

**BORROWING FROM THE OLD TO CREATE SOMETHING NEW AND  
HELPING TRANSEXUALS FEEL LESS BLUE: A PROPOSAL FOR  
CHANGE IN TRANSEXUAL MARRIAGE DEBATES**

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**I. INTRODUCTION**

Although a sizeable number<sup>1</sup> of Americans identify themselves as transgendered,<sup>2</sup> many Americans are unlikely to personally know a transgendered individual. Despite the large number of individuals potentially affected by sex-classification laws, “[t]he law has largely ignored . . . medical conditions in which an individual’s sex may be ambiguous.”<sup>3</sup> Contrary to existing medical evidence, the law traditionally developed “under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous.”<sup>4</sup> When courts and legislatures must determine an individual’s sex for a specific purpose, transsexuals are generally the population segment caught in limbo.<sup>5</sup>

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<sup>1</sup> There are no concrete numbers to reflect the prevalence of transsexuals in America. GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 16 (1994). The Human Rights Campaign reports transsexual prevalence at an estimated .25 to one percent of the United States population, but notes these figures are dated and likely underestimate the true number. Human Rights Campaign, *Transgender Population and Number of Transgender Employees*, [http://www.hrc.org/issues/9598.htm#\\_ednref6](http://www.hrc.org/issues/9598.htm#_ednref6) (last visited Dec. 20, 2009). Another study produced estimates that range broadly from one in five hundred to one in two thousand five hundred. *Id.* (citing Lynn Conway, *How Frequently Does Transsexualism Occur?*, Dec. 17, 2002, <http://ai.eecs.umich.edu/people/conway/TS/TSpvalence.html>).

<sup>2</sup> As used in this article, the term transgender or transgendered refers to an individual who experiences some level of gender dysphoria, while transsexual refers to an individual who has undergone medical procedures to match their physical appearance with their psychological sex.

<sup>3</sup> Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *ARIZ. L. REV.* 265, 267 (1999).

<sup>4</sup> *Id.*

<sup>5</sup> See *id.* at 268 (explaining that transsexuals do not fit into the acknowledged binary code that shapes laws relating to one’s sex).

Society sometimes oversimplifies transsexualism as a condition in which one's "biological sex does not conform with [one's] self-identified sex."<sup>6</sup> As such, it is difficult to fit transsexuals into a system that accommodates only two poles—male or female.<sup>7</sup> As a result—and perhaps not unintentionally—the current system marginalizes transsexuals from the majority.<sup>8</sup> Nowhere are these issues more evident and personal than in the marriage debate, and their resolution is imperative to the equal protection of transsexuals under the law.<sup>9</sup> "Are we to look upon [a transsexual] as an exhibit in a circus side show? What harm has [the transsexual] done to society?"<sup>10</sup> These questions continue to present difficult issues for courts; it is imperative for jurists to reconsider traditional notions of what is acceptable in today's society.

Part II of this Article briefly discusses the history of marriage-restriction laws. Part III addresses the differences between *gender* and *sex*, and explains how a common misunderstanding of these terms led to the development of bad policy decisions by legislatures and courts. Part IV discusses common justifications for refusing to recognize marriages involving a transsexual individual. Finally, Part V discusses a proposal for change in the way courts, legislatures, and administrative agencies perceive issues regarding transsexual marriage.

## II. A BRIEF HISTORY OF MARRIAGE RESTRICTION LAWS

Along with a litany of other rights, marriage is a fundamental right under the Fourteenth Amendment.<sup>11</sup> Like other fundamental rights, debate surrounding the right to marry often revolves around concerns of public policy and state sovereignty.<sup>12</sup> As a result, many states

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<sup>6</sup> *Id.* at 267. For a more full discussion of the medical definition of transsexualism, see *id.* at 278-92.

<sup>7</sup> See *id.* at 323-24.

<sup>8</sup> *Id.* at 292.

<sup>9</sup> *Id.* at 292, 296-98.

<sup>10</sup> *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976).

<sup>11</sup> *Zablocki v. Redhail*, 434 U.S. 374, 383-84, 386 (1978) (providing that reasonable regulations may be imposed so long as those regulations do not "significantly interfere with decisions to enter into the marital relationship") (citing *Califano v. Jobst*, 434 U.S. 47 (1977)).

<sup>12</sup> See H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906.

deny transgendered persons the right to marry.<sup>13</sup> With increasing concern about same-sex marriages, Congress passed and President Bill Clinton signed into law the Defense of Marriage Act (DOMA).<sup>14</sup> DOMA allows (1) the federal government and (2) other states whose laws prohibit same-sex marriages to avoid the forced recognition<sup>15</sup> of same-sex marriages<sup>16</sup> granted in another state.<sup>17</sup> However, DOMA's enactment did not end the movement toward restriction of the right to marry.<sup>18</sup> Because each state is sovereign and has the authority to determine its own public policy,<sup>19</sup> the majority of states enacted either a statutory<sup>20</sup> and/or constitutional definition of marriage as between one man and one woman.<sup>21</sup>

Florida, for example, legislatively banned same-sex marriage.<sup>22</sup> Originally, Florida denied recognition to same-sex marriages through a statutory ban on the issuance of marriage licenses to same-sex couples.<sup>23</sup> In 1997 the Florida legislature enacted the Florida Defense

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<sup>13</sup> Greenberg, *supra* note 3, at 297-98.

<sup>14</sup> 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996).

<sup>15</sup> 28 U.S.C. § 1738C. Forced recognition is required by the Full Faith and Credit Clause of the Federal Constitution. U.S. CONST. art. IV, § 1.

<sup>16</sup> 1 U.S.C. § 7 (defining marriage as "a legal union between one man and one woman as husband and wife," and defining spouse as "a person of the opposite sex who is a husband or a wife").

<sup>17</sup> See H.R. REP. NO. 104-664, at 2 (stating that a primary purpose of DOMA is to allow the states to form their own public policy regarding same-sex marriages, which grants a state the freedom to allow or prohibit homosexual marriages).

<sup>18</sup> Nat'l Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships*, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Dec. 20, 2009). Thirty-eight states have passed statutory and/or constitutional bans on same-sex marriages since DOMA's passage in 1996, while three states had already enacted statutes prior to DOMA. *Id.*

<sup>19</sup> Nevada v. Hall, 440 U.S. 410, 421-22 (1979) (citing Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 502 (1939)).

<sup>20</sup> See Nat'l Conference of State Legislatures, *supra* note 18. According to this website, as of the date of this Article, forty-one states had enacted statutes defining marriage as between one man and one woman. This number includes Connecticut, whose statute was invalidated by the state supreme court in October 2008. Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 260-63 (2008).

<sup>21</sup> *Id.* According to this website, as of the date of this article, thirty states had approved a constitutional provision prohibiting same-sex marriages.

<sup>22</sup> *Id.*

<sup>23</sup> FLA. STAT. § 741.04(1) (2009).

of Marriage Act, expressly prohibiting marriages between same-sex individuals.<sup>24</sup> Like the Federal DOMA, Florida's Defense of Marriage Act (1) prevents the forced recognition of same-sex marriages granted in other jurisdictions,<sup>25</sup> (2) prevents same-sex marriages in Florida, and (3) eliminates any duty to grant full faith and credit to any record regarding same-sex marriage granted outside of Florida.<sup>26</sup> Additionally, Florida expressly restricted marriage to opposite-sex couples by constitutional amendment.<sup>27</sup>

### III. SEX AND GENDER: MISUNDERSTANDING LEADS TO BAD POLICY

#### A. *A Primer on the Difference Between Sex and Gender*

Many statutes and regulations classify individuals on the basis of sex and gender.<sup>28</sup> Society assumes the terms *sex*, *gender*, *male*, and *female* have unambiguous meanings; however, "the law defines these terms inconsistently or frequently fails to define them at all."<sup>29</sup> Consequently, courts must interpret and enforce scores of statutes and regulations without a distinct framework or concrete reference point from which to start. Moreover, until the law's shortcomings are recognized, society will continue discriminating against transsexuals.<sup>30</sup>

Essentially, sex classifies persons as *male* or *female* based solely on biological factors.<sup>31</sup> For legal purposes, sex is "established . . . on a person's birth certificate"<sup>32</sup> which "controls the sex designation on all later documents."<sup>33</sup> Thus, for purposes of legal classification, the birth

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<sup>24</sup> FLA. STAT. § 741.212 (2009).

<sup>25</sup> *Id.* § 741.212(1).

<sup>26</sup> § 741.212(2).

<sup>27</sup> FLA. CONST. art. I, § 27.

<sup>28</sup> Greenberg, *supra* note 3, at 270 (citations omitted).

<sup>29</sup> *Id.* (citing 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, 20 (1995)).

<sup>30</sup> *See id.* at 292-93.

<sup>31</sup> *Id.* at 271.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 309 (citing Foreign Relations, Evidence of U.S. Citizenship or Nationality, 22 C.F.R. § 51.43 (1999)) (current version at 22 C.F.R. § 51.42 (2009)) (requiring a certified copy of a birth certificate to accompany a new passport application).

certificate is prima facie evidence of sex. This proves problematic for transsexuals because in many jurisdictions, “[c]hanges in the birth certificate due to a later ‘change of sex’ are not . . . easily obtained.”<sup>34</sup> To add a layer of complexity, different criteria establish a person’s sex for different purposes, such as for eligibility to compete in athletic competitions.<sup>35</sup> From a biological point of view, males have XY chromosomes and females have XX chromosomes. There is a laundry list of factors that courts could use to determine sex for legal purposes: chromosomal makeup, presence of testes or ovaries, external genitalia, internal reproductive organs, hormones (androgens or estrogens), physical appearance caused by secondary sexual features, assigned sex, and sexual identity (the idea of self-identity).<sup>36</sup> However, so long as the “external genitalia appear unambiguous, the external genitalia typically determine the sex” of an individual.<sup>37</sup>

While biological features determine sex, gender refers to “the cultural or attitudinal qualities that are characteristic of a particular

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<sup>34</sup> *Id.*; see also Dean Spade, *Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies That Adversely Affect Transgender People*, 31 L.A. LAW., Oct. 2008 at 34, 38 (“For example, California’s gender change policy for birth certificates requires the applicant to show that he or she has undergone any of a variety of gender confirmation surgeries, which could include chest surgery (breast enhancement for trans women or mastectomy and reconstruction for trans men), tracheal shave (‘Adam’s Apple’ reduction), penectomy (removal of the penis), orchiectomy (removal of the testicles), vaginoplasty (creation of a vagina), phalloplasty (creation of a penis), hysterectomy (removal of internal pelvic organs), or any one of a range of other gender-related surgeries. When addressing birth certificate gender reclassification, New York City and New York State each require genital surgery. However, their genital surgery requirements differ entirely. People born in New York City are required to provide evidence that they have undergone phalloplasty or vaginoplasty, while people born in New York State must provide evidence that they have undergone penectomy or hysterectomy and mastectomy. The fact that two jurisdictions issuing birth certificates in the same state have come up with entirely different requirements for recognition of gender change alone attests to the inconsistency in this area.”) (citations omitted).

<sup>35</sup> Greenberg, *supra* note 3, at 273.

<sup>36</sup> *Id.* at 269. Gender self-identity addresses the situation in which an individual’s self-imposed gender identity does not match traditional gender notions based upon the appearance of external genitalia.

<sup>37</sup> *Id.* at 271 (citing Alice Domurat Dreger, “*Ambiguous Sex*”—or *Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality*, HASTINGS CENTER REP., May-June 1998, at 24, 27-28 (1998)).

sex.”<sup>38</sup> Society generally considers persons exhibiting traits normally associated with men to have a masculine gender, while the opposite is true for the feminine gender.<sup>39</sup> In a sense, gender is the product of social imposition.<sup>40</sup> Because *gender* and *sex* have different meanings, much confusion over the applicability and interpretation of legislation occurs because “courts, legislators, and administrative agencies often substitute the word ‘gender’ for ‘sex’ when they interpret . . . statutes.”<sup>41</sup>

### ***B. Majority: Gender is Assigned at Birth***

When asked to determine an individual’s gender for purposes of marriage, the majority of courts presume a postoperative transsexual retains his or her birth gender.<sup>42</sup> However, jurisprudence requiring “that individuals be classified into discrete and often binary categories . . . do[es] not reflect reality.”<sup>43</sup> For example, a New York court encapsulated traditional reasoning by opining the “mere removal of the male organs would not, in and of itself, change a [postoperative male-to-female transsexual] into a true female.”<sup>44</sup> Further, a Texas court referred to the esoteric concept of the *Creator* in determining whether a postoperative transsexual legally changed his or her gender for purposes of marriage.<sup>45</sup> Specifically, the court inquired: “[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”<sup>46</sup> In holding a marriage between a male and a male-to-female transsexual invalid, the court stated that gender is immutable and may not be altered through science<sup>47</sup>—likely much to the delight of the *Creator*.

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<sup>38</sup> *Id.* at 274.

<sup>39</sup> *Id.* (citing Valdes, *supra* note 29, at 377 n.1334).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Settings*, 28 T. JEFFERSON L. REV. 167, 179, 181 (2005).

<sup>43</sup> Greenberg, *supra* note 3, at 293.

<sup>44</sup> Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971).

<sup>45</sup> See Littleton v. Prange, 9 S.W.3d 223, 224, 231 (Tex. App. 1999).

<sup>46</sup> *Id.* at 224.

<sup>47</sup> See *id.* at 231.

Domestic courts are not alone in holding that gender is assigned at birth—until recently, a number of foreign jurisdictions agreed.<sup>48</sup> As a basis for its conclusions, a Texas court relied upon the reasoning of an English case from 1970 which held “the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.”<sup>49</sup> Liberal courts of the minority persuasion—those not relying solely on the presence of certain genitalia at birth—even noted the pervasiveness of the majority’s position: “It is true that the anatomical test, the genitalia of an individual, is unquestionably significant and probably in most instances indispensable.”<sup>50</sup>

### C. *New Jersey: Gender is Determined by Sexual Ability*

Light years from the majority viewpoint, the New Jersey Supreme Court fashioned a rather progressive minority rule.<sup>51</sup> The court took gender analysis past the moment of birth and noted the importance of psychological and emotional factors in determining an individual’s sexual identity.<sup>52</sup> Postulating that biological criteria alone are insufficient to determine an individual’s gender, the court opined “that for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.”<sup>53</sup> Unfortunately, the buck did not stop there, and the court went on to proclaim that “it is the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in

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<sup>48</sup> Canada, Great Britain, Singapore, Australia, and the European Court of Human Rights traditionally held an individual’s sex was unchangeably identified at birth. Herald, *supra* note 42, at 172-73 (citations omitted). However, Australia, and a majority of European countries, now hold postoperative transsexuals have legally changed their birth sex. *Id.* at 176 (citations omitted).

<sup>49</sup> *Littleton*, 9 S.W.3d at 227 (quoting *Corbett v Corbett*, [1971] P. 83, 104 (1970) (U.K.)).

<sup>50</sup> *M.T. v. J.T.*, 355 A.2d 204, 208 (N.J. Super. Ct. App. Div. 1976).

<sup>51</sup> *See id.* at 209 (rejecting traditional reasoning in *Corbett v. Corbett*, [1971] P. 83, 104 (1970) (U.K.)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

sexual intercourse as either a male or a female.”<sup>54</sup> The linchpin of the minority view clearly hinges on an individual’s postoperative sexual capacity in his or her postoperative gender. The New Jersey Supreme Court’s view serves as a welcome reprieve from the majority view discussed above—so long as the postoperative transsexual is able to engage in heterosexual intercourse, his or her marriage is enforceable.

#### IV. FEELING BLUE: JUSTIFICATIONS FOR DENYING TRANSEXUALS THE RIGHT TO MARRY

##### A. *Common Meaning Approach*

In “legislation utilizing the terms ‘sex’ and ‘gender’ [there lies an] assumption[ ] that only two biological sexes exist and that all people fit neatly into either the category male or female.”<sup>55</sup> Although there is contrary “medical and anthropological” evidence, the law assumes a “binary sex and gender model.”<sup>56</sup> Reflecting upon the disconnect between law and medicine, The Honorable Sir Roger Ormrod noted:

The law, which is essentially an artefact [sic], is a system of regulations which depends upon precise definitions; . . . the law is obliged to classify its material into exclusive categories; it is, therefore, a binary system designed to produce conclusions of the *yes* or *no* type. Biological phenomena however, cannot be reduced to exclusive categories so that medicine often cannot give Yes or No answers. . . . This fundamental conflict lies at the root of all relations between medicine and law.<sup>57</sup>

As a matter of semantics, many courts rely upon the common meaning of the words *male* and *female* in construing marriage statutes. Not surprisingly, these statutes fail to “define or attempt to define who is a male or who is a female.”<sup>58</sup> A common maxim of statutory construction instructs, “when words are not defined in a statute they are to

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<sup>54</sup> *Id.* (noting evidence in contravention of traditional gender and sex ideals).

<sup>55</sup> Greenberg, *supra* note 3, at 275.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 293 (quoting The Hon. Sir Roger Ormrod, *The Medico-Legal Aspects of Sex Determination*, 40 MEDICO-LEGAL J. 78, 78 (1972)).

<sup>58</sup> *Id.* at 297.

be given their common and ordinary meaning absent a contrary legislative intent.”<sup>59</sup> *Marriage* is often defined as the “[l]egal union of one man and one woman.”<sup>60</sup> Ordinarily, a *female* is understood as “the sex that produces ova or bears young,”<sup>61</sup> and a *male* is understood as “the sex that has organs to produce spermatozoa for fertilizing ova.”<sup>62</sup> Even in states whose legislation adheres to the majority viewpoint, “the assumption of the courts is that a valid marriage requires a union of one man and one woman.”<sup>63</sup> For example, in *Kantaras v. Kantaras* the Florida Second District Court of Appeal held that unless the Florida legislature “amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, [the court] must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth.”<sup>64</sup>

Additionally, words used in a statute that had a common meaning at the time of the statute’s enactment are “presumed to have been used in that sense unless the context compels to the contrary.”<sup>65</sup> While this method of statutory construction does not take into consideration advances made in technology and science,<sup>66</sup> courts use this method of statutory construction when determining issues not contemplated by the drafters of particular statutory language.<sup>67</sup> For example, the Ohio Eleventh District Court of Appeals relied on the common usage of *male* to declare “since the statutory language in question was enacted in the early 1900s, without change, it cannot be argued that the term ‘male,’ as used at that time, included a female-to-male post-operative transsex-

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<sup>59</sup> *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*6 (Ohio Ct. App. Dec. 31, 2003) (citing *Moore Pers. Servs., Inc., v. Zaino*, 784 N.E.2d 1178, 1180 (Ohio 2003)).

<sup>60</sup> Greenberg, *supra* note 3, at 296 (citing BLACK’S LAW DICTIONARY 972 (6th ed. 1990)).

<sup>61</sup> *In re Nash*, 2003 WL 23097095, at \*6 (citing WEBSTER’S II NEW COLLEGE DICTIONARY (1999)).

<sup>62</sup> *Id.* (citing WEBSTER’S II NEW COLLEGE DICTIONARY (1999)).

<sup>63</sup> Greenberg, *supra* note 3, at 296.

<sup>64</sup> *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

<sup>65</sup> *In re Nash*, 2003 WL 23097095, at \*6 (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911)).

<sup>66</sup> See Greenberg, *supra* note 3, at 294.

<sup>67</sup> See *In re Nash*, 2003 WL 23097095, at \*6.

ual.”<sup>68</sup> Some foreign courts accept modern medical advances, and thus recognize postoperative transsexuals as falling within the “ordinary contemporary meaning” of the terms *male* and *female*.<sup>69</sup> However, as made clear by the majority of domestic courts to consider issues of transsexual marriage, there is an inherent struggle between tradition and modern science—and oftentimes tradition prevails.<sup>70</sup>

### *B. Deterrence of Judicial Activism*

On public policy grounds, courts confronting issues regarding transsexual marriage often look to their respective state legislatures for change.<sup>71</sup> The idea of separation of powers is fundamental to the American sense of democracy.

[T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it.<sup>72</sup>

Relying on the traditional definitions of *male* and *female*, conservative courts consistently refuse to interpret marriage statutes to allow marriages including postoperative transsexuals.<sup>73</sup> Even in the face

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<sup>68</sup> *Id.*

<sup>69</sup> See *Re Kevin: Validity of Marriage of Transsexual*, (2001) 28 Fam. L.R. 158, *aff'd*, (2003) 30 Fam. L.R. 1 (Austl.) (Lexis printout pagination).

<sup>70</sup> See Greenberg, *supra* note 3, at 294 (“In stark contrast to the law’s approach is the reality of current medical and psychiatric practice.”).

<sup>71</sup> See *In re Estate of Gardiner*, 42 P.3d 120, 136-37 (Kan. 2002) (“If the legislature wishes to change public policy, it is free to do so; [the Kansas Supreme Court is] not.”).

<sup>72</sup> Peter D. Webster et al., *Statutory Construction in Florida: In Search of a Principled Approach*, 9 FLA. COASTAL L. REV. 435, 497-98 (2008) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947)).

<sup>73</sup> See *Estate of Gardiner*, 42 P.3d at 136 (holding that the court’s responsibility was not to rewrite the marriage statute, but instead to merely interpret it); *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999) (recognizing that the legislature should “determine what guidelines should govern the recognition of marriages involving

of legislative silence, many courts cling to traditional ideals and refuse to change the law through judicial interpretation, instead deferring to the legislature for any change.<sup>74</sup> For example, the issue in *In re Estate of Gardiner* was the interpretation of Kansas Statutes Annotated section 23-101(a), which read:

The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.<sup>75</sup>

The Kansas Court of Appeals held that the statute left unanswered the question of whether a postoperative transsexual could marry in his or her postoperative sex.<sup>76</sup> The court noted “the legislative history [of section 23-101] contains discussions about gays and lesbians, but nowhere is there any testimony that specifically states that marriage should be prohibited by two parties if one is a post-operative . . . transsexual.”<sup>77</sup> In complete disagreement, the Kansas Supreme Court adhered to traditional conventions by “view[ing] the legislative silence to indicate that transsexuals . . . not [be] included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so.”<sup>78</sup>

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transsexuals”); Greenberg, *supra* note 3, at 292 (“The traditional jurisprudential approach in this area has resulted in discrimination against a group of people who have been consistently ignored and marginalized by society.”).

<sup>74</sup> See Greenberg, *supra* note 3, at 296-97 (citing *Dean v. District of Columbia*, 653 A.2d 307, 310 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1194 (Wash. Ct. App. 1974)) (noting that in the absence of a controlling statute, courts presume that only a biological man and a biological woman may legally marry).

<sup>75</sup> *Estate of Gardiner*, 42 P.3d at 125 (quoting KAN. STAT. ANN. § 23-101(a) (2001)).

<sup>76</sup> *In re Estate of Gardiner*, 22 P.3d 1086, 1093 (Kan. Ct. App. 2001), *aff'd in part, rev'd in part*, 42 P.3d 120 (Kan. 2002).

<sup>77</sup> *Id.*

<sup>78</sup> *Estate of Gardiner*, 42 P.3d at 136.

### C. *Public Policy: Full Faith and Credit Abrogation*

The United States Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”<sup>79</sup> Congress, by general law, codified this idea by declaring that another state’s records “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”<sup>80</sup> Courts have used public policy reasons to deny same-sex and transsexual marriages full faith and credit.<sup>81</sup>

The Ohio Eleventh District Court of Appeals noted, “each state retains some attributes of sovereignty and, thus, may enact its own laws and, in effect, define its own public policy . . . .”<sup>82</sup> Through legislative enactment, the majority of states have a clear public policy that recognizes marriages only between persons of opposite sexes.<sup>83</sup> Courts may rely on public policy to deny full faith and credit to the official acts of a state where those acts “would violate the public policy of the state applying the other state’s records.”<sup>84</sup> The Ohio Eleventh District Court of Appeals so abrogated full faith and credit when it refused to recognize a postoperative transsexual’s amended Massachusetts birth certificate for purposes of establishing his postoperative gender in an application for a marriage license.<sup>85</sup> Previously, the Ohio Ninth District Court of Appeals held that the prohibition of same-sex marriage “applie[d] even in a

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<sup>79</sup> U.S. CONST. art. IV, § 1.

<sup>80</sup> 28 U.S.C. § 1738 (2009); *accord* 28 U.S.C. § 1739 (2009).

<sup>81</sup> *See In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095, at \*5-6, \*9 (Ohio Ct. App. Dec. 31, 2003).

<sup>82</sup> *Id.* at \*5 (citing *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 691 (1981); *Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co.*, 393 U.S. 129, 142 (1968); *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939)).

<sup>83</sup> *See Nat’l Conference of State Legislatures*, *supra* note 18.

<sup>84</sup> *In re Nash*, 2003 WL 23097095, at \*5 (citing *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941); *Atl. Fin. Co. v. Fisher*, 183 N.E.2d 135, 137 (Ohio 1962)).

<sup>85</sup> *See generally In re Nash*, 2003 WL 23097095.

situation where one party ha[d] obtained such gender status by means of transsexual surgery; in the contemplation of Ohio jurisprudence, one's gender at birth is one's gender throughout life."<sup>86</sup> Thus, state public policy can and consistently has been used to deny the grant of full faith and credit to the official records of another state.

## V. A PROPOSAL FOR NECESSARY CHANGE

While many scholars are awakening to the realization that gender and sex are "complex and nonbinary" categories,<sup>87</sup> the law lags behind.<sup>88</sup>

The hare of science and technology lurches ahead. The tortoise of the law ambles slowly behind. . . . [F]undamental problems . . . include the adaptation of notions of human rights to the potentialities of science and technology at the close of the 20th century. They also include the capacity of our legal system, its institutions and personnel to produce with anything like appropriate speed and satisfaction the legal responses. New institutions are needed to provide those responses in a prompt and coherent way. Otherwise great injustice will be done and the law will increasingly be seen to be irrelevant, incompetent or obstructive.<sup>89</sup>

Modern medical and legal commentary makes it clear that traditional legal thought—classifying persons into discrete gender categories—does not adequately reflect modern society's notion of gender.<sup>90</sup> Interestingly enough, use of the traditional gender-assigned-at-birth test yields results that, to a person of average sensibilities, appear to defeat the legislative intent of same-sex marriage statutes.<sup>91</sup>

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<sup>86</sup> *Gajovski v. Gajovski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991).

<sup>87</sup> *Greenberg*, *supra* note 3, at 292.

<sup>88</sup> *Id.* at 292-93.

<sup>89</sup> *Id.* at 293 (quoting H.A. FINLAY & WILLIAM A.W. WALTERS, *SEX CHANGE: THE LEGAL IMPLICATIONS OF SEX REASSIGNMENT* 45 (1988)).

<sup>90</sup> *See id.* at 292-94.

<sup>91</sup> *See id.* at 325.

**A. Public Policy Is Flawed: Current Ideologies Lead to Unintended Results**

Many courts refuse to recognize marriages between (1) a female and a postoperative female-to-male transsexual, and (2) a male and a postoperative male-to-female transsexual on the basis that such marriages violate the state's ban on same-sex marriage.<sup>92</sup> Some of the same courts would, however, recognize marriages between (1) a female and a postoperative male-to-female transsexual and, (2) a male and a postoperative female-to-male transsexual because the parties were not the same biological sex at birth.<sup>93</sup> As a result, states like Florida, Ohio, and Kansas—to name a few—recognize the latter type of marriages based on antiquated notions of sex and gender although such marriages appear to be between members of the same sex.<sup>94</sup> Surely, state courts and legislatures did not intend such a result.

**B. Do Civil Rights Mean Anything? Transsexuals Are People Too**

“The time has come to incorporate human hybrids into the legal world.”<sup>95</sup> Until lawmakers abandon or alter traditional ideals, society will continue to “perpetuate[ ] the[ ] castigation and invisibility” of transsexuals.<sup>96</sup> We as a society, however, have decided that certain civil rights are necessary to ordered life:<sup>97</sup>

The establishment of our current civil rights legislation required that we rethink the long established history and origins of our prejudices. Without exception, the continuation of those prejudices was defended in the name of natural law, the God-given order of things, and because

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<sup>92</sup> See *supra* Part IV.A-B.

<sup>93</sup> See Greenberg, *supra* note 3, at 268 (noting that in England, Ohio, and Oregon, a woman was legally able to marry a male-to-female transsexual, despite existing laws that prohibited same-sex marriages).

<sup>94</sup> See *supra* Part IV.A-B.

<sup>95</sup> Greenberg, *supra* note 3, at 325 (citing RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* xii (1996)).

<sup>96</sup> *Id.* (citing COLKER, *supra* note 95 at xi).

<sup>97</sup> See *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-1079, 2003 WL 23097095, at \*11 (Ohio Ct. App. Dec. 31, 2003) (discussing miscegenation and race discrimination laws).

it had always been that way. Then, as today, the defenders of the status quo always seemed to have God's lips to their ears.<sup>98</sup>

If “the defenders of the status quo”<sup>99</sup> were so privileged as to be privy to divine wisdom, it is interesting to note their apparent ignorance of arguably one of the Bible's greatest teachings: “thou shalt love thy neighbour as thyself . . . .”<sup>100</sup> In *M.T. v. J.T.*, the Superior Court of New Jersey—apparently the crusaders of change—reasoned that “allowing people to self-identify their sex is ‘practical, realistic and humane.’”<sup>101</sup> Recognizing the importance of self-identity,<sup>102</sup> the court found “[w]here, . . . with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual . . . .”<sup>103</sup> By recognizing the transsexual in his or her postoperative gender, the legal system “will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.”<sup>104</sup> While the New Jersey approach is certainly the most liberal, it nevertheless places an unnecessary burden on the recognition of a transsexual's marriage—requiring sexual ability in his or her postoperative gender.<sup>105</sup> This requirement seems couched in the traditional belief that the purpose of marriage is for procreation;<sup>106</sup> however, there

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Leviticus* 19:18 (King James).

<sup>101</sup> Greenberg, *supra* note 3, at 325 (quoting *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976)).

<sup>102</sup> *See id.* (citing *M.T.*, 355 A.2d at 209, 211).

<sup>103</sup> *M.T.*, 355 A.2d at 210.

<sup>104</sup> *Id.* at 211.

<sup>105</sup> *Id.* at 210-11 (“If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated.”); *see supra* Part III.C.

<sup>106</sup> *See, e.g.,* *Kantaras v. Kantaras*, 884 So. 2d 155, 160 (Fla. Dist. Ct. App. 2004) (citing *B. v. B.*, 355 N.Y.S.2d 712, 717 (N.Y. Sup. Ct. 1974) (noting New York's public policy that “the marriage relationship exists for the purpose of begetting offspring”)).

are a significant number of heterosexual<sup>107</sup> couples who are either unable, or unwilling, to procreate.<sup>108</sup> Given this reality, it seems fundamentally unfair to place such a qualification upon marriages involving a transgendered individual, when there is no reciprocal sexual-functioning test required as a prerequisite for heterosexual couples to obtain a marriage license. The right to marry is fundamental,<sup>109</sup> and the law should not unnecessarily discriminate against those it simply does not understand.<sup>110</sup>

### ***C. It Is Time to Govern: Society Needs Clear Guidance Regarding Marriage Rights***

Where “the law chooses to regulate behavior based upon a person’s sex, it must clearly define its terms.”<sup>111</sup> As discussed above,<sup>112</sup> the law often uses the nonsynonymous terms *sex* and *gender* interchangeably, and often fails to adequately define terms such as *marriage*, *male*, and *female*. If jurists stubbornly insist on clinging to the rigid male-or-female frame of mind, they “must find a way to define [those terms] so that the rights and obligations of [transsexuals] are as clearly delineated as the rights and obligations of individuals who are not [transgendered].”<sup>113</sup> In the end, Professor Julie A. Greenberg summarized it best:

Society, the medical community, and the law must acknowledge the existence of [trans]sexuality. Currently, [trans]sexuality is often viewed as a shameful secret to be hidden and borne in silent suffering. “To

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<sup>107</sup> As used in this Article, the term heterosexual is not meant to imply that transgendered individuals are homosexual by nature. There are many transgendered individuals who self-identify as heterosexual despite their own gender dysphoria. See Greenberg, *supra* note 3, at 289.

<sup>108</sup> *Id.* at 296-97 (citing *B.*, 355 N.Y.S.2d at 717; *Corbett v. Corbett*, [1971] P. 83, 83 (1970) (U.K.)).

<sup>109</sup> *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978) (citations omitted).

<sup>110</sup> *M.T.*, 355 A.2d at 207 (“The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.”).

<sup>111</sup> Greenberg, *supra* note 3, at 326.

<sup>112</sup> See *supra* Part III.A.

<sup>113</sup> Greenberg, *supra* note 3, at 326.

share such a secret is to invite ridicule and rejection; to keep such a secret condemns one to a life of loneliness and isolation.” The law, by clinging to a binary system that blindly ignores the existence of [trans]sexuals and the importance of self-identity, reinforces the perception that [trans]sexuality is unacceptable. It also ignores the reality of [trans]sexuality. The law should not continue to force [trans]sexuals farther into the deepest recesses of their closet by failing to acknowledge their existence and their self-identity.<sup>114</sup>

The time has come for the law to recognize its shortcomings and harmonize itself with contemporary notions of science and morality. As the adage goes, “[a]ny society, any nation, is judged on the basis of how it treats its weakest members—the last, the least, the littlest.”<sup>115</sup> In modern marriage debates, transsexuals constitute an underclass which society and the law consistently underrepresents and subdues. The progressiveness of the American civil rights revolution must be questioned when the legal system—the body charged with defining and upholding the rights of citizens—systematically denies a fundamental right to its marginalized citizens. As the *M.T.* majority questioned, “[w]hat harm has [the transsexual] done to society?”<sup>116</sup> No concrete, societal harm would directly flow from a decision allowing transsexuals to marry in their postoperative genders. Because transsexual marriage does not threaten to harm society, current legal restrictions on the matter are best described as arbitrary.

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<sup>114</sup> *Id.* at 326-27 (quoting JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES* x (2d ed. 1994)). Although the cited source addresses both intersexuals and transsexuals, the author chose to limit his focus to the law’s effect on transsexuals for clarity. In doing so, the author does not intend to alter the meaning of the cited source.

<sup>115</sup> Los Angeles Lay Catholic Mission, News, Feb. 2009, <http://www.losangelesmission.com/ed/news/0299news.htm> (quoting Cardinal Roger Mahony on Nov. 12, 1998).

<sup>116</sup> *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976).

