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Sex Changes and “Opposite-Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes

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Sex Changes and “Opposite-Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes*

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I. INTRODUCTION

The legal gender status of millions of people in the United States¹ is

1. The exact incidence of intersexualism and transsexualism is unknown. Only rough estimates are available on the number of intersexuals and transsexuals in the United States. Recent estimates of the frequency of intersexuality are in the range of one percent of the population. See ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 51, 53 tbl.3.2 (2000) (estimating that 1.7% of the world’s population are born with some form of intersexuality and noting that the frequency of intersexuality is much higher in some populations than in others); see also ALICE DOMURAT DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 42 (1998) (estimating that about one to three in every two thousand people born in the United States have anatomies that are neither typically male nor female). Such frequency makes intersexuality about as common as cystic fibrosis (“roughly one in two thousand ‘Caucasian’ births”) and Down syndrome (“roughly one in eight hundred live births”). *Id.* at 43.

The incidence of transsexualism is even more difficult to estimate. A 1990 study estimated that about ten thousand transsexuals live in the United States. See DAVID W. MEYERS, *THE HUMAN BODY AND THE LAW* 221 (2d ed. 1990). However, a weekly magazine recently reported that there are roughly thirty thousand transsexuals in the United States. Alex Tresniowski et al., *Split Heirs*, PEOPLE, Aug. 28, 2000, at 75–76. Approximately one thousand sex reassignment surgeries (SRS) are performed in North America each year. See E-mail from Nancy Cain, Executive Director, International Foundation for Gender Education (IFGE), to Shana Brown (Aug. 21, 2000, 12:59:42) (on file with author). Cain offered an explanation for the lack of statistical information regarding transsexuals:

The problem is that the “advice” which was given to transsexuals was to “blend in”—so it’s not like people are including this information on their census forms. . . . The other piece is that once a transsexual person has had surgery, they often consider themselves the gender that they now are (female or male) and no longer identify as a “trans” anything.

Id.

substantially uncertain because the law fails to answer two seemingly simple questions: “What is ‘female’?” and “What is ‘male’?”²

Most Americans take for granted that the little boxes on their birth certificates indicating “female” or “male” were appropriately marked by the physician attending their birth. However, a growing minority contends that the sex designation assigned at their births was either inaccurate at the time or is currently inaccurate. Many states have amended their laws to make clear that such inaccuracies may be changed.³ Some states, however, may force their citizens to suffer the consequences of that inaccuracy for the rest of their lives.

In many areas of the law, sexual categorization is determinative of individual rights.⁴ Whether an individual is officially recognized as a man or a woman decides, to a large extent, his or her fate in our society. Unfortunately, those who feel their gender was mistakenly identified at the time of their births not only have to live with the social stigmatism surrounding their “condition,” but also with a legal system not designed to interpret and apply the law to those who fall outside the “binary sex and gender paradigm.”⁵

Arguably, the most profound consequences of a legal system based upon sexual categorization are felt in the area of marriage. The United States Supreme Court has clearly established that the freedom to marry is a fundamental personal right of constitutional proportions.⁶ The Court

2. Katrina C. Rose discusses this “definitional void” in her article, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA’s Box by Closing the Door on Transsexuals’ Right to Marry*, 9 LAW & SEXUALITY 1, 5–6 (1999–2000).

3. See *infra* Part III.B.

4. Some areas in which one’s legal gender identity determines one’s rights are family law, prisoners’ rights, employment discrimination, military obligations, and athletic competition. In addition, in *Anonymous v. Mellon*, 398 N.Y.S.2d 99 (Sup. Ct. 1977), the court noted that “[t]he fact of sex may be crucial in school admissions, in vocational or recreational opportunities, in military service, in connection with insurance and pensions, or upon an application for a marriage certificate.” *Id.* at 102.

5. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 270 (1999) [hereinafter Greenberg, *Defining Male and Female*]. Greenberg notes that “[a] variety of federal and state statutes and regulations” are based upon an individual’s status as male or female, yet “the law defines these terms inconsistently or frequently fails to define them at all.” *Id.*

6. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“[T]he right to marry is of fundamental importance for all individuals.”); *Carey v. Population Serv. Int’l*, 431 U.S. 678, 684–85 (1977) (“While the outer limits [of the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may

has asserted that “the right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”⁷ However, although everyone has the right to marry, that right has been restricted by laws limiting marriage to unions between persons of the opposite sex,⁸ and courts have consistently upheld those laws.⁹ Such restrictions make transsexuals’ and intersexuals’ right to marry illusory. The law requires one to marry a person of the opposite sex, but without clear, uniform definitions of female or male, determining one’s sex is not necessarily a simple task. Consequently, determining who is of the *opposite* sex can likewise be complicated. Many transgendered individuals must guess as to their legal gender because an intersexual or transsexual can be legally categorized as a woman in one state, but a man in another.¹⁰ As a result, under the current law, who a transgendered individual may marry is subject to change as she crosses state lines.

A recent case¹¹ illustrates the problem transsexuals and intersexuals face in a legal system that does not allow same-sex marriages, but has failed to define female and male. The case involves a transsexual, J’Noel Ball, who intended to marry a person of the *opposite* sex.

Marshall Gardiner and J’Noel Ball were married on September 25, 1998, in Oskaloosa, Kansas.¹² Gardiner died of a heart attack eleven months

make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships, and child rearing and education.’” (citations omitted)); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (“[M]arriage involves interests of basic importance in our society.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing marriage as “essential to the orderly pursuit of happiness by free men”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (characterizing marriage as “creating the most important relation in life”); see also Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 943 (1998).

7. *Zablocki*, 434 U.S. at 384.

8. State legislatures have passed statutes explicitly declaring same-sex marriages void. See, e.g., GA. CODE ANN. § 19-3-3.1 (Harrison 1998 & Supp. 2000) (“No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage.”); MISS. CODE ANN. § 93-1-1(2) (Supp. 2000) (“Any marriage between persons of the same gender is prohibited and null and void from the beginning.”); N.C. GEN. STAT. § 51-1.2 (1999) (“Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”).

9. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

10. See *infra* Part IV.

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

12. *Id.* at 1091; see John T. Dauner, *Wealth and a Sex Change Are at Center of*

later.¹³ He died intestate, leaving behind an estate worth \$2.5 million.¹⁴ After her¹⁵ husband’s death, however, a state district court held that her marriage was invalid because she was of the *same* sex as her late spouse.¹⁶ The court flatly refused to recognize her amended birth certificate as determinative of her legal sex.

Kansas law divides the estate of an intestate decedent evenly between his widow and any offspring.¹⁷ Marshall’s estate was thus set to be split between J’Noel and Marshall’s estranged son from his previous marriage, Joe Gardiner.¹⁸ Shortly after his father’s death, however, Joe discovered that J’Noel had been born a male named Jay Ball.¹⁹ In Kansas, same-sex marriages are void.²⁰ On January 20, 2000, the Leavenworth County probate court held that J’Noel was not entitled to her spousal share because her marriage to Gardiner was invalid.²¹

J’Noel began her physical transformation from male to female in 1991.²² After hormone therapy, electrolysis to remove body hair on her face, neck, and chest, a tracheal shave, and extensive counseling, J’Noel underwent sex reassignment surgery in Wisconsin in 1994.²³ In this surgery, the doctor removed her external male genitalia and created female genitalia by “cut[ting] and invert[ing] the penis, [and] using part of the skin to form a female vagina, labia, and clitoris.”²⁴ After her sex reassignment surgery, J’Noel applied for a new birth certificate that

Kansas Estate Litigation, KAN. CITY STAR, June 24, 2000, at A1, available at 2000 WL 7736247.

13. Devon Spurgeon, *Double Bind: Woman in Missouri Is a Man in Kansas, and Why*, WALL ST. J., Jul. 7, 2000, at A1.

14. Dauner, *supra* note 12, at A1.

15. Throughout this Comment, pronouns that reflect the self-identity of the individuals discussed are used, regardless of their legal gender identity.

16. *In re Estate of Gardiner*, 22 P.3d at 1091.

17. KAN. STAT. ANN. § 59-504 (1994).

18. *See* Spurgeon, *supra* note 13, at A1.

19. *See id.*

20. KAN. STAT. ANN. § 23-101 (Supp. 2000). The statute states: “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.” *Id.* The statute does not define the terms “man” or “woman.” *See id.* Furthermore, “nowhere is there any testimony [in the legislative history] that specifically states that marriage should be prohibited by two parties if one is a postoperative male-to-female or female-to-male transsexual.” *In re Estate of Gardiner*, 22 P.3d 1086, 1093 (2001).

21. *See* Dauner, *supra* note 12, at A1; Spurgeon, *supra* note 13, at A1.

22. *In re Estate of Gardiner*, 22 P.3d at 1091–92.

23. *Id.*; *see also* Dauner, *supra* note 12, at A8.

24. *In re Estate of Gardiner*, 22 P.3d at 1092.

designated her sex as female. Her birth certificate was reissued in September 1994, with the requested change pursuant to a Wisconsin court order.²⁵ Despite that evidence, the Kansas probate court refused to recognize J'Noel's sex as female and held that because J'Noel was born a male, she "remains a male for purposes of marriage under Kansas law."²⁶ The Kansas court's ruling essentially leaves J'Noel without the right to enter into *any* marriage that would be recognized across state lines.²⁷ She cannot marry a man in Kansas, and she cannot marry a woman in Wisconsin.

No state in the United States currently permits same-sex marriages.²⁸ Although this prohibition has been attacked as violative of gays' and lesbians' constitutional right to marry, opponents of same-sex marriage have successfully countered that the prohibition does not violate their right because gays and lesbians are still free to marry partners of the opposite sex.²⁹ The *Gardiner* case demonstrates how that argument is not dispositive of the transgendered community's predicament.

Many states, like Wisconsin, will reissue or amend transsexuals' and intersexuals' birth certificates to reflect their psychological and postoperative anatomical sex.³⁰ However, other states, like Kansas, may refuse to recognize the amended sex designation for purposes of marriage. Consequently, any marriage involving a transsexual like J'Noel Ball can be alternately valid and void as she and her spouse travel across the country.

This Comment argues that, in most cases, states are constitutionally bound to give full faith and credit to laws and judgments rendered in

25. *Id.*

26. Dauner, *supra* note 12, at A1.

27. J'Noel appealed the decision of the Leavenworth District Court, and the Court of Appeals of Kansas issued an opinion on the case in May 2001. *In re Estate of Gardiner*, 22 P.3d 1086. The court of appeals reversed and remanded with instructions that the trial court "consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth." *Id.* at 1110. The court noted that the trial court "may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision." *Id.*

28. As of July 1, 2000, a new Vermont law allows same-sex partners to be joined in "civil unions." See 2000 Vt. Acts & Resolves 72, 72-73. The law was enacted in response to the Vermont Supreme Court holding in *Baker v. State*, 744 A.2d 864 (Vt. 1999), and seeks to provide eligible same-sex couples the opportunity "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples." See *Baker*, 744 A.2d at 886. The Vermont legislature took care to distinguish "civil unions" from "civil marriages," however, and defines "marriage" as the "legally recognized union of one *man* and one *woman*." VT. STAT. ANN. tit. 15, § 1201 (Supp. 2000) (emphasis added).

29. For an overview of arguments on both sides, see generally SAME-SEX MARRIAGE: PRO AND CON—A READER (Andrew Sullivan ed., 1997).

30. See *infra* Part III.B.

sister states, including those that result in changes of the sex designated on birth certificates. The sex designated on the birth certificate controls gender identity for all legal purposes of the individual named therein. Therefore, unless a forum state demonstrates that allowing transsexuals and intersexuals to marry in their legal gender is contrary to an important state interest, that state must recognize "opposite-sex" marriages involving transsexuals and intersexuals.

Part II of this Comment sets forth terminology and some general information about transsexualism and intersexualism. Part III examines the significance of the birth certificate, why legal changes of sex should be granted, and which states currently allow them. Part IV explains the scope of the Full Faith and Credit Clause as well as its limitations. Part V identifies how the Full Faith and Credit Clause may be a successful mechanism for obligating sister states to recognize legally amended sex designations on transgendered individuals' birth certificates. Part VI concludes that once their sexual identity has been legally amended, transsexuals and intersexuals have a right to marry in the sex designated on their birth certificates and that opposite-sex marriages entered into by these individuals should be recognized throughout the United States.

II. IDENTIFYING AND UNDERSTANDING THE TRANSGENDER COMMUNITY

"Transgenderist" is a term used to describe both transsexuals and intersexuals.³¹ A transgendered person is one whose psychological sexual identity is opposite from the biological and physical sex that (s)he appeared to be at birth.³²

31. For purposes of this Comment, "transgenderist" will refer only to transsexuals and intersexuals. Generally, the term "transgenderist" also encompasses transvestites. See MARTHA T. ZINGO, *SEX/GENDER OUTSIDERS, HATE SPEECH, AND FREEDOM OF EXPRESSION* 10 n.17 (1998). Transvestites, or "cross-dressers," are people who wear the clothes associated with the other sex. Some do so to obtain employment unavailable to persons of their anatomical sex or because cross-dressing provides pleasure; others do so to express aspects of their identity they find inexpressible when dressing and acting in conformance with what is socially expected of persons with their anatomy.

Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 *UCLA WOMEN'S L.J.* 219, 239 (1998).

32. See ZINGO, *supra* note 31, at 10–11 (citing LESLIE FEINBERG, *TRANSGENDER LIBERATION: A MOVEMENT WHOSE TIME HAS COME* 6–7 (1992)). Although often used interchangeably, "sex" and "gender" are distinct and independent of each other. See Greenberg, *Defining Male and Female*, *supra* note 5, at 274 ("Most legislation utilizes

A. Intersexuals

Individuals born with some combination of male and female sexual characteristics are classified as intersexual.³³ Medical experts recognize that a combination of eight factors determine one's sex: chromosomal sex (XY or XX), gonadal sex (testes or ovaries), internal sex organs (seminal vesicles and prostate or vagina, uterus and fallopian tubes), genitalia (penis and scrotum or clitoris and labia), hormonal sex (androgens or estrogens), secondary sex characteristics (facial and chest hair or breasts), assigned sex and gender of rearing, and sexual identity.³⁴ Intersexuals experience ambiguity between and within these eight factors.

the word 'sex,' yet courts, legislators, and administrative agencies often substitute the word 'gender' for 'sex' when they interpret these statutes. Despite the different meanings of the terms 'sex' and 'gender,' they are often used interchangeably." Sex is "typically defined according to biological factors," whereas "[g]ender is generally used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex." *Id.* at 273–74. Sexual identity is how one identifies him or herself *biologically*, while gender identity is how one identifies him or herself *socially*. See Nancy R. Nangeroni, International Foundation for Gender Education, *TransGenderism: Transgressing Gender Norms*, at <http://www.gendertalk.com/tgism/tgism.shtml> (last modified Mar. 17, 2001) ("If someone is born female, but wishes to see their body as male in all respects, their *sexual* identity is male." (emphasis added)). Transsexuals (even those who do not undergo sex reassignment surgery (SRS)) have both a sexual and a gender identity opposite that which their anatomy at birth would suggest. Most transvestites, on the other hand, do not see themselves emotionally or even physically as the sex as which they occasionally dress. See Coombs, *supra* note 31, at 239.

33. There are many different intersexed medical conditions. "The most common types of intersexuality are congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS), gonadal dysgenesis, hypospadias, and unusual chromosome compositions . . ." FAUSTO-STERLING, *supra* note 1, at 51. CAH occurs in XX children and is a "[g]enetically inherited malfunction of one or more of six enzymes involved in making steroid hormones." *Id.* at 52. The malfunctioning enzyme(s) can cause "mild to severe masculinization of genitalia at birth or later; if untreated, can cause masculinization at puberty and early puberty." *Id.*

AIS occurs in XY children and is caused by a "[g]enetically inherited change in the cell surface receptor for testosterone." *Id.* AIS children are "born with highly feminized genitalia. The body is 'blind' to the presence of testosterone, since cells cannot capture it and use it to move development in a male direction. At puberty these children develop breasts and a feminine body shape." *Id.*

Gonadal dysgenesis has various causes, not all of which are genetic. *Id.* It is a "catch-all category," and refers to any individual whose "gonads do not develop properly." *Id.* Hypospadias also has various causes. *Id.* The basic feature of hypospadias is a urethra that "does not run to the tip of the penis. In mild forms, the opening is just shy of the tip; in moderate forms, it is along the shaft; and in severe forms, it may open at the base of the penis." *Id.* For further discussion of the causes and features of types of intersexuality see generally DREGER, *supra* note 1; JOHN MONEY, *SEX ERRORS OF THE BODY RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES* (2d ed. 1994); Greenberg, *Defining Male and Female*, *supra* note 5.

34. See Greenberg, *Defining Male and Female*, *supra* note 5, at 278.

A variety of chromosomal combinations have been discovered apart from the usual XX (female) and XY (male) karyotypes.³⁵ Individuals with chromosomal sex disorders have karyotypes such as: XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO.³⁶ One of the most common chromosomal sex disorders is Klinefelter Syndrome.³⁷ Individuals with Klinefelter Syndrome have an extra X chromosome.³⁸ Those affected by Klinefelter are anatomically male, but their testes and penis are often smaller than unaffected males, and some experience breast growth at puberty.³⁹ Medical literature reports that most individuals with Klinefelter identify themselves as heterosexual men.⁴⁰

Some intersexuals experience incongruity between their chromosomal sex and their anatomy. Androgen Insensitivity Syndrome (AIS) affects about one in 20,000 persons.⁴¹ Those affected by AIS are born with XY chromosomes and testes, but have the external genitalia of females.⁴² At puberty, AIS individuals develop breasts, but do not menstruate and are not fertile.⁴³ Most AIS persons have a female sex and gender identity.⁴⁴

35. *See id.* at 281. The Intersexed Society of North America (ISNA) estimates that “1/500 of the population has a karyotype other than XX or XY.” *See* ISNA, *Frequently Asked Questions: What Is Intersexuality (or Hermaphroditism)?*, at <http://www.isna.org/faq.html> (last visited June 30, 2001).

36. Greenberg, *Defining Male and Female*, *supra* note 5, at 281.

37. Klinefelter Syndrome occurs in approximately “1/500 to 1/1,000 of male births.” ISNA, *Frequently Asked Questions: What Is Klinefelter Syndrome?*, at <http://www.isna.org/faq.html> (last visited June 30, 2001).

38. *Id.*

39. *Id.*

40. Greenberg, *Defining Male and Female*, *supra* note 5, at 283. According to the ISNA, however:

Many ISNA members with klinefelter syndrome are homosexual, a few are transsexual, and many experience their gender as quite different from other men. In contrast, medical literature tends to discount any connection between klinefelter syndrome and homosexuality or gender issues. We suspect that medical reassurances that ‘your son will not be gay’ are based more on homophobia than on an accurate assessment of probabilities.

ISNA, *Frequently Asked Questions: What Is Klinefelter Syndrome?*, at <http://www.isna.org/faq.html> (last visited June 30, 2001).

41. Greenberg, *Defining Male and Female*, *supra* note 5, at 286; *see also* ISNA, *Frequently Asked Questions: What Is Androgen Insensitivity Syndrome?*, at <http://www.isna.org/faq.html> (last visited June 30, 2001). Androgen is the “male” sex hormone; however, it is present in both men and women. *Id.*

42. Greenberg, *Defining Male and Female*, *supra* note 5, at 286. AIS individuals will have shorter vaginas than typical women and no female reproductive organs. *Id.*

43. *Id.* (“Unlike several other intersex conditions, individuals with CAIS [complete AIS] almost always are identified as ‘normal’ females at birth because externally they are indistinguishable from XX females. . . . Until puberty, many CAIS

Each year approximately 2600 children are born with somewhat ambiguous genitalia.⁴⁵ In the past (and to some extent in the present), medical experts would perform surgeries to conform intersexual children's genitals to a more cosmetically acceptable appearance, taking little heed of their chromosomal makeup.⁴⁶ In the United States, an estimated 2000 children undergo genital surgery each year.⁴⁷

The term "hermaphrodite" has been commonly used to describe intersexuals who have ambiguous genitalia.⁴⁸ According to medical

women have no inkling that they are other than normal XX women.").

44. *Id.* However, unlike individuals with CAIS, those with PAIS (partial AIS) "may fall anywhere along a spectrum from an almost completely male external appearance and male sexual identity to a completely female external appearance and female sexual identity." *Id.* at 287.

45. Martha Coventry, *Making the Cut*, Ms., Oct.–Nov. 2000, at 52, 55, available at <http://www.msomagazine.com/oct00/makingthecut.html>.

46. See Greenberg, *Defining Male and Female*, *supra* note 5, at 272–73; see also FAUSTO-STERLING, *supra* note 1, at 57.

[M]edical managers employ the following rule: 'Genetic females should always be raised as females, preserving reproductive potential, regardless of how severely the patients are virilized. In the genetic male, however, the gender of assignment is based on the infant's anatomy, predominantly the size of the phallus.'

Doctors insist on two functional assessments of the adequacy of phallus size.

Young boys should be able to pee standing up . . . [and] adult men . . . need a penis big enough for vaginal penetration during sexual intercourse.

Id. (quoting Patricia K. Donahoe et al., *Clinical Management of Intersex Abnormalities*, 28 CURRENT PROBLEMS IN SURGERY 519, 527 (1991)); see also ISNA, *Recommendations for Treatment*, at <http://www.isna.org/recommendations.html> (last visited July 3, 2001) (discussing the inadequacy of the treatment model for intersexual infants and children that was developed in the 1950s and continues to be adhered to in some hospitals).

47. Coventry, *supra* note 45, at 56. The ISNA advocates against forcing genital surgery on infants and children to conform their anatomy to a typical male or typical female appearance. See ISNA, *Recommendations for Treatment*, at <http://www.isna.org/recommendations.html> (last visited July 3, 2001). The ISNA has proposed a model of treatment of intersexual children that "recommend[s] avoidance of harmful or unnecessary genital surgery on infants and children. No surgery should be performed unless it is absolutely necessary for the physical health and comfort of the intersexual child." *Id.* The ISNA strongly recommends that all nonessential, cosmetic surgery be "deferred until the intersexual child is able to understand the risks and benefits of the proposed surgery and is able to provide appropriately informed consent." *Id.*

48. The ISNA advocates eliminating the word "hermaphrodite" from medical literature. It argues that the word is not only "stigmatizing," but also "misleading." ISNA, *On the Word "Hermaphrodite,"* at <http://www.isna.org/hermaphrodite.html> (last visited July 3, 2001) ("The word 'hermaphrodite' implies that a person is born with two sets of genitals—one male and one female—and this is something that cannot occur."). Although the idea of two sets of genitals (male and female) is not possible, intersexual genitals may have aspects of both male and female genitalia. See ISNA, *Frequently Asked Questions: What Is Intersexuality (or Hermaphroditism)?*, at <http://www.isna.org/faq.html> (last visited July 3, 2001) (noting that intersexual genitals can look "truly 'right in the middle,' with a phallus that can be considered either a large clitoris or a small penis, with a structure that might be a split, empty scrotum, or outer labia, and with a small vagina that opens into the urethra rather than into the perineum").

literature, there are three categories of hermaphrodites: true hermaphrodites, male pseudo-hermaphrodites, and female pseudo-hermaphrodites.⁴⁹ True hermaphrodites are rare.⁵⁰ They have some combination of both ovarian and testicular tissue.⁵¹ “Pseudo-hermaphrodites have either ovaries or testes combined with the ‘opposite’ genitalia.”⁵² Male pseudo-hermaphrodites have testicles, but can appear “almost entirely feminine internally and externally.”⁵³ Female pseudo-hermaphrodites have ovaries, but have “some predominance of the masculine genital parts.”⁵⁴

When babies are born with ambiguous genitalia, doctors will assign them a sex partly according to sex-role stereotypes.⁵⁵ Professor Julie A. Greenberg has noted this common practice in the medical community:

A genetic male with an “inadequate” penis (one that is incapable of penetrating a female’s vagina) is “turned into” a female even if it means destroying his reproductive capacity. A genetic female who may be capable of reproducing, however, is generally assigned the female sex to preserve her reproductive capability regardless of the appearance of her external genitalia. If her “phallus” is considered to be “too large” to meet the guidelines for a typical clitoris, it is surgically reduced even if it means that her capacity for satisfactory sex may be reduced or destroyed. In other words, men are defined based upon

49. Greenberg, *Defining Male and Female*, *supra* note 5, at 285; *see also* DREGER, *supra* note 1, at 36–37 (noting that the classification of hermaphrodites as “true” and pseudo was based “primarily on the anatomical structure of the gonadal tissue”); FAUSTO-STERLING, *supra* note 1, at 38.

50. Greenberg, *Defining Male and Female*, *supra* note 5, at 285; *see also* DREGER, *supra* note 1, at 37.

51. DREGER, *supra* note 1, at 37; *see also* FAUSTO-STERLING, *supra* note 1, at 279 n.19 (describing four categories of “true hermaphroditism” whose members have varying combinations of male and female sexual characteristics). Most true hermaphrodites have two X chromosomes, but have a more masculine physique. *Id.* Fifty-five percent of true hermaphrodites have a urethra that runs “either through or near the phallus, which looks more like a penis than a clitoris. Any menstrual blood exits periodically during urination The vagina (without labia), which opens above a normal-looking scrotum, is often too shallow to permit heterosexual intercourse.” *Id.* Despite an otherwise relatively male appearance, however, breasts appear at puberty. *Id.* “Internally, virtually all true hermaphrodites have a uterus and at least one oviduct in various combinations with sperm transport ducts.” *Id.*

52. FAUSTO-STERLING, *supra* note 1, at 38 fig.2.2. The ISNA argues that “[t]he qualifiers ‘male’ and ‘female,’ because they are based only upon the gonadal histology, frequently contradict the sex assignment, and thus are very misleading and disturbing for parents and patients.” ISNA, *On the Word “Hermaphrodite,”* at <http://www.isna.org/hermaphrodite.html> (last visited July 3, 2001).

53. DREGER, *supra* note 1, at 145.

54. *Id.*

55. *See* Greenberg, *Defining Male and Female*, *supra* note 5, at 271 (“The presence of an ‘adequate’ penis in an XY infant leads to the label male, while the absence of an adequate penis leads to the label female.”).

their ability to penetrate females and females are defined based upon their ability to procreate.⁵⁶

Professor Greenberg's observation demonstrates that, at least for intersexuals, sex may be more of a "social construct" than a "biological fact."⁵⁷

The mainstream medical advice given to parents of intersexed children is to hide their intersexuality from them and to raise them in the sex that the doctors assign them.⁵⁸ However, some intersexuals have rebelled against the sex that they were assigned at birth. Experts have reported many cases of intersexuals who undergo sex reassignment surgeries⁵⁹ to construct (or reconstruct) the genitals they feel they should have.⁶⁰

While the medical world deals with the reality of intersexuality, legislatures and courts have ignored or overlooked intersexuals in promulgating laws based on sexual categorization. Because intersexuals do not fit neatly into either a female or male classification, state laws that require marriage to be between a man and a woman, but fail to define "man" and "woman," leave intersexuals uncertain as to whom they can legally marry.

B. Transsexuals

Unlike intersexuals, transsexuals are not born with chromosomal,

56. *Id.* at 271–72.

57. *Id.* at 272. In recent years, some medical professionals have been advocating that doctors take a more thorough approach—one as inclusive as possible of all the sexual factors. See Milton Diamond & H. Keith Sigmundson, *Management of Intersexuality: Guidelines for Dealing with Persons with Ambiguous Genitalia*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 1046 (Oct. 1997), available at <http://www.afn.org/~sfcommed/apam.htm> (last visited Jan. 2, 2001).

58. See, e.g., FAUSTO-STERLING, *supra* note 1, at 80 (describing the life story of Cheryl Chase, founder of the Intersexual Society of North America (ISNA)). Chase was born with ovo-testes, but had an external appearance of a typical female, except for an enlarged clitoris. *Id.* She was raised as a boy until she was eighteen months old. *Id.* "Then, at the advice of physicians, she underwent [a] complete clitorrectomy . . . Her parents changed her name," and they destroyed all evidence of Chase as a boy. *Id.* at 80–81. She did not learn her medical history until age twenty-three, when she finally convinced a doctor to reveal the contents of her medical records. *Id.*

In another case, Angela Moreno was forced to undergo a clitorrectomy in 1985 at the age of twelve under the pretense of the necessity of a hysterectomy due to ovarian cancer. *Id.* at 84. Her clitoris had grown to a length of 1.5 inches, which is considered unacceptable. See *id.* at 59 fig.3.4. Like Chase, Moreno did not find out the truth of her anatomy (that she was XY and originally had testes, not ovaries) and the 1985 surgery until she was twenty-three years old. *Id.* at 84.

59. See *infra* Part II.B (describing sex reassignment surgeries).

60. See Milton Diamond, & H. Keith Sigmundson, *Sex Reassignment at Birth: Long-Term Review and Clinical Implications*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 298, 300 (Mar. 1997), available at <http://www.afn.org/~sfcommed/mdfml.htm> (last visited Jan. 2, 1997).

gonadal, or genital ambiguities.⁶¹ Rather, transsexuals are individuals whose sexual and gender identities are incongruous with the anatomical and chromosomal compositions with which they were born.⁶² In other words, transsexuals’ psychological sex and gender, usually from a very early age,⁶³ do not correspond to their anatomical and chromosomal makeup. The incidence of transsexualism has been reported to be one in 10,000 males and one in 30,000 females.⁶⁴

The medical classification for transsexualism is “gender dysphoria” or “gender identity disorder” (GID).⁶⁵ GID has been defined as “a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex,”⁶⁶ in conjunction with a “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.”⁶⁷ Medical experts have not been able to identify the cause of transsexualism, but have attributed it to a “combination of neuro-biological, genetic and neonatal environmental factors.”⁶⁸ One recent scientific study, however, identified that the area of the brain essential for sexual behavior (called the “BSTc”), which is smaller in women than in men, is likewise smaller in male-to-female transsexuals.⁶⁹

61. See Greenberg, *Defining Male and Female*, *supra* note 5, at 289 & n.160 (stating that the medical condition with which transsexuals are diagnosed is gender identity disorder (GID) and that such a diagnosis is “limited to individuals who *do not* have a related intersex condition” (emphasis added)).

62. See MEYERS, *supra* note 1, at 219–21.

63. Many transsexuals claim that they were aware of the conflict between their sexual identities and their bodies early in their childhoods. See, e.g., *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999) (noting that although the plaintiff was born with normal male genitalia, she testified that she “considered herself a female from the time she was three or four years old”), *cert. denied*, 531 U.S. 872 (2000).

64. Richard Green, Reflections on “Transsexualism and Sex Reassignment” 1969–1999, Presidential Address at the XVI Harry Benjamin International Gender Dysphoria Ass’n Symposium (Aug. 17–21, 1999), in 4 INT’L J. TRANSGENDERISM 1, ¶ 7 (Jan.–Mar. 2000), at <http://www.symposion.com/ijt/greenpresidential/green00.htm>.

65. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994) [hereinafter, DSM-IV]. There is a current movement among transgendered activists to remove GID from the list of mental disorders in the DSM-IV. See Greenberg, *Defining Male and Female*, *supra* note 5, at 289 n.160.

66. DSM-IV, *supra* note 65, at 532.

67. *Id.* at 533.

68. *Littleton*, 9 S.W.3d at 224.

69. See Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 68 (Nov. 2, 1995) (“A female-sized BSTc was found in male-to-female transsexuals. . . . Our study is the first to show a female brain structure in genetically male transsexuals and supports the hypothesis that gender identity develops as a result of an interaction between the developing brain and sex hormones.”).

Tormented by the dichotomy of their state of being, many transsexuals seek medical treatment to align their physical selves with their psychological identities. The acronym MTF (male-to-female) is used to describe a transsexual who was born with male genitalia, but undergoes medical treatment to transition to a female.⁷⁰ A MTF is considered “fully” transitioned once she has undergone hormone treatment and sex reassignment surgery (SRS) in which a vagina and labia are constructed.⁷¹ After successful sex reassignment surgeries, MTFs’ genitals have “a good cosmetic appearance.”⁷² They are also able to function sexually as females,⁷³ and may even be able to experience vaginal orgasms.⁷⁴ However, they have no uterus, cervix, or ovaries.⁷⁵ In addition to sex reassignment surgery, MTFs undergo surgeries such as breast augmentation, tracheal shave (to reduce the adam’s apple), brow and face recontouring, rhinoplasty, liposuction, and voice box modification (to make the voice

70. There has been criticism of this acronym by some transsexuals. They feel that they should not be referred to as “male-to-female” because they have *always* been female. However, the author will use the acronyms “MTF” and “FTM” (female-to-male) in this Comment because they have been widely accepted and widely used by both medical experts and legal scholars. See, e.g., Coombs, *supra* note 31, at 243; Richard F. Storrow, *Naming the Grottesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 276 n.1 (1997); Rose, *supra* note 2, at 15.

71. See, e.g., Coombs, *supra* note 31, at 242–43. The surgeries to construct a vagina and the outer labia are called vaginoplasty and labiaplasty. The penis, scrotum, and testicles are removed, and the constructed vaginal walls are lined by the skin of the penis. See *M.T. v. J.T.*, 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976).

72. *M.T. v. J.T.* 355 A.2d. at 206. Male-to-female sex reassignment surgery has developed into

a highly sophisticated procedure which includes the construction of a very sensate Clitoris, well defined Labia Minor and Majora with overlying hood, normal appearing pink mucosa between the Clitoris and Urethra Meatus, a Urethral opening that is well placed and smooth in its junction between skin and mucosa, a well lined Neo-vagina of adequate depth for sexual intercourse and in general, a vulva so natural looking that it appears virtually the same as it does in the genetic female.

Eugene A. Schrang, *What Results Can Patients Reasonably Expect from a Male to Female Sex Reassignment Surgery*, in 1 INT’L J. TRANSGENDERISM (Oct.–Dec. 1997), at <http://www.symposium.com/ijt/hbigda/vancouver/schrang.htm>.

73. *M.T. v. J.T.*, 355 A.2d at 206 (“[T]he vagina, though at a somewhat different angle, was not really different from a natural vagina in size, capacity and ‘the feeling of the walls around it.’” Plaintiff’s vagina was “the same as a normal female vagina after a hysterectomy . . . and she never complained to [her doctor] that she had difficulty having intercourse.” (quoting Plaintiff’s doctor, Dr. Charles L. Ihlenfeld)).

74. See *In re Anonymous*, 293 N.Y.S.2d 834, 836 (Civ. Ct. 1968) (“[T]he procedure used is to denude the penis by rolling back its epithelial cover and to use this invaginated sheath as a sensitive ‘vagina.’ The erotic sensation is retained, and vaginal orgasm is made possible.”).

75. See *M.T. v. J.T.*, 355 A.2d at 206; see also *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 271 (N.Y. Sup. Ct. 1977) (quoting expert testimony that the sex organs of a MTF transsexual “resemble those of a female who has been hysterectomized and ovariectomized”).

higher).⁷⁶

“FTM” (female-to-male) describes a transsexual who was born with female genitalia, but sees himself as male, and often seeks medical treatment to transition to a male.⁷⁷ The point at which a FTM is considered “fully” transitioned is controversial. The sex reassignment operation for FTMs is called phalloplasty.⁷⁸ However, because phalloplasty is very costly⁷⁹ and often unsuccessful,⁸⁰ many FTMs stop at metoidioplasty.⁸¹ Due to a lack of success with phalloplasty, some doctors are pushing to have metoidioplasty accepted as the sex reassignment surgery for FTMs.⁸² Other procedures undergone by FTMs include breast reduction or bilateral mastectomy, nipple realignment, and hysterectomy.⁸³

Transsexualism is independent of sexual orientation.⁸⁴ While the basis of transsexualism is self-identity, the basis of sexual orientation is attraction to others. Sexual orientation describes which sex an individual finds erotically arousing.⁸⁵ Transsexuals who are attracted to the *opposite* sex from which they identify themselves consider themselves heterosexual; whereas, transsexuals who are attracted to the *same* sex with which they

76. See Cain, *supra* note 1.

77. See Nangeroni, *supra* note 32.

78. Phalloplasty is a procedure whereby a “neophallus” is constructed from biological and sometimes nonbiological tissue and surgically attached to the patient. James Barrett, *Psychological and Social Function Before and After Phalloplasty*, 2 INT’L J. TRANSGENDERISM 1, ¶ 9 (Jan.–Mar. 1998), at <http://www.symposium.com/ijt/ijtc0301.htm> (stating that “[a] permanently attached structure of biological origin and derived from the patient’s body tissues constitutes a neophallus,” and that “[w]hether a neophallus incorporates non-biological tissue such as silicone is not important so long as it does so in a wholly enclosed and internal way”).

79. See Cain, *supra* note 1 (estimating that phalloplasty costs between \$30,000 and \$50,000 and that, in most cases, the surgery is not covered by health insurance).

80. See *id.*; see also Barrett, *supra* note 78, ¶ 10 (“Phalloplasty procedures have been refined over the years, but major problems remain. Complication rates are much higher if it is intended to create a urinary conduit through the neophallus.”).

81. See Cain, *supra* note 1 (describing metoidioplasty as the “freeing up of the hormonally elongated clitoris so that it will extend and appear as a small penis”).

82. See *id.* (“Some doctors are pushing to have this surgery [metoidioplasty] accepted as SRS, due to the instability and varying results of a phalloplasty.”).

83. *Id.*

84. See Greenberg, *Defining Male and Female*, *supra* note 5, at 289 (asserting that “[t]ranssexualism is not necessarily related to sexual orientation”). Although sexual orientation and gender and sex identity are independent of each other, they are all interrelated in that the label one puts on his or her sexual orientation (heterosexual or homosexual) depends on one’s self-identity.

85. See Nangeroni, *supra* note 30 (discussing “Sexual Orientation vs. Gender Identity vs. Sexual Identity”).

identify themselves consider themselves homosexual.⁸⁶ Thus, an MTF who is sexually attracted to men considers herself heterosexual,⁸⁷ while an MTF who is sexually attracted to women considers herself a lesbian.⁸⁸

As with intersexuals, the law has left transsexuals uncertain as to whom they can legally marry. Each state determines its own marriage laws; therefore, which sex transsexuals can marry varies state to state and depends on whether their states of birth and states of marriage allow or recognize legal changes of sex. Because some states allow postoperative transsexuals and intersexuals to legally change their sex while other states do not,⁸⁹ a postoperative MTF may enter into a valid marriage to a man in some states that would be considered an invalid homosexual union in others.

III. LEGAL CHANGES OF SEX

A. *Significance of the Birth Certificate*

The sex designation on an individual's birth certificate determines an individual's sexual identity for virtually all legal purposes.⁹⁰ It provides the basis for deciding, among other things, whether a person must register to be drafted, which prison (s)he may be sent to, and whom (s)he may marry.⁹¹

Unless an infant is born with ambiguous external genitalia, the infant's legal sex is determined by a brief inspection of the genitalia, and then

86. See Greenberg, *Defining Male and Female*, *supra* note 5, at 289–90; see also Coombs, *supra* note 31, at 242 (“Gays and lesbians do not necessarily experience gender confusion; transgendered people are not necessarily gay, but there are transgendered lesbians and transgendered gay men.”) Despite how transsexuals see their own sexual orientation, the law may have a different view. If state law refuses to recognize transsexuals' postoperative sex, the state would consider a MTF who has sexual relationships with men to be gay. See discussion *infra* Part III.A.

87. Christie Lee Littleton, the MTF transsexual plaintiff in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), does not consider herself part of the homosexual community. She has always considered herself a heterosexual woman. Lisa Gray, *XX Marks the Spot*, HOUSTON PRESS, Sep. 14, 2000, at www.houstonpress.com/issues/2000-09-14/gray.html.

88. Jessica Wicks, a MTF transsexual who was able to marry Robin Wicks, a biological female, in Texas in September 2000 because a Texas court of appeals ruled that a postoperative female transsexual is still legally a male. See Gray, *supra* note 87.

89. See discussion *infra* Part III.B and accompanying notes.

90. See Greenberg, *Defining Male and Female*, *supra* note 5, at 309 (“Because the birth certificate is the first official document to indicate sex, it usually controls the sex designation on all later documents.”).

91. In *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 102 (Sup. Ct. 1977), the court noted that the sex listed on the birth certificate “may be crucial in school admissions, in vocational or recreational opportunities, in military service, in connection with insurance and pensions, or upon an application for a marriage certificate.”

recorded on the birth certificate.⁹² Concededly, this rather unscientific method is sufficient in the vast majority of cases.⁹³ The medical community, however, has become increasingly aware that sometimes it is not.⁹⁴ Those for whom it proves inaccurate must endure the tremendous consequences of having a legal identity contrary to their self-identity and perhaps their present anatomy. Many states have dealt with this issue legislatively.⁹⁵ Many others have yet to confront it at all.

B. State Laws Regarding Legal Change of Sex

The circumstances under which transsexuals and intersexuals may legally change the sex designated on their birth certificates vary from state to state. Furthermore, some states will issue the applicant a new certificate, while others issue an amended version of the original certificate.⁹⁶ In at least ten states, transsexuals and intersexuals may petition for a new birth certificate that reflects their postoperative anatomy and their psychological sex.⁹⁷ A few of those states will reissue

92. See Greenberg, *Defining Male and Female*, *supra* note 5, at 271 (“If external genitalia appear unambiguous, the external genitalia typically determine the sex designated on the birth certificate.”).

93. Considering that the incidence of transsexualism and intersexualism are relatively low, most of the time, a brief inspection of a newborn’s external genitalia is adequate to determine the infant’s sex because the other sex characteristics will be harmonious with the external genitalia. See Greenberg, *Defining Male and Female*, *supra* note 5, at 278 (laying out eight factors that contribute to the determination of an individual’s sex and noting that “[f]or most people, th[o]se factors are all congruent”).

94. Organizations like the International Foundation for Gender Education (IFGE) and the Intersex Society of North America (ISNA) as well as many individual medical experts, authors, and lawyers have worked to bring the medical, legal, and social problems faced by transsexuals and intersexuals to light in recent years. See, e.g., www.ifge.org; www.isna.org.

95. See *infra* Part III.B and accompanying notes.

96. There is a distinction between getting a new and an amended birth certificate. See Greenberg, *Defining Male and Female*, *supra* note 5, at 309 nn.346–47. If a *new* certificate is issued, the former sex designation will not appear anywhere on the new certificate, and the original certificate will be placed under seal, not to be broken except by order of a court. *Id.* at 309 n.346. See, e.g., NEB. REV. STAT. § 71-604.01 (1996) (stating that “the original certificate of birth shall be available for inspection only upon the order of a court of competent jurisdiction”). On the other hand, if an *amended* birth certificate is issued, it will show the requested sex designation as well as the original entry. See Greenberg, *Defining Male and Female*, *supra* note 5, at 309 n.347. The legal effect of the alteration will be the same regardless of whether the certificate is reissued or amended.

97. See, e.g., ARIZ. REV. STAT. ANN. § 36-326(A)(4) (West 1993); CAL. HEALTH & SAFETY CODE §§ 103430, 103425 (West 1996); HAW. REV. STAT. § 338-17.7(4)(B) (1993); 410 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West 1997); IOWA CODE ANN. §

the birth certificate once the petitioner submits an affidavit by a physician stating that the petitioner has undergone sex reassignment surgery and that the sex designation on the original certificate is no longer accurate.⁹⁸ The others require the petitioner to obtain a court order.⁹⁹ In those states, the petitioner must present evidence to a court of competent jurisdiction that (s)he desires and intends to live permanently as a member of the gender opposite that which is indicated on his or her original birth certificate and that (s)he has undergone sex reassignment surgery.¹⁰⁰ Once the court has had an opportunity to evaluate the evidence and question the petitioner, it may order that a new birth certificate be issued.

At least fourteen other jurisdictions will issue an amended birth certificate upon proof that the original contains an inaccuracy.¹⁰¹ Again, some will do so based on a doctor's affidavit,¹⁰² while others require that the petitioner obtain a court order mandating the change.¹⁰³ Only one state specifically forbids any modification of the sex designation for individuals who have undergone sex reassignment surgery.¹⁰⁴

144.23(3) (West 1997); LA. REV. STAT. ANN. § 40:62(A) (West 1992); MICH. COMP. LAWS § 333.2891 (1993); MISS. CODE ANN. § 41-57-21 (Supp. 2000); NEB. REV. STAT. § 71-604.01 (1996); N.C. GEN. STAT. § 130A-118(b)(4) (1999).

98. See, e.g., ARIZ. REV. STAT. ANN. § 36-326(A)(4) (West 1993); HAW. REV. STAT. § 338-17.7(4)(B) (1993); 410 ILL. COMP. STAT. ANN. § 535/17 (West 1997); IOWA CODE ANN. § 144.23(3) (West 1997); NEB. REV. STAT. § 71-604.01 (1996); N.C. GEN. STAT. § 130A-118(b)(4) (1999).

99. See, e.g., CAL. HEALTH & SAFETY CODE §§ 103430, 103425 (West 1996); LA. REV. STAT. ANN. § 40:62 (West 1992).

100. See, e.g., LA. REV. STAT. ANN. § 40:62(C) (West 1992) (requiring proof that "sex reassignment or corrective surgery has been properly performed upon the petitioner, and that as a result of such surgery . . . the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner").

101. See, e.g., ALA. CODE § 22-9A-19(d) (1997); ARK. CODE ANN. § 20-18-307(d) (2000); COLO. REV. STAT. ANN. § 25-2-115(4) (West 1990); D.C. CODE ANN. § 6-217(d) (1995); GA. CODE ANN. § 31-10-23(e) (Harrison 1998); 10 GUAM CODE ANN. § 3222(e) (LEXIS through 2000 legislation); MD. CODE ANN., HEALTH-GEN. I § 4-214(b)(5) (2000); MASS. GEN. LAWS ANN. ch. 46 § 13 (West 1994 & Supp. 2001); MO. ANN. STAT. § 193.215(9) (West Supp. 2001); N.J. STAT. ANN. § 26:8-40.12 (West 1996); N.M. STAT. ANN. § 24-14-25(D) (Michie 2000); OR. REV. STAT. § 432.235(4) (1999); UTAH CODE ANN. § 26-2-11 (1998); VA. CODE ANN. § 32.1-269(E) (Michie 1997); WIS. STAT. ANN. § 69.15 (West 1999).

102. See, e.g., 10 GUAM CODE ANN. § 3222(e) (LEXIS through 2000 legislation); MASS. GEN. LAWS ANN. ch. 46 § 13 (West 1994 & Supp. 2001).

103. See ALA. CODE § 22-9A-19(d) (1997); ARK. CODE ANN. § 20-18-307(d) (2000); GA. CODE ANN. § 31-10-23(e) (Harrison 1998); MD. CODE ANN., HEALTH-GEN. I § 4-214(b)(5) (2000); N.J. STAT. ANN. § 26:8-40.12 (West 1996); OR. REV. STAT. § 432.235(4) (1999); UTAH CODE ANN. § 26-2-11 (1998); VA. CODE ANN. § 32.1-269(E) (Michie 1997); WIS. STAT. ANN. § 69.15 (West 1999).

104. See TENN. CODE ANN. § 68-3-203(d) (1996) ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.").

Other states have not enacted statutes that specifically address changes of sex in the cases of individuals who have undergone sex reassignment. Many jurisdictions have laws that provide for corrections in cases in which birth certificates contain an error or inaccuracy,¹⁰⁵ but whether that language entitles transsexuals and intersexuals to amend their official sex designations depends on how the courts interpret it. Transsexuals have tested such ambiguously worded statutes in only a handful of jurisdictions.¹⁰⁶ The majority of those cases were resolved against the petitioner; however, most of them were decided over twenty-five years ago.¹⁰⁷

Many of the expert opinions that courts relied upon to determine whether a postoperative transsexual should be recognized as male or female are outdated.¹⁰⁸ The current trend in the medical community is to recognize and classify postoperative transsexuals as the sex to which they have been “reassigned.”¹⁰⁹ How states choose to classify the sex of transsexuals and intersexuals is admittedly up to them rather than the medical authorities. However, where states have failed to define sex and have not made clear the circumstances under which the sex designation on a birth record may be changed, courts faced with transsexual and intersexual petitioners should consider the current medical research in

105. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 191.028(b) (West 2001) (permitting an amendment if the certificate “is incomplete or proved by satisfactory evidence to be inaccurate”); OHIO REV. CODE ANN. § 3705.15 (West 1998) (permitting correction of a birth record where it “has not been properly and accurately recorded”).

106. See *infra* Part III.B.1–5.

107. See cases discussed *infra* Part III.B.1–5.

108. For example, see *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (Sup. Ct. 1966), in which the court relied on a 1965 study of transsexuals conducted by the Committee on Public Health of the New York Academy of Medicine. The Committee had concluded that transsexuals should not be granted a change of sex on birth certificates because they remain the same *chromosomal* sex even after undergoing surgical alteration of other aspects of their sex. See *id.* at 321–22. Currently, medical experts consider eight factors in determining sex (chromosomal sex, gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex/gender of rearing, and gender identity), rather than basing their determination simply on chromosomal sex. See Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745, 753–54 (2000) [hereinafter Greenberg, *When Is a Man a Man*].

109. See Storrow, *supra* note 70, at 281 n.17 (citing *Maffei v. Kolaeton Indus. Inc.*, 626 N.Y.S.2d 391, 395–96 (Sup. Ct. 1995), as having determined, “given ‘overwhelming medical evidence,’ that transsexuals become their psychological sex once sex reassignment is complete”); see also Greenberg, *When Is a Man a Man*, *supra* note 108, at 754–55 (discussing that the medical experts who testified in a recent Texas case involving a postoperative MTF “indicated that they, and other medical authorities, recognize that Christie is medically a woman”).

deciding whether the petitioner's sex is "inaccurate."

The following discussion of cases involving transsexuals who petitioned for changes of sex on their birth certificates are grouped according to state to demonstrate the different approaches taken by the jurisdictions that have had to interpret ambiguous birth record amendment statutes. Understanding how the following courts arrived at their conclusions sheds light on how courts of other jurisdictions may analyze similarly ambiguous statutes.¹¹⁰

1. New York

Since 1966, New York courts have consistently denied petitions by transsexuals for changes of sex on their birth certificates.¹¹¹ In New York, applications for legal changes of sex must be submitted to the Bureau of Vital Records and Statistics of the Department of Health for approval.¹¹² After the Department of Health passed a resolution in 1965¹¹³ that the Health Code would "not be amended to provide for a change of sex on birth certificates in cases of transsexuals,"¹¹⁴ the Bureau of Vital Records refused to make any amendments requested by

110. All of the cases discussed *infra* involve transsexuals, not intersexuals. The author's research has not turned up any cases involving intersexual petitioners. Intersexuals, however, are in an even stronger position to demand changes of sex on their birth certificates than transsexuals—whether a court interprets a statute as requiring the sex designation to have been inaccurate *at the time of birth* or simply requires a *present* discrepancy, intersexuals should be able to meet either requirement. Intersexuals can more readily demonstrate that the sex which they were assigned at birth was inaccurate at the time. For example, an intersexual who was born with ambiguous genitalia and whom the doctors assigned to be female may argue that the doctors simply were wrong—what the doctors considered an usually large clitoris was actually a small penis. On the other hand, transsexuals have clearly male or female anatomies at birth, so they are left with two difficult legal arguments: (1) convince the court that self-identity is the determining factor of sex and that because they have always had a self-identity opposite their assigned sex, their sex designation was inaccurate at the time it was made, or (2) convince the court that it should determine sex based on present anatomy and self-identity rather than chromosomes.

111. See Greenberg, *Defining Male and Female*, *supra* note 5, at 311 (noting that the first case in New York to test the right of transsexuals to change the sex designated on their birth certificates was decided in 1966). However, prior to 1965, three transsexuals had been able to obtain legal changes of sex without resorting to filing a legal claim. See *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 324 (Sup. Ct. 1966).

112. See *Anonymous v. Weiner*, 270 N.Y.S.2d at 321.

113. The resolution was based on a report submitted by the Committee on Public Health of the New York Academy of Medicine in which the Committee voiced its opposition to changes of sex on birth certificates for transsexuals. See *id.* at 322. The Committee concluded that it was opposed to changes of sex because "1. male-to-female transsexuals are still chromosomally males while ostensibly females; 2. it is questionable whether laws and records . . . should be . . . used as a means to help psychologically ill persons in their social adaptation." *Id.*

114. *Id.* (quoting the resolution passed by the Board of Health on Oct. 13, 1965).

transsexuals.¹¹⁵ Each time a transsexual has appealed to the court, the court has deferred to the decision of the director of the Bureau of Vital Records, reasoning that, as long as the director did not act in an “arbitrary, capricious or otherwise illegal manner,”¹¹⁶ the court is without power to overrule his decision.¹¹⁷

By 1977, at least one New York court questioned the wisdom behind the Department of Health’s rule denying legal sex status changes for postoperative transsexuals.¹¹⁸ The report that the Department of Health relied on in passing its 1965 resolution concluded that “[t]he desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud.”¹¹⁹ Although the *Anonymous v. Mellon*¹²⁰ court still deferred to the decision of the Bureau of Vital Records,¹²¹ it stated that it would regard the concern of fraud “as being of virtually no significance, since it is dubious that any one would go through such drastic procedures . . . for the purpose of deceiving creditors or avoiding the draft.”¹²² Furthermore, the court questioned the Department’s reliance on chromosomes as the determining factor of a person’s legal sex.¹²³

2. Connecticut

No specific Connecticut statute addresses changes to designations of

115. See cases cited *infra* note 117.

116. See *Anonymous v. Weiner*, 270 N.Y.S.2d at 323.

117. See *id.* (“Judicial deference to the decision of those members of the Board of Health who are physicians or otherwise uniquely qualified appears mandatory in the singular circumstances here involved.”); see also *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 103 (Sup. Ct. 1977) (denying petition because director of Bureau of Vital Records “did not act arbitrarily, unreasonably or illegally in declining to designate petitioner’s sex”); *Hartin v. Dep’t of Health*, 347 N.Y.S.2d 515, 518 (Sup. Ct. 1973) (denying petition because “the power of regulating birth certificates lies solely within the jurisdiction of the Board of Health, and the rules thereon are shown to have a rational basis”); *In re Anonymous*, 293 N.Y.S.2d 834, 835 (Civ. Ct. 1968) (declining to rule on a change of sex on the birth certificate of a transsexual because it did not have jurisdiction over the Department of Health for that purpose).

118. See *Anonymous v. Mellon*, 398 N.Y.S.2d at 102.

119. *Anonymous v. Weiner*, 270 N.Y.S.2d at 322.

120. 398 N.Y.S.2d 99 (Sup. Ct. 1977).

121. See *id.* at 102–03.

122. *Id.* at 102.

123. *Id.* (“It has been judicially determined that chromosomal or genetic sex is not the determinative factor in deciding whether a person is male or female. The fact is that no single characteristic is determinative.” (citing *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 271–73 (Sup. Ct. 1977))).

sex on birth certificates,¹²⁴ but under Connecticut law, the Commissioner of Health has the power to make such changes pursuant to his general authority over birth records.¹²⁵ In *Darnell v. Lloyd*,¹²⁶ a postoperative MTF transsexual sued the Commissioner of Health over his refusal to change the sex designation on her birth certificate from male to female.¹²⁷ The court denied the Commissioner’s motion for summary judgment, concluding that if Darnell is able to establish that she is “presently female,”¹²⁸ she may be granted the change.¹²⁹ The court said that the Commissioner must show “some substantial state interest in his policy of refusing to change birth certificates to reflect current sexual status,”¹³⁰ and that “[s]o far the defendant has shown no state interest in this policy whatsoever.”¹³¹

3. Oregon

*K. v. Health Division, Department of Human Resources*¹³² has been essentially overturned by a statutory provision expressly permitting sex designation changes for postoperative transsexuals.¹³³ However, the case is still relevant to understanding how courts go about analyzing unclear statutes because, at the time of *K.*, the pertinent Oregon statutes did not specifically address amending sex designations on birth certificates.¹³⁴ In *K.*, a lower court granted a FTM postoperative transsexual’s petition for a new birth certificate listing his sex as “male” over the objections of the State Board of Health.¹³⁵ The Court of Appeals affirmed, concluding

124. General Statutes of Connecticut section 19a-42 addresses the amendment of vital records and states that vital records “may be amended only in accordance with sections 19a-41 to 19a-45, inclusive.” CONN. GEN. STAT. § 19a-42 (1997 & Supp. 2001). None of those sections deal with changes in designations of sex. CONN. GEN. STAT. §§ 19a-41 to 19a-45 (1997).

125. See *Darnell v. Lloyd*, 395 F.Supp. 1210, 1213 (D. Conn. 1975) (agreeing that the Commissioner “has the power to make changes other than those specifically authorized by statute under his general mandate to supervise birth records”).

126. 395 F.Supp. 1210 (D. Conn. 1975).

127. *Id.* at 1211.

128. *Id.* at 1214.

129. *Id.*

130. *Id.*

131. *Id.*

132. 560 P.2d 1070 (Or. 1977).

133. OR. REV. STAT. § 432.235(4) (1999) (“Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure . . . the certificate of birth of such individual shall be amended . . .”).

134. See *K. v. Health Div., Dep’t of Human Res.*, 560 P.2d at 1071–72 (citing a number of Oregon statutes, none of which specifically address sex designation changes).

135. *Id.* at 1070–71 (noting that the lower court not only granted *K.*’s petition for change of name, but also ordered that a new birth certificate be issued designating *K.*’s sex as male rather than female).

that a birth certificate should show the facts as they presently exist.¹³⁶ However, the Supreme Court of Oregon found it “at least equally, if not more reasonable,”¹³⁷ that the intent of the legislature in enacting the statutes was that a birth certificate be a “historical record of the facts as they existed at the time of birth.”¹³⁸ It reversed the Court of Appeals, and questioned whether the courts, rather than the executive body to whom the power to regulate such issues has been delegated, even have the power to decide the legislature’s intent.¹³⁹

4. Ohio

Ohio law provides that individuals who claim their registration of birth “has not been properly and accurately recorded,” may file an application to correct the inaccuracy in probate court.¹⁴⁰ In *In re Ladrach*,¹⁴¹ a postoperative MTF transsexual filed a request for declaratory judgment that her birth certificate be amended to list her sex as female and that a license for her to marry a man be issued.¹⁴² The court interpreted the Ohio statute to be “strictly a ‘correction’ type statute,”¹⁴³ and refused to order the requested modification.¹⁴⁴

5. Puerto Rico

The Puerto Rico Supreme Court recently permitted a postoperative MTF transsexual to change the sex designated on her birth certificate to female.¹⁴⁵ Her case had been pending for six years.¹⁴⁶ The majority decision called transsexualism “an evident reality that demands a legal solution.”¹⁴⁷ The dissent acknowledged that the decision permits the

136. *Id.* at 1071–72.

137. *Id.* at 1072.

138. *Id.*

139. *See id.* (“In our opinion, it is not for this court to decide which view is preferable. . . . [I]t is by no means clear that it was the ‘apparent’ much less ‘manifest’ intent of the Oregon legislature in enacting ORS 432.135 to confer such broad powers upon the courts of this state.”).

140. OHIO REV. CODE ANN. § 3705.15 (West 1998).

141. 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

142. *See id.* at 829–30.

143. *Id.* at 831.

144. *Id.* at 832.

145. *See* Ivan Roman, *Court Gives Gay-Rights Activists Hope*, ORLANDO SENTINEL, July 17, 2000, at A6, available at 2000 WL 3614188.

146. *Id.*

147. *Id.* (quoting Justice Antonio Negron Garcia writing for the majority).

transsexual to be “a woman for *all* legal purposes,”¹⁴⁸ including marriage.¹⁴⁹

C. *The Bottom Line*

Generally, when courts face ambiguously worded laws, they turn to legislative intent and public policy to interpret their meaning. The courts in New York, Connecticut, Oregon, Ohio, and Puerto Rico all faced laws that were ambiguous as to how they applied to individuals who had undergone sex reassignment operations. The courts could not look to legislative intent because their legislatures had not addressed, or in all likelihood even contemplated, the application of the laws for transsexuals and intersexuals. Therefore, the courts had to interpret the laws based on their ascertainment of public policy.

State courts ascertain public policy by examining their state’s statutes, common law, and traditional social mores and practices.¹⁵⁰ With no common law or statutory definitions of male and female,¹⁵¹ courts must turn to social tradition. However, tradition addressing which sex post-SRS individuals should be recognized as is almost nonexistent. This is because the medical technology that has enabled transsexuals and intersexuals to “fully” transition¹⁵² is relatively new.¹⁵³ Furthermore, public knowledge of transsexualism and intersexualism has been very limited. The transgendered community has only recently become recognizable enough to make the public take notice of their civil and human rights issues.¹⁵⁴ The combination of all of the above factors makes public

148. *Id.* (quoting Justice Francisco Rebollo Lopez) (emphasis added).

149. *Id.* (“This turns Andres Andino into a woman for all legal purposes, being able to get married as a woman, since the marriage certificate would establish that in an official manner.”).

150. *See, e.g.*, *Bldg. Serv. Employees Int’l Union, Local 262 v. Gazzam*, 339 U.S. 532, 537–38 (1950) (“The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. ‘Primarily it is for the lawmakers to determine the public policy of the State.’” (quoting *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931))); *Sirois v. Sirois*, 50 A.2d 88, 89 (N.H. 1946) (stating that public policy “may be found in the common law or in a local statute”); *Taliaferro v. Rogers*, 248 S.W.2d 835, 838 (Tenn. Ct. App. 1951) (locating public policy in “the constitution, legislative enactment[s] or judicial decision[s]” of a state).

151. One court has suggested a “simple formula” for determining sex. *In re Anonymous*, 293 N.Y.S.2d 834, 837 (Civ. Ct. 1968). The court proposed, “Where . . . 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.” *Id.* Further, it recommended that “if such conformity requires changes of a statistical nature, then such changes should be made.” *Id.*

152. *See supra* notes 71–72, 78 and accompanying text for explanations of what full transitions entail.

153. Sex reassignment surgery started to become more common in the 1950s. FAUSTO-STERLING, *supra* note 1, at 306 n.93.

154. Activist organizations (such as the Intersex Society of North America, the International Foundation for Gender Education, and the Harry Benjamin International

policy difficult to ascertain.

At this point, three things are clear: (1) the sex designated on one’s birth certificate controls one’s sexual identity for all legal purposes, including marriage; (2) almost half of the states in the United States have legislatively recognized what the medical community recognized years ago, namely, that chromosomes are not the determinative factor of one’s sex; and (3) when courts in states which do not have decisively worded statutes must determine whether a transsexual can have a legal change of sex, they have little or no precedent or discernable public policy on which to base their determinations.

IV. UNDERSTANDING THE POWER AND CONSTRAINTS OF THE FULL FAITH AND CREDIT CLAUSE

The legal anomaly transsexuals and intersexuals face when they leave their states of birth is that their legal sex may change, and with it, their legal rights. For example, after 1994, while J’Noel Ball was in Wisconsin, she was, for all legal purposes, a woman.¹⁵⁵ However, while J’Noel was in Kansas, according to a Kansas probate court, she was, for all legal purposes, a man.¹⁵⁶ Therefore, while in Wisconsin, if J’Noel wanted to enter a golf tournament, for example, she could only play in the women’s division; if convicted of a crime, she could only be sent to a women’s prison; and if she wanted to marry, she could only marry a man. But while in Kansas, she could only enter the men’s division, only be sent to a men’s prison, and only marry a woman. An anomaly of this nature is exactly what the Full Faith and Credit Clause was intended to resolve.

The purpose of the Full Faith and Credit Clause, as explained by the Supreme Court,¹⁵⁷ is “to alter the status of the several states as independent foreign sovereignties,”¹⁵⁸ and to make them “integral parts of a single

Gender Dysphoria Association) are responsible for raising awareness among the general public in recent years through the use of the internet, *see* www.isna.org; www.ifge.org, www.hbigda.org; mainstream magazines such as *People*, *see* Tresniowski et al., *supra* note 1, and *Ms.*, *see* Coventry, *supra* note 45; and academic journals like the *International Journal of Transgenderism*, *see* Green, *supra* note 64.

155. J’Noel Ball’s sex designation was changed on her birth certificate from male to female in 1994. *See supra* text accompanying notes 24–25.

156. *See supra* text accompanying note 26.

157. *See* *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

158. *Id.* at 277.

nation.”¹⁵⁹ Thus, the Clause is a means to “resolve controversies where state policies differ.”¹⁶⁰ It accomplishes that purpose by requiring enforcement of the legislative measures and common law of one state by all states in the nation.

The Constitution states that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.”¹⁶¹ The Supreme Court has established that this constitutional mandate is self-executing,¹⁶² which means that, on its face, the Full Faith and Credit Clause restricts the forum court’s ability to apply its own law where it would conflict with a law or judgment of a sister state.¹⁶³ However, the Full Faith and Credit Clause has never been interpreted to apply absolutely.¹⁶⁴ The following exceptions are the two most likely to

159. *Id.*

160. *Morris v. Jones*, 329 U.S. 545, 553 (1947).

161. U.S. CONST. art. IV, § 1. In addition to the constitutional mandate, in 1790 Congress prescribed:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1994). Courts have relied on both the Constitution and the 1790 Act in deciding full faith and credit cases. See Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of An Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 414–15 (1998–1999).

162. See, e.g., Rensberger, *supra* note 161, at 414–15 & n.14; Julie L. B. Johnson, Comment, *The Meaning of “General Laws”: The Extent of Congress’s Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1619–20 & nn.41, 43 (1997). But see, e.g., Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998–1999) (arguing that an analysis of historical evidence reveals that the first sentence of the Full Faith and Credit Clause was meant to have only an evidentiary effect); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1 (1981); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1980–1981).

163. See, e.g., Rensberger, *supra* note 161, at 414–15 & n.14.

164. The language of the Full Faith and Credit Clause does not contain any limitations on its face; nevertheless, the effect of the Clause may be limited under four circumstances. See Hamilton, *supra* note 6, at 954–65 (discussing the procedural matter and public policy exceptions).

(1) The Improper Jurisdiction Exception. To be entitled to full faith and credit, a judgment must be final and must have been rendered by a court of competent jurisdiction over the subject matter and the persons governed by it. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (stating that a judgment that meets jurisdictional requirements “qualifies for recognition throughout the land”). State courts are not required to enforce judgments where the rendering court did not have the requisite jurisdiction. For a discussion on how to determine whether a court has proper jurisdiction see, for example, Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due*, 28 RUTGERS L.J. 313, 320–21 (1997) [hereinafter Strasser, *Judicial Good Faith*].

pose an obstacle for transsexuals and intersexuals seeking interstate recognition of their amended sex designation.

A. *The Public Policy Exception*

Supreme Court precedent has established that the full faith and credit mandate does not apply if a law, record, or judgment of a sister state would violate the public policy of the forum state.¹⁶⁵ Currently, the public policy exception is the most likely hindrance to using the Full Faith and Credit Clause to demand interstate recognition of sex designation changes for transsexuals and intersexuals. This is true because courts have had broad discretion to exercise the public policy exception.¹⁶⁶ However, the breadth of that discretion may be shrinking.

The availability of the public policy exception depends on whether the forum court is faced with a *law* or a *judgment* of a sister state.¹⁶⁷ The

(2) The Procedural Matters Exception. The Full Faith and Credit Clause applies only to *substantive* laws. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726–27 (1988). The Clause does not require states to “adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments.” *Baker*, 522 U.S. at 235. Thus, if the forum court determines that the nature of the dispute is procedural, it is not required to apply the laws or judgments of its sister state. See *id.*; see also *Sun Oil*, 486 U.S. at 726–27.

(3) The Public Policy Exception. See *infra* Part IV.A.

(4) The Statutory Exception. See *infra* Part IV.B.

165. See, e.g., Strasser, *Judicial Good Faith*, *supra* note 164, at 317–20; Hamilton, *supra* note 6, at 957.

166. Legal commentators have noted that the public policy exception was originally intended to be construed narrowly and used infrequently. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971–73 (1997) (citing *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918), as evidence of the intended narrowness and relative unimportance of the public policy exception); *Loucks v. Standard Oil Co.*, 120 N.E. at 202 (“The courts are not free to refuse to enforce a foreign right . . . unless [enforcement] would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”); see also Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 935 (1998); Kaleen S. Hasegawa, Casenote, *Re-Evaluating the Limits of the Full Faith and Credit Clause After Baker v. General Motors Corporation*, 21 U. HAW. L. REV. 747, 776 (1999) (concluding that “[t]he exception is meant for rare circumstances when the foreign judgment is undesirable or contrary to the important public policy of the forum” (emphases added)). These commentators concede, however, that over the years courts have so frequently exercised broad discretion to use the public policy exception and to lower the threshold of what violates public policy that their discretion and the lower threshold have become the rule rather than an abuse of power. See Kramer, *supra*, at 1973.

167. See, e.g., Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA*,

full faith and credit obligation is more “exacting”¹⁶⁸ as applied to *judgments*.¹⁶⁹ A forum state may refuse the full faith and credit mandate only in “exceptional circumstances”¹⁷⁰ where the foreign judgment is “‘obnoxious’ to an overriding policy of its own.”¹⁷¹ In some cases, the forum court must give full faith and credit “even to hostile policies reflected in the judgment of another State.”¹⁷²

Recently, in *Baker v. General Motors Corp.*,¹⁷³ the Supreme Court reiterated the limited scope of the public policy exception as applied to judgments.¹⁷⁴ *Baker* involved a wrongful-death complaint, but the case turned on whether a state court has the authority to order a witness not to testify in *any* court of the United States.¹⁷⁵ Ultimately, the case was not decided on the public policy exception issue,¹⁷⁶ so the Court’s discussion of the issue is dicta. However, the fact that the Court “went out of its way”¹⁷⁷ to address the public policy exception reveals the approach it is likely to take if faced with the issue in the future.¹⁷⁸

The Court addressed the public policy exception issue because the lower court in the Bakers’ wrongful-death suit “misread [its] precedent”¹⁷⁹ by “assuming the existence of a ubiquitous ‘public policy exception.’”¹⁸⁰ Justice Ginsburg stated that courts may turn to their state’s public policy for guidance in determining the law applicable to the controversy before them, but emphasized that the Court’s past decisions “support no roving ‘public policy exception’ to the full faith and credit due *judgments*.”¹⁸¹ Thus, in all likelihood, *Baker* has limited the breadth of discretion that courts have previously enjoyed.

The Supreme Court has been less vigilant in enforcing full faith and credit when the forum state faces a *statute* it deems violative of public

Covenant Marriages, and Full Faith and Credit Jurisprudence, 64 BROOK. L. REV. 307, 321–22 (1998) [hereinafter Strasser, *Baker and Some Recipes for Disaster*]; Hasegawa, *supra* note 166, at 764–65; Johnson, *supra* note 162, at 1628.

168. *See Baker*, 522 U.S. at 233.

169. *Id.*

170. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 426 (1957) (Frankfurter, J., dissenting).

171. *Id.*

172. *Estin v. Estin*, 334 U.S. 541, 546 (1948).

173. 522 U.S. 222 (1998).

174. *Id.*; *see Hasegawa*, *supra* note 166, at 770.

175. *Baker*, 522 U.S. at 225–26.

176. *See Hasegawa*, *supra* note 166, at 763 (stating that the Court held that Michigan’s judgment “was not entitled to full faith and credit because it interfered with Missouri’s control of litigation brought by parties who were not before the Michigan court”).

177. *Id.* at 751.

178. *See id.* at 752.

179. *Baker*, 522 U.S. at 234.

180. *Id.*

181. *Id.* at 233.

policy. The Court has stated that the Full Faith and Credit Clause does not obligate a state “to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.”¹⁸² However, a forum court cannot refuse to enforce a sister state’s law merely because it differs from its own.¹⁸³ The forum court must demonstrate that the foreign law is contrary to a *strong* public policy of its state.¹⁸⁴

B. The Statutory Exception

Congress may be able to restrict the application of the Full Faith and Credit Clause by passing laws that enable states to ignore the full faith and credit mandate where it would otherwise be applicable. The second sentence of the Full Faith and Credit Clause states: “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”¹⁸⁵ Prior to 1996, Congress had exercised that power on three occasions, but only to clarify or extend the full faith and credit mandate, never to limit it.¹⁸⁶ The Defense of Marriage Act (DOMA),¹⁸⁷ which was passed in the wake of *Baehr v. Lewin*,¹⁸⁸ is Congress’s first attempt to restrict the application of the Full Faith and Credit Clause.

182. *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939).

183. *See, e.g., Bethlehem Steel Corp. v. G.C. Zarnas & Co.*, 498 A.2d 605, 608 (Md. 1985) (“[M]erely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to Maryland public policy and thus unenforceable in our courts.”); *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918) (“[T]he mere fact that we do not give a like right is no reason for refusing to help the plaintiff. . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”).

184. *See Strasser, Judicial Good Faith, supra* note 164, at 320; *Strasser, Baker and Some Recipes for Disaster, supra* note 167, at 321.

185. U.S. CONST. art. IV, § 1.

186. *See* 18 U.S.C. § 2265 (1994 & Supp. 2001) (full faith and credit given to protection orders); 28 U.S.C. § 1738A (1994 & Supp. V 2000) (full faith and credit given to child custody determinations); 28 U.S.C. § 1738B (1994 & Supp. V 2000) (full faith and credit given to child support orders); *Johnson, supra* note 162, at 1613.

187. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (Supp. V 2000); 1 U.S.C. § 7 (Supp. V 2000)).

188. 852 P.2d 44 (Haw. 1993). The Supreme Court of Hawaii found that a state statute restricting marriage licenses to opposite-sex couples constituted sex-based discrimination, *see id.* at 60, and remanded the case to a lower court to determine whether the state could demonstrate that the statute furthered a compelling state interest and was narrow enough to avoid unnecessary constitutional deprivations. *See id.* at 68. At stake in the *Baehr* case was the potential legality of same-sex marriages in Hawaii.

The effect of DOMA is twofold. First, it creates a federal definition of the word “marriage” limiting it to “a legal union between one man and one woman as husband and wife.”¹⁸⁹ Second, it allows states to sidestep the whole public policy issue by explicitly providing that a state is not required to recognize same-sex marriages that may have been validly performed in a sister state.¹⁹⁰

Although the constitutionality of DOMA may be challenged in the future,¹⁹¹ as the law now stands, the Full Faith and Credit Clause cannot compel a state to recognize same-sex marriages validly performed in a sister state. Significantly, however, Congress failed to fill an important definitional void in enacting DOMA. Although the Act provides federal definitions of “marriage”¹⁹² and “spouse,”¹⁹³ it does not offer criteria to determine who is a “man” and who is a “woman.” DOMA leaves unanswered what constitutes an “opposite-sex” couple. Therefore, transsexuals and intersexuals are still left to guess which of their unions will be considered opposite-sex and which will be considered same-sex, and how that may change depending on which state they move or travel to.

The fact that DOMA exists demonstrates that statutory exceptions to the Full Faith and Credit Clause are, for the time being, possible.¹⁹⁴ Thus, a federal statute defining male and female and authorizing states to ignore the Clause’s mandate as to sex designation amendments validly made in sister states is likewise possible. However, such a law is not probable in the near future. The biggest obstacle for the transgendered

189. 1 U.S.C. § 7 (Supp. V 2000).

190. See 28 U.S.C. § 1738C (Supp. V 2000).

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id.; see also Hasegawa, *supra* note 166, at 769; Johnson, *supra* note 162, at 1612–13.

191. Various commentators have urged that DOMA is unconstitutional. See, e.g., Hamilton, *supra* note 6, at 987 (concluding that “[n]ot only is Congress’s abrogation of the Full Faith and Credit Clause unauthorized by the text and history of that clause, but its passage of DOMA also fails to comport with the requirements imposed by the Supreme Court cases interpreting the clause”); Johnson, *supra* note 162, at 1640 (arguing that “DOMA does not look like the sort of legislation that was intended by the term ‘general Laws’”). But see Rensberger, *supra* note 161, at 411 (“I believe that the Act is within Congress’ power and that it is a largely sensible solution to the problems of interstate federalism.”).

192. 1 U.S.C. § 7 (Supp. V 2000) (restricting the word “marriage” to “a legal union between one man and one woman as husband and wife”).

193. *Id.* (stating that the word “spouse” refers “only to a person of the opposite sex who is a husband or a wife”).

194. Exceptions are possible “for the time being” because future litigation may prove (or may not) that DOMA is unconstitutional.

community in obtaining interstate recognition of sex designation changes remains the public policy exception.

V. APPLYING THE FULL FAITH AND CREDIT CLAUSE TO COMPEL
INTERSTATE RECOGNITION OF CHANGES OF SEX ON BIRTH
CERTIFICATES

The full faith and credit mandate broadly applies to all “Acts, Records, and judicial Proceedings of every other State.”¹⁹⁵ Therefore, if State B authorizes an amendment to a transsexual or intersexual’s birth certificate, State A may be bound to recognize the new or amended record and the resulting legal sex status of that individual. Unless Congress enacts a statutory exception,¹⁹⁶ the extent of State A’s obligation to recognize an amended birth certificate will depend on (1) whether State A has a discernible and important public policy, and (2) whether the change was made pursuant to a statute or a judgment.

A. Public Policies Against Legal Changes of Sex

The Full Faith and Credit Clause requires a forum state to recognize and enforce a law or judgment of one of its sister states even if its own law does not provide a like right.¹⁹⁷ In other words, State A cannot refuse to recognize a legal change of sex validly rendered in State B just because its own laws would not permit the change to its citizens’ birth certificates. A state court cannot avoid enforcing the law or judgment of a sister state unless it identifies an “important rather than a merely legitimate state interest”¹⁹⁸ for doing so. In other words, the public policy exception will not be applicable unless the forum state has a clear, legitimate, and substantial public policy against sex designation changes.

1. The Fraud Issue

One issue overshadowing the public policy discussion is the government’s interest in protecting the public against fraud. The prevention of fraud has long been a foremost public interest. Fraud concerns regarding transsexuals and intersexuals range from whether

195. U.S. CONST. art. IV, § 1.

196. See discussion *supra* Part IV.B.

197. See *supra* note 183 and accompanying text.

198. Strasser, *Judicial Good Faith*, *supra* note 164, at 319.

allowing a change in legal identity would enable them to elude creditors,¹⁹⁹ to whether it would allow them an unfair advantage in competitive athletic events,²⁰⁰ to whether it would provide a loophole through the same-sex marriage prohibitions.²⁰¹

Although fraud is a legitimate concern when legal identity changes are at issue, it is extremely unlikely that the intent behind undergoing a sex reassignment is to dupe society. The hormone treatments, sex reassignment surgeries, and other attending surgeries to which transsexuals and intersexuals submit themselves are too drastic and expensive to realistically believe that the intent behind undergoing them is to perpetuate a fraud.²⁰² Furthermore, in the case of intersexuals, the real deception may have been perpetrated at birth by the assignation of the wrong sex to the infant.

The issue of fraud as related to transsexuals has previously been addressed by the courts in two areas—sports and change of name cases.²⁰³ For the most part, courts have found that recognizing transsexuals as their postoperative gender does not pose a fraud problem. Examining

199. See Rose, *supra* note 2, at 48 (“The accusation that someone will attempt gender reassignment for no other reason than a small financial gain is often made . . .”).

200. Some professional sports associations and the International Olympic Committee were sufficiently concerned with men posing as women to gain a competitive advantage that they made chromosome testing mandatory for participating athletes. See FAUSTO-STERLING, *supra* note 1, at 1–3 (noting that the International Olympic Committee began chromosome screening of Olympic athletes in 1968). The story of Spanish hurdler Maria Patiño illustrates the tragic results of relying purely on chromosomes to determine an individual’s sex. Ms. Patiño, although unaware of the fact, had Androgen Insensitivity Syndrome (AIS), and, therefore, had an XY karyotype despite the fact that her external genitalia, secondary sex characteristics, and sex and gender identity were clearly female. *Id.* at 1–2; see also Greenberg, *Defining Male and Female*, *supra* note 5, at 273 (citing Alison Carlson, *When is a Woman Not a Woman*, WOMEN’S SPORTS & FITNESS, Mar. 1991, at 24–29.). When a sex chromatin test revealed that Ms. Patiño had a Y chromosome, she was banned from competing in the World University Games in 1985, as well as from the 1988 and 1992 Olympics. See FAUSTO-STERLING, *supra* note 1, at 1–3; see also Greenberg, *Defining Male and Female*, *supra* note 5, at 273.

201. See Rose, *supra* note 2, at 48 (“[T]he direct contention that transsexuals have no goal in mind other than an end run around same-sex marriage proscriptions has been asserted.” (citing Tim Fleck, *What’s in a Name (and Sex) Change?*, HOUSTON PRESS ONLINE, at <http://houston-press.com/issues/1999-06-17/columns.html> (June 17, 1999)). Tim Fleck interviewed a Baptist pastor in Texas who “alleges that some court approvals of changes of names and sex were being obtained to provide a legal fig leaf for same-sex marriages.” Fleck, *supra*.

202. See Rose, *supra* note 2, at 6 n.8.

No one wakes up one morning and says, ‘Gee. I think that from now on I will willingly choose to become part of one of the most misunderstood minorities in America. I want to make my life more difficult by confusing and perhaps losing the love of my family and friends. I want to be subjected to hate crimes and employment discrimination. I want to go through the physical and financial pain of obtaining sex reassignment surgery.’

Id. (quoting transgender rights activist Sarah DePalma, Press Release, TGAIN, Littleton Update (Jan. 14, 2000) (on file with Katrina C. Rose)).

203. See *infra* Parts V.A.1.a–b.

the negligible risk of fraud in these areas will demonstrate that it is likewise not a legitimate public policy concern in the area of legal changes of sex.

a. Sports

In the late 1970s, Dr. Renee Richards²⁰⁴ sought an injunction against the U.S. Tennis Association (USTA) to prevent its reliance on a chromosome test to determine her eligibility to compete in the women’s bracket of the U.S. Open Tennis Tournament.²⁰⁵ Richards is a MTF transsexual who underwent a sex reassignment operation about two years before her case came to trial.²⁰⁶ Richards argued that the sex-chromatin test²⁰⁷ was “arbitrary and capricious and d[id] not have a rational basis.”²⁰⁸ The USTA insisted that “there is a competitive advantage for a male who has undergone ‘sex-change’ surgery.”²⁰⁹

The court acknowledged that the defendant’s motivation for instituting the sex-chromatin test was “to assure fairness of competition among the athletes.”²¹⁰ However, the court was more impressed by the opinions of Richards’ medical experts.²¹¹ The surgeon who performed Richards’ SRS testified to the effect that Richards did not have an unfair advantage over other women because “[h]er muscle development, weight, height and

204. Renee Richards’ former name was Richard H. Raskind. *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 267 (Sup. Ct. 1977).

205. *Id.* at 268.

206. *Id.* at 267.

207. The test is also called the “Barr body test.” *Id.* at 268. It determines the presence of a second X chromosome, which would indicate the person tested is a normal female. *See id.* Although the court only discussed the test as it pertains to transsexuals, such a test poses an even greater risk of injustice for *intersexuals* who have anomalous sex chromosome patterns. For example, the sex-chromatin test would determine that an XO individual is not female because she lacks a second X chromosome, despite the fact that XO individuals have female genitalia, a uterus, and female secondary sex characteristics. *See Greenberg, Defining Male and Female, supra* note 5, at 284 & n.110. Some XO females, with proper hormonal treatment and in vitro fertilization of a donor egg, have been able to carry a child to term. *See id.* at 284 n.110.

208. *Richards*, 400 N.Y.S.2d at 268.

209. *Id.* at 269.

210. *Id.* at 269 (quoting an attorney for the USTA).

211. The court cited the opinions of Dr. Robert Granato, the surgeon who performed Richards’ SRS; Dr. Leo Wollman, who stated he had treated over 1700 transsexual patients including Richards; Dr. Donald Rubbell, Richards’ gynecologist; and Dr. John Money, a psychologist who has written extensively on transsexualism. *See id.* at 271.

physique fit within the female norm.”²¹² Furthermore, the court seemed to accept the doctors’ contentions that Richards, “[f]or all intents and purposes, . . . functions as a woman.”²¹³ The court stated: “When an individual . . . finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female.”²¹⁴ The court concluded that the sex-chromatin test “should not be the sole criterion” for determining sex, and granted Richards’ application for a preliminary injunction.²¹⁵ Richards thereby secured the right to play in the women’s division of the U.S. Open Tennis Tournament.²¹⁶

b. Change of Name

At common law, an individual could assume any name “absent fraud or an interference with the rights of others.”²¹⁷ Most states that have codified a name change procedure have retained the common law standard, adding only that a court of jurisdiction must approve such changes.²¹⁸ The courts that have dealt with transsexual petitioners have uniformly expressed that prohibiting fraud is the “primary purpose”²¹⁹ of change of name statutes.²²⁰ Generally, as long as transsexuals and intersexuals who seek to change their names satisfy the court that the change will not lead to “fraud, misrepresentation, confusion, deception or otherwise interfere with the rights of the public,”²²¹ the change will be granted.

Courts have tended to measure the risk of fraud by how far along the

212. *Id.*

213. *Id.* (quoting Dr. Money). Dr. Money described Richards as “a female who has been hysterectomized and ovariectomized.” *Id.* He also testified that “her external organs and appearance, as well as her psychological, social and endocrinological makeup are that of a woman.” *Id.*

214. *Id.* at 272.

215. *Id.* at 273. The court implied that other factors, such as external genital and somatic appearance, gonadal status, and psychological identity, should be considered. *See id.* at 272.

216. Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 330 (1999).

217. *In re Anonymous*, 293 N.Y.S.2d 834, 835 (Civ. Ct. 1968) [hereinafter *Anonymous I*].

218. *See, e.g., id.* (stating that the “provisions establishing judicial procedure for change of name are in addition to, and not in substitution for, the common law methods of change” (quoting *In re Shipley*, 205 N.Y.S.2d 581, 586 (Sup. Ct. 1960))).

219. *In re McIntyre*, 715 A.2d 400, 402 (Pa. 1998).

220. *See id.*; *see also* Commonwealth v. Goodman, 676 A.2d 234, 236 (Pa. 1996).

221. *In re Anonymous*, 587 N.Y.S.2d 548, 548 (Civ. Ct. 1992) (citing *Shipley*, 205 N.Y.S.2d 581) [hereinafter *Anonymous II*].

individual is in the transition process.²²² Many jurisdictions will grant a transsexual’s petition for name change even if the transsexual is not fully transitioned, as long as the individual has demonstrated a permanent commitment to living as a member of the opposite sex.²²³ Generally, courts will not deny petitions for name changes solely because a transsexual has not completed sex reassignment surgery.²²⁴ More than one jurisdiction has reasoned that *not* granting the change of name requested by a transsexual is more likely to defraud the public than granting it.²²⁵

The effects of a legal name change are less significant than the effects of a legal sex change in that legal rights do not flow from a name, only social perceptions do. As a result, jurisdictions that permit both name and sex changes have more stringent requirements for the latter than for the former.²²⁶ Despite those differences in procedure and effect, the

222. See, e.g., *Anonymous I*, 293 N.Y.S.2d at 838 (granting a change of name from a male name to a female name because petitioner was a male transsexual who had a sex reassignment operation and was “anatomically and psychologically a female in fact”).

223. See, e.g., *In re Eck*, 584 A.2d 859, 860–61 (N.J. Super. Ct. App. Div. 1991) (granting a name change to a transsexual who had been successfully living as a female and taking female hormones for two years, but who had not yet undergone sex reassignment surgery); *In re Harris*, 707 A.2d 225, 227–28 (Pa. Super. Ct. 1997) (rejecting the trial court’s interpretation of the law as “unnecessarily narrow” because it held that absent sex reassignment surgery, a transsexual may not be granted a name change and stating that “the better reasoned approach is to require such a petitioner to demonstrate that he or she is permanently committed to living as a member of the opposite sex”).

224. See *Eck*, 584 A.2d at 860–61; *Harris*, 707 A.2d at 227. But see *Anonymous II*, 587 N.Y.S.2d at 548 (denying application for change of name from an obvious male name to an obvious female name because petitioner did not “corroborate this claim by competent medical and psychiatric evaluation, including whether he is a transvestite or a transsexual and, if a transsexual, whether he has undergone a sex change operation and is now anatomically and psychologically a woman”).

225. See *Harris*, 707 A.2d at 228 (“[R]ather than [sic] perpetrating a fraud upon the public, the name change would eliminate what many presently believe to be a fraud; that is, that petitioner is a man.”); see also *Anonymous I*, 293 N.Y.S.2d at 838 (“[T]he probability of so-called fraud . . . exists to a much greater extent when the birth certificate is permitted . . . to classify this individual as a ‘male’ when, in fact, . . . the individual comports himself as a ‘female.’”); *In re McIntyre*, 715 A.2d 400, 403 (Pa. 1998) (addressing the petition of a preoperative MTF and finding that “there is no public interest being protected by the denial of Appellant’s name change petition”).

226. Compare OR. REV. STAT. § 33.410 (1999) (“The change of name shall be granted by the court unless the court finds that the change is not consistent with the public interest.”) with OR. REV. STAT. § 432.235(4) (1999) (“Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and whether such individual’s name has been changed, the certificate of birth of such individual shall be

types of fraud involved in legal name and sex changes are similar enough to invoke comparison. The outcomes of most change of name cases involving transsexuals demonstrate that courts have not found the risk of fraud substantial enough to deny requested changes.²²⁷ Likewise, risk of fraud should not weigh heavily in a court's consideration of whether to recognize a change of sex on a transsexual or intersexual's birth certificate.²²⁸

2. Discerning Policy from Little Precedent

Aside from the fraud factor, public policy may be found in a state's constitutions, statutes, common law, and traditions.²²⁹ Unless a state has amended its statutory laws to expressly allow or disallow legal changes of sex for those who have undergone SRS, public policy cannot be discerned from its statutes. Furthermore, public policy cannot be found in most states' common law given that only a handful of states have addressed the issue as to transsexuals,²³⁰ and no states have documented cases involving intersexuals.²³¹

If a court can find no guidance in the laws of the forum state, it must

amended . . .”).

227. See, e.g., *Anonymous I*, 293 N.Y.S.2d at 838 (addressing and dismissing the probability of fraud as a result of changing a postoperative MTF's name from one that is obviously male to one obviously female); *McIntyre*, 715 A.2d at 403 (finding “no public interest being protected by the denial of Appellant's name change petition”); *Harris*, 707 A.2d at 228 (disagreeing with the trial court's determination that permitting a name change would be unfair to the general public and stating that “a legal name change would actually prevent the daily confusion and public confrontations which presently plague petitioner's dealings with the public”).

228. At least one jurisdiction, New York, has already explicitly dismissed fraud as a factor in change of sex designation cases describing the risk as “of virtually no significance, since it is dubious that any one would go through such drastic procedures as sex reassignment surgery for the purpose of deceiving creditors or avoiding the draft.” *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 102 (Sup. Ct. 1977).

229. See *supra* note 150 and accompanying text.

230. See *supra* Part III.B.1–5. Precedent in two jurisdictions, Ohio and New York, demonstrates that legal changes of sex for postoperative transsexuals are against state public policy. See *supra* Parts III.B.1, B.4 and cases cited therein. Recently, Texas also refused to recognize a postoperative MTF transsexual as legally female, stating that “[b]iologically a postoperative female transsexual is still a male.” *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999). The *Littleton* court interpreted the pertinent Texas Health and Safety Code section to mean “inaccurate as of the time the certificate was recorded; that is, at the time of birth,” *id.* at 231, despite the fact that the actual wording of the statute makes it ambiguous as to transsexuals and intersexuals because it does not specify whether the record had to be inaccurate at the time it was made, or inaccurate given the physical and hormonal changes the petitioner has since undergone. See TEX. HEALTH & SAFETY CODE ANN. § 191.028(b) (Vernon 2001) (permitting amendment to the sex designation on the birth certificate if petitioner demonstrates that the record “is incomplete or proved by satisfactory evidence to be inaccurate”).

231. See *supra* text accompanying note 110.

discern public policy through the traditions and social mores of the state. Here, courts have greater latitude to find an opposing public policy. For example, a court could conclude that chromosomes have traditionally been the determinative factor of sex, and, therefore, that the state has a public policy against changing the sex designation of an individual whose current designation matches his or her chromosomal structure.²³² Another example is that a court could identify a policy that birth certificates are intended as historical records only, and not as reflections of current states of being.²³³ Accordingly, the court could conclude that the state’s policy does not allow amendments that reflect changes due to sex reassignment operations.

The common law in New York, Ohio, and Texas,²³⁴ as well as the statutory law in Tennessee,²³⁵ demonstrate that those states have public policies against sex designation changes for individuals who have undergone sex reassignment operations. Thus, transsexual and intersexual citizens of those states will probably not be able to change their birth certificates. Other states, when confronting the issue, may also discern public policies against such changes from their traditional values or practices.

Determining that a certain right does not exist in the forum state due to public policy, however, is only the first step to using the public policy exception to the Full Faith and Credit Clause. Simply demonstrating that a like right does not exist in the forum state does not justify the state’s refusal to enforce the law or judgment of a sister state.²³⁶ The forum state must show that the foreign law or judgment is hostile to an *important* public policy.²³⁷ Furthermore, the circumstances under which the exception is available are narrowed by the law-judgment distinction clearly announced in *Baker*.²³⁸ Therefore, if the forum state has a conflicting public policy, the court must examine the relative importance of that policy, and whether the birth certificate was amended pursuant to

232. See, e.g., *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966); *In re Ladrach*, 513 N.E.2d 828, 830–32 (Ohio Prob. Ct. 1987).

233. See, e.g., *K. v. Health Div., Dep’t of Human Res.*, 560 P.2d 1070, 1072 (Or. 1977); *Littleton*, 9 S.W.3d at 231.

234. See *supra* Parts III.B.1, B.4 and text accompanying note 228.

235. TENN. CODE ANN. § 68-3-203(d) (1996) (“The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.”).

236. See *Strasser, Baker and Some Recipes for Disaster*, *supra* note 167, at 321.

237. See *id.*

238. See *supra* Part IV.A.

a foreign law or a foreign court's judgment before the public policy exception is available.

3. *Intersexuals*

It is important to note that public policy may differ if the petitioner is an intersexual rather than a transsexual.²³⁹ In states that claim to have a public policy that sex is determined by chromosomes, certain intersexuals may not be precluded from changing their legal sex because their chromosomal composition is not decidedly male or female. For example, if a postoperative MTF intersexual with Klinefelter Syndrome²⁴⁰ petitions State A to recognize that her birth certificate now indicates that she is female, and State A has a policy of determining sex according to whether an individual has two X chromosomes, State A would be hard pressed to argue that recognizing the petitioner as female violates its public policy.

Similarly, states that have declared a "once a man, always a man" policy,²⁴¹ would have to significantly stretch that policy to block recognition of legal sex changes of petitioners who were born with ambiguous genitalia. For example, if H was born with aspects of both male and female genitalia, and as an infant was assigned to the female sex, but as an adult underwent SRS to construct (or *reconstruct*) male genitalia, the forum state would have a difficult time justifying how recognizing H as a male would be contrary to its policy. These examples illustrate that the use of the public policy exception may be even further limited in cases involving intersexual petitioners.

B. Foreign Laws v. Forum State Public Policy

Sex designation changes made pursuant to a state law without a court order²⁴² are more vulnerable to the public policy exception because the credit owed to laws is weaker than that owed to judgments.²⁴³ The Full Faith and Credit Clause does not require the forum state to substitute the

239. Thus far, all of the birth certificate amendment cases in the United States have dealt with transsexuals.

240. Individuals with Klinefelter Syndrome have an XXY karyotype. *See supra* notes 37–40 and accompanying text.

241. *See, e.g., In re Ladrach*, 513 N.E.2d 828, 831–32 (Ohio Prob. Ct. 1987); *Littleton v. Prange*, 9 S.W.3d 223, 230–31 (Tex. App. 1999).

242. Recall that some states have passed statutes allowing the requested amendment to be made by a clerk pursuant to a physician's affidavit that petitioner had successfully undergone sex-reassignment surgery. *See supra* notes 98, 102 and accompanying text.

243. *See Baker v. General Motors Corp.*, 522 U.S. 222, 232–33 (1998) ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. . . . Regarding judgments, . . . the full faith and credit obligation is exacting.").

laws of a sister state for its own.²⁴⁴ Accordingly, Tennessee would probably not be obligated to recognize a birth certificate that has been amended pursuant to a foreign law that allows individuals who have undergone SRS to change their sex designation.²⁴⁵

Although the credit owed laws is less exacting than that owed judgments, the forum court cannot simply disregard a foreign law. The court must first find that the law is in fact “obnoxious” to an important public policy of the forum state.²⁴⁶ Therefore, in the states that do not have a conflicting statute, the scope of the public policy exception should be narrowly construed.²⁴⁷ The mere fact that a sex designation change would not be allowed in the forum state is not sufficient grounds for a court to refuse to enforce a change made pursuant to a sister state’s law.

C. Foreign Judgments v. Forum State Public Policies

As discussed earlier, more than half of the states that have passed laws enabling transsexuals and intersexuals to amend the sex designation on their birth certificates require a court order to affect the change.²⁴⁸ Therefore, many sex designation changes are the result of *judgments*. A court may not invoke the public policy exception to avoid enforcing a final judgment from another state. Recently in *Baker*, the U.S. Supreme Court declared that “[its] decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*,”²⁴⁹ and that in assuming that the exception could be used to resist recognition of sister states’ judgments the lower courts had “misread [its] precedent.”²⁵⁰ As a

244. *See id.* at 232 (“The Full Faith and Credit Clause does not compel ‘a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’” (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 501 (1939))).

245. *See, e.g., Pac. Employers Ins. Co.*, 306 U.S. at 502 (holding that where a foreign law is directly at odds with a law of the forum state, the mandate of the Full Faith and Credit Clause does not apply); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935) (noting that there would be an “absurd result” if a forum state had to enforce a sister state’s laws, rather than its own).

246. *Griffin v. McCoach*, 313 U.S. 498, 507 (1941).

247. *See* Strasser, *Baker and Some Recipes for Disaster*, *supra* note 167, at 322 (stating that the “obnoxiousness exception [should] be read narrowly”).

248. *See supra* notes 99, 103 and accompanying text.

249. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998).

250. *Id.* at 234. Furthermore, the Court said it was “aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause and the Act of Congress require be given to [a] judgment

result, when a transsexual or intersexual's birth certificate has been amended pursuant to a court order in his or her birth state (State B), and that individual later petitions State A to recognize his or her new sex designation,²⁵¹ the forum court in State A will be obligated in most cases,²⁵² under the Full Faith and Credit Clause, to recognize the individual as his or her new legal sex.

VI. THE RIGHT OF THE TRANSGENDERED TO MARRY

The Supreme Court has clearly established that the freedom to marry is a fundamental personal right.²⁵³ As the law stands, the right to marry hinges on an individual's legal sex, and the birth certificate controls the legal sex of an individual. It follows that a valid opposite-sex marriage can be created as long as the birth certificate of one spouse indicates male, and the birth certificate of the other indicates female.²⁵⁴

A. Recognition in All States of Marriages Celebrated in States that Allow Sex Designation Changes

In states that authorize legal changes of sex, a marriage between a transsexual and a nontranssexual of the opposite sex is a valid opposite-sex marriage.²⁵⁵ For example, if an MTF transsexual or intersexual has

outside the state of its rendition." *Id.* (quoting *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943)).

251. Circumstances under which an individual may ask a court in State A to recognize his or her amended sex designation include when the individual wishes to obtain a marriage license from State A or wants State A to recognize his or her marriage for any purpose for which standing to sue requires spousal status (claims on intestate spouse's estate or wrongful death claims, for example.).

252. The rendering court must have had "adjudicatory authority over the subject matter and persons governed by the judgment" for the judgment to qualify for recognition under the Full Faith and Credit Clause. *Baker*, 522 U.S. at 233.

253. See sources cited *supra* note 6.

254. In Texas, two couples, in which one of the partners is a postoperative MTF transsexual, have been issued valid marriages licenses because the transsexuals' birth certificates still indicated that they were men. See John W. Gonzalez, *Lesbians Legally Exchange Vows*, HOUSTON CHRON., Sept. 17, 2000, available at 2000 WL 24511924; John Gutierrez-Mier, *2 More Women Obtain County Marriage License: 1 Member of New-Mexico Pair Born a Man*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 2000, available at 2000 WL 27329428. The state reasoned that theirs were legal opposite-sex marriages, despite the appearance of being same-sex marriages, because their birth certificates indicated that within each couple there was a legal male and a legal female. Gutierrez-Mier, *supra*. Both Robin Manhart and Jessica Wicks (formerly Grady Roland Wicks) of Houston and Cynthia Young and Lori D. Killough (a postoperative MTF) of Corrales, New Mexico obtained marriage licenses through the Bexar County clerk's office in September 2000. *Id.*

255. One court has acknowledged that once a state grants a sex designation change, that state must recognize the right of that individual to marry in the new sex. *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987) ("It seems obvious . . . that if a state

had her birth certificate amended pursuant to a law or judgment of State B, then in State B she will be able to enter into a valid marriage with a man.²⁵⁶ On the other hand, a union between herself and a woman would be an invalid same-sex union.

Three constitutional provisions seem to ensure that a valid marriage between a legally female transsexual and her male spouse will not be confined to the state in which it was celebrated—(1) the right to marry, (2) the Full Faith and Credit Clause, and (3) the right to travel.

First, the right to marry is an established fundamental right. As noted earlier, same-sex marriage is prohibited by both the federal and state governments,²⁵⁷ so the right to marry hinges on whether one’s partner is of the opposite sex. To know whether one’s partner is of the opposite sex, one must first determine his or her legal sex. The birth certificate has been the traditional means of establishing legal identity; therefore, the sex designation on the birth certificate provides a consistent starting point. However, if an individual’s legal identity can be alternately male and female as that person crosses state lines due to varying public policies regarding transsexuals and intersexuals, that person’s right to marry becomes as elusive as his or her sexual identity. The legal identity of the transgendered must be uniformly enforced across the nation to preserve their right to marry.

Second, the Full Faith and Credit Clause was designed to “make [the

permits such a change of sex on the birth certificate of a postoperative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled.”)

256. In two states, courts have declared the marriages between postoperative transsexuals and their opposite-sex spouses valid. *See* *M.T. v. J.T.*, 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976) (“If such sex reassignment surgery is successful and the postoperative transsexual is . . . 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.”); *Transgender Ruling*, L.A. DAILY J., Nov. 26, 1997, at 1 (reporting Orange County Superior Court case, *Vecchione v. Vecchione*, Civ. No. 96D003769, in which the court denied a motion brought by the estranged wife of a postoperative FTM transsexual to declare their marriage an invalid same-sex union because “California recognizes the postoperative gender of all transsexual persons”). Both of these cases were decided without reference to birth certificates because both New Jersey and California law authorize sex designation changes for postoperative transsexuals, but the cases illustrate that recognizing marriages involving transsexuals as opposite-sex marriages has been done before.

257. *See supra* notes 28, 189–190 and accompanying text.

states] integral parts of a single nation.”²⁵⁸ The Clause is a means of preserving transsexuals’ and intersexuals’ right to marry in that it requires other states to recognize the sex designated on their birth certificates and consequently, to recognize their rights as members of that sex. Once an MTF transsexual is legally recognized as female pursuant to a law or judgment of her birth state, other states should not be able to declare her marriage to a man void. In recognizing her as female, they must also consider her union an opposite-sex marriage.

Third, the constitutional right to travel also affords protection to transsexuals and intersexuals seeking recognition of their marriages in states other than the ones where they were celebrated.²⁵⁹ The right to travel is not explicitly stated in the Constitution, but the Court has interpreted it to be part of the “equal protection framework.”²⁶⁰ By 1972, the U.S. Supreme Court had declared the right to travel an “unconditional personal right,”²⁶¹ and warned that infringement of that fundamental right is unconstitutional absent a clear showing of a compelling state interest.²⁶² Subsequently, the Court found statutes denying “basic necessities of life” to new residents unconstitutional.²⁶³ According to U.S. Supreme Court precedent, marriage qualifies as such a necessity.²⁶⁴ Therefore, a marriage involving a transsexual or intersexual that was validly entered into in one state should be recognized in every other state, so as not to impinge on the fundamental right of that couple to travel.

258. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935).

259. See Harold P. Schombert, Baehr v. Lewin: *How Far Has the Door Been Opened? Finding a State Policy for Recognizing Same-Sex Marriages*, 16 WOMEN’S RTS. L. REP. 331, 343 (1995) (analyzing the right to travel as a means of affording protection to “[p]arties seeking recognition of *same-sex* marriages in states other than where they are solemnized” (emphasis added)). Although Schombert focuses on same-sex marriages, his right to travel argument can be applied with equal, if not greater, force to couples in which one of the spouses is transgendered.

260. See *id.*; see also *United States v. Guest*, 383 U.S. 745, 757–58 (1966) (“[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”).

261. *Dunn v. Blumstein*, 405 U.S. 330, 341–42 (1972) (striking down a Tennessee one-year residency voting requirement and declaring that “[a]bsent a compelling state interest, a State may not burden the right to travel” by imposing a penalty on those who choose to exercise that right).

262. *Id.*

263. See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) (striking down a durational residency requirement for state medical care as an impediment on the right to travel); see also Schombert, *supra* note 259, at 344.

264. See cases cited *supra* note 6. The Court has called marriage “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

*B. Marriages Sought in States that Do Not Allow
Sex Designation Changes*

Again, in every state, whether two people can enter into a valid marriage depends on whether they are of the opposite sex.²⁶⁵ If an MTF transsexual undergoes SRS, petitions that her birth certificate be amended to reflect her postoperative anatomy, and is granted the sex designation change, she will be recognized as a woman in that state. If she subsequently moves to a different state and later seeks a license to marry a man, that state should be compelled under the Full Faith and Credit Clause to recognize her as a woman and to issue the marriage license to that couple as it would any other opposite-sex couple, regardless of whether it would have granted the sex designation change itself.

J’Noel Ball has a strong case for the enforcement of the full faith and credit obligation because the sex designation on her birth certificate was changed to female by order of a Wisconsin court well before her marriage to Marshall Gardiner in Kansas.²⁶⁶ The full faith and credit obligation regarding judgments is “exacting,”²⁶⁷ and “the eligibility of a person to contract marriage must be determined from the conditions existing on the date of the solemnization of the marriage.”²⁶⁸ On appeal, J’Noel argued that the trial court erred by “failing to give full faith and credit to [her] Wisconsin birth certificate.”²⁶⁹ The Court of Appeals of Kansas, however, found that the trial court had not erred in giving her birth certificate little or no weight.²⁷⁰

The court ultimately skirted the full faith and credit mandate by turning to a Wisconsin statute dealing with the evidentiary weight of vital statistic records.²⁷¹ The Wisconsin statute that the court relied upon essentially states that an amended birth certificate is not *prima facie*

265. Of course states have other requirements besides sex (like age and no family relationship), but these are not the focus of this Comment and will therefore not be considered.

266. See *supra* notes 24–25 and accompanying text.

267. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998).

268. *Blumenthal v. Blumenthal*, 275 P. 987, 988 (Cal. Dist. Ct. App. 1929).

269. *In re Estate of Gardiner*, 22 P.3d 1086, 1107 (Kan. App. 2001).

270. *Id.* at 1109.

271. *Id.* at 1108–09 (stating that “[e]ven if it is assumed that J’Noel’s amended birth certificate must be given full faith and credit in Kansas, it is a well-established rule of law that Kansas must give the amended certificate only as much recognition or weight as would Wisconsin”).

evidence of the facts stated in the birth certificate.²⁷² The court, therefore, reasoned that Kansas need not give an amended birth certificate any greater evidentiary weight than Wisconsin would give it, and held that the trial court was free to determine the evidentiary value of the amended birth certificate itself.²⁷³

In choosing to side step the full faith and credit issue, the Court of Appeals of Kansas failed to set important precedent as to transsexuals' and intersexuals' right to marry. Ultimately, the Court of Appeals reversed the trial court's decision and remanded the case with directions that the trial court reconsider whether J'Noel was a female at the time of her marriage to Marshall under the criteria set forth by Professor Greenberg.²⁷⁴ Unfortunately, however, the appellate court's decision still leaves transsexuals and intersexuals without a bright line test to determine which of their marital unions will be unchallengeable.

VII. CONCLUSION

Many individual rights, such as the right to marry, stem from a person's legal sex status. Because neither the state nor federal governments have defined the terms "male" and "female," or "man" and "woman," perhaps under the mistaken notion that such meanings are obvious, many transsexuals and intersexuals are uncertain whom they have the right to marry and whether their marriages will be valid if they leave the states in which they were solemnized. The Full Faith and Credit Clause should be used as a tool to eliminate some of this uncertainty by requiring states to recognize sex designation changes made pursuant to a law or judgment of a sister state.

Although some states may oppose and prevent sex designation changes within their own borders, under the Full Faith and Credit Clause they should be obligated to recognize the changes granted by their sister states, as well as the opposite-sex marital unions that follow. The

272. *Id.* at 1109. The court quoted the entire subsection:

Any certified copy of a vital record or part of a vital record issued under this subsection shall be deemed the same as the original vital record and shall be prima facie evidence of any fact stated in the vital record, *except* that the evidentiary value of a vital record filed more than one year after the event which is the subject of the vital record occurred or of a vital record *which has been amended* shall be determined by the judicial or administrative agency or official before whom the vital record is offered as evidence.

Id. (quoting WIS. STAT. ANN. § 69.21(1)(c) (West Supp. 2000) (emphases added)).

273. *In re Estate of Gardiner*, 22 P.3d at 1109.

274. *Id.* at 1110 (stating that those factors are chromosome makeup, "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity"); *see also* Greenberg, *Defining Male and Female*, *supra* note 5, at 278.

mandate of the Full Faith and Credit Clause is consistent with the U.S. federal system of government and consistent with preserving the constitutional rights of all individuals.

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