

## NOTE

### THE (MIS)CATEGORIZATION OF SEX IN ANGLO-AMERICAN CASES OF TRANSEXUAL MARRIAGE

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*The United States' promise to establish equality for all has been challenged by post-operative transsexuals seeking recognition in their acquired sex. The birth certificate is the legal gateway to changing other legal documents; but the process for changing the birth certificate varies widely from state to state. This lack of national uniformity makes post-operative transsexuals' recognition of their acquired sex complicated at best and impossible at worst.*

*This Note details the legal progression from non-recognition to recognition of post-operative transsexuals' acquired sex in the United Kingdom and through the European Court of Human Rights. The Note goes on to explore the basis on which rights should be secured domestically for post-operative transsexuals, namely the Due Process Clause of the Fourteenth Amendment. Through an evaluation of the Supreme Court's use of reason-borrowing, this Note provides a means to establish legal recognition for the acquired sex of post-operative transsexuals in the United States.*

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#### INTRODUCTION

Ordering systems are omnipresent, and create mechanisms by which to categorize everything.<sup>1</sup> Categories identify and separate groups of people and often carry significant political force.<sup>2</sup> Indeed, the management of these categories, particularly when they convey political and social dimensions, shapes life's opportunities. The category of race is a prime example of what a serious and complex issue categorizing people can be.<sup>3</sup> Before the late

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1. For a strong argument on the human propensity for ordering, see MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* (Vintage Books 1994) (1966); THOMAS L. HANKINS, *SCIENCE AND THE ENLIGHTENMENT* (1985).

2. FOUCAULT, *supra* note 1; HANKINS, *supra* note 1.

3. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (10th anniversary ed. 2006). Haney López outlines how Supreme Court decisions forge the definition of the White race. López traces the Justices' rationales for their decisions—ranging from scientific

1960s in the United States, race commonly determined citizens' ability to vote, the schools they could attend, and even which water fountains they could drink from. Rationales for categorizing people by race ranged from scientific evidence to common knowledge.<sup>4</sup> Another of these "ordered" categories, one not often critically engaged in daily life, is sex.<sup>5</sup> Sex, in many ways, is the ultimate category for distinguishing and categorizing individuals, because it is seen as a scientific category—not a socially constructed category, but a function of biology.<sup>6</sup>

Even as a "scientific" category, sex is often not clearly delineated. For example, it is estimated that nearly 2 percent of children are born intersex—not belonging entirely to either the male or female sex.<sup>7</sup> Other people are born as a member of one biological sex, but have the identity of the opposite sex—this is known as gender identity disorder.<sup>8</sup>

Gender identity disorder, as classified by the *International Statistical Classification of Diseases and Related Health Problems*, is a mental disorder defined as:

A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's

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evidence and common knowledge to legal precedence and congressional decisions. López contends that classification as White or not White, particularly as related to the beneficiaries of immigration law, is a significant political determination with critical impacts on the agency of individuals based upon their White/not White categorization.

4. *Id.*

5. GENDER (Carol C. Gould ed. 1999).

6. See HOWARD GARFINKEL, STUDIES IN ETHNOMETHODOLOGY 122–28 (1967). More credence is given to the view of race, ethnicity, and nationality as social categories. See e.g., BENEDICT ANDERSON, IMAGINED COMMUNITIES (rev. ed. 2006) (describing the social construction of nationality). There is significant discussion on the performance and construction of sex. See e.g., JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993). Nonetheless, it appears that sex is considered more rigidly biological than social. See e.g., Sally Raskoff, Everyday Sociology Blog, *The Social Construction of Race, Ethnicity, Sex, and Gender*, <http://nortonbooks.typepad.com/everydaysociology/2009/03/the-social-construction-of-race-ethnicity-sex-and-gender.html> (Mar. 25, 2009).

7. ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000). The general medical practice for children who are intersex is surgical alteration at birth and assignment to one of the two sexes. Elizabeth Weil, *What if It's (Sort of) a Boy and (Sort of) a Girl?*, N.Y. TIMES, Sept. 24, 2006 (Magazine), at 48. This standard medical practice is generally necessitated by the need to provide sex identification on the birth certificate as a legal requirement. The decision to assign the sex of the child at birth has been challenged in court in the United Kingdom. A British court held that sex assignment surgery is preferable to non-surgery because not assigning a sex would leave the child in social and legal limbo. See *W. v. W. (Physical Inter-sex)* [2001] Fam. 111. In 2006, fifty international experts on intersex children signed *The Consensus Statement on the Management of Intersex Disorders*, contending that a child's sex should still be assigned as soon as possible, but discouraging doctors and families of intersex children from having surgery right away. Christopher P. Houk et al., *Summary of Consensus Statement on Intersex Disorders and Their Management*, 118 PEDIATRICS 755 (2006).

8. An estimate on the percentage of people who have gender identity disorder is difficult to attain. See, e.g., Jonathan V. Last, *She ain't necessarily so: Jonathan V. Last takes us to the newest frontier in sexual politics—transgender chic*, WOMEN'S Q., Summer 2002, at 4.

anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex.<sup>9</sup>

There are two important predicates in the diagnosis of gender identity disorder. First, gender identity disorder is based upon a desire to live as a member of the opposite sex.<sup>10</sup> Thus, the medical community focuses on the congruence between the person's self-identified and biological sexes. Second, after psychological evaluation, doctors often recommend a sex change operation along with hormone therapy.<sup>11</sup> Individuals diagnosed with gender identity disorder are often referred to as transsexuals.

A legal dilemma occurs when post-operative transsexuals attempt to gain legal recognition of their acquired sex. Given the widespread belief that sex is easily categorized and fixed at birth, attaining legal recognition of an acquired sex can be difficult.<sup>12</sup> Particularly contentious is the recognition of sex in legal agreements in which the parties' sex is legally relevant. Of these legal agreements, marriage is the most salient and controversial, as it is often limited by law to a partnership between two people of opposite sex.<sup>13</sup>

Currently, states lack uniformity in whether and how they recognize the acquired sex of post-operative transsexuals in both birth certificates and for the purpose of marriage, resulting in sex being determined largely by a person's state of residency. When states fail to recognize transsexuals' acquired sex, individuals' rights are limited. As this Note will argue, these limitations constitute a violation of the Fourteenth Amendment.<sup>14</sup> Throughout the Unit-

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9. 1 WORLD HEALTH ORG. (WHO), INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS, ch. 5, § F64.0 (10th rev., 2007), <http://apps.who.int/classifications/apps/icd/icd10online/>. Published by the World Health Organization, the *International Statistical Classification of Diseases and Related Health Problems* establishes a coding system for categorizing diseases and a wide variety of signs, symptoms, abnormal findings, complaints, social circumstances, and external causes of injury or disease. This system is designed to promote international comparability in the collection, processing, classification, and presentation of these statistics and to help in the diagnosis of diseases. The system is widely used for purposes of statistical comparability and standardized diagnosis. The *International Statistical Classification* includes a section classifying mental and behavioral disorders, which was developed alongside the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"); the two manuals seek to use the same codes. They represent the primary mental health diagnosis systems worldwide. The DSM, which is the United States' separate diagnostic manual, is connected to the *International Statistical Classification of Diseases and Related Health Problems* but uses slightly different standards that more closely approximate U.S. practices. The DSM provides four criteria for gender identity disorder: (1) "[S]trong and persistent cross-gender identification," (2) "[P]ersistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex," (3) "The diagnosis is not made if the individual has a concurrent physical intersex condition," and (4) "[C]linically significant distress or impairment in social, occupational, or other important areas of functioning." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 356 (4th ed. text rev. 2000). The criteria used by the two sources are sufficiently similar for purposes of this analysis.

10. WHO, *supra* note 9, at ch. 5, § F64.0.

11. *Id.*

12. Typically legal recognition comes in the form of official documents such as birth certificates, insurance, marriage documents, etc.

13. *E.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996)).

14. *See infra* Part III.

ed Kingdom,<sup>15</sup> in contrast, the law recognizes the acquired sex of post-operative transsexuals for nearly all purposes, including for birth certificates and marriage. This Note will explore the legal hurdles faced in determining the sex of a post-operative transsexual for the purpose of marriage in the Anglo American legal system. Examining the differences between the laws in the United States and the United Kingdom clarifies both the problem of sex categorization and the arguable legal denial of many transsexuals' substantive due process and equal protection rights.

This Note establishes that the United Kingdom's approach, as detailed both in decisions of courts in the United Kingdom and the European Court of Human Rights ("ECHR"), is consistent with U.S. constitutional requirements and provides a reasoning that the United States should borrow in its own consideration of these issues. Part I demonstrates the inconsistent approach to recognizing the acquired sex of post-operative transsexuals for the purpose of marriage in the United States. Part II analyzes the systematic change in legal reasoning in the United Kingdom that eventually led to the recognition of a post-operative transsexual's sex for the purpose of marriage. Part III argues that the sex equality model underpinning the change in the United Kingdom should be imported into the United States to resolve the state court split in favor of recognizing the acquired sex of a post-operative transsexual. Additionally, Part III provides a legal framework for making this change in the United States.

#### I. STATES IN THE UNITED STATES ARE DIVIDED ON RECOGNITION OF ACQUIRED SEX

In the United States, the recognition of a transsexual's acquired sex is currently an issue addressed solely by state law. A birth certificate is the legal record of a person's sex.<sup>16</sup> Therefore, a transsexual must have the sex on his/her birth certificate changed in order to attain legal recognition of an acquired sex. Transsexuals must modify their birth certificates before updating their acquired sex on other legal documents. States have various

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15. This Note will examine both the case law in the United Kingdom and the European Court of Human Rights. The European Court of Human Rights is a constitutional court established by the European Convention of Human Rights to monitor human rights in member states through application of the Convention. The United Kingdom is the primary focus of this Note for two reasons. First, the European Court of Human Rights case law on transsexuals' rights to gain recognition in their acquired sex deals with cases from the United Kingdom. Decisions made by the European Court of Human Rights interpret and apply either the European Convention on Human Rights, which binds all member states, or the law of member states directly. Accordingly, its decisions are binding on member states. The decisions made by the European Court of Human Rights with regard to the status of transsexuals in the United Kingdom are thus binding on the United Kingdom, adding to their case law, as these decisions both interpret the Convention, to which the United Kingdom is bound, and the law of the United Kingdom directly. Moreover, the United Kingdom, like the United States, is a common law nation. Given the historical links between the United Kingdom and the United States in terms of common law, the United Kingdom is the most relevant nation for comparison.

16. Birth certificates are the primary document used for the assignment of other legal documents, including driver's licenses, passports, etc. Thus, the sex listed on a birth certificate may be determinative of the sex listed on other legal documents.

approaches to recognizing a person's acquired sex. This Part outlines the various approaches taken by states regarding recognition and presents background to furnish the argument developed in Parts II and III. Section A examines the right to change a birth certificate to reflect a sex change and demonstrates that state practices vary dramatically. Section B discusses variations among states' laws regarding the right to marry as a member of an acquired sex.

### A. Changing the Sex Listed on Birth Certificates

The policies of changing the sex listed on a birth certificate fit into three general approaches. First, there are states with a permissive statutory or administrative approach. There are also states that do not allow changes to the sex listed on a birth certificate. Finally, there are states that do not yet have a set administrative or statutory system for addressing changes to the sex listed on a birth certificate.

#### 1. States with a Permissive Statutory or Administrative System

Twenty-eight states have a permissive statutory or administrative policy that provides a mechanism for changing the sex on a birth certificate. Currently, twenty-four states and the District of Columbia statutorily permit changing a birth certificate to recognize a transsexual's acquired sex.<sup>17</sup> These states also allow modification of other official state documents.<sup>18</sup> But most of these states require proof of a sex change operation before permitting the alteration of other legal documents.<sup>19</sup>

Four other states—Kansas, Maine, Nevada, and New York—have no statutes regarding transsexuals' right to legally change their acquired sex on their birth certificates.<sup>20</sup> Instead, these four states provide an administrative process for the modification of birth certificates,<sup>21</sup> which requires demonstrating a need to change the birth certificate.<sup>22</sup> A post-operative transsexual would likely be able to attain a birth certificate change to recognize the acquired sex by using this process.<sup>23</sup> The problem is that there is no set standard for what "need" entails. For instance, in Kansas the Department of Health and Envi-

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17. Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819, 837 (2005).

18. *Id.*

19. *E.g.*, IOWA CODE ANN. § 144.23(3) (West 2009).

20. See Lambda Legal, Amending Birth Certificates to Reflect Your Correct Sex, <http://lambdalegal.com> (search for "Amended Birth Certificates" and then click "view the law in your state") (last visited Feb. 21, 2010).

21. *See id.*

22. *See id.*

23. *See id.*

ronment requires medical certification of a sex change operation,<sup>24</sup> whereas in New York, a court order, made at the judge's discretion based on surgical documentation, is required.<sup>25</sup> Thus, despite statutory or administrative mechanisms for recognizing a change in birth certificates, some changes are not approved.<sup>26</sup>

## 2. States with Prohibitive Statutory Systems

Two states, Texas and Tennessee, expressly prohibit changing sex on birth certificates. Texas courts have ruled that administrative changes to the sex listed on a birth certificate can only be made if the birth certificate contains an inaccuracy.<sup>27</sup> Texas has specifically stated that a sex change operation does not constitute an inaccuracy for the purpose of modifying a birth certificate.<sup>28</sup> Tennessee has specific legislation forbidding the modification of a birth certificate to reflect the acquired sex of a post-operative transsexual.<sup>29</sup>

## 3. States with Neither a Statutory nor Administrative Mechanism

The remaining twenty states have no specific statutory or administrative mechanism for allowing post-operative transsexuals to change the sex listed on a birth certificate. In such jurisdictions, the only way to modify a birth certificate is within the courts.<sup>30</sup> Case law demonstrates a divergence of states' recognition of post-operative transsexuals' acquired sex.<sup>31</sup> Legal sex is particularly important relative to the right of marriage in the United States, because most states do not currently recognize same-sex marriage.<sup>32</sup>

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24. Kansas Department of Health and Environment, How to Amend Birth Certificates for Adults, [http://www.kdheks.gov/vital/amend\\_birth\\_adults.html](http://www.kdheks.gov/vital/amend_birth_adults.html) (last visited Feb. 21, 2010). The Department also notes, "Taking hormones or breast reassignment surgery does not qualify as a sex or gender change." *Id.*

25. Becky Alison, Transgender Roadmap, <http://www.tsroadmap.com/reality/name/new-york-birth-certificate.html> (last visited Feb. 21, 2010).

26. See Press Release, Lambda Legal, Refusals To Change Transgendered People's Birth Certificates Almost Always Conflict with State Laws (Nov. 12, 2002), available at <http://www.lambdalegal.org/news/pr/birth-certificate-amend-male-female.html>.

27. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

28. *Id.* (interpreting the Texas statute and codifying that sex reassignment surgery is not a mistake).

29. TENN. CODE ANN. § 68-3-203(d) (2009) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

30. Greenberg & Herald, *supra* note 17, at 838.

31. See *infra* Section I.B.

32. If a state recognizes same-sex marriage, the need to change the sex on a birth certificate is less consequential because the sex of your spouse would not preclude you from getting married. Of course, there are other reasons a transsexual may want to change the sex listed on his/her birth certificate.

### B. *Recognizing a Change in Sex for the Purpose of Marriage*

States' marriage laws also vary in their treatment of changes in sex. Issues relating to marriage validity in which one of the parties is a post-operative transsexual have been litigated in several state courts in the past decade. In California,<sup>33</sup> trial courts have held that post-operative transsexuals can legally be recognized as a member of the acquired sex. During the same period, the Supreme Court of Kansas<sup>34</sup> and the courts of appeals of Florida,<sup>35</sup> Texas,<sup>36</sup> and Ohio<sup>37</sup> all ruled that for purposes of marriage, transsexuals are recognized only as members of their born sex, and not their acquired sex. Further investigation of the legal decisions in the United States will highlight two divergent views on the right of transsexuals to marry as members of their acquired sex. Section I.B.1 establishes that most jurisdictions do not recognize the acquired sex of post-operative transsexuals. Section I.B.2 discusses the reasoning expressed by jurisdictions that recognize an acquired sex for the purpose of marriage, demonstrating a lack of comprehensive analysis behind the underlying goals of such a policy.

#### 1. *Most Jurisdictions Do Not Recognize the Acquired Sex of Post-Operative Transsexuals*

In the Texas case *Littleton v. Prange*, a post-operative male-to-female transsexual petitioned for the right to sue for malpractice and the wrongful death of her husband.<sup>38</sup> The defendant, Dr. Mark Prange, petitioned the court, successfully arguing that the plaintiff, Christie Lee Littleton, could not bring a claim for wrongful death because she was a man and her marriage was therefore invalid. Littleton appealed the decision to the Court of Appeals of Texas.<sup>39</sup> Chief Justice Hardberger, writing for the majority, explained that, although Littleton physically looked like a woman, she was not legally a woman because she did not possess a womb, ovaries, or a cervix and because she retained male chromosomes.<sup>40</sup> The majority concluded Christie was a man who could not be legally married to another man.<sup>41</sup> The court thereby affirmed the lower court ruling, indicating that sexual identity is not determined by sexual organs, but instead by chromosomes.<sup>42</sup> The court

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33. See, e.g., *Transgender Ruling*, L.A. DAILY J., Nov. 26, 1997, at 1.

34. *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

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

36. *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999).

37. *In re Marriage License for Nash*, Nos. 2002-T-0149, 2002-T-0179, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

38. *Littleton*, 9 S.W.3d at 225.

39. *Id.*

40. *Id.* at 230–31.

41. *Id.*

42. *Id.*

thus invalidated Littleton's marriage, precluding her from suing on her husband's behalf.<sup>43</sup>

The court of appeals judges in *Littleton* were unwilling to rely primarily on scientific literature regarding post-operative transsexuals in reaching their holding.<sup>44</sup> The court did acknowledge, however, that sex determination involves profound philosophical, metaphysical, and policy concerns.<sup>45</sup> But instead of consistently focusing on the biology of sex and the rights stemming from it, the court employed an analysis of the moral and religious aspects of the issue as proxies for biology (although the court did not rest its holding on this reasoning).<sup>46</sup> Sidestepping strictly legal concerns, the court asked, "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"<sup>47</sup>

Regardless of the court's acknowledgement of these issues, the ultimate focus in *Littleton* was on a chromosomal standard and, to a lesser extent, functioning biology to categorize a sex ambiguity into a dimorphic position. Chief Justice Hardberger explained, "Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied."<sup>48</sup> Harberger noted, "The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male."<sup>49</sup> The court did not recognize Littleton's sex in spite of the fact that the decision to undergo a sex change operation was medically advised and the change in her sex was recognized by the medical community.<sup>50</sup>

The *Littleton* reasoning represents the prevailing view of jurisdictions that do not recognize the acquired sex of post-operative transsexuals. In *Estate of Gardiner*, the Kansas Supreme Court, citing *Littleton*, concluded, "A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes."<sup>51</sup> Similarly, in *Kantaras v. Kantaras* the Florida Court of Appeals held, "We agree with the Kansas, Ohio, and Texas courts in their understanding of the common

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43. *Id.*

44. *Id.*

45. *Id.* at 231.

46. *See id.* at 224.

47. *Id.*

48. *Id.* at 231.

49. *Id.* at 230.

50. *Id.* at 224–25.

51. 42 P.3d 120, 135 (Kan. 2002).

meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.”<sup>52</sup>

The message of the *Littleton* court is that, even though a sex change operation is medically prescribed and the person physically changed, a person’s acquired sex will not be legally recognized in some states. The end result is that, in these states, transsexuals can never fully attain recognition of their sex. These cases reveal that, ultimately, the question of legal rights was of lesser concern than the recognition of a biological or a moral standard.

## 2. *The Reasoning Supporting the Recognition of the Acquired Sex of Post-Operative Transsexuals*

The primary model for recognizing an individual’s acquired sex is statutory or administrative, so few cases illustrate the underlying rationale for accepting an individual’s acquired sex. The earliest of these cases in the United States, *M.T. v. J.T.*, recognized the legal right of transsexuals to marry in their acquired sex.<sup>53</sup> The case began when M.T. filed a claim with the Juvenile and Domestic Relations Court in New Jersey for support and maintenance.<sup>54</sup> In defense of not paying support and maintenance, J.T., a man, claimed that the marriage between J.T. and M.T., a male-to-female transsexual, was invalid because M.T. was male and not female.<sup>55</sup> J.T. first met M.T. in 1964, seven years before M.T. had a sex change operation.<sup>56</sup> When J.T. and M.T. first met, M.T. was living as a woman, but J.T. was aware that M.T. was biologically born male.<sup>57</sup> In 1971, M.T. had a sex change operation.<sup>58</sup> In 1972, J.T. and M.T. had a marriage ceremony, consummated their relationship, and lived together for two years.<sup>59</sup>

The court focused on the psychological aspects of sex as a key component in determining a transsexual’s sex for the purpose of marriage. The court reasoned that mere biology was not significant in determining sex. “A person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character.”<sup>60</sup> The court concluded that “for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be

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52. 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

53. 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976).

54. *M.T.*, 355 A.2d at 205.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 209.

governed by the congruence of these standards.”<sup>61</sup> The decision placed greater focus on the individual’s identity, and the alignment of sex and gender to meet that perception, as the proper measure for determining a person’s sex.

Although *M.T. v. J.T.* was a significant step towards transsexuals’ ability to gain recognition of an acquired sex, the case contained some significant caveats. The primary limitation of the decision was that the court explicitly held that the ability to have full intercourse determines the validity of a marriage. Specifically, the court stated, “Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.”<sup>62</sup> Thus, the court limited the recognition of a post-operative transsexual by the capacity to consummate a relationship: A person having a sex change operation that did not result in the ability to have traditional heterosexual penetrative intercourse would not have his or her sex recognized for the purposes of marriage. In particular, the court noted, “[A] female transsexual [who] had had a hysterectomy and mastectomy but had not received any male organs and was incapable of performing sexually as a male” would be ineligible for recognition in the acquired sex for the purpose of marriage.<sup>63</sup>

There have been no significant cases recognizing the acquired sex of a post-operative transsexual for the purpose of marriage since *M.T. v. J.T.*<sup>64</sup> Cases in other jurisdictions have recognized the acquired sex of post-operative transsexuals, utilizing a slightly different rationale. For example, in *Richards v. United States Tennis Ass’n*, Renee Richards, a post-operative male-to-female transsexual, petitioned the state of New York for the right to compete as a woman in the U.S. Open.<sup>65</sup> Richards had previously participated as a man in the competition before undergoing sex reassignment surgery.<sup>66</sup> The United States Tennis Association rejected her application on the theory that she was unfairly advantaged because her previous status as a man made her physically stronger.<sup>67</sup> Specifically, the United States Tennis Association argued that the Barr body test indicated Richards had a Y chromosome and that the very expression of the Y chromosome gave her an improper and unfair physical advantage.<sup>68</sup> The New York State Supreme Court rejected the application of the Barr body test for chromosomes

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61. *Id.*

62. *Id.*

63. *Id.*

64. One known case in California, *Vecchione v. Vecchione*, concurred with the court in *M.T. v. J.T.*, but because there was no appeal there is no reported decision. *Vecchione v. Vecchione*, Civ. No. 96D003769 (Cal. Super. Ct. 1997); see *Transgender Ruling*, *supra* note 33, at 1.

65. Elizabeth Fee, et al. *One Size Does Not Fit All in the Transgender Community*, 93 AM. J. PUB. HEALTH. 899 (2003).

66. *Id.*

67. *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 270 (Sup. Ct. 1977).

68. *Id.* at 268–69.

because hormone therapy had effectively repressed the impact of the Y chromosome,<sup>69</sup> and Richards was granted the right to compete as a woman in the U.S. Open.

*Richards* and *M.T. v. J.T.* focused on biology in determining the right to be recognized in an acquired sex. Both cases were guided by the same principle (although they focused on different aspects of biology), and therefore both indicate a willingness to legally recognize sex changes. The court in *Richards* considered the modification of Richards's chromosomal impact, as a result of operation, sufficient to recognize a change in sex. The focus was not on the right to change her sex, but on the biology of the change and its recognition.

## II. THE UNITED KINGDOM AND THE ECHR MODEL: RECOGNIZING TRANSSEXUALS' LEGAL RIGHTS IN THEIR ACQUIRED SEX

During the last four decades, the United Kingdom has significantly expanded transsexuals' legal right to marry in their acquired sex. Forty years ago the United Kingdom did not allow post-operative transsexuals the right to seek a change in the sex listed on a birth certificate, and actually invalidated marriages of transsexuals in their acquired sex. Critical rulings by the ECHR, however, changed the legal rights of transsexuals. An examination of the case law reveals how the legal doctrine was reshaped and ultimately came to recognize the acquired sex of post-operative transsexuals. Part II.A discusses the United Kingdom's initial position that post-operative transsexuals could not marry as members of their acquired sex. Part II.B examines the shift in legal decisions by the ECHR that led to the eventual recognition of the acquired sex of post-operative transsexuals for the purpose of marriage in the United Kingdom.

### A. *The United Kingdom's Initial Position: Post-Operative Transsexuals Did Not Have the Right to Marry As Members of Their Acquired Sex*

The United Kingdom initially took the legal position that a post-operative transsexual could not marry a person of a sex matching the transsexual's birth sex.<sup>70</sup> Forty years ago, in the landmark case *Corbett v. Corbett*, the United Kingdom established sex as fixed at birth.<sup>71</sup> The court held that "the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means."<sup>72</sup> The court arrived at

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69. *Id.* at 272-73.

70. *Corbett v. Corbett*, [1970] 2 All E.R. 33, 88 (P.).

71. *Id.* at 104.

72. *Id.*

this conclusion by examining the testimony of various medical practitioners who all argued that sex is determined at birth.<sup>73</sup> Specifically, the court focused on determinations by the experts that an individual's sex is determined by four factors: (1) chromosomal, (2) gonadal, (3) genital, and (4) psychological.<sup>74</sup> The court concluded that the psychological factor was not relevant in determining sex, disregarding the experts' opinion,<sup>75</sup> and proceeded to hold that "the law should adopt . . . the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."<sup>76</sup> The court acknowledged that there may not be full congruence on the three factors, writing that "[t]he real difficulties, of course, will occur if these three criteria are not congruent."<sup>77</sup> Judge Omrod, writing for the court, indicated in dictum that "greater weight would probably be given to the genital criteria than to the other two."<sup>78</sup> The only specific recognition of a sex change acknowledged by the court was when "a mistake as to sex is made at birth and subsequently revealed by further medical investigation."<sup>79</sup> The Corbett marriage was invalidated, in part under the view that a marriage cannot be consummated unless there is full penetration, which is only possible when the female is born with a vagina.<sup>80</sup>

The United Kingdom's legal position on transsexuals was further solidified by the ECHR in *Rees v. United Kingdom*.<sup>81</sup> From birth, Brenda Margaret Rees possessed "the physical and biological characteristics of a child of the female sex," and was designated a female in the register of births.<sup>82</sup> "However, already from a tender age the child started to exhibit masculine behavior and was ambiguous in appearance."<sup>83</sup> Rees began hormone treatment, had a double mastectomy, and changed her name to Brendan Mark Rees.<sup>84</sup> Rees eventually had all legal documents, with the exception of his birth certificate, reflect his sex change.<sup>85</sup> Rees brought a

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73. *Id.*

74. *Id.* at 100.

75. *Id.* at 106.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 84.

80. *Id.* at 105 (acknowledging that there may be some difficulty in this determination if a person suffers from a congenital defect that makes full penetration impossible and indicating that under such circumstances an operation may enlarge the vagina or an argument may be made for incapacity).

81. App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1987).

82. *Rees*, 9 Eur. H.R. Rep. para. 12.

83. *Id.*

84. *Id.* paras. 13–14.

85. *Id.* para. 17.

case to have his birth certificate changed and to attain the right to marry as a member of his acquired sex. A medical expert testified that:

[O]f the four criteria of sex—namely chromosomal sex, gonadal sex, apparent sex (external genitalia and body form) and psychological sex, the last was the most important as it determined the individual's social activities and role in adult life, and it was also, in his view, pre-determined at birth, though not evident until later in life.<sup>86</sup>

The expert concluded “the applicant’s psychological sex was male, [so] he should be assigned male.”<sup>87</sup>

Rees contended that the United Kingdom’s refusal to recognize his acquired sex violated the European Convention on Human Rights under both Article 8<sup>88</sup> (the right to respect of private life) and Article 12<sup>89</sup> (the right to marry and form a family).<sup>90</sup> The court rejected the Article 8 claim, reasoning that the government had a significant interest in not altering birth certificates or providing alternative sex documentation. The ECHR found that the United Kingdom might have “positive obligations inherent in an effective respect for private life,” but that the governmental interest outweighed private individual interests.<sup>91</sup> The ECHR went on to hold that there was no Article 12 violation because “the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex,” and the primary focus is on the formation of family.<sup>92</sup> The holding clarified that Article 12 ensures only that “the very essence of the right” is not impaired and that, as long as people of the opposite biological sex are allowed to marry, the law in the United Kingdom is permissible.<sup>93</sup> Yet the ECHR noted, “The need for appropriate legal measures [for transsexuals] should therefore be kept under review having regard particularly to scientific and societal developments.”<sup>94</sup>

Three years later, the ECHR reviewed *Rees* in *Cossey v. United Kingdom*.<sup>95</sup> *Cossey* concerned Caroline Cossey, a post-operative transsexual who was born male. Beginning at age thirteen, Cossey began feeling different

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86. *Id.* para. 16.

87. *Id.*

88. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).

89. *Id.* at art. 12 (“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.”).

90. *Rees*, 9 Eur. H.R. Rep. para. 31. The United Kingdom is bound by the European Convention on Human Rights.

91. *Id.* para. 35.

92. *Id.* para. 49. The ECHR is making two assumptions with this holding: first, that the goal of marriage is reproduction and the formation of a family, and second, that transsexual couples are incapable of forming a family.

93. *Id.* para. 50.

94. *Id.* para. 47.

95. *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622 ara. 1 (1990).

from other males, later feeling psychologically female, and eventually pursuing hormone treatment and sexual reassignment surgery to make her physically female.<sup>96</sup> Caroline Cossey married in 1989;<sup>97</sup> but, in 1990, the English High Court “pronounced [the marriage] to have been by law void by reason of the parties not being respectively male and female.”<sup>98</sup>

Cossey, like Rees, argued the United Kingdom violated Articles 8 and 12 of the European Convention of Human Rights. While Cossey attempted to distinguish herself from Rees, because Rees did not yet have a partner wishing to marry him,<sup>99</sup> the ECHR found this distinction immaterial.<sup>100</sup> And, although the ECHR reviewed the case, they concluded they had “been informed of no significant scientific developments that have occurred in the meantime; in particular, it remains the case—as was not contested by the applicant—that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex.”<sup>101</sup> In the end, the ECHR refused to depart from the holding in *Rees*, stating “that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for the purpose of marriage.”<sup>102</sup>

Seven year later, the ECHR examined not the right to marry, but the right for a female-to-male transsexual to be named as the father of a child on the child’s birth certificate with *X, Y, & Z v. United Kingdom*.<sup>103</sup> The ECHR relied heavily on the conceptions of sex solidified in *Corbett*, *Rees*, and *Cossey* to hold that the European Convention on Human Rights does not grant an individual right to the recognition of a sex change that is medically required. In the end, the ECHR acknowledged that transsexual identity “raises complex scientific, legal, moral and social issues,” but refused recognition of the acquired sex.<sup>104</sup>

In *Sheffield & Horsham v. United Kingdom*, the ECHR continued to apply the biological standards in *Corbett*, *Rees*, and *Cossey* in determining that transsexuals had no right to recognition of an acquired sex for purposes of marriage or modification of a birth certificate.<sup>105</sup> Simultaneously, however, the ECHR acknowledged a need for the United Kingdom to alter laws

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96. *Id.* paras. 10–11.

97. *Id.* para. 14.

98. *Id.*

99. *Id.* para. 44.

100. *Id.*

101. *Id.* para. 40.

102. *Id.* para. 46.

103. *X, Y, & Z v. United Kingdom*, App. No. 21830/93, 24 Eur. H.R. Rep. 143 paras. 12–17 (1997).

104. *Id.* para. 3.

105. *Sheffield & Horsham v. United Kingdom*, App. Nos. 22885/93, 23390/94, 27 Eur. H.R. Rep. 163 paras. 36–37 (1998).

concerning transsexuals.<sup>106</sup> Though the court maintained that “the applicants have not shown that since the date of adoption of its *Cossey* judgment in 1990 that there have been any findings in the area of medical science which settle conclusively the doubts concerning the causes of the condition of transsexualism,”<sup>107</sup> it acknowledged that a change in this policy could occur.

The court reasoned that the status of transsexuals could change if scientific research indicated a conclusive position on the sex of transsexuals. Moreover, the ECHR reminded the United Kingdom that “there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.”<sup>108</sup> The ECHR acknowledged that, in addition to potential scientific codification resulting in the acknowledgement of the right of transsexuals to be recognized in their acquired sex, the increased social acceptance warranted review of the sex status of post-operative transsexuals.<sup>109</sup>

#### B. *The United Kingdom’s Policy Now Recognizes the Acquired Sex of Transsexuals for the Purposes of Marriage*

The grounds for further reflection and alteration in policy were set in *Sheffield & Horsham v. United Kingdom*, but it would take another four years for the policy in the United Kingdom to change. Two pivotal cases, *Goodwin v. United Kingdom* and *I v. United Kingdom*, brought jointly before the ECHR and referred to as *Goodwin v. United Kingdom*, altered the legal status of post-operative transsexuals in the United Kingdom.<sup>110</sup> Ultimately, these cases led to the recognition of the acquired sex of transsexuals for the purposes of marriage.

In 2002, the ECHR reversed its precedent regarding the status of post-operative transsexuals in *Goodwin v. United Kingdom*. The ECHR noted that the United Kingdom was already reexamining the basis of its treatment of transsexuals.<sup>111</sup> On April 14, 1999, “the Secretary of State for the Home Department announced the establishment of an Interdepartmental Working Group on Transsexual People.”<sup>112</sup> In 2000, the Interdepartmental Working Group on Transsexual People concluded that “the principal areas where the

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106. As in the previous cases, in *Sheffield & Horsham v. United Kingdom* “the issue [raised by the applicants] before the court is not that the respondent State should abstain from acting to their detriment but that it has failed to take positive steps to modify a system which [they] claim operates to their detriment.” *Id.* para. 51.

107. *Id.* para. 56.

108. *Id.* para. 60.

109. In addition, nine of the twenty justices dissented from the opinion in *Sheffield & Horsham v. United Kingdom* on Article 8 grounds. *Id.* para. 80.

110. App. No. 28957/95, 35 Eur. H.R. Rep. 447 (2002).

111. *Goodwin*, 35 Eur. H.R. Rep. 447.

112. *Id.* para. 49.

transsexual community is seeking change are birth certificates, the right to marry and full recognition of their new gender for all legal purposes.”<sup>113</sup> The ECHR concluded that the Interdepartmental Working Group on Transsexual People and its findings constituted an acknowledgement of the changing societal status of transsexuals in the United Kingdom and Europe more generally.<sup>114</sup>

In accepting the right of transsexuals to legal recognition of their acquired sex, the court acknowledged sex discrimination against transsexuals. The court noted that the lack of legal recognition of the acquired sex of post-operative transsexuals had the greatest “effects on the applicant’s life where sex is of legal relevance and distinctions are made between men and women.”<sup>115</sup>

The ECHR also recognized a violation of the right to privacy, indicating “that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity.”<sup>116</sup> In effect, the court asserted that there is “discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of [sex].”<sup>117</sup> Transsexuals are denied the right by courts to live their lives as they see fit because of rules that deny a concordance between their personal identity and their legal status.<sup>118</sup>

The ECHR also noted a peculiar disparity between the medical diagnosis that eventually motivated the decision to undergo a sex change operation and the legal status of transsexuals.<sup>119</sup> A sex reassignment surgery is a procedure recommended for some people who suffer from gender identity disorder,<sup>120</sup> the belief that one’s sex and gender are not properly aligned.<sup>121</sup> The goal of sex reassignment surgery is “as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs.”<sup>122</sup> In fact, the National Health Service in the United Kingdom recognizes gender identity disorder and sex reassignment surgery.<sup>123</sup> “Where a State has authorized the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations . . . it appears

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113. *Id.* para. 50 (citation omitted).

114. *Id.*

115. *Id.* para. 76.

116. *Id.* para. 77.

117. *Id.*

118. *Id.*

119. *Id.* para. 78.

120. In the United Kingdom, gender identity disorder is often referred to as gender dysphoria. For purposes of clarity, this Note will use the term gender identity disorder rather than gender dysphoria.

121. *Goodwin*, 35 Eur. H.R. Rep. 447 para. 78.

122. *Id.*

123. *Id.*

illogical to refuse to recognize the legal implications of the result to which the treatment leads.”<sup>124</sup>

The ECHR continued by concluding that scientific evidence points to a distinct biological and psychological recognition of transsexuals as members of their acquired sex.<sup>125</sup> The court also concluded that “the principal unchanging biological aspect of [sex] is the chromosomal element.”<sup>126</sup> It went on to acknowledge there may be natural chromosomal abnormalities that still require a person be designated as a member of one sex or the other, despite that person not fitting into the traditional distinction between male (XY) and female (XX).<sup>127</sup> Thus, the lack of recognition of the acquired sex of post-operative transsexuals was not congruent with provisions of Article 8.

Regarding the right to marry specifically, the ECHR overruled *Rees*<sup>128</sup> and *Cossey*.<sup>129</sup> The ECHR held “that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex.”<sup>130</sup> The ECHR found its previous position incommensurate with the desire for a post-operative transsexual to marry someone opposite of his or her acquired sex. The ECHR noted that Goodwin lived as a female and “is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court’s view, she may therefore claim that the very essence of her right to marry has been infringed.”<sup>131</sup>

Ultimately, the ECHR held that the United Kingdom must take steps “to implement such measures as it considers appropriate to fulfill its obligations to secure the applicant’s, and other transsexuals’, right to respect for private life and right to marry in compliance with this judgment.”<sup>132</sup> The end result was the establishment of the Gender Recognition Act in 2004, which provided full recognition of the sex of both post- and pre-operative adult transsexuals.<sup>133</sup>

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124. *Id.*

125. *Id.* para. 81.

126. *Id.* para. 82.

127. *Id.*

128. *Rees v. United Kingdom*, App. No. 9532/81, 9 Eur. H.R. Rep. 56 (1987).

129. *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622 (1990).

130. *Goodwin*, 35 Eur. H.R. Rep. para. 101.

131. *Id.*

132. *Id.* at 483.

133. Gender Recognition Act, 2004, c. 7.

III. APPLYING A SEX EQUALITY MODEL EMERGING FROM THE  
UNITED KINGDOM AND THE ECHR AS A METHOD FOR  
RESOLVING THE DIVIDED STATE POSITIONS  
IN THE UNITED STATES

The lack of a coherent position within the United States places transsexuals in a position where recognition of their sex is entirely dependent upon their state of residence. The result is that fundamental liberties stemming from recognition of an acquired sex are arbitrarily governed by residency. Therefore, a post-operative transsexual wishing to challenge a state's refusal to change the sex on his/her birth certificate should utilize a Fourteenth Amendment claim by arguing that the U.S. Supreme Court should borrow the legal reasoning the ECHR applied to the United Kingdom.<sup>134</sup> Section A explains the concept of reason-borrowing, discusses when and why it is invoked, and argues that the ECHR is an appropriate source from which U.S. courts should reason-borrow. Part III will continue by examining specific reasoning that should be imported from the ECHR to support recognition under the U.S. Constitution of the right of transsexuals to be recognized in their acquired sex for marriage purposes.<sup>135</sup> In particular, Section B will propose borrowing ECHR's reasoning on privacy and liberty. Section C examines potential reason-borrowing from the ECHR on sex discrimination. Finally, Section D explains how the Supreme Court can borrow ECHR reasoning on emergent post-operative transsexual treatment.

A. *Precedent for Reason-Borrowing*

The reason-borrowing framework provides support for protecting transsexuals' right to marry in their acquired sex.<sup>136</sup> Reason-borrowing would import the reasons given by a foreign or international decision maker for arriving at a particular position into U.S. jurisprudence.<sup>137</sup>

Reason-borrowing has been strongly advocated for by Supreme Court Justices when similar issues were raised in similarly situated foreign courts. Justice Breyer noted, "[W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. . . . Judges in different countries increasingly apply

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134. See *supra* note 15 for a discussion of the connection between laws in the United Kingdom and the ECHR and their applicability to constitutional analysis.

135. Larsen looks to *Smith v. California*, 361 U.S. 147, 166–67 (1959) (Frankfurter, J., concurring), to provide an illustration of the reason-borrowing framework. Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1292 (2004). Justice Frankfurter looked to the House of Commons debate in evaluating if a California statute making booksellers strictly liable for possession of obscene material violated the First Amendment. *Smith*, 361 U.S. at 166–67 (citing legislative history in Parliament regarding a similar provision in a British law about obscene publications).

136. See Larson, *supra* note 135, at 1291–92, for a general discussion of the reason-borrowing approach.

137. *Id.*

somewhat similar legal phrases to somewhat similar circumstances . . . .<sup>138</sup> In other words, Justice Breyer is suggesting that the Supreme Court use foreign courts as sources of legal reasoning upon which to support opinions in U.S. courts when the U.S. court and foreign court are addressing similar issues. Justice O'Connor argued:

There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.<sup>139</sup>

Justice O'Connor is similarly advocating for the use of reason-borrowing in U.S. courts. Chief Justice Rehnquist also advocated for the use of decisions by other nations' constitutional courts in the deliberative process of U.S. courts:

For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority . . . . But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>140</sup>

The views of various Justices advocating differing forms of reason-borrowing are indicative of its usefulness as a tool in constitutional jurisprudence.<sup>141</sup> When faced with particularly difficult constitutional questions, which foreign constitutional courts have previously addressed, the process of reason-borrowing is beneficial in developing the Court's own reasoning.

The Supreme Court has previously engaged in reason-borrowing, specifically in cases that have dealt with the Due Process Clause of the Fourteenth Amendment. *Smith v. California* provides an illustration of the reason-borrowing framework.<sup>142</sup> In *Smith*, the Supreme Court reviewed the

138. Stephen Breyer, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 2–5, 2003), in 97 AM. SOC'Y INT'L L. PROC. 265, 265 (2003).

139. Sandra Day O'Connor, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law (Mar. 13–16, 2002), in 96 AM. SOC'Y INT'L L. PROC. 348, 350 (2002).

140. William Rehnquist, *Constitutional Courts-Comparative Remarks*, in GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE- A GERMAN-AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

141. Leading scholars have similarly argued for reason-borrowing. See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 825–26 (1999); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 601 (1999); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 263 (2001); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999).

142. 361 U.S. 147, 166–67 (1959) (Frankfurter, J., concurring). *Smith* dealt with issues arising under both the Due Process Clause of the Fourteenth Amendment and the First Amendment.

legality of a Los Angeles ordinance restricting the presence of obscene books in bookstores.<sup>143</sup> Section 41.01.1 of the Municipal Code of the City of Los Angeles made it unlawful “for any person to have in his possession any obscene or indecent writing, [or] book . . . in any place of business where . . . books . . . are sold or kept for sale.”<sup>144</sup> The Municipal Court of Los Angeles, and later the Superior Court of California, imposed a jail sentence on Mr. Smith based on the presence of a “book found upon judicial investigation to be obscene” in his bookstore.<sup>145</sup> “The definition included no element of scienter—knowledge by appellant of the contents of the book—and thus the ordinance was construed as imposing a ‘strict’ or ‘absolute’ criminal liability.”<sup>146</sup> In examining the application of the First and Fourteenth Amendments in *Smith*, Justice Frankfurter looked to a debate of the British House of Commons.<sup>147</sup> Frankfurter noted that obscenity is understood in the context of “contemporary community standards.”<sup>148</sup> The evidence of the “contemporary community standards” requires evidentiary support.<sup>149</sup> Frankfurter contends, “The importance of this type of evidence in prosecutions for obscenity has been impressively attested by the recent debates in the House of Commons dealing with the insertion of such a provision in the enactment of the Obscene Publications Act.”<sup>150</sup> Frankfurter was borrowing the reasoning of the House of Commons as support for the proposition that prosecuting obscenity requires an evidentiary investigation of “contemporary community standards.” Frankfurter also looked to the reasoning of the Court of Appeals of New Zealand, noting, “It has been well observed of a statute construed as dispensing with any requirement of scienter that: ‘Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.’”<sup>151</sup> Once again, Frankfurter was borrowing the reasoning of a foreign court to lend support to his conclusion. *Smith* illustrates that the Court has and is willing to borrow reasoning from similarly situated foreign courts in interpreting constitutional provisions. Frankfurter relies on the reasoning of other courts and legislatures<sup>152</sup> in arriving at a decision.

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143. *Id.* at 147 (majority opinion).

144. *Id.* at 148.

145. *Id.* at 149.

146. *Id.* (footnote omitted).

147. *Id.* at 166 (Frankfurter, J., concurring) (citing 597 PARL. DEB., H.C. (5th ser.) (1958) 36).

148. *Id.* at 165.

149. *Id.* at 166.

150. *Id.* (footnote and citation omitted).

151. *Id.* at 153 (majority opinion) (footnote omitted) (quoting *R v. Ewart*, [1905] 25 N.Z.L.R. 709, 729 (C.A.)).

152. Although borrowing reasoning from legislative bodies is not expressively advocated by Breyer, Rehnquist, or O’Connor, the Supreme Court has in practice borrowed from legislative bodies because legislatures also provide reasoning for laws.

Similarly, Chief Justice Rehnquist, in *Washington v. Glucksberg*,<sup>153</sup> cited and described decisions from other nations' constitutional courts in identifying the relevant "background" to evaluate the claim that the State of Washington's prohibition on assisted suicide violates the Due Process Clause of the Fourteenth Amendment.<sup>154</sup> In *Glucksberg*, four Washington physicians who treated the terminally ill, three terminally ill patients, and a nonprofit organization sought a declaration that the ban on assisted suicide was unconstitutional on its face.<sup>155</sup> The contention was that the doctors would otherwise have assisted in the suicide of the patients but did not do so because of Washington's ban on the practice.<sup>156</sup> "[Respondents] assert[ed] a liberty interest protected by the Fourteenth Amendment's Due Process Clause which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."<sup>157</sup> Rehnquist supports the proposition that there is no right to assisted suicide by citing decisions of multiple foreign bodies: the Supreme Court of Canada, which rejected a claim of a fundamental right to assisted suicide in the Canadian Charter of Rights and Freedoms;<sup>158</sup> the British House of Lords Select Committee on Medical Ethics, which refused to change Great Britain's assisted-suicide prohibition;<sup>159</sup> and New Zealand's Parliament, which rejected a "Death With Dignity Bill" legalizing physician-assisted suicide.<sup>160</sup> Again, the Court illustrated its willingness to borrow reasoning from foreign courts and governments in interpreting provisions of the Fourteenth Amendment.

There are two strong foundations for the Supreme Court to engage in reason-borrowing from the ECHR's jurisprudence regarding the legal recognition of an acquired sex. First, the borrowed reasoning is from a constitutional court. Some criticism of the Supreme Court has focused on the lack of reason-borrowing that is derived from similarly situated constitutional courts whose focus would also be constitutional rights and provisions.<sup>161</sup> The ECHR is tasked with interpretation of the European Convention on Human Rights.<sup>162</sup> Cases rise to the ECHR upon an allegation that

153. 521 U.S. 702 (1997).

154. *Glucksberg*, 521 U.S. at 718 n.16.

155. *Id.* at 702.

156. *Id.*

157. *Id.*

158. *Id.* at 718 n.16 (citing *Rodriguez v. British Columbia (Attorney Gen.)*, [1993] 107 D.L.R. 342).

159. *Id.* (citing House of Lords, *Session 1993-94 Report of the Select Committee on Medical Ethics*, 12 ISSUES IN LAW & MED. 193, 202 (1996) ("We identify no circumstances in which assisted suicide should be permitted.")).

160. *Id.* (citing Graeme Lee, *MPs Throw out Euthanasia Bill*, THE DOMINION POST, Aug. 17, 1995, at 1).

161. *E.g.* Jackson, *supra* note 141, at 226. ("[E]ven when the Court has considered the constitutional experiences of other nations, it almost never has engaged the reasoning of other constitutional courts.").

162. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 88, t.32 ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and

a member state violated the European Convention on Human Rights. This parallels the system in the United States where the Supreme Court hears cases dealing with potential violations of the Constitution. Decisions of the ECHR are binding on the parties including member states. Again, this parallels the United States, where decisions made by the Supreme Court are binding on the parties to the case. Given the somewhat parallel tasks of the Supreme Court and the ECHR, borrowing the reasoning of the ECHR would be appropriate. Second, the specific provisions of the European Convention on Human Rights are analogous to the Due Process Clause protections of the Fourteenth Amendment. An advocate for the recognition of the transsexuals' rights in their acquired sex should argue that the Supreme Court borrows ECHR reasoning in three areas: privacy and liberty, sex discrimination, and the awareness of an emergent treatment of post-operative transsexuals. By borrowing from the reasoning of the ECHR, the Fourteenth Amendment's Due Process Clause should be interpreted to protect the right of post-operative transsexuals to be recognized in their acquired sex.

#### B. *Borrowing the ECHR Reasoning on Privacy and Liberty*

A primary concern expressed by the ECHR was that a prohibition on the right of post-operative transsexuals to marry in their acquired sex constituted a violation of their privacy under Article 8 of the Convention.<sup>163</sup> Although the right to privacy is not explicitly present in the U.S. Constitution, the Supreme Court has held that privacy is a protected constitutional right under the Fourteenth Amendment's Equal Protection Clause and substantive due process in a line of cases—*Griswold v. Connecticut*,<sup>164</sup> *Eisenstadt v. Baird*,<sup>165</sup> and *Roe v. Wade*.<sup>166</sup> In *Planned Parenthood of South-eastern Pennsylvania v. Casey*, the Supreme Court found:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>167</sup>

For people with gender identity disorder, making the decision to live life as a member of the gender with which you identify is an intimate and personal decision that is tied to essential conceptions of autonomy and dignity; it is

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application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 47.”).

163. *Id.* art. 8 (“Everyone has the right to respect for his private and family life, his home and his correspondence.”).

164. 381 U.S. 479 (1965).

165. 405 U.S. 438 (1972).

166. 410 U.S. 113 (1973).

167. 505 U.S. 833, 851 (1992). This very argument was restated verbatim in *Lawrence v. Texas*, further solidifying the position that privacy is protected by the Constitution. 539 U.S. 558, 574 (2003).

fundamental to defining “one’s own concept of existence.”<sup>168</sup> The underlying argument ties together privacy and liberty. As Justice Kennedy noted in *Lawrence v. Texas*, “the individual’s right to make certain unusually important decisions that will affect his own or his family’s destiny.”<sup>169</sup>

The position of the ECHR provides the reasoning necessary to complete a privacy and liberty argument for recognizing a person’s acquired sex. The ECHR concluded “that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity.”<sup>170</sup> Specifically, the ECHR held that “[t]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot . . . be regarded as inconvenience arising from a formality.”<sup>171</sup>

The view espoused by the ECHR parallels the position taken by the Supreme Court in *Casey*<sup>172</sup> and *Lawrence*,<sup>173</sup> which generally hold that certain personal decisions ought to be protected. As the Supreme Court noted in *Lawrence*, “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>174</sup> Borrowing the reasoning established in the ECHR and applying it to the view expressed by the Supreme Court provides strong ground for the position that post-operative transsexuals should have the right to get married in their acquired sex.

### C. Borrowing the ECHR Reasoning on Sex Discrimination

Advocates for transsexual rights should also utilize reason-borrowing from the ECHR’s approach by finding that denying transsexuals the right to marry in their acquired sex is sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court first applied the Equal Protection Clause to sex discrimination in *Craig v. Boren*.<sup>175</sup> The Court established that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>176</sup> Since *Craig v. Boren*, a series of cases have led the Su-

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168. *Casey*, 505 U.S. at 851.

169. *Washington v. Glucksberg*, 521 U.S. 702, 744 (1997) (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 719–20 (7th Cir. 1975)).

170. *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 447 para. 77 (2002).

171. *Id.*

172. 505 U.S. at 851.

173. 539 U.S. at 573–74.

174. *Lawrence*, 539 U.S. at 574; *see also Casey*, 505 U.S. at 851.

175. 429 U.S. 190 (1976).

176. *Craig*, 429 U.S. at 197.

preme Court to raise the threshold of intermediate scrutiny.<sup>177</sup> As Justice Ginsburg explains in *U.S. v. Virginia*, “[t]o summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’”<sup>178</sup> The government carries the burden under intermediate scrutiny as outlined in *U.S. v. Virginia*. As Ginsburg notes, “The burden of justification is demanding and it rests entirely on the State.”<sup>179</sup>

The reasoning of the ECHR provides a strong parallel to the view of sex discrimination outlined by the Supreme Court. The ECHR indicated that the primary problem in the treatment of post-operative transsexuals is “discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognize the change of [sex].”<sup>180</sup> The view is that the denial of the right to be recognized in one’s acquired sex is a denial of the sex in which the person lives their life, a sex that is medically prescribed. The result is that the government, in choosing not to recognize a post-operative transsexual’s sex, is discriminating against the transsexual based upon his/her actual lived sex. As the ECHR notes, non-recognition has its most substantial “effects on the applicant’s life where sex is of legal relevance and distinctions are made between men and women.”<sup>181</sup> The impact of not recognizing a person’s acquired sex is to inherently discriminate against them in instances when sex matters. The contention is that non-recognition leads to discrimination against a person based upon the sex that person has acquired. Once a transsexual has had a sex-change operation, the decision to deny legal rights based upon his or her sex unjustifiably limits the individual’s basic legal and political rights.<sup>182</sup>

Advocates for transsexual rights should borrow the ECHR reasoning that discrimination against post-operative transsexuals is sex discrimination.<sup>183</sup> Importing this reasoning would bring consistency to the United States’ position and protect the rights of post-operative transsexuals from unlawful sex discrimination.<sup>184</sup>

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177. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

178. 518 U.S. 515, 532–533 (1996).

179. *Id.* at 533.

180. *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 447, para. 76, 77 (2002).

182. *Id.*

183. This Note does not take up the issue, but it is possible to argue that transsexuals should be considered a protected class under the Equal Protection Clause. Justice O’Connor has indicated that targeting a group of people for disfavored treatment based upon a single characteristic could form an “underclass” status. *Lawrence v. Texas*, 539 U.S. 558, 584 (2003) (O’Connor, J., concurring). But even O’Connor has been unwilling to go as far as to claim that this constitutes a protected class requiring the constitutional protection of strict scrutiny.

184. It is important to note that the Seventh Circuit has previously indicated that transsexuals cannot claim sex discrimination in the Title VII employment context. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied* 471 U.S. 1017 (1985). But, the holding focused only on the definition of sex as used in Title VII. *Id.* at 1087. The Seventh Circuit held that including

Further supporting the sex equality approach is the fact that the Supreme Court includes discrimination based on gender in its definition of sex discrimination. The inclusion of gender within sex discrimination permits transsexuals a stronger foundation for a sex discrimination claim under the Fourteenth Amendment. The Supreme Court's primary contention in sex discrimination cases focuses on the social (gender) rather than the biological (sex) concerns.<sup>185</sup> The Court continuously uses sex and gender as proxies for one another, indicating that they are linked. The first, most stark, and most unpleasant evidence of the connection was present in *Bradwell v. Illinois*, in which Justice Bradley noted:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.<sup>186</sup>

Bradley was making the claim that the biological characteristics of women incline them to certain social positions.<sup>187</sup> Bradley's position sees an immutable bind between sex and gender. Although *Bradwell* is admittedly a very old case, it has never been overruled and thus is still good law.

The interchangeability of sex and gender can also be seen in Title VII cases. Under Title VII, gender discrimination is prohibited as sex discrimination. The Supreme Court in *Price Waterhouse v. Hopkins*, held that sex-type stereotyping was a sex-based violation of Title VII.<sup>188</sup> The Court noted, "[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."<sup>189</sup> The Court also indicated:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>190</sup>

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transsexuals was beyond Title VII's "common and traditional interpretation" and that if "the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." *Id.* at 1086–87. The argument discussed here is not similarly bound by the language of Title VII. It is important to note that after the holding in *Ulane* the Supreme Court has held that gender discrimination based on gender/sex stereotyping is not permitted. *See supra* notes 164–167 and accompanying text.

185. CATHARINE A. MACKINNON, *SEX EQUALITY* 211 (2d ed. 2007).

186. 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

187. *Id.* at 141.

188. 490 U.S. 228 (1989) (plurality opinion).

189. *Hopkins*, 490 U.S. at 258.

190. *Id.* at 251 (quoting *L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). *Forms, Inc.* is the most recent court to validate the *Price Waterhouse* holding. *See* 579 F.3d 285, 290 (3d Cir. 2009).

The Supreme Court has not expressly proffered such a strong position on the connection of sex and gender under the Equal Protection Clause. But it has continued to view or consider sex and gender as bound, and gender discrimination as impermissible under the Equal Protection Clause. In *Craig v. Boren*, the Court found a “gender-based” difference in drinking age unconstitutional.<sup>191</sup> The Court even noted that the primary basis for discrimination was social stereotyping.<sup>192</sup> In *U.S. v. Virginia*, the Court found “official classification based on gender” to be impermissible.<sup>193</sup> The Court objected to discrimination that is based upon social categories, specifically the distinct “capacities,” “tendencies,” and “preferences” of men and women.<sup>194</sup>

The focus on gender discrimination as impermissible discrimination under the Equal Protection Clause indicates both that the Court sees sex and gender as connected and that the Court finds gender discrimination impermissible. In fact, prohibited sex discrimination is founded on “principally social meaning [gender] in legal application.”<sup>195</sup> Therefore, U.S. courts acknowledge that what is called sex discrimination applies to discrimination based on both sex and gender.<sup>196</sup>

The rhetorical interchangeability of sex and gender as applied by U.S. federal courts indicates that gender is an important part of Fourteenth Amendment sex discrimination claims. The view forwarded by U.S. federal courts is commensurate with the ECHR’s view regarding the importance that gender plays in determining a person’s sex.<sup>197</sup> The ECHR noted that gender is a critical part in assessing a person’s sex.<sup>198</sup> For a post-operative transsexual, a medical decision was made to align sex and gender.<sup>199</sup> Non-recognition of the acquired sex by U.S. courts is in direct contrast to the medical decision, which presupposes that a person can fully transition into the new sex.<sup>200</sup>

As the ECHR notes, the goal of sex reassignment surgery is “achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs.”<sup>201</sup>

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191. 429 U.S. 190, 192 (1976).

192. *Id.* at 202 n.14.

193. 518 U.S. 515, 532–33 (1996).

194. *Id.* at 541.

195. *MACKINNON*, *supra* note 185, at 211.

196. *See Kahn v. Shevin*, 416 U.S. 351, 352 (1974) (holding “the [Florida] statute violative of the Equal Protection Clause of the Fourteenth Amendment because the classification ‘widow’ was based upon gender”); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (holding that sex references both biological and social differences); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that Title VII protection against sex discrimination encompasses both sex and gender).

197. *See Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 447 (2002).

198. *See id.*

199. *See id.* at 78.

200. *See id.*

201. *Id.*

This view indicates that gender is an important part of sex. Denying a person the ability to marry as a member of their acquired sex would discriminate against the person's gender—namely because people whose gender aligns with their sex are allowed to marry people of the opposite sex, but people whose gender and sex do not align at birth and then have sex re-assignment surgery to align their sex and gender are denied the right to marry people opposite of their acquired sex. The clear interchangeability of sex and gender in equal protection sex discrimination cases in the United States indicates that not recognizing the sex identity of post-operative transsexuals should be considered a violation of the Fourteenth Amendment.

A challenge to the sex and gender discrimination position could be made to the effect that post-operative transsexuals can still marry someone opposite of their born sex. But the ECHR provides strong reasoning that could be borrowed to indicate that this position is tenuous at best. The ECHR held “that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex.”<sup>202</sup> Post-operative transsexuals want to align their sex and gender, and, if they additionally want to fit into traditional sex and gender roles, they often want to marry a person that is opposite their acquired sex. Denying them the right to marry someone opposite the sex they have acquired would deny them a basic right that belongs to members of their acquired sex. The ECHR noted that a person who acquires a sex and wants to marry someone opposite of that sex is denied the very right of that sex in marriage, thus “the very essence of her right to marry has been infringed.”<sup>203</sup>

#### D. *Borrowing the ECHR Reasoning on the Awareness of an Emergent Treatment of Post-Operative Transsexuals*

Transsexual rights advocates should acknowledge the continuing trend toward the recognition of the rights of post-operative transsexuals in their acquired sex. The Supreme Court has acknowledged that an examination of a legislative or legal movement can be important in assessing equal protection claims.<sup>204</sup> The conclusions of the ECHR along with the research that was done in arriving at that conclusion could be borrowed to illustrate a movement toward recognition. That the Interdepartmental Working Group on Transsexual People found that there was growing demand for and recognition of the legal rights of transsexuals in their acquired sex made a significant impression on the ECHR.<sup>205</sup> The ECHR concluded that the Inter-

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202. *Id.* para. 101.

203. *Id.*

204. See *Lawrence v. Texas*, 539 U.S. 558, 559 (2003); *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 126 (1992).

205. *Goodwin v. United Kingdom*, App. No. 28957/95, 35 Eur. H.R. Rep. 447 paras. 45, 50–51 (2002) (citation omitted).

departmental Working Group on Transsexual People and its findings constituted an acknowledgement of the changing societal status of transsexuals in the United Kingdom and Europe more generally.<sup>206</sup>

The movement within the United States toward recognition further supports this conclusion. Twenty-four states allow post-operative transsexuals to change their birth certificate to recognize their acquired sex, while only two states do not allow for the change of sex to be recognized on a birth certificate.<sup>207</sup> In addition, the medical community seems to be converging on the position that a sex change operation allows transsexuals to attain their proper sex.<sup>208</sup>

#### CONCLUSION

Exploring the Anglo American legal system's treatment of the acquired sex of post-operative transsexuals exposes the tenuous nature of the category of sex. It also reveals the potential consequences of legal decisions attempting to codify sex at birth. Although we may be reluctant to acknowledge it, traditional conceptions of sex are just as easily and erroneously constructed, both socially and legally, as race. However, there have been advances in recognizing the difficulties of a rigid categorization focusing solely on biological factors at birth.

The United Kingdom has advanced further than the United States in this respect, but the United Kingdom's progress presents a set of legal arguments that may help to resolve the lack of continuity in the United States' system. The United Kingdom's acknowledgment that non-recognition is a form of sex discrimination comports well with the sex discrimination view articulated in U.S. jurisprudence. Advancing a sex equality approach in recognizing the acquired sex of post-operative transsexuals could elevate the issues from states to federal courts and bring coherence to the treatment of post-operative transsexuals in the United States.

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206. *See id.* It is also important to note that the Supreme Court has acknowledged conclusions of the ECHR as an indication of legal and legislative movement. *See Lawrence*, 539 U.S. at 560.

207. *See supra* Section I.A.

208. *See supra* notes 11 and 119–24.

