

2006

In re Marriage of Simmons: A Case for Transsexual Marriage Recognition

Katie D. Fletcher

Loyola University Chicago, School of Law

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Family Law Commons](#)

Recommended Citation

Katie D. Fletcher, *In re Marriage of Simmons: A Case for Transsexual Marriage Recognition*, 37 Loy. U. Chi. L. J. 533 (2006).

Available at: <http://lawcommons.luc.edu/lucj/vol37/iss3/4>

This Mentorship Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

In re Marriage of Simmons:
A Case for Transsexual Marriage Recognition

Katie D. Fletcher*

mentored by Judge Lola Maddox**

I. INTRODUCTION

It's a girl! It's a boy! At birth, every individual is identified as either male or female, usually by visual examination.¹ Gender and sex are typically unambiguous and most people consider them the same.² The

* J.D., Loyola University Chicago, expected January 2007. Mom and Carol, thank you for your never-ending love and support, you both inspire and spur me. This Article would not be what it is today without the invaluable assistance from the *Loyola University Chicago Law Journal* editorial board and members. Additionally, special thanks and gratitude to the Honorable Judge Maddox for providing insight and for encouraging and challenging me throughout the process. Finally, this Article would not have been possible without contributions in many different forms and for that I am grateful to Professor Cynthia Ho and Jody Marksamer.

** Judge Lola Maddox is a Circuit Judge of the Third Judicial Circuit in Illinois having been appointed by the Supreme Court to fill a vacancy from March 1, 2006 to December 4, 2006. She had retired from the judicial system on November 30, 2004 after more than twenty-five years as an Associate Judge where she served in many capacities including Chief Associate Judge and Supervising Judge of the Family and Law Magistrate Divisions. Judge Maddox worked as a pro bono volunteer for the Land of Lincoln Legal Assistance Foundation in Alton, Illinois during her short retirement. Judge Maddox has received numerous accolades during her tenure as a Judge including the Third Judicial Circuit Family Violence Coordinating Council "Partners in Peace" Award in 1999, Civic Award from Alton NAACP in 1998 for outstanding and dedicated work in the court system, Woman of Distinction Award in 2004 from Edwardsville Business and Professional Women, Chair of the Third Judicial Circuit Domestic Violence Coordinating Council from 1996 to 2004, and Chief Judge's Representative to the Madison County Juvenile Justice Council Planning Committee.

1. Alyson Dodi Meiselman, Katrina C. Rose & Phyllis Randolph Frye, *Cause of Action for Legal Change of Gender*, 24 CAUSES OF ACTION 2D 135, 139 (2004); see also HOWARD W. JONES, JR. & WILLIAM WALLACE SCOTT, HERMAPHRODITISM, GENITAL ANOMALIES AND RELATED ENDOCRINE DISORDERS 55 (1958) (explaining that the obstetrician determines the baby's sex by observation of the external genitalia); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999) (explaining that the birth certificate sex designation is determined by a birth attendant).

2. Ruth Bader Ginsburg was in large part responsible for the fact that the law uses the words "sex" and "gender" interchangeably resulting in an unfortunate terminological gap.

law presumes that these terms are interchangeable, but generally the law is concerned with a person's legal sex.³ For transsexual individuals, this can be a problem because, although a person's legal sex is the sex assigned at birth, a transsexual individual identifies himself or herself as the sex opposite that assigned at birth.⁴

When a child is born, a birth attendant makes a sex assignment decision based on the external physical features of the child.⁵ Unfortunately, any incongruence between biological factors and other factors, whether biological or psychological, may go unnoticed at the time of the designation.⁶ For most individuals, their birth-assigned sex is not a problem, but for others it may be—specifically, it may be a problem for transsexual individuals who had their sex assigned by readily observable physical features at birth.⁷ Transsexual individuals

According to Ginsburg, “[f]or impressionable minds the word ‘sex’ may conjure up improper images” of what occurs in porno theaters. Therefore, she stopped talking about sex discrimination years ago. . . . [S]he explained that a secretary once told her, “I’m typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don’t you know those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don’t you use the word ‘gender’? It is a grammatical term and it will ward off distracting associations.”

Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

3. See Greenberg, *supra* note 1, at 267 (stating that the law usually finds the terms “male” and “female” unambiguous and fixed).

4. Some states do not allow a change of sex on a birth certificate even after sex-reassignment surgery. See, e.g., TENN. CODE ANN. § 68-3-203(d) (2005) (stating a birth certificate will not be changed as a result of sex change surgery).

5. Greenberg, *supra* note 1, at 271.

6. *Id.* at 271 & n.27.

7. *Id.* at 271–72. Based on the appearance of the person's external genitalia, a person's legal sex is generally fixed at birth. In the presence of ambiguous genitalia, medical professionals usually suggest surgery to fix the genitalia so that they appear clearly male or female.

The presence of an “adequate” penis in an XY infant leads to the label male, while the absence of an adequate penis leads to the label female. A genetic male with an inadequate penis (one that is incapable of penetrating a female's vagina) is “turned into” a female even if it means destroying his reproductive capacity. A genetic female who may be capable of reproducing, however, is generally assigned the female sex to preserve her reproductive capability regardless of the appearance of her external genitalia. If her “phallus” is considered to be “too large” to meet the guidelines for a typical clitoris, it is surgically reduced even if it means that her capacity for satisfactory sex may be reduced or destroyed. In other words, men are defined based upon their ability to penetrate females and females are defined based upon their ability to procreate. Sex, therefore, can be viewed as a social construct rather than a biological fact.

Id.; but see Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 3 (2000) (questioning the medical practice of early surgery on infants

face numerous difficulties as they try to lead their lives as their identified sex while the law views them as the opposite sex.⁸

For clarity and consistency, this Article uses certain terms in the following manner. “Sex” represents the generally accepted biological attributes, such as gonads, genitalia, chromosomes, and hormones, and “gender” describes the biological aspect of sex in the brain.⁹ “Transsexual” includes the term transgender¹⁰ and refers to an individual who has undergone sexual reassignment of some kind, including, but not limited to, hormone therapy or surgery.¹¹ Additionally, due to the sensitive issue of noun and pronoun usage when discussing transsexual individuals, this Article refers to an

with ambiguous genitalia).

8. See *infra* Part II.B.1 (discussing U.S. cases where a transsexual’s identified sex was not recognized).

9. Hazel Beh & Milton Diamond, *Ethical Concerns Related to Treating Gender Nonconformity in Childhood and Adolescence: Lessons From the Family Court of Australia*, 15 HEALTH MATRIX 239, 239–40 n.1 (2005) [hereinafter Beh & Diamond, *Ethical Concerns*]. Professor Beh and Dr. Diamond explain that most people with a transsexual condition identify themselves as unequivocally members of the sex in which they aspire to live.

Part of the issue revolves around how an individual’s sex is considered. Over the years this has evolved so that different categories can be evaluated in arriving at this determination. Most commonly a person’s sex is evaluated based on chromosomes, gonads, hormonal titers, internal genitalia, external genital appearance, and social lifestyle. With increasing sophistication and knowledge, however, more factors are being identified so that a final resolution on a person’s “sex” can also involve different gene constellations as well as brain sex. Over time an individual’s primary sex characteristic came to be regarded as the person’s gonads. We now understand that an individual’s gonads may not correspond even with other features of gross anatomy or genitalia. There is thus no universally agreed upon standard for how to assess “sex.”

These discrepancies have implications over and above any grammatical matter. A resolution of these conflicting assay methods has legal and practical effects. Understanding such difference can account for a person being considered a male in one state, a female in another, and an intersexed person in a third. Persons with an intersexed or transsexual condition consider, not their gonads, but their brains and core sense of self, as the primary consideration in the determination of sex. Currently this is best evaluated by the individual’s own admission rather than by any currently available scientifically objective measure.

Id. (citations omitted).

10. In recent scholarly literature the terms transgender and transsexual are not interchangeable, with the term transgender referring to persons who may or may not have undergone hormone therapy or surgical treatments but nonetheless identify themselves as the sex opposite of their birth-assigned sex. ANDREW N. SHARPE, *TRANSGENDER JURISPRUDENCE: DYSPHORIC BODIES OF LAW* 1–2 (2002).

11. *Id.* In his book, Sharpe uses the word transgender as a term not of unlimited scope but as a term of self-description, and he uses transsexual as a medico-legal term. *Id.* at 2. Sharpe recognizes that the transgender community utilizes the term “transgender” to include those people who identify as both, neither, or something other than male or female in an attempt to deconstruct the rigid binary sex classification system utilized in society. *Id.* at 1–2. In order to facilitate ease of reading, understanding, and consistency, this Article uses the term transsexual.

individual's sex as the sex in which they aspire to live, or their identified sex.¹² It is with this frame of reference that this article proceeds.

Part II of this Article examines the medical and legal background of transsexual individuals, reviewing important medical concepts, past court decisions, and the Illinois Vital Records Act.¹³ Part III introduces the case providing the backdrop for this article, *In re Marriage of Simmons*, involving a transsexual man who married and raised a child with his wife and subsequently had his parental rights terminated during divorce proceedings when an Illinois court ruled the marriage invalid as a same-sex marriage.¹⁴ Part III then discusses the circuit and appellate court decisions in *Simmons*.¹⁵ Part IV analyzes the *Simmons* decisions in light of the background discussed in Part II.¹⁶ Finally, Part V proposes that states promulgate statutes allowing for a court order recognizing a transsexual's identified sex.¹⁷

II. BACKGROUND

Generally, society assumes that every human being is either male or female.¹⁸ The criteria used to classify a person as either male or female appears to be so self-evident as to make the classification trivial.¹⁹ However, when considering the list of items that differentiate male from a female, no one characteristic is true of only one sex *always and without exception*.²⁰ The overlap in characteristics translates into

12. See Beh & Diamond, *Ethical Concerns*, *supra* note 9, at 239 n.1 (explaining the sensitive issue of noun and pronoun usage when discussing transsexuality).

13. See *infra* Part II (discussing the medical history of transsexualism, prior cases involving transsexual persons, and the Illinois Vital Records Act).

14. See *infra* Part III (discussing *In re Marriage of Simmons*).

15. See *infra* Part III.B-C (discussing the circuit court and appellate court decisions in *In re Marriage of Simmons*).

16. See *infra* Part IV (analyzing the circuit court and appellate court decisions in *In re Marriage of Simmons*).

17. See *infra* Part V (proposing statutes designed to allow for a court order recognizing a transsexual's identified sex).

18. SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH I* (1978). Kessler and McKenna analogize the fact that someone is a man or a woman to the result of a coin toss. *Id.* A coin toss will always result in either heads or tails and the answer is easily found by looking. *Id.* However, if the coin is worn, close inspection is necessary. *Id.* Similarly, a person may not clearly be one gender or the other. *Id.* "But just as we assume that we can determine 'heads' or 'tails' by detailed inspection (rather than concluding that the coin has no heads or tails), we assume that we can do the same with a person's gender." *Id.*

19. *Id.*

20. *Id.* at 1-2. There are no behavioral or physical characteristics, visible, unexposed, or normally unexamined (e.g. gonads), that always differentiate between genders. *Id.* For example,

individuals that do not fall neatly into the male or female category.²¹ For example, transsexual individuals identify themselves as the sex opposite of their birth-assigned sex because the external genitalia they were born with and identified by at birth does not comport with their psychological or brain sex.²²

Because society and the law rely on an individual's sex, transsexual people face discrimination in virtually every aspect of their lives including employment, housing, credit, marriage, parenting, military service, law enforcement, and public accommodations, such as the restroom.²³ Discrimination and mistreatment of transsexual people is not a recent phenomenon²⁴—nor are transsexuals, intersexed,²⁵ or

some men wear skirts and some women have facial hair. *Id.*

21. See *infra* Part II.A.2 (describing medical conditions that cause a person to not fit into societal norms of male or female).

Perhaps the most traumatic failure to meet our expectations of normalcy is presented by sex errors of the body. Genital abnormalities, in particular, challenge the basic tenets of our identities as men or women. We regard the sex we are as an eternal verity. It lies at the core of our being and is therefore sacrosanct. One of the great mysteries of creation, it is not to be tampered with, explored, analyzed, explained, or questioned. To do so is to debase it. This mystification of sex leaves no room for doubt, no place for ambiguity. The first thing asked of every new human being is whether it is a boy or a girl. It must be one or the other. There are no additional categories. This is an attitude fraught with value judgments.

Louis Gooren, *Foreword* to JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES, at ix (1994).

22. Milton Diamond, *Sex and Gender: Same or Different?*, 10 FEMINISM & PSYCHOL. 46, 50 (2000); see also *infra* Part II.A.3 (discussing brain sex theory).

23. See NAN D. HUNTER, COURTNEY G. JOSLIN & SHARON M. MCGOWAN, THE RIGHTS OF LESBIANS, GAY MEN, BISEXUALS, AND TRANSGENDER PEOPLE 171 (4th ed. 2004) (listing different types of discrimination faced by the transsexual); see also, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) (holding that Title VII does not prohibit discrimination based on transgender status); *Kirkpatrick v. Seligman*, 636 F.2d 1047, 1051 (5th Cir. 1981) (finding no violation of a state law prohibiting sex discrimination where a transsexual female was required to wear male clothing at work); *Goins v. West Group*, 635 N.W.2d 717, 720 (Minn. 2001) (denying transsexual's claim of discrimination under the Minnesota Human Rights Act where she was denied the right to use the bathroom of her reassigned gender).

24. See Hymie Gordon, *Ancient Ideas About Sex Differentiation*, in GENETIC MECHANISMS OF SEXUAL DEVELOPMENT 1, 2 (H. Lawrence Vallet & Ian H. Porter eds., 1979) (describing ancient Roman writings describing abnormal sexual differentiations as portents).

[A]t Frusino, a baby was born who was the size of a four-year old. It was a wonder not merely because of its size but because its sex, whether male or female, was uncertain. In fact, the soothsayers summoned from Etruria said it was a disgusting and disgraceful portent which had to be removed from Roman territory, far from contact with the earth, and drowned in the sea. They put it alive into a chest, carried it out to sea, and threw it overboard.

Id.

25. Intersexed individuals are persons with apparent anatomical admixtures of male and female biological characteristics. MONEY, *supra* note 21, at 37.

hermaphrodites²⁶ recent phenomena.²⁷ Until the late 1990s, Title VII claims of sex discrimination did not include transsexualism.²⁸ Some federal courts have since held, however, that Title VII and other sex discrimination statutes protect transsexual people from discrimination.²⁹ Regardless, courts have generally not recognized a transsexual person's constitutional right to marry³⁰ or raise children.³¹

This Part introduces the key issues and concepts involved in considering a transsexual person's right to legally marry or raise children.³² First, this Part outlines medical conditions associated with sex differentiation, including the brain sex theory.³³ Next, this Part discusses key cases in the history of transsexual legal issues in the United States and Europe.³⁴ Finally, this Part describes the language and history of the Illinois Vital Records Act, the statute at the center of the debate in *Simmons*.³⁵

A. *The Study of Sex Differentiation*

This Part provides a background to the historical views of sex, medical conditions associated with sex differentiation, brain sex theory, surgical options, and the internationally recognized Harry Benjamin International Gender Dysphoria Association Standards of Care.³⁶

26. True hermaphrodites have ovarian as well as testicular tissue and the diagnosis applies irrespective of chromosomal complement. JOE LEIGH SIMPSON, *DISORDERS OF SEXUAL DIFFERENTIATION: ETIOLOGY AND CLINICAL DELINEATION* 237–38 (1976).

27. See Gordon, *supra* note 24, at 1–32 (discussing ancient ideas about sex differentiation).

28. HUNTER, *supra* note 23, at 174; see, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (holding that Title VII does not forbid discrimination against a transsexual).

29. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding that harassment based on sex stereotypes is covered by Title VII); *Miles v. New York Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (holding Title IX prohibits sexual harassment of a transsexual woman).

30. See *Loving v. Virginia*, 388 U.S. 1, 10 (1967) (speaking for the majority, Chief Justice Warren described the freedom to marry as essential to the pursuit of happiness); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty contemplated by the Fourteenth Amendment includes the right of the individual to marry, establish a home, and raise children).

31. See *infra* Part II–III (surveying cases involving transsexuals and the right to marry).

32. See *infra* Part II.A–C (describing sex differentiation, the history of transsexual legal issues, and the Illinois Vital Records Act).

33. See *infra* Part II.A (discussing the study of sex differentiation, brain sex theory, surgery, and surgical standards of care).

34. See *infra* Part II.B (listing and summarizing legal cases in the United States and Europe that involve transsexuals).

35. See *infra* Part II.C (discussing the Illinois Vital Records Act).

36. See *infra* Part II.A.1–4 (examining the history of sex differentiation, medical conditions of sex differentiation, the brain sex theory, surgical options, and the Harry Benjamin Standards of Care).

1. Historical Views of Sex

Sex differentiation has been recognized and studied since ancient times.³⁷ Historically, the factors that determine one's sex have changed over time; it has not always been true that genitals were the critical determinant of an individual's sex.³⁸ Furthermore, anthropologists have found other societies and cultures that reject binary sex and gender systems.³⁹ For example, a native Siberian tribe, the Chukchi, describe seven gender categories in addition to the categories "woman" and "man."⁴⁰ India, ancient cultures, and some religious texts recognize a third sex/gender status.⁴¹ Also, many Native American cultures recognize, indeed revere, a "two-spirit"—a third gender who functions as neither male nor female.⁴²

Although U.S. courts currently use genital or chromosomal tests to determine a person's sex, the medical field recognized, as far back as the 1930s, that it was exceedingly difficult to determine sex from a biological viewpoint.⁴³ In a 1958 study, scientists recognized that there

37. See Gordon, *supra* note 24, at 13 (stating that speculations about the mechanisms of sex differentiation are found in the ancient writings of philosophers and physicians, such as Plato).

38. See Greenberg, *supra* note 1, at 272–73 n.32 (explaining that during the Renaissance people acknowledged that an individual's genitals may change over the course of one's life and that from the late nineteenth century until World War I, the ultimate criterion for gender assignment for hermaphrodites was the presence or absence of ovaries).

39. See *id.* at 275–76 & n.53 (describing several villages in the Dominican Republic that formally recognize a third sex).

40. STEPHEN WHITTLE, RESPECT AND EQUALITY: TRANSSEXUAL AND TRANSGENDER RIGHTS 4 (2002) ("Though individual Chukchi could choose to 'change sex' from man to woman, there were also other genders which Chukchi could take up which do not involve a change from one sex to another, but rather from one gender to another.").

41. Serena Nanda, *The Hijras of India: Cultural and Individual Dimensions of an Institutionalized Third Gender Role*, in THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR 35–54 (Evelyn Blackwood ed., 1986). In India, the hijra is an institutionalized third gender role. *Id.* Hijra are neither male nor female, but contain elements of both. *Id.* Greek myths include Hermaphroditus who was half-male and half-female. Greenberg, *supra* note 1, at 276–77. Jewish texts include rules relating to legal rights and responsibilities of intersexed individuals. *Id.*

42. Greenberg, *supra* note 1, at 276. "Anthropologists have documented 'two-spirits' in over 130 Native American societies . . ." *Id.* at 276 n.59.

43. HUGH HAMPTON YOUNG, GENITAL ABNORMALITIES, HERMAPHRODITISM & RELATED ADRENAL DISEASES 23 (1937); see, e.g., *In re Marriage of Simmons*, No. 98 D 13738 (Cook County, Ill., Cir. Ct., County Dep't, Dom. Rel. Div. Apr. 8, 2003) (stating that because petitioner still had external female genitals he was still female in the eyes of the law); Greenberg, *supra* note 1, at 273 (describing how before 1968, athletic organizations examined a female athlete's external genitalia to determine her right to participate in sports as a female, and recounting the story of Maria Patino, a Spanish hurdler with Androgen Insensitivity Syndrome (AIS) whose sex verification test revealed a chromosomal make-up of a male (XY) even though her external morphologic sex, phenotype, and self-identification were clearly female).

was more than one criterion to identify sex.⁴⁴ The study described seven criteria of sex—five organic and two psychologic: (i) chromosomal arrangement; (ii) gonadal structure; (iii) morphology of the external genitalia; (vi) morphology of the internal genitalia; (v) hormonal status; (vi) sex of rearing; and (vii) gender role of the individual.⁴⁵

In 1968, a psychologist, John Money, identified ten developmental variables of sex:⁴⁶ (i) genetic or chromosomal sex;⁴⁷ (ii) gonadal sex;⁴⁸ (iii) fetal hormonal sex;⁴⁹ (vi) external morphologic sex;⁵⁰ (v) internal morphologic sex;⁵¹ (vi) hypothalamic sex;⁵² (vii) sex of assignment and rearing; (viii) pubertal hormonal sex;⁵³ (ix) gender identity and role; and (x) procreative sex impairments. Money posited that each of these developmental variables has its own probabilities of error or malfunction with some errors overlapping from one variable to another.⁵⁴ Courts in the United States still reference these variables today, and the medical community also looks to these variables when identifying sex differentiation conditions.⁵⁵

44. JONES & SCOTT, *supra* note 1, at 46.

45. *Id.*

46. MONEY, *supra* note 21, at 4.

47. Genetic or chromosomal sex describes the XX(female) or XY(male) chromosomal arrangement. Greenberg, *supra* note 1, at 281–82.

48. Gonadal sex refers to whether a person has ovaries or testes. *Id.*

49. Both males and females produce, in differing levels, androgens and estrogens. MONEY, *supra* note 21, at 4. These differing levels are measured during fetal development and at puberty to distinguish male from female. *Id.*

50. External morphologic sex refers to the external sexual organs—penis, scrotum, clitoris, and labia. Greenberg, *supra* note 1, at 281–82.

51. Internal morphologic sex refers to internal sexual organs—seminal vesicles, prostate, vagina, uterus, and fallopian tubes. *Id.*

52. The hypothalamus is connected to the pituitary gland. MONEY, *supra* note 21, at 59. It sends messages to the pituitary gland to produce gonadotropins, which instruct the ovaries or testes to produce male or female hormones. *Id.*

53. See *supra* note 49 and accompanying text (explaining fetal hormonal sex and pubertal hormonal sex).

54. MONEY, *supra* note 21, at 4. According to Dr. Harry Benjamin, a recognized expert in the field of gender identity:

“To insist that a person must live and be legally classified in accordance with his or her chromosomal sex violates common sense as well as humanity. It reduces science to a mere technicality and an absurd one at that.”

“With the same justification, one may insist that Rembrandt’s works are not paintings, but pieces of canvas covered with paint. Accurate but asinine.”

Douglas Smith, Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 966 (1971) (quoting a letter from Dr. Harry Benjamin to the Cornell Law Review).

55. See *infra* Part II.A.2 (discussing various sex differentiation conditions); see also *infra* Part II.B.2 (mentioning that a recent 2005 decision referenced the same variables).

2. Medical Conditions in Sex Differentiation

The medical community recognizes numerous conditions related to ambiguous genitalia, non-standard chromosomes, and other situations where biological factors are not all congruent.⁵⁶ For example, XXY Klinefelter Syndrome, Swyer Syndrome, and Turner Syndrome are three conditions related to chromosomal irregularities.⁵⁷ XXY Klinefelter Syndrome is a relatively common chromosomal abnormality found in 1 in 700 to 800 males.⁵⁸ Likely sexed at birth as male, a person with Klinefelter's Syndrome appears to be male, but has a female chromosomal arrangement.⁵⁹ Conversely, a person with Swyer Syndrome has the male Y-chromosome but is missing the sex-determining segment, preventing the development of testes.⁶⁰ Because of this irregularity, the fetus takes the default female path and develops a uterus without ovaries.⁶¹ Because the condition is not apparent at birth, parents usually raise the child as a girl, even though the child has a male chromosomal pattern.⁶² Turner Syndrome is a condition in which an individual is born with an XO chromosomal pattern that does not fit into the XX-XY binary system.⁶³ Occurring in approximately one in every 2000 births, Turner Syndrome children are raised as girls.⁶⁴

The primary condition related to ambiguous genitalia is *hermaphroditismus verus* where both ovarian and testicular tissue is present in the same person.⁶⁵ Male hermaphroditism exists in genetic males who have testicular gonadal tissue but with ambiguous external genitalia and feminine secondary sex characteristics.⁶⁶ Because of predominately feminine external genitalia, a male hermaphrodite will likely be reared as a female.⁶⁷ On the other hand, female hermaphrodites are genetically female with genitalia that have

56. For a more detailed discussion of biological sexual ambiguities, see Greenberg, *supra* note 1, at 278–91.

57. *Id.* at 283–84.

58. Faruk Hadziselimovic & Dale Huff, *Gonadal Differentiation – Normal and Abnormal Testicular Development*, in *PEDIATRIC GENDER ASSIGNMENT: A CRITICAL REAPPRAISAL* 15, 18 (Stephen A. Zderic et al. eds., 2002).

59. JONES & SCOTT, *supra* note 1, at 80–81.

60. *Id.*

61. *Id.*

62. *Id.*

63. Greenberg, *supra* note 1, at 284.

64. Turner Syndrome Society of the United States, <http://www.turner-syndrome-us.org/about/> (last visited Mar. 6, 2006).

65. JONES & SCOTT, *supra* note 1, at 91.

66. *Id.* at 139.

67. *Id.* at 139–40.

masculine characteristics although they have internal female organs.⁶⁸

In addition to the above conditions, numerous other sexually anomalous conditions exist.⁶⁹ The incidence of intersexuality, where individuals have either ambiguous or noncongruent sex features, may be as high as two to four percent of live births.⁷⁰ At a minimum, the rate is at least one-tenth of one percent of the population.⁷¹ As such, even at the lowest rate, the statistical likelihood of an intersex condition is as common as cystic fibrosis or Down's Syndrome.⁷²

But not all intersexed individuals are born with an intersex condition; surgical construction can create an intersexed individual.⁷³ The story of David Reimer made national headlines,⁷⁴ spawning a best selling book⁷⁵ as well as magazine⁷⁶ and journal articles.⁷⁷ The case involved a twin boy subjected to sexual reassignment surgery after a botched circumcision mutilated his penis.⁷⁸ Raised as a girl, David recounts that he always felt he was not a girl.⁷⁹ David's case is perhaps the most recognized, but it is not an isolated case.⁸⁰ Medical conditions related to sex differentiation and situations like David Reimer show that

68. See *id.* at 181–275 (describing female hermaphroditism due to congenital adrenal hyperplasia and female hermaphroditism without virilization, which is the development of secondary male characteristics like facial hair that occurs in some female hermaphrodites).

69. See Greenberg, *supra* note 1, at 281–89 (discussing various sexually anomalous conditions).

70. *Id.* at 267 n.7. For a more complete list of intersex and anomalous sexual conditions, see *id.* at 278–91.

71. *Id.* at 267 n.7.

72. ALICE DOMURAT DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 43 (1998).

73. Greenberg, *supra* note 1, at 290–93.

74. Shari Roan, *The Basis of Sexual Identity; He Was a Boy, Became a Girl, and Then a Boy Again. His Case Helps Show the Brain's Role in Gender*, L.A. TIMES, Mar. 14, 1997, at E1.

75. JOHN COLAPINTO, *AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL* (2000).

76. John Colapinto, *The True Story of John/Joan*, ROLLING STONE, Dec. 1997, at 55.

77. See Patricia L. Martin, *Moving Toward an International Standard in Informed Consent: The Impact of Intersexuality and the Internet on the Standard of Care*, 9 DUKE J. GENDER L. & POL'Y 135 (2002) (discussing David Reimer's story).

78. See generally COLAPINTO, *supra* note 75 (telling the story of David Reimer).

79. *Id.* at center photo pages.

80. *Id.* at 273–274. The *Urology Times* discusses a case where a baby boy was reassigned to girlhood by castration, vaginal surgery, and hormone treatment with results strikingly similar to David Reimer's. *Id.* Upon reaching adolescence the child demanded to be reassigned as a boy because he did not feel he was a girl. *Id.* In another case, a circumcision severely damaged a child's penis and the decision was made to turn the child into a girl. Greenberg, *supra* note 1, at 291. The child underwent sex reassignment surgery and the parents raised the child as a girl. *Id.* Interviews at age sixteen and twenty-six indicate that she identifies as a bi-sexual female and has recreational and occupational interests that are more typically identified with males. *Id.*

defining sex may not be as easy as the genital or chromosomal test that courts consistently use.⁸¹

3. Brain Sex Theory

Some argue that transsexualism is a purely psychological disorder because transsexualism does not have a known cause or origin like other biological conditions.⁸² Others argue that transsexuals should be included as a physical intersex syndrome like those discussed above.⁸³ But at the Brain Bank in the Netherlands, studies support the hypothesis that “there is a brain sex difference between men and women, and transsexual people have the brain sex of that gender group to which they maintain they belong.”⁸⁴

In one study from the Netherlands, researchers found that genetically male transsexuals have a female brain structure.⁸⁵ This finding supports the hypothesis that gender identity forms from an interaction between the developing brain and sex hormones.⁸⁶

On the basis of this study, as well as the David Reimer case and others like him, it appears that the brain may be more critical than the external genitalia to psychosexual development and adaptation.⁸⁷

81. See Greenberg, *supra* note 1, at 292 (explaining that the medical and psychiatric community now question their long-held beliefs and that, likewise, the law must question its long-held assumptions about the legal definition of sex).

82. Teresa A. Zakaria, *By Any Other Name: Defining Male and Female in Marriage Statutes*, 3 AVE MARIA L. REV. 349, 356 (2005). The author uses the term transsexual as a person who has a strong desire to become the opposite sex of his or her unambiguous birth sex and who suffers not from a biological condition but from a psychological disorder. *Id.* The author supports this by stating that biological conditions have a known cause or origin, psychological disorders do not, and transsexualism does not have a known cause or origin. *Id.* See also THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION’S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, SIXTH VERSION 2, 4, 6 (2001) [hereinafter HARRY BENJAMIN SOC], available at <http://www.hbigda.org/Documents2/socv6.pdf>. The Harry Benjamin SOC explain that since 1994, transsexualism has appeared in the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition (DSM-IV) as Gender Identity Disorder. *Id.* at 4. Although listed in the DSM-IV as a mental disorder, this is not a license for stigmatization or deprivation of a person’s civil rights. *Id.* at 6. “The use of a formal diagnosis is often important in offering relief, providing health insurance coverage, and guiding research to provide more effective future treatments.” *Id.*

83. WHITTLE, *supra* note 40, at 10.

84. *Id.*

85. Jiang-Ning Zhou et. al., *A Sex Difference in the Human Brain and its Relation to Transsexuality*, 378 NATURE 68, 68 (Nov. 2, 1995).

86. *Id.* (explaining that previous studies showed that the bed nucleus of the stria terminalis (BSTc), a brain area that is essential for sexual behavior, is larger in men than women).

87. Greenberg, *supra* note 1, at 326; see also Roan, *supra* note 74 (arguing that the John/Joan story provides stark evidence that a person’s brain, not anatomy or social environment, predetermines sexual identity).

According to Milton Diamond, an expert on intersexed and sex-reassigned individuals, “brain sex” is a “powerful and new approach that will get a good deal of attention legally since it trumps all the standard characteristics used to determine one’s sex.”⁸⁸

4. The Harry Benjamin International Gender Dysphoria Association Standards of Care and Surgical Options for Transsexual Individuals

a. The Harry Benjamin International Gender Dysphoria Association Standards of Care

The Harry Benjamin International Gender Dysphoria Association (HBIGDA) publishes guidelines in the form of Standards of Care (SOC) for the treatment of persons with gender identity disorders.⁸⁹ The purpose of the SOC is to articulate the professional consensus about the psychiatric, psychological, medical, and surgical management of gender identity disorders.⁹⁰ Specifically, the SOC intend to provide flexible directions for the treatment of persons with gender identity disorders.⁹¹ The SOC recommend that a clinician consider five elements when dealing with a transsexual patient, including “diagnostic assessment, psychotherapy, real-life experience, hormone therapy, and surgical therapy,” with the latter three representing a triadic therapy available to the transsexual.⁹² The SOC make it clear that not all patients will desire nor require all three elements of triadic therapy.⁹³ The SOC further provide guidelines for mental health professionals to follow, including eligibility requirements for hormone therapy or surgery.⁹⁴ However, the SOC do not define when the process of sex reassignment is complete.⁹⁵

88. E-mail from Milton Diamond, Professor of Anatomy and Reproductive Biology, University of Hawaii Manoa, to Katie Fletcher, Student, Loyola University Chicago School of Law (Oct. 7, 2005) (on file with author). Dr. Milton Diamond is a professor of anatomy and reproductive biology at the University of Hawaii Manoa. Diamond directs the John A. Burns School of Medicine’s Pacific Center for Sex and Society. Known for his research on the origins of sexual identity, Diamond studies the experiences of intersex and sex-reassigned individuals and challenges aspects of the practice of surgically changing the gender of infant children whose genitalia are deformed or damaged. Pacific Center for Sex and Society Homepage, <http://www.hawaii.edu/PCSS/index.html> (last visited Mar. 6, 2006).

89. The HBIGDA is named after Harry Benjamin, M.D. (1885–1986) who was one of the first physicians to work with gender dysphoric persons. For more information, visit the HBIGDA website, <http://www.hbigda.org> (last visited Mar. 6, 2006).

90. HARRY BENJAMIN SOC, *supra* note 82, at 1.

91. *Id.*

92. *Id.* at 3.

93. *Id.*

94. *Id.* at 6–14. For example, the SOC recommend that a person live full time in the identified gender for twelve months prior to genital surgery. *Id.* at 7.

95. *Id.* at 22.

b. Surgical Options for Transsexual Individuals

For some people with a gender identity disorder, surgery is an effective treatment.⁹⁶ The first complete male-to-female surgery reportedly occurred in 1931.⁹⁷ Previous attempts at this surgery were incomplete, resulting only in removal of the genitals.⁹⁸ Female-to-male sex-reassignment surgery was first reported in Germany in 1912.⁹⁹ However, sex-reassignment surgery did not garner mainstream attention until the late 1940s and early 1950s when Christine Jorgensen, an American, underwent sex-reassignment surgery.¹⁰⁰

Today, many surgeries are available to the male-to-female patient and the female-to-male patient.¹⁰¹ However, the female-to-male patient may be restricted in his choice of techniques by anatomical, aesthetic or surgical considerations.¹⁰² Phalloplasty—resulting in good appearance, standing micturition,¹⁰³ sexual sensation, and/or coital ability—requires separate stages of surgery and involves frequent technical difficulties

96. *Id.* at 18.

97. The International Transsexual Sisterhood, *First Gender Changes*, <http://www.the-sisterhood.net/thepinknazi/id4.html> (last visited Mar. 6, 2006). The patient underwent castration in 1922, followed by a penectomy and the construction of a vagina in 1931. *Id.*

98. *Id.*

99. *See id.* (reporting that performance of the first incomplete sex-reassignment surgeries in female-to-male patients occurred in Berlin in 1912).

100. *Id.*

101. Surgical options for the male-to-female include orchiectomy (surgical excisions of testis or testes), penectomy (surgical removal of penis), vaginoplasty (plastic surgery of the vagina), rhinoplasty (plastic surgery of the nose), blepharoplasty (plastic surgery on an eyelid especially to remove fatty or excess tissue), clitoroplasty (clitoral reduction), labiaplasty (plastic surgery of the labia), thyroid chondroplasty (aesthetic reduction of thyroid cartilage), suction-assisted lipoplasty of the waist (removal of fat from the waist), and facial bone reconstruction. American Society of Plastic Surgeons, *Lipoplasty*, http://www.plasticsurgery.org/public_education/procedures/Lipoplasty.cfm (last visited Mar. 6, 2006); *Laser Treatments, Labiaplasty*, <http://www.lasertreatments.com/labiaplasty.html> (last visited Mar. 6, 2006); *Medline Plus*, [http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=\[insert word\]](http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=[insert word]) (last visited Mar. 6, 2006); *PubMed*, http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=11094221&dopt=Abstract (last visited Mar. 6, 2006).

Surgical options for the female-to-male include hysterectomy (surgical removal of the uterus), salpingo-oophorectomy (surgical incision of Fallopian tube and ovary), vaginectomy (partial or complete surgical excision of the vagina), scrotoplasty (plastic surgery of the scrotum), urethroplasty (plastic surgery of the urethra), phalloplasty (plastic surgery of the penis or scrotum), metoidioplasty (clitoral release), and placement of testicular prostheses. *MedLine*, [http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=\[insert word\]](http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=[insert word]) (last visited Mar. 6, 2006); *Metoidioplasty*, <http://www.brownsteinmd.com/metaidioplasty.html> (last visited Mar. 6, 2006).

102. HARRY BENJAMIN SOC, *supra* note 82, at 21.

103. Micturition is the act of urination. *Urination*, *MedicineNet*, <http://www.medterms.com/script/main/art.asp?articlekey=4383> (last visited Mar. 6, 2006).

that may require additional operations.¹⁰⁴ The HBGDA SOC recognize that there are a variety of techniques available for penis construction.¹⁰⁵

Despite the medical community's recognition of transsexuals and the availability of surgical options, surgery does not guarantee that transsexuals will be legally recognized as their identified sex, as illustrated by the cases that follow.¹⁰⁶

B. History of Transsexual Legal Issues

For almost forty years, courts in the United States have generally failed to recognize a transsexual's identified sex.¹⁰⁷ The cases that follow are divided into those that did and those that did not recognize a transsexual's reassigned sex, illustrating the inconsistent and confusing manner in which American law has dealt with transsexuals.¹⁰⁸ This Part concludes with a brief look at the treatment of transsexuals under European law.¹⁰⁹

1. United States: Cases Not Recognizing a Transsexual's Reassigned Sex

In 1966, a United States court first considered the right of transsexuals to legally change their sex in *Anonymous v. Weiner (Anonymous D)*.¹¹⁰ In *Anonymous I*, the petitioner sought to change the sex on her birth certificate from male to female in the New York Supreme Court.¹¹¹ The court sent the petitioner's request to the administrative agency responsible for issuance of a new birth certificate, the Bureau of Records and Statistics of the Department of Health of the City of New York (Bureau).¹¹² The Bureau, recognizing the possible consequences of any decision, called upon the New York Academy of

104. HARRY BENJAMIN SOC, *supra* note 82, at 22.

105. *Id.*

106. *See infra* Part II.B.1 (detailing court cases in which a transsexual's identified sex was not recognized by U.S. courts).

107. Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 L. & SEXUALITY 87, 88 (2003).

108. *See infra* Part II.B.1–2 (discussing cases heard in U.S. courts).

109. *See infra* Part II.B.3 (briefly discussing European law and a recent case heard in the European Court of Human Rights).

110. 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

111. *Id.* at 320. The court noted that the petitioner had undergone surgery and had "assumed the name and role of a female in our society." *Id.* at 321.

112. *Id.* at 321. Petitioner was not asking for an amended birth certificate for the purpose of marriage. *Id.* The New York Supreme Court is the trial court in New York and was not the court acting as an appeals court in this situation. *Id.*

Medicine (Academy) to study the problem and to submit its recommendations to the Board of Health.¹¹³ The Committee on Public Health of the Academy turned to a group of specialists to explore the issue of changing transsexuals' birth certificates to reflect their identified sex.¹¹⁴

The Academy reported that it opposed a change of sex on a birth certificate for transsexuals, reasoning that the public interest in protection against fraud outweighed a transsexual's right to privacy.¹¹⁵ After receiving the Academy's opinion, the Bureau unanimously denied the petitioner's application for amendment or issuance of a new birth certificate.¹¹⁶ On review of the petitioner's request, the New York Supreme Court stated that it was unable to substitute its views for those of the administrative body in charge of maintaining the records of births and deaths because doing so would usurp a function of the executive branch of government.¹¹⁷

More recently in 1999, in *Littleton v. Prange*, the Texas Court of Appeals considered the question of a transsexual person's sex in the context of marriage.¹¹⁸ In *Littleton*, the plaintiff, a transsexual female, married a man and filed a wrongful death suit as the surviving spouse after her husband died.¹¹⁹ The defendant doctor argued that the wife could not be the surviving spouse because she was male and that made the marriage void.¹²⁰

113. *Id.* The New York Supreme Court pointed out three reasons for the Board of Health's investigation and the need for a formulation of policy and possible implementation by regulation. *Id.* First, it "reflect[ed] the Board's awareness of its obligation to society to ensure the accuracy of public records[;]" second, it "indicate[d] its deep concern for the individual, the transsexual[;]" and finally, and most significant according to the court, "it represente[d] adherence to the highest standards of the administrative process." *Id.*

114. *Id.* The group included "gynecologists, endocrinologists, cytogeneticists, psychiatrists and a lawyer." *Id.*

115. *Id.* at 322; Committee on Public Health of The New York Academy of Medicine, *Change of Sex on Birth Certificates for Transsexuals*, 42 BULL. N.Y. ACAD. MED. 721, 724 (Aug. 1966). The Academy concluded that "[m]ale-to-female transsexuals are still chromosomally males while ostensibly females" and questioned a changed birth certificate "as a means to help a psychologically ill person in their social adaptation." *Id.* Interestingly, the Academy does not address whom the transsexual would defraud. *Id.*

116. *Anonymous I*, 270 N.Y.S.2d at 322. The Board stated they would change a birth certificate if there was an error but could not change a birth certificate for the reasons proposed by this petitioner. *Id.*

117. *Id.* at 323-24 (holding that the Board's conclusion had not been proven to be arbitrary and that the nature of the issue required judicial deference to the medical community).

118. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999). The court framed the issue as being "[w]hen is a man a man, and when is a woman a woman?" *Id.* at 223.

119. *Id.* at 225. The couple had been married for seven years and the plaintiff's spouse was aware of her background. *Id.*

120. *Id.*

In determining whether the wife was a woman and the marriage was valid, the court looked to whether any statutes recognized her legal name change and whether the surgical and chemical changes that she undertook were sufficient to change her sex.¹²¹ The court failed to find any statutory guidance and considered the issue as a question of law.¹²² Examining state law and cases from other jurisdictions, the court concluded that the wife was still male for the purposes of determining the validity of her marriage and thus ruled the marriage invalid.¹²³ The court reasoned that the wife was male, both anatomically and genetically at birth, and refused to be bound by a name change on an amended birth certificate.¹²⁴

Similarly, the Kansas Supreme Court in 2002 refused to recognize a transsexual woman's change of sex in *In re Gardiner*, a case in which the surviving wife lost the right to her deceased husband's estate to her husband's estranged son.¹²⁵ In *Gardiner*, the wife had sexual reassignment surgery in Wisconsin many years before her marriage to the deceased.¹²⁶ Wisconsin acknowledged the sexual reassignment and changed her birth certificate, pursuant to Wisconsin statutes.¹²⁷ However, in *Gardiner*, the Kansas Supreme Court declined to give full faith and credit to the decisions of the Wisconsin courts.¹²⁸ Instead it held that, for the purposes of marriage in the State of Kansas, the wife was still a male and as such, her marriage to the deceased was void.¹²⁹

The Florida Court of Appeal also refused to recognize a transsexual person's change of sex.¹³⁰ In 2004, in *Kantaras v. Kantaras*, the Court of Appeal overturned a trial court decision, which found the marriage

121. *Id.* at 229–31.

122. *Id.* at 225, 230.

123. *Id.* at 225–29, 231; *see also In re Ladrach*, 513 N.E.2d 828, 832 (Stark County, Ohio Prob. Ct. 1987) (finding no Ohio statutory provision for a designated gender change and refusing to validate a marriage involving a post-operative transsexual without some statutory approval from the state legislature).

124. *Littleton*, 9 S.W.3d at 230 (“We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.”). *But see Goins v. West Group*, 635 N.W.2d 717, 721 (Minn. 2001) (stating that the respondent was a transgendered person who was born a male but reassigned as a female by a Texas court in 1995).

125. *In re Gardiner*, 42 P.3d 120, 137 (Kan. 2002).

126. *Id.* at 122–23.

127. *Id.* at 123. Her driver's license, passport, health documents, and records at two universities reflected she was female. *Id.* Also, the opinion states that a Wisconsin court drafted an order directing the Department of Health and Social Services in Wisconsin to prepare a new birth record. *Id.*

128. *Id.* at 134–36.

129. *Id.* at 136–37.

130. *Kantaras v. Kantaras*, 884 So. 2d 155, 155 (Fla. Dist. Ct. App. 2004).

valid, and remanded the case to the trial court to reconsider custody of the couple's two children.¹³¹ The trial court concluded that the husband was legally a male at the time of marriage, reasoning that chromosomes are only one factor in the determination of sex and they do not outweigh gender or self-identity.¹³² However, the Florida Court of Appeal reversed, declaring that sex for the purpose of the Florida marriage statutes is a question for the legislature.¹³³

2. United States: Cases Recognizing a Transsexual's Reassigned Sex

Despite the cases discussed above, there are some jurisdictions in the United States that have recognized a transsexual's reassigned sex.¹³⁴ In 1968, just two years after *Anonymous I*, a similar case appeared before the Civil Court of the City of New York.¹³⁵ The petitioner in *In re Anonymous (Anonymous II)*, a transsexual female, petitioned the court for an order to change her name and sex on her birth certificate.¹³⁶

In deciding to grant the order, the court found that the petitioner, a post-surgical transsexual female, had to be viewed as her identified sex because of the physiological changes she underwent in having surgery.¹³⁷ The court emphasized that the petitioner had no chance of sexually functioning as a male and that she functioned as a woman because she could have a vaginal orgasm, although she could not procreate.¹³⁸ The court further noted that a post-surgical transsexual should be recognized as his or her identified sex just like a surgically repaired pseudo-hermaphrodite.¹³⁹

131. *Id.*; see also Press Release, Nat'l Ctr. for Lesbian Rights, NCLR Announces Historic Settlement Agreement: Transsexual Father Retains Parental Rights (June 10, 2005), <http://www.nclrights.org/releases/pr-kantaras-061005.htm> (detailing the settlement reached between the parties in *Kantaras*). In June 2005, a settlement was reached through arbitration whereby the transsexual father retained all parental rights and shared legal custody of the children. *Id.*

132. *Kantaras*, 884 So. 2d at 156–57.

133. *Id.* at 161.

134. See *supra* Part II.B.2 (discussing United States cases in which a transsexual's reassigned sex has been legally recognized).

135. *In re Anonymous (Anonymous II)*, 293 N.Y.S.2d 834, 835 (N.Y. Civ. Ct. 1968); see *supra* Part II.B.1 (discussing *Anonymous I*).

136. *Anonymous II*, 293 N.Y.S.2d at 835.

137. *Id.* at 836–38.

138. *Id.* at 836.

139. *Id.* at 837. The court explained that a child mis-sexed at birth was a pseudohermaphrodite. *Id.* “Female pseudohermaphrodites may have anomalies limited to the external genitalia” and “male pseudohermaphrodites are individuals with a Y chromosome whose external genitalia do not develop as expected for normal males.” SIMPSON, *supra* note 26, at 157, 183. The court then compared a pseudohermaphrodite, corrected as an infant, and the true hermaphrodite, and posited that without corrective surgery, society would continue to classify this

The court also responded to the Academy's fraud concern in *Anonymous I*, stating that fraud is more likely when the law classifies a person, who is apparently female, as a male.¹⁴⁰ The court recognized the psychological component of a person's sex, dismissing the notion that chromosomal arrangements determine sex.¹⁴¹

Similarly, in *M.T. v. J.T.* in 1976, the Superior Court of New Jersey espoused an expansive view of sex in answering the question of how to determine a person's sex for marital purposes.¹⁴² In *M.T.*, the court found that the marriage between the plaintiff transsexual female, who had surgery to remove her male sex organs and construct a vagina, and the male defendant was valid.¹⁴³

In validating the marriage between a male and a post-operative transsexual female, the court saw no reason to view the plaintiff as anything other than female because of her sex-reassignment surgery and her capacity to function sexually as a female.¹⁴⁴ The court also stated that there are several criteria or standards potentially relevant in determining the sex of an individual, rejecting the chromosomal test of *Anonymous I* as unhelpful, unrealistic, and inhumane.¹⁴⁵

In 2003, the Maryland Court of Appeals¹⁴⁶ heard an uncontested case in which the petitioner requested an order from the court that would

individual as his or her birth certificate sex and not the individual's true sex. *Anonymous II*, 293 N.Y.S.2d at 835. The court then likened the post-surgical transsexual with a surgically repaired pseudohermaphrodite and asked, "[s]hould not society afford some measure of recognition to the altered situation and afford this individual the same relief as it does the pseudo-hermaphrodite?" *Id.* at 836-37.

140. *Anonymous II*, 293 N.Y.S.2d at 838. The court stated it was in "complete disagreement" with the conclusion reached by the Academy. *Id.*

141. *Id.* at 838. The court supported this by stating:

A male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact. . . .

Nevertheless, should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most function and reactions, many so exquisite in nature, including sex orientation? I think not.

Id.

142. *M.T. v. J.T.*, 355 A.2d 204, 208-11 (N.J. Super. Ct. App. Div. 1976). Because marriage is only legal when between a man and a woman, the court had to determine the plaintiff's sex to decide the legality of the marriage. *Id.* at 207.

143. *Id.* at 211.

144. *Id.* at 210-11. The court held that there was "no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated." *Id.*

145. *Id.* at 210.

146. The Court of Appeals is Maryland's highest court.

reflect a name change and a sex-change from male to female.¹⁴⁷ The lower court approved the petitioner's request for a name change but denied the sexual identity change, holding that gender had physical manifestations that were not subject to modification.¹⁴⁸ The Maryland Court of Appeals concluded that Maryland courts could determine and declare that a person had changed from one sex to the other, although, in this case, the petitioner had not presented sufficient evidence of change.¹⁴⁹ This case illustrates a court's willingness to recognize a transsexual's identified sex under certain circumstances.¹⁵⁰

In a more recent case in 2005, *In re Lovo-Lara*, the Board of Immigration Appeals (BIA) of the Department of Justice found that a North Carolina marriage between a post-operative transsexual female and a foreign male was valid.¹⁵¹ The BIA found the marriage valid because a North Carolina statute allowed a person to amend his or her birth certificate after sex-reassignment surgery and because the state issued the parties a marriage license and registered their marriage.¹⁵²

Although the BIA relied on state law in making its ruling, it responded to the Department of Homeland Security's argument that chromosomal characteristics are the definitive test for determining sex, noting that such a claim is subject to much debate within the medical community.¹⁵³ It further referenced eight criteria (and recognized that they are not always congruent) typically used by medical professionals to determine an individual's sex: (1) genetic or chromosomal sex—XY or XX; (2) gonadal sex—testes or ovaries; (3) internal morphologic sex—seminal vesicles/prostate or vagina/uterus/fallopian tubes; (4)

147. *In re Heilig*, 816 A.2d 68, 69 (Md. 2003).

148. *Id.* at 69. Petitioner contended that section 4-214(b)(5) of the Health-General Article of the Maryland Code directed the Secretary of Health and Mental Hygiene, upon receiving a court order, to amend that person's Maryland birth certificate. *Id.* Part of the problem in this case was that the petitioner, though a resident of Maryland, was born in Pennsylvania and courts generally hold that they are only empowered to change birth certificates issued in their own state. *Id.* at 69–70.

149. *Id.* at 70. The court remanded the case so that the petitioner could provide proof of gender reassignment. *Id.* at 87. However, the court noted that it was not clear what, if any, medical or legal criteria existed for determining when a complete, permanent, and irreversible gender change occurred. *Id.* at 86–87. The court stated that the petitioner would bear the burden of producing sufficient medical evidence of both the criteria for determining when a gender change occurred and medical data showing that the petitioner completed a permanent and irreversible change from male to female. *Id.* at 87.

150. *Id.*

151. *In re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (B.I.A. 2005).

152. *Id.* at 748. The court looked to the state in which the marriage took place as the governing and controlling law. *Id.*

153. *Id.* at 752.

external morphologic sex—penis/scrotum or clitoris/labia; (5) hormonal sex—androgens or estrogens; (6) phenotypic sex (secondary sexual features)—facial and chest hair or breasts; (7) assigned sex and gender of rearing; and (8) sexual identity.¹⁵⁴

The cases presented above illustrate that some U.S. courts have acknowledged a more expansive view of a person's sex, but U.S. courts have not reached as far as the courts in Europe.¹⁵⁵

3. European Law

In Europe, the recognition of transsexuals' right to change their birth-assigned sex is a recent development.¹⁵⁶ Until 2002, *Corbett v. Corbett* governed English marriage law with respect to transsexuals, holding that an individual cannot change their birth-assigned sex.¹⁵⁷ However, in *I. v. United Kingdom (Case of I)* in 2002, the European Court of Human Rights found that the United Kingdom violated Articles 8¹⁵⁸

154. *Id.* Most individuals are born with the requisite 46 chromosomes—including the sex chromosome pair of either XX or XY—and generally all eight factors are congruent with the chromosomal pattern. Greenberg, *supra* note 1, at 278. However, this is not the case for intersexed individuals, transsexuals, or others who may have any number of anomalous sexual conditions. See *supra* Part II.A.2 (discussing medical conditions in sex differentiation).

155. Compare *supra* Part II.B.1 (illustrating court cases that did not recognize a transsexual's identified sex), with *supra* Part II.B.2 (illustrating court cases that did recognize a transsexual's identified sex).

156. See *I v. United Kingdom (Case of I)*, App. No. 25680/94, 36 Eur. Ct. H.R. Rep. 967 (2002), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Application Number 25680/94) (recognizing the right of a transsexual to change his or her birth-assigned sex); *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. Ct. H.R. 447 (2002), available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search Application Number 28957/95) (finding the United Kingdom in violation of the European Convention on Human Rights by not recognizing a transsexual's identified sex); see also Berrigan, *supra* note 107, at 88–90 (explaining that, in July 2002, the European Court of Human Rights ordered recognition of transsexual marriage); Robert E. Rains, *Legal Recognition of Gender Change for Transsexual Persons in the United Kingdom: The Human Rights Act 1998 and "Compatibility" with European Human Rights Law*, 33 GA. J. INT'L & COMP. L. 333 (2005) (examining the legal treatment of transsexuals in the United Kingdom and by the European Convention on Human Rights).

157. *Corbett v. Corbett*, 2 All E.R. 33, 49 (1970); see also *Case of I*, 36 Eur. Ct. H.R. Rep. 967 (explaining that *Corbett* held that sex for the purpose of marriage was to be determined by the chromosomal, gonadal, and genital tests where these are congruent and without regard to any surgical intervention). The *Corbett* case does not, however, address incongruence in the chromosomal, gonadal, and genital tests. *Corbett*, 2 All E.R. at 48.

158. Article 8 – Right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals,

and 12¹⁵⁹ of the European Convention on Human Rights and Additional Protocols when it did not recognize the petitioner's sex change.¹⁶⁰

In so finding, the court found no significant public interest to weigh against the petitioner's interest in obtaining legal recognition of her sex reassignment.¹⁶¹ Nor was it apparent to the court that a person's chromosomes, as opposed to any other factors, must determine a transsexual's sexual identity.¹⁶²

In its opinion, the European Court of Human Rights observed the statutory recognition of gender reassignment in Singapore, Canada, South Africa, Israel, Australia, and New Zealand.¹⁶³ It also noted that 54% of the contracting states to the European Convention on Human Rights¹⁶⁴ permitted transsexual marriage while 14% explicitly rejected it and the other 32% had unclear positions.¹⁶⁵

In contrast, the law in the United States generally determines sex based on a person's birth-assigned sex.¹⁶⁶ While scholars in law and other disciplines are beginning to recognize the complex and non-binary nature of sexual categories, the law in the United States has failed to do so.¹⁶⁷ Unfortunately, "[t]he hare of science and technology lurches

or for the protection of the rights and freedoms of others.

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, 230 (entered into force Sept. 3, 1953).

159. Article 12 – Right to marry: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. *Id.* art. 12, 213 U.N.T.S. at 232.

160. *Case of I*, 36 Eur. Ct. H.R. Rep. 967, ¶¶ 42, 74, 85. “Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.” *Id.* ¶ 70.

161. *Id.* ¶¶ 62, 73. The court also found no reason to deny a transsexual the right to enjoy marriage. *Id.* ¶¶ 83–84.

162. *Id.* ¶ 62.

163. *Id.* ¶ 39. The court also referenced that all but two states in the United States have statutory recognition of gender reassignment. *Id.*

164. The United States is not a party to the European Convention on Human Rights. Council of Europe, http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp (last visited Mar. 6, 2006).

165. *Case of I*, 36 Eur. Ct. H.R. Rep. 967, ¶ 40. The 54% of countries that permitted transsexual marriage included Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey, and Ukraine. *Id.* The 14% that did not permit transsexual marriage included Ireland and the United Kingdom. *Id.* No legislation exists in Moldova, Poland, Romania, and Russia. *Id.*

166. See *supra* Part II.B.1 (discussing U.S. cases where courts have predominantly ruled based on a person's assigned sex at birth).

167. Greenberg, *supra* note 1, at 292.

ahead [while] the tortoise of the law ambles slowly behind.”¹⁶⁸

C. Illinois Vital Records Act

In Illinois, the Vital Records Act (Act) provides the procedures necessary for the re-issuance of a birth certificate, which is particularly relevant to the recognition of transsexuals and to the outcome in *Simmons*.¹⁶⁹ The Act governs the reissuance of a birth certificate for the purposes of adoption, legitimacy, and sex-reassignment.¹⁷⁰ The Act provides, in part, that a person may obtain a new birth certificate subject to certain restrictions.¹⁷¹ Specifically, the Act provides that a person shall have a new birth certificate issued after the State Registrar receives an affidavit from a physician stating that the physician has performed a surgery such that the applicant’s birth certificate should be changed.¹⁷²

The Act’s legislative history relative to the issuance of a new birth certificate after sex-reassignment only reveals that the legislature amended the 1915 Act in 1955, adding Section 17(1)(d), allowing for amendment of birth certificates.¹⁷³ However, in *City of Chicago v. Wilson* in 1978, the Illinois Supreme Court referenced Section 17(1)(d) of the Act and stated that the Illinois legislature authorizes the issuance of a new birth certificate following sex-reassignment surgery.¹⁷⁴ In *Wilson*, the Chicago police arrested two transsexuals for violating a

168. *Id.* at 293.

169. 410 ILL. COMP. STAT. 535/17(1)(d) (2004).

170. 410 ILL. COMP. STAT. 535/17; *see also In re Roger B.*, 418 N.E.2d 751, 752 (Ill. 1981) (stating that the statute provides that an original birth certificate shall be sealed after an adoption); *Sullivan v. McGaw*, 480 N.E.2d 1283, 1290 (Ill. App. Ct. 2nd Dist. 1985) (explaining that the statute provides for a change in a child’s birth certificate to reflect the result of a paternity test).

171. 410 ILL. COMP. STAT. 535/17(1)(d). Specifically,

(1) For a person born in this State, the State Registrar of Vital Records shall establish a new certificate of birth when he receives any of the following:

. . .

(d) An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person’s birth record should be changed. The State Registrar of Vital Records may make any investigation or require any further information he deems necessary.

Id.; *see also infra* Part IV.B (discussing the Illinois Vital Records Act in relation to the *Simmons* case).

172. 410 ILL. COMP. STAT. 535/17(1)(d).

173. 1955 ILL. LAWS 1026. SENATE JOURNAL OF ILLINOIS 585, 609, 857, 888, 977, 993, 1108, 2250 (1955). The text of the Senate Journal lists only the names of the senators who motioned and voted for the amendment. *Id.* *But see* Committee on Public Health of The New York Academy of Medicine, *Change of Sex on Birth Certificates for Transsexuals*, 42 BULL. N.Y. ACAD. MED. 721, 723–24 (Aug. 1966) (suggesting that the Illinois statute, while enacted for hermaphrodites, allows for broader application).

174. *City of Chicago v. Wilson*, 389 N.E.2d 522, 533–34 (Ill. 1978).

Chicago ordinance that prohibited a person from wearing clothing of the opposite sex.¹⁷⁵ The defendants argued that they were pre-operative transsexuals and that pre-operative therapy required that they dress in clothes of the sex to which they were transitioning.¹⁷⁶ The court balanced the government's interest in infringing on the defendants' choice of dress and the defendants' liberty interest and found for the defendants.¹⁷⁷ The court reasoned that if the Illinois legislature implicitly allows a change of sex on a birth certificate following sex reassignment surgery and the protocol to be followed prior to surgery requires wearing clothing of the opposite sex, then the ordinance infringed upon the defendants' constitutional liberty interests.¹⁷⁸

Further, in 2003, the Maryland Court of Appeals referenced the Illinois Act as a statute that allows a person who has had a sex change to amend his or her birth certificate to reflect the change when the person has surgery and presents an affidavit from a physician attesting to the surgical change.¹⁷⁹ While the Maryland court found that twenty-two states, including Illinois, as well as the District of Columbia, have statutes that allow for a change in sex on a birth certificate and twenty states have statutes addressing amendments but not specifically sex changes,¹⁸⁰ the Illinois case of *In re Marriage of Simmons* questions whether Illinois courts would actually use the Illinois Vital Records Act to allow a transsexual to change his or her sex for the purpose of recognizing a transsexual's marriage.¹⁸¹

III. DISCUSSION

In *In re Marriage of Simmons*, Illinois courts, in a case of first impression,¹⁸² did not recognize a transsexual individual as his identified sex in the context of marriage.¹⁸³

175. *Id.* at 522.

176. *Id.* at 523.

177. *Id.* at 525.

178. *Id.*

179. *In re Heilig*, 816 A.2d 68, 83 n.8 (Md. 2003).

180. *Id.* at 83–84.

181. *See infra* Parts III–IV (discussing and analyzing the *Simmons* case).

182. Other cases in Illinois have discussed transgender legal issues. *See, e.g.*, *City of Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978) (finding unconstitutional, as applied to transsexual female defendants, a Chicago ordinance that prohibited the wearing of clothing of the opposite sex with intent to conceal wearer's sex).

183. *See infra* Parts III.B–C (discussing the trial court and appellate court decisions in *Simmons*).

A. *Facts of In re Marriage of Simmons*

Born in 1959 and sexed as female at birth, John¹⁸⁴ grew up as a very masculine child.¹⁸⁵ After being diagnosed as a male transsexual, John started to live as a male at age nineteen and began using male hormones at the age of twenty-one.¹⁸⁶ In 1991, John had surgery to remove his internal reproductive organs.¹⁸⁷ Following surgery, John obtained a new birth certificate with a sex designation as a male.¹⁸⁸

John and Jane Simmons met and began dating in 1984 and were married in 1985.¹⁸⁹ In 1991, John and Jane decided to have a child together, using artificial insemination from an anonymous sperm donor.¹⁹⁰ John, Jane, and their physician signed a contract stating, with regard to John, “any children born from the procedure are his own legitimate children and are heirs of his body, he waives any right to disclaim the child, and that any children from the procedure are the children of his own body.”¹⁹¹ John paid for the costs of the pregnancy, including the insemination, drove Jane to doctor’s appointments and attended Lamaze classes with Jane.¹⁹² Jane gave birth in 1992.¹⁹³

In the mid 1990s, John and Jane experienced marital difficulties and eventually separated.¹⁹⁴ During this separation, John maintained

184. In the interest of privacy, the litigant’s actual names have been changed. “John” refers to the petitioner husband in this case. “Jane” refers to the respondent wife.

185. *In re Marriage of Simmons*, 825 N.E.2d 303, 306 (Ill. App. Ct. 1st Dist. 2005).

186. Brief of Petitioner-Appellant at 5, *Simmons*, 825 N.E.2d 303 (No. 1-03-2284); *Simmons*, 825 N.E.2d at 307.

187. Brief of Petitioner-Appellant, *supra* note 186, at 5; *Simmons*, 825 N.E.2d at 307. John retains external female genitalia, although permanently altered through years of hormone therapy. Brief of Petitioner-Appellant, *supra* note 186, at 6; *Simmons*, 825 N.E.2d at 307. Additionally, there is discrepancy regarding the purpose of John’s surgery. Brief of Petitioner-Appellant, *supra* note 186, at 5. John’s physician wrote a letter to John’s insurance company stating the surgery was for sex reassignment. Brief of Petitioner-Appellant, *supra* note 186, at 5. During trial, the same physician testified that he performed the surgery because of the cancer risk associated with long-term testosterone use. Brief and Argument of Minor-Appellant at 15, *Simmons*, 825 N.E.2d 303 (No. 1-03-2284). See *infra* note 260 and accompanying text (discussing the purpose of John’s surgery).

188. Brief of Petitioner-Appellant, *supra* note 186, at 6; *Simmons*, 825 N.E.2d at 307.

189. Brief of Petitioner-Appellant, *supra* note 186, at 6; *Simmons*, 825 N.E.2d at 307.

190. Brief of Petitioner-Appellant, *supra* note 186, at 7; *Simmons*, 825 N.E.2d at 307.

191. Brief and Argument of Minor-Appellant, *supra* note 187, at 5; *Simmons*, 825 N.E.2d at 311.

192. Brief of Petitioner-Appellant, *supra* note 186, at 7–8.

193. Brief and Argument of Minor-Appellant, *supra* note 187, at 5; *In re Marriage of Simmons*, No. 98 D 13738, at 6, ¶ 33 (Cook County, Ill., Cir. Ct., County Dep’t, Dom. Rel. Div. Apr. 8, 2003).

194. Brief and Argument of Minor-Appellant, *supra* note 187, at 9.

custody of their child by court order.¹⁹⁵ The court granted Jane supervised weekend visitation.¹⁹⁶ John and Jane reconciled for a period, but in 1998, John petitioned for dissolution of the marriage.¹⁹⁷

B. Domestic Relations Division of the Circuit Court of Cook County

1. Trial

At the dissolution trial, both parties called numerous witnesses in support of the dissolution and in support of their right to custody of the child.¹⁹⁸ However, John sought dissolution of the marriage as a valid marriage between a man and a woman whereas Jane sought dissolution because the marriage was invalid as John was not male.¹⁹⁹

In support of his argument in favor of the marriage's validity, John called an expert in sexual reassignment.²⁰⁰ The expert testified that John was a male based on a physical examination.²⁰¹ However, the direct and cross-examination of the expert reflected conflicting positions on when John became a male.²⁰² Initially, the expert testified that sex reassignment occurred when John began hormone therapy, twenty-one years earlier, but, on cross-examination, the expert opined that sex reassignment was an ongoing process, referring to the HBGDA SOC and stating that there were other surgical options available to John that cost upwards of \$120,000.²⁰³ John's expert further testified that personality determines gender and defined sexual reassignment as "any change in the physiology or the physical makeup of an individual to comport with the desired gender."²⁰⁴

John also called his mother as a witness, who described John's childhood, including his interest in traditionally male activities.²⁰⁵ She

195. Brief of Petitioner-Appellant, *supra* note 186, at 11.

196. Brief of Petitioner-Appellant, *supra* note 186, at 11.

197. Brief of Petitioner-Appellant, *supra* note 186, at 11.

198. Brief and Argument of Minor-Appellant, *supra* note 187, at 11–28. The trial court decision and the appellate court opinion recite very few of the facts in this case and proceedings at the trial. Among the available briefs, the Minor-Appellant's contains the most extensive recitation.

199. Brief and Argument of Minor-Appellant, *supra* note 187, at 11–12.

200. Brief and Argument of Minor-Appellant, *supra* note 187, at 24.

201. Brief and Argument of Minor-Appellant, *supra* note 187, at 24–25.

202. Brief and Argument of Minor-Appellant, *supra* note 187, at 24–25.

203. Brief and Argument of Minor-Appellant, *supra* note 187, at 24–25; *In re Marriage of Simmons*, 825 N.E.2d 303, 309 (Ill. App. Ct. 1st Dist. 2005); see also *supra* Part II.A.4 (discussing the Harry Benjamin Standards of Care).

204. Brief and Argument of Minor-Appellant, *supra* note 187, at 24.

205. Brief and Argument of Minor-Appellant, *supra* note 187, at 20.

testified that John played like a boy as a child and dressed in boys' attire since age fifteen and that she took him to a psychiatrist to help him with his sense of being the wrong gender.²⁰⁶ Finally, John's mother described her son as a loving, adoring, and understanding father.²⁰⁷

Like John, Jane called an expert in sexual reassignment who testified that John physically appeared to be male but that he had female genitalia, female breast tissue, and a female chromosome arrangement.²⁰⁸ Jane also called the surgeon who performed John's surgery in 1991.²⁰⁹ He testified that prior to the surgery, he knew that John was attempting to change his gender but that, in his opinion, John's gender—both before and after the surgery—was female.²¹⁰

Regarding custody of the child, all three professionals who conducted custody evaluations for the case determined there was a strong parental bond between John and the child and that John was a better and more stable parent for the child than Jane.²¹¹ A court-ordered psychiatrist, a social worker, and a Cook County Supportive Services caseworker found that John was the better parent and that, in the best interests of the child, John should retain physical and legal custody of the child with visitation by Jane remaining supervised.²¹²

206. Brief and Argument of Minor-Appellant, *supra* note 187, at 20.

207. Brief and Argument of Minor-Appellant, *supra* note 187, at 20.

208. Brief and Argument of Minor-Appellant, *supra* note 187, at 14–15.

209. Brief and Argument of Minor-Appellant, *supra* note 187, at 14–15.

210. Brief and Argument of Minor-Appellant, *supra* note 187, at 14–15.

211. Brief of Petitioner-Appellant, *supra* note 186, at 8.

212. Brief of Petitioner-Appellant, *supra* note 186, at 8–10; Brief and Argument of Minor-Appellant, *supra* note 187, at 15. Specifically, the court-ordered psychiatrist's report states:

"Mr. Simmons is a good father. . . . His parenting has not been hindered by substance abuse, unemployment or his own emotional instability. He does not consistently place his son in the middle of the conflict by speaking negatively about his mother. . . ."

"Clearly [the child] feels more comfortable with his father. . . . It is painful for him to hear his mother and grandmother ridicule and denigrate his father. Ms. Simmons' attempt to make her son 'realize that Mr. Simmons is a female' has only served to isolate him from her and form a stronger alliance with his father who doesn't make him feel so uncomfortable."

"Despite her best intentions, Ms. Simmons does not have the parenting skills that [the child] needs from her. . . . She also has limited skills and techniques for optimal parenting for this child. Therefore structured parenting education classes are recommended for Mrs. Simmons."

Brief of Petitioner-Appellant, *supra* note 186, at 9. The social worker's report states:

"Mr. Simmons . . . presents as a stable, loving, committed and responsible parent, . . . His concerns in relation to his wife's drug use and associated behaviors seem legitimate and appropriate, and he appears to have the child's best interests at heart. He also appears to be willing and able to facilitate and encourage a close and continuing relationship between the child and his mother, as long as she remains drug free."

2. Circuit Court Decision

The circuit court ruled the marriage invalid as it was prohibited by statute and contrary to public policy because it was a same-sex marriage.²¹³ The court referenced several Illinois statutes that concern marriage and make valid only marriages between a man and a woman.²¹⁴

The court based its decision on its finding that John was female before, during, and after the marriage.²¹⁵ The court acknowledged John's transsexual claim but stated that the evidence did not support John's assertion that he was male.²¹⁶ The court went no further than stating instead that John was born a female and continued to possess female chromosomes, sex organs, and genitalia.²¹⁷

The court awarded custody of the child to Jane and explained its decision by stating that there was no biological relation between John and the child, that John had no standing as a parent, and that Jane became pregnant after the sixth insemination procedure and not the first.²¹⁸ According to the trial court, Illinois law requires a "separate and specific written agreement for each artificial insemination procedure of a wife with another man's semen for a husband to be treated as the natural father of the child born from such a procedure."²¹⁹ The court further held that a valid agreement, such as the artificial insemination contract signed by Jane and John, would give rights to a *husband*, but because John was not Jane's husband he had no status as husband or natural father and therefore had no legal right to custody of the child.²²⁰

The court also found that John lacked standing to seek custody of the

"It is strongly recommended that Mr. Simmons retain primary physical custody of the child. He is clearly the more stable and capable parent at the present time, and with the motivation and ability to promote an ongoing relationship between the child and his mother."

Brief of Petitioner-Appellant, *supra* note 186, at 10.

213. *In re Marriage of Simmons*, No. 98 D 13738, at 1 (Cook County, Ill., Cir. Ct., County Dep't, Dom. Rel. Div. Apr. 8, 2003).

214. *Id.* at 1–2. The court only refers to statutes that address Illinois' prohibition against same-sex marriage, 750 ILL. COMP. STAT. 5/201, 5/212(5), 5/213(1) (2004). *Id.* at 2.

215. *Id.* at 1–2, ¶¶ 1–3, 8.

216. *Id.* at 2, ¶¶ 4–8.

217. *Id.*

218. *Id.* at 6, 8 ¶¶ 34–35, 48–49, 53.

219. *Id.* at 7, ¶ 43. The appellate court clarified this law. *In re Marriage of Simmons*, 825 N.E.2d 303, 311 (Ill. App. Ct. 1st Dist. 2005). It noted that the law came from *dicta* in a Fourth District appellate court opinion, not the plain language of the statute. *Id.* Nevertheless, it also found the artificial insemination agreement did not comport with the statute. *Id.*

220. *Simmons*, No. 98 D 13738, at 7, ¶ 45.

child.²²¹ The court explained that it had jurisdiction to decide a child custody matter only when a parent or stepparent commences the proceeding or, if a person other than a parent commences the proceeding, when the child is not in the physical custody of one of his parents.²²² Because Jane had physical custody of the child and the court deemed John neither parent nor stepparent, the court ruled that John lacked standing to seek custody of the child.²²³

On the matter of visitation, the court recognized a bond between John and the child and gave John visitation rights so as not to disturb that relationship.²²⁴ The court referenced the best interest of the child as well as its observation of John and the child's relationship, their bond, and the child's desire to have a relationship with John.²²⁵

Both John and the child appealed the trial court's decision, except the portion regarding visitation rights.²²⁶

C. Appellate Court of Illinois

In upholding the trial court's decision and finding that it was not against the manifest weight of the evidence, the appellate court focused on the trial testimony of the expert witnesses who found that John still possessed all of his female genitalia.²²⁷ The court disagreed with John's argument that undergoing a hysterectomy and oophorectomy removed the impediment to marriage.²²⁸ The court stated that while surgery removed John's internal female organs, he still possessed all of his external female genitalia and he required additional surgeries before the sex reassignment could be complete.²²⁹

Further, the appellate court acknowledged but disregarded the fact that John received a new birth certificate following surgery.²³⁰ The court noted that the State Registrar of Vital Records issued a new certification without conducting any investigation.²³¹ In the absence of

221. *Id.* at 8, ¶ 53.

222. *Id.* at 8, ¶ 49 (citing 750 ILL. COMP. STAT. 5/601(a)(b) (2004)).

223. *Id.* at 8, ¶¶ 51–52.

224. *Id.* at 10, ¶ 57.

225. *Id.* at 10–11, ¶¶ 58–66.

226. *In re Marriage of Simmons*, 825 N.E.2d 303, 307 (Ill. App. Ct. 1st Dist. 2005).

227. *Id.* at 309.

228. *Id.* The court recognized that parties to a marriage prohibited under 750 ILL. COMP. STAT. 5/212 (prohibiting marriage in Illinois between two individuals of the same sex) could validate the marriage by cohabitating after removal of the impediment to marriage. *Id.* at 308.

229. *Id.*

230. *Id.* at 310.

231. *Id.*

any fact-finding by the State Registrar, the appellate court found that the trial court, as a fact-finding body, could find facts that the State Registrar did not, and ruled accordingly.²³²

The Illinois Supreme Court denied John's and the child's petitions for certiorari.²³³

IV. ANALYSIS

A. Circuit Court Decision

The trial court found the marriage between John and Jane invalid based on its finding that John was female.²³⁴ The court never reached the merits of John's arguments²³⁵ as the court used its finding that John was female to derail any further discussion or analysis of any of his arguments.²³⁶ While the court correctly interpreted the statutes pertinent to marriage in Illinois, requiring marriage to be between a man and a woman, it did so with the belief that both parties were female.²³⁷ For example, the court stated "John and Jane were both born females, remained female at the date of the purported marriage, and continue to be females today. They each were born with and continue to possess female chromosomes and female genitalia."²³⁸ The trial court refused to consider that John was a male, blankly saying that the evidence did not "support John's assertion that she [sic] was male."²³⁹ The trial court

232. *Id.*

233. *Simmons v. Simmons*, 839 N.E.2d 1037 (Ill. 2005).

234. *In re Marriage of Simmons*, No. 98 D 13738, at 1–2 (Cook County, Ill., Cir. Ct., County Dep't, Dom. Rel. Div. Apr. 8, 2003).

235. The only issue discussed in this Article is whether John was male or female. The other issues brought in the case, including the Illinois Parentage and Marriage Acts, equitable estoppel, laches, and the statute of limitations are beyond the scope of this Article. *Simmons*, 825 N.E.2d at 310–15.

236. *Id.*

Consequently, the parties' purported marriage is invalid because the legislature has determined that a marriage between two individuals of the same sex is prohibited in Illinois. . . .

. . . .

Further, a valid agreement would give rights to a husband. The artificial insemination agreement does not confer upon [John] the status of husband or natural father. As previously found, under Illinois law, [John] was not [Jane's] husband. . . .

The court finds that [John] has no standing to seek or assert any claim for custody and, therefore, denies her [sic] claim for sole custody.

Simmons, No. 98 D 13738, at 2, ¶ 9, at 7, ¶ 45, at 9, ¶ 55.

237. *Id.* at 1–2, ¶¶ 1, 9.

238. *Id.* at 1, ¶ 1.

239. *Id.* at 2, ¶ 5.

determined John's sex and consequently the validity of the marriage as a question of fact—the fact being that the trial court did not (or would not) recognize that John could ever become male, whether through surgery, hormone therapy, lifestyle changes, or any combination thereof.²⁴⁰

But under the Illinois Vital Records Act, a person born in the state may have a new birth certificate issued when certain conditions exist.²⁴¹ In *Simmons*, John did just that following his sex reassignment surgery.²⁴² However, the court failed to reference or to consider the applicability of the Act.²⁴³ In the past, the Illinois Supreme Court, as well as other state courts, has noted that the Act authorizes the issuance of a new birth certificate after sex reassignment surgery.²⁴⁴ In failing to apply the Act or at least show why the Act should not apply, the trial court ignored a transsexual's right to be recognized as his identified sex.²⁴⁵

Moreover, the Act's plain language clearly sustained John's argument that he was male for the purposes of an amended birth certificate.²⁴⁶ A plain language reading of section 537/17(1)(d) supported John's argument that he was male due to the hysterectomy and oophorectomy performed in 1991.²⁴⁷ The statute requires "a" surgery; John met this requirement.²⁴⁸

240. See *id.* at 2, ¶ 7 (stating that John had not been transformed from a woman to a man).

241. See 410 ILL. COMP. STAT. 535/17(1)(d) (2004) (providing that the State Registrar will issue a new birth certificate upon receiving an affidavit from a physician stating that he has performed an operation on a person and that, because of the operation, the person's birth certificate shall be changed to reflect the new sex designation); see also *supra* Part II.C (discussing the Illinois Vital Records Act).

242. Brief of Petitioner-Appellant, *supra* note 186, at 6.

243. *Simmons*, No. 98 D 13738.

244. See, e.g., *City of Chicago v. Wilson*, 389 N.E.2d 522, 533–34 (Ill. 1978) (referencing the implicit recognition of sex reassignment by the Illinois legislature); see also *supra* Part II.C (discussing cases that recognize the Illinois Vital Records Act); *supra* note 173 and accompanying text (stating that The New York Academy of Medicine implied that the Illinois Vital Records Act could be applied to a wide variety of cases although it was enacted for hermaphrodites).

245. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 373 (2000) (stating "the necessary starting point of any exercise in statutory interpretation—the plain language of the statute.").

246. See *Stewart v. Martinez-Villareal*, 523 U.S. 637, 648 (1998) (Thomas, J., dissenting) ("I begin with the plain language of the statute.").

247. Brief of Petitioner-Appellant, *supra* note 186, at 6. The HBGDA SOC supports removal of internal reproductive organs as sex-reassignment surgery for transsexual men. HARRY BENJAMIN SOC, *supra* note 82, at 21.

248. See *supra* Part II.C (discussing the Illinois Vital Records Act).

B. Appellate Court Opinion

The appellate court also failed to consider the Illinois Vital Records Act and its effect on the *Simmons* case.²⁴⁹ The appellate court reviewed the trial court's decision that John was female under the highly deferential "against the manifest weight of the evidence" standard used for findings of fact.²⁵⁰ Applying this standard of review, the appellate court ignored the complexity of the case.²⁵¹

The *Simmons* case rested on a factual issue—whether for the purposes of marriage, John was male or female.²⁵² However, the primary issue for resolution was legal because no legal precedent previously existed that articulated a test for determining when a person has achieved a sex change.²⁵³ The appellate court therefore needed to decide what test courts would use when determining what constitutes a legal sex change.²⁵⁴ Whether John was male or female presented a question of law—what legal test to use.²⁵⁵ The issue of whether John satisfied that test was a question of fact.²⁵⁶ The appellate court therefore should have applied a standard of review applicable to a

249. *In re Marriage of Simmons*, 825 N.E.2d 303, 306–10 (Ill. App. Ct. 1st Dist. 2005).

250. *Id.* at 308.

251. Brief and Argument of Minor-Appellant, *supra* note 187, at 3–4.

252. *See Simmons*, 825 N.E.2d at 308 (stating that the petitioner challenges the trial court ruling that he is female); *see* Brief and Argument of Minor-Appellant, *supra* note 187, at 3 (stating that the "issue boils down to whether [John] is or was a man or a woman either at the marriage ceremony or during the marriage" and that this is a question of fact).

253. Brief and Argument of Minor-Appellant, *supra* note 187, at 3–4.

254. Brief and Argument of Minor-Appellant, *supra* note 187, at 3–4. Illinois Supreme Court Rule 341 requires that all appellate briefs include a section on the applicable standard of review. ILL. SUP. CT. R. 341(e)(3). Applicable standards are based on whether the issue is one of law, one of fact, or one of mixed law and fact. *See Kelley Kunsch, Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 21 (1994) (explaining that legal issues have traditionally been characterized as issues of law, issues of fact or mixed issues of law and fact).

255. Questions of law are reviewed *de novo*. *Quad Cities Open, Inc. v. City of Silvis*, 804 N.E.2d 499, 505 (Ill. 2004). Construction of a statute is a question of law and where the language of a statute is clear and unambiguous a court gives effect to the plain and ordinary meaning of the language. *Id.* Courts construe statutes so that "each word, clause, or sentence is given reasonable meaning and not deemed superfluous or void." *Id.* On appeal, questions of statutory construction or interpretation are questions of law and therefore reviewed *de novo*. *Id.*

256. Questions of fact are reviewed under the manifest weight of the evidence. *City of Belvidere v. Ill. State Labor Relations Bd.*, 692 N.E.2d 295, 302 (Ill. 1998). Questions of fact include findings of fact made by a trial judge. *Corral v. Mervis Indus., Inc.*, 839 N.E.2d 524, 529 (Ill. 2005). The typical appellate standard of review for findings of fact is manifestly erroneous. *See id.* (stating that manifest error is appropriate to review findings of fact in civil actions). Mixed questions of law and fact examine the legal effect of a given set of facts. *Comprehensive Cmty. Solutions, Inc. v. Rockford Sch. Dist.*, 837 N.E.2d 1, 11 (Ill. 2005). Decisions of mixed questions of law and fact are clearly erroneous when the reviewing court, on the entire record, finds that a mistake has been committed. *Id.*

mixed question of law and fact.²⁵⁷

Instead of deferring to the trial court's finding on this complex legal and factual issue, the appellate court should have looked to the only possible legal test—the Illinois Vital Records Act.²⁵⁸ The Act clearly states that a person may obtain a new birth certificate, reflecting his or her new sex, after the State Registrar of Vital Records has received “[a]n affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person’s birth record should be changed.”²⁵⁹ Under this standard, any court should find that John was a male because he had an operation and by reason of this operation his sex on his birth certificate was changed accordingly.²⁶⁰

In fact, the appellate court recognized that the State Registrar makes decisions on when to issue new birth certificates and that the State Registrar has the power to investigate applications for a sex designation change.²⁶¹ However, the appellate court ignored the fact that the State Registrar chose not to investigate John’s application and instead the court deferred to the trial court’s fact-finding.²⁶² If the appellate court did not agree with the test used by the State Registrar to determine if a person had satisfied the legal requirements for a sex change designation on their birth certificate, the appropriate place for such a change is the legislature, not the court.²⁶³

257. Under the mixed standard of review the analysis would look something like this: the rule is the statute (an operation by reason of which the designation should be changed) and the facts are that John had an operation (hysterectomy and oophorectomy) for the purpose of sex reassignment. Brief of Petitioner-Appellant, *supra* note 186, at 5.

258. 410 ILL. COMP. STAT. 535/17(1)(d) (2004).

259. *Id.*

260. See Brief of Petitioner-Appellant, *supra* note 186, at 6 (explaining that John had met the requirements under the statute and had a new birth certificate issued). Notably, although the plain language of the statute mentions operation in the singular, the court seems to demand multiple operations (without referencing the statute, however), at least where the change is female to male. *In re Marriage of Simmons*, 825 N.E.2d 303, 309–10 (Ill. App. Ct. 1st Dist. 2005). Further, although there was some contradictory evidence as to the purpose of John’s surgery, see *supra* note 187 and accompanying text (discussing the contradictions), an argument can be made that the use of testosterone was for the purpose of sex reassignment and the hysterectomy and oophorectomy was required because of the extensive and extended testosterone use, thus leading to the conclusion that the hysterectomy and oophorectomy were completed for the purpose of sex reassignment. Brief of Petitioner-Appellant, *supra*, note 186, at 5.

261. *Simmons*, 825 N.E.2d at 310.

262. *Id.*

263. Interestingly, the “Affidavit of Physician as to Change of Sex Designation” submitted by John in 1994 asked the physician to subscribe and swear “that he/she performed *certain* surgical operations on the person of [insert name], by reason of which the sex designation of the same person should be changed from [insert gender] to [insert gender]” and to include the date and place of surgery. Record Document Number 014592, *Simmons*, 825 N.E.2d 303 (No. 1-03-2284)

V. IMPACT & PROPOSAL

A. *Impact of the Simmons Cases*

The impact of the *Simmons* cases is two-fold.²⁶⁴ First, on an individual level, John lost the right to raise his child.²⁶⁵ John did everything legally required in Illinois to be a husband and father, including changing his birth certificate from female to male,²⁶⁶ consenting to the artificial insemination of his wife,²⁶⁷ sharing parental responsibilities, and providing for his family as a husband.²⁶⁸ But, under current Illinois law, it is likely courts will never allow John to be recognized as a father or to marry a female.²⁶⁹ The trial court as well as the appellate court could not look beyond the fact that John was genetically a female.²⁷⁰ Even if John underwent genital reassignment surgery, the court might still have ruled he was female because he was genetically a female.²⁷¹ The trial court failed to understand the plight of John and transsexual individuals by not acknowledging the possibility that a person may be a sex other than what their chromosomes show.²⁷²

Second, the future is certainly no brighter for sexually reassigned individuals after the *Simmons* cases.²⁷³ The Illinois decisions make clear that the rights of transsexuals will continue to be ignored, particularly because a transsexual individual, even with a birth certificate indicating their identified sex, may still encounter legal issues

(emphasis added). In May 2005, the Illinois Department of Health, Division of Vital Records required a new form "Affidavit by Physician After Completion of Gender Reassignment" that requires a physician to list the operations performed to complete gender reassignment surgery. Illinois Department of Public Health (2005), <http://www.idph.state.il.us/vitalrecords/pdf/genderreassign.pdf>. Perhaps in an attempt to prevent fraudulent or incorrect physician affidavits, the Illinois Department of Health, Division of Vital Records now requires more information and specific data regarding surgeries and procedures performed in order for a person to have their sex legally changed on their birth certificate. *Id.* However, the form still does not spell out what is required to guarantee that the new birth certificate will be recognized. *Id.* See also HUNTER, *supra* note 23, at 178 (explaining that it is not clear what constitutes a legal change of sex and that sex may be recognized for some legal purposes but not others).

264. See *infra* Part V.A (discussing impact of *In re Marriage of Simmons*).

265. *In re Marriage of Simmons*, No. 98 D 13738, at 6 (Cook County, Ill., Cir. Ct., County Dep't, Dom. Rel. Div. Apr. 8, 2003).

266. Brief of Petitioner-Appellant, *supra* note 186, at 6.

267. Brief of Petitioner-Appellant, *supra* note 186, at 7.

268. Brief of Petitioner-Appellant, *supra* note 186, at 7-8.

269. *In re Marriage of Simmons*, 825 N.E.2d 303, 310 (Ill. App. Ct. 1st Dist. 2005).

270. *Simmons*, No. 98 D 13738, at 4-5, ¶¶ 24-25; *Simmons*, 825 N.E.2d at 309-10.

271. See *Simmons*, 825 N.E.2d at 309-10 (stating that John was genetically female).

272. *Id.*

273. See *supra* Part III (discussing the *Simmons* decisions).

in the courtroom.²⁷⁴ Absent a statute or enforcement of an existing statute clearly allowing a transsexual's reassigned sex and/or court decisions recognizing a transsexual's reassigned sex, transsexual marriage rights with respect to their identified sex will continue to be nonexistent.²⁷⁵

B. Proposal

As demonstrated by John's experience, the current system in Illinois does not work to protect transsexuals and is therefore not appropriate.²⁷⁶ In the absence of an objective "brain sex" test, a different test is required to determine a person's sex.²⁷⁷ In Illinois and in the United States as a whole, courts and legislatures should look to the precedent set by the European Court of Human Rights and realize the importance of human dignity and freedom.²⁷⁸

In ruling that the United Kingdom had violated a transsexual's human rights, the European Court of Human Rights found that, while there were no definitive findings as to the causes of transsexualism, there was also nothing to suggest anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment, diminishing any scientific and medical evidence to the contrary.²⁷⁹ The court dismissed the chromosomal element of sex determination, and in the context of a transsexual wishing to marry, found that legal recognition of a transsexual's sex "should depend on a multitude of factors to be assessed at the time of the marriage."²⁸⁰

To protect the transsexual, spouse, future children, and beneficiaries under a will from challenges after the fact (such as the court proceedings experienced by John), the recognition of a sex change must be unchallengeable and irrevocable.²⁸¹ A ministerial application, such

274. *Simmons*, 825 N.E.2d at 310.

275. See *infra* Part V.B (advocating a proposal to remedy the inequity of the *Simmons* case).

276. See *Simmons*, 825 N.E.2d at 310 (reasoning that the court can make additional findings of fact even if the administrative agency chooses not to and overruling the administrative agency's decision).

277. See generally KESSLER & MCKENNA, *supra* note 18, at 121 (explaining that transsexuals cannot change gender, they can only change their genitals).

278. See *supra* Part II.B.3 (discussing the European Court of Human Rights' decision to recognize a transsexual person's identified sex in the *Case of I*).

279. *Case of I*, App. No. 25680/94, 36 Eur. Ct. H.R. Rep. 967, ¶ 61(2002).

280. *Id.* ¶¶ 62, 64.

281. E-mail from Dr. Hazel Beh, Professor of Law, University of Hawaii Manoa William S. Richardson School of Law, to Katie Fletcher, Student, Loyola University Chicago School of Law (Oct. 10, 2005) (on file with author) (explaining that individuals deserve certainty in that the law should recognize their marital and parental rights).

as that “allowed” in Illinois, is not sufficiently adjudicatory to have the finality that other legal proceedings enjoy.²⁸² An uncontested court proceeding resulting in a judgment and order is required.²⁸³

Because each state could have their own sex change requirements, it is necessary to have a uniform law to protect transsexuals when they move from state to state.²⁸⁴ Representative experts would discuss the particulars of a uniform standard, culminating in a recommended standard.²⁸⁵ A uniform standard must specify what is required for the law to recognize the identified sex of a transsexual individual.²⁸⁶

Furthermore, in light of the *Simmons* case, the law should not require a female-to-male transsexual to have reconstructive phalloplasty.²⁸⁷ Sex reassignment surgeons as well as the HBGDA SOC recognize the technical difficulties and complications of phalloplasty.²⁸⁸

282. *Id.*

283. *Id.* A proceeding similar to the adoption procedure would comport with many of the requirements to assure legal recognition of the transsexual. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS AND ESTATES 92 (7th ed. 2005) (“Adoption, unlike marriage, is not revocable . . .”). See also 410 ILL. COMP. STAT. 535/17(1)(a) (2004) (allowing for a new birth certificate to be established by the State Registrar of Vital Records upon receipt of an *order of adoption*).

284. See Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 824 (2005) (“When courts refuse to recognize an amended birth certificate from a sister state, they violate principles of full faith and credit and unconstitutionally infringe upon the right to travel under the Dormant Commerce Clause.”). See also *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (stating that in the absence of a strong public policy to the contrary, a sister state must give full faith and credit to a final judgment rendered by an appropriate adjudicatory court from another state). However, a standard implemented by the federal government is not advocated. Instead, states should promulgate their own statutes relative to the issue of transsexual sex recognition, hopefully with some uniformity.

285. “The National Conference of Commissioners on Uniform State Laws (NCCUSL), now 114 years old, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.” The National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org/Update/> (last visited Mar. 6, 2006).

286. A Working Group on Transsexual People in the United Kingdom led to a formal government announcement stating that it aims to publish a Bill to “give legal recognition in their acquired gender to transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the gender acquired since they were registered at birth.” Rains, *supra* note 156, at 393.

287. See Zakaria, *supra* note 82, at 380 (pointing out that proponents of sexual reassignment surgery do not prescribe it as the treatment for every patient suffering from gender identity dysphoria).

288. See Response Brief of Respondent-Appellee at 2–3, *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 1st Dist. 2005) (No. 1-03-2284) (identifying Dr. Levine as a consulting expert); Laurence A. Levine & Lev Elterman, *Urethroplasty Following Total Phallic Reconstruction*, 160 J. UROLOGY 378, 381 (1998) (stating that creating a neophallus is complicated by recalcitrant strictures that are prone to develop in patients with total phallic

According to the internationally recognized HBGDA SOC, the treatment goal for transsexuals is psychotherapeutic, endocrine, and/or surgical therapy, which provides lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment.²⁸⁹ In other words, the goal for a transsexual is to be comfortable in themselves through therapy, hormone treatment, and/or surgery.²⁹⁰ These standards do not require complete sex-reassignment surgery, particularly in female-to-male individuals.²⁹¹

In creating a legal standard that recognizes a transsexual's identified sex, we must remember that the law is primarily concerned with human relationships and their effects on individuals and society as a whole.²⁹² Accordingly, in determining a person's legal sex, the law should be

reconstruction); *see also* HARRY BENJAMIN SOC, *supra* note 82, at 22 (explaining that patients should be fully informed that reconstructive phalloplasty requires several stages of surgery and are subject to frequent technical difficulties often requiring additional surgeries); Gerald H. Jordan, *Total Phallic Construction, Option to Gender Reassignment*, in PEDIATRIC GENDER ASSIGNMENT: A CRITICAL REAPPRAISAL 275, 276-77 (Stephen A. Zderic et al. eds., 2002) (explaining the complications encountered after total phallic construction). Perhaps the most reasonable reason for not requiring total phallic reconstruction comes from the psychiatrist appointed by the trial court in the *Simmons* case, who stated:

Admittedly, Mr. Simmons continues to have female genitalia but, at this point, it is a technical detail that can be resolved as surgical correction. Since it is not the custom in our society to show one's genitalia in public and even in private, except in certain very intimate situations, his specific genital anatomy should have little bearing on his social activities or those of [the child]. Thus, the status of Mr. Simmons' genitals play remarkably little role in his social or parental functioning, except to the extent that some individuals make it an issue. He can live and parent as a male. He can be a husband and a male friend.

Psychiatric Consult, *In re Marriage of Simmons*, No. 98 D 13738 (Cook County, Ill., Cir. Ct., County Dep't, Dom. Rel. Div. Apr. 8, 2003) (copy on file with author).

289. *See supra* Part II.A.4.a (discussing the HBGDA SOC).

290. *Id.*

291. *Id.* *See also* Beh & Diamond, *Ethical Concerns*, *supra* note 9, at 282. The authors agree with an Australian court's decision that it is unreasonable to require surgery for a sex change to be legal, reasoning that this is inconsistent with human rights. "The requirement is more disadvantageous and burdensome for people seeking legal recognition of their transition from female to male than male to female . . . the requirement of surgery is a form of indirect discrimination." *Id.* at 282 (citations omitted).

The reliance on surgery, and via its use to remove a penis and consider that a sign of maleness, disregards conditions such as the complete androgen insensitivity syndrome (CAIS), 5-alpha-reductase deficiency, and 17beta-hydroxysteroid dehydrogenase deficiency where males are born without a penis. It similarly can wrongly categorize conditions like congenital adrenal hyperplasia (CAH) where females are born with phalluses. It denies the reality that one's brain sex is more crucial in determining sexual and gender identity than are genitals.

Id. at 282 n.193 (citations omitted).

292. *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236, 241 (1971).

most concerned with the biological factors that influence person-to-person interactions, namely the psychology and outward appearance of the individual.²⁹³ A person's chromosomal composition and internal anatomical structure have little direct effect on society and therefore should not factor into the determination of a person's legal sex.²⁹⁴

VI. CONCLUSION

We have made some progress towards rights for transgendered and transsexual individuals. Some states now allow a person to legally change the sex reflected on their birth certificate. Unfortunately, some states still do not allow a legal sex change, nor give full faith and credit to another state's recognition of a legal sex change, regardless of the procedures an individual may have undergone or despite an individual being mis-sexed at birth. As shown here by the *Simmons* case, even if a person has the requisite surgery and obtains an amended birth certificate, this may not be enough to satisfy some courts. Moreover, though some progress has been made toward equal rights for transgendered and transsexual individuals, the law has not kept pace with the inequalities facing the female-to-male transsexual. The law should not require complex surgery for a female-to-male transsexual. The HBGDA SOC recommends treatment goals for the transsexual which may or may not include surgery. It is of little importance what physical genitalia a person has between his or her legs—an area viewed only by the most intimate of partners. The other factors discussed in this article—gender identity, public persona, hormone levels, and medical and psychiatric diagnoses—should suffice when a transsexual transitions from their birth-assigned sex to their identified sex, and the law in *every* state of the United States should recognize that.

293. *Id.*

294. *Id.*

TABLE OF CASE CROSS-REFERENCES

Case Name	Regional Reporter	Illinois Reporter
<i>City of Belvidere v. Ill. State Labor Relations Bd.</i>	692 N.E.2d 295 (Ill. 1998)	181 Ill. 2d 191 (1998)
<i>City of Chicago v. Wilson</i>	389 N.E.2d 522 (Ill. 1978)	75 Ill. 2d 525 (1978)
<i>Comprehensive Cmty. Solutions, Inc. v. Rockford Sch. Dist.</i>	837 N.E.2d 1 (Ill. 2005)	216 Ill. 2d 455 (2005)
<i>Corral v. Mervis Indus., Inc.</i>	839 N.E.2d 524 (Ill. 2005)	217 Ill. 2d 144 (2005)
<i>In re Roger B.</i>	418 N.E.2d 751 (Ill. 1981)	84 Ill. 2d 323 (1981)
<i>In re Marriage of Simmons</i>	825 N.E.2d 303 (Ill. App. Ct. 2005)	355 Ill. App. 3d 942 (1st Dist. 2005)
<i>Quad Cities Open, Inc. v. City of Silvis</i>	804 N.E.2d 499 (Ill. 2004)	208 Ill. 2d 498 (2004)
<i>Simmons v. Simmons</i>	839 N.E.2d 1037 (Ill. 2005)	216 Ill. 2d 734 (2005)
<i>Sullivan v. McGaw</i>	480 N.E.2d 1283 (Ill. App. Ct. 1985)	134 Ill. App. 3d 455 (2nd Dist. 1985)