

SHOULD A TRIP FROM ILLINOIS TO TENNESSEE CHANGE A WOMAN INTO A MAN? : PROPOSAL FOR A UNIFORM INTERSTATE SEX REASSIGNMENT RECOGNITION ACT

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In Illinois, a transgender woman¹ who has had sex reassignment surgery can request an amendment to her birth certificate to change her legally-recognized sex (legal sex)² from the sex assigned at birth to one she chooses later in life.³ Though she was born male, she can become legally

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¹ “Transgender” is defined as “having personal characteristics (as transsexuality or transvestism) that transcend traditional gender boundaries and corresponding sexual norms.” Hudson’s FTM [Female-to-Male] Resource Guide, FTM Basics: Terminology, <http://www.ftmguide.org/terminology.html> (last visited Apr. 7, 2008). For clarification, in this Article a “transgender person,” “trans person,” or “transsexual” is a person whose sex identity is not consistent with some or all external and internal indicators of sex. A “transgender man” is a person born female who has adopted a male identity. A “transgender woman” is a person born male who has adopted a female identity. An “intersex” person is someone with ambiguous or inconsistent physical sex characteristics, such as a person with both male and female genitalia or a person who has XY sex chromosomes, but female genitalia. See The Intersex Society of North America, What Is Intersex?, http://www.isna.org/faq/what_is_intersex (last visited August 26, 2007). The term “post-operative,” as this Article will explore below, is highly problematic and may be used to describe a person who has undergone any of a broad range of procedures in order to more closely conform to the person’s sex identity.

² “Sex” and “gender” are terms which courts often use interchangeably, but have different meanings. In this Article, “sex” refers to physical, biological, and psychological components which make a person male, female, or intersex. “Legal sex” refers to the recognition given to the person by courts, legislatures, and administrative agencies, which in most instances will also be the person’s physical sex, but may conflict for some individuals in some jurisdictions, as will be explored below. For example, a person could be physically female—possessing a vagina and breasts and generally identifiable as a woman—but could be legally considered male in some states if chromosomally XY. That person would be of the female sex in most respects, but her legal sex would be male.

³ 410 ILL. COMP. STAT. ANN. 535/17 (LexisNexis 2006).

female by amending her birth records. She is able to marry a man, adopt a female name, and incorporate her female identity into her legal life.⁴ However, were this woman to leave Illinois and enter Tennessee, she would become legally male once again.⁵ Though she may have breasts, a vagina, a husband, and an Illinois birth certificate stamped “female,” this person would always be considered legally male in Tennessee. Her sexual identity, her marriage, and her physical body become irrelevant. In Tennessee, a person identified as male at birth is male for life.

States traditionally determine their own marriage requirements and issue their own birth certificates.⁶ The resulting disparate treatment of transgender people across jurisdictions in the United States has created both practical and constitutional concerns⁷ that warrant the implementation of a uniform system for sex reassignment recognition nationally.⁸ Individuals are constantly being classified as either male or female, through mechanisms as diverse as employment records, birth records, driver’s

⁴ *Id. But see* In re Marriage of Simmons, 825 N.E.2d 303, 309 (Ill. App. Ct. 2005) (holding that the trial court’s decision to amend the birth certificate was against the great weight of the evidence because the petitioner had never undergone genital constructive surgery as indicated in his affidavit and therefore still possessed female genitalia, but implying that if petitioner had undergone additional surgeries before marriage, he would be legally male).

⁵ “The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.” TENN. CODE ANN. § 68-3-203(d) (2001).

⁶ Julie Greenberg, *When is Same-Sex Marriage Legal? Full Faith and Credit and Sex Determination*, 38 CREIGHTON L. REV. 289 (2005) (noting that before the passage of the federal Defense of Marriage Act, states had exclusive authority to determine which marriages were valid).

⁷ These problems include impediments to free movement, which arguably violates the right to travel under the dormant commerce clause. Julie Greenberg & Marybeth Harold, *You Can’t Take It with You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 WASH. L. REV. 819, 884 (2005). Also, imposing a system of sex recognition for determining access to state rights arguably violates equal protection. *Id.* at 863. Greenberg points out that such constitutional problems could easily be avoided by allowing same-sex marriage in all states, but also rightly says that “as long as laws continue to differentiate between men and women, legal institutions will be required to determine exactly what makes a man a man and what makes a woman a woman.” *Id.* at 822.

⁸ For a discussion of a federal legislative approach to this issue, see Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169 (2008) (proposing federal legislation modeled on the Gender Recognition Act adopted in the United Kingdom).

licenses, passports, restrooms, and interactions with law enforcement. Transgender people may present gender-signifying characteristics or documentation that are contrary or inconsistent, complicating these routine interactions.

What happens, for example, when a male-to-female transgender person chooses to marry a man? A particular state's policy for recognition of her new identity may prevent her from marrying in that state. Or, she may fear that her marriage will not be recognized once she and her husband move to another state.⁹ That fear is legitimate. Even when a state does provide a mechanism for changing one's legal sex, the state's chosen procedure may not be entitled to full faith and credit in other states.¹⁰ As the law currently stands, Tennessee will not recognize a marriage contracted in Illinois between a man and a transgender woman, because Tennessee considers this a same-sex marriage.¹¹ There is very little certainty or security for transgender people, their partners, and their children when they cross state borders into a jurisdiction where such a rule exists. As a transgender person's legal status (and, potentially, the validity of her marriage) varies from state to state, and so too does her ability to recover damages in tort, to receive spousal support after divorce, to gain custody of marital children, or even to marry in the first place.¹²

These difficulties raise a variety of state and federal issues, and the solution that this Article explores and proposes in response is model state legislation. A model or uniform act has several advantages over other potential responses to the problem of systemic disadvantages for transgender people. First, it is not clear that a comprehensive solution to this problem is within the commerce clause powers of Congress.¹³ Second,

⁹ The federal Defense of Marriage Act (DOMA) states: "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State" 28 U.S.C. § 1738C (2000).

¹⁰ See generally Greenberg, *supra* note 6.

¹¹ TENN. CODE ANN. § 68-3-203(d) (2001).

¹² See *infra* Part II.

¹³ In *United States v. Lopez*, the Supreme Court held that Congressional authority under the Commerce Clause is limited to activities that are actually commercial. 514 U.S. 519, 565 (1995). The Court invalidated the Gun Free School Zones Act on the grounds that its connection to interstate commerce was too attenuated. It is likewise possible that courts would find a federal statute governing amendments and recognition of identification documents insufficiently related to interstate commerce.

though it takes time for uniform legislation to be adopted in every state, a model code provides useful reference for interpreting existing law and establishing public policy, as a form of persuasive soft law, similar to the Restatements of Law.¹⁴ A model code would also allow states to adapt the legislation to their particular needs, while still keeping the general purpose and scope of the model intact.

A Texas case, *Littleton v. Prange*, provides an example of the flaws in the current system and suggests the foundation for a model act addressing legal recognition for transgender people in the context of marriage rights. Christie and Jonathon met and married in Kentucky but later moved to Texas to live.¹⁵ During the marriage, the couple conducted themselves as husband and wife. They engaged in sexual intercourse and filed joint tax returns.¹⁶ When Jonathon, who was married previously, fell behind on child support payments to his ex-wife, the Attorney General of Texas required Christie to fulfill his child support obligation as his legal spouse under Texas's community property system.¹⁷ When Jonathon died, Christie attempted to bring a wrongful death claim as his surviving spouse, but was barred by the state court from doing so because she was found to be legally male and as such her marriage to a man was, per se, invalid.¹⁸ Though the state had treated the couple as legally married for years, the court declined to allow Christie to recover damages for her husband's death because Christie had been born male and therefore could not be legally married to another man in Texas.¹⁹ Married couples like Christie and Jonathon cannot freely travel or settle in all fifty states, as they risk invalidating their marriage and forgoing all of the rights that marriage entails.²⁰

¹⁴ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS (1981).

¹⁵ Phyllis Frye & Alyson Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1048-49 (2001) (describing the marriage between Christie and Jonathan, a male/female couple who consummated their marriage and held themselves out to the community as married).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that notwithstanding her birth certificate amendment and longstanding marriage, Christie could not be considered female and her marriage was voided by the state's prohibition on same-sex unions).

¹⁹ *Id.*

²⁰ For a full discussion of the impact such rulings have had on transgender people and an analysis of the constitutional implications, see Greenberg & Harold, *supra* note 7.

While at this time there is no recognized constitutional right to change one's legal sex, the lack of an organized system to recognize sex reassignment in the United States has created an unconstitutional deprivation for transgender people.²¹ Sex has always been a major factor in assigning rights and privileges to an individual, and uncertainty as to legal sex creates uncertainty as to sex-linked rights. Historically, in the United States, women could not vote, own property, or make contracts to the same extent as men.²² Though many such restrictions have now fallen away, sex still determines whether one can be drafted, whom one can marry, and to which prison one may be assigned.²³ To complicate matters, many transgender people do not have access to the medical procedures needed to establish a legal sex change in many states, and many choose not to undergo the costly and dangerous surgery because they consider it unnecessary to their sexual identity. These individuals are excluded from the scant legal protections afforded to persons who have undergone sex reassignment procedures.²⁴ Because no uniform system exists for determining a person's sex at any stage in their sexual transition, a transgender person's status relative to sex-segregated rights and privileges remains ambiguous, especially when traveling from state to state. To protect these rights and privileges, the current assortment of statutes²⁵ that recognize or modify legal sex must be reformed. This is a matter of urgency, not simply as a form of justice for transgender people who may find themselves in the "wrong" prison, hospital ward, or homeless shelter, but also for courts and administrative agencies that must do the day-to-day work of placing individuals into categories and dealing with inconsistencies. Thus, a person should have the same legal sex in every state, and the procedures for determining and changing legal sex should be uniform, consistent, and reasonable, incorporating up-to-date medical knowledge and humanistic principles of independence and self-determination.

This Article will discuss several theories of sex determination, including various legal frameworks used in case law and medical frameworks suggested by scientific studies that may broaden our

²¹ See Greenberg, *supra* note 6.

²² Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213, 214 (2005).

²³ *Id.*

²⁴ See *infra* Part II.B.

²⁵ See *infra* Part I.B.

understanding of sexual identity and development. Part I.A presents the various standards currently in place for determining, changing, and recognizing a person's sex, noting that the legal standards used by courts may not be consistent with medical knowledge.²⁶ Part I.B introduces the statutory responses to sex reassignment and explores the troubles a transgender person may encounter in obtaining legal recognition of his or her sex reassignment, as well as the implications of the Full Faith and Credit Clause and the Defense of Marriage Act on state to state recognition of sex reassignment. Part II.A presents the impracticability of continuing to use birth certificates as *prima facie* evidence of legal sex, and Part II.B analyzes responses to the problem of gender status modification by New York City and the United Kingdom.²⁷ Finally, in Part II.C, this Article proposes a uniform state statute for recognition of sex reassignment, which would create a seamless system for recognition, amendment, and declaration of a person's legal sex. By balancing the legal and medical theories of sex determination with a humanistic approach that prioritizes respect for self-determination, it is possible to create a two-pronged system of legal recognition for sex reassignment that is accessible, fair, and just.

I. SCIENCE, CASE LAW, AND STATUTES: DISPARATE APPROACHES TO TRANSGENDER ISSUES

Sex determination is a troublesome and complex issue in part because it seems so simple at first glance. In most delivery rooms, the question of "boy or girl" is not met with deliberation or debate.²⁸ Sex is usually easily determined at birth—and later in life—by simply looking at external physical characteristics.²⁹ New parents would be confused and concerned if they asked the doctor whether the baby was a boy or a girl, and she replied that she did not know. However, as the topics of intersex and transgender have become less taboo to recognize and discuss, it has become clearer that a person's sex cannot always be determined just by "looking."

²⁶ See *infra* Part I.A.

²⁷ See *infra* Part II.

²⁸ Matambanadzo, *supra* note 22 (noting that the "sexing" process begins immediately after birth and that dichotomous division at this point is regarded as natural).

²⁹ ANNE FAUSTO-STERLING, *SEXING THE BODY* 53 (2000) (concluding that 1.7 percent of all births involve some type of intersexual condition).

Sex and gender experts now consider eight factors when they make a determination of sex.³⁰ The factors include chromosomal sex, gonads, internal morphology, external morphology, hormones, phenotype, assigned sex, and self-identity.³¹ Although in most cases these factors all lead to the same conclusion, in a significant fraction of the population they present contradictions that must somehow be resolved.³² There are several theories of sex determination permeating the judicial, medical, and statutory systems affecting transgender individuals,³³ but most courts have given preference to one theoretical approach over the others, just as they have given more weight to some of the eight factors than others.³⁴

³⁰ JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES* 4 (2d ed. 1994).

³¹ *Id.* Chromosomal sex is determined by looking at a person's genetic makeup: a normal female has two X chromosomes, and a normal male has one X and one Y. Gonads are sex glands that produce gametes (sperm or ova), and so gonadal sex is determined by possession of either testes or ovaries. Morphology consists of the size, shape, and structure of an organism or its parts; internal and external morphology are the shape and structure of a person, regardless of functionality. Hormones are substances secreted by the body which affect physiological activity; concentrations of particular sex hormones are normally associated with one sex or the other. A phenotype is comprised of the observable characteristics of an organism and is distinguishable from a genotype (genetic characteristic) because it is possible for two organisms to have the same observable characteristics but not the same genetic make-up. Assigned sex is the sex designated for a person. Self-identity is a person's own determination of her sexual identity. *Id.*

³² There are no reliable data available to indicate the commonness of transgenderism. The Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) indicates that studies held in European countries have found about one out of every thirty thousand males and one out of one hundred thousand adult females seek sex reassignment surgery, American Psychiatric Association, *Gender Identity Disorder*, in *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (Text Revision, 4th ed. 2000), but since not all transgender people seek sex reassignment surgery, this estimation is necessarily low. According to the Intersex Society of North America (ISNA), approximately one out of every fifteen hundred births has noticeably atypical features that require a specialist in sex differentiation. Intersex Society of North America, *How Common Is Intersex?*, <http://www.isna.org/faq/frequency> (last visited May 25, 2008). Additionally, there are subtle features or sex differences that do not appear until later in life, resulting in an estimate from ISNA that one in every hundred births has a feature or characteristic not consistent with "normal" male or female standards. Intersex Society of North America, *supra*.

³³ See *infra* Parts I.A-C.

³⁴ Compare *B. v. B.*, 78 Misc. 2d 112, 115 (N.Y. Sup. Ct. 1974) (requiring a showing of sexual function for a transgender person to marry as a member of his sex identity and, therefore, weighing physical factors most heavily and adopting a medical approach), with *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio Prob. 1987) (emphasizing only the legal

A. The Courtroom and Sex Determination

Courts have taken various approaches to determining legal sex in cases involving transgender or intersex individuals.³⁵ However, few courts have adopted an analytical approach that acknowledges or incorporates even half of the factors used by the medical community.³⁶ In the United States, the first rule of judicial sex determination commonly applied by courts was the *Corbett* rule, named for the first British case to address the validity of a transgender person's marriage.³⁷ The *Corbett* court determined that sex is immutably fixed at birth and cannot be altered by medical or legal intervention later in life.³⁸ The assumption underlying this rule is that a person's sex can be easily and accurately determined at birth through traditional means (in other words, examining the external physical characteristics of the baby), and that this easily-determined sex cannot be altered by medical procedures.³⁹ Though many states have now abandoned this rule, some state courts and statutes continue to focus on external sex characteristics, genetics, and gonads in making their determinations, while some go even further by requiring specified sexual functionality or the

status of the parties rather than any physical traits, and thus adopting a statutory approach to sex determination), and *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999) (holding that sex is immutable and fixed by God at birth, thus adopting a religious or pre-deterministic approach).

³⁵ See *infra* Parts I.A.1-5. The issues faced by intersex individuals contesting their assigned gender identity in the courtroom is beyond the scope of this Article, but for additional information about intersex conditions, see *What Is Intersex?*, *supra* note 1; see also, e.g., Emily A. Bishop, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment*, 82 N.Y.U. L. REV. 531 (2007).

³⁶ See *infra* Parts I.A.1-3.

³⁷ The case involved a marriage between a man and a transgender woman. The husband filed for a declaration voiding the marriage after only two weeks, on the grounds that his spouse was a man and could not legally be married to another man. The court looked only at chromosomes, gonads, and external sexual organs as factors for determining legal sex. The ruling, though acknowledging that the medical community uses more factors to determine sex, limited a person to the sex assigned at birth. Unless an error occurred in the initial determination of the newborn's sex, the *Corbett* ruling forbids changing the legal sex later in life. *Corbett v. Corbett*, (1970) 2 All E.R. 33.

³⁸ *Id.*

³⁹ See *Matambanadzo*, *supra* note 22.

ability to procreate.⁴⁰ This Part will discuss recent developments in both the medical and legal processes for sex determination in order to establish the best strategies for integration of accepted medical standards into legal rules and reasoning.

1. Gender Reassignment in United States Courts: Sexual Function, Genitalia, and Marriage

Courts in the United States first addressed the problem of post-operative transgender persons' legal status in the early 1970s.⁴¹ Early cases typically involved the disputed validity of a marriage between a post-operative transgender person and a member of his or her originally-determined sex.⁴² The validity of such a marriage has bearing on, *inter alia*, divorce, intestacy, and tort claim rights of transgender individuals seeking legal recognition of their sex identity and the right to marry as a member of that sex.⁴³ Many of the courts that faced the question of whom a transgender person might legally marry focused on sexual function and genitalia in their analysis.⁴⁴

One of the first U.S. cases to discuss whom a transgender person could legally marry, *B. v. B.*, arose in New York in 1974.⁴⁵ In this case, a transgender man had undergone a hysterectomy and mastectomy and was undergoing hormone therapy treatments, but retained external female sex

⁴⁰ See *In re Gardiner*, 22 P.3d 1086, 1092 (Kan. Ct. App. 2001), *rev'd*, 42 P.3d 120 (Kan. 2002) (relying on dictionary definitions of male and female). "'Male' is defined as 'designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*.' 'Female' is defined as 'designating or of the sex that produces ova and bears offspring: opposed to *male*.'" *In re Gardiner*, *supra*; see also *B. v. B.*, 78 Misc. 2d 112, 117 (N.Y. Sup. Ct. 1974) (voiding a marriage because the husband's physical alterations still did not allow him to perform a male sexual role, and he was therefore female); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (holding that a transgender woman was not female, despite physical alterations and an amended birth certificate, because at birth she was both anatomically and genetically male).

⁴¹ See *B. v. B.*, 78 Misc. 2d at 115; *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971); *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. App. Div. 1976); *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio Prob. 1987); *Littleton*, 9 S.W.3d at 225.

⁴² See *B.*, 78 Misc. 2d at 115; *Littleton*, 9 S.W.3d at 225; *M.T.*, 355 A.2d at 211.

⁴³ See *infra* Part I.A.1.

⁴⁴ See *infra* Part I.A.1.

⁴⁵ *B.*, 78 Misc. 2d at 115.

organs.⁴⁶ He had legally changed his name from Marcia to Mark and married a woman who apparently believed that Mark was a man and had male genitalia at the time of marriage.⁴⁷ She then brought an action seeking an annulment of the marriage on the grounds that Mark was really female and could not legally be married to another female.⁴⁸ In deciding that the marriage was invalid, the court noted that, under New York law, a marriage could be annulled when one party lacks physical capacity for sexual activity.⁴⁹ Because Mark lacked the male genitalia necessary for penetrative sexual intercourse as a man, the court found that he was not able to fulfill a husband's duties and obligations in marriage.⁵⁰

Though this ruling established that sexual function or external genitalia of one's sex identity are *necessary* for a valid marriage, the court did not address whether sexual function alone is *sufficient* for a valid transgender marriage. The court also remained silent with respect to factors to consider in determining whether this physical requirement has been met. Some post-operative transgender individuals are physically capable of engaging in penetrative intercourse as members of their respective self-identified genders,⁵¹ and would therefore be able to pass the sexual function test as articulated in *B. v. B.* However, many other transgender persons cannot engage in penetrative intercourse, even though they may have surgically constructed external genitals. This ruling is also of questionable applicability in states that no longer allow marriage annulments based on sexual capacity. If a state does not have a statute similar to New York's, allowing for an annulment based on sexual incapacity, then this holding

⁴⁶ *Id.*

⁴⁷ *Id.* at 113 (noting that the plaintiff wife's complaint said that the defendant husband fraudulently misrepresented that the husband was male).

⁴⁸ *Id.* at 118. Mark filed a motion for leave to amend his answer to counterclaim for divorce on the grounds that the plaintiff had abandoned the marriage. The court denied leave to amend because they found that no valid marriage existed and so there could be no divorce, rendering a counterclaim unnecessary. *Id.*

⁴⁹ *Id.* at 117.

⁵⁰ *Id.* at 118 ("Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable the defendant to perform male functions in a marriage. Attempted sex reassignment by mastectomy, hysterectomy and androgynous hormonal therapy, has not achieved that result. . . . While it is possible that defendant may function as a male in other situations and in other relationships, defendant cannot function as a husband").

⁵¹ See *supra* notes 15-17 and accompanying text.

would appear to be inapplicable. Also, a court might be inclined to distinguish this case from one where the facts established show that both parties to the marriage were aware of their partners' transgender status and no fraud occurred.

Another early New York case also dealt with a transgender person's contested marriage, but did not focus on the sexual incapacity statute. *Anonymous v. Anonymous* reached state court in 1971 when a plaintiff sought a declaration as to his marital status.⁵² When the parties met in 1968, the plaintiff apparently believed that the defendant was a woman and continued to believe this until they were married in 1969.⁵³ The two had never lived together or engaged in a sexual relationship until their wedding night, at which time the plaintiff husband discovered that his new wife possessed male sexual organs.⁵⁴ After this discovery the parties separated, but the defendant wife continued to correspond with plaintiff and received a share of plaintiff's military pay.⁵⁵ During the separation, the defendant wife underwent sex reassignment surgery so that at the time of the action she no longer had male sexual organs and was therefore capable of penetrative intercourse.⁵⁶ The court held that, regardless of the procedures the defendant had undergone in the interim, at the time the marriage was formed the defendant possessed male sex organs and was thus male; therefore, he could not legally have married another male.⁵⁷

Though the court left the door open to finding, under different facts, that a person's sex reassignment surgery could enable him to marry as a member of his new sex, it made clear that such physical changes must be in place at the time the marriage is formed or the marriage will not be valid.⁵⁸ This verdict strictly enforced traditional sexual roles and valued penetrative genital intercourse over other forms of sexual contact. Combined with *B. v. B.*, this case established that a transgender marriage cannot be valid unless,

⁵² *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 500.

⁵⁷ *Id.* ("The court finds as a fact that the defendant was not a female at the time of the marriage ceremony. It may be that since that time the defendant's sex has been changed. . . . What happened to the defendant after the marriage ceremony is irrelevant.").

⁵⁸ *Id.*

at the time the marriage is formed, the transgender spouse possesses the sex organs typically associated with his or her sex identity and can fulfill the traditional sexual role opposite to her spouse. Significantly, while the rule does not exclude the possibility of some transgender marriages being legally recognized, both cases invalidated the transgender marriages in question.

2. Requiring Sexual Function and Appropriate Genitalia Does Not Invalidate All Transgender Marriages

New Jersey was the only state during the 1970s to validate a marriage in which the transgender spouse married as a member of her self-identified sex.⁵⁹ In a 1975 case, *M.T. v. J.T.*,⁶⁰ the plaintiff wife filed a complaint for support and maintenance after her husband left the marital home.⁶¹ Her husband claimed that he owed no spousal support, on the grounds that his wife was actually male and the marriage was therefore void.⁶² The facts were simple: the plaintiff, although classified male at birth, had always believed herself to be female and began dressing as a woman and dating men in her teens.⁶³ When she met the defendant, she told him that she was a transgender woman; the two began living together in 1964.⁶⁴ In 1971, she went to a surgeon and chose to undergo surgery to remove her penis and testicles and construct a vagina, a procedure paid for by the defendant husband.⁶⁵ Over a year after the surgery, the parties were married, and they lived as a married couple until 1974. During this time, the parties engaged in sexual intercourse and the defendant supported the plaintiff

⁵⁹ See *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. App. Div. 1976) (“In this case the transsexual’s gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did do so here.”).

⁶⁰ *Id.*

⁶¹ *Id.* at 205.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

financially.⁶⁶ The court of appeals upheld the trial court's determination that the plaintiff was female at the time of marriage and that the marriage was valid after examining the evidence of physical characteristics and sexual function of the plaintiff.⁶⁷

Because the plaintiff was sexually functional as a woman, had consummated the marriage with her husband, and possessed external female genitalia at the time of the marriage, the court held that the marriage was valid.⁶⁸ The court focused on plaintiff's sexual function in her marital role and on the presence of genitalia appropriate to that role.⁶⁹ Therefore, although this case is notable for its result, the standards applied by the court for determination of legal sex were not significantly different from those established by the New York courts in the cases discussed above.⁷⁰

3. From Body to the Birth Certificate: A New Statutory Approach

In the late 1980s, an Ohio court addressed the legal status of a post-operative transgender woman for the purposes of marriage. In *In re Ladrach*, the plaintiff Elaine Ladrach, a transgender woman, had applied for and was denied a marriage license to marry a man.⁷¹ The application was denied because Ohio law prohibits persons of the same sex to marry, and the plaintiff's birth certificate indicated that she was a male.⁷² Approximately a month later, Ladrach's application to correct her birth certificate was denied.⁷³ After this denial, Ladrach filed an action for declaratory judgment, asking the court to declare that she was a female person so that a marriage license could be issued.⁷⁴ However, the court

⁶⁶ *Id.*

⁶⁷ See *supra* note 31 and accompanying text.

⁶⁸ *M.T.*, 355 A.2d at 211.

⁶⁹ *Id.* It is notable that in this case, unlike some of those discussed above, the defendant husband was aware at the time of the marriage that his wife was a transgender woman, but this lack of fraud was not listed among the factors on which the court made its determination.

⁷⁰ See *supra* Part I.A.

⁷¹ *In re Ladrach*, 513 N.E.2d 828, 829 (Ohio Prob. 1987).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

determined that the complaint did not meet the requirements for a declaratory judgment and proceeded only on the question of whether a post-operative transgender woman could legally marry a man in Ohio.⁷⁵

The *Ladrach* court, interestingly, assumed that a birth certificate is not just evidence of sex, but is itself determinative of sex for the purpose of issuing marriage licenses. The court said, "It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual . . . then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled."⁷⁶ However, the court went on to hold that the Ohio statute allowing changes to birth certificates functioned strictly to correct certificates that were originally in error, not to amend the records to reflect changes made later in life.⁷⁷ Following this line of reasoning, the court held that because there was no evidence that the determination of sex made at plaintiff's birth was incorrect, Ohio could not issue a marriage license allowing the plaintiff to marry a man.⁷⁸

This case is very different from the previous cases, because instead of inquiring into the physical characteristics or sexual function of the plaintiff, the court focused on the legal status of the plaintiff as indicated by the birth certificate itself. The court said explicitly that if the birth certificate were changed, then a marriage license could issue.⁷⁹ By not inquiring into the marital roles, sexual functionality, or the public policy issues addressed by previous courts, this court not only left to the legislature the issues of when and how to recognize a change in a person's sex, but also announced that if the legislature should choose to recognize such changes, then the court would recognize the changes in marriage cases in turn. Though Ohio does not have a birth record amendment procedure for transgender persons,⁸⁰ many states do have such a procedure.⁸¹ The court

⁷⁵ *Id.* at 830.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 832.

⁸⁰ *Id.*

⁸¹ See *infra* note 111 and accompanying text.

did not address whether it would be inclined to issue marriage licenses to persons who amended their birth records in another state.⁸²

4. The Most Restrictive Legal Standard: The Body at Birth Determines Marriage Rights for Life

Not all courts give as much evidentiary weight to birth records as the Ohio court does in *Ladrach*. The Texas Court of Appeals addressed the issue in 1999 in *Littleton v. Prange*, a wrongful death action brought by a surviving spouse claiming her husband died as a result of medical malpractice.⁸³ The defendant doctor filed a motion to dismiss the case on the grounds that the plaintiff, Christie Littleton, was a man who could not have been legally married to the decedent and therefore lacked standing to bring the claim as Jonathon Littleton's surviving spouse.⁸⁴ While the action was pending, Christie amended her birth certificate pursuant to a Texas statute allowing for changes to a record that is "incomplete" or "inaccurate."⁸⁵ On appeal, the court found that the lower court that granted the amendment wrongly construed the statute's term "inaccurate." The lower court's interpretation of the statute led it to consider the accuracy of Mrs. Littleton's birth certificate at the time of trial, rather than at the time of her birth.⁸⁶ At the birth certificate amendment proceedings, Christie presented evidence that she was female at the time of the proceedings, making "male" designation in her birth records inaccurate, and so the lower court amended the certificate.⁸⁷

The court of appeals rejected that analysis, concluding that the legislature meant that the birth records must be "inaccurate" as of the time of birth to qualify for an amendment.⁸⁸ Based on this conclusion, the court declared that Christie was legally male and that her marriage to another male was void. Therefore, she was not permitted to bring a cause of action

⁸² See *Ladrach*, 513 N.E.2d 828.

⁸³ *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

⁸⁴ *Id.*

⁸⁵ TEX. HEALTH AND SAFETY CODE ANN. § 191.028 (Vernon 1992).

⁸⁶ *Littleton*, 9 S.W.3d at 231.

⁸⁷ *Id.*

⁸⁸ *Id.*

as a surviving spouse.⁸⁹ In rejecting the evidence offered in support of amending Christie's birth certificate, the court relied on genetic and biological factors to determine that Christie was still male, saying, "The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied."⁹⁰ The ruling was unambiguously dismissive of the psychological factors that may determine gender or sex and refused to give weight to what it characterized as the "misty fields of sociological philosophy."⁹¹ Justice Hardberger asked, "Can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"⁹² The result of this case was in part, if not entirely, predetermined by the way the court posed the question before it; pitting divine intent against human action tends to invite only one outcome. The court ignored not only the surgical changes Christie had undergone, but also her actions as a wife, including her sexual relationship with her husband, their economic interdependence, and the nature of their long-term commitment to each other.⁹³ This case hinged on the assumption that God creates each human being as a specific sex, rather than on an examination of evidence about the plaintiff at the time of trial.

5. Reconciling the Conflicting Legal Standards with Modern Medicine and with Each Other: Can Courts Take Charge in the Interest of Justice?

Though a few consistent arguments appear throughout the above cases, conflicting assumptions such courts have made have had a significant impact upon the various outcomes. Some courts assumed that the inquiry as to the physical and biological factors of sex should be made as of the time of birth, either because that is when the birth records are made or because changes made to the physical form later in life are not considered legitimate or relevant to the court's inquiry.⁹⁴ Other courts operated with the premise that in order to be legally a member of a particular sex, and particularly in

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 224.

⁹³ See *supra* notes 15-17 and accompanying text.

⁹⁴ *Littleton*, 9 S.W.3d at 224.

order to marry as such, a person must be capable of engaging in penetrative intercourse as a member of that sex.⁹⁵ This allows the inquiry about the physical features of a transgender person to be made at the time of trial or the time of marriage, rather than at birth.⁹⁶ Sometimes, courts make these types of assumptions as part of an attempt to construe an ambiguous statute,⁹⁷ and sometimes courts do not clearly articulate the assumptions that underlie their reasoning at all. Either way, such suppositions weaken judicial analysis. By making assumptions about the immutability of sex, the appropriate time that sex should be determined, and what constitutes proof of sex, the courts overlook the powerful individual determination that a person makes about her sex.⁹⁸ A person's sexual self-identity predates any sex reassignment surgery she may choose to have, and it endures after such procedures are complete. It is important to acknowledge self-identity to support the freedom and autonomy of the individual.

However, one case has demonstrated that a court can creatively address the problem of a transgender person's legal sex and give weight to self-determination if it is willing to look beyond the birth certificate modification statute and seek other grounds for authority.⁹⁹ In *In re Heilig*, a post-operative transgender woman petitioned for a name change and a change in legal sex in Maryland state court. The trial and appeals courts refused to grant her a change in legal sex because the statute allowing for amendments to birth certificates restricted court jurisdiction only to birth certificates issued in Maryland.¹⁰⁰ The Maryland Supreme Court, however, severed the link between legal sex and birth certificates, and held that the court's jurisdiction to change a person's legal sex is not dependent on having jurisdiction over the agency that issued the birth certificate.¹⁰¹ The court viewed the statute allowing changes to the birth certificate as evidence

⁹⁵ See *supra* notes 44 and 57 and accompanying text.

⁹⁶ See *supra* Part I.A.1.

⁹⁷ *Littleton*, 9 S.W.3d at 224.

⁹⁸ See *supra* Section I.A.1.

⁹⁹ *In re Heilig*, 372 Md. 692, 719-21 (2003) (holding that though the court did not have jurisdiction to modify a birth certificate out of state, the petitioner's legal sex could be addressed under the equitable authority already granted the courts).

¹⁰⁰ *Id.* at 712. Heilig was born in Pennsylvania. *Id.* at 693.

¹⁰¹ *Id.* at 720 (noting that the case falls within the court's general equity jurisdiction).

that the legislature contemplated state courts having the authority to change a person's legal sex.¹⁰² On this basis, the court reasoned that if a person were properly before the court, it could use its equity jurisdiction to alter legal sex independent of its authority to amend a birth certificate.¹⁰³ This was a novel approach because the court looked to equitable remedies and broadly construed its authority. However, the court declined to comment on the collateral effects of its decision in this matter,¹⁰⁴ leaving it unclear whether it believed such a ruling would be valid proof of legal sex in other states or to other courts, for example, under the Full Faith and Credit Clause.

The *Heilig* decision provides the beginning of a model for an effective legislative response to transgender status. Such a statute should include a grant of authority to the courts to issue a final order declaring a person's legal sex. Alternatively, the statute could refer to the grant of equitable authority already in place in that state, specifying that a court in equity may issue a declaration of legal sex. The statute should have a guide for courts to follow when looking into the physical or biological features of a person whose sex is in question and should identify the time frame to be considered in making this inquiry. If the statute is not sufficiently detailed, it will not truly address the conflicts between courts, nor be an effective tool to unify sex reassignment recognition across states. The most important functions of a uniform statute on sex reassignment would be to incorporate the current medical research on gender and sex, promote respect for independence and self-determination, and replace the inconsistent judicial definitions courts have used. The uniform statute proposed in this Article is intended to further these goals and secure transgender rights beyond the level currently available in most states.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 721 ("The question may be raised, of what use is a judgment declaring that a person's gender has been changed if we do not specify the effect of such a judgment? The answer is that courts rarely specify the collateral effect of their judgments, unless it is raised as a justiciable issue. The question in a case, ordinarily, is simply whether a party is entitled to the judgment, not what the party may do with it. What effect a judgment has depends on the law governing what the judgment holder seeks to do, and that is true in this regard as well.").

B. Statutory Responses: Changing the Law of Legal Sex

Though many states have some law that is applicable to a transitioning transgender person, most of these states require some form of sex reassignment surgery. Very few statutes directly address the issue of a post-operative transgender person's legal status or even which procedures one must have to qualify as a "post-operative transsexual."¹⁰⁵ Some states do have statutes that explicitly allow a birth certificate to be amended in cases in which a person has undergone sex reassignment surgery; however, in other cases, existing laws for birth certificate amendment that are silent with regard to transgender people have been used to alter a person's legal sex with varying degrees of success.¹⁰⁶ This approach is insufficient because many of the statutes in place require only administrative measures that are not entitled to full faith and credit in other states, unlike formal judicial proceedings.¹⁰⁷ Further, some courts have found that an amendment conducted within that state is not binding on judicial proceedings because the amendment procedure was not meant to change legal status or was

¹⁰⁵ See MICH. COMP. LAWS § 333.2831 (2006) (requiring an affidavit certifying that sex reassignment surgery has been performed, but failing to define "sex reassignment surgery" or list any procedures that would satisfy the requirement); NEB. REV. STAT. § 71-604.01 (2006) (requiring an affidavit of sex change and a court order for name change in order to amend the birth certificate, but not specifying what types of surgical procedures would qualify).

¹⁰⁶ See discussion of *Littleton v. Prange*, *supra* Part I.A.1; see also *In re Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 2005) (finding that the birth certificate amendment was not binding because the amending agency did not ascertain the facts correctly). Seventeen states have general birth certificate amendment statutes which are ambiguous as to their applicability to transgender people. ALASKA STAT. § 18.50.290 (2006); DEL. CODE ANN. tit. 16 § 3131 (2007); FLA. STAT. ANN. § 382.016 (West 2006); IND. CODE § 16-37-2-10 (2007); MINN. STAT. ANN. § 144.218(4) (West 2006); MISS. CODE ANN. § 41-57-21 (West 2007); MONT. CODE ANN. § 50-15-204 (2005); OKLA. STAT. ANN. tit. 63, § 1-321 (West 2007); 35 PA. STAT. ANN. § 450.603 (West 2007); R.I. GEN. LAWS § 23-3-21 (2007); S.C. CODE ANN. § 44-63-150 (2006); S.D. CODIFIED LAWS § 34-25-51 (2007); TEX. HEALTH & SAFETY CODE ANN. § 191.028, § 192.011 (Vernon 2007); VT. STAT. ANN. tit. 18, § 5075 (2006); W. VA. CODE ANN. § 16-5-25 (LexisNexis 2007); WYO. STAT. ANN. § 35-1-424 (2007).

¹⁰⁷ Many states use an administrative procedure to amend birth certificates. See, e.g., MICH. COMP. LAWS § 333.2831 (requiring that proof of sex reassignment surgery be made to the registrar, not a court). Julie Greenberg noted that in such cases "[a]lthough the person authorizing the amendment must determine whether the statutory requirements are met, this act is likely a ministerial act, not entitled to the same deference under full faith and credit principles as an amendment ordered by a court after a full judicial proceeding." Greenberg & Harold, *supra* note 7, at 851.

incorrectly applied to a transgender person.¹⁰⁸ Finally, though some courts do assume that the birth certificate is controlling, prima facie evidence of legal sex,¹⁰⁹ others have refused to recognize as valid a birth certificate that has been amended to reflect a change of sex.¹¹⁰ Unless a uniform statute can be enacted across all jurisdictions, transgender people will continue to face an uncertain legal landscape where the medical and legal procedures they have endured will not avail them of their desired goal of definitive sex identity wherever they are. In order to be effective, the uniform statute must provide clear guidelines about what constitutes sex reassignment, require judicial determinations in accordance with the guidelines, and mandate the recognition of the judgments in other states for purposes of marriage and other legal rights connected to a person's gender.

1. Many States Have No Clear Statutory Provisions Relating to the Legal Status of Transgender Persons in Terms of Sex Status Modification, or Have Prohibited Such Changes

Though nearly every state has some process by which birth records may be amended, many only allow such changes in cases in which there was a mistake on the original documents or a name change in accordance with adoption or paternity proceedings.¹¹¹ Approximately seventeen states have birth certificate amendment statutes that do not explicitly mention sex reassignment as grounds for amendment.¹¹² Transgender people are sometimes able to procure judicial or administrative amendments pursuant to these vague statutes, but the effects of such amendments are unclear.¹¹³ Because these statutes are ambiguous, they provide no help to transgender people seeking to rely on their new legal status for marriage or other

¹⁰⁸ See *supra* notes 77, 88 and accompanying text.

¹⁰⁹ See *supra* note 76 and accompanying text.

¹¹⁰ See *supra* Part I.A.3; *In re Ladrach*, 513 N.E.2d 828, 830 (Ohio Prob. 1987); *In re Heilig*, 372 Md. 692, 719-21 (2003).

¹¹¹ See, e.g. ALASKA STAT. § 18.50.290 (2007); DEL. CODE ANN. tit. 16, § 3131 (2003); FLA. STAT. ANN. § 382.016 (West 2007); IND. CODE § 16-37-2-10 (2004); MINN. STAT. ANN. § 144.218(4) (West 2005); MISS. CODE ANN. § 41-57-21 (West 2007); MONT. CODE ANN. § 50-15-204 (2007); N.D. CENT. CODE § 23-02.1-25 (2006).

¹¹² Greenberg & Harold, *supra* note 7, at 837-38; see also *supra* note 106.

¹¹³ Greenberg & Harold, *supra* note 7, at 838.

rights.¹¹⁴ The Texas Supreme Court, for example, has disregarded birth certificate amendments made pursuant to Texas's own amendment statute and denied rights to a transgender woman despite her amended birth certificate.¹¹⁵ Even when transgender persons may be successful in using such statutes to obtain legal amendments, the risk remains that such amendments will not be recognized when they litigate an important, related issue, such as marriage or divorce, employment discrimination, military service, or medical treatment. Ambiguous status amendment statutes do not provide any concrete protection to transgender persons and may be creating a false sense of security among such people who do not realize their amended documents could be invalidated.

Further, one state goes so far as to explicitly prohibit a legal sex change through birth certificate modification, clearly articulating a policy that damages transgender rights. Tennessee unambiguously declares in its birth certificate amendment statute that birth records cannot be amended due to sex reassignment surgery.¹¹⁶ In essence, the physical changes of sex reassignment have no legal significance in the state. While Tennessee is the only state to enact a statute forbidding sex reassignment to be reflected in birth records, some state courts have made similar holdings.¹¹⁷ Without legislative change, transgender people will have no legal protections for their sex identity in Tennessee and only tenuous protection in many other states.

2. States Specifically Allowing Transgender Individuals to Modify Birth Records to Reflect Their Sex Identity

Of the twenty-five jurisdictions to enact statutes allowing transgender people to modify birth records, all but a handful require proof that the individual seeking modification has undergone some form of sex reassignment surgery.¹¹⁸ Most of these jurisdictions also require a court

¹¹⁴ See discussion of *Littleton v. Prange*, *supra* Part I.A.1.

¹¹⁵ See *supra* note 88 and accompanying text.

¹¹⁶ TENN. CODE ANN. § 68-3-203(d) (2001).

¹¹⁷ See *supra* note 57 and accompanying text.

¹¹⁸ Greenberg & Harold, *supra* note 7 at 837; see, e.g., ALA. CODE § 22-9A-19(d) (Supp. 2004); ARIZ. REV. STAT. ANN. § 36-337 (Supp. 2005); ARK. CODE ANN. § 20-18-307(d) (Supp. 2005); CAL. HEALTH & SAFETY CODE § 103425, § 103430 (West 1996); COLO. REV. STAT. ANN. § 25-2-115(4) (West 2005).

order or judgment modifying the person's sex before the agency in charge of birth records will issue the amended certificate.¹¹⁹ This means that for some, legal recognition is a multi-step process requiring judicial or administrative proceedings in more than one state. For example, a transgender person born in Colorado and living in Maryland now could bring an action in Maryland¹²⁰ to ask the court for an order modifying her legal sex, but upon receipt of that order, the person would have to present the order to the Colorado registrar¹²¹ and request an amended birth certificate. This two-step procedure may be enough to ensure that this person's legal sex change will subsequently be recognized in all states.¹²² However, a process like this is not available to people born or residing in states which will not issue court orders regarding sex reassignment or modify birth records to reflect such a change. Additionally, people who cannot or have not had sex reassignment surgery cannot avail themselves of this process, though they may have adopted a new gender identity in all other respects. This procedure is also burdensome as it requires multiple steps, perhaps in multiple states, and requires proof of surgery without specifying which of many types of procedures constitute such proof.¹²³ A

¹¹⁹ The Georgia statute has typical language: "Upon receipt of a certified copy of a court order indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation." GA. CODE ANN. § 31-10-23 (2006); *see also* OR. REV. STAT. § 432.235(4) (2006); WIS. STAT. § 69.15 (2006).

¹²⁰ *In re Heilig*, 372 Md. 692, 711 (2003) (holding that the Maryland courts' equitable jurisdiction allows the court to make a declaration that a person's legal sex is changed, despite not having jurisdiction over the agency that issued the birth certificate).

¹²¹ COLO. REV. STAT. ANN. § 25-2-115(4) (West 2005) (allowing the Colorado birth certificate to be amended after any court of competent jurisdiction issues an order changing legal sex).

¹²² *Cf.* U.S. CONST. art. IV, § 1. ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

¹²³ Courts sometimes assume that sexual function should be the goal of sex reassignment surgery. *See supra* Part I; *In re Heilig*, 372 Md. at 722 (noting that few courts or statutes have specified what surgery is necessary to complete a "sex-change," but concluding that external genitalia must be in conformity with the sex identity). Among the surgeries offered by a sex reassignment doctor's website are vaginoplasty, phalloplasty, testicular implants, hysterectomy, oophorectomy, labiaplasty, tracheal shave, penile skin inversion, breast implants, and facial feminization. Chettawut Tulayaphanich, *Cosmetic and Sex Reassignment Surgery in Thailand*, <http://www.chet-plasticsurgery.com> (last visited Nov. 5, 2006).

transgender individual attempting to secure a legal sex change might be daunted by the time, money, travel requirements, and uncertainties involved.

However, some of the states in the group of twenty-five only allow for birth certificate amendments through administrative proceedings, rather than judicial action.¹²⁴ While an administrative process is often easier than a judicial proceeding, administrative actions are not entitled to the same full faith and credit from other states as judicial acts, and therefore may go unrecognized by sister states for reasons of public policy.¹²⁵ Unless it adopts a statute authorizing judicial declaration of legal status of a person's sex, a state provides no means by which a person living within its borders can reliably expect legal recognition of her sex reassignment elsewhere.¹²⁶ A state's records agency likely does not have the jurisdiction to modify birth records from another state, which severely limits the ability of a transgender person born in a different state to obtain a binding amendment.¹²⁷ Further, it is unclear to what extent administrative agencies within a state must give credit to each other's acts, meaning that a driver's license, marriage certificate, and birth certificate for an individual might not all be changed with a single procedure and could potentially become irrevocably contradictory. Because these administrative determinations are likely not entitled to full faith and credit in all other states and are limited to those born within the state, administrative amendment statutes are also insufficient guarantees that transgender people can affirmatively establish their legal status permanently throughout the country.

¹²⁴ See, e.g., ARIZ. REV. STAT. ANN. § 36-337(A)(3) (Supp. 2005); HAW. REV. STAT. ANN. § 338-17.7(a)(4)(B) (LexisNexis 2004); 410 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West Supp. 2005); IOWA CODE ANN. § 144.23(3) (West Supp. 2005); MASS. ANN. LAWS ch. 46, § 13(e) (LexisNexis Supp. 2005); MICH. COMP. LAWS ANN. § 333.2831 (West 2001); MISS. CODE ANN. § 41-57-21 (West 1999); N.C. GEN. STAT. § 130A-118(b)(4) (2003).

¹²⁵ See *supra* note 8; *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003) (noting that recognition of sister state judgments is required, but recognition of another state's statute is less exacting when it is in conflict with the forum state's public policy); *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (differentiating the credit owed to laws and common law from credit owed to judgments).

¹²⁶ See *supra* notes 99-100 and accompanying text.

¹²⁷ See MICH. COMP. LAWS § 333.2831 (2006) (granting authority to the Michigan Registrar to amend birth certificates of individuals born in Michigan only).

II. FIXING THE PROBLEM: INCORPORATING PRACTICALITY, SOCIAL JUSTICE, AND SELF-DETERMINATION AND OUSTING THE BIRTH CERTIFICATE AS PROOF OF LEGAL SEX

A. Birth Certificates and Legal Sex: An Illogical Pair

Courts and legislatures dealing with the issue of a transgender person's legal status have necessarily made certain assumptions about sex.¹²⁸ States issuing birth certificates often assume that sex is binary and easy to determine.¹²⁹ State legislatures assume that sex is so self-evident that the term need not be defined.¹³⁰ These assumptions ignore the empirical fact that sex determination factors may be incongruent with each other, or may be impossible to ascertain.¹³¹ Many of the statutes already mentioned deal primarily with changes to the birth certificate, a document that is often used by courts as *prima facie* legal evidence of sex.¹³² However, the birth certificate is considered by some to be an inappropriate vehicle for proof of sex, because it reflects only visible characteristics at the start of life and limits the categorization of those characteristics to a binary model.¹³³ Nor does an amendment procedure necessarily solve the problems created by the disparate treatment of transgender people throughout the United States, as these amendments are not necessarily entitled to full faith and credit. A number of possible solutions exist, some more radical than others.

¹²⁸ See *supra* sections I.A.1-3 and I.C.1-2.

¹²⁹ Dep't of Health & Human Servs. Ctr. for Disease Control & Prevention, Birth Edit Specifications for the 2003 Revision of the U.S. Standard Certificate of Birth, Item 3, at 2 (2005) (allowing for only "male," "female," and "not yet determined" classifications on the certificate, and requiring that if the third option is selected the hospital be contacted until the determination is made).

¹³⁰ Greenberg, *supra* note 6, at 291 (noting that legislators falsely assume that the terms "male" and "female" are unambiguous).

¹³¹ See *supra* Part I.B.1.

¹³² Some birth certificate statutes explicitly say that the document is *prima facie* evidence of the facts therein stated. See ALASKA STAT. § 18.50.320 (2006). A court may assume even without such a statute that the birth certificate is definitive in establishing a person's sex for legal purposes. See *supra* note 76 and accompanying text.

¹³³ See, e.g., Elizabeth Reilly, *Radical Tweak—Relocating the Power To Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 CARDOZO J.L. & GENDER 297, 322-23 (2005).

1. Birth Certificates Should Be Descriptive Rather than Categorical

If the goal of legislative change is to create a legal process which would allow an individual to receive legal recognition of changes to her sex later in life, then the document which records only physical features and family relationships *at birth* seems ill-suited to do so.¹³⁴ Similarly, if the goal is to provide legal recognition of a person's sex as determined by brain development, rather than by external physical characteristics, then it is problematic even to assume that sex can be determined at birth at all.¹³⁵ Indeed, it may be necessary to reexamine the very process by which sex is identified legally for the first time in an individual's life and that may make an amendment procedure less necessary.¹³⁶

For example, minors arguably do not require recognition of a legal sex for the first decade or so of life, and perhaps beyond, because very few sex-linked rights, such as marriage and intestacy rights, are relevant to minors. Obviously there would be some social recognition of gender during this period, but legally, there are few reasons to assign a person to a particular sex during childhood. A child will not be applying for marriage licenses or filing claims against an estate as a common-law spouse,¹³⁷ nor will a child be working until age thirteen or fourteen.¹³⁸ One possibility, then, would be to document legal sex for the first time on a state-issued driver's license or ID card, rather than on the birth certificate. Another

¹³⁴ See discussion of sex reassignment surgery in court cases determining post-operative sex *supra* Part I.A.1.

¹³⁵ See discussion of visible and invisible factors used to determine sex *supra* Part I.

¹³⁶ Elizabeth Reilly proposed that sex classification at birth be abandoned, though her work is concerned primarily with intersex people, who fit neither the "male" nor "female" categories. Reilly, *supra* note 133. Reilly argues that assigning sex at birth before a person's sex identity is developed can be harmful because it conflates "identity" with "identification." *Id.* at 312. According to Reilly, a birth certificate's purpose should be to describe or identify an individual, but by classifying babies into distinct binary groups instead creates a legal "identity" that creates social and legal presumptions about the person which may prove inescapable later in life. *Id.* at 311.

¹³⁷ All but two states require a person to be eighteen years old or to have parental consent to marry. See Legal Info. Inst., Marriage Laws of the Fifty States, the District of Columbia and Puerto Rico, http://www.law.cornell.edu/topics/Table_Marriage.htm (last visited November 6, 2006).

¹³⁸ See U.S. Dep't of Labor, Age Requirements, <http://www.dol.gov/dol/topic/youthlabor/agerequirements.htm> (last visited August 26, 2007).

possibility would be to leave a person legally neutral in terms of sex until such time as he or she required a determination relative to a sex-linked right, a system of “opting in” to a particular sex, rather than “opting out.” Under this system an individual would ask a court administrative agency to issue a document or rule that she was female when applying for a marriage certificate to marry a man, when filing a sex discrimination case or in other cases in which sex is at issue. If a person never required a legal determination of sex, then that person would remain effectively sex neutral under the law.

However, such a system would be undesirable because it does not lend significantly more certainty to transgender people in their interactions with social institutions and would increase uncertainty for non-transgender people. Because the same full faith and credit concerns discussed above would apply to an administrative declaration of sex, such a procedure would add little certainty or consistency to sex-linked rights and privileges and would strain judicial and bureaucratic resources in place under the current system.

Unfortunately, both of these solutions would probably be too radical for easy legislative adoption and would create too many administrative problems to be uniformly implemented. Rather than recognizing a manifestation of brain structure that has been present all along, most states will probably continue to assume that sex can be determined at birth and must be *changed*—most likely by surgical procedure—during adulthood. While this attitude is not consistent with the multi-factor medical approach to sex determination¹³⁹ it reflects the traditional conceptualization of sex in the law.¹⁴⁰ But, even operating from the assumption that it is a sex *change* that should be recognized, birth certificate amendment procedures would still be inadequate for our purposes. A judicial procedure that changes a birth certificate can only occur if the court has jurisdiction over the agency that issued the certificate,¹⁴¹ and that severely limits the mobility of transgender people and the effectiveness of a judicial amendment.

¹³⁹ See *supra* Parts I.B.1-3.

¹⁴⁰ See *supra* Part I.A.1, Part I.C.2.

¹⁴¹ *In re Heilig*, 372 Md. 692, 717-21 (2003).

2. A Maryland Case that Rejects Birth Certificate Amendment in Favor of a Declaratory Judgment: A New Model for Judicial Modification of Legal Sex

One solution to the problem of legal sex and birth certificates is to adopt the approach that the Maryland Supreme Court used in *In re Heilig*.¹⁴² The *Heilig* court concluded that in Maryland, circuit courts have equitable jurisdiction over changes in legal status and can change a person's sex by decree, even if they are not able to amend the birth certificate itself, such as when it was issued in another state.¹⁴³ By applying its equitable jurisdiction to legal sex changes, the court was able to issue a declaration that was binding in Maryland without a specific statutory grant of authority. However, most statutes addressing changes in legal sex still focus on birth certificates,¹⁴⁴ giving the courts no power over other states' records. So far no other state courts have elected to follow the *Heilig* principle and issue sex-change declarations under their extant equitable authority.

A separate system for recognizing legal sex later in life is probably not practical or likely to be implemented by the states.¹⁴⁵ Also, the inadequacy of birth certificate amendments to provide the kind of relief that transgender persons are seeking means that some other statutory procedure needs to be created. A simple legislative solution would codify the court's conclusion in *Heilig* that the equitable jurisdiction already granted to circuit courts suffices for changes in legal sex by decree.¹⁴⁶ Such a statute could also help clarify the effect of this type of decree or provide a mechanism to recognize similar decrees from other states or courts.

B. Providing Just and Equal Access to Legal Sex Change Procedures

Drafting a legislative remedy for the ambiguous status of transgender individuals with respect to marriage rights in the United States presents a number of challenges. As discussed above, there is no consensus under the current system as to whether or how a person may legally change

¹⁴² See *supra* notes 99-104 and accompanying text.

¹⁴³ *Heilig*, 372 Md. at 711-12.

¹⁴⁴ See *supra* notes 118-119 and accompanying text.

¹⁴⁵ See *supra* Part II.A.1.

¹⁴⁶ *Heilig*, 372 Md. at 711-12.

her sex, or even basic agreement on what comprises “sex.”¹⁴⁷ Case law and statutes addressing this issue use a variety of standards to determine when a sex change has occurred and a variety of methods for recognizing the change. Choosing from amongst the existing rationales, developing new and better procedures, incorporating modern medical knowledge, and creating a uniform system are not the only elements of such a statute. The main purpose of the legislation is not to address inconvenience, but injustice. There are injustices built into the current system that go beyond the uncertainty and ambiguity of status. The proposed statute, if adopted, would recognize that gender self-determination is a basic human right. This would bring the United States more in line with the stance adopted in other first-world countries and reflect the reasoning used by the European Court of Human Rights and the European Court of Justice.¹⁴⁸ The statute would also resolve the current difficulties faced by transgender individuals seeking recognition of marriages and other legal protections based on gender.

1. Closing the Gap: Unequal Access to the Legal Sex Modification Process

Though the legal standards used by American courts have varied, most courts require a person’s genitalia to be consistent with her sex identity in order to marry as a member of that sex.¹⁴⁹ Some courts even require that a person be capable of penetrative intercourse with her intended spouse.¹⁵⁰ Similarly, though the statutes authorizing legal sex modification differ from state to state, nearly all states that provide for modification require some form of sex reassignment surgery, usually without specifying what procedures are necessary.¹⁵¹ This focus on the physical body creates

¹⁴⁷ See *supra* Parts I.A.1-4.

¹⁴⁸ See *I. v. United Kingdom*, 36 Eur. Ct. H.R. 53 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 (2002) (holding that the United Kingdom’s failure to legally recognize gender change by transgender persons and failure to permit transgender persons to marry as a member of their expressed sex violated Articles 8 and 12 of the European Convention on Human Rights); *K.B. v. Nat’l Health Serv. Pensions Agency*, Case C-117/01, 2004 E.C.R. I-541 (finding that a United Kingdom government pension plan’s marriage requirement impermissibly discriminated against transgender persons, who at the time were unable to marry members of their birth sex).

¹⁴⁹ See *supra* Parts I.A.1-2.

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 123 and accompanying text.

economic and medical barriers for many transgender people. As one author points out, “the rights of transgender people are contingent upon their ability to access medical care”¹⁵² in a society where surgery is required before a person can get legal recognition of a new gender, and the surgery itself is contingent on a long period of psychological treatment, hormonal therapy, and medical evaluation.¹⁵³ While some counseling and hormone therapy may be covered by medical insurance or state-funded health plans, it is rare in the United States for any of the surgical treatments or follow-up care to be covered.¹⁵⁴ This leaves the bulk of the costs to be paid by the individual seeking treatment. By making a legal change dependent on having reassignment surgery, American legislatures and courts limit access for people who lack financial resources, leaving the poor and those without access to health care with a much more difficult road to recognition.

2. The Advantage of Being Born Male: The High Cost of a New Penis

The economic obstacles limiting access to existing legal sex modification procedures are exacerbated by birth sex. In 1999, the estimated costs for a complete male-to-female surgical transition were between \$18,000 and \$35,000.¹⁵⁵ In contrast, for transgender men, a phalloplasty, the surgery that creates a penis from other tissue, costs \$50,000 alone.¹⁵⁶ This is in addition to the costs of an oophorectomy and

¹⁵² Franklin Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 736 (2005) (noting that the medical model of transgender assumes that transgender people suffer from a disease which requires treatment).

¹⁵³ See The Harry Benjamin International Gender Dysphoria Association’s Standards of Care for Gender Identity Disorders 4 (6th version, Feb. 2001), available at <http://www.wpath.org/Documents2/socv6.pdf> (recommending a minimum of one year hormonal therapy, one year living full time as the desired gender, and three months psychological counseling before reassignment surgery).

¹⁵⁴ Todd Savage & Lisa Neff, *Costly Trans-Action—High Cost of Sex Change Operations*, ADVOC., May 25, 1999, at 66. Some doctors are able to get reimbursement for hormonal treatments only by being vague about the purpose of the treatments in their reports to insurance companies. The authors warn against using medical coverage for sex reassignment procedures even if it is available, because insurance providers will consider the psychological diagnosis when making future coverage decisions. *Id.*

¹⁵⁵ *Id.* at 64.

¹⁵⁶ *Id.*

hysterectomy, the removal of the uterus and ovaries,¹⁵⁷ and a mastectomy, removal of the breasts. Transgender women are more likely to be able to raise the funds necessary to complete the surgical transition and tend to be more satisfied with the results than transgender men.¹⁵⁸ Transgender men often opt not to undergo phalloplasty because of its high costs, scarring, limited effectiveness, and risks.¹⁵⁹ These factors seriously limit surgical access by transgender men, and as a result, fewer transgender men are able to obtain legal recognition of their sex identity.

Access to the medical procedures required by many states for a legal change of sex is limited to those with access to medical care and the financial resources to pay for that medical care. People born physically female have even more limited access than those born physically male, because of both the high costs and delicate, highly imperfect nature of the surgical procedures. A guarantee of the legal rights and privileges associated with a person's sex identity should not be reserved only for those lucky enough to be born male and wealthy.¹⁶⁰

3. Sex Changes: Only for the Wealthy and "Unhealthy"

Even those with financial resources and access to health care might be denied medical treatment due to medical or psychological problems.¹⁶¹ Conversely, the lack of a particular diagnosed psychological problem may seriously limit a transgender person's ability to receive transition treatment. Without a diagnosis of Gender Identity Disorder (GID), a transgender person usually cannot get even the preliminary treatments necessary to start

¹⁵⁷ Hudson's FTM [Female-to-Male] Resource Guide, Hysterectomy and Oophorectomy, <http://www.ftmguide.org/hysto.html>. (last visited Sept. 30, 2007).

¹⁵⁸ Cressida Hayes, *Changing Race, Changing Sex: The Ethics of Self-Transformation*, 37 J. SOC. PHIL. 266, 275 (2006) (noting that results of phalloplasty are typically poor).

¹⁵⁹ Hudson's FTM [Female-to-Male] Resource Guide, FTM Genital Reconstruction Surgery (GRS), <http://www.ftmguide.org/grs.html> (last visited Sept. 30, 2007) (listing the associated risks of phalloplasty, which include scarring, death of the transplanted tissue, difficulty urinating, loss of sexual sensation, and other problems).

¹⁶⁰ For a full discussion of surgical sex reassignment and Medicaid, see Jerri Dasti, *Advocating a Broader Understanding of the Necessity of Sex Reassignment Surgery Under Medicaid*, 77 N.Y.U. L. REV. 1738 (2002).

¹⁶¹ Hudson's FTM [Female-to-Male] Resource Guide, <http://www.ftmguide.org/> (last visited Sept. 30, 2007) (describing the evaluation procedure done by the doctors, mental health professionals, and surgeons before a sex reassignment surgery will be approved).

a physical transformation and will likely never be approved for sex reassignment surgery.¹⁶² The sex reassignment process is so rigidly controlled by the medical establishment that some members of the transgender community have used social networking and medical literature to directly educate one another in order to more effectively conform to the clinical description of GID during medical and psychological evaluations and obtain access to desired treatments.¹⁶³ Many transgender people are not comfortable with the definition of transgender as a psychiatric disorder and the description of that disorder in medical texts,¹⁶⁴ because it requires a transgender person to embody stereotypical traits of that person's self-identified gender and identify himself as diseased before he can obtain treatment. Even with a diagnosis of GID, a person with a history of other psychological problems or with a physiological condition that makes treatments medically dangerous may be denied access to sex-change procedures.¹⁶⁵

Some transgender authors have criticized the heavy reliance on medical authority and GID diagnosis as a prerequisite for any sex reassignment procedures.¹⁶⁶ In recounting difficulties he experienced in obtaining the medical care and procedures he sought, transgender legal scholar and advocate Dean Spade mocks the evaluation process by envisioning a fictional dialogue between a plastic surgeon and a potential patient.¹⁶⁷ In the imagined dialogue, the patient has always wanted a nose job, but the doctor responds by saying, "Then you have rhino-identity disorder . . . [W]e want you to get letters from two psychiatrists and live as a small-nosed woman for three years, just to be sure."¹⁶⁸ Non-transgender

¹⁶² *Id.*

¹⁶³ Hayes, *supra* note 158, at 278 (noting that certain patterns of behavior are necessary to secure a diagnosis of GID, and that this diagnosis is required to gain access to hormone therapies, surgeries, and other medical services as a transgender person).

¹⁶⁴ See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 23 (2003) (rejecting the description of transgender people as disordered and criticizing the stereotypical definitions of gender used by the diagnostic manual—notably, the manual says boys with GID enjoy playing house and drawing pictures of princesses in childhood).

¹⁶⁵ *Id.*

¹⁶⁶ See Spade, *supra* note 164, at 16; See also Romeo, *supra* note 152, at 714.

¹⁶⁷ Spade, *supra* note 164, at 15.

¹⁶⁸ *Id.*

people may use cosmetic surgeries as a means of self-determination and self-expression without having to first prove that they fit into some pre-determined category. Strict adherence to the medical model for transgender ignores the wide range of sexual and gender expression and requires that transgender people fully embrace the essentialized social norms associated with a new gender before they are allowed to begin to embody it.¹⁶⁹

The tension between the medical model and the self-determinative model is not easily resolved. The statute proposed in this Article recognizes that the medical explanation has value and need not be ignored, because it is only existing mode for transgender people to obtain the sex/gender status recognition necessary to go about their daily lives. At the same time, however, the statute offers alternative criteria for obtaining the desired status to avoid imposing rigid pre-determined requirements on all transgender people with respect to their physical bodies and gender roles.

4. Is it Possible? Access to Legal Sex Change Without Surgery: Lessons from New York City and the United Kingdom

On November 7, 2006, the *New York Times* announced that New York City's Board of Health planned to adopt a novel approach to legal sex reassignment, with no surgery required.¹⁷⁰ The proposal allowed people born in New York City to change the sex designation on their birth certificates by presenting affidavits from health professionals stating that they had lived as a member of the new sex for two years and that the change was permanent.¹⁷¹ By focusing on permanency rather than surgery, the proposed policy allowed those who could not afford surgery or who chose not to undergo surgery to complete a legal sex change.

¹⁶⁹ *Id.* (describing the author's difficulty convincing medical authorities that he was transgender, because he wanted only hormone therapy and chest surgery, not genital modification). The medical model as presently envisioned leaves little room for someone who might choose to have female genitals and live as a man. The author writes, "I've always rejected the strategy that adopts some theory of innate sexuality and forecloses the possibility that anyone, gender troubled childhood or not, could transgress sexual and gender norms at any time." *Id.*

¹⁷⁰ Damien Cave, *New York Plans to Make Gender Personal Choice*, N.Y. TIMES, Nov. 7, 2006, at A1.

¹⁷¹ *Id.*

However, only a month later, the Board of Health voted down the proposal.¹⁷² The Board said that one reason for the change was that new federal regulations required state and federal agencies to cross-check the information on a person's identifying documents, and allowing vital records to be altered when a similar change could not be made to other documents would lead to security problems.¹⁷³ The Board cited other concerns as well, including the proposal's potential impact on sex-segregated institutions such as hospitals, schools, and prisons.¹⁷⁴ The health commissioner, Dr. Thomas R. Frieden, acknowledged that the Board had not fully considered the implications of the birth-certificate amendment rule or consulted with experts from sex-segregated facilities before voting on the measure.¹⁷⁵ These admissions have drawn criticism from the legal and transgender communities.¹⁷⁶ By failing to consider the important effects of a progressive move to recognize sex identity, the Board of Health undermined its own efforts to aid the transgender community. Ultimately the Board settled for a change that brought New York City in line with the remainder of New York state: transgender people who have undergone sex reassignment surgery may now petition for a change of sex on their birth certificates, where previously their only option was to delete the "M" or "F" and leave the sex entry blank.¹⁷⁷

Though New York City's failure to achieve its progressive aim dealt a blow to the transgender community and its advocates, the

¹⁷² Damien Cave, *City Drops Plan to Change Definition of Gender*, N.Y. TIMES, Dec. 6, 2006, at B1 (explaining that once the city's plan was widely publicized, many concerns arose that led to the city's Board of Health's reconsideration of their decision).

¹⁷³ *Id.* See also Real ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005).

¹⁷⁴ Cave, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., Kenji Yoshino, *Sex and the City: New York Bungles Transgender Equity*, SLATE, Dec. 11, 2006, <http://www.slate.com/id/2155278> (accusing the New York City Board of Health of failing to do even the "most rudimentary diligence"); Press Release, Transgender Law and Policy Institute, NYC Rejects Changes to Birth Certificate Policy (Dec. 5, 2006), available at <http://www.transgenderlaw.org/release12-05-06.htm> (characterizing the decision as out of touch with common sense and medical knowledge); Sylvia Rivera Law Project, *The Fight for Fair Access To Birth Certificates Continues*, http://www.srlp.org/index.php?sec=03H&page=nycbc_newpolicy (last visited April 4, 2008) ("These concerns do not present well-founded bases to withhold accurate birth certificates to transgender people.").

¹⁷⁷ Yoshino, *supra* note 176.

transgender community overseas has recently seen a success upon which further progress may be modeled. The Gender Recognition Act (GRA), adopted by the United Kingdom in 2004, mandates legal recognition of gender change for transgender people, and no medical procedure is required.¹⁷⁸ The Act establishes a Gender Recognition Panel that *must* grant an application for a gender recognition certificate if the applicant (1) has gender dysphoria, (2) has lived as a member of the acquired gender for the two years prior to applying, (3) intends to live as that gender until death, and (4) can present evidence from a medical practitioner or psychologist that this is the case.¹⁷⁹ Like the New York City proposal, the GRA allows a transgender person to obtain legal recognition of her sex identity without surgery, but unlike the New York proposal, it carefully sets out some of the legal effects of such recognition.¹⁸⁰

Under the GRA, once a person is granted a certificate of gender recognition, she is considered “for all purposes” to be a member of the sex listed on the certificate.¹⁸¹ The Act specifically provides that a certificate holder has access to social security benefits,¹⁸² sex discrimination protection,¹⁸³ inheritance, and peerages to the same extent as any other

¹⁷⁸ See Her Majesty's Stationery Office, Explanatory Notes to Gender Recognition Act (2004), available at http://www.opsi.gov.uk/acts/acts2004/en/ukpgaen_20040007_en_1; Allen, *supra* note 8, at 184.

¹⁷⁹ Gender Recognition Act, 2004, ch. 7, § 1(1) (U.K.).

¹⁸⁰ Gender Recognition Act § 9; Allen, *supra* note 8, at 184-85; Cave, *supra* note 172.

¹⁸¹ Gender Recognition Act § 9 (“Where a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person’s sex becomes that of a man and, if it is the female gender, the person’s sex becomes that of a woman)”; Gender Recognition Act § 20 (allowing a certificate-holder to be charged as a member of the acquired gender for sex crimes that specify criminality based on the gender of the offender or the victim). *But see* Gender Recognition Act § 19 (limiting a certificate-holder’s participation in sport); Gender Recognition Act § 12 (stating that the certificate has no effect on the holder’s status as the legal mother or father of a child).

¹⁸² Gender Recognition Act § 13 (granting a person the same pension and benefits entitlement as other members of the gender listed on the certificate); Allen, *supra* note 8, at 185.

¹⁸³ Certificate-holders are entitled to protection under the Sex Discrimination Act of 1975 as members of the gender listed on the Certificate. Gender Recognition Act § 14; Allen, *supra* note 8, at 185.

member of the gender listed on the certificate.¹⁸⁴ However, the GRA does limit the effects a certificate can have on some aspects of life, such as parenting and sports.¹⁸⁵ Under § 19 of the Act, the regulating body of a sport may restrict certificate-holders' participation if necessary to ensure fairness and safety.¹⁸⁶ Also, obtaining a certificate does not affect the holder's parental rights or status as a father or mother of children.¹⁸⁷ This provision recognizes a reality of life for transgender people and ensures that parental rights and responsibilities of transgender people and their co-parents are not jeopardized.

Though the GRA represents a progressive and comprehensive approach to gender recognition, it has some drawbacks. A certificate holder can marry as a member of her certified sex, but applicants who are already married cannot obtain a full certificate until the marriage ends.¹⁸⁸ In the United States, in the states that provide for legal recognition of sex change after surgery, a post-operative transgender person could remain married to her spouse *and* obtain legal recognition of the sex change, resulting in a "same-sex" marriage. The GRA is specifically drafted to prevent this outcome.¹⁸⁹ The law also does not explicitly address imprisonment, schooling, and hospitals, though presumably these situations fall under the

¹⁸⁴ Gender Recognition Act § 15 ("The fact that a person's gender has become the acquired gender under this Act does not affect the disposal or devolution of property under a will or other instrument made before the appointed day."); Gender Recognition Act § 16 ("The fact that a person's gender has become the acquired gender under this Act—a) does not affect the descent of any peerage or dignity or title of honour, and (b) does not affect the devolution of any property limited (expressly or not) by a will or other instrument to devolve (as nearly as the law permits) along with any peerage or dignity or title of honour unless an intention that it should do so is expressed in the will or other instrument.").

¹⁸⁵ See *supra* note 181.

¹⁸⁶ Gender Recognition Act § 20 (allowing such restrictions only in "gender-affected" sports, where strength, stamina, or physique would put members of one gender at a disadvantage to members of the other).

¹⁸⁷ Gender Recognition Act § 12.

¹⁸⁸ Gender Recognition Act § 4(3) (requiring married applicants to be granted only an interim certificate). Issuance of an interim gender recognition certificate to one partner in a marriage is grounds for an annulment, except in Scotland where the marriage laws do not allow annulment. Explanatory Notes to Gender Recognition Act (2004), *supra* note 178.

¹⁸⁹ This Article proposes legislation that would not require married partners to divorce simply so that one partner could get recognition of her sex identity. This may create an incentive for transgender people who are attracted to members of their sex identity to marry before beginning transition in order to protect their ability to legally marry.

“for all purposes” language of the Act.¹⁹⁰ By not addressing these areas, however, the GRA may be exposing the transgender community to danger or abuse. Especially in the context of prisons, placing a transgender man who has not undergone surgery in an all-male environment could have serious consequences.¹⁹¹ A legislative solution in the United States should address these concerns and provide for the safety of the transgender community while granting as many of the rights and privileges of self-identified gender as possible.

It is difficult to attend to concerns of equal access, economic fairness, and justice for transgender people while balancing concerns about implementation and effects on the broad range of activities where people are segregated by sex. The statute proposed in this Article provides access to status change for all transgender people who desire a legal sex change, regardless of whether they are willing or able to obtain costly and risky surgery. The statute provides two distinct standards for sex reassignment, one surgical and one non-surgical. The non-surgical path requires more extensive documentation and a longer waiting period to protect against fraud and assure permanence, while the surgical path will specify types of procedures that suffice to complete a legal transition. Both paths lead to official recognition of a person’s sex identity.

5. Resolving Jurisdiction and Full Faith and Credit Problems Seen in Earlier Statutes and Court Cases

The purpose of the proposed statute is to allow transgender individuals to obtain a final and binding judgment as to their sex status that will enable them to have certainty regarding sex-linked rights and privileges throughout the United States. Though birth certificates and official records are generally used to prove sex, these devices are usually issued by administrative agencies and are not binding on the courts or agencies of other states.¹⁹² A judicial order is necessary to ensure that the change will be

¹⁹⁰ See *supra* note 181 and accompanying text.

¹⁹¹ For a more detailed discussion of transgender policy in U.S. prisons, see Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167 (2006).

¹⁹² See *supra* note 107; Gender Recognition Panels and Certificates of the United Kingdom’s Gender Recognition Act are not a good procedural model for the United States because of Full Faith and Credit concerns, and it is doubtful that federal legislation similar to the GRA would be possible in the United States because of Congress’s limited Commerce Clause powers. See *supra* note 13 and accompanying text.

recognized outside the jurisdiction where it was made.¹⁹³ In order to fully accomplish the goals of the statute, the legislature must grant state courts the authority to determine the sex status of individuals, as well as provide guidance as to how to do so fairly and accurately.¹⁹⁴ The biology-at-birth standard,¹⁹⁵ the birth-certificate standard,¹⁹⁶ and the sexual function/physical conformity standard¹⁹⁷ used by courts do not provide relief for transgender individuals who cannot undergo sex reassignment surgeries for medical or economic reasons or choose not to because of the balance of risks. These standards should be replaced by standards that recognize the paramount importance of self-determination, are consistent with medical evidence, and require permanency and proof to protect against fraud.

C. The Uniform Sex Reassignment Recognition Act

For a uniform act to be truly useful, it must not only be clear and comprehensive, but it must also represent a policy that is likely to be substantially adopted in every state. A uniform act that is not broadly adopted fails in its basic purpose of harmonizing an inconsistent area of law throughout the United States and creating a predictable legal scheme. Acknowledging that reality, the proposed Uniform Sex Reassignment Recognition Act does not represent the most progressive or comprehensive recognition of transgender rights, or necessarily the best solution to the problem of transgender persons' status in marriage and other facets of life.¹⁹⁸ Instead, the Act is a compromise, an attempt to promote principles of equality while recognizing that there has been substantial resistance to transgender rights in the case law, statutes, and tradition of this country.¹⁹⁹

¹⁹³ See *supra* notes 107 and accompanying text.

¹⁹⁴ See *supra* Part I.A for a discussion of judicial standards already used.

¹⁹⁵ See *supra* Part I.A.4.

¹⁹⁶ See *supra* Part I.A.3.

¹⁹⁷ See *supra* Part I.A.2.

¹⁹⁸ A significant remaining issue is that the proposed Act would not give transgender people the ability to alter social security records and other federal documentation to match the Declaration; complementary federal law would be required to avoid mismatch problems under the Real ID Act.

¹⁹⁹ See *supra* Part I.A.

The United Kingdom has provided a model for recognizing a person's choice and giving individuals the chance to obtain some power over their own legal sex. State governments in the United States should follow suit and adopt measures which recognize that many people, though undisputedly the transgender, have been denied access to the medical system that would allow them to shape their bodies to match their identity or, for a variety of fully valid reasons, have opted not to undergo such bodily changes.²⁰⁰

The Uniform Sex Reassignment Recognition Act incorporates the medical model of sex, including physical characteristics, but also provides an alternative path modeled on the self-determinative approach attempted by New York City and realized by the United Kingdom. The Act also guides courts to value the fundamental factor previously ignored in adjudication of a person's sex: self-identification. The medical technology to alter physical sex characteristics will only improve, and the United States should have a forward-looking uniform approach in place to address these advances as they develop. By acknowledging both the medical realities of transitioning sexes and an individual's right to self-determination and self-identity, the statute is designed to provide fair and equal access to legal sex modification.

Section 1: Purpose

The purpose of this Uniform Act is to provide a simple, uniform, and equitable process for determining an individual's legal sex. The Act shall be construed broadly to encourage fair access to the adjudication process and to promote justice. The Declaration of Legal Sex shall be a permanent and binding order which is valid in all jurisdictions and which shall entitle the recipient to all the legal rights and privileges associated with the sex identified in the Declaration, except where limited by the provisions of this Act. The Declaration of Legal Sex shall be effective from the time it is entered. In recognition of the medical reality that sex characteristics are not fixed at birth, a Declaration of Legal Sex shall serve as *prima facie* evidence of the recipient's legal sex, regardless of the sex indicated on the recipient's birth certificate.

²⁰⁰ Spade, *supra* note 164.

Section 2: Definitions

a. A “Declaration of Legal Sex” is a judgment of the court declaring the legal sex of a recipient. The Declaration may be registered with the Registering Agency of any jurisdiction in the United States. The Declaration shall

(1) entitle the Recipient to identify him/herself as a member of the sex indicated in the Declaration for all legal purposes and to list only that sex on identifying documents, including but not limited to driver’s licenses, marriage certificates, birth certificates, state-issued identification cards, and other similar documents.

(2) entitle the Recipient to all legal rights and privileges associated with the sex indicated in the Declaration, including, but not limited to marriage, health care, employment, and divorce rights.

(3) be subject to the limitations listed at Section 6 of this Act.

b. A “female” for the purposes of this section is a person who at the time of the hearing has EITHER

(1) the majority of characteristics normally associated with the female sex, considering internal morphology, external morphology, hormones, and psychological/neurological sex, whether naturally occurring or created surgically, OR

(2) has lived as a woman pursuant to the requirements of Section 4(a)(2).

c. A “male” for the purpose of this section is a person who at the time of the hearing has EITHER

(1) the majority of characteristics normally associated with the male sex, considering internal morphology, external morphology, hormones, and psychological/neurological sex, whether occurring naturally or created surgically, OR

(2) has lived as a man pursuant to the requirements of Section 4(a)(1).

d. “Physical characteristics normally associated with the female sex” include developed breasts, a vagina, reproductive organs, feminine facial features, and other observable physical indicators.

e. “Physical Characteristics normally associated with the male sex” include a penis, scrotum, testes, facial hair, masculine facial features, and other observable physical indicators.

f. “Recipient” is the person whose sex is identified in a Declaration of Legal Sex.

g. A “Registering Agency” for the purposes of this section is an agency responsible for collecting or maintaining vital records, licenses, or other data regarding the persons in the state, and may include but is not limited to the Department of Human Services, County Clerk, Department of Motor Vehicles, and Vital Records Office.

Section 3: Jurisdiction

a. A person domiciled in this state may petition the court for a Declaration of Legal Sex.

b. A court of appropriate jurisdiction of this state may issue a Declaration of Legal Sex if properly petitioned, whether or not any other relief is or could be claimed in law or equity.

c. This section should not be construed to limit or reduce a court’s authority or jurisdiction in law or equity to adjudicate a Petition for Legal Sex, but rather should be construed broadly to allow such petitions.

Section 4: Adjudication

a. Upon proper filing of a petition for a Declaration of Legal Sex, the court shall determine whether the petitioner is male or female.

(1) If the petitioner asks the court for a Declaration that he is male, the court shall consider only whether at the time of filing—

(i) The petitioner retains or has acquired through surgical or hormonal treatments the majority of physical characteristics normally associated with the male sex, OR

(ii) The petitioner has adopted a legal name that is normally associated with the male gender or is androgynous, and has presented affidavits from at least one expert stating that he has lived continuously as a male for two consecutive

years immediately preceding the date the Petition was filed and intends to continue living as a male until death.

(iii) The expert is a medical doctor or psychologist with sufficient knowledge of the petitioner to determine whether the petitioner is living as a male, considering social interaction, interpersonal relationships, self-identification, clothing, lifestyle, and other factors.

(2) If the petitioner asks the court for a declaration that she is female, the court shall consider only whether at the time of filing—

(i) The petitioner retains or has acquired through surgical or hormonal treatments the majority of physical characteristics normally associated with the female sex, OR

(ii) The petitioner has adopted a legal name that is normally associated with the female gender or is androgynous, and has presented affidavits from at least one expert stating that she has lived continuously as a female for two consecutive years, and intends to continue living as a female until death.

(iii) The expert is a medical doctor or psychologist with sufficient knowledge of the petitioner to determine whether the petitioner is living as a male, considering social interaction, interpersonal relationships, self-identification, clothing, lifestyle, and other factors.

b. If the petitioner meets the requirements of either 4(a)(1) or 4(a)(2), the court shall

(1) enter a judgment and issue a Declaration of Legal Sex declaring petitioner to be a male/female for all legal purposes, unless the state proves by a preponderance of the evidence that the petition was made to defraud the public or for some other unlawful purpose, and

(2) grant other requested relief if just and appropriate.

Section 5: Registration

a. Upon issuance of a Declaration of Legal Sex, the recipient must register it with the state's Registering Agency.

b. Such agency, upon receipt of Declaration of Legal Sex for registration, shall

(1) modify existing records to indicate the sex ordered in the Declaration,

(2) retain a copy of the Declaration as proof of the identified legal sex, and

(3) provide copies of the Declaration to other agencies upon request, to the extent permitted by law.

Section 6: Limitations

a. A Declaration of Legal Sex shall have no effect on parental rights or on the Recipient's status as the mother or father of a child.

b. A Declaration of Legal Sex shall not void a Recipient's marriage contracted before the Declaration was issued.

c. A Declaration of Legal Sex does not entitle the Recipient to compete in a sport if the sport's regulating body has determined that for safety and fairness, all competitors must have the same birth sex.

d. A state prison, jail, detention facility, or rehabilitation program may incarcerate or detain a Recipient as a member of his or her birth sex in contravention of the Declaration of Legal Sex if

(1) a court of competent jurisdiction finds that incarceration in accordance with the Declaration would be hazardous to the recipient's health and welfare and

(2) the recipient has not undergone sex reassignment surgery.

CONCLUSION

Though many states have at least one statute relating to legal sex already, all states should adopt a law similar to the one proposed in this Article. Currently, no state affords a clear system of determining legal sex that would be binding on all other states, nor does any state provide for its courts to place primary importance upon psychological, neurological, or self-determinative factors when making a determination of legal sex. The current system ignores the strong conviction and independence of the

individual, and often the individual entirely, except to inquire what genitalia she has and how she came to have it. Transgender people face many barriers in the United States, including social stigma and lack of access to medical care, and states should consider those barriers when legislating legal sex. Universal adoption of this uniform act would resolve the current conflicts between state systems for determining sex and would provide certainty for transgender people and their spouses so that their rights no longer disappear at the state line.

