Transsexual Marriage: A Trans-Atlantic Judicial Dialogue

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Let me not to the marriage of true minds
Admit impediments; love is not love
Which alters when it alteration finds,
Or bends with the remover to remove.
O, no, it is an ever-fixed mark
That looks on tempests and is never shaken. . .

—*William Shakespeare*[1]

I. INTRODUCTION

What makes a marriage a marriage? Is it sexual intercourse? Love? An exclusive relationship between a man and a woman? What makes a man a man and a woman a woman? Chromosomes? Anatomy? Self-identity?

The easy answer to these questions is "all of the above." But "all of the above" is not possible when a transsexual wishes to marry.

A transsexual is someone born with the chromosomes and anatomy of one sex, but who strongly self-identifies from a very early age with the

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1. William Shakespeare, *Sonnet 116*, *in* THE RIVERSIDE SHAKESPEARE 1770 (G. Blakemore Evans ed., 1974) (1609).

other sex.[2] Transsexualism usually manifests itself in early childhood and creates significant personal distress and impairment.[3] Postoperative transsexuals are those who undergo grueling medical treatment and painful reassignment surgery to harmonize anatomy to that self-perception.[4] Once the transition is made, the person may well wish to date and ultimately marry someone of the 'opposite' sex.[5] While the transsexual population is small,[6] the status of the legal rights of transsexuals to marry[7] challenges fundamental assumptions about marriage and sexual identity; challenges that defy the complacency of easy answers and impact other sexual minorities.

For over thirty years, American courts have, with a few noteworthy exceptions, rejected the claims of transsexuals to legally marry in accord with their self-identified sex. These cases rely to a significant degree on a 1970 "monumental" decision from England that declared that chromosomes determine sex and heterosexual intercourse determines marriage.[8] This past July, the European Court of Human Rights effectively ended the reign of that decision and ordered that legal

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2. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537 (4th ed. 1994) [hereinafter DSM-IV]. Transsexualism is not homosexuality. A homosexual is sexually attracted to persons of the same sex, but is not necessarily discontent with his/her own sexual anatomy. A transsexual from an early age feels alienated from his/her anatomy as contrary to his/her sexual identity. *Id.* at 532-33. Transsexuals can be heterosexual (attracted to the sex opposite to their own sexual identity) or homosexual (attracted to the same sex as their sexual identity). *See id.* at 533-34. Nor is a transsexual a transvestite. A transvestite is a heterosexual male who dresses in female clothes for sexual excitement, but is not necessarily uncomfortable with being male. *Id.* at 536-37.

3. *See* DSM-IV, *supra* note 2, at 536.

4. For purposes of this Article, the author's term "transsexual" presumes a postoperative transsexual, someone who has completed all treatment and surgical intervention available.

5. Unless otherwise noted, all reference to transsexuals marrying presumes a postoperative transsexual who wishes to marry a person of the sex opposite to their reassigned gender. In other words, a male to female transsexual wishing to marry a male; a female to male transsexual wishing to marry a female.

6. *See* DSM-IV, *supra* note 2, at 535. No epidemiological studies exist providing data on the prevalence of this condition. *Id.* Information from some European nations indicate that roughly one out of 30,000 adult males and one out of 100,000 adult females seek sex-reassignment surgery. *Id.*

7. The author emphasizes "legal right to marry." As a practical matter, a transsexual may well succeed in marrying because the authorities issuing the license have no knowledge of the transsexual's status. *See, e.g.*, M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). As will be seen in the case law, however, the legal capacity to marry becomes an issue in the event of divorce, annulment or other post-marriage legal action that depends on marital status. *See* discussion Part II *infra*. Hence, the transsexual cannot rely on the ignorance of the licensing authorities as assurance of the legality of the marriage.

8. Bellinger v. Bellinger, [2002] 2 W.L.R. 411, 448-49 (C.A. 2001) (Thorpe, L.J., dissenting) (citing Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970)).

recognition be granted to transsexual marriage.[9] How American courts respond to the discrediting of their precedent remains to be seen. This Article will explore the dialogue—where it began, how it came to where it is today and whether legal marriage is in the future for transsexuals in the United States.

II. THE BEGINNINGS OF THE DIALOGUE

New York appears to have been the first American jurisdiction to deal with transsexual identity issues impacting marriage. In 1966, in *Anonymous v. Weiner*,[10] a male to female transsexual petitioned to have her[11] birth certificate changed to show her sex as female.[12] She was born biologically male but had undergone conversion surgery and used a female name, living outwardly as a woman.[13] Prior to filing suit, she had petitioned the Bureau of Records and Statistics for a new birth certificate.[14] The Board of Health, in turn, called upon the New York Academy of Medicine to analyze the issue and make recommendations.[15] The Committee of specialists[16] thus created came to the following conclusions: (1) male-to-female transsexuals remain chromosomal males, despite their female appearance; (2) "it is questionable" whether documents such as birth certificates should be changed as a means "to help psychologically ill persons in their social adaptation"; and (3) the "desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."[17] Not surprisingly, the Board of Health refused to issue a revised birth certificate.[18]

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9. *See* I. v. United Kingdom, Application no. 25680/94 (Eur. Ct. H.R. July 11, 2002), *available at* http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0; Goodwin v. United Kingdom, Application no. 00028957/95 (Eur. Ct. H.R. July 11, 2002), *available at* http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=5&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0.

10. 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

11. Throughout this Article, the author refers to the petitioners by the sex with which they self-identify. This is consistent with the practice of *most* of the cases cited herein.

12. *Weiner*, 270 N.Y.S.2d at 320. The action was in the nature of a mandamus action against the Bureau of Records and Statistics of the Department of Health of the City of New York. *Id.*

13. *Id.* at 320-21.

14. *Id.* at 321.

15. *Id.*

16. The Committee included gynecologists, endocrinologists, cytogeneticists, psychiatrists and a lawyer. *Id.*

17. *Id.* at 322.

18. *Id.* at 322-23.

In addition to citing the above sequence of events, the trial judge referenced a 1964 medical treatise that described transsexualism as "a truly untrodden, controversial and largely unexplored field of medicine . . .", albeit a "disorder of the harmony and uniformity of the psychosexual personality . . ." and characterized transsexuals as "miserable people."[19] The court declined to overturn the Board of Health's decision.[20]

Two years later, the issue reappeared in New York, this time in a request for a legal change of *name*.[21] Petitioner was a male-to-female transsexual who wished to change the name on her birth certificate from an apparently male name to an apparently female name.[22] She had undergone sex change surgery which included the removal of the male sexual organs and the creation of a vaginal canal.[23] The court posed the question: "Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims it to be?"[24] This question was all the more compelling, according to the judge, when a person has had his or her anatomical sexual characteristics changed to be consistent with his or her psychological self-image.[25]

The court was sharply critical of the findings of the New York Academy of Medicine Committee cited in *Weiner*:

> [S]hould the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sexual orientation? I think not.[26]

The court was also in "complete disagreement" with the Committee's conclusion that the need to protect against "fraud" outweighed the transsexuals desire for legal recognition of their sex reassignment.[27] The court considered a postoperative male-to-female transsexual to be anatomically and psychologically a female in fact.[28] A

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19. *Id.* at 320-21.
20. *Id.* at 324.
21. In the Matter of Anonymous, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968) (emphasis added).
22. *Id.* at 835.
23. *Id.* at 836.
24. *Id.*
25. *See id.* at 837.
26. *Id.* at 838 (citing Anonymous v. Weiner, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966)). For a full discussion of the *Weiner* decision, see *supra* notes 10-20 and accompanying text.
27. *Id.* at 838.
28. *Id.*

greater danger of fraud arguably existed in insisting that the birth certificate record a sex that did not comport with outward reality.[29]

The court allowed the name change and instructed that the order be attached to the petitioner's birth certificate in the Department of Health records.[30]

Two years later, in 1970, an English probate court directly faced the issue of transsexual marriage.[31] Its landmark decision reigned supreme in England and, to a large extent, in America thereafter, until the European Court of Human Rights rejected it as outdated in 2002.[32]

Corbett dealt with a petition to annul a marriage on the basis that the wife was in fact a male.[33] The wife was a transsexual named April Ashley, who was born male, but had undergone the requisite hormonal treatments and sex-conversion surgery necessary to remove the male sexual organs and create a vaginal cavity as well as other female characteristics.[34] The man she married was aware of her history and, in fact, actively pursued the marriage despite Ashley's initial reluctance.[35] They knew each several years prior to the marriage although the marriage itself lasted no more than two weeks before Ashley left.[36] It was disputed whether the marriage was sexually consummated.[37]

The judge held hearings over a period of several weeks, taking testimony from a number of medical experts.[38] With regard to the cause of transsexualism, the judge acknowledged two lines of thought: (1) it is a psychological disorder arising after birth due to some early childhood experiences; and/or (2) it is an organically based condition.[39] With respect to determining a person's sex, the medical witnesses suggested a minimum of four criteria: (1) chromosomal factors; (2) gonadal factors (the presence or absence of testes or ovaries); (3) genital factors (including internal sex organs); and (4) psychological factors.[40]

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29. *Id.*
30. *Id.*
31. Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970).
32. *See* I. v. United Kingdom, Application no. 25680/94 (Eur. Ct. H.R. July 11, 2002), *available at* http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0); Goodwin v. United Kingdom, Application no. 00028957/95 (Eur. Ct. H.R. July 11, 2002), *available at* http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=5&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0.
33. *Corbett*, 2 All E.R. at 34.
34. *Id.* at 36.
35. *Id.* at 38.
36. *Id.* at 37-40.
37. *See id.* at 34, 49.
38. *Id.* at 40-46.
39. *Id.* at 43-44.
40. *Id.* at 44.

Additional considerations were hormonal factors or secondary sex characteristics, including hair and physique, among others.[41] In April Ashley's case, the physical examination disclosed well developed breasts, a normal looking urethral opening and virtually no penile tissue and no testicles.[42] The vagina was normal size, lined with skin capable of producing moisture.[43] A chromosomal test evidenced male cells.[44]

Citing the standards set forth above, the judge concluded that Ashley was a chromosomal male; that she had male gonads and male external genitalia prior to surgery and that psychologically she was "transsexual."[45] He conceded that her outward appearance was female, which he then characterized as a "pastiche of femininity" because it was the result of skillful surgery.[46] He concluded that the biological sex of a person is fixed at birth and cannot be changed, ergo April Ashley's surgery and other medical interventions could not affect her "true sex."[47] She was a male.

The judge then turned to the role of sexual identity and sexual relations in marriage:

> [S]ex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex. . . . The question then becomes what is meant by the word 'woman' in the context of a marriage. . . . Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, ie [sic] the chromosomal, gonadal and genital tests, and, if all three are congruent,

41. *Id.*
42. *Id.* at 41.
43. *Id.*
44. *Id.*
45. *Id.* at 46-47.
46. *Id.* at 46.
47. *Id.*

> determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.[48]

While the judge, to his credit, devoted considerable court time to then current medical testimony regarding transsexualism, his fundamental premise as to marriage was distinctively nonscientific. He declared that marriage is a union of man and woman "because it is and always has been."[49] Likewise his declaration that "[m]arriage is a relationship which depends on sex and not on gender."[50] By those criterion, a same sex marriage is void, and despite Ashley's convincing feminine anatomy and self-identity as female, she was nonetheless male . . . hence her marriage to another man was invalid.

More accurately, the judge concluded that marriage depended on "natural heterosexual intercourse," rather than just sex or gender.[51] This becomes clear in his handling of the secondary issue of whether April Ashley's marriage could be consummated. In light of declaring the marriage void, he did not need to reach this issue but chose to nonetheless:

> I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr. Burou, can possibly be described . . . as 'ordinary and complete intercourse' . . . of the natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres.[52]

Over the subsequent six years, the few American courts dealing with this issue likewise concluded that sex at birth was the sex for life.[53]

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48. *Id.* at 48. The judge in *Corbett* did not describe what the "essential role of woman" was in marriage. In context, it appears to be as the opposing partner to the male in sexual intercourse. *See id.* at 49-50.

49. *Id.* at 48.

50. *Id.* at 49.

51. *Corbett*, 2 All E.R. at 48.

52. *Id.* at 49.

53. *See, e.g.*, Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (the 'wife' was a *pre*operative transsexual at the time of the marriage, having surgery thereafter; the court declared the marriage void; in dicta, the court suggested that even had the 'wife' undergone the surgery prior to the marriage, that would not have changed her into a true female); Hartin v. Dir. of the Bureau of Records, 347 N.Y.S.2d 515 (N.Y. Sup. Ct. 1973) (male to female transsexual sought to have a new birth certificate identifying her as female; the Board of Health issued a new certificate but omitted any identity of sex; the Board declared conversion surgery as "mutilating surgery" that nonetheless did "not change the body cells governing sexuality." *Id.* at 518; the court found no error); Frances B. v. Mark B., 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974) (wife sought to annul marriage; husband was a transsexual who had undergone a mastectomy and a hysterectomy; court declared the marriage void; the husband did not have the "necessary

In 1976, a New Jersey appellate court issued a decision that rejected this jurisprudential tide and became the rebuttal to *Corbett* over the subsequent years.[54]

M.T. was born male but from her earliest memory self-identified as female.[55] When she met the male defendant, J.T., she disclosed this self-awareness.[56] They began living together and M.T. subsequently underwent the conversion surgery, including creation of a vaginal cavity.[57] The defendant, J.T., was not only aware of the surgery, but also paid for it.[58] A year after the operation, the two married and for two years thereafter, lived as husband and wife and engaged in sexual intercourse.[59] J.T. then abandoned the home and M.T. applied for support and maintenance.[60] J.T. responded that the marriage was void because M.T. was male; therefore, he owed no support.[61]

The trial court conducted hearings similar to those held in *Corbett*, taking testimony from a number of doctors.[62] It was largely undisputed that gender identity as male or female is established by the time a child is three-years or four-years old.[63] M.T.'s identity was that of a girl, despite her male anatomy.[64] M.T.'s doctor testified that he knew of no way to change her self-perception, and the best course of treatment was to change her body to conform to her conception of self.[65] This was done. A physical examination of M.T. disclosed the same anatomy as April Ashley—female in all outward and intimate appearance, including a functional vaginal cavity.[66] The district court concluded that M.T. was female at the time of her marriage, ergo the marriage was valid:

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apparatus to enable defendant to function as a man for purposes of procreation." *Id.*). *But see also* Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975) (male-to-female post-operative transsexual requested her sex be changed on the birth certificate, alleging among other things that she was unable to procure a marriage license to marry a man without having a birth certificate declaring her to be a woman; the Commissioner of Health moved for dismissal and/or summary judgment; both were denied; the court noted in part that both privacy and marriage implicate fundamental constitutional rights; the formal outcome of the case is unknown).

54. M.T. v. J.T., 355 A.2d 204, 208-09 (N.J. Super. Ct. App. Div. 1976) (criticizing the reasoning in the *Corbett* decision).

55. *Id.* at 205.

56. *Id.* at 56.

57. *Id.*

58. *Id.*

59. *Id.* J.T. supported M.T. during the course of their marriage. *Id.*

60. *Id.* at 56.

61. *Id.*

62. *Id.* at 205-06.

63. *Id.* at 205.

64. *See id.* at 205-06.

65. *Id.* at 206.

66. *Id.*; *see also* Corbett v. Corbett, [1970] 2 All E.R. 33, 41 (P. 1970).

> It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus side show? What harm has said person done to society? The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.[67]

The appellate court affirmed.[68] It began its legal analysis from the premise that a marriage could only be valid between a male and female, which M.T. did not dispute.[69] The court's rationale was identical to that of *Corbett*, only heterosexual marriages were lawful because that is the way it has always been.[70] The court then cited the *Corbett* decision as the only reported decision dealing with the validity of a marriage of a postoperative transsexual.[71] The court acknowledged *Corbett*'s conclusion that sex is biological and unchangeable, regardless of medical or surgical intervention, but rejected *Corbett*'s biology-at-birth approach, finding other factors relevant.[72] These factors encompass "an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character."[73] The court likewise rejected *Corbett*'s conclusion that one's "true sex" was his/her biological sex.[74] The court held that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."[75] The person's "true sex" then is that of his/her self-identity plus the anatomical changes necessary to harmonize the biological with that identity.

The court, nonetheless, did agree with *Corbett* that "sexual capacity" was a decisive factor, which includes "both the physical ability and psychological and emotional orientation to engage in sexual intercourse as either a male or a female."[76] In the case of M.T., who was

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67. *M.T.*, 355 A.2d at 207.
68. *Id.*
69. *Id.*
70. *See Corbett*, 2 All E.R. at 48.
71. *M.T.*, 355 A.2d at 208 (citing *Corbett*, 2 All E.R. 33).
72. *Id.* at 208-09 (rejecting the *Corbett* rationale).
73. *Id.* at 209.
74. *Id.*
75. *Id.*
76. *Id.*

a male-to-female transsexual with a functional vaginal cavity, sexual performance was in fact possible.[77]

The *M.T.* court also briefly reviewed the prior American cases that implicated the issue of transsexual marriage, all of which are discussed or mentioned above, and concluded they were either distinguishable from this case or simply wrong in their reasoning.[78] For example, the court flatly rejected the chromosomal test as "unhelpful."[79] As for fraud, the court found that a transsexual seeks to remove false aspects of her identity, not create them.[80]

In conclusion, the court held that if a postoperative transsexual is capable of functioning sexually as a male or female, as the case may be, it "perceive[d] 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."[81] It continued, adding that its decision protected the individual with no harm to the public interest:

> In so ruling we do no more than give legal effect to a *fait accompli*, based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.[82]

The *M.T.* decision at both the trial and appellate court levels is remarkable in its compassionate treatment of the difficult and painful road traveled by transsexuals seeking unification of their anatomy with their gender. Unlike the judge in *Corbett* who characterized the surgical result as a "pastiche of femininity,"[83] the *M.T.* court found it a reconciliation with one's true sex.[84] Nevertheless, the court did conclude that the capacity to engage in heterosexual intercourse was crucial.[85] This requirement, however, created no problem for M.T. whose surgery created a functional vaginal cavity. The same is not true of a female-to-

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77. *See id.* at 209.
78. *Id.* at 209-10 (citing, inter alia, Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); Anonymous v. Weiner, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966)).
79. *Id.* at 210 (citing *Weiner*, 270 N.Y.S.2d at 322).
80. *Id.* (citing *Weiner*, 270 N.Y.S.2d at 322).
81. *Id.* at 210-11.
82. *Id.* at 211.
83. Corbett v. Corbett, [1970] 2 All E.R. 33, 46 (P. 1970).
84. *M.T.*, 355 A.2d at 84.
85. *See id.* at 210.

male transsexual.[86] And, as already noted, the *M.T.* court was firmly rooted in the assumption that same sex marriages were invalid.[87]

Over the subsequent ten years, the American jurisprudence was sparse. In one case, the Oregon Supreme Court refused to order the sex changed on the birth certificate of a transsexual, considering it a matter for the legislature.[88] The legislature subsequently amended the law to allow birth record amendment.[89] A New York court again upheld the policy of the Board of Health to omit any designation of sex on a revised birth certificate for a transsexual.[90] A Pennsylvania court concluded that a postoperative male-to-female transsexual was entitled under Pennsylvania law to have a new birth certificate issued reflecting her sex as female.[91] The court cited the New Jersey case of *M.T. v. J.T.* as persuasive authority.[92] Throughout the late 1970s and 1980s, other states legislatively provided for alteration of the birth certificate to reflect a different sex after reassignment surgery.[93]

III. THE EUROPEAN COURT OF HUMAN RIGHTS JOINS THE DIALOGUE

A. The Early Cases

In 1986, the European Court of Human Rights[94] for the first time dealt directly with transsexual marriage in a case arising out of *Corbett*'s

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86. *See, e.g.*, B. v. B., 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974). In the case of *B.*, a woman sought to annul her marriage where her husband was a transsexual who had undergone a mastectomy and a hysterectomy. *Id.* at 714-15. The court declared the marriage void because the husband did not have the "necessary apparatus to enable defendant to function as a man for purposes of procreation." *Id.* at 717.

87. *M.T.*, 355 A.2d at 87.

88. K. v. Health Div., Dep't of Human Res., 560 P.2d 1070 (Ore. 1977).

89. Or. Rev. Stat. § 432.235(4).

90. Anonymous v. Mellon, 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1977).

91. *In re* Dickinson, 4 Pa. D. & C. 3d 678 (Common Pleas 1978).

92. *Id.* at 680 (citing M.T. v. J.T., 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976)).

93. *See, e.g.*, ALA. CODE § 22-9A-19(d) (Alabama); HAW. REV. STAT. § 338-17.7(4)(B) (Hawaii); LA. REV. STAT. ANN. 40:62 (Louisiana); VA. CODE ANN. § 32.1-269 (Virginia). For a complete list of the states and the statutory provisions concerning birth certificate amendments following gender reassignment surgery, see Lambda Legal Def. & Educ. Fund, *Amending Birth Certificates to Reflect Your Correct Sex*, *State-by-State Map*, *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1163 (last visited Feb. 9, 2003).

94. The European Court of Human Rights was created in 1959 as a judicial enforcement arm to implement the Convention for the Protection of Human Rights and Fundamental Freedoms. The historical background of the Convention is available *at* http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm (last visited Feb. 2, 2003). The Convention is akin to the American Bill of Rights in that it sets forth articles articulating a series of political and civil rights. Those articles are available *at* http://www.echr.coe.int/Convention/Convention%20countries%20link.htm (last visited Feb. 08, 2003). Currently forty-four nations have joined the Convention. *See id.* The European nations who choose to be bound by the Convention are

home, England.[95] The case dealt specifically with whether the sex stated on a birth certificate could be changed and whether a transsexual male could legally marry a woman.[96]

The petitioner, Mark Rees, was born with the physical and biological characteristics of a female and was identified as female on the registrar of births.[97] Nonetheless, Rees self-identified as male from an early age.[98] As an adult, Rees adopted a male name, underwent hormonal treatment and surgery to change his sexual appearance, consisting of a bilateral mastectomy and removal of other feminine external characteristics.[99] Considering himself to be male, and living outwardly as a male, Rees sought to have his birth certificate changed by the Registrar General to reflect the male sex.[100] He claimed the failure to do so limited his ability to fully integrate into society as a male, this was due, in significant part, to the fact that whenever he was required to disclose his birth certificate, it showed a sex different from his apparent sex.[101]

Rees's challenge was premised upon a violation of Article 8 of the European Convention (the Convention) which states: "Everyone has the right to respect for his private and family life, his home and his correspondence."[102] According to the Convention, this right may not be "interfered with" by the government unless necessary for some overriding purpose.[103] The Registrar General refused to make the requested change on the basis that the petitioner's sex was accurately recorded at the time of birth.[104]

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obliged, by and large, to comply with the decisions of the court. *See generally id. at* http://www.echr.coe.int (last visited Feb. 3, 2003).

95. Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 (Eur. Ct. H.R. 1986).

96. *See generally id.*

97. *Id.* at 57.

98. *See id.*

99. *Id.* at 57-58.

100. *Id.*

101. *See id.* at 58.

102. *Id.* at 62. The full text of Article 8 of the Convention provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 8.

103. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 8, cl. 2.

104. *Rees*, 9 Eur. H.R. Rep. at 58.

The Court noted that a birth certificate in England records an historical fact, not current identity.[105] The Court also noted that the criteria for determining sex was not set out in any law, but that the practice of the Registrar General was to "use exclusively the biological criteria: chromosomal, gonadal and genital sex."[106] The Registrar General, in particular, did not consider "psychological sex."[107] Turning to Article 8, the Court concluded that the mere refusal to alter the birth certificate could not be considered an "interference" by the government with the petitioner's rights.[108] The Court acknowledged, however, that Article 8 carries positive obligations to "respect" that privacy as well.[109] With respect to transsexuals and amendments to their birth certificates, the Court noted a wide diversity of views among the member nations: some member countries allowed it, while others did not.[110] The Court also noted that changing a birth certificate would complicate the facts relevant to family and succession laws, affect third parties such as public authorities, like the armed services, as well as private entities, such as life insurance companies.[111] The Court held, by a vote of twelve to three, that England had not violated Article 8 by refusing to make the change on the birth records.[112]

Rees also complained that English law prohibited him from marrying a woman and that was a violation of Article 12 of the Convention.[113] Article 12 states that: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[114]

The Court observed that under English law, marriage is defined as a union of male and female.[115] The Court cited *Corbett* as the English authority for determining one's sex for purpose of marriage, finding that the "biological definition of sex laid down in [*Corbett*] has been followed by English courts and tribunals on a number of occasions and for purposes other than marriage."[116] The Court concluded that the right to

105. *Id.* at 59-60.
106. *Id.* at 60.
107. *Id.*
108. *Id.* at 63.
109. *Id.*
110. *Id.*
111. *Id.* at 67.
112. *Id.* at 68.
113. *Id.*
114. *Id.* (citing The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 12).
115. *Id.* at 61, 68.
116. *Id.* at 61 (citing Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970)).

marry protected by Article 12 refers to the "traditional marriage between persons of opposite biological sex."[117] Hence, Article 12 was not violated in Rees's case. The vote was unanimous.[118]

While rejecting Rees's petition, the Court nevertheless cautioned its member states:

> [T]he Court is conscious of the seriousness of the problems affecting these persons and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. . . . The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.[119]

Returning to the shores of America in 1987, a probate court in Ohio directly confronted the question of whether a postoperative male-to-female transsexual could obtain a marriage license to marry a male.[120] The court quoted the language from *M.T. v. J.T.* upholding such a marriage, but then dismissed the decision as "very liberal" and questioned whether the decision would have been the same had the issue arisen prior to the marriage rather than at its dissolution.[121] The court then quoted extensively from *Corbett*, adopting its biology-based rationale, and refused to issue the license.[122]

The European Court of Human Rights revisited the issue in 1990.[123] The case dealt again with a transsexual challenging English law with regard to changing a birth certificate and being eligible for marriage in the reassigned sex.[124] Caroline Cossey had been born male, but recognized her sexual identity as female as a child.[125] As an adult, she underwent hormonal treatment, breast augmentation, and gender reassignment surgery to create female genitalia, including a vagina capable of sexual intercourse with a male.[126] As did Mark Rees, she raised her challenge under Article 8 and Article 12 of the European Convention.[127]

The Court repeated its observations from *Rees* regarding the *Corbett* decision and the use of biological criteria to determine sex for

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117. *Id.* at 68.
118. *See id.*
119. *Id.* at 67-68.
120. *In re* Ladrach, 513 N.E.2d 828 (Ohio Ct. Comm. Pleas 1987).
121. *Id.* at 832.
122. *Id.* (quoting Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970)).
123. Cossey v. United Kingdom, 13 Eur. H.R. Rep. 622 (Eur. Ct. H.R. 1990).
124. *See generally id.*
125. *Id.* at 624.
126. *Id.*
127. *Id.* at 629.

purposes of the birth certificate as well as marriage.[128] The Court found the instant matter indistinguishable from *Rees* and came to the same conclusion that no interference with the right of privacy had occurred, nor was there a positive obligation on the part of the English authorities to accommodate the petitioner's requests.[129]

The Court did note that since *Rees*, developments had taken place in some of the member states towards legal recognition for transsexuals, but not enough to warrant a consensus.[130] The Court reiterated its caveat in *Rees* that transsexuals face serious problems, that the Convention articles are to be interpreted "in light of current circumstances" and that "the need for appropriate legal measures in this area should be kept under review."[131]

Notable in *Cossey* is that the vote of the European Court was significantly narrower than in *Rees*. The finding of no violation of Article 8 was by a mere ten-to-eight vote (as opposed to twelve-to-three in *Rees*) and the finding of no Article 12 violation was by a fourteen-to-four majority (as compared to a unanimous decision in *Rees*).[132]

In his lengthy dissent, Judge Martens was deeply sympathetic to the plight of transsexuals. He observed that their "attempts to 'change sex' infringe a deeply rooted taboo" and that the reaction of public authorities, including courts, is "almost instinctively hostile and negative."[133] He described the transsexual's quest for well-being as twofold: first, by means of hormone treatment and reassignment surgery to have his outward physical sex be in harmony with his psychological sex; and second, to achieve social and legal recognition of his new sexual identity.[134]

In acknowledgment of alternative judicial approaches across the Atlantic, Judge Martens cited favorably the New Jersey decision of *M.T. v. J.T.* and was sharply critical of the biology-based criteria of the *Corbett* decision.[135] He noted that gonadal, genital and psychological factors are all subject to alteration while chromosomal make-up is not, and questioned why that last factor should be decisive over the others.[136] He

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128. *Id.* at 630-31.
129. *Id.* at 633.
130. *See id.* at 630-31.
131. *Id.* at 634.
132. *Id.* at 635; *cf.* Rees v. United Kingdom, 9 Eur. H.R. Rep. 56, 68 (Eur. Ct. H.R. 1986).
133. *Cossey*, 13 Eur. H.R. Rep. at 646 (Martens, J., dissenting).
134. *Id.* at 645 (Martens, J., dissenting).
135. *Id.* at 646-47 (Martens, J., dissenting) (citing Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970); M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).
136. *See id.* at 657-58 (Martens, J., dissenting).

considered chromosomes "completely irrelevant" to a woman's role in sexual intercourse and found *Corbett*'s claim that sexual union is an essential determinant of marriage "clearly unacceptable."[137] Attacking the theory of marriage as a mere legitimization of sexual intercourse, Judge Martens wrote:

> Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not 'essential' for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. This is because marriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities); it is a societal bond, in that married people (as one learned writer put it) "represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence"; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one.[138]

Judge Martens cited an increasing societal awareness of the differences among people, and a growing tolerance for such differences, including rights of privacy for those that are different from the norm. In his view:

> The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the *fait accompli* he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated, without discrimination, on the same footing as all other females, or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling reasons . . . (otherwise) such a refusal can only be qualified as cruel. But there are no such reasons.[139]

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137. *Id.* at 658 (Martens, J., dissenting).
138. *Id.* (Martens, J., dissenting).
139. *Id.* at 648 (Martens, J., dissenting).

B. The Recent American Judicial Debate—Corbett v. M.T.

In 1999, and 2001-2002, two significant cases on transsexual marriage were decided in two American courts, with both jurisdictions addressing the issue for the first time. The first arose in Texas and continued the *Corbett* legacy without hesitation.[140] The second arose in Kansas and its history reflects the deep and continuing conflict between the biology-based rationale of *Corbett* and the multi-factored test favored by *M.T.* and Judge Martens in his *Cossey* dissent.[141]

In the Texas case, a transsexual woman filed a medical malpractice wrongful death action in connection with the death of her husband.[142] The doctor challenged her capacity to sue on the basis that she was a man and the marriage was therefore void as a same sex marriage.[143] Littleton had been born a male, underwent all the hormonal and sex reassignment surgeries available and married a man who was aware of her history.[144] They were married seven years before he died.[145]

The trial court granted summary judgment for the doctor and the appellate court affirmed.[146] The court framed the question as whether "a physician [can] 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?"[147] The court quoted extensively from *Corbett* and then adopted chromosomal immutability as proof of sex.[148] Referring to the reassignment surgery as "surgery that would make most males pale and perspire to contemplate," the court nonetheless dismissed it as irrelevant to whether Littleton was male or female.[149] "There are some things we cannot will into being. They just are."[150] So Littleton, despite her external female anatomy and psychological self-identity as a woman, was in fact a man. As for her fervent belief she was female, the court considered this a "[m]atter of the heart" beyond the scope of the court's purview.

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140. Littleton v. Prange, 9 S.W.3d 223 (Tx. Ct. App. 1999).

141. *See In re* Gardiner (Gardiner I), 22 P.3d 1086 (Kan. Ct. App. 2001).

142. *Littleton*, 9 S.W. 3d at 224. The Texas wrongful death and survivor statute allows a surviving spouse to sue in tort. *See id.* at 230.

143. *Id.* at 225.

144. *Id.* at 224-25.

145. *See id.* at 225.

146. *Id.* at 225.

147. *Id.* at 224. Aside from the obvious religious overtone of the question, the court also conflates sex with gender. *See id.* at 223-24.

148. *Id.* at 226-27 (citing Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970)).

149. *Id.* at 231.

150. *Id.*

> We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy.[151]

As Texas forbids same sex marriages, the marriage was declared invalid and Littleton could not bring a wrongful death action as a surviving spouse.[152]

The case before the Kansas courts was more complex.[153] J'Noel Gardiner was born male in Wisconsin.[154] She underwent the sex reassignment surgery, a name change and hormonal treatments to become female in all outward appearances.[155] She successfully petitioned under Wisconsin law to have her birth certificate amended to state she was female.[156]

J'Noel was well educated, earning a Ph.D., and taught at a university in Kansas.[157] In 1998, she married a local businessman named Marshall Gardiner.[158] J'Noel claimed Gardiner knew of her history and there was no evidence to contradict that claim.[159] They were apparently compatible. Gardiner subsequently died intestate.[160] His estranged son from a prior marriage contested J'Noel's right to her spousal share of the estate on the basis that the marriage was same sex and therefore invalid under Kansas law.[161]

The district court relied heavily on *Littleton* (which in turn relied heavily on *Corbett*) and found the marriage void, making the estranged son the sole heir.[162] The Kansas appellate court reversed.[163]

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151. *Id.*

152. *Id.* Texas, like many states, has statutorily defined marriage as being exclusively between a man and a woman, thus barring same-sex marriages. *Id.* at 225 (citing TEX. FAM. CODE ANN. § 2001(b) (Vernon 1998)). In addition to the federal government and Texas, thirty-six states have adopted DOMA-like statutes. For a complete listing of states' same-sex partnership restrictions, see Human Rights Campaign, *Couple/Partner Protections*, *at* http://www.hrc.org/familynet/chapter.asp?article=554 (last visited Feb. 9, 2003).

153. *In re* Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002).

154. *Gardiner I*, 22 P.3d at 1091-92.

155. *Id.* at 1092.

156. *Id.*

157. *Id.* at 1091.

158. *Id.*

159. *Id.*

160. *Id.* at 1090.

161. *Id.* Kansas statutorily recognizes a marriage as existing only between a man and a woman: "The marriage contract is . . . a civil contract between two parties who are of the opposite sex." KAN. STAT. ANN. § 23-101 (2001).

162. *Gardiner I*, 22 P.3d at 1091.

163. *Id.* at 1110.

The appellate court noted that this was the kind of case that did not fit into clear sets of classifications, rather it highlighted

> the tension which sometimes exists between the legal system, on the one hand, and the medical and scientific communities, on the other. Add to these concerns those whose focus is ethics, religion, lifestyle, or human rights, and the significance of a single decision is amplified. We recognize that this may be such a case.[164]

The court also agreed with the Vermont Supreme Court, which stated: "It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle."[165]

The court observed that serious study of transsexuals was limited to the last thirty years (roughly covering the scope of the jurisprudential treatment as well).[166] The court noted that the most recent studies support a neurobiological-based explanation for transsexualism.[167] Autopsy studies indicated female-to-male transsexuals had similar brain neuron patterns as males, and male-to-female transsexuals likewise were similar to females.[168] The study's conclusion was that in transsexuals, sexual differentiation in the brain and the genitals may go in opposite directions, which would explain the strong self-identity of transsexuals as being of the opposite sex of their anatomical makeup.[169] That finding would also provide a biological basis for that sex-gender disparity.[170] This, according to the Kansas appellate court, undermines the assumption that chromosomes alone should determine legal sex.[171] The court quoted extensively from an article regarding so-called *intersex* persons whose sexual biology is ambiguous, including persons whose sex-determining chromosomes are atypical, resulting in anatomies with both male and female characteristics.[172] That article declared that current medical

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164. *Id.* at 1090.

165. *Id.* (quoting *In re* B.L.V.B, 628 A.2d 1271 (Vt. 1993)).

166. *Id.* at 1093.

167. *Id.* (quoting Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034 (2000)).

168. *Id.* at 1093.

169. *Id.* (quoting Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034 (2000)).

170. *Id.*

171. *See id.* at 1094.

172. *Id.* at 1094-1100 (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999)).

expertise identifies eight different criteria to determine sex, only one of which is genetic or chromosomal sex.[173]

The appellate court reviewed the jurisprudential history of transsexual marriage, including *Corbett* and *M.T.* It found *Corbett* of limited precedential value, due in part to its age.[174] It concurred in the reasoning of *M.T.*, particularly in its rejection of a biological test for sex and its reliance on a combination of anatomy and gender.[175] The court dismissed the recent *Littleton* decision from Texas as "rigid and simplistic."[176]

The court concluded that for purposes of marriage, sex must be determined at the time of the marriage, not at birth.[177] Nor are chromosomes the exclusive criteria.[178] The additional factors to consider are: gonadal sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.[179] Other criteria may be added as the science develops. The court then remanded the matter back to the trial court for a full hearing on what J'Noel's sex was at the time of her marriage.[180]

The deceased's son applied for a writ of review to the Kansas Supreme Court, which was granted, and the appellate decision was reversed.[181] In its opinion, the Kansas Supreme Court identified the two lines of cases dealing with the question of the validity of a marriage of a postoperative transsexual.

> One judges validity of the marriage according to the sexual classification assigned to the transsexual at birth. The other views medical and surgical procedures as a means of unifying a divided sexual identity and determines the transsexual's sexual classification for the purpose of marriage at the time of marriage. The essential difference between the two approaches is the latter's crediting a mental component, as well as an anatomical component, to each person's sexual identity.[182]

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173. *Id.* at 1094 (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278-92 (1999)).

174. *See id.* at 1101-02 (*citing* Corbett v. Corbett, [1970] 2 All E.R. 33 (P. 1970)). In addition to the age of the case, the court noted the "unusual facts" of *Corbett* in determining that its precedential value had outlived its usefulness. *Id.* at 1102.

175. *Id.* at 1102-03 (citing M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

176. *Id.* at 1110.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* Noteworthy is that the appellate court did not consider dispositive the fact that J'Noel's Wisconsin birth certificate reflected she was female. *See id.* at 1107. The weight to be given that document was for the trial court to decide. *See id.* at 1109.

181. *In re Gardiner (Gardiner II)*, 42 P.3d 120 (Kan. 2002).

182. *Id.* at 124.

The court opined that the words "sex," "male," and "female" are commonly understood words that envision distinct biological differences and do not encompass transsexuals.[183] Even though the male organs are removed, the male-to-female transsexual does not have female gonads nor has she the capacity to procreate, hence, she is not female under the usual definition of the word.[184] Under Kansas law, marriage must be between a man and a woman, with "[a]ll other marriages" declared void.[185] While the legislature was vocal in its intent to prohibit gays and lesbians from marrying, nothing was said about postoperative transsexuals. The Kansas Supreme Court concluded this silence meant that postoperative transsexuals were in the excluded class.[186] "[T]he legislature clearly viewed 'opposite sex' in the narrow traditional sense."[187] As J'Noel was not female in the traditional sense, the marriage to her husband was not a legally permissible union under Kansas law and was therefore void. As a result, she could not inherit the spousal share of her husband's estate. Nevertheless, the court did at least acknowledge the inequity of the situation:

> Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under K.S.A. 2001 Supp. 23-101. We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.[188]

C. The European Court Dismisses Corbett *from the Dialogue*

The Kansas Supreme Court rendered their decision on March 15, 2002. Four months later, on July 11th, the European Court of Human

183. *Id.* at 135.
184. *Id.*
185. *Id.* at 125-26 (quoting KAN. STAT. ANN. § 23-101 (2001)).
186. *Id.* at 136.
187. *Id.*
188. *Id.* at 137.

Rights overturned *Corbett* and ordered legal recognition in Europe of transsexual marriage.[189]

The personal facts in *Case of I.* were essentially no different than those of *Rees* and *Cossey*. A male to female transsexual in England sought legal recognition of her reassigned sex on her birth certificate, claiming the refusal to do so violated her Article 8 right to respect for privacy and her Article 12 right to marry.[190]

The Court noted as it had in the prior cases that English law defined marriage as the union between a man and a woman.[191] It acknowledged *Corbett*'s holding that for purposes of marriage a person's biological makeup determined that person's sex, ignoring any surgical intervention, and the *in dicta* finding that transsexuals were incapable of normal sexual intercourse, hence were incapable of consummating the marriage.[192]

The Court considered as significant the recent developments in scientific research regarding transsexualism.[193] While the cause of the condition was still not definitively known, research was pointing towards a prenatal physiological development in the brain, rather than a purely psychological dissonance.[194] In addition, the international medical community accepted the disorder as a bona fide medical condition for which irreversible reassignment surgery was an appropriate treatment.[195] The Court also acknowledged the commitment and conviction necessary to undergo "the numerous and painful interventions involved" in such surgery.[196]

While recognizing that a transsexual cannot alter his biology entirely, the Court rejected the argument that chromosomes should control a person's sexual identity:

> [W]ith increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to

189. I. v. United Kingdom, Application no. 25680/94 (Eur. Ct. H.R. July 11, 2002), *available at* http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0.

190. *Id.* ¶¶ 3, 12.

191. *Id.* ¶ 17.

192. *Id.* ¶¶ 17-18.

193. *Id.* ¶ 16.

194. *Id.* ¶ 61.

195. *Id.* ¶¶ 61-62.

196. *Id.* ¶ 61.

> the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity.[197]

The Court also considered the significance of a continuing trend in Europe and elsewhere toward legal recognition of gender reassignment. In particular, thirty-three European countries now permit the reassigned sex to be noted on the birth certificates and twenty-two permitted transsexuals to legally marry.[198] These developments are critical, as the Court's interpretation of the Convention is through an "evolutive approach" that considers "changing conditions" and "evolving convergence" on the recognition and protection of particular human rights.[199] The Court also chided England for having done nothing to reform their laws to improve the lives of transsexuals, despite the Court's strong suggestion in *Rees* and *Cossey* that it do so.[200]

With respect to Article 8, the Court declared that "the very essence of the Convention is respect for human dignity and human freedom."[201] In this context, it noted the difficulty of the social, physical, and legal plight of the transsexual:

> It must . . . be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. . . . 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 recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.[202]

And stated further:

> In 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

197. *Id.* ¶ 62.

198. *See id.* ¶¶ 38, 40. This analysis of trends was developed by Liberty, an English nongovernmental organization, who filed an amicus brief on behalf of the Plaintiff, I. *Id.* ¶ 38.

199. *Id.* ¶¶ 38-40 54, 64-65.

200. *Id.* ¶¶ 72-73.

201. *Id.* ¶ 70.

202. *Id.* ¶ 57.

> intermediate zone as not quite one gender or the other is no longer sustainable.[203]

The Court recognized the difficulties that legal recognition could create for record keeping, family law, inheritance, criminal law and other social and legal institutions, but considered the problems solvable and manageable. "[A]s regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."[204] In conclusion, the Court held that there were no significant factors of public interest to outweigh the petitioner's interest in obtaining legal recognition of her gender reassignment, thus, England had violated Article 8.[205]

Turning to the Article 12 "right to marry," the Court directly confronted and rejected *Corbett*'s holding that sex for purposes of marriage must be determined by purely biological criteria:

> There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors—the acceptance of the condition of gender identity disorder by the medical professions and health authorities . . . the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive they properly belong and the assumption by the transsexual of the social role of the assigned gender.[206]

The Court found "no justification" for prohibiting a transsexual to marry and likewise found England in violation of Article 12.[207] The decision of the Court was unanimous on both claims. As a result of its holding that England was in violation of both Article 8 and Article 12 of the Convention, the Court ordered England to implement appropriate measures to secure the petitioner's and other similarly situated transsexuals' right to respect for private life and the right to marry.[208]

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203. *Id.* ¶ 70.
204. *Id.* ¶ 71.
205. *Id.* ¶ 73.
206. *Id.* ¶ 80.
207. *Id.* ¶ 83.
208. *Id.* ¶ 95.

D. How Will the American Courts Respond?

The rejection of *Corbett* by the European Court of Human Rights creates an opportunity and a challenge for American courts. The opportunity is to discard a precedent that had committed one side of the debate to a narrow definition of marriage and sex that excluded far more than transsexuals.[209] The challenge is to find new legal benchmarks that encompass what current science, medicine and social conditions justify.

American courts can, of course, continue to follow *Corbett* despite its rejection by the European Court of Human Rights. Our courts are no more bound to follow the European Court than they were to follow *Corbett* in the first place. But standing by *Corbett* creates significant difficulties for today's American courts. Do we truly want to declare that sexual intercourse is the *raison d'etre* of a marriage? That definition excludes heterosexual people who love each other and wish to commit to each other but who are physically incapable or otherwise unable to engage in sexual intercourse.

Do we truly believe that the "essential role of a woman"[210] in a marriage is as a participant in sexual intercourse? *Corbett* was rendered in 1970, prior to the massive societal changes wrought by the feminist movement. The pre-feminism depiction of women as "barefoot and pregnant" has long been replaced by the concept of an equal partner in all aspects of marriage as well as outside the home.[211]

Corbett also discredited the surgical creation of a vaginal canal that was crafted from April Ashley's body tissue and skin.[212] Such an "apparatus" was incapable of "natural" sexual intercourse, hence the marriage could not be consummated.[213] This interpretation likewise declares as unnatural all the advances in reproductive technology in recent years that have allowed otherwise sexually disabled husbands or wives to engage in sexual relations.

Surely today's society would agree with Judge Martens that marriage is much more than a union that "legitimates sexual intercourse." It is instead "a relationship based on strong human emotions, exclusive commitment to each other and permanence; . . . a species of togetherness

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209. *See* Corbett v. Corbett, [1970] 2 All E.R. 33, 48-49 (P. 1970).

210. *Id.* at 49-50.

211. One popular expression of that era, in response to the typecast role of women, was "[a] woman's place is in the House and in the Senate."

212. *Corbett*, [1970] 2 All E.R. at 50.

213. *Id.* at 49-50.

in which intellectual, spiritual and emotional bonds are at least as essential as the physical one."[214]

Indeed, this is the concept of marriage recognized by the United States Supreme Court.

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[215]

Noteworthy is that *Griswold*, the source of the above quote, involved the use of contraceptives by married couples.[216] Yet in the definition of marriage, sexual intercourse is not even mentioned, much less declared essential.

While *Corbett*'s depiction of the essence of marriage is outdated today, its biology-at-birth criteria for sex classification undoubtedly still has advocates. Its simplicity is appealing, and for the vast majority of people, biology-at-birth is consistent with the biology and self-identity thereafter.

But we now know from science and medical research that for a substantial number of people, the apparent biology-at-birth is not in fact consistent with other aspects of their sexuality.[217] Genetics tells us that women are women because they have an XY chromosome and men are men because of an XX chromosome; but some people are born with an extra X or extra Y.[218] Furthermore, the development that flows from the chromosomes can take unexpected turns *in utero* and thereafter. Some individuals develop atypical ovaries or testes; others ambiguous external sexual organs; still others suffer from hormonal imbalances, or develop incongruent secondary sex characteristics, such as breasts on men and heavy facial hair on women.[219] Finally, there are those whose psychological makeup and self-identity is out of kilter with their physiology. Recent research indicates a prenatal biological base for even

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214. *Cossey*, 13 Eur. H.R. Rep. at 658 (Martens, J., dissenting).
215. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
216. *See id.* at 480.
217. *See* Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 294-96 (1999).
218. *Id.* at 270-73, 282.
219. *Id.* at 282.

this dissonance in self-concept.[220] All in all, medical experts now identify eight separate factors that make up a person's sex.[221]

Considering these multiple factors in sexual development, and the multiple ways they can go awry, it is difficult to argue that any one of them is definitive. Medical treatment and surgery can now alter or remove all the tangible biological indicators of sex, leaving only chromosomes, and possibly now self-identity as immutable. The Kansas appellate court and the European Court of Human Rights rejected the chromosome-only criteria for sex, in large part because the postoperative transsexuals had in fact changed all outward aspects of their physical appearance to coalesce with their self-identified sex.[222] Chromosomes, on the other hand, cannot be seen, heard, tasted or touched by the normal human senses and contribute nothing to the emotional or psychological dynamics of a marriage.[223] "[The] monumental judgment in *Corbett v. Corbett* . . . was undoubtedly right when given on 2 February 1970. It is only subsequent developments, both medical and social, that render it wrong in 2001."[224]

The Texas court in *Littleton* added a religious connotation to the biology-at-birth premise when it referred to a person's gender being "immutably fixed by our Creator at birth."[225] Injecting religious beliefs into public policy is precarious for a number of reasons, including the risk of being unconstitutional. In *Loving v. Virginia*, the Supreme Court struck down criminal statutes in Virginia that made interracial marriage a criminal offense.[226] The case was brought by an interracial married couple who were convicted under the statute.[227] At sentencing, the trial judge had declared:

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220. *See* Greenberg, *supra* note 217, at 294-96.

221. *Id.* at 278-79. These are: (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/prostrate 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. *Id.*; *see also Gardiner I*, 22 P.3d at 1094 (discussing Greenberg's article).

222. *See* I. v. United Kingdom, Application no. 25680/94 (Eur. Ct. H.R. July 11, 2002), *available at* http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=211024628&Notice=0&Noticemode=&RelatedMode=0.

223. *See* Bellinger v. Bellinger, [2002] 2 WLR 411, 448 (C.A. 2001) (Thorpe, L.J., dissenting).

224. *Id.*

225. *Littleton*, 9 S.W.3d at 223.

226. 388 U.S. 1 (1967).

227. *Id.* at 2-3.

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents.
>
> And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[228]

The United States Supreme Court struck down the statutes in *Loving* as "invidious racial discrimination."[229]

An analogous declaration is arguably made with the *Corbett/Littleton* rationale: Almighty God created the sexes as male and female and but for the interference with his arrangement (by medical treatment) there would be no cause for such (transsexual) marriages.[230] Should sexual and racial identity be considered differently?

Aside from the questionable legality of using religious concepts to define legal values for all[231] (and whose religion would we use anyway?), the notion that anyone, including a court, can glean God's intention is highly doubtful. The same Creator that made male and female presumably also made transsexuals. Did the Creator intend for them to suffer in lonely misery their entire lives as a result of their condition? Or did the Creator intend for those people to become harmonized with themselves and to find happiness in a loving relationship with another person? Is reassignment surgery any different than any other medical intervention to help a person born with a physical or psychological disorder from obtaining relief for their condition and living a full life?

Finally, reliance on the *Corbett* rationale can create unanticipated and certainly unwelcome consequence for its most ardent promoters. As earlier noted, transsexualism and homosexuality are distinct phenomena;

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228. *Id.* at 2.

229. *Id.* at 11.

230. The analogy with anti-miscegenation laws is apt also for its biological base. Under the Virginia law any "ascertainable" amount of Negro blood made a personal legally "colored." Only those who had "no trace whatever of any blood other than Caucasian" were considered white. *Id.* at 4 n.4. In *Plessy v. Ferguson*, 163 U.S. 537 (1986), the plaintiff was precluded from sitting in the railway car for white passengers even though he was seven-eighths Caucasian and apparently looked white. As with chromosomes and sex, the degree of "colored" blood flowing in an apparently white person could be gleaned only by scientific analysis. These statutes, common from colonial times, were justified as necessary to "preserve the racial integrity of its citizens," to prevent the "corruption of blood," a "mongrel breed of citizens," and "the obliteration of racial pride." *Loving*, 388 U.S. at 7.

231. *See* Bob Jones University v. United States, 461 U.S. 574 (1983) (reciting belief of the sponsors of the university that the Bible forbids interracial dating and marriage; interracial dating or advocacy of interracial dating is grounds for expulsion); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (reciting facts to wit: that Christian school would not renew contract of a pregnant teacher based on the school's religious doctrine that mothers should stay home with their preschool age children; the teacher was then suspended after she filed suit because of another Biblically based doctrine that one Christian should not sue another).

the first deals with one's gender, the latter with one's sexual orientation.[232] Just as nontranssexuals may be heterosexual or homosexual, likewise transsexuals experience the same variation. Judging by the vast majority of states that have laws prohibiting same-sex marriages, society is firmly opposed to homosexual marriage. Consider where *Corbett* has led us. April Ashley is considered to be male because she has male chromosomes.[233] Her body, however, is outwardly female, complete with a functional vaginal cavity.[234] She self-identifies as a woman and is heterosexual in her sexual orientation.[235] She falls in love with and wishes to marry a man, who knows her history and wishes to marry her. According to *Corbett*, this is, nonetheless, a same sex marriage,[236] and would be illegal in most states of the United States.[237] This is so despite the fact that both husband and wife consider it a heterosexual union; they want to live as a heterosexual couple and they appear to be a heterosexual couple, even to the wife's gynecologist.

On the other hand, if April Ashley had a homosexual orientation, she could have fallen in love with and wished to marry a woman. She may well have found a woman, a lesbian, who likewise fell in love with her and wished to marry. According to *Corbett*, because April was truly a male, this union would not be illegal as a same sex marriage. So, they could legally marry and yet live for all outward appearances as a same sex couple.

Which scenario better promotes the concept of heterosexual marriage? The *Corbett* advocates would perhaps argue that the latter marriage is void as well because it could not be "consummated" as both the partners only had female sexual organs. But, that would mean that transsexuals cannot legally marry anyone. Even homosexuals are not prohibited from marrying at all. A gay man can marry a woman and has the sexual equipment to consummate the marriage, regardless of whether that is his desire. Under the *Corbett* scenario, April Ashley cannot marry a man because she has the chromosomes of a man and she cannot marry a woman because she has the sexual anatomy of a woman. But, the United States Supreme Court has declared repeatedly that the right to marry is a fundamental right.[238] "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly

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232. *See supra* notes 2-6 and accompanying text.
233. Corbett v. Corbett, [1970] 2 All E.R. 33, 50 (P. 70).
234. *See id.* at 49-50.
235. *See id.* at 35-37.
236. *See id.* at 50.
237. *See* Human Rights Campaign, *supra* note 152.
238. Zablocki v. Redhail, 434 U.S. 374 (1978).

pursuit of happiness by free men;"[239] marriage is one of the "basic civil rights of man," fundamental to our very existence and survival;[240] "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage."[241] So, April Ashley would have a fundamental constitutional right to marry . . . but whom?

IV. CONCLUSION: A CORBETTLESS FUTURE

Only five states have directly dealt with the question of whether transsexuals can marry.[242] The issue is open in all others. Louisiana is one such state. What would be the legal framework to decide the issue? One consideration would be Article 1, § 5 of the Louisiana Constitution, which provides a constitutionally protected right to privacy: Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.[243]

This is akin to Article 8 of the European Convention which entitles everyone to "the right to respect for his private and family life, his home and his correspondence." Article 8 provided the foundation for the European Court's decision to recognize transsexual marriage.

Louisiana's legal definition of marriage is "a legal relationship between a man and a woman that is created by civil contract."[244] The law considers marriage a purely civil matter, not subject to "religious or ecclesiastical law."[245] The statute does not provide a definition of sex.

In 1996, the Louisiana legislature passed a concurrent resolution endorsing the "traditional marriage" as one between a man and a woman and specifically rejecting same sex marriages[246]. The legislature declared that marriage is an institution "that sustains order and morality in our communities and preserves the posterity and well-being of our larger

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239. Loving v. Virginia, 388 U.S. 1, 12 (1967).

240. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

241. Carey v. Population Servs. Int'l, 431 U.S. 869, 876 (1977).

242. New Jersey (M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)); New York (Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); B. v. B., 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974)); Ohio (*In re* Ladrach, 513 N.E.2d 828 (Ohio Ct. Comm. Pleas 1987)); Texas (Littleton v. Prange, 9 S.W.3d 223 (Tx. Ct. App. 1999)); Kansas (*In re* Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002)).

243. LA. CONST. art. I, § 5

244. LA. CIV. CODE ANN. art. 86.

245. LA. CIV. CODE ANN. art. 86, Revision Comment B 1987.

246. LA. CIV. CODE art. 86, House Concurrent Resolution No. 124 of the 1996 Regular Session.

society" and that it "must be protected and preserved at all costs."[247] Same sex marriages clearly were targeted as a significant threat to this traditional institution of marriage.

In order to obtain a marriage license in Louisiana, each person must provide a certified copy of his or her birth certificate to the licensing authorities.[248] Louisiana law allows postoperative transsexuals to obtain a new birth certificate changing their sex designation.[249] The statute provides that if a person is diagnosed as transsexual and undergoes reassignment surgery and medical treatment which changes the anatomical structure of the person to a sex other than that on the original birth certificate, then the court "shall" order the issuance of a new birth certificate "changing the sex designated thereon from that shown upon the petitioner's original certificate of birth."[250] Once that is done, the "original" birth certificate and the petition to change it "shall be sealed" and not be opened except upon the request of the petitioner and then only by order of the court.[251]

With this as a legal framework, the table would then be open for consideration of advances in science and medicine and for a more expansive dialogue about ethics, diversity of life style, personal privacy and individual rights. What would a Louisiana court do?

This Article began with a Shakespearean reflection on marriage. I close with his advice to the individual, advice that is truly taken to heart, body and soul by a transsexual:

> *This above all: to thine own self be true,*
> *And it must follow, as the night the day,*
> *Thou canst not then be false to any man.*[252]

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247. *Id.*

248. LA. REV. STAT. ANN 9:225; LA. REV. STAT. ANN 9:226. LA. REV. STAT. ANN 9:225(B) states that the person authorizing the license must be presented with a certified copy of the "original" birth certificate. The remainder of the statute and LA. REV. STAT. ANN. 9:226 refer simply to the "birth certificate."

249. LA. REV. STAT. ANN. 40:62.

250. *Id.*

251. *Id.*

252. WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET PRINCE OF DENMARK, act 1, sc. 3.