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Mary I. Coombs, *Sexual Dis-orientation: Transgendered People and Same-sex Marriage*, 8 *Women's L.J.* 219 (1998).

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SEXUAL DIS-ORIENTATION: TRANSGENDERED PEOPLE AND SAME-SEX MARRIAGE

Mary Coombs*

ABSTRACT

In this Article, Professor Coombs argues that the debate about same-sex marriage has wrongfully ignored transgendered people and their relationships. She provides an overview of arguments made by opponents of same-sex marriage, such as tradition, procreation, child-rearing, and family values. She then examines cases involving transsexual marriages and uses this analysis to deconstruct the same-sex marriage debate. Professor Coombs argues that an honest consideration of transgendered people and their relationships forces a re-evaluation of arguments against same-sex marriage and disrupts the gendered patriarchy on which traditional marriage rests. Marriage should be seen as a relationship between two people, regardless of their gender appearance, their gender roles, or the genitalia they currently have. This view of marriage would liberate not only transgendered people but also gays, lesbians, and heterosexual women.

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* This Article is an extension and adaptation of ideas first articulated in Mary Coombs, *Transgenderism And Sexual Orientation: More Than A Marriage Of Convenience*, 3 NAT'L J. SEX ORIENTATION L. 1 (1997) <<http://sunsite.unc.edu/gaylaw/>>. I want to thank the University of Miami Law Library staff for their unfailing help tracking down sources and the *UCLA Women's Law Journal* editors for their excellent editorial help.

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I. INTRODUCTION

The question of same-sex marriage has become one of the hot socio-cultural topics in recent years. The issue became visible as the possibility of explicitly legal same-sex marriage became very real; in 1993, the Hawaii Supreme Court, in *Baehr v. Lewin*,¹ announced that laws forbidding same-sex marriage would implicate the provision of the Hawaii constitution forbidding discrimination on the basis of sex. Thus, a ban on same-sex marriage would be constitutional only if supported by a compelling state interest. On remand, the trial court ruled that the state had provided no such proof and hence that it must permit marriage between persons of the same sex as it does between persons of different sexes.² Absent either an unlikely reversal of that judgment by the Hawaii Supreme Court or the passage of an amendment to the Hawaii constitution forbidding such marriages, same-sex marriage will soon be legal in Hawaii.

Both the opponents and the proponents of same-sex marriage have generally assumed that "same-sex marriage" is equivalent to "gay or lesbian marriage." In this Article, I focus on the disjuncture between these terms by examining marriages involving transgendered people (hereinafter referred to as "transgender marriages"). Of course, these people and their relationships are important in their own right. The underlying purpose of examining them here, however, is as a means of critiquing the opposition to same-sex marriage. The opponents assume a fixity of gender and sex — biologically, socially, and normatively — that is simply belied by transgender marriages.

1. 852 P.2d 44, 68 (Haw. 1993). The court held that a rule allowing a man to marry a woman but not another man amounted to discrimination on the basis of the sex of the proposed partner. *Id.* at 64.

2. *See Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

Furthermore, those false beliefs about gender are crucial to their opposition to gay and lesbian same-sex marriages.

Until *Baehr*, no American court had ever ruled in favor of same-sex marriage. In fact, a number of courts rejected challenges with an almost cruel dismissiveness.³ The Hawaiian developments, however, changed the legal landscape across the country. Lawsuits have been filed in at least three other states seeking marriage rights for same-sex couples.⁴ In response, a number of states added provisions to their laws specifying that marriage is to be limited to different-sex couples.

The likely legality of same-sex marriage in Hawaii has also evoked much discussion about whether other states will recognize the same-sex marriages performed in Hawaii. The applicability of the law regarding full faith and credit to marriages has never been entirely clear. States have generally recognized marriages performed elsewhere; one is not required to remarry upon moving across state lines as one is required to obtain a new driver's license. Nonetheless, states have sometimes refused to recognize marriages performed elsewhere when the marriage was evasive (i.e., undertaken by residents of one state who go to another state to take advantage of its looser marriage laws and immediately return to their home state) and/or in violation of the "strong public policy" of the home state. These decisions appear to assume that the home state can, as a matter of choice-of-law rules, make such decisions and is not bound to recognition under the more restrictive rules of full faith and credit.

Undoubtedly, Hawaiian same-sex marriages will force courts to confront these issues. In anticipation of that situation, Congress passed the Defense of Marriage Act ("DOMA"),⁵ which

3. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

4. One case has been brought in Vermont by three couples. See Cheryl Wetzstein, *Gay Couples Sue Vermont for Refusing Marriage Licenses*, WASH. TIMES, July 23, 1997, at A1, available in 1997 WL 3678718. The other was brought in New York by Toshav and Phillip Storrs. See Yancey Roty, *Gay Couple Asks Court for Marriage License*, GANNETT NEWS SERV., Nov. 6, 1997, available in 1997 WL 8840951.

5. The section of DOMA dealing with marriage recognition is codified at 28 U.S.C. § 1738C. It says that no state "shall be required to give effect to any public act, record, or judicial proceeding" of any other state "respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C.A. § 1738C (West Supp. 1997)). DOMA also includes a provi-

purports to free other states not to recognize such marriages. Similarly, a number of states have passed legislation directing courts not to recognize such marriages or declaring it the strong public policy of the state to limit marriages to different-sex couples.⁶ None of this legislation has yet been judicially reviewed.

The situation internationally is similar to that domestically. No country gives full, unqualified marriage rights to same-sex couples, though the domestic partner provisions in much of Scandinavia provide for almost the same rights and duties as marriage, both between the parties and vis-à-vis the state.⁷ Great Britain limits marriage to different-sex couples. The European Court of Human Rights has rejected the claim that such a limitation is in violation of the right to marry,⁸ holding that "the right to marry . . . refers to the traditional marriage between persons of opposite biological sex" and that the relevant provision of the Convention "is mainly concerned to protect marriage as the basis of the family."⁹

sion, codified at 1 U.S.C. § 7 which defines marriage for purposes of federal law and regulation to "mean[] only a legal union between one man and one woman." *Id.* at § 3(a).

6. Sixteen states, Alaska, Arizona, Delaware, Georgia, Indiana, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, and Utah had adopted such restrictive legislation as of June 18, 1997. See Evan Wolfson, *Anti-Marriage Bills 1997 — State-by-State Status Report* (last modified June 18, 1997) <<http://www.ftm.org/overview/state-by-state.html>>. Legislation was introduced in many other states but was blocked or was still pending at the time of the compilation.

In this Article, I avoid use of the term "opposite sex," except in quotations. While males and females are different, the notion of "opposite" suggests a greater distinction than seems true of human beings who share their membership in the species *Homo sapiens*, and whose variability within sex categories is vastly greater than the variability between men and women. The term "opposite sex" also embeds a heterocentrist notion of a natural relationship between the sexes ("opposites attract"). The concept of the two sexes as opposites, which may seem natural and biological, is in fact historical and contingent. See THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* (1990); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 70-74. (1995).

7. An Internet posting references such laws in Norway, Sweden, Iceland and Hungary. See Bob Stock, 1 QUEERLAW-DIGEST 333 (Nov. 17, 1996) <<http://abacus.oxy.edu/pub/queerlaw/digests/v01.n333>>.

8. See *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (Ser. A) (1987), 9 E.H.R.R. 56, 68 (1987) (construing Article 12 of the Convention on Human Rights, which provides that "[m]en 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").

9. *Id.*

In Part II of this Article, I summarize the position of the opponents of same-sex marriage, looking at both the statements in judicial opinions rejecting same-sex marriage claims and the arguments of commentators. I then turn to the question of transgenderism. In Part III, I briefly describe transsexualism and transgenderism and the variety of ways in which the transgendered status of one of the partners in a relationship can create conflict with the legal rules limiting marriage to different-sex pairs. Part IV examines the reasoning of the leading English and American cases in which transgender marriages have been challenged as same-sex and therefore void. Part V brings the two strands of the Article together to consider how the existence of transgender marriages fundamentally challenges each of the arguments used by opponents to same-sex marriage.

II. RATIONALES OF OPPONENTS TO SAME-SEX MARRIAGE

In order to establish rights to same-sex marriage, it is necessary to understand the reasons given for opposing such rights. The arguments can be found in a number of fora — the opinions of those courts that denied claims for such marriage rights, the arguments of litigants, and the writings of academics and other commentators. I examine these arguments and then compare them to transgender relationships in order to see how such relationships might serve to undermine or deconstruct the opposition to same-sex marriage. Thus, I do not fully respond to these claims nor cite to the extensive literature that responds to them.

To put it mildly, the earlier court opinions are under-theorized, consider *Baker v. Nelson*,¹⁰ *Singer v. Hara*,¹¹ and *Jones v. Hallahan*.¹² Each rejects both the argument that the relevant state statute does not limit marriage to different-sex couples and the argument that any such limit is unconstitutional. Although the statutes are silent, each court simply asserts that marriage by its nature, tradition, or definition is an institution that requires one man and one woman. This understanding is “as old as the book of Genesis;”¹³ thus, what the plaintiffs “propose is not a marriage.”¹⁴ Because marriage has already been defined by the court’s *ipse dixit* as an inherently two-sexed institution, the rule

10. 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972).

11. 522 P.2d 1187 (Wash. Ct. App. 1974).

12. 501 S.W.2d 588 (Ky. 1973).

13. *Baker*, 191 N.W.2d at 186.

14. *Jones*, 501 S.W.2d at 590.

does not infringe on the constitutionally protected right to marry. Similarly, *Loving v. Virginia*¹⁵ is an inapt analogy because the gender rule, unlike the racial restriction on marriage in that case, is descriptive of marriage, not a limitation on it.¹⁶ In all three opinions there is but one phrase that provides any hint of a rationale — *Baker v. Nelson* notes, in passing, that marriage is an institution “uniquely involving the procreation and rearing of children.”¹⁷

The arguments of the court were considerably more developed in *Dean v. District of Columbia*,¹⁸ perhaps because the case was the site of a major litigation effort.¹⁹ Nonetheless, the opinions reach the same conclusion regarding the meaning of the marriage statute, though with much greater detail. Again, it is assumed that the word marriage means man-and-woman marriage. The court relied on gendered statutes elsewhere in the domestic relations law, case law from other jurisdictions, and “the traditional understanding of ‘marriage.’”²⁰ To define this traditional understanding of marriage, the court looked to *Webster's* and *Black's Law Dictionaries*, both at the time the statute was enacted and more recently, to conclude that “the word ‘marriage’ . . . means the union of two members of the opposite sex.”²¹

As to the constitutional arguments, the majority held that “same-sex marriage is not a ‘fundamental right,’”²² and that the recognized fundamental right to marry was protected “because of its link to procreation.”²³ Thus, marriage was limited to persons of opposite sexes — persons who could conceivably have

15. 388 U.S. 1 (1967) (holding that Virginia's anti-miscegenation law forbidding interracial marriage was unconstitutional discrimination on the basis of race).

16. See *Singer*, 522 P.2d at 1191-92.

17. 191 N.W.2d at 186.

18. 653 A.2d 307 (D.C. 1995) (There are three separate opinions by Judges Feren, Steadmen, and Terry. All agree in the ultimate ruling for the defendant).

19. William Eskridge, the lead counsel, is a professor at Georgetown who has written extensively on issues of sexual orientation. The case also drew amicus support from the ACLU and Lambda Legal Defense and Education Fund.

20. *Dean*, 653 A.2d at 314-17.

21. *Id.* at 315. In his concurrence, Judge Terry asserts that a court could not alter this definition, which reflects what the term has meant “for hundreds of years.” *Id.* at 362 (Terry, J., concurring). Compare the comments of Senator Coats (Republican from Indiana) that the “definition of marriage . . . is rooted in our history, our laws, our deepest moral and religious convictions, and our nature as human beings. It is the union of one man and one woman. This fact . . . cannot be altered.” 142 CONG. REC. S4947 (daily ed. May 9, 1996).

22. *Dean*, 653 A.2d at 331.

23. *Id.* at 332-33.

children with each other. While Judge Ferren would have recognized an equal protection claim based on sexual orientation sufficient to deny the defendant's summary judgment, he garnered no other votes for this position.²⁴ Judge Steadman, concurring, reiterated the special nature of those relationships protected by the fundamental right to marry: they are "bound up with sexual relations, procreation, childbirth and child rearing" and are linked to the "survival of the . . . species."²⁵ Special recognition of such considerations "constitute the requisite substantial relationship to an important government interest."²⁶ Judge Terry dismissed the equal protection argument out-of-hand. Marriage, as Judge Ferren stated, is by its nature limited to different-sex couples, and thus "same-sex 'marriages' are legally and factually — i.e., definitionally — impossible."²⁷ The plaintiffs cannot claim discrimination, for "the sameness of their gender prevents them from entering into . . . [that] legal status."²⁸

The opinions in these cases provide only the most fragmentary bits of reasoning for why marriage is and should be limited to different-sex couples. This is in part a reflection of the issues before the courts. It is not wholly irrational, in divining legislative intent behind gender-neutral marriage laws, to look to dictionaries or to (presumably) long and unbroken histories of different-sex marriages. Yet the easy dismissal of the constitutional arguments is more troubling, for the arguments seem largely to assume, rather than explain, why the fundamental right to marry is so limited. The sole "argument" is rooted in the concept that marriage is protected because it is linked to notions of family or, more specifically, procreation. Marriage is valued because of its contribution to the species in producing children and because married couples presumably provide the best atmosphere for raising children.

The linkage between traditional marriage and children forms the core of the *Baehr v. Lewin* holding that rejected the plaintiff's due process claim²⁹ and the claim for a "compelling state interest" to overcome the equal protection claim on re-

24. *See id.* at 333.

25. *Id.* at 362-63 (Steadman, J., concurring) (citations omitted).

26. *Id.* at 362, 364 (Steadman, J., concurring).

27. *Id.* at 361 (Terry, J., concurring).

28. *Id.*

29. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Marriage is constitutionally protected as "the logical predicate" of "the fundamental rights of procreation, childbirth, abortion, and child rearing." *Id.* at 56.

mand. This linkage is repeated in the arguments against same-sex marriage presented in the amicus brief of the National Association for Research and Therapy on Homosexuality ("NARTH") in *Baehr v. Miike*.³⁰ These arguments assert that the ideal family constellation for the healthy psychological development of children is the mother-father-child grouping³¹ and that recognition of same-sex marriages might make the motherless or fatherless child into an ideal instead of a recognized sub-optimal form.³² A brief on behalf of a collection of religious conservative organizations, led by the National Legal Foundation, argues as follows: (1) same-sex marriage necessarily entails sodomy; (2) sodomy, as Blackstone indicated, is contrary to the law of nature and nature's God;³³ and (3) the Declaration of Independence makes it clear, all positive law should be construed to be consistent with such natural law.³⁴ Therefore, the court should not require Hawaii to recognize same-sex marriage, for to do so would "perpetuate a dangerous trend in the law, whereby law has been divorced from its religious moorings."³⁵ Finally, echoing the views of the NARTH brief, these organizations argue that the social science data on the effect on children is unclear and thus "society must 'err' on the side of the traditional family."³⁶

The most diverse arguments against same-sex marriage appear in the briefs of the defendant, the State of Hawaii. In large part, these arguments attempt to avoid the prior ruling of the Hawaii Supreme Court which states that the restriction against same-sex marriage implicates the provision of the Hawaii Constitution forbidding sex discrimination. The defendant asserts repeatedly that the rule is really one about sexual orientation forbidding homosexual marriages.³⁷ The rule merely uses gender

30. See Amicus Brief for National Association for Research and Therapy on Homosexuality at 2-3, *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, (Haw. Cir. Ct. Dec. 3, 1996).

31. See *id.*

32. The findings of the trial court that lesbian parenting structures produced healthy children were dismissed on the grounds that they did not prove conclusively "that there is no harm and that no harm will be found in the future," and thus that the courts should avoid changes that are contrary to common sense. *Id.* at 5-8.

33. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 215-16 (15th ed. 1809).

34. See Amicus Brief of Coral Ridge Ministries Media et al., at 3-6, *Baehr*, 1996 WL 694235.

35. *Id.* at 7.

36. *Id.* at 8.

37. See State's Opening Brief at 12-19, *Baehr*, 1996 WL 694235.

as a perfect proxy since the state argues that “heterosexual people, by definition, do not wish to marry individuals of the same sex.”³⁸ Interspersed with this argument are claims that might be loosely classified as “tradition” and “children.” The first claim includes arguments that the state is entitled to reflect “the widely held values of its people” in its marriage law, especially when “no other society, past or present,” has ever defined marriage otherwise.³⁹

Furthermore, the state should not be required to give homosexual relations the same approbation that it accords that relationship “that ha[s] always been the bedrock of civilization.”⁴⁰ The state’s arguments regarding same-sex marriage and children largely echo those of the amici. The state has a concededly compelling interest in fostering the propagation of the human race, and that interest “is advanced by sanctioning only those marriages in which procreation is possible.”⁴¹ The brief refers to the conceded “unique paternal and maternal contribution” that can be provided only “in the context of a traditional marriage.”⁴²

It is unsurprising that these litigation-generated documents provide only superficial arguments against same-sex marriage. One would assume, by contrast, that the literature generated by academics and other commentators would provide a much richer, more theoretically grounded set of arguments that might help us understand the basis for opposition. Unfortunately, that literature is also thin, fragmentary, and generally under-theorized.

One quickly notices that only a small proportion of the burgeoning legal academic literature dealing with same-sex marriage and other issues of sexual orientation is written from a conservative perspective. One of those conservative writers, Professor Lynn Wardle of Brigham Young University, notes that between 1990 and mid-1995, only one of seventy-two law review articles, notes, comments, or essays on same-sex marriage took an uncompromising position in favor of the existing limitations, while sixty-nine were generally supportive of same-sex marriage rights.⁴³ Wardle attributes this to a liberal hegemony in the law

38. *Id.* at 16.

39. *Id.* at 1.

40. State’s Reply Brief at 7 n.8, *Baehr*, 1996 WL 694235.

41. *Id.* at 8.

42. State’s Opening Brief at 32.

43. See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18-20 [hereinafter Wardle BYU].

reviews that makes the expression of positions such as his "taboo" in the academy. This taboo, he asserts, "may make publishers of academic writing less willing to print articles expressing viewpoints opposing gay/lesbian goals such as same-sex marriage."⁴⁴ Wardle is right that the absence of a fully developed debate about such important public policy issues is a loss. He is very partial, however, in his explanation for why few articles are written in opposition to same-sex marriage. First, people choose what they will spend great time and effort writing about by what stirs their passions. Opposition to some other groups' claims of rights is unlikely to evoke the sort of emotionally charged yet disciplined response that would lead people to spend months and years researching and writing about the issue.⁴⁵ Second, the rather weak quality of the few articles that are published in opposition to same-sex marriage suggests that it is difficult if not impossible to write something that is intellectually coherent and rigorous from that viewpoint. If the existing literature contains the best arguments that can be made, the position ought to lose in an intellectually honest debate.

A review of this literature is a depressing task. Trying to organize and analyze the various rationales is a bit like trying to divide a bag of multicolored feathers into neat piles in a windy room. Nonetheless, the exercise is worth the effort. Understanding the intellectual weaknesses of the opposition may help focus us on the more significant concern, i.e., responding to the political and psychological biases that form the basis of popular and legislative opposition.

The arguments opposing same-sex marriage are generally classifiable under four headings. First, there are arguments of tradition and definition: marriage is and always has been solely between men and women. Same-sex marriage is a contradiction in terms or, at least, an insult to the traditions and morals of society. Second, there are arguments about the value of marriage: traditional marriage is both a core of our civilization and an institution currently under threat. Treating same-sex relationships (an inferior if not harmful social form) the same as traditional marriage would undermine the status that is necessary to pre-

44. *Id.* at 22.

45. Wardle himself concedes that those most interested in same-sex family issues will be likely to favor gay rights. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 839 (1997) [hereinafter Wardle ILL].

serve traditional marriage. Third, there are arguments based on marriage as a vehicle for procreation: marriage is valued and protected because of its relationship to procreation. The essence of marriage is the potentially procreative marital sexual act, and such an act by definition cannot occur in same-sex relationships. Fourth, there are the arguments about the risk to children: because the existence of approved same-sex relationships would contradict necessary moral values, all children would be misled if same-sex marriage were allowed. Furthermore, the recognition of same-sex marriage would result in children being raised within households without both a mother and a father; such families are necessarily inferior loci for child rearing.

These rationales appear in various permutations in the commentary. Perhaps the most coherent set of arguments is made by natural law theorists, John Finnis, Robert George, and Gerard Bradley. They assert that marital sex is a unique human good to which all other sexual activity is deeply inferior. Finnis argues that the "union of the reproductive organs of husband and wife really unites them biologically."⁴⁶ Such an act by its nature is potentially procreative, even between spouses who happen to be sterile,⁴⁷ and therefore has a meaning that extends beyond the instrumental use of another person's body for one's pleasure.⁴⁸ All other sexual acts lack this character and are thus inferior. The state can and should deny its approbation to non-marital sexual relationships.⁴⁹ The argument seems inconsistent for it rests on the potentially procreative nature of particular bodily joinings, yet includes within its approved category joinings in which procreation is clearly impossible.

46. John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066 (1994).

47. *See id.*

48. *Cf.* Hadley Arkes, *The Closet Straight*, NAT'L REV., July 5, 1993, at 43 (homosexual activity is inferior to penile-vaginal intercourse which is "the only sexuality that can produce 'another generation'") (quoting Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993).

49. *See* Finnis, *supra* note 46, at 1053. Finnis would not criminalize sodomy if carried out discreetly. Some natural law critics have taken even harsher positions vis-à-vis homosexuality. Harry Jaffa asserts that "the very root of the meaning of nature is generation," and that marriage by its nature is linked to procreation. Homosexuality is a violation of natural law and the failure to condemn it as immoral sets a society on the slippery slope to the acceptance of "incest, rape, and other enormities." Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 265-77 (1995) (discussing HARRY V. JAFFA, ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION (1993)).

George and Bradley claim that this critique misunderstands the natural law position. Marriage itself is a good, apart from its instrumental relation to procreation. Furthermore, the essence of marriage is the "two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type."⁵⁰ They assert that, the term "reproductive type" avoids the apparent dilemma of the nonfertile octogenarian by defining a category that includes her marriage and marital intercourse as "intrinsically good."⁵¹ All these authors recognize the difficulty in explaining such concepts to the rational, secular mind, but suggest that that difficulty inheres in the reader rather than the text. Bradley and George say that "[i]ntrinsic value cannot, strictly speaking, be demonstrated . . . it must be grasped in noninferential acts of understanding."⁵² Primary evidence for its truth is that the recognition of the intrinsic value of marriage is part of "our legal and religious traditions."⁵³

The most extensive, academic argument against same-sex marriage is presented in two lengthy articles by Lynn Wardle.⁵⁴ His articles expand on all of the claims enumerated above. Same-sex marriage cannot be a fundamental right because there is no traditional or widespread support for it.⁵⁵ Marriage is historically and by its nature heterosexual and "the heterosexual dimension of the relationship . . . is the reason why marriage is so valuable to individuals and society."⁵⁶ Society, therefore, rightly

50. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 305 (1995).

51. *Id.*; cf. ANDREW SULLIVAN, VIRTUALLY NORMAL 46 (1996) (presenting argument that "[e]ven with sterile people, there is a symbolism in the union of male and female that speaks to the core nature of sexual congress and to its virtuous instantiation"). See also Finnis, *supra* note 46, at 1065.

52. George & Bradley, *supra* note 50, at 307 (footnote omitted).

53. *Id.*

54. See Wardle BYU, *supra* note 43; Wardle ILL, *supra* note 45. See also Lynn D. Wardle, Some Common-Sense Objections to Same-Sex Marriage (unpublished manuscript, cited in Wardle BYU, *supra* note 43, at 5 n.7).

55. See Wardle BYU, *supra* note 43, at 57.

56. Wardle BYU, *supra* note 43, at 39; see also G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541, 567 (1985) (arguing that the perception of marriage as sacred "would be compromised by enlarging its base to include same-sex unions"). Eskridge summarizes this line of argument as resting on the concern that "[t]o allow homosexual marriages would be to taint this good [of marriage] and send a signal that the state is somehow approving such relationships." WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 104 (1996).

Perhaps the clearest explication of this traditional-definitional claim notes the way in which "marriage, viewed now as a symbolic event, enacts, institutionalizes, and ritualizes the social meaning of heterosexuality . . . and maintains heterosexual-

gives traditional marriage a special place and to claim that same-sex relations are entitled to the same status sends us down a slippery slope that would also protect incest or polygamy.⁵⁷ Furthermore, recognizing and protecting same-sex relationships as if they were marriages would harm children. In particular, two harms are likely. Children raised by homosexual parents are at special risk of themselves engaging in homosexual behavior, which is assumed to be a harm to them.⁵⁸ Moreover, Wardle seems to suggest that children raised in gay households are likely to suffer the harms associated with parental extramarital relationships.⁵⁹

In particular, Wardle perceives gender difference as essential to marriage and parenting. Fathering is different from mothering and children are best off if "raised by both a father and a mother."⁶⁰ Two genders are equally necessary for the roles of "husband" and "wife."

The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential strengths and inimitable potential value to society. The essence of marriage is the integration of a universe of gender differences . . . associated with sexual identity.⁶¹

ity as a social identity." Richard D. Mohr, *The Stakes in the Gay-Marriage Wars*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 105, 106 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter *SAME-SEX MARRIAGE*].

57. See Wardle *BYU*, *supra* note 43, at 47. Conservative activist Robert Knight extends the slippery slope analogy. If marriage is not limited to one man and one woman, there is apparently no basis for not extending it to a man and his daughter or a man and his dog. See Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, in *SAME-SEX MARRIAGE*, *supra* note 56, at 108, 115.

58. See Wardle *ILL*, *supra* note 45, at 853-54. Disapproval of same-sex sexual relations also provides ammunition for protecting all children from the temptations toward such behavior. See, e.g., RICHARD A. POSNER, *SEX AND REASON* 297 (1992) (recognizing the possibility that societal disapproval of homosexuality may help young people who are wavering to stay on the heterosexual side of the divide); SULLIVAN, *supra* note 51, at 102 (stating that society should "resist . . . the movement to abolish" the distinctions between gay and straight to "reduc[e] the risk that . . . children will become homosexual" (quoting E.L. Pattullo)).

59. See Wardle *ILL*, *supra* note 45, at 856. See also Mark Strasser, *Sodomy, Adultery, and Same-Sex Marriage: On Legal Analysis and Fundamental Interests*, 8 *UCLA WOMEN'S L.J.* 313, 326-29 (1998).

60. Wardle *ILL*, *supra* note 45, at 861.

61. Wardle *BYU*, *supra* note 43, at 39; cf. Buchanan, *supra* note 56, at 559 ("[O]pposite-sex marriage, the status traditionally offered by government as the framework in which sexual conduct may legally occur, is tied uniquely to the gender of those seeking to enter the relationship.").

Richard Posner, in his inimitable fashion, constructs a somewhat distinct, though overlapping set of arguments for restricting marriage to different-sex couples. Tradition matters not because marriage must always mean what it has meant, but because various legal rules associated with marriage were designed for a heterosexual paradigm and their extension to same-sex couples should be considered one-by-one.⁶² Same-sex relationships (at least among men) will be, on average, inferior to heterosexual marriages, in light of: (1) "the male taste for variety in sexual partners;" (2) the fact that the partners, as they age, will become less attractive to each other, given men's desire for young and attractive sexual partners; and (3) and the lack of children biologically related to both, which are "the strongest cement of marriage."⁶³ "[I]t would be misleading to suggest that homosexual marriages are likely to be as stable or rewarding as heterosexual marriages."⁶⁴ Society should be reluctant to "plac[e] a stamp of approval on homosexuality" by permitting same-sex marriage.⁶⁵

Part of the reason Posner sees gay male relationships as inherently less stable is because they involve only men. The stability of traditional marriage is a consequence of "the presence of a female."⁶⁶ According to Posner, gay men, like all men, desire frequent sexual encounters, a pattern exacerbated by the unavailability of marriage, which is "an important device for taming sexual desire."⁶⁷ However, gay men are also disproportionately viewed as effeminate and found in unmanly occupations, while lesbians are seen as mannish.⁶⁸ While Posner does not specifi-

62. See POSNER, *supra* note 58, at 313.

63. *Id.* at 305-06. Arkes provides a related "reason" for excluding gays from marriage. Marriage is an institution based on monogamy which "is not exactly the vision of gay sex." Arkes, *supra* note 48, at 44.

64. POSNER, *supra* note 58, at 312. More bluntly, Robert Knight asserts that "[c]alling two lesbians a 'marriage' is telling a lie." Knight, *supra* note 57, at 115. Others have analogized the extension of marriage to same-sex couples as a "form of grand theft . . . [since] straights wouldn't really be married if gays were." RICHARD D. MOHR, *GAY IDEA: OUTING AND OTHER CONTROVERSIES* 90 (1992). See also Buchanan, *supra* note 56, at 567 ("[I]t is perhaps too strong a statement to say that loss of exclusiveness would trivialize opposite sex marriage.").

65. POSNER, *supra* note 58, at 311.

66. *Id.* at 307. Hadley Arkes asserts that men without women to domesticate them suffer from numerous social ills and they are not "likely to be tamed to a sudden civility if they are merely arranged, in sets of two or three." Arkes, *supra* note 48, at 44. As Sullivan ironically notes, such arguments, carried to their logical conclusion, would suggest that women would be best off in lesbian relationships. See SULLIVAN, *supra* note 51, at 110.

67. POSNER, *supra* note 58, at 302.

68. See *id.* at 300-04.

cally link these views of homosexuals to the opposition to same-sex marriage, he notes that one reason for the negative reactions to the perceived effeminacy of gay men may be a desire “to sort everyone into one of just two unambiguous gender bins — the ‘masculine’ and the ‘feminine.’”⁶⁹ While he does not specifically refer to children when concluding that same-sex marriage ought not be legalized, he does specify, as a reason for caution, the concern that such a rule might provide same-sex married couples the “same rights of adoption and custody as heterosexual couples.”⁷⁰

The legal commentators tend to structure their arguments largely within a constitutional structure. Since I am searching for the public policy arguments — the arguments for why same-sex relationships ought not be granted the status of marriage — it is useful to look as well at those commentators that speak directly to that issue. I focus on two who are exemplary of a larger set of conservative commentators.

James Q. Wilson largely reiterates the natural law arguments of Finnis and others.⁷¹ Marriage has been understood and valued as a heterosexual institution in every religion and culture.⁷² Marriage is a supreme human value “for without it the newborn infant is unlikely to survive or . . . prosper.”⁷³ Marriage is thus linked to procreation. But what of the sterile? Marriages between sterile heterosexual couples do not threaten the vision of marriage as same-sex marriages do; “people . . . want the form observed even when the practice varies: a sterile marriage . . . remains a marriage of a man and a woman.”⁷⁴ Because same-sex marriages are visibly different, they erode the public sense of marriage as uniquely valuable and thus threaten the institution itself. Finally, Wilson presses the argument around children. Children, tradition shows, are best raised by married heterosexu-

69. *Id.* at 302.

70. *Id.* at 313. Like Wardle, he also assumes that it is undesirable that children turn out gay and that any parent, if they could do so costlessly and without side effects, would provide their child with a cure for homosexuality. *See id.* at 308-09.

71. *See* James Q. Wilson, *Against Homosexual Marriage*, in *SAME-SEX MARRIAGE*, *supra* note 56, at 137.

72. *See id.* at 141.

73. *Id.* at 140. Similarly, Arkes suggests that the function of marriage is “the generation of children” and the institution is thus not needed by gays. Arkes, *supra* note 48, at 44. *See also* Baehr v. Miike, No. CIV. 91-1394, 1996 WL 694235, at *6 (Haw. Cir. Ct. Dec. 3, 1996) (Defense expert Dr. Eggebeen testified that “marriage is a ‘gateway to becoming a parent,’ and marriage is synonymous with having children.”).

74. Wilson, *supra* note 71, at 140.

als. Children deliberately brought into same-sex unions will learn of their difference and we cannot "now say how grievous" this knowledge will be.⁷⁵ Again, the assumption is of harm; all the evidence to the contrary is rebutted by noting that there are only relatively small studies over relatively short periods.⁷⁶

Finally, a summary of the conservative arguments against same-sex marriage would not be complete without a discussion of the arguments of Robert H. Knight, the Director of Cultural Studies at the Family Research Council.⁷⁷ He summarizes his arguments at the beginning of his article. Legalizing same-sex marriage is wrong because it would: (1) erode the priority given to marriage over other relationships; (2) deny the "procreative imperative" behind the protection of marriage and family; (3) erode the social stability derived from marriage-based kinship system; and (4) increase the likelihood that children will be raised in same-sex households "despite the clear danger this poses to children's development of healthy sexual identities."⁷⁸ The article then expands on these and other positions. Marriage is, by definition, a relationship between one man and one woman whose purpose "is to stabilize sexuality and to provide the best environment in which to procreate and raise children."⁷⁹ If the term "marriage" was used for any other relationship, it would be devalued.⁸⁰ Marriage is valued because it is necessary to the survival of society. "[S]ocieties can get along quite well without homosexual relationships, but no society can survive without heterosexual marriages and families."⁸¹ A society that does not put marriage and the family in a special, protected place is in danger of chaos and political destruction.⁸² Extending marriage to same-sex relationships necessarily transforms and weakens the

75. *Id.* at 144.

76. *See id.* at 143. This point is developed at much greater length in Wardle ILL, *supra* note 45, at 851-52.

77. *See* Knight, *supra* note 57.

78. *Id.* at 108.

79. *Id.* at 119.

80. *See id.* at 115. This point is made in a more sophisticated fashion by Posner, who argues that the informational value of knowing someone is married would be lessened. Under current law, for example, "if our son or daughter tells us that he or she is getting married, we know the sex of the prospective spouse." POSNER, *supra* note 58, at 312. One would hope that most parents would have more direct information about their offspring's sexual orientation.

81. Knight, *supra* note 57, at 114.

82. *See id.* at 117 (Knight does not explicate how recognizing gay and lesbian marriage would have such apocalyptic consequences.).

institution. It is, he argues, part of an agenda to “demote marriage to a level with all other conceivable relationships.”⁸³ Same-sex pairings are inherently different and inferior. They are less likely to be monogamous and they involve oral and anal sex, which Knight describes as the “unhealthy behavior that is the essence of homosexual sexual activity.”⁸⁴

Finally, homosexuality and its approval, by extending marriage to same-sex couples, threaten children and the family. Marriage is meant to benefit the children of that marriage and other children as they seek role models. Any family other than one with a biological mother and father present is necessarily inferior.⁸⁵ Same-sex households are worse than divorced or single-parent families, since they “present[] an aberrant form of sexuality as something ‘normal.’”⁸⁶

Lurking within most of these arguments, though only intermittently articulated, is a very specific and deeply gendered vision of legitimate marriage.⁸⁷ Andrew Sullivan explains the position:

to legitimize homosexuality is to strike at the core of the possibility of civilization — the heterosexual union and its social affirmation — and to pervert the natural design of male and female as the essential complementary parts of the universe.⁸⁸

Those relationships that are valued necessarily involve one man and one woman. This is so because it has always been so. It is so

83. *Id.* at 112.

84. *Id.* at 116.

85. While Posner appears to adopt the sociobiological perspective that the advantage accrues from the genetic tie between the adults and child, others focus on the gendered nature of the household. In the remand in *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996), the State of Hawaii asserted that “it is best for a child that it be raised in a single home by its parents, or at least by a married male and female.” However, their own witness, Dr. Pruett, returned to the genetic theme, arguing “that biological parents have a predisposition which helps them in parenting children.” *Id.* at *4.

86. Knight, *supra* note 57, at 119.

87. A number of commentators from the more liberal side of the spectrum also see same-sex marriage as challenging the gender norms that underlie traditional marriage, but argue that this supports a constitutional right to such marriages by strengthening the analogy to *Loving v. Virginia* which held that a ban on interracial marriages was unconstitutional. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 631-33 (1992); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

88. SULLIVAN, *supra* note 51, at 21.

because proper sex requires a penis and a vagina and — at least as a kind of legal fiction — the possibility of procreation. It is so because men and women as such relate differently to children and children require both maternal and paternal child-rearing skills. Those relationships that are forbidden by a same-sex marriage ban disrupt this gendered pattern. By doing so they cause harm and offense. The majority of people opposes same-sex marriage both because they find such relationships abhorrent and because they are worried that such relationships would be appealing if not surrounded by moral and legal disapproval. Thus, society must both condemn same-sex relationships and be seen as condemning them. The case of transgendered people and their relationships, as elaborated below, challenges a number of these arguments and their underlying presumptions.⁸⁹

III. EXISTING SAME-SEX MARRIAGES IN TRANSGENDER RELATIONSHIPS

The debate about same-sex marriage falsely assumes: (1) that the issue is whether same-sex marriages will be permitted in the future; and (2) that it is a simple matter to categorize a given relationship as same-sex or different-sex. While there are probably few transsexual marriages,⁹⁰ they do exist and they serve as a conceptual point for deconstructing the same-sex marriage debate. Ignoring transgendered people and their relationships is both a moral wrong to this minority and a mistake in developing the theoretical tools for the larger debate. To help combat this omission, I want to briefly describe: (1) the characteristics of transgenderism; and (2) the varieties of intimate relationships involving transgendered people.

89. Martine Rothblatt calls this the “apartheid of sex” and says that “blurring of class boundaries is the gravest offense because it challenges the reality of the division of reality.” MARTINE ROTHBLATT, *THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER* 19 (1995).

90. Some members of the transsexual community report a “VERY rough” estimate of 150-250 transsexual-rooted “legal same sex marriages.” Janet Elizabeth Flecher, 1 *QUEERLAW-DIGEST* 268 (Sept. 21, 1996) <<http://abacus.oxy.edu/pub/queerlaw/digest/v01.n268>>. The number may be higher. By one estimate, one-half of one percent of the population does not fit easily and clearly within the category “man” or “woman.” See Laura Markovitz, *When the Mirror Is Wrong*, 1 *FAMILY* 3 (1995) (citing family therapist Gary Sanders). While such persons may have a significantly lower marriage rate than the general population, this would suggest a substantially larger number of marriages in which one of the partners is, in some way, gender transgressive.

A. *Characteristics of Transgenderism*

Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual *orientation*, but sexual *identity*. Transgenderism describes people who experience a separation between their gender and their biological/anatomical sex.⁹¹ For some transgendered people, core gender identity is different from their sex; others engage in a gender presentation that is different from that associated with their sex. The transgender community comprises people of different races, ages, genders, classes, and family situations. Thus, different meanings will be attached to their transgenderism and different social consequences will flow from their attempts to express that sexual identity. As the case of Renee Richards⁹² indicates, a successful doctor and tennis star can afford to obtain sex reassignment surgery and hire expensive lawyers to litigate her claim to play tennis as a woman. Richards's situation is both similar to and radically different from that of a working-class transsexual who cannot afford surgery or who will lose his job at the factory when he cross-dresses.⁹³

There are also important differences within the transgendered community which are linked to the very criteria that

91. Analysis of transgender issues thus provides a means for examining the analytical distinctions between sex and gender. See, e.g., Meredith Gould, *Sex, Gender, and the Need for Legal Clarity: The Case of Transsexualism*, 13 VAL. U. L. REV. 423 (1979). Unfortunately, perhaps in a misguided attempt to desexualize the concept of sex discrimination, the Supreme Court has misused the term gender when it means sex. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 157 n.1 (1994) (noting that the case "does not involve peremptory strikes exercised on the basis of femininity or masculinity . . . [t]he case involves . . . sex discrimination plain and simple") (Scalia, J., dissenting).

In thus separating sex and gender analytically, I do not mean to accept the notion that gender is the epiphenomenon of sex. Rather, I believe it is closer to the truth, as Katherine Franke says, that "sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles." Franke, *supra* note 6, at 2. For purposes of this Article, the central fact is the distinction between sex and gender, not their logical or metaphysical relationship.

92. See *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267 (1977).

93. Cf. *Doe v. Boeing*, 846 P.2d 531 (Wash. 1993) (Transsexual engineer at Boeing sued unsuccessfully after she was terminated for wearing "excessively" feminine clothing). Given the limited success of transsexuals in legal challenges, it is unlikely that any transsexual who cannot afford attorney's fees will be able to hire private counsel on a contingency fee basis. There is also, to my knowledge, no established national public interest organization whose focus is the pro bono litigation of transgender legal issues.

define that community. The collectivity of those who are defined by their "non-normative" position on issues of sexual identity includes, but is not limited to transsexuals. Transsexuals understand themselves to be members of the "opposite sex"⁹⁴ from that which their genitals would suggest and often seek sex reassignment surgery to make those genitals match their core gender identity. In effect, transsexuals seek to become, physically, socially, and legally the sex they have always been psychologically. If they succeed in doing so, transsexuals often consider themselves simply to be members of their new sex, rejecting any emphasis on how they arrived there.⁹⁵ In that sense, one might imagine them as akin to the "virtually normal" gay folk who want to be part of a world in which sexual orientation is as insignificant as eye color, and disappear into the melting pot of the straight world.⁹⁶ Other transsexuals have claimed transsexualism as a basis for an identity and they have built a politicized community. Those who use the term "transgenderism" see themselves as connected to the gay/lesbian community; this larger grouping is sometimes referred to by the umbrella term "queer."⁹⁷

94. See *supra* note 6 (on use of term "opposite sex").

95. "Transsexuals usually just want to live their lives as men and women and do not ordinarily want to be part of any particular group, life-style, or social cause." KIM ELIZABETH STUART, *THE UNINVITED DILEMMA: A QUESTION OF GENDER* 47 (1983). See also ANNE BOLIN, *IN SEARCH OF EVE: TRANSSEXUAL RITES OF PASSAGE* 70-71 (1988) ("[A]t some point during full-time status [male-to-female transsexuals] transform their personal and social identities to the point that they view themselves as natural women . . . and reject their transsexual identity as well as the term passing.").

Transsexuals might also be seen as the conservative wing of the transgender community because they do not challenge the notion that there are two sexes and two genders which match them, only their individual place within that framework. See Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, 846 (1995) (asserting that sex reassignment surgery "essentially reassigns individuals from an existence which represents a fundamental challenge to social construction of gender . . . to an existence which is no longer threatening").

96. Cf. SULLIVAN, *supra* note 51 (arguing for legal protection of gays and lesbians who are "straight" in all but their choice of erotic partners and against the notion of a distinct "queer" identity).

97. See Carey Goldberg, *Shunning "He" and "She," They Fight for Respect*, *N.Y. TIMES*, Sept. 8, 1996, at 24; GORDENE OLGA MACKENZIE, *TRANSSEXUAL NATION* (1994) (arguing that demand for sex reassignment surgery as a response to "gender dysphoria" is culturally contingent and proposing nonsurgical cross-gender living along the model of the berdache). Only in the last few years have transgendered persons formed an organization, "It's Time, America," specifically designed to advance their interests in the political arena. See Jane Fee, *Round Table Discussion on Transgender Activism*, *PROCEEDINGS FOURTH INT'L CONF. ON TRANSSEXUAL L. & EMPLOYMENT POL'Y* 59 (1995). On the development of open

The transgender community also includes nontranssexual people whose gender identity or presentation does not consistently or completely match the gender that society insists is the natural and necessary correlate to their anatomical sex. Cross-dressers⁹⁸ wear the clothes associated with the other sex. Some do so to obtain employment unavailable to persons of their anatomical sex or because cross-dressing provides pleasure; others do so to express aspects of their identity they find inexpressible when dressing and acting in conformance with what is socially expected of persons with their anatomy.⁹⁹ While outside observers may assume cross-dressers are gay, the cross-dressing community has traditionally defined itself as specifically heterosexual,¹⁰⁰ excluding a priori the cross-dressing drag queen and stone butch. In effect, both the gay/lesbian and the transgender communities have historically marginalized or excluded gays and lesbians who were also cross-dressers and gender nonconformists.¹⁰¹

and politicized transgender organizations, see generally Anne Bolin, *Transcending and Transgendering: Male-to-Female Transsexuals, Dichotomy and Diversity*, in *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY* 447, 472-74 (Gilbert Herdt ed., 1994).

98. Psychologists and other outside "experts" generally use the term transvestism for this phenomenon; those within the community generally prefer the term cross-dressing.

99. See Bolin, *supra* note 97, at 458. The last reason is an issue for men today who are, as men, inhibited from forms of emotionalism deemed to "effeminate." The extent to which transsexualism and transvestism are distinctive phenomena is a matter of contention, with transsexuals more likely to perceive the two as entirely distinct and cross-dressers to perceive a continuum between them. See *id.* at 457-58.

100. Bolin notes that "gay cross-dressers were eliminated from the Berdache Society," which thus became an organization solely for male-to-female transsexuals and heterosexual male cross-dressers. *Id.* at 451; see also MACKENZIE, *supra* note 97.

101. Cf. Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995) (discussing erasure of drag queens and other gender nonconformists in gay history). I believe that the move toward alliance with the transgendered community reflects, and is partly dependent on, the change within the gay and lesbian community to include our gender rebels. By contrast, the proponents of a lesbian feminism that condemns butch and femme roles cannot accept the possibility of political or epistemological linkages with transgenderism. Cf. JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE* (1994) (harsh feminist critique of transsexualism).

Nonetheless, the alliance is not a simple one. Insofar as transsexuals insist that maleness is defined by masculinity and femaleness by femininity, they challenge the insistence of many effeminate gay men and butch lesbians (as well as of more radical transgenderists) that one's sex is not dependent on one's gender presentation and, indeed, that there is nothing necessarily binary about gender itself.

Transgenderism also includes people who cannot be neatly pigeonholed as either transsexuals or cross-dressers, but who live in a variety of ways that reject the dichotomy of gender, the place they have been assigned within that dichotomy, or both.¹⁰² Transgenderism includes, for example, nonoperative transsexuals and bi-gendered people.¹⁰³ A person born with male genitalia might understand herself to be a woman. She might dress, live, present herself publicly as a woman, and perhaps take hormones to induce some physical shifts toward a more feminine body, but choose not to undergo sex reassignment surgery. As far as she is concerned, she *is* a woman and what is between her legs does not affect that identity.¹⁰⁴ Tom/Sharon, my acquaintance who describes himself as “bi-gendered,” rejects simple gender dichotomies in a different way. Tom/Sharon chooses, at different times, and in response to particular social and psychological incentives to present him/herself as male or female. The anatomy remains the same; the dress, walk, voice patterns, and sense of self shift.¹⁰⁵ One might think of him/her as the transgendered equivalent of the bisexual.

[P]reoperative, postoperative and nonsurgical transsexuals as well as male and female cross-dressers and transvestites . . . form a transgender community that is in the process of creating not just a third gender but the possibility of numerous genders and multiple social identities.¹⁰⁶

The two communities also must confront their conflicted and tangled cultural roots. For example, one sees a struggle over history: are those women who cross-dressed to avoid the strictures of the female role proto-transsexuals, or proto-lesbians, or both? More contemporaneously, consider the hostile reaction of transgender activists when a *Village Voice* writer referred to murdered female-to-male transsexual Brandon Teena as a lesbian, in effect denying Teena the pronoun he died for claiming. See Michelangelo Signorile, *Transgender Nation*, OUT, June 1996, at 40. Transgender folks and their allies have also condemned the erasure of the transgenderism of the leading figures in the Stonewall riots. See, e.g., Arriola, *supra*, at 33. Bolin suggests that the common use of the berdache as a model by the transgender and homosexual communities may facilitate affiliation between the groups. See Bolin, *supra* note 97, at 477.

102. See, e.g., ROTHBLATT, *supra* note 89, at 3 (“[M]anhood and womanhood can be life-style choices open to anyone, regardless of genitalia.”).

103. See *id.*

104. Phyllis Frye, a Texas lawyer and transgender activist, has facilitated documentation of their new gender identity for two such nonsurgical transsexuals.

105. Interview with Tom/Sharon in Houston, Tex. (July 4-6, 1996). See also Richard M. Levine, *Crossing the Line: Are Transsexuals at the Forefront of a Revolution — Or Just Reinforcing Old Stereotypes About Men and Women?*, MOTHER JONES INTERACTIVE (May/June 1994) <http://www.motherjones.com/mother_jones/MJ94/levine.html>.

106. Bolin, *supra* note 97, at 447.

Transgenderists also vary on the dimension of sexual orientation. Transgenderism and homosexuality are not simply two faces of the same characteristic, as suggested by social conservatives who label all such people as “perverts.”¹⁰⁷ In an attempt to bring scientific clarity to the phenomenon of transsexualism, the earliest theorists rejected this conflation and insisted that “the transsexual is not a homosexual.”¹⁰⁸ Some even made heterosexuality one of the diagnostic criteria.¹⁰⁹ The criterion of heterosexuality reflected a deep-seated homophobia. A transsexual with male anatomy had to be a straight woman in a man’s body. Thus, her desire for men was not perverse. But what if she understood herself to be a woman attracted to women? The doctors and psychiatrists were not and still frequently are not prepared to change what looked like a straight man into a lesbian.¹¹⁰

These researchers and activists were correct in rejecting the notion that homosexuals comprised a third sex¹¹¹ or that they were in essence suffering from gender confusion.¹¹² But they

107. See, e.g., Jeff Vos, *The Homosexual Threat: The Battle Rages* (visited Apr. 28, 1998) <[http://alpha.ftcnet.com/~freedom/colum/vos1.html#the battle rages](http://alpha.ftcnet.com/~freedom/colum/vos1.html#the_battle_rages)>.

108. Edward S. David, Note, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 292 (1975). But see Michael W. Ross, *Gender Identity: Male, Female or a Third Gender*, in TRANSSEXUALISM AND SEX REASSIGNMENT (William Walters & Michael Ross eds., 1986) (noting that there is not necessarily a link between transsexualism and sexual orientation, and citing one study which showed that postoperative transsexuals were disproportionately homosexual).

109. See Ross, *supra* note 108.

110. “A review of the professional literature revealed that heterosexuality was frequently cited as an intrinsic attribute and defining feature of transsexualism.” Bolin, *supra* note 97, at 460. See also HARRY BENJAMIN, *THE TRANSSEXUAL PHENOMENON* 22-23 (1966) (defining transsexuals as, inter alia, oriented towards persons of the “opposite” sex of his/her psychological sex). Furthermore, traditionally “transsexuals are . . . required to divorce their spouses before a surgeon may perform the conversion operation” so as not to create a legal same-sex marriage. Bolin, *supra* note 97, at 454. Nonetheless, studies of transsexuals themselves suggest that a substantial proportion define themselves as gay or bisexual. See STUART, *supra* note 95, at 49-60. These sources may somewhat overstate matters. None of my survey respondents indicated that medical personnel used issues of family status or sexual orientation to screen them for the availability of sex reassignment surgery.

111. For a discussion of this concept and its historical application to both homosexuals and transgendered persons see, for example, *THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY*, *supra* note 97; GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940* 49-63 (1994).

112. This collapse of transgenderism and homosexuality is still apparent in the responses to children who do not behave in “gender-appropriate” ways. They are perceived by parents and therapists as proto-homosexuals and/or proto-transsexuals

were wrong when they replaced a false concept of necessary sameness — that all transsexuals must be homosexual — with an equally false concept of necessary difference — that all transsexuals must be heterosexual. Gays and lesbians do not necessarily experience gender confusion; transgendered people are not necessarily gay,¹¹³ but there are transgendered lesbians and transgendered gay men.

B. *A Survey of Transgendered People*

Given the range of characteristics of transgendered people, including their various sexual orientations, they may face a variety of obstacles to legalized marriage.¹¹⁴ To develop some understanding of the variety of transgender relations and the legal barriers for each, I sent out a survey by e-mail¹¹⁵ asking respondents about their gender status and their intimate relationships before and after transition. The potential respondents — transgender activists I knew and people to whom they passed on the survey — form a wholly unscientific sample. Nonetheless, the results may at least provide some evidence of the range of possibilities.

All but one of the respondents were already taking hormones. Some had undergone significant numbers of surgeries related to their sex reassignment, such as mastectomies for

and subject to forced treatment. See Eve Kosofsky Sedgwick, *How To Bring Your Kids Up Gay*, in FEAR OF A QUEER PLANET 69 (Michael Warner ed., 1994); Shannon Minter & Phyllis Randolph Frye, *GID and the Transgender Movement: A Joint Statement by the International Conference on Transgender Law and Employment Policy ("ICTLEP") and the National Center for Lesbian Rights ("NCLR")* (1996) (unpublished manuscript, on file with author).

113. Although some of her correspondents still assume cross-dressing equals homosexual, Ann Landers, that repository of Middle America wisdom, reports that experts say "while some cross-dressers are homosexual or bisexual, some are not." Ann Landers, *Couples Can Come to Terms with Cross-Dressing Issue*, MIAMI HERALD, May 21, 1993, at 2F. See also Ann Landers, *Cross-Dressing Is Not Necessarily Homosexuality*, MIAMI HERALD, Jan. 13, 1997, at 5C.

114. As Pat Califia notes, there is a dearth of literature about transsexuals' erotic relationships. Most of the literature by and about transsexualism tends to describe atomized individuals, focusing on their gender identity to the exclusion of their sexual activities and relationships. See PAT CALIFIA, *SEX CHANGES: THE POLITICS OF TRANSGENDERISM* 196-208 (1997) (describing, and beginning to remedy, this lack of attention).

115. I prepared a questionnaire and distributed it through the Internet to transgendered activists with the request that they redistribute it within their communities. I received approximately three dozen responses. The number of people who saw the posting is unknown. Copies of the survey and responses (with identifying information deleted) are on file with the author.

females-to-males ("FTM") or breast implants and voice box surgery to raise the voice pitch for males-to-females ("MTF"). Some had scheduled but not yet completed "full" surgical transformation. A number of respondents, however, were in a more ambiguous or transitional place. They were unsure if they wanted to undergo "bottom" surgery to construct the genitalia of their chosen sex. Some simply answered "no" to the question "have you had" or "are you planning to have" surgery. Others indicated that they probably would not undergo surgery because of financial limitations or health problems that made major surgery dangerous. Regardless of the stage at which they found themselves or their ultimate anatomical goals, all defined themselves as transsexual.

A significant number of the respondents had been in long-term committed relationships prior to their decision to begin hormone therapy or sex reassignment surgery. Most of these, like most of the respondents overall, were MTF and each was married, at least initially. In each case, the nature of the relationship changed; they described their current relationships with their wives as being "like sisters" or no longer sexual. One MTF described her wife's "sadness at the loss of penetration." These marriages continued for some of the same reasons that other couples' marriages continue: commitment, affection, and economic interdependence, including the wife's need for continued employment-based health benefits. A number of respondents expressed concern that these benefits might be at risk because of their employer's knowledge of their sex change; at least one had to persuade her employer that her marital status was unchanged by her change in sex. Half the MTF respondents saw their prior marriages end either before the change or during the transition. One MTF attributed her marital separation to her wife's unwillingness to become a lesbian.

None of the FTM respondents had been married. One had been involved with a genetic male; three had been in lesbian relationships. One relationship continued and they married after the respondent's sex reassignment surgery. This couple are currently seeking to allow the wife to execute a second parent adoption of the child the he bore when he was still genetically female. Two other lesbian relationships ended, one when the partner of the FTM transitioned into a gay man. The respondent later also transitioned but has become a heterosexual man.

A smaller proportion of the respondents have formed long-term intimate relationships since their transitions. Half of them remain heterosexual and in two cases they married their new partners without having or needing a changed birth certificate. Conversely, two of the three MTFs in new relationships with genetic females have married or plan to marry their partners by relying on their unchanged birth certificates to obtain marriage licenses for what appear to be and are experienced as lesbian relationships.

While one can draw no statistical conclusions from fewer than thirty responses, one can see the wide range of possibilities in terms of the gender status of the respondents, their sexual orientation, the responses of prior partners to the transition decision, and the kinds of post-transition intimate relationships these respondents have chosen. In the next Part, I examine the ways in which legal institutions have dealt with some of these issues.

IV. THE LEGAL RESPONSE TO TRANSGENDERED MARRIAGES

There are few reported legal decisions involving the intersection of transgendered persons and marriage rights. That small set of decisions, however, provides a useful lens for examining how the law constructs gender and what it means when it requires that marriage partners not be of the "same sex." For whatever reason, the British cases are by far the most lengthy. They provide a thick description of the parties and their relationship, as well as a detailed analysis of the relevant law and related medical and social science. I begin with a recounting of *Corbett v. Corbett*¹¹⁶ and *J. v. S.-T*¹¹⁷ before turning to the American cases.

A. *Corbett v. Corbett*

Even for one who does not find transsexualism itself peculiar, *Corbett's* facts are strange.¹¹⁸ The petitioner-husband, Arthur Corbett, was already married when he met the respondent. Corbett was a transvestite who associated with a "deviant" subculture and had engaged in homosexual encounters. He was in-

116. [1970] 2 All E.R. 33.

117. [1997] 3 W.L.R. 1287.

118. The case involved "a relationship with a rather odd man of varied sexual inclinations: heterosexual, homosexual, and transvestite." Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 1007 (1971) (footnotes omitted).

trigued when he learned about April Ashley, who was born George Jamieson, had spent time as a merchant seaman, had joined a troupe of female impersonators, and had later undergone sex reassignment surgery. Arthur arranged a meeting with Ashley and apparently fell in love. His feelings for her "had become those of a full man in love with a girl"¹¹⁹ and he asked her to marry him, though he also testified that he was jealous of her success at femininity. The two spent less than two weeks together after the wedding and, within a few months, Arthur successfully sought an annulment on two grounds: April was a man and she had refused to consummate the marriage.

In the course of his decision, Lord Ormrod, who was a physician as well as a judge,¹²⁰ discussed at length the sexual peculiarities of the parties and transsexualism in general. He set out several potential criterion for determining an individual's sex,¹²¹ and concluded that the most significant determinants were those which he held constituted biological sex: chromosomes, gonads, and genitals. These biological traits were fixed at birth and determined the individual's "true sex," which was unaffected by any later actions, including sex reassignment surgery.¹²²

Lord Ormrod's explanations, for the importance of sex categorization and for the choice of these criteria, are rooted in a particular, heterocentric view of marriage. He explained his decision as follows:

sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognized 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 Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, on whether the respondent is or is not a woman The question then becomes what is meant by the word "wo-

119. [1970] 2 All E.R. at 38 (quoting Arthur Corbett).

120. See Smith, *supra* note 118, at 1005 n.277.

121. The listed criteria include: (i) Chromosomal factors, (ii) Gonadal factors (i.e., the presence or absence of testes or ovaries), (iii) Genital factors (including internal sex organs), (iv) Psychological factors, and (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique, etc. which are thought to reflect the balance between the male and female sex hormones in the body). See Corbett, [1970] 2 All E.R. at 44.

122. Such surgery would have no effect on the person's chromosomes and could not produce functioning gonads (i.e., testes or ovaries). While external genitalia are constructed in such surgery, Lord Ormrod determined, in effect, that these were not sufficiently functional to count in his analysis. *Id.*

man" 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.¹²³

The heterocentrism in Lord Ormrod's opinion is apparent; what is somewhat less clear is his rationale for that heterocentrism. What is the "essential role of a woman in marriage" that requires that marriage match a "real" woman and a "real" man? One possibility is that the role is one which Ashley concededly could not perform — procreation. Ormrod, like many of the opponents of same-sex marriage, might assume that marriage is fundamentally a means to procreation.¹²⁴

The logical flaws in the procreation argument are glaringly obvious. First, no state has ever required proof of capacity to procreate before issuing a marriage license to a different-sex couple, as the weddings of the inhabitants of various retirement communities attest. Second, procreation does not need marriage. Third, procreation does not, in the late twentieth century, even need intercourse, as the sperm banks set up to facilitate the lesbian baby boom demonstrate.¹²⁵ Fourth, parenting does not require procreation: singles and couples, whether married, unmarried, straight, gay, or transgendered can successfully adopt and raise children if the state will let them. Finally, even if we assumed that marriage was a preferred environment for raising children because it provides a stable home with two adults deeply committed to the child's welfare, it is unclear how children

123. [1970] 2 All E.R. at 48 (emphasis added).

124. Cf. *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235, at *6-7 (Haw. Cir. Ct. Dec. 3, 1996) (describing the analogous argument by Hawaii's witnesses). Gay rights, including the right to same-sex marriage, have been criticized on the grounds that "[s]exuality" refers to that part of our nature that has as its end the purpose of begetting [o]ther forms of 'sexuality' may be taken as minor burlesques or even mockeries of the true thing." Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 64 GEO. L.J. 321, 323 (1995). See also Finnis, *supra* note 46, at 1066-67 (1994).

125. While much assisted reproduction is directed at childless heterosexuals, the lesbian community has developed its own institutions to facilitate reproduction. See LAURA BENKOV, *REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS* 116-27 (1994).

reared by heterosexual parents would be harmed because other adults could enter into same-sex marriage.¹²⁶

Alternatively, the judge in *Corbett* may have meant that the essential role of a woman in marriage is to provide a vagina as a penis receptacle. Ashley was, however, a post-operative MTF transsexual; she *had* a vagina. Furthermore, an earlier British case had held that a husband was not entitled to an annulment because his wife had a physical defect that rendered intercourse impossible, because an operation was available that could adequately enlarge her vaginal cavity.¹²⁷ The judge in that case rejected the husband's argument that a "mere cul-de-sac leading nowhere" was insufficient.¹²⁸ Lord Ormrod, however, in allowing Corbett's claim based on Ashley's alleged refusal to consummate, stated:

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" or as "vera copula" — 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 centimeters.¹²⁹

The syllogism seems to be that (1) Ashley was born male; (2) therefore Ashley is still male; (3) therefore intercourse between a man and Ashley is inherently sodomy. For the judge to hold this marriage legitimate would be to bridge the gap — perhaps of mere centimeters — between "normal" heterosexual sexual relationships and homosexual ones. In effect, the judge by an act of

126. Cf. Jonathan Rauch, *For Better or Worse?*, NEW REPUBLIC, May 6, 1996, at 18, 22 (arguing, contrary to conservative opponents of same-sex marriage, that purposes for promoting marriage include "domesticating men and providing reliable caregivers" as well as promoting procreation). For arguments in favor of permitting gay marriages, despite their nonprocreative character, see generally ESKRIDGE, *supra* note 56, at 62-74.

As Senator Barbara Boxer somewhat flippantly asked in her floor statement opposing DOMA, "Does the author of the bill in the House, whom the press says has been married three times, truly believe that the Defense of Marriage Act would have made him a better husband or his wives better wives?" E-mail from Barbara Boxer, United States Senator, to Mary Coombs, Professor of Law, (Sept. 18, 1995) (on file with author).

127. See *S. v. S. (otherwise W.)*, [1962] 3 All E.R. 55.

128. *Id.* at 59.

129. [1970] 2 All E.R. at 49. The term "intra-crural" refers to a form of intercourse in which the penis of one partner moves back and forth between the thighs of the other.

will deny the existence of gender ambiguity in the face of facts that make such ambiguity undeniable.

B. *S.-T. v. J.*

In 1995, the British courts were again faced with the situation of a transsexual marriage.¹³⁰ The transsexual partner had conceded the marriage was void so the formal question before the court was whether he was entitled to seek ancillary relief as a party to an annulled marriage. In the course of its opinion, however, the court examined the holding of *Corbett* in light of intervening human rights law and developments in the medical understandings of transsexualism.

The defendant, Michael, was born female, but understood himself to be male from an early age. He took hormones and had a radical mastectomy but, because of medical complications, never had surgery to change his female genitals. He began a sexual relationship with a woman who was described as sexually naïve. They married and had two children by artificial insemination. Michael never told his wife of his transsexual status. After approximately sixteen years of marriage, the wife filed for divorce. At that time she told an old school friend, who happened to be a private investigator, about some of her concerns about Michael — “his nipples, the scars under his arms, the fact that he used an artificial penis and the [blood] stains upon his underpants,” and of her belief that he was not very well endowed, perhaps “even sexually deformed.” Her friend investigated and told her that Michael’s birth certificate showed him to be a female named Wendy. The wife was apparently completely taken aback; “the sight of the birth certificate appears to have triggered the realization on her part that there was something fundamentally wrong.” Michael, who had made every effort not to discuss his gender status with his wife, was also upset by the revelation. The wife then sought a nullification of the marriage on the grounds that legal marriage requires a man and a woman. Michael did not contest the nullification.

The issue in the reported case was whether the former husband could apply for ancillary relief. Statutes normally conferred discretion on a trial judge to provide for property division or support after a nullified marriage, although not where the parties

130. See *S.-T. v. J.* [1997] 3 W.L.R. 1287.

had merely been cohabiting.¹³¹ A previous case had held that such relief would not be available for a bigamist.¹³² The issue was whether Michael's behavior here similarly went to the heart of marriage and thus barred ancillary relief as a matter of law.

On this particular issue and particular facts, the court¹³³ found that relief was barred. The court stressed that the husband's perjury, in asserting that he was legally eligible to marry, defrauded not only the state but his wife. The court found that Michael had been physically coy and verbally noncommunicative, and that his wife had not fully understood his sex/gender status.¹³⁴ The court found that she would not have married him if she had known his true gender.

In its larger discussion of the legal status of transsexualism, however, the *S.-T. v. J.* court was far less rigid than the *Corbett* court. It discussed the cases subsequent to *Corbett* in the European Court of Human Rights¹³⁵ and in other jurisdictions. The *S.-T. v. J.* court also discussed a paper by Dr. Gooren on biological aspects of transsexualism¹³⁶ and quoted at length from a New Zealand case which allowed a fully transitioned transsexual to marry as a member of his new sex.¹³⁷ Society

131. The wife came from wealth and had supplied the funds for the marital home; it appears that absent such relief the husband would be left near-destitute. Other proceedings had dealt with the extent to which he would be permitted continued contact with the children. *Id.* at 1287.

132. See *Whiston v. Whiston* [1995] 3 W.L.R. 405.

133. For convenience sake, I use the term "the court" to refer to the primary opinion by Ward, L.J. The concurring opinions by Potter and Neill are discussed briefly *infra*.

134. Although the court accepts this finding by the trial court, it does note how it is "astonishing that there was no single occasion in 17 years of life together when her eyes did not see, or her hands or her body feel, or her senses tell her that she was living with a man who had the genital formation of a woman, a man who did not simply have a small or deformed penis, but had no penis at all." *S.-T. v. J.* [1997] 3 W.L.R. at 1313.

135. Although those cases have not found it a violation of the convention to deny transsexuals the right to marry in their new sex, the judges of the European Court of Human Rights have been skeptical of the rigidity displayed in *Corbett*. See *Case of X, Y and Z v. United Kingdom* Eur. Ct. H.R. (Ser. A) (1997) (finding that a couple, one of whom is transsexual, and their child born through artificial insemination, are a family unit); *Rees v. United Kingdom* 106 Eur. Ct. H.R. (Ser. A) (1987). Recently, the European Court of Justice held that transsexuals were protected by the rules against sex discrimination in employment. See *Case 13/94 P. v. S. and Cornwall County Council* E.C.R. 2519 (1996).

136. The paper was approved in 1993 by the European Committee on Legal Cooperation at the Council of Europe. See *S.-T. v. J.* 3 W.L.R. at 1306.

137. See *id.* at 1302-03 (quoting *M. v. M.* (unreported) 30 May 1991, S. Ct. of NZ).

ought . . . to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry. Where two persons present themselves as having the apparent genitals of a man and a woman, they should not have to establish that each can function sexually.¹³⁸

The New Zealand court then noted that the alternative would be more disturbing. If a MTF was deemed still male, she could marry a woman, in what would to all outward appearances be a same-sex marriage.¹³⁹ In effect, *S.-T. v. J.* suggests that courts should approve seemingly heterosexual same-sex marriages, such as those of Arthur Corbett and Ashley Corbett, rather than gay or lesbian same-sex marriages as might exist if Ashley had married a genetic female.

The judges in *S.-T. v. J.* did not need to decide this question or the validity of *Corbett*, however, since Michael had not undergone the “surgical construction of a penis.”¹⁴⁰ For almost two decades, the husband and wife had sex with a dildo. Although this would have been irrelevant if the husband had been supplementing a too-small penis, as the wife said she believed, it was determinative when it was the only penis.

The husband’s perjury regarding his gender went to the heart of the marriage relationship, since it related to “a quintessential element of capacity.”¹⁴¹ The court noted that not all perjury was so serious. For example, lies about one’s prior marital history would not bar relief.¹⁴² The court suggested, however, that postoperative transsexuals might legitimately claim to be their new sex. The British marriage statute provides that a marriage is void if “the parties are not respectively male and female,”¹⁴³ but that language could, in the light of advancing medical knowledge, be reconceptualized to “place greater emphasis on gender than on sex in deciding whether a person is to be regarded as male or female.”¹⁴⁴

Judge Ward’s openness to the possibility of a legal heterosexual marriage between, say, a FTM and a woman is of course, dicta. Furthermore, this openness is not shared by the concurring judges. Judge Potter in *S.-T. v. J.* cites *Corbett* approvingly

138. *Id.* (quoting *M. v. M.*)

139. *See id.* (quoting *M. v. M.*).

140. *Id.* at 1303.

141. *Id.* at 1312.

142. *See id.* at 1315-16.

143. *Id.* at 1305 (citing Matrimonial Causes Act § 11(c) [1973]).

144. *Id.*

for the proposition that the criterion for determining sex “are biological,”¹⁴⁵ although he suggests that they might be mutable. A FTM “is not generally regarded as having satisfied the criteria of masculinity unless endowed (by surgery or otherwise) with apparent male genitalia.”¹⁴⁶ Judge Neill would also deny relief, focusing especially on the “grave deception” practiced on the plaintiff.¹⁴⁷ It is thus unclear how a British court would rule today in a case like *Corbett*, in which the marriage occurred after full sex reassignment surgery and where the nontransgendered spouse was aware of his/her spouse’s sex change.

C. American Case Law

The American cases involving actual or contemplated transsexual marriages generally follow a similar, though more abbreviated, logic to that applied in *Corbett* and *S.-T. v. J.* In *Anonymous v. Anonymous*,¹⁴⁸ the facts are a mirror image of *S.-T. v. J.* The husband sought an annulment, after discovering on his wedding night that his bride had male sex organs, both on the grounds that she was a man and thus could not marry another man, and on the grounds of fraud. The *Anonymous* court agreed with both arguments. The holding based solely on the wife’s fraud seems unexceptional.¹⁴⁹ Whatever the limits may be to the doctrine of annulment on the grounds of fraud going to the “essentials of the marriage,” it would seem that concealment of the fact that one does not have the equipment for the kind of intercourse one’s spouse expects would qualify.¹⁵⁰ Yet, the *Anony-*

145. *Id.* at 1326.

146. *Id.*

147. *Id.* at 1335.

148. 325 N.Y.S.2d 499 (1971).

149. In an earlier version of this Article, I rather snidely suggested the husband lacked a normal degree of sophistication for not discovering this fact about his fiancée before the wedding. That was, however, before learning of the wife in *S.-T. v. J.* who apparently remained ignorant of her husband’s female genitalia for seventeen years.

150. The naiveté or subconscious desire implicit in the action of the husband in *Anonymous*, 325 N.Y.S.2d 499, like that of the wife in *S.-T. v. J.*, 3 W.L.R. 1287, is less extraordinary than one might imagine. It is central to the plot in David Henry Hwang’s Broadway hit, *M. Butterfly*, the true story of a French diplomat who falls in love with his ideal “woman,” only to discover that his amour is a male Chinese spy cross-dressed as a woman. More recently, Bruce Jensen, a Utah Mormon married the cross-dressing Felix Urioste, on the belief that he had gotten her pregnant. He learned of his bride’s true sex only when the police found him/her after Jensen had filed a missing persons report. Again, annulment was the natural and available solution, although the media attention suggested that the case raised questions regarding

mous court also held that the marriage was void simply because the wife was a man. The court asserted that, not only was he a man at the time of the marriage, but that even sex reassignment surgery would not make him the requisite "true female." Marriage required a true male and a true female since its purpose was procreation.¹⁵¹

Not long after *Anonymous*, a New York court in *B. v. B.*¹⁵² faced the less common situation of a challenge by a wife to the validity of her transsexual marriage to a FTM.¹⁵³ During their courtship, Frances B., the wife, assumed Mark, the husband, was a man, relying on his words, dress, and appearance. Upon marriage she discovered Mark was incapable of normal sexual intercourse because he "[did] not possess a normal penis, and in fact [did] not have a penis."¹⁵⁴ Mark answered that he was a FTM transsexual in transition. Citing both *Anonymous* and the gay marriage cases of *Baker v. Nelson*¹⁵⁵ and *Jones v. Hallahan*,¹⁵⁶ the court held that marriage required one male and one female since "the marriage relationship exists with the results and for the purpose of begetting offspring."¹⁵⁷ The court seemed to conflate incapacity to have intercourse, traditionally a ground for annulment, with sterility. While one who is impotent cannot, absent assisted reproduction, procreate, many people are potent though sterile. They have never been deemed incapable of legal marriage. Mark, after sex reassignment surgery, could have had intercourse with his wife, though like many men, he could never

the sophistication and the "manhood" of the good citizens of Utah. Of course, as Bruce's bishop explained, he was "just a little country bumpkin from Wyoming." "Nice Guy" Amazed to Find Jailed Wife Is a Man, ARIZ. DAILY STAR, July 14, 1995, at 1A, available in 1995 WL 3278081. For a fascinating fictional portrait of a transsexual, suggesting psychologically compelling reasons why the girls with whom he was involved might want to understand the central character as a man, despite his lack of genitalia, see DINITIA SMITH, *THE ILLUSIONIST* (1997) (novel based on the case of Brandon Teena, a young FTM drifter murdered by jealous local teenage boys).

151. See *Anonymous*, 325 N.Y.S.2d at 500-01.

152. 355 N.Y.S.2d 712 (1974).

153. Although transgender activists claim that the situation occurs as often among anatomical females as anatomical males, every other litigated transsexual case that appeared in research for this Article involved an MTF transsexual.

154. 355 N.Y.S.2d at 713.

155. 191 N.W.2d 185 (Minn. 1971).

156. 501 S.W.2d 588 (Ky. 1973).

157. 355 N.Y.S.2d at 717 (quoting *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926)). See also *Adams v. Howerton*, 673 F.2d 1036, 1042-43 (9th Cir. 1982) (indicating that refusal to grant preferential immigration status to same-sex spouses might be justified by fact that "homosexual marriages never produce offspring").

impregnate her. The court held, however, that “[w]hile it is possible that defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship.”¹⁵⁸

B. v. B. suggested that categorization of a person by sex is a functional question and that Mark might be legally male in other contexts. Other courts, however, have been reluctant to recognize a sex change for fear that it will facilitate the transsexual’s ability to marry in his or her new sex. For example, the immediate issue before the court in *In re Ladrach*¹⁵⁹ was the MTF petitioner’s ability, following sex reassignment surgery, to obtain a new birth certificate reflecting her current sex and name. The court refused to order the bureaucracy to issue such a certificate precisely because Ladrach planned to use that birth certificate sex to marry “another” man.

Two American cases, one still ongoing, portend a somewhat more hospitable legal environment for transsexuals’ domestic relations situations. The case of *M.T. v. J.T.*¹⁶⁰ involved a marriage between a man, J.T., and a woman, M.T., who the husband knew had undergone MTF sex reassignment surgery before the marriage. Indeed, they began living together before the operation and J.T. had helped pay for M.T.’s surgery. They married and lived as husband and wife for two years, regularly engaging in penile-vaginal intercourse. Nonetheless, when the wife sued for divorce, the husband countered that she was a man and that the marriage was therefore void. The MTF wife had the best possible facts for refusing to void the marriage: (1) she had fully transitioned; (2) she could and did engage in sex as a woman; and (3) her spouse knew before the wedding that he was marrying a transsexual. The court held the marriage valid. It assumed that marriages are heterosexual unions between different-sex persons,¹⁶¹ but it concluded that the wife was a woman. Unlike *Corbett*, the *M.T. v. J.T.* court held that the most important criterion for classifying a person as male or female was core gender identity, not chromosomes. The determination of sex rested on “the

158. 355 N.Y.S.2d at 717.

159. 513 N.E. 828 (Ohio 1987).

160. 355 A.2d 204 (N.J. Super. Ct. 1976).

161. “[A] lawful marriage requires . . . two persons of the opposite sex. . . . In the matrimonial field the heterosexual union is usually regarded as the only one entitled to legal recognition and public sanction.” *Id.* at 207.

dual test of anatomy and gender," which determined sexual capacity. Sexual capacity was defined as "the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female."¹⁶² Under this test, *M.T.* was a female and her marriage to a male was therefore valid.

In one sense, *M.T.* splits the interests of gays and lesbians from those of heterosexual transsexuals, since it assumes that heterosexual sexual intercourse is the defining marital act. The case, however, provides a step forward from *Corbett* and *Anonymous* by deheterosexualizing marriage and exploding the conflation of sex, gender, and sexual orientation. *M.T.* implicitly rejects procreation as the necessary purpose of marriage; instead it views the core meaning of the marital relationship as intercourse and intimacy. Procreation excludes gay and lesbian relationships by definition. While gays and lesbians can and do procreate, they can never be genetic coparents. In contrast, intimacy and intercourse — at least if the latter is not narrowly limited to penile-vaginal forms of erotic intimacy — are as descriptive of gay and lesbian relationships as of heterosexual ones.¹⁶³

The most recent case involving a transsexual marriage is *Vecchione v. Vecchione*,¹⁶⁴ filed in Orange County, California in 1996. Joshua Vecchione, a FTM transsexual, underwent sex reassignment surgery nearly twenty years ago. He changed legal documents, to the extent possible, to reflect his current name and sex, but New York, where he was born, does not permit a change of sex on birth certificates. In 1990, Joshua married a woman, Kristie. They had a daughter by artificial insemination with the sperm of Joshua's brother. In 1996, Kristie filed for divorce and, shortly thereafter, amended her petition seeking to declare the marriage null and void. She and her attorney, a conservative activist, claimed that the marriage was never valid because Joshua was, and always would be, female and that as a female he could not legally marry another female. If such a petition were

162. *Id.* at 209.

163. *Cf. Smith, supra* note 118, at 1008 (describing the essential role of spouse as including the ability to engage in intercourse and "the ability to love and understand another" and concluding that a "marriage, transsexual or otherwise, should not be declared [void] unless it is apparent that the marriage never existed in the minds of the parties themselves"). This unassailable sentiment makes sexual orientation as irrelevant to the legitimacy of marriage as sex at birth.

164. No. 95D003769 (Orange County filed April 23, 1996).

granted, Joshua would be denied parental rights to his child. California law recognizes the husband as the legal father when a child is conceived through artificial insemination of a married woman with the husband's concurrence — as occurred in this case.¹⁶⁵ However, if Joshua were not the husband, and also not the genetic father, he would be a legal stranger to his daughter and the wife could cut off any continuing relationship between Joshua and the child.¹⁶⁶

The wife argued that a person's sex is determined by his or her chromosomes at birth and cannot be changed thereafter. Appearance, gender identity, and gender roles are all irrelevant. "[O]ne cannot change one's gender by merely changing clothes, receiving hormone injections, and applying makeup."¹⁶⁷ The surgery which removed his external female sex characteristics and constructed a penis was dismissed as merely "cosmetic surgery."¹⁶⁸

While the briefs primarily assert that gender is a matter of chromosomes, a declaration by the wife-petitioner suggests one rationale for not recognizing Joshua as a true male. His surgery could not create a fully operational male organ. The organ "certainly does not appear to be a penis, nor does it function like one. It is continually flaccid" and can only function for intercourse with the assistance of a splint-like support.¹⁶⁹

These arguments build on a conception of gender which is both rigid and rigidly dichotomous. One is what one is; any attempt to be anything else is a form of fraud on the universe.¹⁷⁰

165. See CAL. FAM. CODE § 7613(a) (West 1998).

166. Cf. *Curiale v. Reagan*, 222 Cal. App. 3d 1597 (1990); *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (1991) (denying the nonbiological lesbian comother legal rights to visitation with child).

167. Points and Authorities in support of Petitioner's Notice of Motion for a Blood Test at 4, *Vecchione*, No. 95D003769.

168. *Id.* at 8. This seems not only conceptually absurd but legally wrong, since California had previously recognized that sex reassignment surgery did not fall within the "cosmetic surgery" exception to eligibility for Medi-Cal funding. See *G.B. v. Lackner*, 80 Cal. App. 3d 64, 71 (1978). Compare the comments of the trial judge in *Ulane v. Eastern Airlines*, 581 F. Supp. 821, 826 (N.D. Ill. 1983) ("I do not know what it would take to convince defendant that a person who undergoes so radical a procedure . . . knowing all of the dangers and all of the trouble that it would and might involve, did not do it for some ulterior purpose.").

169. Declaration of Petitioner in Support of Motion for Summary Judgement at 2-3, *Vecchione*, No. 95D003769.

170. The attorney provides a numbered list of steps on the slippery slope that he feels we would be on if Joshua's sex change were recognized, including such suggestions as that a Caucasian could become black and obtain the benefits of affirmative

As one of the briefs argues, it would "emasculate[] all vestiges of legal reasoning" to find that someone could, by hormones and surgery, "alter father nature's plan" and change from a woman to a man.¹⁷¹

Fortunately, the petition to annul the marriage failed. The *Vecchione* court noted that a California statute recognized the validity of one's post-operative sex by providing for a change of gender designation on California birth certificates following sex reassignment surgery.¹⁷² Citing this statute, the court held that "the post operative genital anatomy of Mr. Vecchione is male except that he is sterile and unable to conceive children."¹⁷³

In summary, the transsexual marriage cases show courts struggling to categorize the defendants as male or female in order to decide if their marriages were valid. The courts agree that the nontranssexual partner is entitled to know what he or she is getting into, and that fraud or concealment of transsexual status are grounds to declare the marriage void. They similarly seem to agree that a person cannot marry as a member of his or her new sex before completing sex reassignment surgery — a man must have a penis and a woman cannot have one. The cases are least coherent and consistent when the courts are faced with deciding the sex of a postoperative transsexual. He or she appears to be a member of the new sex and can have what by all appearances is penile-vaginal intercourse, but is sterile. The courts cannot agree if such a person can perform "the essential role" of a man or woman. They cannot agree, I suggest, because they cannot de-

action "by modifying the color of his or her skin," that a noncustodial father could avoid further child support by undergoing a sex change operation and claiming that as a woman he "is no longer the father," and that a 50-year-old, by dyeing his hair white and delusionally believing himself to be 70, could "qualify for Medicare." Memorandum of Points and Authorities in Support of Summary Judgment for Entry of Nullity of Marriage at 11-12, *Vecchione*, No. 95D003769. The suggestion that a person could avoid parental support obligations by a claim of transsexual status was specifically rejected in *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (1985), which found a FTM to be the legal father and thus responsible for the support of the children produced by the artificial insemination of his wife.

171. Memorandum of Points of Authorities in Support of Motion for Summary Judgment for Entry of Nullity of Marriage at 8, *Vecchione*, No. 95D003769.

172. See CAL. HEALTH & SAFETY CODE § 103425 (West 1998).

173. Minute Order at X, *Vecchione*, No. 95D003769. The court denied summary judgment on the question of whether the marriage was based on fraud. The wife's various declarations seem to assert that the husband both informed her of the transsexual status and claimed that he had functioning testicles that produced sperm. *Id.* This, like the facts of other cases reviewed herein, suggests that high school sex education has had quite a limited effect on knowledge as well as sexual behavior.

cide precisely what that essential role is. The transsexual cases force courts to distinguish and deconstruct the multiple aspects of sexual identity and sexual role. The psychological disorientation evident in the opinions is apparently not conducive to the most precise analytic reasoning.

V. TRANSEXUAL MARRIAGES AS A CHALLENGE TO THE OBJECTIONS TO SAME-SEX MARRIAGES

No matter which strand of the opposition's argument against same-sex marriage we consider, transgendered marriages and the subsequent legal response undermine those arguments. Consider, first, the claims of language and tradition. Marriages, it is argued, must consist of a man and a woman because this is what marriage means and what marriage has always meant. However, the argument based on tradition rests on a factually faulty basis. As Eskridge showed, relationships between persons of the same genetic sex, that otherwise look to all the world like marriage, are recognized in a variety of cultures. In a number of African societies, powerful and wealthy women took wives.¹⁷⁴ In certain Native American cultures, berdaches — biological males who dressed and took on roles highly similar to women's — served as wives to male husbands.¹⁷⁵ These situations did not involve transsexuals in the modern sense of persons who have surgically changed their anatomy. Rather they involved a marriage-like relationship between two people of the same anatomical sex but of different genders. In that sense, these relationships could be cited as predecessors to either a modern transsexual heterosexual relationship or a gay or lesbian marriage. Clearly, however, they show that one cannot view marriage as an unbroken tradition solely of two-gendered, different-sex, heterosexual pairings.¹⁷⁶

Within American culture there have also been marriages that do not fit the traditional model in Euro-American society, although their nonconformity has been largely invisible. In addition to the transgender relationships revealed in the litigated cases above and in my survey, there are occasional stories of

174. See ESKRIDGE, *supra* note 56, at 33-35.

175. See *id.* at 27-31; see also CALIFIA, *supra* note 114, at 130-35.

176. As Nancy Polikoff has stressed, these relationships do not challenge the patriarchal, gendered nature of marriage and thus raise doubts whether gay marriage would similarly mean the domestication of gay life more than the liberation of marriage. See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993).

marriages whose transgressive nature is revealed only by accident.¹⁷⁷ For example, jazz player Billy Tipton was assumed by fans, neighbors — even, apparently, by his three wives and his children — to be a man until it was discovered upon his death that he was a woman who spent her life passing as a man.¹⁷⁸ Such marriages, during their hidden existence, do not challenge the presumptions of the same-sex marriage opponents. They demonstrate, however, that what appear to be good, traditional marriages may secretly house transgressive relationships. Like Trojan horses, these camouflaged relationships contain a different vision of marriage. Knowledge of these relationships shatters the complacency built into claims rooted in definition or tradition.

The argument based on traditional definitions of marriage is also vulnerable because it assumes that the dictionary can capture reality. Marriage is a humanly constructed institution and can, at least in theory, obey the rules of the dictionary. But a definition of marriage as one man and one woman assumes that the terms “man” and “woman” are sufficiently clear and stable to serve as building blocks. Biology, however, increasingly shows that defining sex/gender is not so simple. There are anatomically intersexed persons, sometimes called hermaphrodites, whose genitalia at birth are not clearly male or female. There are also persons whose chromosomal makeup is neither XX nor XY. Finally, there are transsexuals whose physical characteristics conflict with their psychological gender identity and social gender role. Neither *Webster's* nor *Black's Law Dictionary* can tell us how to categorize such persons or whom they should be permitted to marry.¹⁷⁹

Courts that have been faced by challenges to transsexual marriages, like the opponents of same-sex marriage, have generally assumed that marriage is valid only if there are two different-

177. See ESKRIDGE, *supra* note 56, at 37-39, 42-44.

178. See James Christopher, *The Lady Was a Jazzman*, TIMES LONDON, Nov. 11, 1997, available in 1997 WL 9242159.

179. On the complexity of sex/gender, see generally, KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US 72-73 (1994); ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT MEN AND WOMEN (1985). On the significance of these ambiguities and complexities for the same-sex marriage question, see MARK PHILIP STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION (1997); David Berreby, *Quelle Difference? Biology Will Defeat the Defense of Marriage Act*, SLATE (Sept. 10, 1996) <<http://www.slate.com/Concept/96-09-10/Concept.asp>>.

sex parties.¹⁸⁰ They also have generally assumed that this is a question of fact which the courts are qualified to determine.¹⁸¹ The differences among the various opinions have largely reflected differences in the underlying assumption of the relevant criteria. Some assume that sex has a true essence. The facts in the transsexual marriage cases make it impossible for the courts to take the simplistic positions of gay marriage cases like *Jones v. Hallahan* or commentators like Robert Knight. The opinions in the transsexual marriage cases still assume that every person has a discoverable, true sex. For *Corbett*, the key criteria were chromosomes, gonads, and genitals; sex is thus unchangeable. For *J.T. v. M.T.*, the key criteria were external genital anatomy and core gender identity; sex could then theoretically be changed. Other courts explicitly indicated that the criteria are functional. For example, *B. v. B.* said that B's lack of a penis meant that he could not be a husband, but suggested he might be male for other purposes.

When deciding how to determine if X is a man or a woman, and thus if X can be a husband or a wife, a court must have some vision of what it means to be a husband or a wife. As *Corbett* notes, there are a number of different possible criteria.¹⁸² The essence of transgenderism is the recognition that for some people these are inconsistent. The choice of which criteria count must reflect some notion of which are "true," or perhaps more pragmatically, which criteria will be allowed to matter.¹⁸³

180. Sometimes this rule has been embodied in the relevant statute, as in *S.-T. v. J.*, [1997] 3 W.L.R. 1287. In other cases, such as *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971), it seems merely to have been assumed.

181. Arguably, the *Vecchione* court found that the legislature had already set out the criteria for sex. Joshua was male because he had met the requirements for obtaining a change of sex designation on his birth certificate, had he been born in California. See CAL. HEALTH & SAFETY CODE § 103425 (West 1998).

182. The list in the case includes: (i) Chromosomal factors, (ii) Gonadal factors (i.e., the presence or absence of testes or ovaries), (iii) Genital factors (including internal sex organs), (iv) Psychological factors, and (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique, etc. which are thought to reflect the balance between the male and female sex hormones in the body). See *Corbett v. Corbett*, [1970] 2 All E.R. 33, 44.

183. No court has held any single criterion to be determinative. Even *Corbett*, which has been seen as resting on chromosomes, also refers to gonads and genitals in the criteria it rests its decision upon. In the case before it, it would appear that April had a vagina and did not have a penis, which would make her female by the criterion of genitals. The court evaded this logical inconsistency in its own analysis by simply asserting that, given April's chromosomal maleness, the cavity between her legs could not be a vagina. See [1970] 2 All E.R. at 49.

In deciding which criteria are relevant, the courts in transsexual marriage cases struggle with the same concerns as the opponents to same-sex marriage — the relative significance to marriage of intercourse and procreation. If, as Finnis says, true marriage requires the unitive act of penile-genital intercourse,¹⁸⁴ then a marriage requires a person with a penis and a person with a vagina. But, it turns out, the terms “penis” and “vagina” are as deconstructable as “man” and “woman” or “husband” and “wife.” A penis-holding cavity between the legs is not really a vagina if it is constructed between the legs of someone who is a chromosomal male, says *Corbett*.¹⁸⁵ Sex with an artificial penis, according to *S.-T. v. J.*, is presumably acceptable if the device supplements a deformed and useless penis, but not if it is the only penis.¹⁸⁶ But the judgement in *M.T. v. J.T.* held that the husband was a man after his surgery because he had “the physical ability . . . to engage in sexual intercourse” as a man.¹⁸⁷

Like the opponents of same-sex marriage, the opinions in the transsexual marriage cases sometimes read as if they need not choose between intercourse and procreation as definitions of marriage. *Corbett's* refusal to concede that a vagina can be surgically constructed seems to rest on a concern that April's cavity led nowhere — any sperm would hit a dead end — since for erotic purposes it was no different than a genetic woman's vagina. *Anonymous* suggested that even a postoperative MTF might not be a marriageable woman because marriage exists “for the purpose of begetting offspring.”¹⁸⁸ *B. v. B.* demonstrates as well the inherent confusion between the concepts of procreation and intercourse, for it claims that the key is Mark's inherent sterility, yet relies on cases annulling marriages for impotence.¹⁸⁹ Sterility, however, has never been recognized as a ground for annulment of marriages between persons with different and functioning external genitalia.

184. See Finnis, *supra* note 46, at 1066.

185. See 2 All E.R. at 33.

186. See *S.-T. v. J.*, [1997] 3 W.L.R. 1287. Surgeons can now construct artificial penises that function for intercourse, although, as with certain forms of impotence, an implanted device must be manually triggered to achieve erection. See MACKENZIE, *supra* note 97, at 19; Amy Bloom, *The Body Lies*, NEW YORKER, July 18, 1994, at 38.

187. *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. 1976).

188. *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (1971).

189. See 355 N.Y.S.2d 712, 717 (1974); See also *Anonymous*, 325 N.Y.S.2d at 500 (same confusion).

At a fundamental level, the opposition to transgender and to any same-sex marriage rests heavily on resistance to both gender transgression and the appearance of such transgression. What makes the marriages problematic is not merely who the parties are but who they appear to be. The distinction between reality and perception — or more precisely between perceptions rooted in various visions of sex and gender — can occur at two levels. First, there may be a fraud or misperception between the parties. Second, there may be a “fraud on the public.”¹⁹⁰ While the first raises legitimate ethical concerns, the second reveals the inherent falseness of the beliefs about both gender and marriage that are disrupted by such relationships.

In a number of the litigated cases, the spouses claimed ignorance of the transsexual status of the persons they were marrying until some time after the wedding. Deception as to one’s sexual identity, if proven, is surely an appropriate grounds for an annulment. Marriage is, in large part, about a gendered eroticism and the desire to engage in certain sexual acts within a socially approved institution. One is surely entitled to know that one’s partner is incapable of engaging in such acts or can do so only with the help of an artificial aid.¹⁹¹ Even if one partner is a post-operative transsexual fully capable of engaging in penile-vaginal intercourse, that fact is something the other partner is entitled to know. Transsexuals are unable to procreate. While sterility itself is not a ground for annulment, the possibility of children is sufficiently important to many, that fraudulent concealment of sterility frequently is.¹⁹² The cases suggest that there is a legal

190. The concept of “fraud on the public” has been particularly evident in the context of petitions for a change of name. See, e.g., *In re Dengler*, 246 N.W.2d 758, 761 (N.D. 1976); *Moskowitz v. Moskowitz*, 385 A.2d 120, 122 (N.H. 1978); *In re Fermer*, 685 A.2d 78, 81 (N.J. Super. Ct. 1996). *M.T. v. J.T.* rejected the argument that the concept should extend to marriages of a transsexual in her post-operative gender, stating that the assumption of that new gender was rather, the “removal of a false façade.” 355 A.2d at 209.

191. Annulment seems entirely appropriate, for example, in a situation like that in *Anonymous* where the husband claims that he woke up the day after the wedding and “discovered that the defendant had male sex organs.” He then left and they never had sexual relationships or lived together. It seems much less apt for the wife in *S.-T. v. J.* who claims to have only discovered her husband’s sexual identity by a document search after seventeen years of marriage and two children.

192. See, e.g., *Kronman v. Kronman*, 286 N.Y.S.2d 627 (1956); *Stegienko v. Stegienko*, 295 Mich. 530 (1940). By contrast, inability to engage in intercourse, but not inability to have children, is grounds for an annulment. See *Stepanek v. Stepanek*, 193 Cal. App. 2d 760, 762 (1961) (defining the test of physical inability as “inability for copulation, not fruitfulness”).

obligation in at least some jurisdictions to inform one's partner before marriage that one is transsexual; certainly there is an ethical obligation to do so.

A marriage, freely and knowingly entered into, should not be void, however, because the *state* believes the spouses cannot marry each other. The finding that marriages must be between different-sex parties is precisely such a rule, denying marriage to some who seek it. Even where the parties are aware of the sexual identity of their partners, the marriage is void because it does not fall within the legally cognizable bounds of marriage. Laws like the Defense of Marriage Act¹⁹³ and the holdings of cases like *Corbett*¹⁹⁴ permit one of the parties to such a marriage to use the law strategically to avoid marital obligations they willingly and knowingly accepted. This strategy is similar to the practice of some lesbian biological mothers who have sought to deny the legitimacy of their past relationships in order to block their comother from continued access to their child.¹⁹⁵ These statutes and cases would apparently also permit a transgender marriage to be ignored or challenged by third parties, such as parents, children of a prior marriage, insurance companies, or tortfeasors who might benefit legally if the marriage did not exist.

The opposition to transgender and same-sex marriages is based, in part, on a felt need to reserve the status of marriage for couplings between male husbands and female wives. The value of the institution of marriage is eroded if it is made available to others. Those who are uncertain of their sexual orientation may be more inclined to form a homosexual union deemed less desirable, if this does not mean giving up on the dream of being married. Even the solidly heterosexual may be less inclined to marry if the institution does not carry the status that derives from its exclusively heterosexual nature.

How will these harms occur? The population will know that gays and lesbians are marrying because they will see them in married couples. With the right to marry, gay and lesbian couples will be more open and blatant. They will invade public spaces in apparently intimate pairings, wearing matching wedding bands. Knowing that someone is married, as Posner argues,

193. Defense of Marriage Act, Pub. L. No. 104-199, § 2(a), 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C.A. § 1738C (West Supp. 1997)).

194. [1970] 2 All E.R. 33.

195. *See, e.g., In re Alison D. v. Virginia M.*, 7 N.Y.2d 651 (Ct. App. 1991).

will no longer tell you the sex of their spouse or (if it ever did with certainty) the person's sexual orientation.¹⁹⁶

In one sense, the sorts of transsexual marriages that reach the courts seem to provide little challenge to this enforced vision of the marital world as bi-gendered and heterosexual. They all involve a transsexual with a core gender identity and appearance of one sex and a partner of the other. However, transsexual marriages demonstrate that appearances can be deceiving. For example, consider a man who is married to a MTF who was born male. The wife still has male chromosomes, male internal organs; and she cannot produce eggs. She may not have a fully functioning vagina, indeed, she may not have a vagina at all. If such a person can be considered a woman, and a man can choose to marry her, it is not a big step for a man to marry a drag queen — where both parties understand themselves to be two men and their sexual relationship to be homoerotic although one has the gender presentation of a woman. In effect, transgender folks, by breaching the wall of gender dichotomy, demonstrate that heterosexual marriages and gay or lesbian marriages are points on a continuum, not two entirely distinct institutions.

Yet, if the courts were to enforce strict adherence to the chromosomal gender definition, they would find themselves on the other horn of the dilemma. This view assumes that a MTF is and remains a male, regardless of appearance, core gender identity, hormones, breasts, or surgically constructed vagina. Her marriage to a male is void. Logically, then, she must be able to marry a woman (because the birth certificates would indicate the requisite two sexes), even though this would appear to be a same-sex marriage.

This is the irony of the ruling in *In re Ladrach*,¹⁹⁷ which was designed to insure that a MTF transsexual could not change her birth certificate and marry a genetic man. Because she was still legally a man, then, she *could* marry a woman. In effect, the legal rules designed to prevent same-sex marriages, would forbid postoperative transsexuals from entering into what appears to be a different-sex heterosexual marriage. Those same rules would effectively authorize granting them a license to enter into what

196. See POSNER, *supra* note 58, at 312.

197. 513 N.E.2d 828 (1987).

would appear to be, and what they and their partners would understand to be, marriages between two men or two women.¹⁹⁸

Such apparently same-sex, transgender marriages now exist. The litigated cases all involve post-transition marriages. Yet, as the survey shows, some people marry first and later come to understand themselves as transsexual. Some then undergo sex reassignment surgery. If the partner remains married to the transsexual, the marriage between two people born of different sexes (or a woman and a MTF) is now to all appearances a marriage between, say, a man and a FTM transsexual. While I am unaware of any case challenging the validity of such a marriage, some transsexuals and their partners are concerned that the flurry of post-*Baehr* legislation makes their marriages vulnerable to annulment. At least one person in the survey has declined to change his birth certificate to minimize such danger.¹⁹⁹

One possible outcome is that unlike the rest of us, transsexuals, at a certain stage, have the freedom to marry a partner of either sex. Consider a genetic male planning to have a sex change operation. If the pre-operative MTF wants to marry a genetic female, she can, in most jurisdictions, marry her because the birth certificates will indicate she is a man marrying a woman.²⁰⁰ Despite the trepidation of some of my respondents, the

198. See *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975) (remanding the issue of whether a postoperative transsexual could obtain a change of birth certificate. The court noted that a failure to allow the change might be impermissible, in part, because it could infringe on the petitioner's fundamental right to marry.). As one commentator noted, to prohibit the transsexual from marrying in his or her new sex "might deprive the sexually reassigned individual of the ability to maintain a legal heterosexual relationship, forcing the transsexual to choose between celibacy and illegality." Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 247 (1971). *Baehr v. Mücke*, No. CIV. 91-1394, 1996 WL 694235, (Haw. Cir. Ct. Dec. 3, 1996), of course, provides another way to resolve the celibacy/illegitimacy dilemma. The ultimate goal of such reform, however, is to permit everyone, including the transsexual in his/her new sex, to marry a person of whatever sex he/she chooses.

199. In effect, such marriages are same-sex, but not homosexual. Opponents of some same-sex marriages falsely deny that such a relationship can exist. See, e.g., Defendants Reply Brief at 5, *Baehr*, 1996 WL 694235 (asserting that if a lesbian changed her sexual orientation she "would by definition no longer wish to marry the person she currently loves because that person is the same sex she is"). How, then, can you explain the heterosexual female partners of my MTF respondents who remain married to their now same-sex husbands?

200. Compare the case of Lori Michelle Buckwalter. According to news reports, she is taking hormones and planning sex reassignment surgery, which will make her anatomically female. "[S]ince he legally remains a man until then, Buckwalter is free to marry Sharon Contreras today." ASSOC. PRESS, Dec. 14, 1996. A similar case involving the marriage of a MTF prior to her surgery, to the woman she loved,

later surgery is not likely to void an existing different-sex marriage. Conversely, if she wants to marry a genetic male, she can have the surgery first, then either have the birth certificate changed in states that allow it, or apply for a marriage license, using her driver's license and her female persona to marry him. My survey respondents include people who have entered into both sorts of marriages. A rule that would forbid this freedom to transsexuals by requiring a fixed sex would limit the right to marry to persons who could pass a biological test of "proper" sex identity. Such a rule would deny intersexuals, and those such as S.-T., who cannot be securely classified as one sex or the other, the right to marry at all.

Marriage has been recognized as a fundamental right under the Constitution.²⁰¹ States cannot deny the right to marry even to those who do not pay their child support²⁰² or to those in prison.²⁰³ A rule limiting marriage to those whose sex/gender status is unambiguous would be the most extreme form of deprivation of the right to marry. Rules proscribing incest, polygamy, or gay marriage deny the affected persons the right to marry particular other persons. Those whose gender status is ambiguous, even for reasons beyond their control, could never marry anyone.

VI. CONCLUSION

An honest consideration of transgendered people and their relationships explodes the secure sense of fixed categories on which the opposition to same-sex marriages rests. The opposition clings to the fixed categories like a drowning man clings to a life raft in a sea of postmodern complexity and dissolving boundaries. If transsexuals can and do marry, then the meanings of marriage, husband and wife, and man and woman are necessarily fluid, complex, and socially constructed.²⁰⁴ These categories are no more fixed and natural than heterosexuality.

occurred more recently in Canada. Canadian Press report, *in* e-mail posting, Nov. 7, 1997 (on file with author).

201. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to . . . happiness.").

202. See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

203. See *Turner v. Safley*, 482 U.S. 78 (1987).

204. Conservatives seem to find same-sex sexual orientation to be a choice and unnatural; their own heterosexual desires are presumed inborn and natural. In reality, all sexual desire, like all sexual identity, is partly chosen, although generally ex-

Marriage is a relationship between two people who choose intimacy and commitment regardless of their gender appearance, their gender roles, or their current genitalia. Such a concept liberates transgendered people. It liberates gays and lesbians. It also liberates women. By breaking the perceived naturalism of the link between sex and gender, transgender relationships disrupt the gendered patriarchy on which traditional marriage rests. In an era in which the Promise Keeper movement promises to put women back on the pedestal and back into the cage from which they emerged a generation ago, alternative models of marriage are sorely needed.²⁰⁵ As transsexual marriages in all their glorious variety become more public, the conservative's rigid boundaries will be eroded, and we will all share the same freedom to marry.

perceived as immutable. All are equally natural, rather than perverse, but also socially constructed. On the gendered roots of the opposition to same-sex relationships, see generally JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* (1993); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1 (1995); Franke, *supra* note 6; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 *CAL. L. REV.* 1 (1995). On the relationship between opposition to same-sex marriage and demands for traditional gender roles, see, for example, Fajer, *supra* note 87; Koppelman, *supra* note 87; Law, *supra* note 87.

205. A freely chosen relationship involving roles of submission and dominance is as permissible in our liberal polity when taken on by two committed Christians as by a strict butch and femme. But the Promise Keepers seem to suggest a man's obligation to take back the leadership of the family, regardless of the wife's wishes in the matter.