2007

Against the Surgical Requirement for Chance of Legal Sex

Harper Jean Tobin

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol38/iss2/7

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
AGAINST THE SURGICAL REQUIREMENT FOR CHANGE OF LEGAL SEX

Harper Jean Tobin

"I'm just an average bloke that lives in the suburbs. I'm a family man. I have a lovely loving wife who cares for me very much. We have two wonderful children you know? . . . I get up and go to work five days a week. We have a mortgage. We're no different to anyone else."

INTRODUCTION ................................................................................................................. 394
I. BACKGROUND ................................................................................................................ 396
   A. Transsexualism ........................................................................................................... 396
      1. What is Transsexualism? ......................................................................................... 396
      2. Sex Reassignment Surgery ..................................................................................... 399
   B. Transsexuals and Legal Sex ....................................................................................... 402
      1. Early Treatment in a Civil Law Jurisdiction ............................................................. 402
      2. The Doctrine of Immutability ................................................................................ 403
      3. The Trend Away From Immutability ....................................................................... 405
II. DRAWING THE LINE: THE SURGICAL REQUIREMENT FOR GENDER RECOGNITION .................................................................................................................. 408
   A. What is "Sex"? ............................................................................................................. 409
   B. Surgery as a Determining Factor .............................................................................. 410
   C. Reliance on Medical Knowledge .............................................................................. 411
      1. Inconsistent Medical Opinion ................................................................................. 412
      2. Inconsistent Use of Medical Opinion ..................................................................... 413
      3. Parting Ways with Medical Opinion ...................................................................... 414
   D. A Bright-Line Rule That Isn't .................................................................................. 415
   E. Public Policy Rationales ............................................................................................ 417
      1. Sexual Function ....................................................................................................... 417
      2. Appearance ............................................................................................................. 419
      3. Irreversibility ......................................................................................................... 420
      4. Fertility .................................................................................................................... 422
III. GENDER RECOGNITION, FAIRNESS, AND HUMAN RIGHTS .................................................................................................................. 424

* BA, Oberlin College, Oberlin, Ohio (2003); JD, MSSA, Case Western Reserve University, Cleveland, Ohio (2007). The author would like to thank Rachel Wyatt and Allison Marczak for their critical feedback throughout the writing process; Sharona Hoffman and Cole Thaler for some helpful suggestions; and Elizabeth Bienz and Lee McKeever for their encouragement and their help in working out ideas for this Note over endless dinner conversations.

A. The Right to Equal Treatment .................................................. 424
B. The Right to Gender Recognition........................................... 425
C. The Right to Bodily Integrity................................................ 427
D. The Right to Religious Observance....................................... 428
E. Balancing Interests .................................................................. 428

IV. THE U.K. GENDER RECOGNITION ACT: A MODEL FOR REFORM ...... 429
A. Passage of the GRA ................................................................. 429
B. How the GRA Works ............................................................... 430
C. The Best Available Option .................................................... 432

V. CONCLUSION ............................................................................. 434

POSTSCRIPT ................................................................................. 435

INTRODUCTION

At least to the rest of the world, “Kevin” (a pseudonym) was not always an average bloke. Kevin was born and raised female, a fact that caused him agony throughout his life. At the age of thirty he discovered that others like him—people who were born of one sex but felt they belonged to another—could seek medical assistance to live in their authentic gender. Over the next few years, Kevin began taking testosterone; underwent surgery to remove his breasts and give his chest more masculine contours; and had his female reproductive organs removed. These steps enabled Kevin to live a normal and happy life as the man he had always felt himself to be:

He'd taken all of the available medical steps. He'd made all of the social adjustments. . . . He had a male birth certificate, a male passport[,] etcetera, and everybody whose path he crossed regarded him as male, from the people closest to him, such as his partner . . . our extended family, the people he worked with[,] and anybody that passed him in the street . . . .

Those are the words of “Jennifer,” the woman Kevin fell in love with one year after he began living as a man, and whom he would later marry. Jennifer learned on their second date that he was born female, but decided it didn’t matter. “I know what a man is,” she would later say, “and I know what a husband is, and I know what a father is; and he's all of those things.”3 After nearly three years together, Kevin and Jennifer decided to get married. But because they knew of no one else in their situation, they did not know whether their marriage would be legally valid. To resolve this uncertainty, they wrote to the office of the Australian Attorney-General. When they finally received a response,

---

3 Id.
[W]e were just devastated, shattered, like how on earth could we possibly get this correspondence like this? How could we be treated as second-class citizens, as people that don’t even have rights. The correspondence basically straight out said that I could be locked up in [jail] for two years [for marrying Jennifer].

Jennifer recounted:
I felt very shocked when I read that. I was actually physically shaking when I read it. The woman that wrote the letter, who was in quite a responsible position in the department answering matters of family law and so on, just made no attempt to veil her personal bias.

Despite the troubling letter, Kevin and Jennifer went ahead with their wedding. No criminal charges resulted, but the Attorney-General challenged the validity of their marriage on the basis that Kevin was not a man and could not be a husband. The ensuing legal battle traveled through Australian courts for four years. Kevin would later describe this process as “very[,] very stressful . . . . It was very, very difficult [coping with] the unknown of what was going to happen. I mean we had an awful lot on the line . . . . in relation to our life.”

Ultimately, Kevin and Jennifer prevailed, in a landmark ruling affirmed by the full Family Court of Australia in 2003. This ruling came as a godsend to thousands of transsexual Australians and their loved ones—but this result was far from inevitable. If Kevin and Jennifer had lived in almost any part of Europe or North America, courts would probably have found Kevin legally a female and therefore invalidated their marriage. Courts in those jurisdictions would have found that Kevin had not, in fact, “taken all of the available medical steps” to become male since (as the Family Court noted), “[h]e has elected not to have further surgery involving the construction of a penis or testes.” The court saw no reason that the law should require such surgery, since it “is complex and expensive, and has risks of complications and failure.” Other courts, however, have taken a different view.

This Note will examine how various jurisdictions determine the legal sex of transsexual persons, and in particular the prevalence of sex reas-

4 Cohen, supra note 1.
5 Four Corners, supra note 2.
6 Cohen, supra note 1.
signment surgery as a prerequisite for gender recognition.⁹ Part I will provide background on transsexualism and the development of an international legal consensus on the mutability of sex.¹⁰ Part II will discuss the prevailing prerequisite of sex reassignment surgery. It will be argued that rather than promoting certainty in the law, this requirement creates uncertainty. Neither can appeals to medical science justify this requirement. Most importantly, the requirement has no basis in the public interest, and attempts to justify it in terms of public policy have little if any substance. Part III will argue that the surgical requirement poses serious problems of fairness and human rights. Part IV will discuss the history and effects of the United Kingdom’s Gender Recognition Act of 2004—which does not require surgery—and consider it as a model for other jurisdictions.

I. BACKGROUND

Transsexualism is a little-understood subject, and its treatment in law is not well known. Part I-A provides important background information on transsexualism generally, and on sex reassignment surgery in particular. Part I-B describes how various jurisdictions have defined the legal sex of transsexual persons, and the developing international consensus in favor of recognizing sex changes in some circumstances.

A. Transsexualism

1. What is Transsexualism?

The term transsexual “denote[s] individuals who desire[] to live (or actually live[]) permanently in the social role of the opposite gender and who want[] to undergo sex reassignment.”¹¹ The process of sex reassignment typically involves some form of body modification, which may include hormone therapy (which produces remarkable changes in a wide variety of secondary sex characteristics),¹² mastectomy or breast reduction in

⁹ In this Note, “gender recognition” refers to legal recognition of an individual’s gender identity. Many attempt to distinguish “sex” as a biological category from “gender” as reflecting social, behavioral and cultural features of masculinity and femininity. The terms are used interchangeably here because the distinction reflects an assumed dichotomy between biology and culture which this Note will challenge. See SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 7 (1978).

¹⁰ The continuing debate in some jurisdictions on whether to provide gender recognition under any circumstances is beyond the scope of this Note.


¹² Effects of female-to-male hormone therapy include beard development, redistribution of body fat, deepening of voice, and cessation of menses. See Jerilynn C. Prior & Stacy Elliott, Hormonal Therapy of Gender Dysphoria: The Female-to-Male Transsexual, in CURRENT
the case of trans men, and sex reassignment surgery (SRS). Every person has a gender identity, and seeks to live in a gender role and achieve gender attributions consistent with that identity. For transsexual people, that identity, and their desired role and attributions, differ from the gender attributed at birth. Estimates of the prevalence of transsexualism vary widely, suggesting a U.S. transsexual population anywhere from seven thousand to two hundred thousand.

According to the American Psychological Association (APA), transsexual people suffer from Gender Identity Disorder. The APA defines...
Gender Identity Disorder as a "strong and persistent cross-gender identification" that "is manifested by symptoms such as preoccupation with getting rid of primary and secondary sex characteristics . . . or belief that he or she was born the wrong sex."\(^{16}\) This diagnosis proves controversial, however, since "transsexualism does not appear to be inherently associated with [any] psychopathology,"\(^ {17}\) and much of the distress and social dysfunction transsexuals experience may result from societal prejudice.\(^ {18}\) Australia's Family Court has called it "questionable whether this condition is properly described as a disorder,"\(^ {19}\) observing that "people who have longed for transition to the opposite sex may find it offensive to find the incompatibility between their sense of self and the sex of their body being categorised as a 'disease' or a 'malfunction.'"\(^ {20}\)

While theories abound, no scientific consensus exists as to the cause of transsexualism.\(^ {21}\) Generally, transsexual people are typical members of their birth sex in terms of sexual anatomy and physiology, which accounts for the initial popularity of psychological (and particularly psychoanalytic) theories of the origin of transsexualism. Recent attention has focused on studies suggesting that certain elements of brain anatomy in transsexual women resemble other women more than non-transsexual men.\(^ {22}\) Some have seized upon this work as indicating an origin in either genes or prenatal hormones; in other words, that transsexualism is literally intersexuality of the brain. So far, however, only tentative data support this "brain sex" theory.\(^ {23}\)

\(^{16}\) American Psychiatric Association, supra note 15, at 581.

\(^{17}\) Cohen-Kettenis & Pfaefflin, supra note 11, at 152.

\(^{18}\) See, e.g., Lev, supra note 15, at 177–81 (surveying theories); Kettenis & Pfaefflin, supra note 11, at 70–84.


\(^{20}\) Id., ¶ 197.


\(^{22}\) See, e.g., Jing Ning Zhou et al., A Sex Difference in the Human Brain and its Relation to Transsexualism, 387 Nature 68 (1995); Frank P.M. Kruijver et al., Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus, 85 J. Clinical Endocrinology & Metabolism 2034 (2000).

\(^{23}\) See generally Anne Fausto-Sterling, Sexing the Body: Gender Politics and the Construction of Sexuality 115–45 (2000) (discussing methodological and conceptual problems with research on sex and the brain).
2. Sex Reassignment Surgery

For many trans people, SRS is essential to achieving peace of mind and a successful life in their authentic gender; the alternative is constant anxiety, social maladjustment, depression, and the danger of suicide. In male-to-female sex reassignment surgery, surgeons use the skin of the penis and scrotum to form labia and a vagina; nerve and erectile tissue from the glans are relocated as a clitoris. Female-to-male surgery involves one of two basic approaches. In phalloplasty, surgeons form a phallus from skin grafts, usually from the forearm. In metoidioplasty, the existing, testosterone-enlarged phallus is released from the clitoral hood. In both procedures the urethra is sometimes lengthened using tissue from the inner labia, while the outer labia are often brought together (as in typical male fetal development) to form the scrotum. Metoidioplasty is a simpler procedure, resulting in a smaller, but more erotically sensitive penis than with the more traditional phalloplasty.

When performed by highly skilled surgeons on average, healthy patients, the risks of SRS are low; however, reports on aesthetic results and post-surgical sexual sensation vary widely. As with any major surgery, recovery can be lengthy and painful. Complications, though uncommon, may occur. Possible complications for male-to-female SRS include:

- minor infections, bleeding, a sloughing-off and loss of some of the grafted skin. Most of these minor complications can easily be managed and will be under control before the woman leaves the hospital. . . . The more serious complications include major infection or bleeding, and damage to the bladder, prostate or major nerves during the dissection to form the vagina.


These complications can be difficult to control and correct, may require major extension of the hospital stay, and can lead to permanent uncorrectable damage.\textsuperscript{26}

Similar complications are possible with female-to-male surgeries, and it is not uncommon that patients require follow-up or "revision" surgeries.

While the definition of transsexualism once focused heavily on the psychological need for SRS,\textsuperscript{27} contemporary usage reflects the reality that many individuals undergo a permanent gender transition without having such surgery. Medical conditions such as AIDS, hepatitis C, or clotting disorders prevent many individuals from undergoing SRS.\textsuperscript{28} Others simply cannot afford these surgeries, which cost in the tens of thousands of dollars.\textsuperscript{29} While coverage by public or private health insurance is increasingly the norm in Europe;\textsuperscript{30} in other countries, such as the United States, private insurers almost universally deny coverage for SRS.\textsuperscript{31}

For some, religion also prevents them obtaining reassignment surgery. In a study of over five hundred Malaysian trans women, only nineteen had had SRS; while some mentioned the difficulty of finding and affording

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{26}] Lynn Conway, \textit{supra} note 15; see also Chettawut Tulayaphanich, \textit{Recovery After Sex Reassignment Surgery and Possible Complications} (2005), at \url{http://www.chetplasticsurgery.com/Srs_postop.html}.
\item[\textsuperscript{27}] See, e.g., \textsc{Harry Benjamin}, \textit{The Transsexual Phenomenon} 13–21 (1966); \textsc{David W. Meyers}, \textit{The Human Body and the Law} 219 (2d ed. 1990).
\item[\textsuperscript{28}] While HIV-positive status is itself no longer considered a bar to SRS, full-blown AIDS impedes surgery. A. Neal Wilson, \textit{Sex Reassignment Surgery in HIV-positive Transsexuals}, 3 \textsc{Int’l J. Transgenderism} pts. 1, 2 (1999), available at \url{http://www.symposion.com/ijtlhiv_risk/wilson.htm}.
\item[\textsuperscript{30}] See \textsc{Goodwin v. United Kingdom, 2002-VI Eur. Ct. H. R. 3, 21 (2002)} (noting public funding for SRS in UK, Ireland and other European nations); see also \textsc{Robyn Emerton, \textit{Neither Here Nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law}, 34 H. K. L. J. 245, 250 (2004)} (describing public funding in Hong Kong).
\item[\textsuperscript{31}] See, e.g., \textsc{Kari E. Hong, \textit{Categorical Exclusions, Exploring Legal Responses to Health Care Discrimination Against Transsexuals}, 11 \textsc{Colum. J. Gender & L.} 88 (2002)} (discussing such exclusions, their occasional use to deny a wide range of other health care to trans people, and potential strategies for challenging them).
\end{itemize}
\end{footnotesize}
a competent surgeon, "[r]eligion is the main factor that discouraged the Muslim [trans woman]."\textsuperscript{32} They and their families worried that they would be unable to receive a proper Muslim burial; some also "believed that if they had [SRS], their souls would float aimlessly after their death since their bodies were no longer the same as what God had originally given them."\textsuperscript{33} While this concern is made particularly acute in Malaysia by a 1983 fatwa against SRS by the Islamic Council of Rulers,\textsuperscript{34} there is no reason to suppose that it is unique to Malaysia.\textsuperscript{35} Similarly, the majority view in Orthodox Judaism is that SRS violates scriptural prohibitions on deliberate castration and sterilization.\textsuperscript{36}

Some find the results of available surgical techniques unsatisfactory in light of the high cost, painful recovery, and risks of complications and diminished sensation.\textsuperscript{37} Transsexual men in particular, owing to the less advanced state of female-to-male SRS, undergo it much less frequently than trans women.\textsuperscript{38} And still others—apparently a growing number\textsuperscript{39}—simply do not feel such invasive surgery is necessary for a successful life in their authentic gender.\textsuperscript{40} In everyday life, the only people who need know or be

\begin{thebibliography}{9}
\item \textsuperscript{32} TEH YIK KOON, THE MAK NYAHS: MALAYSIAN MALE TO FEMALE TRANSSEXUALS 66–67 (2002).
\item \textsuperscript{33} \textit{Id.; see also id.} at 109–12 (discussing traditional Muslim views of transsexualism).
\item \textsuperscript{34} \textit{Id.} at 46.
\item \textsuperscript{35} \textit{See id.} at 109–13 (discussing traditional Muslim views of transsexualism).
\item \textsuperscript{38} CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 81–86 (Joanne B. Eicher ed., 1998) (noting the higher cost and less satisfactory outcomes of FTM “bottom” surgeries).
\item \textsuperscript{39} Jason Cromwell, \textit{Fearful Others: Medico-Psychological Constructions of Female-to-Male Transgenderism, in CURRENT CONCEPTS, supra note 12, at 135 (“More and more transsexuals are coming forward who do not invest in their genitalia as signifiers of their womanliness or manliness.”}); Richard Green, \textit{Conclusion to Transsexualism and Sex Reassignment: Reflections at 25 Years, in CURRENT CONCEPTS, supra note 12, at 422 (noting the “growing number of persons” seeking hormone therapy and/or mastectomy but not SRS).}
\item \textsuperscript{40} GRIGGS, \textit{supra} note 38, at 86 (noting that “the change in attributed gender in FTMs is generally more effective” than in MTFs, i.e., trans men often “pass” more successfully as men and therefore feel less need for surgery); \textit{MOTTET & OHLE, supra} note 29; \textit{LEV, supra note} 15, at 34–35. Trans men may have more success with achieving proper gender attributions because male is the “default” gender in our culture, while female gender attributions
concerned about whether a person has had SRS are his or her lover and his or her doctor.\textsuperscript{41}

\section*{B. \textit{Transsexuals and Legal Sex}}

\subsection*{1. Early Treatment in a Civil Law Jurisdiction}

People have lived in a gender different from that apparent at birth in innumerable cultures throughout history,\textsuperscript{42} and sex reassignment surgeries date back as far as 1931.\textsuperscript{43} In 1945, the Neuchâtel Cantonal Court in Switzerland decided the first reported case of a transsexual person seeking legal sex recognition.\textsuperscript{44} There, a transsexual woman who had undergone reassignment surgery approached the court seeking a name change and "to obtain judicial recognition of his [sic] change of sex, which will permit him [sic] to lead the normal life of a woman, with a woman's name and dressed as a woman."\textsuperscript{45} Medical experts stated that Ms. Leber's sex had not been—and could not be truly be—changed, but that her gender identity was congenital and legal recognition as a woman would be in her best interest.\textsuperscript{46} The court opined that "[i]t is not only the body which determines the sex of an

\begin{thebibliography}{9}
\bibitem{note1} In everyday life, individuals attribute gender to one another without any certain knowledge of one another's biological characteristics or subjective gender identity. These attributions are by far the most important aspect of gender in everyday life, while genitals are rarely revealed or discussed in everyday social contexts. \textit{Kessler \& McKenna}, supra note 9, at 145–50.
\bibitem{note4} \textit{Requete de A.-L. Leber, 8 Recueil De Jugements Du Tribunal Cantonal De La Republique Et Canton De Neuchâtel} 536 (1945), \textit{translated in Eugene De Savitsch, Homosexuality, Transvestism and Change of Sex} 96–107 (1958). One source refers to an earlier Swiss case, with the same result but apparently without a written opinion, in 1931, and states that at least a handful of individuals were granted recognition "by solitary decisions of German registrars or local administrations" in the 1930s. \textit{Cohen-Kettenis \& Pfafflin, supra} note 11, at 160. Western legal systems have for centuries wrestled with the not unrelated question of the status of intersex persons, that is, those born with ambiguous sex characteristics. \textit{Id.} at 155–57 (summarizing this history).
\bibitem{note5} \textit{De Savitsch, supra} note 45, at 97.
\bibitem{note6} \textit{See id. at} 100.
\end{thebibliography}
individual, it is also the mind.” The court therefore held that recognizing
the change of sex would benefit not only the individual but also “the inter-
est of public order and morality.”

2. The Doctrine of Immutability

Despite this favorable precedent, transsexuals frequently fared
worse in courts in the years to come, particularly in common law jurisdic-
tions. In the 1970 case of Corbett v. Corbett, an English court faced for the
first time the question of whether a man can become a woman. The case
concerned the validity of a marriage in which the wife—a top fashion model
until the tabloid press revealed her past—was a post-operative transsexual
woman. Although cautioning that medical facts “do not necessarily decide
the legal basis of sex determination,” the court in fact relied heavily on
medical testimony. It cited agreement among the expert witnesses “that the
biological sexual constitution of an individual is fixed at birth (at the latest),
and cannot be changed, either by the natural development of organs of the
opposite sex, or by medical or surgical means. The respondent's operation,
therefore, cannot affect her true sex.” The court then opined that,
“[h]aving regard to the essentially hetero-sexual character of... marriage,
the criteria [for being a man or woman] must, in my judgment, be biologi-
cal.” Moreover, it held that Mrs. Corbett could not be a wife because she
was not

naturally capable of performing the essential role of a woman in marriage.
In other words, the law should adopt in the first place...the chromosomal,
gonadal and genital tests, and if all three are congruent, determine the sex
for the purpose of marriage accordingly, and ignore any operative inter-
vention.

47 Id. at 105. This has also been translated as, “it is also his soul.” Michael R. Will, Legal
Conditions for Sex Reassignment by Medical Intervention: Situation in Comparative Law, in
48 DE SAVITSCH, supra note 45, at 105.
50 Jane Warren, Forty Years After My Sex Change I'm Still Treated as a Joke, Though I
(U.K.) (Judgment of Lord Nicholls) (“The change of body can never be complete.”).
53 Corbett, [1971] P. 83, 106. Curiously, the court did not specify whether “the essential
role of a woman in marriage” was intercourse, childbirth, or something else.
Over the years, courts in South Africa,\textsuperscript{54} Canada,\textsuperscript{55} Hong Kong,\textsuperscript{56} New Zealand,\textsuperscript{57} Ireland,\textsuperscript{58} Singapore,\textsuperscript{59} and the United States\textsuperscript{60} have followed the reasoning of Corbett.

Corbett's doctrine of immutability has had far-reaching and pernicious effects for transsexual people and their families. Most centrally, the law has barred transsexual persons from marrying members of the opposite sex, or has voided their marriages after the fact. This can result in deprivation of the right to inherit by intestacy, the right to sue for loss of consortium or wrongful death, the right to spousal support in case of divorce, and even the right to custody of their children.\textsuperscript{61} Immigrants may be deported if their marriage is invalidated.\textsuperscript{62} In some jurisdictions, liability for crimes of sexual violence depends on the sex of the perpetrator or the victim.\textsuperscript{63} The age of eligibility for public pension rights may depend on sex.\textsuperscript{64} Requirements for military service may also depend on sex.\textsuperscript{65} Whether prisons cate-

\textsuperscript{54} W v. W 1976 (2) SA 308 (W.L.D.) (S. Afr.).
\textsuperscript{55} M v. M, [1984], 42 R.F.L. (2d) 55. (Can.).
\textsuperscript{56} Katherine O'Donovan, \textit{Sexual Freedom}, in \textit{CIVIL LIBERTIES IN HONG KONG} 302, 315 (Raymond Wacks ed., 1988) (Corbett followed by trial court); Emerton, \textit{Neither Here Nor There}, supra note 31 (Registrar still follows Corbett, and courts likely to continue to do so as well).
\textsuperscript{59} Lim Ying v. Hiok Kian Ming Eric, [1992], 1 S.L.R. 184 (Sing.).
\textsuperscript{60} \textit{See In re} Ladrach, 513 N.E.2d 828 (Ohio Prob. 1987); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999).
\textsuperscript{61} \textit{See Alyson Dodi Meiselman, et al., Cause of Action for Legal Change of Gender} § 5, 24 Causes of Action No. 2 135 (2005) (citing cases).
\textsuperscript{65} The position in the United States is somewhat unclear. The Selective Service System itself states, "Individuals who are born female and have a sex change are not required to register. U.S. citizens or immigrants who are born male and have a sex change are still required to register. In the event of a resumption of the draft, males who have had a sex change can file a claim for an exemption from military service if they receive an order to report for
gorize inmates as, and house them with, men or women can have serious implications for their safety and wellbeing.\textsuperscript{66} Even the use of a public restroom may subject an individual to legal sanction.\textsuperscript{67} Beyond the direct legal effects of sex, having legal documents (such as a birth certificate and driver’s license) which indicate a sex incongruent with identity and social role leads to embarrassment and harassment for transsexual persons who must regularly produce them for identification purposes.

3. The Trend Away From Immutability

Despite the wide influence of \textit{Corbett}, conflict and uncertainty on this issue continued. A long string of commentators,\textsuperscript{68} and some courts, took the view that \textit{Corbett} was out of step with current medical knowledge and that “[n]o relevant principle or policy is advanced” by refusing to recognize change of sex.\textsuperscript{69} Only six years after \textit{Corbett}, one American court ruled that exclusive reliance on chromosomes for sex determination by professional athletic associations is “grossly unfair, discriminatory and inequitable,” and examination or induction.” Selective Service Administration, \textit{Frequently Asked Questions} (2005), at http://www.sss.gov/FAQ.HTM#quest35. But see Jamison Green, \textit{Visible Man: Selective Service} (2004), at http://www.planetout.com/people/columns/green/archive/20040115.html (“If you are living as a male and listed as male with Social Security, the answer is YES, you must register,” which would include many post-operative trans men). As for trans women, the Selective Service System appears not to have formulated standards for adjudging their exemption claims, should the need arise.


\textsuperscript{68} See \textit{ANDREW N. SHARPE, TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW} 58 (2002) (citing works by two dozen commentators in various nations between 1970 and 1994 criticizing \textit{Corbett}).

in violation of New York’s Human Rights Law.\textsuperscript{70} By the 1990s, the view that sex is immutable had definitely lost favor.

Today, almost all U.S. states, as well as the District of Columbia and Guam, recognize change of sex under some circumstances.\textsuperscript{71} This position is now generally accepted in common law jurisdictions,\textsuperscript{72} and by 1997 at least twenty-three of the thirty-seven Council of Europe member states clearly permitted change of legal sex.\textsuperscript{73} Today, only seven jurisdictions in all of Europe and North America now refuse to recognize change of sex under any circumstance,\textsuperscript{74} and recognition is quickly gaining ground in other parts of the world.\textsuperscript{75} Japan adopted legislation in 2004 recognizing sex changes;\textsuperscript{76} Singapore codified its long-standing policy of recognition in

\textsuperscript{70} Richards v. United States Tennis Ass’n, 400 N.Y.S.2d 267, 272 (1977).

\textsuperscript{71} See In re Heilig, 816 A.2d 68, 83–84 n.8 (Md. 2003) (citing twenty two statutes “expressly enabling a person who has undergone a change in gender to have his or her birth certificate amended to reflect the change,” and noting the existence of twenty other statutes dealing generally with birth certificate changes).

\textsuperscript{72} See Otaulu, [1995] 1 N.Z.L.R. at 603; Alteration of Sex Description and Sex Status Act 49 of 2003 (S. Africa); Integrating Transsexual and Transgendered People, Liberty Amicus Curiae filed in Sheffield & Horsham v. United Kingdom, (1998) V Eur. Ct. H.R. 2014, available at http://www.pfc.org.uk/node/345 [hereinafter Liberty] (noting “full acceptance and change of documents” in Namibia). In Canada the case law is ambiguous but seems to point toward post-operative recognition, see Shauna Labman, Left in Legal Limbo: Transsexual Identity and the Law, 7 APPEAL 66 (2001). India stands out as an important common law exception. See People’s Union for Civil Liberties of Karnataka, Human Rights Violations Against the Transgender Community 50 (2003), available at http://ai.eecs.umich.edu/people/conway/TS/PUCL/PUCL%20Report.html. India’s failure to embrace gender recognition is puzzling in light of its constitutional privacy guarantee and the long-standing cultural visibility of gender-variant people there. While such empirical questions are beyond the scope of this Note, this author speculates that factors contributing to this state of affairs may include the traditional dominance of religion in Indian family law, and peculiarities of traditional gender-variant identities and communities in India. See generally Serena Nanda, Neither Man Nor Woman: The Hijras of India (1990); Rajesh Talwar, The Third Sex and Human Rights 53–79 (1999).

\textsuperscript{73} Liberty, supra note 73.


\textsuperscript{75} Unfortunately, precious little information is available in English about gender recognition in African and Latin American jurisdictions.

\textsuperscript{76} Robyn Emerton, Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong, 34 H.K.L.J. 515, 546–49 (2004).
1996 after a contrary court ruling, and South Korea’s Supreme Court established recognition in mid-2006. In Malaysia, legislation on gender recognition has been introduced following conflicting court rulings. Lower courts in Kuwait and the Philippines have recognized changes of sex, but have been reversed on appeal. Recognition is available to transsexual citizens in at least some regions of China. Even nations as dissimilar as Israel and Iran—the latter known for its draconian treatment of gay and lesbian people—appear to agree on the issue of gender recognition.

The European Court of Human Rights (ECHR) and the Commission beneath it have played a major role in the history of gender recognition. Between 1980 and 2002, the ECHR and the Commission heard over a dozen suits alleging that refusal to recognize gender transition violated the right to private life and the right to marry under the European Convention on Fundamental Rights and Freedoms. In the first case, the Commission ruled against Belgium, but the ECHR dismissed the case on procedural grounds. Cases against Germany and Italy were dropped when those countries passed

---

77 WOMEN’S CHARTER (AMENDMENT) ACT NO. 30/96 (1961); see also Chan Wing Cheon, Latest Improvements to the Women’s Charter, SING. J. LEG. STUD. 553 (1996).


81 Emerton, Time for Change, supra note 78, at 517 n. 10 (citing one trial court case and alluding to others); Denise Brogan, TS in the PI, MUSINGS ON LIFE, LAW AND GENDER, Mar. 5, 2006, http://musingsonlifelawandgender.typepad.com/life_law_gender/2006/03/ts_in_the_pi.html (excerpting a Philippine news report of Court of Appeals reversal in case cited by Emerton).

82 Emerton, Neither Here Nor There, supra note 31, at 247 n.15 (citing several news reports).


gender recognition laws. A series of cases against the United Kingdom began in 1986. While the Court declined to rule against the U.K., it showed increasing impatience with the government's persistent failure to review the issue. In a 1992 suit against France, the Court gave its first clear ruling that the Convention mandates gender recognition. In two subsequent cases the Court maintained that the gender recognition issue fell within the U.K.'s "margin of appreciation." Finally, in 2002 the Court held unanimously against the U.K. In the case of Goodwin v. United Kingdom, it declared that "since there are no significant factors of public interest to weigh against the interest of [the] individual applicant in obtaining legal recognition of her gender re-assignment," their rights under the Convention had been violated.

As the ECHR recognized in Goodwin, there is now "a continuing international trend towards legal recognition." But while there is now a consensus that "a system for recognising transsexual people in their acquired gender must exist," there is no such consensus as to what that system should look like. In particular, the crucial question of the substantive criteria for recognition remains.

II. DRAWING THE LINE: THE SURGICAL REQUIREMENT FOR GENDER RECOGNITION

Kevin and Jennifer's marriage was challenged on the grounds that it was a same-sex marriage. Applying such a label merely begs the question of how an individual's sex is defined. By adopting gender recognition for post-operative individuals, states have effectively decided that sex is not defined by chromosomes, social or anatomical history, or reproductive capacity.

85 Will, supra note 48, at 78.
89 Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 32.
90 Id. at 29. Accord Kevin v. Att'y Gen. (Re Kevin), (2001) 165 Fam. L.R., 404, 473 (Austl.) (observing that "there is a remarkable consensus . . . that the law should treat post-operative transsexuals as members of their re-assigned sex").
92 See 418 PARL. DEB., H.C. (6th ser.) (2004) 13-14 (statement of Mr. David Lammy, Parliamentary Under-Secretary of State for Constitutional Affairs) ("There are no universally applied international standards for gender recognition at present.").
Part II-A explains how sex determinations are based on the relative weighting of various sex characteristics. Part II-B discusses generally the use of SRS as a determinative factor for gender recognition. Parts II-C through II-E discuss and critique courts' and legislatures' appeals to medical authority, consistency and predictability, and public policy concerns.

A. What is “Sex”?

Beginning with Corbett v. Corbett, courts have generally understood “sex” as describing a collection of physical and, perhaps, psychological and social characteristics. In a formulation cited recently by an American court, those factors are:

1. Internal morphologic sex (seminal vesicles/prostate or vagina/uterus/fallopian tubes);
2. External morphologic sex (genitalia);
3. Gonadal sex (testes or ovaries);
4. Chromosomal sex (presence or absence of Y chromosome);
5. Hormonal sex (predominance of androgens or estrogens);
6. Phenotypic sex (secondary sex characteristics, e.g. facial hair, breasts, body type); and
7. Personal sexual identity.  

Conceptualizing “male” and “female” as categories constituted by the presence or absence of certain characteristics illuminates the essential problem of sex determination: How should these factors be weighted relative to one another?

Courts have reached different conclusions in similar fact scenarios by including different characteristics in their analysis, and by placing greater or lesser weight on them. The British court in Corbett placed overwhelming emphasis on chromosomes, and ignored “psychological factors.” The Australian court in Re Kevin, by contrast, emphasized identity and social role, combined with visible physical characteristics. Once one decides which attributes are essential to being a man or woman, which ones are of lesser importance, and which ones are inconsequential, determining any individual’s sex should be relatively easy.

B. Surgery as a Determining Factor

Definitions of legal sex, and the criteria for changing it, are variously established by case law, legislation, and administrative regulations,

---


94 Re Kevin (2001) 165 Fam. L.R. 404, 475 (Austl.).
with varying levels of specificity. For example, in the United States, twenty-three states and the District of Columbia prescribe conditions for change of sex by statute, while the rest have left the issue to courts. Different approaches to defining sex and change of sex cut across these methods of law-making. But while statutes and case law frame the issue in different ways, a strong emphasis on genitals is a common theme. Requiring SRS as a condition of gender recognition is a natural consequence of this emphasis. Some jurisdictions have gone so far as to require proof of SRS before granting a change from a name associated with one gender to one associated with another gender.

In some jurisdictions, courts have read ambiguous statutes to require surgery; in others, notably South and Western Australia, courts have read statutes not to require surgery when this has not been explicitly stated. Many statutes use vague language suggesting some medical body modification is required, without specifying whether and what type of surgery may be required. For example, in the Netherlands an applicant must demonstrate being "physically adjusted to the desired gender to the extent as is possible and justified from [the] medical and psychological point of view," while in South Africa change of status is available to "[a]ny person whose sexual characteristics have been altered by surgical or medical treatment." Courts and commentators emphasize various reasons for requiring

---

96 Heilig, 816 A.2d at 83–84 (citing twenty-two state statutes and a DC statute permitting sex change, and Tennessee statute forbidding it). A word of caution: these statutes provide for changes on the birth certificate, which may be presumed to have full legal effect—but this may not be so in every jurisdiction. See In re Marriage of Simmons, 825 N.E.2d 303, 310 (“The issuance of marriage licenses and new birth certificates are ministerial acts that generally do not involve fact-finding . . . . The courts, on the other hand, are fact-finding bodies, and in this particular instance the trial court found facts which the State Registrar did not find and ruled accordingly.”).
97 See, e.g., In re Application of Anonymous, 587 N.Y.S.2d 548 (N.Y. Civ. Ct. 1992); see also In re Matter of Anonymous, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968) (emphasizing importance of genital surgery in granting change from male to female name); In re Brian Harris, 707 A.2d 225, 230 (Pa. Super. Ct. 1997) (Saylor, J., dissenting) (“To permit [the petitioner] to adopt an obviously female name would be to perpetuate a fiction, since the fact remains that petitioner is anatomically a male until he undergoes reassignment surgery.”).
100 Alteration of Sex Description and Sex Status Act 49 of 2003.
SRS, which in some cases would create different results: medical truth; clarity and consistency; and particular public policies.\(^\text{101}\)

C. Reliance on Medical Knowledge

\[\text{The word transsexual . . . means crossing (trans) from one sex to the other. But that makes certain a priori assumptions: that we know what sex is, and that we know what 'crossing over' is.}\(^\text{102}\)

An essential problem confronting courts and legislatures in matters relating to gender recognition is that “neither science nor society has yet to narrow in on a particular definition of sex.”\(^\text{103}\) The Maryland Supreme Court states that “almost all courts have recognized that the question of whether and how sex or gender can be changed is one where the law depends upon and, to a large extent, must follow medical facts.”\(^\text{104}\) This, however, overstates the case. Expert witnesses and medical authorities differ dramatically as to what the “medical facts” are. Moreover, courts sometimes reject medical opinions which contradict their preferred outcome. Finally, many gender recognition cases simply have not considered medical opinions but have relied solely on public policy arguments.

1. Inconsistent Medical Opinion

Medical experts consulted in gender recognition cases give widely varying answers as to what features determine an individual’s sex: some

---


\(^\text{104}\) In re Heilig, 816 A.2d 68, 87 (Md. 2003).
continue to opine that sex cannot be changed, while many assert that SRS
determines a transsexual person’s gender. Yet others maintain that sex
can be medically altered without SRS. This variance arises because, in
the words of a foundational handbook of endocrinology, “There is no such
biological entity as sex.” Medicine is concerned with particular character-
istics and processes of the body, which tend to be grouped in such a way as
to make for ready categorization of most individuals into one of two
groups.

Thus, the medical textbook continues, “[s]ex is not a force that pro-
duces these contrasts; it is merely a name for our total impression of the
differences.” This “total impression” has in itself no biological reality or
significance, though the individual characteristics do. The Australian
Family Court recognized that, “[a]tributing some kind of primacy to [a
particular] aspect of the person [in determining sex] is not a medical conclu-
sion. It is a social or legal one.” As one embryologist-turned-social-
scientist writes, “[w]e may use science to help us make the decision, but
only our beliefs about gender—not science—can define our sex.”

105 See, e.g., Littleton v. Prange, 9 S.W.2d 223, 231 (Tex. App. 1999) (“Some physicians
would consider [a post-operative trans woman] a female; other physicians would consider
her still a male.”).

106 See, e.g., Richards v. U.S. Tennis Ass’n, 400 N.Y.S.2d 267, 272 (S. Ct. 1977) (relying
heavily on expert testimony that “psychologically... endocrinologically... somatically...
and socially Dr. Richards is female [and her] gonadal status us that of an ovarectomized
(Malay.) (showing that while some courts have declared transsexualism an issue for the
legislature, “the legislative body would depend on medical opinions. And here, in the instant
case, the medical men have spoken: the plaintiff is FEMALE”)

O.R.3d 569 574–75.

108 Frank R. Lillie, General Biological Introduction, in Sex and Internal Secretions: A
Survey of Recent Research 3 (Edgar Allen ed., 1939).

109 For example, an XY karyotype is often found together with sperm production. Sperm
production is often found together with the presence of a penis. The presence of a penis,
however, is seldom found together with pronounced breast development.

110 Lillie, supra note 110, at 3.

111 Thus, when we speak of differing health risks for men and women, we are really talking
about risks associated with specific X-linked genes, hormone levels, or other characteristics
that are correlated with sex but do not directly correspond to it; “sex” is in this context a
shorthand term.


113 Fausto-Sterling, supra note 23, at 3. Specifically, science can aid these decisions by
defining what physiological and psychological characteristics are associated with sex; what
combinations of those characteristics are seen in humans; and the relative frequencies of
various combinations.
While it must often rely on experts from other fields, the law recognizes that their expertise always has its limits. Any scientific expert would go beyond her expertise in attempting to identify an individual’s “true” race, or to opine on the point at which human life begins. Some concepts—such as disability and insanity in U.S. law—have legal definitions with medical components; medical experts help courts to apply the medical parts of these tests. When it comes to gender, however, courts have expected doctors to go beyond their expertise and determine the legal test itself.

2. Inconsistent Use of Medical Opinion

In light of all this, it would be surprising indeed if courts relied solely on medical evidence to determine the sex of persons. In fact, courts seem to rely on medical opinions selectively. The Federal Court of Australia dismissed a medical report stating that the respondent “is no less a woman for not having had surgery, nor would she be any more a woman for having had the surgery.” It relied instead on “ordinary English usage,” concluding that a person “may be said…to have undergone a sex change” only after SRS. Likewise, an Ontario court “differ[ed] with” medical reports that the

114 See, e.g., Paul C. Giannelli, Understanding Evidence 324 (2d ed. 2006) (“An expert qualified on one subject may not be qualified on another (even a related) subject.”).
116 See Roe v. Wade, 410 U.S. 113, 159 (1973) (observing that “those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus” on this question); see also Planned Parenthood v. Rounds, 467 F.3d 716 (8th Cir. 2006) (following this conclusion in Roe to invalidate requirement that women seeking abortions be told pregnancy is “a whole, separate, unique, living human being”).
117 See 42 U.S.C. §12102(2) (defining “disability” as a medical impairment that substantially limits a major life activity); see also, Chai R. Feldblum, Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender, 54 Me. L. Rev. 159, 181–83 (2002) (noting that social impairments characteristic of “disability” are “the result of [a] particular society’s pre-existing choices”).
120 Id. at 469, 472. See also Kantaras v. Kantaras, 884 So.2d 155, 161 (rejecting trial court’s finding of fact, in an exhaustive 800-page opinion reviewing medical opinion, case law, and legal commentary on transsexualism, that sex can be changed by medical intervention, and relying instead on “common meaning of male and female”). Both SRA and Kantaras echo the U.S. Supreme Court’s 1923 holding that “the understanding of the common man,” and not anthropological classifications, controlled the meaning of “White person” for naturalization purposes. U.S. v. Thind, 261 U.S. 204, 206 (1923). In all three cases, courts
applicant's treatment was sufficient to permanently change his sex. Nevertheless, when experts testified in an Illinois case that the petitioner's surgery was incomplete, the court relied heavily on their opinions.

3. Parting Ways with Medical Opinion

As with Shakespeare's famous quip about the devil's use of Scripture, medical science can be and has been used to support every conceivable conclusion about the sex of persons. But as the Swiss court in Leber early recognized, law need not turn to medicine for its conclusions in this area. Faced with medical testimony that sex is immutable, the Neuchâtel Cantonal Court concluded that, "In Law, if not in Medicine, it is really a change of sex which has taken place [in Ms. Leber's case]." Instead of medical expertise, the court grounded its decision in public policy concerns—what it called "the interests of public order and morality." The Family Court of Australia has echoed this view, stating that "the task of the law is not to search for some mysterious entity, the person's 'true sex,' but to give an answer to a practical human problem." The ECHR rejected the arguments of member states that "the law should fasten on the reality" of sex rather than mere "appearances" brought about through medical intervention. Instead of relying entirely on medical opinions, jurisdictions have created tests for sex determination based on supposed public policy concerns, discussed below.

125 Id. at 105.
127 B v. France, 232 Eur. Ct. H.R. (ser. A) 33, 49 (1992). The Court relied on medical evidence not to determine the "true sex" of applicants, but only to determine the existence of "a physical, not merely psychological explanation of [transsexualism], which would mean there could be no excuse for refusing to take it into account in law." Id. at 48. See also SHARPE, supra note 69, at 51–52 (discussing the treatment of scientific knowledge of sex in earlier ECHR judgments).
D. A Bright-Line Rule That Isn’t

One reason for requiring SRS is that it “provides a convenient and workable line for the law to draw.”\(^{129}\) The certainty and consistency of a bright-line rule supposedly eliminate the “spectral difficulties” involved in evaluating other relevant factors,\(^{130}\) such as “the person's self-perception as a man or woman [and] the extent to which the person has functioned in society as [such].”\(^{131}\) Since international medical standards call for an extended period of psychosocial evaluation prior to SRS,\(^{132}\) post-operative individuals can be presumed to meet the implied criteria of self-perception and social functioning.\(^{133}\)

However, the SRS requirement may not in fact provide great consistency and predictability, since the statutes and much of the case law requiring surgery do not spell out what constitutes “sex reassignment surgery.” Moreover, there is “no ‘standard’ operation or recognized definition of . . . completed surgery.”\(^{134}\) It may or may not include removal of internal reproductive organs. It may or may not include mastectomy for trans men. Likewise, it is not clear whether “sex reassignment surgery” means phalloplasty, metoidioplasty, or either one.

Recall that “Kevin” had undergone surgical breast reduction and removal of the uterus and ovaries. He appears male in almost all respects, but still has a vagina. The Family Court of Australia, relying on expert medical testimony, regarded him as “post-operative” and legally male.\(^{135}\)

---

129 Re Kevin, 165 Fam. L.R. at 474 (Austl.).
131 Re Kevin, 165 Fam. L.R. at 475 (Austl.).
133 Morgan, supra note 105, at 1372. Accord Re Kevin, 165 Fam. L.R. at 414 (Austl.); Dep’t of Soc. Sec’y v. SRA (1993) 118 A.L.R. 467, 469 (Fed. Ct. Austl., Gen. Div.) (Black C.J.) (quoting the lower tribunal’s statement that “[t]he fact that a person has undergone surgery would also satisfy the requirement that their social and cultural identity conforms to that of the reassigned sex.”); Dep’t of Soc. Sec’y v. HH [1991] 23 A.L.D. 53, ¶ 23 (Admin. App. Trib., Austl.). While jurists have generally placed great trust in medical authorities, there is at least one French case in which judges expressed skepticism about the appropriateness of SRS and the authenticity of a post-operative woman’s gender identity. See Sharpe, supra note 69, at 54–55.
135 Supra notes 1–7 and accompanying text. Although Kevin had eschewed a phalloplasty procedure because of its costs and risks, the Australian Attorney-General at no time “sought to argue that the sex-reassignment surgery was in any way incomplete or unsuccessful.” Re Kevin 165 Fam. L.R. at 411 (Austl.).
But in a recent American case, an Illinois appeals court, also relying on expert medical testimony, regarded a similarly situated man as legally female on the grounds that "there were other surgeries which had to be done on him before he could be considered completely sexually reassigned."\textsuperscript{136} An Ontario court held similarly in the case of \textit{B. v A.}, interpreting the statutory requirement that "the anatomical sex structure of a person is changed to a sex other than that which appears on the registration at birth" to require the construction of masculine external genitalia.\textsuperscript{137}

Tellingly, a ten-year study of the application of the German Transsexuals’ Act demonstrated such "considerable regional differences" between judges in determining what constituted reassignment surgery that "[o]ne got the impression that prerequisites for ... sex change applications were arbitrary."\textsuperscript{138} For example, one commentator notes conflict among German courts as to whether, in transsexual men, the fashioning of a phallus and scrotum must be supplemented by occlusion of the vagina—thus assuring that the individual cannot be the receptive party in vaginal intercourse, i.e. function "as a woman."\textsuperscript{139} Since most laws requiring surgery are no more specific than Germany’s, this phenomenon may be widespread. For example Turkey’s law is also "subject to wide interpretation by local judges."\textsuperscript{140} Quebec’s statute was unclear and interpreted to require phalloplasty for trans men until a 1999 court challenge.\textsuperscript{141}

Such variable interpretation renders the supposed benefits of a bright-line rule illusory. One reason given for abandoning the \textit{Corbett} approach was the avoidance of situations where individuals were simply unable to comply with a bright-line rule.\textsuperscript{142} As explained in Part I-A, however,\textsuperscript{136}

\begin{itemize}
\item[\textsuperscript{136}] In re Marriage of Simmons, 825 N.E.2d 303, 309. The court’s description of the facts suggests that Mr. Simmons had not had breast reduction surgery but nevertheless, by all appearances had a “male torso.” \textit{Id.} at 308. Given the wide variation in breast size and shape among as well as between men and women, surely a change of sex cannot depend on breast reduction surgery in such a case.
\item[\textsuperscript{137}] B v. A, [1990] 1 O.R.3d 569, 573–75 (1990) (Change of status requires “some radical and irreversible surgical intervention with all the fundamental reproductive organs, more than their simple removal”).
\item[\textsuperscript{139}] Will, supra note 48, at 89–90.
\item[\textsuperscript{140}] Liberty, \textit{supra} note 73.
\item[\textsuperscript{142}] Morgan, \textit{supra} note 105.
\end{itemize}
many individuals cannot readily comply with surgery requirements either. While Italian courts have apparently carved out an exception to the require-
mment of surgery for those whose medical condition prevents it,\textsuperscript{143} this, too, raises serious line-drawing issues.\textsuperscript{144}

E. Public Policy Rationales

In explaining and justifying the surgery requirement, case and statutory law rely on one or more of four criteria based on supposed public policy concerns. These criteria are (1) sex-appropriate sexual function; (2) sex-appropriate genital appearance; (3) irreversible physical changes; and (4) fertility, or lack thereof. Because concern over enabling “same-sex” marriages permeates these discussions, this section will consider both the explanations courts have given for requiring surgery and the relation of these criteria to marriage more generally.\textsuperscript{145}

1. Sexual Function

Jurisdictions dealing with this issue by statute do not mention sexual function. Many judicial opinions, however, emphasize that the postoperative individual is able to take the role in heterosexual intercourse “appropriate” to her reassigned sex.\textsuperscript{146} For example, one Australian court noted that “[f]unctionally [the respondent] is a member of her new sex and capable of sexual intercourse.” In one early case, a New Jersey appellate court framed sexual function as a crucial condition for sex change:

If ... the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female ... 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.\textsuperscript{147}

\textsuperscript{143} Stefano Febeni, The Rights of Transsexual and Transgender Persons: The Italian Legal Framework and New National and European Challenges (2002), http://tgeu.net/Documents/Co01_I_CGIL_WorkersOut_TgRights.pdf (“Only in a few isolated cases the change of legal sex and name has been authorised even without the surgical intervention ... [in these cases], the intervention had been previously established by the judge but it could not be carried out due to the health conditions of the person concerned.”).

\textsuperscript{144} See infra note 199–201 and accompanying text.

\textsuperscript{145} For purposes of this discussion, I assume arguendo that limiting marriage to different-sex couples is a legitimate public policy. If the opposite were assumed, much of the concern over sex determination would presumably evaporate, inasmuch as sex distinctions in other areas of law are increasingly rare and less emotionally charged.

\textsuperscript{146} This is, perhaps, to be expected, considering that most sex determination cases have arisen in the context of marriage.

As an additional or alternative requirement, Australian and New Zealand courts have noted that the reassigned individual was at least unable to take the role in intercourse appropriate to their birth sex.\textsuperscript{148}

In the context of marriage these criteria might be rationalized on the basis of the traditional requirement of ability to consummate, but Australian legal scholar Andrew Sharpe points out that in the jurisdictions deciding these cases, consummation is largely or wholly irrelevant to the validity of marriages.\textsuperscript{149} Rather, these courts seek "not so much to ensure that a particular sexual practice occur within marriage but rather seek to ensure that other sexual practices do not."\textsuperscript{150} In other words, if it is no longer legally required that the husband be able to sexually penetrate the wife in the traditional way, it is at least expected that the wife must not be able to sexually penetrate the husband (either because the wife has a penis or because the husband has a vagina). The implication is that these would be in some important sense same-sex marriages.\textsuperscript{151} Yet in one way or another all wives can

\textsuperscript{148} Att’y Gen. v. Otahuhu Fam. Ct. [1995] 1 N.Z.L.R. 603, 607 ("Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex"); Dep’t of Soc. Sec’y v. SRA (1993) 118 A.L.R. 467, 493 (Fed Ct. Austl., Gen Div) (Lockhart J.) ("After surgery, a male-to-female transsexual is no longer a functional male.").

\textsuperscript{149} SHARPE, supra note 69, at 91–92.

\textsuperscript{150} Id. at 196.

\textsuperscript{151} Id. at 96 (stating that the focus on genitals is intended to "insulate marriage . . . from perceived ‘homosexual’ practice"). The focus on sexual function is only the most obvious way in which the courts construct maleness and femaleness as essentially heterosexual. As Sharpe notes, "the homophobia of law proves important, if not central, to an understanding of the transgender/law relation." Id. at 141; see generally id. at 89–134. Thus, the appellate court in New Jersey stated—and Singapore’s High Court repeated—that the capacity to marry "requires the coalescence of both physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female," i.e., heterosexually. M.T., 355 A.2d at 209; Lim Ying v. Hiok Kian Ming Eric, [1992] 1 S.L.R. 184, 190 (Sing.) (emphasis added). A few courts have appeared to use litigants’ sexual histories to either confirm or call into question the authenticity of their gender claims. The New Jersey court noted that "[a]s a youngster [the plaintiff] . . . became very interested in boys." M.T., 355 A.2d at 205. By contrast, the Berlin Court of Appeal found a trans woman’s pre-transition marriage to be "a sign of her male orientation at that time." Van Kück v. Germany, 2003-VII Eur. Ct. H.R. 1, 12 (following civil suit against insurance company for denial of reimbursement for sex reassignment surgery, the ECHR held that the German court’s denial that SRS was medically necessary violated the rights to a fair hearing and private life). Even the European Commission on Human Rights, in rejecting the claim of a German trans woman that her country’s requirement of SRS violated fundamental rights, found it significant that “following the dissolution of his [sic] first marriage, the applicant married [a woman] again in 1994 and had another child.” Roetzeheim v. Germany, 91-A Eur. Comm’n H.R. Dec. & Rep. 40, 45 (1997). The implicit conflation of authentic gender with heterosexuality in these opinions is deeply offensive in its heterosexism, and echoes the lingering cultural suspicion that gay and lesbian people are not “real” men and women. As previously noted, supra note 14 and accompanying text, many transsexual men and women are gay, lesbian and bisexual; their identities are no less authentic and their transitions no less complete because they are not heterosexual.
sexually penetrate their husbands if so inclined. In any event, the possibility of particular private sexual acts seems a dubious basis for dividing permitted from prohibited marriages in light of contemporary notions of marital privacy.\textsuperscript{152} If it is not the state’s business what married people actually do in bed, it is no more the state’s business what they are able to do in bed.

2. Appearance

In reviewing relevant court decisions and state statutes, Maryland’s high court concluded that for purposes of gender recognition, it was crucial that “the external genitalia [be] brought into consistency with that indicative of the new gender.”\textsuperscript{153} Noting that “[t]here are many forms of sexual expression possible [in marriage] without penetrative sexual intercourse,” New Zealand’s Family Court emphasized genital appearance rather than sexual function.\textsuperscript{154} The same court stated that while “neither constructed organ needs to be fully sexually functional,” women must have vaginas, and men penises.\textsuperscript{155}

Similarly, in denying a wife’s pension to a pre-operative trans woman, an Australian federal judge mentioned “external genital features” several times, suggesting that in “common English usage” a person born male is said to have changed sex only when they have “assumed, speaking generally, the external genital features of a woman.”\textsuperscript{156} A Canadian court also emphasized the “apparent form” of the genitalia in denying a trans man—who had undergone extended hormone therapy and mastectomy and lived as a man for more than fifteen years—an order for interim spousal support based on a cohabiting relationship of more than twenty years.\textsuperscript{157}

Courts treat this requirement as obvious and reasonable. The statutes and case law indicate no public purpose behind it, however, beyond lawmakers’ discomfort at “the ‘monstrosity’ of the pre-operative body” (i.e., of the man with a vagina and the woman with a penis).\textsuperscript{158} Without a

\textsuperscript{152} See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

\textsuperscript{153} In re Heilig, 816 A.2d 68, 87 (Md. 2003).


\textsuperscript{155} Id.


\textsuperscript{157} B v. A, [1990] 1 O.R.3d 569 (Ont.).

\textsuperscript{158} SHARPE, supra note 69, at 102 (noting that this discomfort is closely tied to the specter of homosexuality).
firm grounding in some recognizable public interest, this preoccupation with the appearance of body parts that are already hidden from public view has no justification.

Instead of a focus on what is unseen in daily life, a focus on what is seen—the gender an individual functions as and presents in daily life—is more consonant with the rationales for prohibiting same-sex marriage recently announced by American courts. While legislatures may believe (despite mounting social science evidence) that "it is better, other things being equal, for children to grow up with both a mother and a father,"\textsuperscript{159} transsexual persons' ability to fill these gendered parental roles does not vary before and after SRS. Similarly, assuming that restricting marriage to different-sex couples is meant to communicate a societal endorsement of different-sex coupling, that message is muddled when many who live and appear as different-sex cannot marry because of socially invisible characteristics.\textsuperscript{160}

3. Irreversibility

A second crucial requirement for recognition noted by the Maryland high court is that "the change is regarded as permanent or irreversible."\textsuperscript{161} \textit{Re Kevin} refers repeatedly to the "irreversible" nature of the applicant's surgery, and that of parties in other cases the court reviewed, apparently hoping to assuage fears about the implications of its landmark decision.\textsuperscript{162}

Courts consider the irreversibility of SRS a bulwark against ill-considered changes of sex, contrasting "irreversible sex reassignment surgery" with "a mere whim."\textsuperscript{163} The court in \textit{SRA} thus described the requirement of SRS as a way of "confirming the person's psychological attitude."\textsuperscript{164} An Australian judge in \textit{R v. Harris and McGuinness} indicated a similar concern with permanence:

The law could not countenance a definition of male or female which depends on how a particular person views his or her own gender. The conse-

\textsuperscript{159} Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); see also Anderson v. King County, 138 P.3d 963, 983(Wash. 2006) ("[T]he legislature was entitled to believe that providing that only opposite-sex couples may marry will encourage procreation and child-rearing in a "traditional" nuclear family where children tend to thrive.").

\textsuperscript{160} This point is complicated, however, by the following: (1) any rule on sex determination would, by one or another definition, permit some same-sex unions and prohibit some different-sex unions, and (2) possession of a marriage certificate is itself invisible; and whether a couple's self-proclaimed marriage is legally recognized is ordinarily assumed by others on the basis of their apparent sex.

\textsuperscript{161} \textit{In re Heilig}, 816 A.2d 68, 87 (Md. 2003).

\textsuperscript{162} Kevin v. Att'y Gen. (\textit{Re Kevin}), (2001) 165 Fam. L.R. 404, 474, 476 (Austl.).

\textsuperscript{163} M.T. v. J.T., 355 A.2d at 207 (quoting trial court opinion).

quence of such an approach would be that a person could change sex from year to year despite the fact that the person's chromosomes are immutable.\textsuperscript{165}

Another judge in the same case concluded that such a rule "would be vulnerable to abuse by people who were not true transsexuals at all."\textsuperscript{166} The now outdated clinical term "true transsexual" assumed that only the unhesitating drive for SRS established the authenticity of trans people's gender identities.\textsuperscript{167}

In addition to "affirming the patient's psychological sex choice," judges have viewed requiring SRS as essential to "protect the public against fraud"\textsuperscript{168}—especially the fraudulent attainment of same-sex marriages,\textsuperscript{169} but also more typical kinds of identity fraud.\textsuperscript{170} "[I]t is dubious," stated one New York judge, "that any one would go through such drastic procedures as sex reassignment surgery for the purpose of deceiving creditors or avoiding the draft."\textsuperscript{171} Courts have generally failed to recognize that an individual undergoing cross-sex hormone therapy to perpetrate such fraud, or living in a gender they don't identify with for many years, is equally unlikely. As one state court recognized, "the probability of so-called fraud, if any, 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 [sic] as a 'female.'"\textsuperscript{172} The lack of any reported

\textsuperscript{165} R. v. Harris & McGuinness (1988) 17 N.S.W.L.R. 158, 170 (Carruthers J.). The significance of the reference to chromosomes here, when the court had already discarded chromosomes as a test of legal sex, is unclear.

\textsuperscript{166} Id. at 181 (Mathews, J.).

\textsuperscript{167} The classification of trans people as "true" and otherwise, although increasingly out of favor in the medical field, has left a deep impression upon jurists, who assume that genital surgery is the only reliable indication that a trans person's gender identity is abiding and authentic.


\textsuperscript{170} This has been a greater concern for courts considering name changes in jurisdictions where such changes are subject to judicial scrutiny. See generally, Sheila Lee Pearson, In re McIntyre: A Victory for Pre-operative Transgender Persons, 8 LAW & SEXUALITY 731 (1998) (surveying transsexual name change cases).

\textsuperscript{171} Anonymous v. Mellon, 398 N.Y.S.2d 99, 102 (N.Y.Sup. Ct. 1977) (declining nevertheless to overrule administrative denial of change of birth certificate since the absence of any single factor determining sex made it "impossible" to hold such a determination arbitrary and without basis).

\textsuperscript{172} Matter of Anonymous, 293 N.Y.S.2d 834, 836 (N.Y.Civ. Ct. 1968). While this case concerned a post-operative individual, the court's reasoning applies equally to those who have not had SRS.
cases of individuals seeking a change of official sex for fraudulent purposes, and the increasing number of methods for tracking and confirming personal identity, suggest that fraud is not a real concern in permitting gender recognition.

4. Fertility

To the extent that the surgical requirement is tied to the prohibition of “same-sex” marriages, it finds no support in the chief rationale upon which that prohibition has been upheld, namely the link between marriage and procreation. In explaining this rationale American courts have noted that “[i]ndividuals may marry regardless of fertility or intent to procreate. The sterile and elderly are allowed to marry, and married couples are not required to have children.” Inability to procreate together is not an impediment to different-sex couples where one has had SRS, and nor should it be for those same couples in the absence of SRS. These same courts have noted that, “if the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns.” The sex determination cases quoted throughout this Note represent just the sort of “grossly intrusive inquiries, and arbitrary and unreliable line-drawing” these courts fear.

Some jurisdictions, including Finland, Germany, Japan, the Netherlands, Portugal, Sweden, and Switzerland, actually require that individuals seeking to change their sex be sterile. Japan has a further requirement, unique in the world, that applicants for gender recognition be childless. Interestingly, while commentators have insisted that “[s]terility must be absolutely certain and permanent,” and debated exactly what should qualify one as sterile, they have not articulated specific justifications for this re-

---


174 Andersen, 138 P.3d at 982; see also Sadler, 821 N.E.2d at 27 (marriage restriction valid “regardless of whether there are some opposite-sex couples that wish to marry but one or both partners are physically incapable of reproducing”).

175 Standhardt, 77 P.3d at 462.

176 Hernandez, 855 N.E.2d at 12.


178 Emerton, Time for Change, supra note 78, at 548 (“Notably, no other country’s legislation makes childlessness a pre-condition for a legal change of gender”).
requirement. Rather, sterility has been treated as self-evident. Critics suggest that these requirements have more than a hint of eugenics about them. While no one has yet suggested that transsexualism is hereditary, some have suggested that transsexual parents are a harmful influence. In Japan, for example, "[t]he rationale for [requiring that individuals have no children] is that children would be confused should a parent change his or her registered sex."

Judges and lawmakers also seem to be prompted by the rather amorphous "fear of the pregnant man," and of the prospect of a woman siring children. For example, an Australian court stated that, "There are, I think, dangers in a male capable ... of procreation being classified by the law as a female," without suggesting what those dangers might be. An earlier Australian tribunal thought such "inherent" dangers "apparent." One ECHR judge, dissenting in the landmark judgment against France, warned of "the possibility of artificial insemination after rectification or after an operation. The whole of civil law and inheritance law could be thrown into confusion."

179 Will, supra note 48, at 88.
180 Stephen Whittle, Gemeinschaftsfremden—or How to Be Shafted by Your Friends, in LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 42 (Leslie J. Moran et al. eds., 1998).
181 Id. A British Government interdepartmental working group observed ominously that "[t]hose states in which there are sterility requirements ... are generally those where, in the past, negative eugenics (the forced sterilization of unfit, asocial, groups of people) was accepted medical practice." UK HOME OFFICE, REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSEXUAL PEOPLE, 2000, 46, available at http://www.dca.gov.uk/constitution/transsex/wgtrans.pdf.
183 Associated Press, Japanese court rejects transsexual's request to change registered gender, ADVOCATE.COM, Feb. 7, 2006, available at http://www.advocate.com/print_article_ektid25191.asp. Robyn Emerton reports, however, that the restriction in fact had no rationale beyond a pragmatic strategy "to propose a very conservative law which [supporters] knew they could get through parliament quickly." Emerton, supra note 78, at 549.
184 UK HOME OFFICE, supra note 183, at 36 (internal quotation marks omitted).
Courts fail to articulate the threatened legal problems because none exist. It would not only be unprecedented but unimaginable for an individual’s parental rights to be called into doubt simply because his or her role in a child’s conception seemed to contradict the parent’s legal sex. Judges assert that “dangers” exist, without meaningful reflection, because of underlying fears of the “bizarre” or “absurd”: female fathers and male mothers, making confusion, not of the law, but of common-sense notions of family roles. Such amorphous anxieties have no place in shaping law.

III. GENDER RECOGNITION, FAIRNESS, AND HUMAN RIGHTS

A legal rule with only a very weak basis in public policy, or even a wholly irrational one, may go unchallenged if its harmful effects are few and slight. The surgical requirement for gender recognition is far from harmless. The following section discusses how this rule results in unequal treatment and real harm to trans individuals’ lives and human rights.

A. The Right to Equal Treatment

None of the cases emphasizing sexual function or genital appearance have involved post-operative trans men. This is significant given “how much more difficult it is to undergo successful female-to-male reconstructive surgery than the male to female.” Surgeries for trans men do not result in a penis “with the full capacity to function sexually as a male” in the sense of erection, penetration and ejaculation. New Zealand’s Family Court cited this differential as one reason for favoring an appearance test over a sexual function test.

The appearance test seems to have the advantage of not operating as a blanket exclusion of trans men. Nevertheless, it too may disproportionately exclude trans men, because current surgical techniques produce a much greater cosmetic approximation of typical genitals for trans women than for trans men. Because it “is more advantageous and burdensome for people seeking legal recognition of their transition from female to male rather than male to female,” Australia’s Family Court has suggested in dicta

188 Likewise, threatened confusion with regard to inheritance—for example, in the interpretation of a will leaving property to “my son” or “my father”—has never materialized in any jurisdiction, and in any case could be avoided by statutory amendment. There have been a few cases in Islamic courts in which family members have sought to deprive trans women of much of their inheritance—since, under Islamic law, daughters are not entitled to as much as sons. The courts have thus far ruled that where the inheritance preceded the transition, their sex at the time decides the issue and the court need not decide whether to recognize a change of sex. See, e.g., Saudi Court Rules in Favor of Transsexual, AL BAWABA, Dec. 16, 2004, http://www.muslimwakeup.com/bb/viewtopic.php?p=12415.


that surgery requirements may operate as "a form of indirect [sex] discrimination."\textsuperscript{191}

Additionally, these criteria are applied only to transsexual persons. As noted above, the ability to engage in traditional sexual intercourse is not a prerequisite for valid marriage in most of the jurisdictions under discussion.\textsuperscript{192} Certainly, a person's status as a man or woman is not usually called into question due to sexual dysfunction. Neither does it depend on possession of a penis or vagina; persons who have lost these features by accident, or had them removed for medical reasons, retain the legal rights associated with their gender. These requirements are visited on trans people because of their inconsistent gender history, a fact beyond their control. Thus, surgical requirements create unequal treatment of trans men in particular, and of trans people in general. These disparities are unfair, and not compelled by any public interest.\textsuperscript{193}

\textbf{B. The Right to Gender Recognition}

The reasons given for requiring SRS seem particularly weak in relation to the individual rights this restriction implicates. Instead of relying on medical expertise or traditional beliefs about gender to determine legal sex, the ECHR's gender recognition jurisprudence has emphasized the individual's "freedom to define herself [or himself] as a female [or male] person."\textsuperscript{194} The Court identifies this freedom as an aspect of the right to private life under the European Convention, and characterizes it as "one of the most basic essentials of self-determination."\textsuperscript{195} In response to the U.K. Govern-
ment's argument that this was a complex and controversial matter within states' "margin of appreciation," the Court in Goodwin stated unequivocally that, "[i]n the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy."\footnote{Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 31.}

It is curious, therefore, that the Court appeared to fasten on SRS as the threshold of states' obligation to recognize that freedom.\footnote{Roetzheim v. Germany, 91-A Eur. Comm'n H.R. Dec. & Rep. 40 (1997) (holding unanimously Germany's SRS and sterility requirements "appropriate" and not in violation of right to private life). As one scholar said of the \textit{R v. Harris} case, "It would seem that humanitarian and libertarian concerns expressed by the majority judges arise only in relation to . . . persons falling on one side of the pre/post-operative dyad." SHARPE, \textit{supra} note 69, at 67.} Surgical requirements make the enjoyment of this "basic" right impossible for individuals with certain medical conditions, as well as those who cannot afford these expensive procedures. For others, gender recognition will remain out of reach for years before SRS can be obtained. The then-Chief Justice of the Family Court of Australia has thus criticized the surgical requirement (albeit in dicta) as "a cruel and unnecessary restriction upon a person's right to [gender recognition, with] little justification on grounds of principle."\footnote{Re Alex (2004) 180 Fam. L.R. 89, ¶ 66, available at http://www.familycourt.gov.au/presence/resources/file/eb001848a4fb4f4/realex.pdf.}

As in Italy, courts and legislators may recognize the inequities involved in a strict surgical requirement yet desire to restrict any exceptions for those who \textit{cannot} have surgery.\footnote{See Febeni, \textit{supra} note 145 and accompanying text.} Any such limitation raises difficult questions. How severe a complication must a patient face from SRS before it is not required? How much more likely than average must the risk of such a complication be? Can a line be drawn between risks affecting "only" quality of life and "serious" medical risks?\footnote{Although no source in English describes the facts of the Italian cases, they likely involved individuals who would have very serious medical risks in having SRS. These cases also likely left questions of line-drawing for later judges.} Should an exception also be made for cases such as SRA, where "financial constraints are the only thing preventing surgery"\footnote{Dep't of Soc. Sec'y v. SRA, (1993) 118 A.L.R. 467, 478 (Fed. Ct. Austl., Gen. Div.) (Lockhart J.).}? These questions illuminate the basic balance involved in making medical interventions a prerequisite for gender recognition. On one side of that balance is any public interest in conformity between legal and anatomical gender. On the other is the individual's right, not only to gender recognition, but to bodily integrity.
C. The Right to Bodily Integrity

Bodily integrity is universally recognized as a fundamental human right, protected by national laws and constitutions as well as international conventions. It is well established that a state violates that right by forcing individuals to undergo invasive medical procedures. The state, however, should not force an individual to forgo one basic right to enjoy another. This is precisely what states do whenever they make surgery a prerequisite for gender recognition.

Several commentators have noted that surgery requirements create perverse incentives; individuals "may find themselves coerced into major surgical operations they otherwise would not have" in order to exercise their right to gender recognition. Under the European Convention, an individ-

---


203 See, e.g., SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 254 (2004) (forced sterilization of women violates ICCPR article 7); Washington v. Harper, 494 U.S. 210, 237 (1990) (Stevens J., concurring in part and dissenting in part) ("Every violation of a person's bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury . . . Moreover, any such action is degrading if it overrides a competent person's choice to reject a specific form of medical treatment."); Winston v. Lee, 470 U.S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' [under Fourth Amendment] even if likely to produce evidence of a crime."); Rochin v. California, 342 U.S. 165, 174 (1952) (forced stomach pumping violates the Due Process Clause); X v. Austria, App. No. 8278/78, 18 Eur. Comm'n H.R. Dec. & Rep. 154 (1980) (stating that compulsory medical procedures, no matter how minor, interfere with the right of bodily integrity and must be justified by public interest); Matter of Slovakia, App. No. 31534/96, Eur. Ct. H.R. ¶ 62–72 at 8–11 (July 5, 1999), available at http://www.echr.coe.int/eng (holding that a forcible examination in mental hospital interferes with the right to privacy; there was no violation in the instant case, however, because the examination was in accordance with law and justified by "protecting the applicant's own rights and health").

204 It would be difficult to find or to imagine another regulation that so squarely puts this kind of choice to the individual. More common are those regulations, forbidden under the U.S. Constitution that condition some discretionary public benefit upon the surrender of a fundamental right. See, e.g., Board of County Comm'rs v. Umbehr, 518 U.S. 668, 673–75 (1996) (holding that the First Amendment protects contractors from retaliatory termination for speech, as well as summarizing free speech cases in the public employment context). The Supreme Court has held more squarely in the federalism context that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all." New York v. U.S., 505 U.S. 144, 176 (1992).

ual cannot be forced by police to choose between a compulsory gynecological examination and indefinite imprisonment. Neither should an individual be forced by statute to choose between an undesired and invasive surgical procedure and the legal rights and formal recognition appropriate to his or her gender. As one commentator put it, putting this choice to individuals amounts to "forcing [them] under the scalpel."

D. The Right to Religious Observance

Like bodily integrity, the right to freedom of religious practice is deeply engrained in constitutional democracies, and should not easily be compromised. As indicated above, for at least some Muslims and Jews the surgical requirement forces a choice between gender recognition and fidelity to religious principles.

E. Balancing Interests

"[T]he fair balance . . . between the general interest of the community and the interests of the individual" is the bedrock of human rights jurisprudence. Yet as the foregoing discussion has shown, the Court's statement in Goodwin that there are "no significant factors of public interest to weigh against the interest of [the] individual [seeking gender recognition]" applies equally whether or not that individual has had SRS. Public unease with pre- or non-operative transsexual bodies cannot outweigh the individual's rights to equal treatment, gender recognition, and bodily integrity. And while post-operative recognition has long been the dominant ap-

---

207 Will, supra note 48, at 93.
208 While some verses in both the Hadith and the Torah would seem to prohibit gender transition altogether, the point here is not one of theological principle but of religious practice. So long as some Muslims and Jews earnestly believe that their religion sanctions transition but prohibits surgery, their right to religious observance does not depend on whether their interpretation is correct or sanctioned by religious authority. See, e.g., Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 715–16 (1981) (holding that religious beliefs need not be logical, consistent, or shared by all members of a religious group to enjoy protection of Free Exercise Clause because "[c]ourts are not arbiters of scriptural interpretation.").
209 Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 25; See supra note 89 and accompanying text.
proach, it is not the only possible approach, as demonstrated by recent events in the United Kingdom.

IV. THE U.K. GENDER RECOGNITION ACT: A MODEL FOR REFORM

A. Passage of the GRA

Parliament can do anything but make a man a woman and a woman a man.\(^{210}\)

U.K. law maintained the position that sex is immutable for over thirty years after the Corbett decision.\(^{211}\) During that time, this position was subjected to frequent criticism as neighboring countries enacted laws or issued decisions recognizing gender transition. A transsexual lobby group, Press for Change, conducted a determined campaign to educate the public and Members of Parliament about trans people and the issues facing them.\(^{212}\) In 1999, the U.K. Home Office formed an Interdepartmental Working Group on Transsexual People, which issued a report on these issues the following spring,\(^{213}\) but no further action was taken until the July 2002 judgment in Goodwin. Five months later, the Government announced its intention to present a bill to provide legal recognition for transsexual people.\(^{214}\) The Gender Recognition Act (GRA)\(^{215}\) passed by wide margins in both houses of Parliament, received Royal Assent on July 1, 2004, and took effect six months later.\(^{216}\)

---

\(^{210}\) Attributed originally to Henry Hubert, Second Earle of Pembroke, who is said to have uttered this phrase in 1648, the saying was further popularized by legal commentator Jean Louis DeLolme in the early nineteenth century and has become a well-known legal proverb. H.A. Finlay, *Sex Change: Medical and Legal Aspects of Sex Reassignment* 117 at n.163 (1988); see 421 *Parl. Deb.*, H.C. (6th ser.) (2004) 1542 (statement of Parliament member Edward Leigh).


\(^{213}\) UK Home Office, *supra* note 183.


\(^{215}\) Gender Recognition Act, 2004, c. 7 (U.K.).

B. How the GRA Works

The GRA permits individuals to apply to a panel—consisting of at least one medical and one legal expert—to have their change of gender recognized and a revised birth certificate issued. Individuals must establish that they (1) have or have had gender dysphoria; (2) have lived for two years in the "acquired gender"; and (3) intend to live in that gender until death.\[^{218}\]

Married applicants receive an "interim gender recognition certificate," and must have their marriage annulled before obtaining full recognition. Individuals who have gone through this process are considered to be the acquired gender for all purposes,\[^{219}\] and access to their original birth certificate will be strictly limited.\[^{220}\]

The GRA is notable for the absence of any specific requirement of medical treatment or body modification. The Government made clear throughout the parliamentary process that,

> The criteria [in the Bill] are designed to establish whether a person has taken decisive steps to live fully and permanently in their acquired gender. That must be the test for legal recognition . . . , not whether the person's physiology fully conforms to the acquired gender and not whether they "look the part." Such tests are inappropriate and inconsistent with our broader ambition to respond to the needs and concerns of a small minority group.\[^{221}\]

This position reflected the Government's determination to "avoid discriminating against people who for some medical reason unconnected with their gender are unsuitable for particular kinds of surgical, hormonal or other treatment," or who due to finances or hospital waiting lists must wait

\[^{217}\] The appointed membership of the Panel must include both one or more experienced attorneys and one or more doctors or licensed psychologist. Gender Recognition Act, 2004, c. 7, §1(4), sched.1 (U.K.).

\[^{218}\] Id. § 2(1). Alternatively, individuals may obtain recognition based on their change of sex in another country with similar or stricter standards. Id. § 2(2). For information on the application process and the makeup of the Gender Recognition panel, see generally Gender Recognition Panel, http://www.grp.gov.uk (last visited Sept. 22, 2006).

\[^{219}\] Private sports associations are exempted. Gender Recognition Act, 2004, c. 7, § 19 (U.K.). Similarly, members of the clergy with sincere religious objections are not required to marry couples where one spouse is transsexual. Id. § 11, sched. 4. Both of these provisions were subject to extended discussion. See, e.g., LIBRARY OF THE HOUSE OF COMMONS, RESEARCH PAPER NO. 04/15, THE GENDER RECOGNITION BILL 24, 45, 52 (2004), http://www.parliament.uk/commons/lib/research/rp2004/rp04-015.pdf (summarizing Lords debate).

\[^{220}\] See Id. §22.

years to receive surgeries. This position was taken from the time the Bill was first introduced, and—despite its relative novelty—seems to have been questioned only by those who opposed the entire Bill on principle. An amendment in the House of Lords which would have required surgery was quickly withdrawn after peers called it "wrong" and "quite unnecessarily cruel." They noted the risks of surgery, and that certain medical conditions could increase those risks. And while a committee report indicated concerns that "the Draft Bill, by extending beyond post-operative transsexuals... comes perilously close to giving legal recognition to a lifestyle choice," no one ever proposed distinguishing between those who could not obtain surgery for the financial and medical reasons urged by Government ministers and those who merely made "a lifestyle choice."

The Government also made clear that, while applicants for gender recognition must "intend" to continue to live in the acquired gender until death..., the law does not contemplate legal transition as irreversible, and it is possible for individuals to go through the process more than once. Despite the emphasis placed on irreversibility in other countries, there were no suggestions in Parliament to make the process irreversible. There was, however, debate over amendments—ultimately withdrawn—which would have made returning to one's birth sex easier than the initial transition, by permitting the revocation on demand of a gender recognition certificate. In the House of Commons, the bill's sponsor noted that the number of people who reverse their gender transition is very small, and argued that in any case, "the criteria in the Bill for changing gender should apply equally to a

225 JOINT COMMITTEE ON HUMAN RIGHTS, supra note 224.
226 The absence of any absolute requirement of hormone therapy was never discussed. It is worth considering whether the relative absence of controversy over the Bill, and over the absence of a surgery requirement in particular, owed anything to Members' acceptance of arguably erroneous facts. Backers of the Bill often stated that "[s]uch people who do not have surgery are few." 656 PARL. DEB., H.L. (5th ser.) (2004) 375 (remarks of Lord Filkin). The Bill's leading opponent, on the other hand, contended that "some 50 per cent" never have SRS. 655 PARL. DEB., H.L. (5th ser.) (2004) 1311 (remarks of Baroness O'Cathain). Similarly, proponents frequently pointed out that the Bill dealt with very small group of people numbering no more than 5,000. But, as noted above, that number may represent a serious undercount. See discussion supra note 13. Might Members have voted differently had they believe there were as many as 15,000 or 20,000 transsexuals in the country, and that a great many of them had not had and would not have surgery? See also SHARPE, supra note 69, at 184–85 (discussing these issues in the context of law reform in Western Australia).
person who seeks recognition in the acquired gender and to a person who wishes to return to being recognized in the birth gender.228

While it does not mandate irreversibility, however, the law is unlikely to permit the “switching back and forth” that some have feared. An amendment in the House of Lords to limit persons to two changes of gender status was withdrawn after the bill’s sponsor suggested it was virtually redundant. “I cannot conceive of a situation where a panel would be open to persuasion,” he said, that an individual who had transitioned twice before genuinely intended to live in the once-again-acquired gender until death.229

Another striking feature of the Bill, emphasized by Government ministers and other Bill supporters, is that “[t]he individual is in control of the process” of gender recognition.230 In response to concerns that individuals would be forced to divorce, or to forego pension rights, by virtue of their change of legal status—concerns which consumed the bulk of debate on the Bill—supporters echoed again and again the concept of “informed choice.”231 Transsexual persons “do not have to go all the way to gender recognition; they can live the life and have the surgery without necessarily applying for the gender recognition certificate.”232 This means that an individual and her spouse would remain legally members of the opposite sex, despite appearing to the entire world as a same-sex couple.

C. The Best Available Option

Under the GRA sex is no longer a fact to be assessed by courts of law, but is an administrative status that changes only through an administrative process.233 Courts will no longer look to individuals’ actual sex characteristics, but to their birth certificate, which will reflect whether they have gone through that process. Thus, married couples can be either of the same

---

232 Id. at GC96.
233 This is apparently the case in some of the United States as well, except that in the absence of a special panel for transsexual persons, individuals must apply directly to the vital statistics bureau. See, e.g., HAW. REV. STAT. § 338-17.7(a)(4) (2006) (sex change established by submitting affidavit by physician to registrar); N.C. GEN. STAT. § 130A-118 (2006). But see infra, note 96 (birth certificate not always decisive).
birth sex, or of the same social sex—or, potentially, both—so long as they are not of the same legal sex. In this sense, legal sex under the GRA was aptly described by one Member of Parliament as simply a “bit of paper.”

Nevertheless, this “bit of paper” controls individuals’ legal rights and responsibilities. Transsexual individuals have a unique freedom under the GRA to choose their legal gender irrespective of their actual gender. But while individuals need not choose surgery to obtain recognition, the GRA’s scheme carries with it the necessity of making other potentially painful choices. For example, some are forced to choose between a birth certificate that reflects who they are, and remaining in a valid marriage, or obtaining a public pension.

Additionally, replacing the false assurance of a “bright-line” surgical requirement with the vague standard of “living in the acquired gender” carries certain risks. Reliance on illegitimate stereotypes about how men and women “live” could result in inequitable decisions. While the expert composition of the Gender Recognition Panel may minimize this danger, inquiries into whether an individual is “living in the acquired gender” also have the potential to be quite intrusive.

By eschewing a requirement of surgery, or any test of “true sex,” the GRA, (in the words of one of its staunchest opponents,) “abandons absolute beliefs about sex and gender.” Having gone this far, and in light of the continuing difficulties posed for trans people by legal distinctions between men and women, there might seem to be little purpose in retaining such legal distinctions at all. Legal distinctions between racial groups were once pervasive in American law, but have since been universally rejected as

---

234 This would be the case where an individual obtained a gender recognition certificate, married, and subsequently returned to living in her birth sex, but decided to forego legal recognition.

235 HOUSE OF COMMONS STANDING COMMITTEE A, GENDER RECOGNITION BILL, 2004, H.C. 083, available at http://www.publications.parliament.uk/pa/cm200304/cmstand/a/st040311/am/40311s02.htm (remarks of Mr. Shaun Woodward). Mr. Woodward aptly described the situation thus created as “a ludicrous pickle.” Id. at 084. In semiotic terms, legal sex under the GRA verges on the “radical disconnection between signifier and signified...” that characterizes the “empty signifier.” DANIEL CHANDLER, SEMIOTICS: THE BASICS 74 (2002).

236 See infra notes 111–28 and accompanying text.

237 Such inquiries, and the kinds of evidence they are likely to rely upon, also bear an unsettling resemblance to nineteenth-century American trials in which courts looked to the testimony of neighbors and associates to determine a person’s racial identity. See generally Ariela J. Gross, Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South, 108 YALE L.J. 109, 147–51 (1998) (surveying cases in which courts heard testimony about a person’s social company to determine his or her race).

unconscionable and unconstitutional. The number of areas in which legal sex distinctions are made is also in decline, in Britain as elsewhere. Nevertheless, serious political barriers and some significant policy concerns—for example, the areas of prison security and antidiscrimination law—make the wholesale abolition of legal sex distinctions an unlikely prospect at the present time. In this context, the GRA represents the most fair and sensible legal approach to gender recognition yet seen.

V. CONCLUSION

Recent developments in a variety of jurisdictions evidence a strong international trend toward gender recognition for some transsexual people. But while gender recognition for some is increasingly recognized as sound social policy, and (at least in Europe) as an important human right, trans men and women who have not undergone sex reassignment surgery are almost uniformly denied this right. Large numbers of trans people live without such surgery due to medical conditions, financial constraints, fear of complications, religious beliefs, or simply by personal choice. Attempts to justify the denial of gender recognition to these individuals reveal misuse of medical science, baseless fears, and irrational prejudice. Despite increasing respect by courts and legislatures for the human rights of transsexual people—not least the right to gender recognition—surgical requirements compromise their rights to equal treatment, bodily integrity, and religious observance.

The vague and often conclusory explanations given by courts and commentators for the surgical requirement suggest that it is based on faulty assumptions more than on careful consideration. Rather than having considered and rejected them, decision-makers appear unaware of the compelling

---


241 Although a recent act has eliminated sex-based partnership rights in all but name, significant public opposition to sex-neutral civil marriage persists. Civil Partnerships Act, 2004, c. 33 (U.K.).

242 As in the United States, the Equal Pay Act, 1970, c.41 (U.K.), as well as the Genuine Occupational Qualification defense to employment discrimination suits, Sex Discrimination Act, 1975, c. 65, §7 (U.K.), both rely on explicit sex distinctions. Eliminating these distinctions while still serving the statutes’ purposes would pose significant, though perhaps not insurmountable, difficulties.
reasons why many transsexual individuals cannot have SRS, choose not to have it, or must delay it for many years. Moreover, they have been strongly influenced by the outdated notion that only SRS can confirm the authenticity and permanence of gender transition. In other words, “there are no significant factors of public interest to weigh against the interest of [the] individual applicant in obtaining legal recognition of her gender re-assignment,” regardless of whether he or she has had such surgery.\footnote{Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1, 32.}

The United Kingdom’s Gender Recognition Act represents a clear and deliberate break from jurisdictions requiring surgery. In the first two years of its operation, the Gender Recognition Panel processed over nine hundred applications, of which about two percent were rejected.\footnote{440 PARL. DEB., H.C. (6th ser.) (2005) 2549W. Another 240 applications had been received but not processed. \textit{Id.} The rate of applications will naturally begin to decrease after the first year, as the system is currently facing a “backlog” of people who would have applied for gender recognition years ago had it been available.} As this process continues and ill social effects fail to materialize, the GRA will stand as an example for other nations that surgical requirements are not only cruel but unnecessary.

\textbf{POSTSCRIPT}

As of this writing, the Spanish government is poised to pass a bill that, like the GRA, would enable gender recognition without surgery.\footnote{BOCG, Senado, 2006, 79(a) (Spain) (as transmitted to Senate on 28 November 2006), \textit{earlier draft available in English at} \url{http://www.pfc.org.uk/PL_transsexual_PSOE.pdf}.} As in the UK, the bill would require that applicants have lived in their authentic gender for at least two years.\footnote{\textit{Cabinet Backs Legal Status for Transsexuals’ New Gender,} EL PAIS, June 3, 2006, at 1, \textit{available at} 2006 WL 9509889. In contrast to the GRA, it appears the Spanish bill will not affect pension eligibility. \textit{Id.}} Since same-sex marriage is recognized in Spain, eligibility to marry is a non-issue. This fact will no doubt ease the passage of this bill and perhaps prompt the passage of others like it in jurisdictions embracing same-sex marriage.