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Transcending Gender: How the Absence of a Consistent Legal Definition of Gender Creates a Legal Limbo for Transgendered Individuals in the Context of Marriage

Shawn C Ellison

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“Injustice anywhere is a threat to justice everywhere.”  

I. INTRODUCTION

Christie and Jonathon were married for seven years. After Jonathon died while under a doctor’s care, Christie sued the doctor for wrongful death. To her dismay, both the trial court and the Texas Court of Appeals ruled that her marriage was void. She had no standing to sue.

Marshall was a successful Kansas businessman. J’Noel held a Ph.D. in finance and taught at Park College. Each had been married before. Marshall and J’Noel were married for only about eleven months when Marshall suddenly died intestate. Shortly after Marshall’s death, his estranged son from a previous marriage filed a petition seeking denial of J’Noel’s right to a spousal share of the estate. The courts again ruled that the marriage had been void.

How did the courts arrive at such extraordinary rulings? The answer lies in the fact that in both cases, the wife was a male-to-female (“MTF”) post-operative transsexual. In both cases, the husband was aware of his wife’s previous life as a male. In both cases, the courts held that one cannot legally change one’s gender. In the eyes of the law, both Christie and J’Noel were still male, and were therefore in violation of their respective states’ ban on marriages between two people of the same gender.

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3 In re Estate of Gardiner, 42 P.3d 120, 120 (Kan. 2002).
Transgendered citizens constitute an often-overlooked minority. Conflicting court decisions, particularly cases involving marriage, have rendered this minority’s legal status, rights, and protections vague and unclear. This paper will examine the phenomenon of transgendered individuals, as well as court cases in which a person’s gender identity has become an issue. Part II will provide a definition of transgendered, which will include conditions of both psychological and physical origin. Part II will also describe the sexual characteristics used in determining a person’s gender. Part III will examine some of the court cases in which a person’s gender identity has been in dispute (including the two cases cited in the opening paragraphs). All of these cases occur in the context of marriage. Part IV will briefly describe some types of physical intersex conditions. Part V will look at two instances in which the gender of a physically intersexed individual became an issue. Part VI will describe how the precedents established in cases involving transsexuals are likely to affect future cases involving people with intersex conditions. Part VII will conclude by observing how these various court decisions in matters of sexual identity might well prevent a transgendered person from having a reasonable certainty about (1) his or her legal gender status or (2) his or her right to marry anyone. The final section will also question the need for gender distinctions, and consider whether, in light of current scientific understanding, such distinctions have any viable meaning.

II. DEFINING TRANSGENDERED

There is no universal agreement regarding the terminology and definitions associated with transgendered individuals. Whether gender-variant manifestations should
be labeled with medical terms such as “syndromes” or “disorders” is itself controversial. The definitions adopted in this paper are intended to facilitate a clear discussion, and are not intended to convey any disrespect for transgendered individuals.

The term *transgendered* is an umbrella term that encompasses many categories of gender-variant people, including transsexuals, transvestites, intersexed, and other differently gendered people. “Transgendered” refers to a person’s sexual identity, which is not to be confused with one’s sexual orientation. Transgendered people may be heterosexual (sexually attracted to members of the opposite sex), homosexual (attracted to members of the same sex), bisexual (attracted to both sexes), or nonsexual (attracted to neither). It may be helpful to think of transgendered conditions as falling into two broad categories: (A) those with a psychological basis; and (B) those with a physical basis.

**A. Transgendered conditions with a psychological basis.**

Individuals who manifest characteristics of transsexualism and transvestitism fall into the psychologically based category of transgendered states. A *transsexual* is a person who believes that his or her anatomical body does not represent his or her true sex. The feeling of discomfort with one’s own anatomical or biological gender is

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4 See generally ARLENE ISTAR LEV, TRANSGENDER EMERGENCE: THERAPEUTIC GUIDELINES FOR WORKING WITH GENDER-VARIANT PEOPLE AND THEIR FAMILIES, 1-9 (Terry S. Trepper, ed., 2004) (discussing the difficulties and controversies of inventing and agreeing on labels for various types of gender-variant people).

5 *Id.* at 399.

6 *Id.*

7 Corbett v. Corbett, 2 All E.R. 33, 42 (Probate, Divorce, and Admiralty Division, 1970) (Eng.). In adopting this distinction—set forth by the judge in this case—between psychologically based and physically based types of transgendered conditions, the reader should keep in mind that there may be some overlapping between these two categories. For example, a transsexual who has a psychological desire to be of the opposite gender also has a physically based condition once he or she submits to hormonal therapy or gender reassignment surgery. Another point to consider is that, while no one has yet proven a physical basis for transsexualism or transvestitism, we cannot rule out the possibility that these conditions may in fact have their origin in physical conditions that have yet to be discovered.

8 *Id.*

9 LEV, *supra* note 4, at 400.
sometimes called “gender dysphoria” and is known clinically as Gender Identity Disorder (GID).\textsuperscript{10} The two necessary components for a diagnosis of GID are: (1) a “strong and persistent cross-gender identification”; and (2) a “persistent discomfort” with one’s sex, or a “sense of inappropriateness in the gender role of that sex.”\textsuperscript{11} Some, but not all, transsexuals desire, and undergo, gender reassignment surgery.\textsuperscript{12} Transsexuals are sometimes described as pre-operative, post-operative, or non-operative. A non-operative transsexual is a person who, while perceiving his or her own body as being of the wrong sex, is either unable or chooses not to undergo surgical modification.\textsuperscript{13} In addition to surgery, some transsexuals seek hormonal therapy.\textsuperscript{14} In order to be eligible to receive medical assistance such as hormonal or surgical treatment, an individual must have received a diagnosis of GID.\textsuperscript{15}

Transvestitism is another type of transgendered condition that appears to be psychological in origin. A transvestite, or cross-dresser, is a person who enjoys wearing clothing associated with the opposite sex.\textsuperscript{16} A transvestite is not necessarily a transsexual, nor is he or she necessarily homosexual.\textsuperscript{17}

**B. Transgendered conditions with a physical basis.**

The second broad category of transgendered conditions is based on physical characteristics. Humans possess several different physical characteristics related to gender. When the physical sexual characteristics of an individual are ambiguous or

\textsuperscript{10} THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 576 (4\textsuperscript{th} Edition, 2000).
\textsuperscript{11} Id.
\textsuperscript{12} LEV, supra note 4, at 400.
\textsuperscript{13} Id.
\textsuperscript{14} Id. at 44.
\textsuperscript{15} Id. at 177.
\textsuperscript{16} LEV, supra note 4, at 396. See also HELEN BOYD, MY HUSBAND BETTY: LOVE, SEX, AND LIFE WITH A CROSSDRESSER 41-43 (2003) (describing different types of crossdressers).
\textsuperscript{17} LEV, supra note 4, at 396.
incongruent, that person has an intersex condition.\textsuperscript{18} Intersexuality can manifest in a variety of ways and can be caused by numerous factors, including chromosomal aberrations at various stages of fetal development, abnormal metabolism of sex hormones, or drugs received during pregnancy.\textsuperscript{19} A fuller discussion of various types of intersex conditions will be presented in section IV.

C. Sexual characteristics used to determine gender.

In everyday life, we determine the gender of people we encounter by observing their secondary sexual characteristics, such as facial hair, body shape, or voice range. When an infant is first born, or when a fetus is observed through ultrasound imaging, the appearance of the genitalia is the determining factor. However, when uncertainty or ambiguity exists, one must consider other criteria. The criteria doctors generally use include:

(1) Genetic or chromosomal sex (XX or XY);
(2) Gonadal sex (reproductive sex glands—testes or ovaries);
(3) Internal morphologic sex (determined after three months gestation); (This term refers to the presence of seminal vesicles and prostate or a vagina, uterus, and fallopian tubes.)
(4) External morphologic sex (genitalia—penis/scrotum or clitoris/labia);
(5) Hormonal sex (androgens or estrogens).\textsuperscript{20}

To the above list, some would add two non-physical characteristics: (1) the gender one is assigned at birth; and (2) one’s own sense of sexual identity.\textsuperscript{21} As we will soon see, the question of whether to include a person’s sexual identity in the criteria for determining gender has been a deciding factor in several court cases involving transsexuals.

\textsuperscript{18} BLACK’S MEDICAL DICTIONARY 373 (41\textsuperscript{st} ed. 2006).
\textsuperscript{19} Id.
\textsuperscript{21} Id. at 732.
III. CASES INVOLVING TRANSSEXUALS

Like the incidence of transsexualism itself, cases involving transsexuals are not common. Often these are cases of first impression in their jurisdictions. Of the cases to be examined here, in which courts have had to determine the gender of an individual with ambiguous sexual characteristics, the courts have split on the issue of whether a person’s assigned birth gender is controlling or whether other factors, such as an individual’s sense of sexual identity, can be considered.

A. Cases in which original birth assignment determined gender


Because most of the cases involving transsexuals lack controlling precedent, courts often seek guidance from a 1970 English case, *Corbett v. Corbett.* In this landmark case, Arthur Corbett and his wife, April Ashley, an MTF post-operative transsexual, sought to annul their marriage.

Arthur and April had met in 1960. Arthur was unhappily married at the time; April was performing at London’s Carousel nightclub with a group of female impersonators. Arthur, a cross-dresser himself, became infatuated with April. After Arthur’s marriage ended in 1962, he made repeated attempts to persuade April to marry him. She finally agreed, and they were married in Gibraltar in September 1963.

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22 *Corbett v. Corbett,* (1970) 2 All E.R. 33 (Probate, Divorce, and Admiralty Division) (Eng.).
23 *Id.* at 34.
24 *Id.* at 37.
25 *Id.*
26 *Id.* at 37-38.
27 *Id.* at 39.
28 *Id.* Throughout this paper, pronouns referring to various transsexual individuals will reflect their “target”, or self-identified gender, regardless of their birth-assigned gender or whether gender reassignment surgery has been performed.
Three months later, April left him.\textsuperscript{29} Because they had both divided their time between London and Marbella, Spain, the couple had been together only fourteen days during this three-month period.\textsuperscript{30} Despite April’s withdrawal, Arthur seemed not to fully accept that the marriage was over.\textsuperscript{31} In February 1966, after a long period of no communication, Arthur received a summons claiming maintenance.\textsuperscript{32} Finally, in May 1967, Arthur filed a petition seeking to nullify the marriage.\textsuperscript{33} In his petition, Arthur asserted that April was actually a male.\textsuperscript{34} He alternatively sought a decree of nullity on the ground that, due to either April’s incapacity or her willful refusal, the marriage had never been consummated.\textsuperscript{35} In her response, April also asked for a decree of nullity on the ground that the marriage had never been consummated due to Arthur’s incapacity or willful refusal.\textsuperscript{36}

The judge had to determine whether April was male or female, and thus whether the marriage had been valid in the first place.\textsuperscript{37} Trying to determine April’s “true sex,” Judge Ormrod (who was himself a medical doctor) heard the medical opinions of nine expert witnesses, which included two medical inspectors called by the court, and three medical experts called by each side.\textsuperscript{38} The witnesses included doctors and professors, whose specialties included psychiatry, gynecology, endocrinology, and sexual anomalies.\textsuperscript{39}
After hearing expert testimony on physical intersexual disorders, transsexualism, and transvestitism, Judge Ormrod found there were two broad divisions of sexual anomalies: (1) those that were “primarily psychological in character”; and (2) those in which there are “developmental abnormalities in the anatomy of the reproductive system (including the external genitalia).” The judge viewed transsexualism and transvestitism as psychological anomalies.

The judge also gleaned from the experts’ testimony that “there are, at least, four criteria for assessing the sexual condition of an individual.” These criteria include:

1. Chromosomal factors.
2. Gonadal factors (i.e. presence or absence of testes or ovaries).
3. Genital factors (including internal sex organs).
4. Psychological factors.

The judge noted that some witnesses would add a fifth criterion, that of “(h)ormonal factors or secondary sexual characteristics.”

While the experts agreed that April was indeed a transsexual, some suggested that there was evidence there may have been some “physical contributory factor.” In other words, April may have had some sort of physical intersex condition before her surgery. The court noted that in her written answer to the original petition, April had referred to the removal of a “vestigial” penis. However, because the court was unable to contact her surgeon, and because April herself was an unhelpful witness, it was not clear why she had used the word “vestigial.” Although there was not uniform agreement among the

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40 Id. at 42
41 Id.
42 Id. at 44.
43 Id.
44 Id.
45 Id. at 43
46 Id. at 37.
47 Id. at 36-37.
experts on how to classify April, the judge agreed that she should be “properly classified as a male homosexual transsexualist.”

The Corbett decision is notable for Judge Ormrod’s advocacy of a three-pronged test for determining gender, which would look for congruence among “the first three of the doctors' criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.”

Another notable aspect of the Corbett decision is the fact that, in establishing this three-pronged approach, Judge Ormrod completely disregarded psychological factors (the fourth of the doctors’ criteria) in determining a person’s sex. The criteria must be biological, the judge wrote, because “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.” The judge did not elaborate on what he meant by a woman’s “essential role” in marriage.

Judge Ormrod found that April possessed XY (male) chromosomes, and before her surgery, had possessed testicles and male external genitalia. Applying his three-prong test, the judge concluded April was of the “male chromosomal sex,” the “male gonadal sex,” and the “male genital sex.”

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48 Id. at 43.
49 Id. at 48.
50 Id. at 44, 48.
51 Id. at 48.
52 Id.
53 Id. at 46-47.
Judge Ormrod wrote, “the biological sexual constitution of an individual is fixed at birth.” Gender reassignment surgery, the judge held, “cannot affect her true sex.” In other words, once a male, always a male. Judge Ormrod found the marriage to be void. As we shall soon see, the persuasive impact of the Corbett decision would turn out to be far-reaching.


In 1986, Elaine Frances Ladrach and her fiancé went to the marriage license bureau in Stark County, Ohio and applied for a marriage license. Ms. Ladrach had been born a male, but had undergone gender reassignment surgery, facts she did not try to conceal from the bureau clerk. Upon noticing some unusual facts (Elaine had been married twice before, as a male, to women), the clerk called a judge to review the application. Relying on the reasoning in Corbett, the probate court judge held, “there is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person.” The application for an appeal was denied.


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54 *Id.* at 47.
55 *Id.*
56 *Id.*
58 *Id.*
59 *Id.*
60 *Id.* at 832.
61 *Id.* at 828.
The Texas case of Christie Lee Littleton versus Dr. Mark Prange is another example of a court’s refusal to recognize the new sexual identity of an MTF post-operative transsexual. Christie Littleton was born as Lee Cavazos, Jr., a male, in San Antonio, Texas in 1952. After a lifetime of gender dysphoria, Lee changed her name to Christie Lee Cavazos in 1977, and between November 1979 and February 1980 underwent a series of three surgical procedures that transformed her body from male to female. In 1989, Christie married Jonathon Littleton, with whom she lived until his death in 1996. After Jonathon’s death, Christie, in her capacity as his surviving spouse, filed a medical malpractice suit under the Texas Wrongful Death and Survival Statute. The doctor, Dr. Prange, challenged Christie’s standing to sue, alleging that she was actually a man, and could therefore not be the surviving spouse of another man. Dr. Prange filed for a summary judgment. The trial court granted summary judgment to Dr. Prange, and the San Antonio Court of Appeals affirmed its ruling. After the Supreme Court of Texas denied a petition for review, Christie filed a petition for writ of certiorari with the U.S. Supreme Court, but the petition was denied.

Faced with a case of first impression involving a transsexual, the Texas appellate court relied on the Corbett decision for guidance. Upon being asked to decide the validity of a marriage between a man and person born male, but surgically altered to become a female, Chief Justice Phil Hardberger concluded that one’s gender cannot be

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63 Id. at 224.
64 Id. at 225.
66 Littleton, 9 S.W. 3d 223 at 225.
67 Id.
68 Id.
69 Id. at 231.
71 Littleton, 9 S.W. 3d at 226-27.
legally changed.\textsuperscript{72} The court held, “as a matter of law . . . Christie Littleton is a male.”\textsuperscript{73} Because of Texas’s prohibition of same-sex marriages, Hardberger reasoned, Christie’s marriage to Jonathon was invalid; therefore, she was barred from filing a suit as a surviving spouse.\textsuperscript{74}

Looking to the Texas statutes, Justice Hardberger found no guidance in deciding whether transsexuals could be recognized as surviving spouses.\textsuperscript{75} He wrote of the need for legislative guidelines, and he refused to take on the role of writing public policy.\textsuperscript{76}

In a concurring opinion, Justice Karen Angelini agreed with Hardberger’s preference for considering biological over psychological factors when determining a person’s gender.\textsuperscript{77} However, Justice Angelini pointed out the limitations of biological determinations. Even using the three criteria introduced in \textit{Corbett} [congruence of chromosomal, gonadal, and genital characteristics], Angelini noted that future problems are bound to occur as people of ambiguous sexual classification enter the legal system.\textsuperscript{78} Her observation echoed a similar concern expressed years earlier by Judge Ormrod, the author of the \textit{Corbett} decision, who also recognized the limitation of his three-prong test.\textsuperscript{79} Judge Ormrod had anticipated problems would arise in future cases involving physically intersexed individuals who did not show congruence between the three criteria.\textsuperscript{80}

\begin{footnotes}
\item[72] \textit{Id.} at 230-31.
\item[73] \textit{Id.} at 231
\item[74] \textit{Id.}
\item[75] \textit{Id.} at 230.
\item[76] \textit{Id.}
\item[77] \textit{Id.} at 232.
\item[78] \textit{Id.}
\item[79] \textit{Corbett}, (1970) 2 All E.R. 33, at 48-49.
\item[80] \textit{Id.}
\end{footnotes}
In her dissenting opinion, Justice Alma Lopez took issue with the notion that whether Christie was Jonathon’s surviving spouse was a question of law rather than a question of material fact. 81 Noting that in order to prevail in a summary judgment motion, the movant must show (a) that no genuine issue of material fact exists, and (b) that the movant is entitled to judgment as a matter of law, Lopez noted that Dr. Prange’s sole piece of evidence was Christie’s original birth certificate, which showed the infant to be a male. 82 Noting the absence of any law describing how gender is to be determined, Lopez wrote that Littleton’s considerable evidence that she was now a female should have raised an issue of material fact. 83

In her dissent, Justice Lopez also noted that Christie had lawfully amended her birth certificate to reflect her new name and self-selected gender. 84 She pointed out that when a legal document replaces an earlier version, that earlier version becomes a “nullity.” 85 Such nullification generally occurs in court pleadings, but Lopez argued that, as an official state document (particularly one which is the deciding piece of evidence in a summary judgment), the original birth certificate should not have been considered to be valid. 86 Justice Lopez asked, “If Christie's evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not satisfactory enough to raise a genuine question of material fact on a motion for summary judgment?” 87

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81 Littleton, 9 S.W. 3d 223 at 232.
82 Id.
83 Id.
84 Id. at 233.
85 Id.
86 Id.
87 Id.
4. *In re the Estate of Gardiner (2002): Another affirmation of Corbett—

*Gender is fixed at birth.*

The case of Marshall and J’Noel Gardiner falls into the lineage of cases such as *Corbett, Ladrach,* and *Littleton*—cases in which a person’s gender (and consequently the validity of that person’s marriage) is irrevocably determined at birth. Marshall Gardiner, a wealthy Kansas businessman, had only been married to J’Noel, an MTF post-operative transsexual, for eleven months, when he died without a will.88 Marshall’s estranged son, Joe, petitioned the court to deny J’Noel her spousal share of the estate.89 Joe based his argument on several grounds, including the assertion that J’Noel was a male and her marriage to Marshall, therefore, was void.90

The district court agreed with Joe’s argument that the marriage between Marshall and J’Noel was void.91 The Kansas Court of Appeals reversed and remanded.92 Following the reasoning in *Littleton,* the Supreme Court of Kansas reversed that decision, and affirmed the district court’s view that (1) a post-operative MTF transsexual is not a woman; and (2) a marriage between a post-operative MTF transsexual and a man is contrary to public policy and void.93

As in the *Littleton* case, the court refused to read meanings into state statutes that it believed were not included in the legislature’s original intent.94 Kansas law defines marriage as “a civil contract between two parties who are of opposite sex.”95 Trying to discern the intent of the statutes’ authors, Justice Allegrucci wrote that the terms “sex,”

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88 In the Matter of the Estate of Gardiner, 42 P.3d 120, 123 (2002).
89 Id.
90 Id.
91 Id.
92 Id. at 120.
93 Id.
94 Id. at 136.
“male,” and “female” “do not encompass transsexuals” in their everyday understanding. While acknowledging the “stress and pain” suffered by those with gender dysphoria, the justice nevertheless refused to venture into public policy by validating a marriage between a man and a transsexual. The justice recognized the dilemma that J’Noel and other transsexuals face, and admitted, “there are people who do not fit neatly into the commonly recognized category of male or female.” Recognizing the absence of laws that account for people like J’Noel, the Justice closed the opinion by encouraging the legislature to address this deficiency.

B. Cases in which courts considered sexual identity.

In the absence of clear statutory guidelines for determining an individual’s gender, the courts, when confronted with cases involving transsexuals, are left to their own devices. In the cases described so far, the courts have taken what we might call a “traditional” approach. The rule seems to be that gender is forever determined at birth and cannot be altered by a person’s feelings of identification with the opposite sex or even by gender reassignment surgery. However, in the following two cases—one from New Jersey and one from Australia—the courts adopted a more lenient approach, and took into account factors other than birth-assigned gender.


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96 Gardiner, 42 P.3d at 135.
97 Id. at 137.
98 Id.
99 Id.
The case of *M.T. v. J.T.* represents a rare victory for a transsexual who sought to have her chosen gender legally accepted. This 1976 New Jersey case involved a dispute over marital support. J.T., a male, and M.T., a post-operative MTF transsexual, married in New York State in 1972 and moved to Hackensack, New Jersey. The couple lived together as man and wife for over two years before J.T. left their home. M.T. filed a complaint for support and maintenance in the Juvenile and Domestic Relations Court. J.T. responded that M.T. was actually a male and that the marriage was therefore void. J.T., the husband, was well aware of his wife’s condition, as M.T. had been anatomically male when the two met in 1964. In fact, J.T. had paid for her gender-reassignment surgery in 1971. The trial court concluded that M.T. was a female and, because no fraud had been involved, J.T. was obligated to pay her $50 per week as support. The Superior Court of New Jersey (Appellate Division) affirmed this ruling.

At the original hearing before the Juvenile and Domestic Relations Court, the plaintiff, M.T., called several expert witnesses, including her medical doctor (who had first diagnosed her as a transsexual and had recommended surgery), a psychologist, and a Ph.D. who specialized in behavioral therapy and sexual dysfunctions. All three men,
experts in the area of transsexualism, testified that the plaintiff should be considered a female.\textsuperscript{109}

Over M.T.’s objections, J.T. called his own adoptive father, a medical doctor, as an expert witness.\textsuperscript{110} This witness, referred to as “Dr. T.,” testified that because M.T. did not possess the internal organs of a female, he considered her a male.\textsuperscript{111}

The trial court judge found that M.T. was a female and that the marriage was valid.\textsuperscript{112} After listening to the medical and biographical evidence, the judge wrote that M.T. had been “of the female psychic gender all her life” and that her surgery had made her anatomy congruent with her own sense of sexual identity.\textsuperscript{113} Noting that transsexuals pose no harm to society, the judge expressed his belief that “society has no right to prohibit the transsexual from leading a normal life.”\textsuperscript{114} The judge conceded that while many people may find the whole subject of transsexualism “repugnant,” such social disapproval “should not govern the legal acceptance of a fact.”\textsuperscript{115}

The appellate court considered—and rejected—the conclusion reached in Corbett that sex is “irrevocably cast . . . at birth”\textsuperscript{116} Like the English court, the New Jersey court sought to find some congruence between different sexual characteristics. In the New Jersey case, however, the court included the respondent’s “self-image,” which it defined as “the deep psychological or emotional sense of sexual identity and character,” in the roster of sexual characteristics to be considered.\textsuperscript{117} The court thus concluded that “for

\begin{footnotesize}
\begin{enumerate}
\item Id. at 204-06.
\item Id. at 206-07.
\item Id. at 207.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 209.
\item Id.
\end{enumerate}
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marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.” 118 The court considered the respondent’s “sexual capacity,” which included both her “physical ability” and her “psychological and emotional orientation to engage in sexual intercourse,” in reaching its conclusion.119


Although cases in which transsexuals prevail in having courts recognize their self-identified gender seem to be the exception to the rule, the Australian case of Kevin v Attorney-General (Commonwealth) is another such exception.120 The Kevin court roundly rejected the reasoning and conclusions of Corbett, and recognized the right of a transsexual to change his original gender.121

The facts of the case are as follows: Kevin (a pseudonym), was born a female in 1965.122 From a very early age, Kevin had perceived himself as a male.123 Repeated efforts by Kevin’s parents to make him dress, play, and act like a girl failed.124 When he was about thirty years of age, Kevin began hormone treatment that resulted in facial and chest hair growth, a deeper voice, and increased muscularity.125 In 1997, Kevin had breast reduction surgery, and, in 1998, he underwent a total hysterectomy with bilateral

118 Id.
119 Id.
121 Id. at 427, 473-74.
122 Id. at 410.
123 Id.
124 Id.
125 Id. at 411.
oophorectomy (removal of the ovaries).  Kevin chose not to have further surgery to construct a penis and testes.

In October 1996, after having begun hormone treatment, but pre-surgery, Kevin met Jennifer (another pseudonym), the woman who would become his wife. Kevin was forthcoming with Jennifer about his transsexual status. In February 1997, the couple began living together and agreed to marry. In November 1999, Jennifer gave birth to a baby boy, the result of in vitro fertilization by an anonymous semen donor. Kevin and Jennifer were listed on the birth certificate as the father and mother of the child. After formally declaring they believed there was no legal impediment to marriage, Kevin and Jennifer were officially married in August 1999.

Their case arose when the couple applied, as allowed under Australian law, for a declaration of the validity of their marriage. The Attorney-General intervened in opposition to the application. However, the Attorney-General’s efforts appeared less than enthusiastic. Although he submitted pleadings, based largely on Corbett, he neither offered evidence nor cross-examined the applicants or their witnesses. Moreover, the Attorney-General even provided some funding to assist the applicants in presenting their case.

Judge Chisholm, who presided over the tribunal, heard evidence from a social worker and a doctor who were part of the team that had approved the couple’s application

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126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id. at 412.
133 Id. at 405.
134 Id. The hyphenated spelling of “Attorney-General” comes from the text of the case.
135 Id.
for fertilization treatment. The team, which had included medical, nursing, counseling, and scientific clinicians, was fully aware of Kevin’s transsexual status. The team found the pair to be a “committed and loving couple” with a supportive extended family. The social worker and the doctor both testified that, in their opinion, Kevin’s transsexual history “should not prevent him from being considered a man for the purpose of marriage and disentitle the couple from being legally married as man and wife.”

The judge also heard evidence from two psychiatrists, both of whom testified that, at the time of his marriage, Kevin was “psychologically” a male. In addition, the judge heard testimony from another thirty-nine witnesses, which included family, friends, work colleagues, and acquaintances. All of the witnesses agreed that Kevin had always been very masculine, even as a young girl; all seemed to accept his identity as a male.

Describing the witnesses’ evidence as “consistent, impressive, and unchallenged,” the judge described the portrait of Kevin that emerged as “not an object of anatomical curiosity but a human being living a life, as we do, among others, as a part of society.”

Judge Chisholm devoted several pages of his lengthy opinion to analyzing and rebutting the reasoning in the Corbett case. (While the Australian Attorney-General relied in large part on Corbett to make his case, English court decisions, at the time of the Kevin case, were not controlling authority.) Judge Chisholm began by noting that the issue of what criteria should be used in determining a person’s gender is a question of law, while the issue of whether the criteria exist in a particular case is a question of

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136 Id. at 412-13.
137 Id. at 412.
138 Id. at 413.
139 Id. at 413-14.
140 Id. at 414.
141 Id. at 414-17.
142 Id. at 417.
143 Id. at 405, 418.
fact. Judge Chisholm focused his inquiry on a key passage in *Corbett*, in which judge Ormrod had written that one’s “biological sexual constitution” is “fixed at birth” and “cannot be changed” by “medical or surgical means.” April Ashley’s gender-reassignment surgery, Judge Ormrod had written, “cannot affect her true sex.”

The problem with Ormrod’s reasoning, wrote Judge Chisholm, was his treatment of the terms “biological sexual constitution” and “true sex” as equivalent. Assigning equivalency to these two terms, Chisholm contended, was simply an unsupported assertion, one that by definition excluded social and psychological factors. Chisholm diagrammed Ormrod’s reasoning into a logical syllogism, in which one critical premise asserted that whether a person is a man or a woman “depends solely on the person’s biological sexual constitution.” But this assertion, Chisholm wrote, which purported to be a statement of law, lacked any supporting evidence. Ormrod’s false equivalency of “biological sexual constitution” and “true sex,” the judge wrote, amounted to a “definitional sleight of hand,” which assumed, rather than showed, that psychological factors were irrelevant. Judge Chisholm concluded that the reasoning in *Corbett* was “not persuasive” and declined to follow its example. The judge declared Kevin and Jennifer’s marriage valid.

Australian case law is, of course, not controlling over cases in the United States. The case of *Kevin* can only serve as a persuasive guide in this country. The *Kevin* case is

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144 *Id.* at 418.
145 *Corbett*, 2 All E.R. at 47, quoted in *Kevin*, 165 F.L.R. at 419.
146 *Kevin*, 165 F.L.R. at 419.
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.* at 420.
151 *Id.* at 427-28.
152 *Id.* at 476.
included in this paper because: (1) it is one of the few cases that recognized a transsexual’s chosen gender; (2) it considered and completely rejected *Corbett*; and (3) it could possibly be a harbinger of subsequent decisions in the United States.

IV. PHYSICAL INTERSEX CONDITIONS

As noted in section II, an intersex condition exists when the sexual characteristics of an individual are ambiguous or incongruent.\textsuperscript{153} There are numerous types of hormonal and genetic disorders that can lead to an intersex condition. For example, while the majority of humans have either XX (female) or XY (male) sex chromosomes, some individuals have such ambiguous genetic combinations as XXX, XXY, XXXY, XYY, XYYY, and XYYYY.\textsuperscript{154} An exhaustive survey of these various disorders is beyond the scope of this paper. However, we will briefly look at four types of disorders in order to illustrate the following point: some people, through no fault of their own, are born different.

A. Androgen Insensitivity Syndrome (AIS)

1. Complete Androgen Insensitivity Syndrome (CAIS)

Complete AIS (CAIS) or partial AIS (PAIS) is found in approximately one out of every 20,000 genetic males.\textsuperscript{155} Individuals with complete or partial AIS have XY (male) chromosomes and testes.\textsuperscript{156} A person with CAIS, however, has a receptor defect that prevents the testes from processing androgens.\textsuperscript{157} During fetal development, this inability to process androgens causes the fetus to develop external female genitalia, but no internal

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\textsuperscript{153} BLACK’S MEDICAL DICTIONARY 373 (41\textsuperscript{st} ed. 2006).
\textsuperscript{154} ROBERT POOL, EVE’S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES 70 (1994).
\textsuperscript{155} Michalek, *supra* note 20, at 732.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
reproductive organs.\textsuperscript{158} Infants with CAIS are typically identified as females, and in fact may never be aware of their condition until they fail to menstruate after the onset of puberty.\textsuperscript{159}

2. Partial Androgen Insensitivity Syndrome (PAIS)

Individuals with PAIS are partially receptive to androgens.\textsuperscript{160} Although the genes and gonads are male, such a person’s external appearance and sexual identity may range anywhere along a spectrum from completely male to completely female.\textsuperscript{161}

B. 5-Alpha-Reductase Deficiency (5-A-R D)

Persons with 5-A-R D, like those with AIS, possess XY chromosomes and testes, but appear externally to be female.\textsuperscript{162} Individuals with 5-A-R D are unable to convert testosterone to dihydrotestosterone, which is the androgen responsible for the development of male external genitalia.\textsuperscript{163} The body will, however, masculinize upon the onset of puberty.\textsuperscript{164}

C. Congenital Adrenal Hyperplasia (CAH)

Congenital Adrenal Hyperplasia (CAH), also known as adrenogenital syndrome, is an inherited condition that affects about one in 7,500 infants.\textsuperscript{165} In girls, CAH often produces virilization of the genitals, manifesting as gross enlargement of the clitoris and fusion of the labia, so that the genitalia resemble a malformed penis.\textsuperscript{166}

D. Progestin-Induced Virilization (PIV)
Progestin-Induced Virilization (PIV) is caused by a fetus’s exposure to progestin taken by the mother during pregnancy. As is the case with CAH, women with PIV have XX chromosomes and appear to be female, but often have an enlarged clitoris.

E. Other intersex conditions

In addition to these four anomalies, there are numerous other naturally-occurring intersex conditions. Among these are 17-Beta-Hydroxysteroid Dehydrogenase-3 Deficiency, Persistent Müllerian Duct Syndrome, Klinefelter Syndrome, and Turner Syndrome.
V. CASES INVOLVING INDIVIDUALS WITH INTERSEX CONDITIONS.

Cases involving intersexed individuals and gender issues are rare. This section will look at two such cases, one from Australia, and another involving the International Olympic Committee. Although neither case originated in the United States court system, these two cases may provide clues regarding the outcome of future U.S. cases.

A. In the Marriage of C and D (falsely called C) (1979, Australia)—A person is found to be neither male nor female, but a “combination of both.”

In this 1979 Australian case, a wife (“D”) sought to nullify her marriage to her husband (“C”) who, unbeknownst to her, had been born with an intersex condition.\textsuperscript{173} The husband, whose parents were related to each other, had been raised as a male. However, when he began puberty, he began to experience conditions consistent with the female gender, such as the growth of breasts and a monthly loss of blood.\textsuperscript{174} At age 21, C consulted a doctor for recurrent abdominal pains. Exploratory surgery revealed that C possessed an ovary and a uterus.\textsuperscript{175} He subsequently underwent a series of operations to correct his external sex organs (he had never been able to urinate while standing) and to remove his breasts.\textsuperscript{176} According to the case report, C was diagnosed as a \textit{hermaphroditus verus}—a true hermaphrodite.\textsuperscript{177} Not long after his surgeries, C became

\begin{footnotes}
\footnotetext[173]{In the Marriage of C and D (falsely called C) (1979) 28 A.L.R. 524, 524 (Austl.)}
\footnotetext[174]{Id. at 525.}
\footnotetext[175]{Id.}
\footnotetext[176]{Id. at 525-26.}
\footnotetext[177]{Id. at 526. See TABER’S CYCLOPEDIC MEDICAL DICTIONARY 889 (18\textsuperscript{th} Ed. 1997) (1940) (defining true hermaphroditism as a condition in which a person possesses both ovarian and testicular glands). The reader might well wonder at this point whether there is a difference between hermaphroditism and intersexuality. The two terms are essentially synonymous—medical dictionary entries in Taber’s cross-reference each other. Taber’s defines intersexuality as the “varying expression of male and female physical and sexual characteristics in the same individual.” (Id. at 1010). Taber’s defines a hermaphrodite as “an individual possessing genital and sexual characteristics of both sexes.” (Id. at 889). Comparing these two general definitions, there is little apparent difference. However, both terms also have more specific meanings. Taber’s definition of hermaphrodite goes on to state that the “clitoris is usually enlarged, resembling the male penis.” (Id.) Clearly, this definition refers to a more specific condition, such as
\end{footnotes}
engaged to D. After a chaste five-year engagement, the couple wed. However, the husband was apparently unable to consummate the marriage.\textsuperscript{178}

In her application for a declaration of nullity, D declared that her consent to the marriage had not been true consent, as she had been mistaken as to C’s identity.\textsuperscript{179} The court agreed that although D had believed she was marrying a male, in fact C was “a combination of both male and female.”\textsuperscript{180} Charged with determining the gender of the respondent, the court looked to \textit{Corbett} for guidance. Applying Judge Ormrod’s three-prong test, the court found that C “exhibited as a male in two of the three criteria.”\textsuperscript{181} While C, after surgery, apparently possessed male genitalia and gonads, he also possessed female chromosomes.\textsuperscript{182} The court granted D a decree of nullity.\textsuperscript{183}

\textbf{B. The case of Maria Patiño v. The International Olympic Committee—
}\textit{Spanish athlete barred from Olympic competition due to a previously undetected intersex condition.}

In 1985, Maria Patiño, a Spanish hurdler, went to Kobe, Japan to compete in the World University Games. As a female competitor, Patiño was required to take a sex test to prove that she was actually a female. The test involved a procedure known as a buccal

\begin{itemize}
  \item Congenital Adrenal Hyperplasia. Furthermore, when we look at Taber’s definition of \textit{hermaphroditism}, (as opposed to \textit{hermaphrodite}) we find a much more specific description of a “condition in which both ovarian and testicular tissue exist in the same individual.” Taber’s definition of \textit{intersex} (as opposed to intersexuality) is the condition in which a genetic male or female possesses both “male and female secondary sexual characteristics.” \textit{(Id. at 1010)} So, Taber’s definition of \textit{hermaphroditism} focuses on the gonadal characteristics, while its definition of \textit{intersex} focuses on the incongruence between a person’s chromosomes and his or her secondary sexual characteristics. Taber’s definition of \textit{intersex} \textit{(Id.)} notes that the term is “descriptive” but has “little or no diagnostic value.” The author of this paper has tried to avoid using the term \textit{hermaphrodite} as a synonym for \textit{intersex} for two reasons: (1) most of the surveyed literature employs the term \textit{intersex}; and (2) the term \textit{hermaphrodite} seems both archaic and saddled with negative connotations.
  \item \textit{In the Marriage of C and D} (falsely called C), 28 A.L.R. 524, 528 (1979).
  \item \textit{Id.} at 527.
  \item \textit{Id.}
  \item \textit{Id.} at 528.
  \item \textit{Id.} at 526, 528.
  \item \textit{Id.} at 528.
\end{itemize}
smear, in which a few skin cells were scraped from the inside of a woman’s cheek. The cells were then examined under a microscope to see whether they contained the XX chromosomes that are present in a normal female. To her astonishment, Ms. Patiño failed the test. The results indicated that she was, genetically, a male.\textsuperscript{184} She was told that she would not be allowed to compete. Like other athletes had done in similar circumstances, Patiño faked an injury and left.\textsuperscript{185}

However, Maria Patiño was determined not to give up her athletic career. Despite a warning not to compete from the Spanish athletic federation, Patiño entered an event in Spain several months later.\textsuperscript{186} She won her event, but within a few days she was booted off the Spanish national team, stripped of her titles, and barred from further competition.\textsuperscript{187} Her newfound intersex condition (Androgen Insensitivity Syndrome), which she had been able to conceal after the Kobe test, suddenly became public knowledge.\textsuperscript{188}

Maria Patiño decided to challenge the International Olympic Committee (“IOC”) over what she considered an unfair testing method.\textsuperscript{189} Backed by a coalition of athletes, doctors, and scientists, Patiño argued for a return to an earlier policy of determining gender: a simple visual inspection of the competitors’ genitalia. After all, she argued, the point of the test was to prevent men from disguising as women, and not to discriminate against people with a chromosomal anomaly.\textsuperscript{190}

\textsuperscript{184} Pool, supra note 154, at 65-66.
\textsuperscript{185} Id. at 66.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 68-69, 79-80.
\textsuperscript{189} Id. at 80.
\textsuperscript{190} Id.
Although Patiño was not successful at the time in persuading the IOC to abandon its chromosomal test, another governing body, the International Amateur Athletic Foundation (“IAAF”), switched from the chromosomal test to a visual examination in 1991.\textsuperscript{191} At the time, the IOC had not changed its policy, but it did agree to recognize sex certificates from the IAAF. Patiño was certified as a female by the IAAF, making her eligible for the 1992 Summer Olympics.\textsuperscript{192} By that time, however, Patiño had lost some of her youthful speed. Maria Patiño, who had once set a Spanish women’s record for the sixty-meter hurdles, was edged out of a spot on the Spanish Olympic team by another hurdler.\textsuperscript{193}

**VI. FUTURE IMPLICATIONS FOR INTERSEXED INDIVIDUALS.**

Although there have been few cases involving gender issues and people with intersex conditions, new cases are inevitable. Unfortunately, because there are presently few (if any) statutes or clearly defined standards from case law that account for or accommodate such individuals, people with intersex conditions enter the legal system at their own peril. The Australian case of *C and D* and the case of Olympic hopeful Maria Patiño each illustrate some of the problems faced by people with intersex conditions.

**A. Evaluating *In the Marriage of C and D (falsely called C).***

In *C and D*, the respondent was unable to produce a congruent result when he was held to the *Corbett* three-prong test.\textsuperscript{194} The language of the decision clearly implied that C, being neither male nor female, but a combination of both, would be prohibited from

\textsuperscript{191} Id. at 80.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 80-81.
\textsuperscript{194} In the Marriage of C and D (falsely called C), 28 A.L.R. 524, 528 (1979).
marrying anyone of either gender. Perhaps the dilemma of this unfortunate individual was beyond the power of the court to remedy. Nevertheless, it is clear that marriage laws, based on a binary classification of gender, are ill-equipped to deal with those individuals who vary from the normal range of human physical manifestations. The disposition of this case will hardly inspire confidence for individuals with intersex conditions.

**B. Evaluating Patiño v. IOC.**

In the case of Maria Patiño, the discovery of her previously undetected intersex condition may well have cost her a chance to compete in the Olympics. Ms. Patiño was not subjected to the Corbett three-prong test. Unfortunately for her, those charged with determining her gender focused even more narrowly on a single sexual characteristic—her chromosomes. Not only did they disregard psychological factors, such as self-identity, the IOC arbiter disregarded her genitalia! The absence of a fair and consistent standard robbed this young athlete of a chance to compete in the international spotlight. Although Ms. Patiño eventually won a partial victory when the IOC accepted the test results of the International Amateur Athletic Foundation, her struggle to be legally declared a woman illustrates the problems sure to be faced by other intersexed people.

**C. The legacy of Corbett and the three-prong test.**

As long as courts employ the Corbett three-prong test, people with physical intersex conditions will risk having their gender become an issue, their marriages voided, their rights denied. The Littleton and Gardiner cases could well have had the same outcome if the wives in those cases had not been transsexuals, but had been born with
naturally occurring intersex conditions. Had Christie Littleton or J’Noel Gardiner had an intersex condition, their sex, and consequently their marriages, could have been called into question. Had the court applied the Corbett three-prong test, they would have been unable to prove that they were truly women.

Judge Ormrod, who first advocated the three-prong sex test, foresaw problems for intersexed individuals. Ormrod candidly acknowledged the problems sure to arise in future cases if his test were to be applied to people with intersex conditions. He noted that the “real difficulties . . . will occur if these three criteria are not congruent.” However, because such a condition was not before him in the Corbett case, he saw no need to address this deficiency.

Judge Ormrod’s concerns were echoed years later in a concurring opinion to the Littleton case. In her concurrence, Justice Angelini pointed out that “even when biological factors are considered, there are those individuals whose sex may be ambiguous.” Angelini expressed “no opinion as to how the law would view such individuals with regard to marriage.” Like Judge Ormrod, Justice Angelini also recognized that such a case was not before the court, and she consequently declined to offer a solution to the dilemma.

D. The Defense of Marriage Act.

Gender is embedded in many statutes. One notable example is the Defense of Marriage Act (“DOMA”). The Defense of Marriage Act, which became law in 1996, defined the word “marriage” to mean “only a legal union between one man and one

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195 Corbett, 2 All E.R. at 48.
196 Id.
197 Littleton, 9 S.W. 3d at 232.
198 Id.
woman as husband and wife . . . “. However, nowhere in the Act are the terms “man” and “woman” defined. Implicit in the language of DOMA is an assumption of a binary system of gender classification. This binary system fails to acknowledge the existence of transgendered people in general, and intersexed people in particular. As long as the law continues to ignore the existence of people whose gender varies from the norm, such people are less likely to be treated fairly by the legal system.

VII. CONCLUSIONS

Regardless of one’s personal views towards gender-variant people, it would be difficult to reasonably argue against the propositions that such people are (1) human beings who are entitled to respect; and (2) citizens who deserve the right to life, liberty, and the pursuit of happiness, as well as equal protection under the law. The cases surveyed in this paper provide a glimpse into the challenges that some transgendered individuals face. As we attempt to understand the legal terrain that the transgendered inhabit, numerous questions arise.

A. Can a transgendered person have a reasonable expectation of his or her legal status?

It should be apparent by now that the present state of the law, which fails to consistently and adequately account for transgendered citizens, is unacceptable. The current law simply does not work for those of ambiguous or altered gender. Until legislatures, or the Supreme Court, establish clear, consistent and workable definitions of terms like “man,” “woman,” “male,” “female,” “sex,” and “gender,” those individuals

200 Id.
who vary from the norm will have no reasonable certainty regarding their legal status. Today, when a transgendered individual faces a decision regarding marriage, divorce, or adoption, he or she cannot act with certainty that the law will recognize his or her self-identified gender or will permit or endorse his or her choices. Most of the cases described in this paper have dealt with transsexual individuals. However, as long as gender remains undefined in the law, those people with physical intersex conditions are certain to face similar problems in future cases.

Consider the case, described earlier, of Christie Littleton. The judgment, which voided a seven-year marriage, raises troubling questions. Was justice served? What public policy, if any, was upheld? Was Christie justified in claiming a reasonable expectation that her marriage was valid? Having been declared to be a male by the Texas courts, could this person—with a female name, appearance, and genitalia—legally marry a woman? Or does Christie inhabit some legal nether-world in which she is not permitted to marry anyone?

Or consider the case of J’Noel Gardiner. When she accepted the marriage proposal of her wealthy boyfriend, would she have been reasonable in assuming that, in the event of his death, she would be his heir? Like Christie Littleton, Ms. Gardiner has the appearance and genitalia of a woman, but has been found by the courts in her state to be a man.

**B. Should courts allow psychological factors such as self-identity to affect gender determination?**

In his analysis of the reasoning behind the *Corbett* decision, Judge Chisholm (author of the *Kevin* decision) labeled the decision whether social or psychological
factors were relevant in determining gender the “key issue.”\textsuperscript{201} In Judge Chisholm’s view, psychological factors were relevant, and the judge completely rejected the Corbett view that such factors were not worthy of consideration.\textsuperscript{202}

There are various theories, and no clear answers, of the causal factors behind gender-variant behavior.\textsuperscript{203} Debates over “nature versus nurture” have extended for decades, but a clear consensus has yet to emerge.\textsuperscript{204} Given our lack of understanding of the causes of transgender conditions, we must consider whether it is wise to categorically reject psychological factors and rely solely on physical factors. It is difficult to imagine what possible harm could come from considering all the various factors that influence human behavior.

**C. Should statutes be enacted to acknowledge and accommodate transgendered individuals?**

Consistency and certainty in the application of the law are desirable outcomes. It should be clear by this point that the law is neither consistent nor certain in cases involving transgendered individuals. Even if the Supreme Court were to rule today that the Corbett three-prong congruence test will henceforth be the standard for determining gender, people with physical intersex conditions would still have no certainty in the law.

The judges who penned the decisions in both Littleton and Gardiner pointedly appealed to state legislatures to address this issue. As noted earlier, Justice Allegrucci, who authored Gardiner, pointed out that the statutory terms “sex,” “male,” and “female” do not include or account for transsexuals.\textsuperscript{205} It seems apparent that the law has not kept

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\textsuperscript{201} Kevin, 165 F.L.R., at 419.
\textsuperscript{202} Id. at 427-48.
\textsuperscript{203} LEV, supra note 4, at 113.
\textsuperscript{204} See id. at 113-32 for an overview of various theories of the cause of transgender behavior.
\textsuperscript{205} Gardiner, 42 P. 3d at 135.
pace with society’s evolving understanding of the diverse manifestations of human sexuality.

Until legislatures provide definitions that do account for transgendered individuals, courts will continue to issue rulings without clear guidance from statutes. Some courts may follow the reasoning of Corbett; other courts may reject that reasoning. Other courts may choose to construct new tests for determining gender. The absence of statutory guidance will result in a continuation of the current patchwork of diverse rulings.

D. Should we do away with gender distinctions altogether?

As Judge Ormrod pointed out in Corbett, the law is, in large part, indifferent to sex.\textsuperscript{206} In cases involving contracts, torts, and most crimes, sex is irrelevant.\textsuperscript{207} However, because a marriage is traditionally held to be the legal union of a man and a woman, sex is not merely relevant—it is an “essential determinant” in marriage relationships.\textsuperscript{208}

One solution to the problem of gender definitions would be to eliminate all gender distinctions in the law. Opponents of this option will be quick to point out that such a move could pave the way for same-sex marriages. Debating the merits of same-sex marriages is beyond the scope of this paper, but it is probably safe to say that most of the country is not ready for such an outcome. A handful of states have allowed same-sex couples to register as civil unions or domestic partnerships.\textsuperscript{209} Only one state,

\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} The following states have passed laws allowing same-sex couples to register as domestic partnerships: California, Maine, and Washington. Oregon’s domestic partnership law went into effect January 1, 2008.
Massachusetts, has legalized same-sex marriage. Most states forbid such marriages by statute. Many states have also added referendum-driven amendments to their constitutions forbidding such unions.

Until some resolution to the question of the legal definition of gender is achieved, however, the uncertainty that transgendered individuals face in a court of law will persist. In a free society, in which individuals are permitted to surgically alter their sexual

The following states have passed laws recognizing civil unions of same-sex couples: Connecticut, New Jersey, and Vermont. New Hampshire’s civil union law took effect January 1, 2008. The relevant statutes are these: For California’s statutes pertaining to domestic partnerships, CAL. FAM. CODE §§ 297—299.6 (2005). For Maine, ME. REV. STAT. ANN. tit. 22, §2710 (2003). For Washington, WASH. REV. CODE §§ 26.60.010—26.60.070 (2007). For Connecticut’s statutes regarding civil unions, CONN. GEN. STAT. §§ 46b-38aa—46b-39 (2007). For New Jersey, N.J. REV. STAT. §§ 37:1-30—37:1-36 (2006). For Vermont, VT. STAT. ANN. tit. 15 §§ 1201—1207 (1999). These relatively recent laws—recognizing domestic partnerships or civil unions—generally attempt to extend rights and benefits to same-sex couples that are equal to those of heterosexual married couples. Because they are state laws, however, these statutes cannot provide any rights or benefits of a federal nature (such as, for example, income tax filing laws or Social Security benefits). Because of DOMA, it is unlikely that such benefits will be granted to same-sex couples in the foreseeable future. A controversy exists within the lesbian, gay, bisexual, and transgendered ("LGBT") community regarding whether these state civil union or domestic partnership laws represent progress towards equality or rather confer a “separate but equal” status on same-sex relationships. See generally EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 125-44, 191-92 (2004) (discussing differences in benefits between legal marriage and civil unions or domestic partnerships); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 29-54 (2004) (discussing differences in benefits between legal marriage and civil unions or domestic partnerships).

See Goodridge v. Mass. Department of Public Health, 798 NE 2d 941, 948 (2003). In this landmark decision, the court held that denying same-sex couples the protections, benefits, and obligations inherent in the right to marry was inconsistent with the state’s constitution. Subsequently, in 2004, Massachusetts became the first state to issue marriage licenses to same-sex couples.

E.g., Tex. Fam. Code §2.001(b) (Vernon 2006).

E.g., Tex. Const. art. I, § 32. (added Nov. 8, 2005).
identity, those individuals who choose to alter their sexual identity should not be forced to forfeit their rights as citizens.

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ABSTRACT

In cases in which the validity of a marriage is in dispute, will courts accept the new gender of a post-operative transsexual? Does a person’s sense of sexual identity have any legal bearing on his or her legal gender? Courts have split on these questions. Many courts seek guidance from a 1970 English case, *Corbett v. Corbett*, in which the court, relying on its own three-prong congruency standard, ruled against the transsexual. This paper examines *Corbett* and its legacy. The paper also addresses the issue of how such rulings affect people with physical intersex conditions.