gender

16. The pronouns used to refer to transsexuals in this article consistently reflect the transsexuals' chosen genders.

identity disorder ("GID").¹⁷ "The essential feature of [GID] is a person's persistent and intense distress about his or her assigned sex and desire to be, or an insistence that he or she is of, the other sex."¹⁸ The International Classification of Diseases ("ICD-10") articulates criteria for the identification of transsexualism, defining the disease as one specific type of GID. "Transsexualism, defined as a wish to be a member of the opposite sex, can be diagnosed when the transsexual identity has persisted for at least 2 years, is not the symptom of another mental disorder, and is not associated with intersex, genetic, or sex chromosome abnormality."¹⁹

In 1979, the Harry Benjamin International Gender Dysphoria Association established standards of care for the treatment of GID, with the purpose of articulating the "international organization's professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders."²⁰ The Association established guidelines for triadic therapy, one possible treatment for GID.²¹ Triadic therapy consists of real life experience living as the new gender, hormone therapy, and sexual reassignment/gender confirming surgeries such as genital reconstruction and/or breast surgery.²² Since achieving each of these steps is not the advisable procedure for every transsexual, other methods of treatment are available.²³ Triadic therapy affords the best opportunity for transsexuals to bring their sexual characteristics in conformity with the gender role they adopt.²⁴ To participate in triadic therapy, transsexuals must meet eligibility and readiness requirements which involve the completion of several steps, including a comprehensive evaluation by a qualified mental health professional.²⁵

V. TRADITIONAL SEX DETERMINATION OF TRANSSEXUALS

A. *LITTLETON v. PRANGE*

In the 1999 case of *Littleton v. Prange*, the San Antonio Court of Appeals of Texas held that a post-operative female transsexual is biologically

17. KAPLAN & SADOCK, *supra* note 6, at 712. "DSM-IV . . . is the official psychiatric coding system used in the United States." *Id.* at 287. Widely used by psychiatrists and other health care professionals, it provides a comprehensive list of mental disorders and their diagnostic criteria. *Id.*

18. *Id.* at 712.

19. *Id.* at 716. "The ICD is the official medical and psychiatric nosology used throughout most of the world." *Id.* at 287.

20. The Harry Benjamin International Gender Dysphoria Association, Standards of Care for Gender Identity Disorders, at <http://www.hbgda.org/soc5.html>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. The Harry Benjamin International Gender Dysphoria Association, Standards of Care for Gender Identity Disorders, at <http://www.hbgda.org/soc5.html> (which lists in detail the requirements for the treatment of gender disorders in adults, adolescents, and children).

a male.²⁶ Although the court considered various factors for determining the sex of the appellant, Christie Littleton, it essentially concluded that her chromosomal structure dictates that she is male.²⁷ Factors such as Christie's sexual reassignment surgery, hormone treatment plan, and psychological state of mind proved inconsequential to the court's decision.²⁸ The court erred in holding that Christie is a man as a matter of law. Judge Hardberger selected a narrow approach to the issue when the issue demanded a workable analysis. He chose to adhere to the same inflexible, objective sex determination analysis utilized by other jurisdictions when he should have utilized the more functional approach of gender assessment.

Christie was born in San Antonio, Texas in 1952 as Lee Cavazos, Jr., a biological male.²⁹ She developed normal male genitalia, including penis, scrotum, and testicles. In her early childhood years, however, Christie began experiencing feelings of gender dysphoria.³⁰ These feelings of wanting to become a female compelled her to seek assistance in obtaining sexual reassignment surgery from a program at the University of Texas Health Science Center.³¹ After completing the necessary psychological treatments and a hormone therapy plan, Christie legally changed her name to Christie Lee Cavazos in 1977.³² By 1980, Christie had successfully undergone sexual reassignment surgery.³³ In 1989, she married a man named Jonathon Mark Littleton in Kentucky.³⁴

When Jonathon died in 1996, Christie sued Jonathon's physician for medical malpractice under the Texas Wrongful Death and Survival Statute ("TWDSS") in her capacity as Jonathon's surviving spouse.³⁵ Dr. Prange moved for summary judgment, arguing that Christie lacked standing to bring her claim because she is actually a man and, as such, legally cannot be the wife of Jonathon.³⁶ Christie responded to the motion for summary judgment.³⁷ After considering the summary judgment evidence, the trial court granted summary judgment.³⁸ Christie appealed.³⁹

Christie's appeal of the summary judgment motion consisted of four parts.⁴⁰ First, Dr. Prange did not sustain his burden of establishing as a matter of law that Christie and Jonathon's marriage was a same-sex mar-

26. Littleton v. Prange, 9 S.W.3d 223 (Tex. App.—San Antonio 1999, pet. denied).

27. *Id.*

28. *Id.* at 230.

29. *Id.* at 224.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 225.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 229.

riage.⁴¹ Second, Dr. Prange did not sustain his burden of establishing as a matter of law that when Christie married Jonathon she was a male and that the sex determination of a post-operative transsexual for purposes of marriage does not occur at birth.⁴² Third, Dr. Prange did not sustain his burden of establishing as a matter of law that Christie's marriage was void.⁴³ Fourth, since Christie produced summary judgment evidence raising a genuine issue of material fact, the court should reverse the summary judgment.⁴⁴

Because Christie's claim against the doctor was brought under the TWDSS, the court needed to determine whether Jonathon's and Christie's marriage created a valid union under Texas law.⁴⁵ Although Christie and Jonathon had participated in a marriage ceremony in Kentucky, if the court concluded that Christie was a male, Texas law would not recognize the marriage.⁴⁶ She, therefore, would not meet the spousal status requirement of the TWDSS and would lack standing to bring her claim.⁴⁷

The issue of whether a post-operative female transsexual is a man or a woman was one of first impression in Texas.⁴⁸ Because the Texas legislature had established no guidelines for determining how transsexuals should be recognized under the TWDSS, the court concluded that it could not permit the jury to decide the question of Christie's sex.⁴⁹ Treating the issue as a pure question of law, the court analyzed what it considered to be the appropriate factors for reaching a conclusion.⁵⁰

B. THE FAILURE OF SEX CLASSIFICATION ANALYSIS

Littleton relied upon a sex determination analysis when approaching the issue of whether Christie and Jonathon had a legal union in Texas. A determination of Christie's sex does not resolve the issue of the case; if anything, it only muddies the waters. Instead, the court needed to focus upon Christie's adopted gender role. Clinically, the term "sex" is defined as "attributes that collectively, and usually harmoniously, characterize biological maleness and femaleness [including] sex-determining genes, the sex chromosomes, the X-Y sex-determining antigen, the gonads, the sex hormones, the internal reproductive structures, and the external genitalia."⁵¹ Medical scholars understand gender to encompass "behaviors, attitudes, and personality traits that a society, in a given culture and

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 225.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 230.

50. *Id.* at 230-31.

51. KENNETH J. ZUCKER, PH.D. & SUSAN J. BRADLEY, M.D., *GENDER IDENTITY DISORDER AND PSYCHOSEXUAL PROBLEMS IN CHILDREN AND ADOLESCENTS* 2 (1995).

historical period, designates as masculine or feminine.”⁵² Although the terms sex and gender are sometimes used interchangeably in non-medical contexts, the difference in meaning between the words might have led the court to reach a more favorable outcome for Christie. Typically, “judges either accept the claims in a manner consistent with traditional thinking about gender (more rarely) or reject transsexual claims altogether (more often).”⁵³

After noting Christie’s male XY chromosomes, her physician-constructed female features, and her lack of female reproductive organs, Judge Hardberger concluded that since Christie was genetically and anatomically a male at birth, she could do nothing that would change her sex classification.⁵⁴ This statement ignores the reality of the small but notable group of individuals who are born with genetic abnormalities or who experience non-normative sexual development. Examination of how the medical profession deals with these anomalies promotes the conclusion that “arbitrary” best describes the sex of these select individuals. Consider the case of an individual diagnosed with testicular feminisation. Despite being born with male chromosomes, she has developed sexually as a female.⁵⁵ She possesses the anatomy, hormones, physical appearance, and, most importantly, the social characteristics of a female.⁵⁶ From a medical perspective, “telling [her] that she is fundamentally male but with abnormal sexual development . . . does nothing to help: it simply destroys a most fundamental part of a person’s identity—gender The explanation offered should begin from the understanding that [she] is female, and it should build on that assumption.”⁵⁷ This example suggests that sex is not an immutable characteristic for certain people.

Consider also the case of an infant born with physical intersex characteristics: mixed female and male sexual features. Sometimes an infant is born with genitalia so ambiguous that the sex to which the infant should be assigned is not evident; assignment in these cases involves a thoughtful discussion between the physician and the parents as to which sex would best serve the interests of the child. Established guidelines aid the physicians and parents who jointly decide to which sex they will assign the infant.⁵⁸ The first guideline suggests that the chosen sex should be the one that carries the best prognosis for good reproductive function, promising sexual function, normal-looking external genitalia and physical ap-

52. *Id.* at 3.

53. Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 331 (1999).

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

55. James A. O. Ahlquist, *Phenotypically, Anatomically, Legally, and Socially Female*, 308 THE BRITISH MEDICAL JOURNAL 1041 (1994).

56. *Id.*

57. *Id.*

58. Susan J. Bradley, M.D., et al., *Experiment of Nurture: Ablatio Penis at 2 Months, Sex Reassignment at 7 Months, and a Psychosexual Follow-up in Young Adulthood*, 102(1) PEDIATRICS 132-33 (1998).

pearance, and a stable gender identity.⁵⁹ This decision-making process of the parents and the physician of the infant clearly negates Judge Hardberger's assertion that "some things we cannot will into being. They just are."⁶⁰ Persons born with 47 (XXY) or 45 (X) chromosomes instead of the normal 46 (XX) or 46 (XY) structure, the woman devoid of breasts and a uterus after undergoing a double mastectomy and hysterectomy, and the male weightlifter who has experienced feminization effects after having taken steroids his entire adult life present problems for Judge Hardberger's sex determination approach. Interpreted literally, his analysis in *Littleton* suggests that the courts would require guidelines from the legislature in order to determine how to adjudicate the claims of these individuals when the applicable law necessitates classification based on sex. In reality the courts classify these individuals not based upon sex, but on gender—specifically, the gender roles that the individuals have adopted—using, as markers of gender, certain physical characteristics the individuals exhibit to the world. Thus, gender assessment for transsexuals requires no departure from courts' current analysis in these unique cases.

VI. STATUTORY CONSIDERATIONS

A. PRESERVING LEGISLATIVE INTENT

Classification based on gender assessment proves more accurate than classification based upon sex in reaching the results intended by the legislature. Because sex is a compilation of many anatomical, physiological, and genetic characteristics, it would be difficult for courts to arrive at confident conclusions were they to attempt to determine an individual's sex. Attempts could be made based on a balancing of the sex characteristics, but this analysis would yield unintended and illogical consequences. As in Christie's case, a balancing of her sex characteristics produced a legal determination that contradicted her established gender expression. Assessment of the sex characteristics in favor of the gender role the transsexual litigant has chosen to adopt eliminates this problem. Furthermore, it lends legal credibility to the involved medical processes a transsexual undergoes to bring his or her sex in conformity with his or her chosen gender role.

In addition to avoiding the social contradictions that Judge Hardberger's sex determination approach creates, an analysis based upon gender assessment provides a resolution to the issue in *Littleton* that furthers the legislative intent of the Texas statute regulating the granting of marriage licenses. The statute reads, "a license may not be issued for the marriage of persons of the same sex."⁶¹ It exemplifies the common practice of interchanging the words "sex" and "gender," for undoubtedly the legislators intended to prohibit marriage between individuals who hold

59. *Id.*

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

61. TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

themselves out to the world as the same gender. Reasoning otherwise leads to the conclusion that spouses with genetic or developmental abnormalities may have problems if a court were to rule upon the validity of their marriages. Thus, the statute should be construed in such a manner as to effectuate its purpose, rather than in a way that creates unintended and undesirable results.

One can infer that since the Texas Legislature amended this statute a year after the Defense of Marriage Act ("DOMA") was passed, the intent aligns with that of DOMA. The federal statute, however, incorporates the same invalid assumptions about sex that form the basis of *Littleton*:

We are each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point. Our engendered existence, as men and women offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting.⁶²

The legislators intended through DOMA and presumably through the Texas statute, "to defend the institution of traditional heterosexual marriage."⁶³ They failed to acknowledge, however, that heterosexual unions begin with an attraction for the opposite gender, not necessarily the opposite sex. That is, all individuals, heterosexuals and homosexuals, select their spouses on the basis of gender role, not on the basis of genetic makeup. The law implicitly relies upon this practice, given that it does not require genetic karyotyping of engaged couples. The best reading of the Texas statute is one that construes the term "sex" as referring to gender since the meaning of sex endorses arbitrariness whereas the meaning of gender promotes results intended by the Texas Legislature.

The intent of the Texas marital licensing statute is really to prohibit marriages between individuals of the same gender, regardless of whether both spouses happen to possess the same chromosomal structures or even maintain similar sexual characteristics. Legislators contend, "society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing."⁶⁴ Nonetheless, they choose to recognize as valid heterosexual unions in which one or both spouses are sterile.⁶⁵ Clearly, the inability of the transsexual to procreate with his/her spouse poses no unresolved problem. Judge Hardberger's approach to Christie Littleton's situation produced a legal precedent contrary to the intent of the Texas marital licensing statute. A decision based upon gender assessment would have eliminated this contrary result.

62. See H.R. REP. NO. 104-664, at 13 (1996), *microformed on* CIS No. 96-H523-23 (Cong. Info. Serv.) (quoting Prepared Statement of Hadley Arkes, Ney Professor of Jurisprudence and America Institutions, Amherst College, at 11-12, Subcommittee Hearing).

63. *Id.* at 2.

64. *Id.* at 13.

65. *Id.* at 14.

B. AVOIDANCE OF UNFORESEEN CONSEQUENCES

In Texas on September 6, 2000, Bexar County Clerk Gerry Rickoff issued Jessica Wicks and Robin Manhart a marriage license, and the couple wed on September 16.⁶⁶ Manhart is a biological female and Wicks is a male to female transsexual, like Christie Littleton.⁶⁷ According to *Littleton*, Wicks is biologically a man; thus, her marriage to Manhart does not violate the Texas marital licensing statute.⁶⁸ Based on *Littleton*, Rickoff concluded that if a woman has an "M" on her original birth certificate, she can marry another woman who has an "F."⁶⁹ Despite the information their birth certificates provide, both Wicks and Manhart hold themselves out to the world as being female. The union flaunts the appearance and embodies all of the same qualities as that of a homosexual union even though Wicks has an XY chromosome structure. Their valid union promotes the government's interest in heterosexual unions only in form. In reality, it produces the opposite effect. After Wicks and Manhart were issued a marriage license, the couple's attorney publicly invited "any female-to-male transsexual in a gay relationship as well as any male-to-female transsexual in a lesbian relationship to take a week's vacation, fly in [to the 4th Court's jurisdiction], wait the 72 hours required and get married."⁷⁰

The attorney's statement paints an accurate picture of the unintended consequences resulting from the sex determination analysis used in *Littleton*. Gender assessment would have eradicated results such as these that prove contradictory to what the Texas Legislature desired. Clearly, when the Texas Legislature drafted its marriage statute, it aimed to eliminate the possibility of two individuals of the same gender joining together in marriage. The inference that the focus was upon gender differences proves logical since the legislature chose to make no special exceptions for individuals with genetic or physical abnormalities. The likely conclusion from reading the statute is that as long as two people who desire to marry look and act to the world like people of the opposite gender, Texas will permit a union between them. Courts following a gender assessment approach will avoid results contrary to the statute because their determinations will be more accurate. They will classify transsexuals based upon the observable gender expression. Courts will base their determinations upon how individuals have chosen to hold themselves out to the world.

Because gender assessment yields outcomes congruent with the intent of the Texas marital licensing statute, the approach does not assure every transsexual litigant a victory in the courtroom. If relying upon gender

66. *Ruling Lets Transsexual Marry Another Woman*, N.Y. TIMES, Sept. 18, 2000 (late edition), at A18.

67. *Id.*

68. See Polly Ross Hughes, *Lesbians' Plans to Wed Look Legal; Bexar County Ruling Could Pave Way for Trip Down Aisle*, THE HOUSTON CHRONICLE, Aug. 31, 2000, A1.

69. *Id.*

70. Adolfo Pesquera, *Lesbian Couple Get License to Wed; Transsexual Ruling Clears the Way*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2000, at 1B.

assessment results in a finding that a transsexual lives as a partner in a same-sex union, the courts cannot protect the transsexual from the necessary conclusion that the marriage is invalid. For instance, had *Littleton* utilized a gender assessment approach, Wicks and Manhart would never have received a marriage license in Texas. Even when courts begin to accept that gender is a mutable characteristic, difficult situations continue to arise.⁷¹ For instance, a spouse who underwent sexual reassignment surgery during the course of a heterosexual marriage could attempt to bring a wrongful death action for the other spouse's death; however, because sexual reassignment surgery in this case created a same sex union, without future legislative exceptions for transsexuals, the litigant would lack standing. For now, gender assessment would permit certain transsexuals like Christie to make legal claims relating to marriage without asking courts to formulate judicial exceptions to applicable statutes.

VII. GENDER SELF-IDENTIFICATION

A. TRANS LIBERATION

Gender self-identification is another approach to determining the rights of transsexuals that the courts must consider. Usage of the term varies, but this comment defines gender self-identification as one's ability to shape his or her gender independent of societal expectations that only two gender roles exist. The most audible advocates of gender self-identification are activists of trans liberation. A movement aimed at rallying support for trans people, trans liberation is founded upon the belief that society should not categorize individuals as male or female but rather should allow individuals the opportunity to adopt more complex forms of gender expressions.

Most trans individuals are not classified as mentally ill, unlike transsexuals. "Some [clinicians] employ [the term transgendered] to refer to those with unusual gender identities in a value free manner—that is, without a connotation of psychopathology."⁷² A majority of trans individuals feel little or no dissatisfaction with the sexual characteristics with which they were born; however, they find undesirable the gender expression that society expects of them simply because of the sex characteristics they possess.

Members of the trans liberation movement advocate gender self-identification, but they remain highly critical of a gender assessment approach. Gender assessment reinforces the notion that only two possible gender expressions exist. Trans people want society to offer them options other

71. Keller, *supra* note 53, at 383 ("If judges were to adopt a position of elastic tenability, whether across the board, or at opportune moments, the results would not produce coherence where earlier there were key contradictions; the incoherence would simply be of a different kind.").

72. The Harry Benjamin International Gender Dysphoria Association, Standards of Care for Gender Identity Disorders, at <http://www.hbgda.org/soc5.html>.

than categorization as male or female.⁷³ They struggle with normal everyday events that force them to decide between two poles of what medical research now calls a gender continuum.⁷⁴ For instance, a person with a female body who has adopted masculine gender characteristics and therefore presents herself to the world as a male makes an agonizing choice when deciding which public restroom to choose.⁷⁵ Either choice condemns the person in one way or another. When applying for passports or driver's licenses, trans people must choose between checking the box that the law dictates they must check or the alternative box, which may better conform to their gender expressions.⁷⁶ Essentially they chose between commission of a crime or personal satisfaction. Many despise both choices and advocate for an alternative box. Leslie Feinberg, a leader of the Trans Liberation movement, writes:

Personally, I would . . . benefit from expanding concepts and language of gender possibilities . . . I was born female, and my gender expression is masculine. For that reason, my birth sex and my gender expression appear to be at odds. I believe this is a social contradiction that can only exist in a society that mandates—with coercive force—that gender expression must conform to birth biology.⁷⁷

Because of her male gender expression, Feinberg has encountered discrimination no less compelling than that faced by members of minority races within this country. Police have arrested her for wearing men's clothing in public, mental health professionals have refused to treat her, and strangers have attacked her for looking and acting like a man.⁷⁸ Now, as an activist in the movement, Feinberg works "to put a halt to 'legal' and extralegal violence against trans people."⁷⁹

Trans people hope for the dissolution of the sex/gender binary system. They challenge society to broaden the possibilities for gender expression. Where the binary system still remains, they call for recognition that categorization of an individual as male or female should not matter. Comparing gender classification to racial classification, Feinberg foresees the day when checking a male or female box is no longer a requirement for official documents and such. She writes: "[A]uthorities . . . say such rules cannot be changed. But when I was a kid, I was required to put down my race on documents. That was mandatory—until the Civil Rights and

73. FEINBERG, *supra* note 10, at 5 ("[Trans people's] lives are proof that sex and gender are much more complex than a delivery room doctor's glance at genitals can determine, more variegated than pink or blue birth caps. We are oppressed for not fitting those narrow social norms. We are fighting back.").

74. See Anne Vitale, *A Brief Description of the Problem* (1997), at <http://www.avitale.com/MenuPage.html>.

75. FEINBERG, *supra* note 10, at 19.

76. *Id.* at 23. See also Greenberg, *supra* note 3, at 292 ("Although some jurisdictions allow individuals to amend their official documents to reflect the person's self-identified sex, intersexuals and transsexuals are typically legally categorized by biological criteria that often do not comport with their self-identified sex.").

77. FEINBERG, *supra* note 10, at 29.

78. *Id.* at 11.

79. *Id.*

Black liberation movements challenged the racist underpinnings. Then the authorities were forced to remove the 'race' box."⁸⁰ As Feinberg travels throughout the country garnering more support for the trans liberation movement, she battles against the conservative groups of this country that are unwilling to find a place for gender self-identification within the legal system.

B. THE RELIGIOUS RIGHT

The experiences of Feinberg and other trans people cannot be ignored by our courts of law. The problem facing the courts is the long-standing binary sex/gender system upon which many laws operate. "A variety of federal and state statutes and regulations differentiate between individuals based upon their sex and gender, or their status as males and females or men and women."⁸¹ Marriage, discrimination, and other areas of law are predicated upon an understanding that an individual can be easily classified as male or female. Many conservative political groups, standing in opposition to trans liberation, support a movement to preserve the binary system and confine possible gender expression to male and female.

Gender self-identification faces attack from many conservative groups. Trans people have increasingly joined forces with homosexuals and bisexuals to form the Gay/Lesbian/Bisexual/Transgendered ("GLBT") movement.⁸² Although trans people believe that joining forces with gays and lesbians can only further support for the movement and, therefore, lead to swifter achievement of the movement's goals, they also now face the same kind of opposition that the gay and lesbian rights movement has encountered from conservative political groups.⁸³ GLBT people feel especially targeted by the Religious Right, which has gained political power over the past two decades.⁸⁴ The Religious Right, a dominant presence within the Republican Party, has worked to halt the advances of the GLBT rights movement.⁸⁵ Activists in the conservative groups stand firm in their opinion that the sexuality issues championed by the GLBT movement deserve no special protection under law.⁸⁶ "Where [GLBT]

80. *Id.* at 21.

81. Greenberg, *supra* note 3, at 270.

82. FEINBERG, *supra* note 10, at 47, 55.

83. *Id.*

84. Paul Mazur, *Religion in American Politics and the Religious Right*, in GAY/LESBIAN/BISEXUAL/TRANSGENDER PUBLIC POLICY ISSUES 3 (Wallace K. Swan DPA ed. 1997).

85. *Id.* at 3 ("The significant victory for the Religious Right in the cultural war [in 1994] left civil rights and gay rights activists, feminists, civil libertarians, and many others stunned because the agenda of the Religious Right called for rolling back many of the legislative advances made by those groups over the years.").

86. See Republican Party, National Platform 2000, at <http://www.rnc.org/2000/2000platformcontents>.

We support the traditional definition of "marriage" as the legal union of one man and one woman, and we believe that federal judges and bureaucrats should not force states to recognize other living arrangements as marriages. We rely on the home, as did the founders of the American Republic, to instill the virtues that sustain democracy itself. That belief led Congress to enact the Defense of Marriage Act, which a Republican Department of Justice will

people want their relationships with partners validated, members of the Religious Right find biblical passages emphasizing that only opposite-sex marriage relationships are valid.”⁸⁷ Conservative groups base their legal arguments on the concept of family values.⁸⁸ They uphold a definition of family that comports with Judeo-Christian traditions, believing “God has defined the family as one man married to one woman, their children, and those related to them by blood, adoption, or marriage.”⁸⁹ Finding no basis in legal history, they understand the goals of the GLBT movement to directly conflict with their belief in the preservation of family values through legislative power.

C. PROBLEMS WITH GENDER SELF-IDENTIFICATION

Even if one does not adhere to the same set of values championed by the Religious Right, these conservative groups address certain legitimate legal problems with gender self-identification. The fact is, “[i]mplicit in legislation utilizing the terms ‘sex’ and ‘gender’ are the assumptions that only two biological sexes exist.”⁹⁰ Since the courts’ role is to discern the meaning of the law, using legislative intent when necessary, they have the power to infer that, within specific contexts, sex actually means gender. But the courts have little room to move beyond this inference considering that the intent of most marital legislation prohibiting same-sex marriage comports with that of the Defense of Marriage Act and aims to preserve traditional family values. The underpinnings of these statutes depend upon a society that identifies individuals as only two possible types of genders.⁹¹ Until the legislature provides the courts with any further legislation by which the courts should make determinations regarding legitimate unions, courts may find themselves unable to utilize gender self-identification approaches.

Besides the danger of usurping legislative power, the courts face an additional problem of the lack of articulated boundaries for gender self-identification. Until legislatures choose to recognize alternative genders, gender self-identification creates a greater potential for chaos inside the courtroom. Were the courts to follow gender self-identification approaches, they would permit individuals to create their own genders and would wed themselves to these self-constructed gender expressions that may, in fact, be of a transient nature. The legitimate concern of some courts is whether gender self-identification would provide certain individuals with a legally legitimate way of defrauding creditors or shirking ac-

energetically defend in the courts. For the same reason, we do not believe sexual preference should be given special legal protection or standing in law.

Id.

87. Mazur, *supra* note 84, at 13.

88. Alliance Defense Fund, *Alliance Defense Fund Protects Family Values*, at <http://www.alliancedefensefund.org>.

89. *Id.* (“Family values are the ideals and beliefs that support and give strength to the traditional definition of a family.”).

90. Greenberg, *supra* note 3, at 273.

91. *Id.*

quired responsibilities. One possible method of control is that gender self-identification would be confined to those who are diagnosed with GID, but this constraint disadvantages individuals who lack the funds necessary to undergo medical evaluation. By adopting a gender self-identification policy for all individuals, courts increase the chance of manipulation of the laws by individuals who are willing to take advantage of the highly flexible judicial criteria for identification. Furthermore, some objective standard for determining gender is necessary so long as gender remains an essential way of classifying individuals.

One can draw an analogy between gender self-identification and racial self-identification. Despite the movement by a number of multi-racial individuals to create a multi-racial category by which they can identify themselves, the law in most states adheres to the one drop of Black blood rule. That is,

[t]he term "white" as used in the census report refers to persons understood to be pure-blooded whites. A person of mixed blood is classified according to the nonwhite racial strain . . . thus a person of mixed white . . . and Negro . . . is classified as . . . a Negro . . . regardless of the amount of white blood⁹²

Although the possibility of a multi-racial category seems like the best solution to the issue of racial classification, the approach exhibits its own problems. Specifically, the proposal is critiqued because "it forces biracial people to choose between two valid identities."⁹³ Identifying as multi-racial denies the individual of black and white descent the ability of being identified as African-American. This precludes the bi-racial individual from formally identifying as part of the strong cultural unity offered to him/her because of history.⁹⁴

The important point to consider from this analogy is that until society does in fact broaden its horizons with regard to race and gender, categories still exist. Despite an individual's attempt at self-identification, society makes choices for the individual, regardless of the ability to self-identify. As Christine B. Hickman describes, when the parents of a bi-racial child go to an adoption agency, how the parents identify the child is of little importance; what matters is how society identifies the child.⁹⁵ By attempting to deny association with the pre-established categories by placing themselves outside the boxes, multi-racial individuals only work to narrow the categories and diminish the importance of the cultural heritage that has provided the strength for members of each race as they function in society. The same rationale applies to gender self-identification: regardless of what type of gender role the individual adopts, society

92. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1187 (1997) (quoting Bureau of the Census, U.S. Dept. of Commerce, Fourteenth Census of the United States: 1920, at 10 (1923)).

93. *Id.* at 1259.

94. *Id.* at 1246-48.

95. *Id.* at 1250.

will, for now, classify him/her as either male or female. The most appropriate role for the courts, in light of the legislature's adherence to the binary of male and female, is to validate different forms of gender expression by allowing for expansions of the definitions of pre-existing categories.

VIII. A FUNCTIONAL COMPROMISE: GENDER ASSESSMENT

Just like sex determination analysis fails to recognize the reality that gender expression does not always equate to biological characteristics, the gender self-identification approach fails to recognize that as long as society continues to operate under the binary system of male and female, self-identification proves unworkable for practical reasons. The gender assessment approach offers the most logical and functional analysis for the courts, given the legislative backdrop with which they are working. Through this approach, courts can effectuate the rights of individuals who represent deviations from the strict traditional characterizations of men and women without rejecting the legislative values upon which these characterizations are based.

The first step is recognition. Using terms such as sex and gender interchangeably proves detrimental to the transsexual individual because it invalidates the identity change of the transsexual. Since it is currently impossible to alter the genetic make-up of individuals, a transsexual born with normal sex chromosomes will always have a significant sexual characteristic that does not match with the gender role he/she has chosen to adopt. Equating this one, albeit major, sex characteristic with one's gender negates every step the transsexual has taken to reach the goal of maintaining a stable lifestyle as the opposite gender. Alternatively, acceptance of the idea that gender is a continuum running from absolute male on one end to absolute female on the other and that genital sexual physiology may not necessarily be congruent with gender identity opens the door to more well-reasoned and fair opinions.⁹⁶ Through a legal recognition of the differences between sex and gender and an understanding that the two concepts do not necessarily match in certain individuals, the courts defer to the conclusions of medical research regarding GID and show the proper sensitivity to issues facing transsexuals.

The second step is determining expanded concepts of the two established genders. Gender assessment best achieves this goal. Under a gender assessment approach, courts begin their analysis with the presumption that a transsexual's gender is based upon his/her behavior and expression that declares his/her gender to the world.⁹⁷ Socially established qualities of male and female comprise the gender assessment scale, but unlike a sex determination analysis, gender assessment embraces the idea of a gender continuum. Founded upon the premise that traditional

96. See Vitale, *supra* note 74.

97. See KAPLAN & SADOCK, *supra* note 6, at 711.

notions of male and female are poles, gender assessment considers all relevant sexual and social characteristics of the individual which function as markers on the gender continuum. These markers guide the courts in determining toward which pole the transsexual litigant gravitates.

This approach works best for post-operative transsexuals. Courts will have no trouble identifying the gender presumption, as the transsexual's assumed gender role is firmly established as part of triadic therapy.⁹⁸ The court then considers the various sexual and social characteristics, which function as indicators on the continuum, pointing toward either of the two poles. Gender assessment proves especially effective for post-operative transsexuals because the transsexual adopts the other gender not only by taking on the societal role of the other gender but also by acquiring some of the sexual characteristics of that gender. Thus, the majority of the post-operative transsexual's indicators will always yield an assessment in favor of the adopted gender role. Unlike in a sex determination analysis, having male sex chromosomes will not preclude a male-to-female transsexual from being legally recognized as female because the other assessment criteria will gravitate toward the female pole. Thus, the court legally recognizes the gender corresponding to the weighted pole. When the court discovers a discrepancy between the presumed gender and several of the indicators, the court must assess in favor of the adopted gender role. Doing so legally legitimizes the non-surgical methods of treatment that certain transsexuals elect to receive. This method proves effective because gender assessment will always yield the results that conform to society's perception of the individual. This conclusion does not necessarily hold true when applied to other trans individuals; for this reason, this comment acknowledges its applicability only to disputes involving transsexuals.

IX. EVIDENCE OF GENDER ASSESSMENT

Evidence supporting a gender assessment approach exists in several of the cases that have addressed transsexual identity for the purpose of adjudication of marital and discrimination claims. These cases show a willingness to accept gender assessment as the middle ground. That is, the courts continue to utilize the binary of male and female, mandating a determination of the transsexual's identity as one or the other but also accept that the decision may involve abandoning the idea that sexual characteristics sum to a perfect gender match.

A. MORE THAN SEX DETERMINATION: *IN RE LADRACH*

In *In re Ladrach*, the Probate Court of Stark County, Ohio addressed the issues of whether a post-operative female transsexual is permitted

98. The Harry Benjamin International Gender Dysphoria Association, Standards of Care for Gender Identity Disorders, at <http://www.hbgda.org/soc5.html> ("The act of fully adopting a new or evolving gender role for the events and processes of everyday life is known as the real-life experience.").

under Ohio law to marry a male and whether a birth certificate may be modified to reflect the sexual reassignment operation.⁹⁹ Ladrach filed for declaratory judgment on three issues: that the court issue an order finding that she be referred to as a female for legal purposes, that the order be attached to her birth certificate, and that a marriage license be issued.¹⁰⁰ Previously she and her fiancé, a man, had tried to obtain a marriage license at the Stark County Probate Court but had been denied because her birth certificate still indicated that she was male, and an Ohio statute precluded same-sex marriages.¹⁰¹ Ladrach testified that she considered herself female, despite the fact she had been born male and had been married twice before, both times to females.¹⁰²

Much like *Littleton*, *Ladrach* refused to recognize the union, and the court also did not agree that a modification of Ladrach's birth certificate was proper.¹⁰³ Adhering to a sex determination approach, the court stated, "It is generally accepted that a person's sex is determined at birth by an anatomical examination by the birth attendant. This results in a declaration on the birth certificate of either 'boy' or 'girl' or 'male' or 'female.'"¹⁰⁴ Birth designation, the court reasoned, should be the classification that attaches to individuals throughout their lives. The court denied relief to Ladrach, identifying itself solely as an interpreter of statutes and noting that success for a claim such as Ladrach's depended upon the legislature's decision to modify the marital statute in the future.¹⁰⁵

The court did not stop its analysis at this point. Instead it included a cryptic final paragraph that implied a gender assessment approach could be the more appropriate way to determine some of these cases, although not the instant action.

There was no evidence that applicant at birth had any physical characteristics other than those of the male and he was thus correctly designated "Boy" on his birth certificate. There also was no laboratory documentation that the applicant had other than male chromosomes. There has been nothing shown to this court to cause it to change the existing Ohio law.¹⁰⁶

What if there had been evidence of female characteristics on Ladrach's body at the time of birth? Was the court referring to the somewhat "arbitrary" choice of sex that the physician and parents of the intersex infant make immediately after the birth of the infant (since the decision is made in accordance with medical guidelines that in no way assure conformity with the individual's later established gender)?¹⁰⁷ What if Ladrach had been an intersex infant or had an XXY chromosome structure? The

99. 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

100. *Id.* at 830.

101. *Id.* at 829.

102. *Id.* at 830.

103. *Id.* at 832.

104. *Id.*

105. *Id.*

106. *Id.*

107. See Bradley et al., *supra* note 58, at 132-33.

court seems to suggest that had Ladrach offered this type of evidence, it would have considered issuing a holding that would modify the Ohio statutes.

The court's opinion proves contradictory. On one hand, it claims not to have the authority to function as judicial activist, yet on the other hand, it offers to modify the laws upon a showing of specific evidence. Presumably the evidence sought functions as a red flag to the court that the individual has experienced gender identity issues throughout his/her life. Evidence of ambiguous sexual characteristics at birth, according to the court's reasoning, would justify its decision to allow changes in birth certificates more so than evidence of medically-recognized surgical procedures that an individual has undergone to bring his/her sex in conformity with the gender he/she has adopted. The court's rule expresses a willingness to make exceptions for the significant number of individuals who are born with intersex characteristics but precludes the much larger number of individuals with documented gender dysphoria from receiving special exceptions.

The court's contradictory holding no doubt stems from its discomfort with a sex determination analysis. Although unwilling to deviate from this approach, the court chooses to validate the reality that sexual characteristics are not always congruent with gender. This court could eliminate its contradictory holding if it would adopt a gender assessment approach for the issue of determining an individual's maleness or femaleness. The birth certificate determination functions as an assessment of the gender traits society can expect the infant to adopt as he continues along the various stages of development. Although the birth certificate achieves its purpose for the majority of individuals in this country, it fails its purpose for individuals suffering with GID who adopt the gender that does not conform to the sex reflected on their birth certificates. Thus, the court should permit changes to birth certificates when the individual who petitions the court passes the gender assessment analysis. That is, the court must analyze the gender role that the individual has chosen to adopt and determine whether the individual has taken advantage of all possible scientific procedures or other therapies to bring his sex in conformity with the chosen gender.¹⁰⁸ Only then will the court be fulfilling the intent of the legislature in its reading of the statute.

B. A MOVE TOWARD GENDER: *M.T. v. J.T.*

In *M.T. v. J.T.*, the Superior Court of New Jersey addressed the issue of whether the marriage between a male and a post-operative female transsexual was void since the transsexual was biologically male at the

108. The meaning of the word "possible" refers not just to the number of therapies that exist but also to those that the individual litigant is able to afford. Recently, challenges to federal health programs that fail to provide coverage for sexual reassignment surgery have been unsuccessful. See *Smith v. Rasmussen*, 57 F. Supp. 2d 736 (N.D. Iowa 1999).

time of the marriage ceremony.¹⁰⁹ M.T.'s situation was similar to that of Christie Littleton's: although born a male, M.T. had experienced a desire to become the other gender since a very young age.¹¹⁰ She began dating men when she was fourteen years old.¹¹¹ Eventually she cohabitated with a male, J.T., and at that point approached a physician about the possibility of becoming a woman through surgery.¹¹² Within a year, J.T. had paid for her to have surgery for the removal of male sex organs and the construction of a vagina.¹¹³ Her birth certificate was changed in New York, and she and J.T. married thereafter.¹¹⁴ Two years after the marriage J.T. left M.T. and stopped supporting her as he had done since they had married.¹¹⁵ M.T.'s claim against J.T. was one for weekly financial support.

The court began its analysis by articulating that "a lawful marriage requires the performance of a ceremonial marriage of two persons of opposite sex, a male and a female," despite the fact that the marital statutes contained no such explicit requirement.¹¹⁶ The court felt that a reading of the statutes that would permit marriages between persons of the same sex would be contrary to an implicit legislative intent.¹¹⁷ The court rejected the anatomical classification of an individual for the purposes of marriage and refused to accept the argument that, with respect to this issue, the sex of an individual is determined at birth.¹¹⁸ Launching into a discussion of what is meant by the word "sex," the court comes close to engaging in a gender assessment analysis. In the court's effort to define the word "sex" in a more expansive and encompassing way, it explained that 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."¹¹⁹ The court adopts a more progressive approach by taking into account these elements of gender identity:

A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person's gender. If such sex reassignment surgery is successful and the post-operative 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

109. 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

110. *Id.* at 205.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 207.

117. *Id.* at 208 ("It is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed.").

118. *Id.* at 209.

119. *Id.*

identification at least for purposes of marriage to the sex finally indicated.¹²⁰

Although using this analysis, because the court held that, for the purposes of marriage, *M.T.* was a female, its approach falls short since the court will only validate a new gender if the transsexual is post-operative—if he or she has undergone sexual reassignment surgery. Sex determination analyses, even the one used in *M.T.*, ultimately fail the litigants because the courts refuse to recognize that the focus is gender. Conceivably, it would be possible for legislators to place themselves in the shoes of medical scientists and physicians in an effort to identify the multitude of possible genetic and psychological abnormalities that only a minority of individuals in this country experience. In this manner, they could draft a fair and encompassing statute that would provide the courts with the necessary tools for making a determination of an individual's maleness or femaleness for purposes of "public records, service in the branches of the armed forces, participation in certain regulated sports activities, eligibility for types of employment and," of course, marriage.¹²¹

Assuming that a legislature would endeavor to undertake such a task, a better solution is for the courts to develop a functional approach to these issues which looks something like that discussed in *M.T.* except that the approach would focus more upon the transsexual litigant's gender role. Because of the range of options available to individuals for treating genetic abnormalities or gender dysphoria, gender determination should consider transsexuals' efforts to bring their sexual characteristics in conformity with their adopted gender role, but the conformity cannot be a conclusive determination of gender.¹²² When the court makes a determination of someone's maleness or femaleness, it will have arguably the most significant impact upon that individual's life. To base the determination solely upon transsexuals' abilities—whether physically or financially—to modify their sex characteristics (breasts, estrogen, and vagina v. penis, testosterone, and testicles) is a demeaning way to treat these individuals, who qualify as mentally ill, in the courts of law. Courts must, in order to properly respect these individuals, view identity within the framework of gender. They must make an inquiry that determines the gender roles the individuals have adopted; this includes an exploration of sexual characteristics but, more importantly, social characteristics. After all, members of the Religious Right and Trans Liberation would probably both agree that the concern is how society perceives the individual. Psychology tells us that how we perceive ourselves is very influential over how society will perceive us. Regardless of any anomalous sex characteristics the individual may have, if the decision to classify according to gender is based upon testimony of the individual and his/her treating

120. *Id.* at 210-11.

121. *Id.* at 209.

122. The Harry Benjamin International Gender Dysphoria Association, Standards of Care for Gender Identity Disorders, at <http://www.hbgda.org/soc5.html>.

physician that he/she made a firm lifestyle change, the court will produce a more grounded result. As *M.T.* revealed, the courts' outcomes in these cases should align with the result that fosters the social well-being of the transsexual.¹²³

Hesitation to adopt a gender assessment approach may arise from the fear that it is not based upon a bright-line rule and involves much more of a trust factor than traditional sex determination because of the balancing of the anatomical and genetic indicators in favor of the gender role which the transsexual has adopted. In *Anonymous v. Weiner*, the court refused to modify the birth certificate of a male-to-female transsexual because to do so would increase the chance of fraud,¹²⁴ but this holding was criticized in an opinion published a few years later that addressed the same issues. *M.T.* highlighted the trial court's findings against the probability of fraud: "The transsexual is not committing a fraud upon the public. In actuality, she is doing her utmost to remove any false façade."¹²⁵

For this reason, courts should not hesitate to embrace a gender assessment approach that would rely mostly upon the individual's adopted gender role with reference to the sex characteristics of maleness and femaleness that function as indicators. There is little to fear from a social standpoint because the probability of fraud is slight. If provided with enough evidence of documented gender dysphoria from a physician or clinician, along with the sworn testimony of the affected individual, to meet the burden of proof then the court has exactly what it needs to make the proper determination of maleness and femaleness under a gender assessment analysis. As *M.T.* implied, the court would be doing the public a service by adopting a more fluid approach—one that accepts the gender the transsexual litigant desires to be. Any other approach perpetuates the myth that although the post-operative female transsexual lives her life day in, day out as a female, representing herself to society with all the qualities stereotypically associated with females, she is actually a male.

C. MALE AND FEMALE MEANS MORE TODAY:
ULANE V. EASTERN AIRLINES

Another reason courts have been reluctant to adopt a gender assessment approach is because it would mean expanding traditional definitions of what it means to be male and female. In *Ulane v. Eastern Airlines*, the court expressed an unwillingness to do so when faced with a Title VII claim brought by Karen Ulane, a post-operative transsexual female.¹²⁶ Eastern Airlines ("Eastern") hired her for a pilot position in 1968 when she was living as Kenneth Ulane.¹²⁷ During her employment with East-

123. 355 A.2d at 211.

124. 270 N.Y.S.2d 319 (Sup. Ct. 1966).

125. 355 A.2d at 210.

126. 742 F.2d 1081 (7th Cir. 1984).

127. *Id.* at 1082.

ern Airlines, she underwent sexual reassignment surgery in 1980 and was subsequently able to get her birth certificate modified to reflect the change.¹²⁸ Eastern did not know about the surgery until she returned to work after it was performed and, in 1981, Eastern fired Ulane.¹²⁹

The court held that Title VII, based on its legislative history, does not protect transsexuals from discrimination.¹³⁰ It also considered Ulane's argument that Eastern discriminated against her because she was a female. When considering the allegation, the court exposed its aversion to the suggestion of classifying a male-to-female transsexual as a female.

[I]t may be that society . . . considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.¹³¹

When the court classified Ulane as a transsexual, the court essentially classified her as an "it"—an individual without a sex. From the court's perspective Ulane was not quite of the female sex because she retained male chromosomes. The court, however, failed to state why it could so confidently categorize Ulane as a man since the *only* male characteristic she had was a genotype of 46 (XY). The court's apparent confidence functions as a cover for its utter confusion about how to classify Ulane for purposes of the statute. The court holds that Title VII does not protect transsexuals—only men and women—but by utilizing this reasoning, the court unknowingly engages in the self-identification debate. Essentially *Ulane* acknowledges that gender identities other than male and female exist, yet in its blind adherence to a sex determination approach, *Ulane* refuses to legally validate this alternative gender expression by reading Title VII expansively. If the court refuses to accept the argument that Ulane is a woman, then the court needs to recognize that she is not a man either. Were she still considered a man by the outside world, it is likely that Eastern Airlines would not have terminated Ulane's employment contract.

Even if the court was unwilling to recognize a new gender expression, by confidently determining that Ulane is not a woman, the court harshly declined the opportunity it had been given to expand the traditional definitions of woman (or man) to which, not just the legal world—with some exceptions such as *M.T.*—but also most of society in general, still adheres.¹³² A gender assessment approach would allow for this expansion, as it would not deny Ulane any legal recognition as a woman simply because she lacks the chromosomal structure that most but not all women

128. *Id.* at 1083.

129. *Id.*

130. *Id.* at 1084-85.

131. *Id.* at 1087.

132. Keller, *supra* note 53, at 347-48.

possess. Instead the court would consider Ulane's sex characteristics and the qualities society has collectively deemed as feminine in nature, while fully recognizing that these qualities are constantly changing as times change. Furthermore, many of these qualities may even be rejected by society because of the negativity surrounding stereotypes. Courts need to remember, however, that often the goal of pre-operative transsexuals is to embody the characteristics of the opposite gender, even the stereotypes about the gender.¹³³

D. FOLLOWING LOGIC THROUGH GENDER ASSESSMENT:
IN RE ESTATE OF GARDINER

On May 11, 2001, the Kansas Court of Appeals held in *In re Estate of Gardiner* that a trial court when determining the validity of a marriage where one spouse's sex is called into question must determine whether the individual was male or female at the time the individual's marriage license was issued as opposed to simply identifying the chromosomal structure with which the individual was born.¹³⁴ J'Noel, a post-operative female transsexual, met and married Marshall G. Gardiner in 1998.¹³⁵ Marshall had a son, Joe, from a previous marriage.¹³⁶ When Marshall died in August of 1999, both J'Noel and Joe filed petitions for letters of administration, and each objected to the other's petition.¹³⁷ Joe moved for summary judgment on the invalidity of the marriage between J'Noel and Marshall and on two other issues. He specifically challenged J'Noel's status of surviving spouse on the grounds that her marriage to Marshall was void under the Kansas marital statute.¹³⁸ J'Noel moved for partial summary judgment on the issue of whether she is legally a female and could be classified as one at the time of her marriage to Marshall.¹³⁹ The court held that the marriage was void under the Kansas marital statute—permitting civil contracts between two parties who are of the opposite sex and voiding any other type of marriage—thereby nullifying J'Noel's claim to Marshall's estate under the laws of intestate succession.¹⁴⁰ J'Noel appealed the court's denial of her motion for partial summary judgment.¹⁴¹

J'Noel was born Jay Noel Ball in Green Bay, Wisconsin and was identified as male at the time of her birth.¹⁴² Since childhood, J'Noel had experienced strong desires to become female and was diagnosed with GID.¹⁴³ J'Noel began the intensive process of transitioning to the female

133. See CROMWELL, *supra* note 7, at 107.

134. *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001).

135. *Id.* at 1091.

136. *Id.*

137. *Id.* at 1090.

138. *Id.* at 1091.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

gender in the early 1990s.¹⁴⁴ Beginning with counseling and therapy, J'Noel proceeded to undergo electrolysis, hormone therapy treatment, and a tracheal shave.¹⁴⁵ She then underwent surgical procedures including a bilateral orchiectomy to remove her testes and rhinoplasty for the modification of her nose.¹⁴⁶ In August of 1994, J'Noel underwent sexual reassignment surgery, and she received a new birth certificate reflecting her surgical sex change after she petitioned the Circuit Court of Outagamie County, Wisconsin, pursuant to a Wisconsin statute.¹⁴⁷

Gardiner provides the most recent example of a court's use of gender assessment for resolving a dispute involving a transsexual litigant. *Gardiner* reversed the district court's holding that J'Noel's marriage to Marshall was invalid and remanded the case with instructions on how to determine J'Noel's gender.¹⁴⁸ The court began its analysis by stating that the legislative history of the Kansas marital act affirmed the traditional view of marriage but did not explicitly prohibit marriages in which one party was a post-operative transsexual.¹⁴⁹ Framing the issue in the case as whether J'Noel was a female at the time her marriage license was issued, the court explained the criteria that should be used to make this determination. Refusing to allow chromosomes to be the determinative factor, the court instructed that chromosomes, in addition to genitalia, hormones, and phenotype should all be deemed significant in the decision-making process.¹⁵⁰ The *Gardiner* court was also the first to focus, in part, upon the litigant's gender. Rejecting *Littleton* as "a rigid and simplistic approach to issues that are far more complex than addressed in that opinion," and offering approval for the rationale provided in *M.T.*, the court moved away from a sex determination approach and instead embraced gender assessment.¹⁵¹ It reasoned that the Kansas marital statute does not require proof of one's sex to obtain a marriage license and concluded that doing so would raise questions about the validity of marriages in which one spouse has a genetic abnormality.¹⁵² Furthermore, the court emphasized the stable relationship between J'Noel and her spouse that was marked by emotional and physical compatibility and acknowledged that it found no evidence of fraud.¹⁵³ The opinion concluded with a physician's quote that advocated a closer look at how the individual views him or herself in the context of gender determinations. A possible interpretation of this message is that, when faced with incompatible factors, the best policy courts could adopt is to resolve these conflicts in favor of the individual's adopted gender role. In its entirety, *Gardiner*

144. *Id.*

145. *Id.* at 1091-92.

146. *Id.* at 1092.

147. *Id.*

148. *Id.* at 1110.

149. *Id.* at 1093.

150. *Id.* at 1110.

151. *Id.*

152. *Id.* at 1094.

153. *Id.* at 1110.

shows how it is possible for a court to implement a workable approach that properly respects the life experiences of transsexual litigants while still remaining faithful to the legislative intent of the statute at issue.

X. CONCLUSION

Transsexuals have problems living comfortably in the world because of their intense yearning to become the opposite gender; the yearning is so painful that transsexuals' daily lives become crippled by the stress. Normal life activities such as working and interacting with others become agonizing. Like other mental illnesses, gender dysphoria can effectively be treated. Courts not only need to recognize that the treatment exists, but they should attempt to provide legal validation of the end goals of these therapies and surgeries within the system of the sex/gender binary to which society continues to adhere. This paper does not address whether the breakdown of the sex/gender binary system would prove beneficial to society as a whole. Rather, it recognizes that society continues to classify based upon two established categories: maleness and femaleness, while a movement to dissolve or at least blur these two categories is slowly gaining momentum. Within this existing framework, the courts need to develop an approach for providing adequate relief for transsexuals seeking legitimate remedies.

The sex determination approach fails to give appropriate relief to transsexual litigants as well as yields results contrary to the apparent intent underlying many applicable state statutes. First, by holding that because an individual was born male or female, he or she remains as such throughout life fails to give any credibility to the treatment plans available to transsexuals. Second, inflexible sex determination analyses yield results that the lawmakers of many states desired to prohibit. The self-identification approach also does not work for transsexuals at this time since transsexuals embrace the concepts of two distinct genders, and they try very hard to adopt typically male or female traits. Gender assessment offers a compromise between the two approaches. Using this approach, courts adhere to two distinct gender classifications but expand the definitions of male and female to take into account that transsexuals, because of available medical treatments, can fit comfortably within the system that society continues to accept. Until legal changes are made that revolutionize sex/gender classification, disputes involving transsexuals require heightened sensitivity to the pertinent issues and a workable analysis.

