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"Not Quite One Gender or the Other": Marriage Law and the Containment of Gender Trouble in the United Kingdom

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“NOT QUITE ONE GENDER OR THE OTHER”¹: MARRIAGE LAW AND THE CONTAINMENT OF GENDER TROUBLE IN THE UNITED KINGDOM

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ABSTRACT

The recent implementation of the Gender Recognition Act marks a dramatic change in the regulation of transsexualism in the United Kingdom. The author argues, however, for a cautious reading of this development. She suggests that Corbett v. Corbett [1971] P. 83 (U.K.) and its progeny have sought to contain the troubling effects that recognition of

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1. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 476 (2002).

transsexual and intersexual embodiment might have for prevailing gender norms. The article proposes a novel re-reading of Corbett in the context of a little noted line of cases involving intersex spouses. Contrasting responses to the spouses in these cases suggests that courts have been unsympathetic to transsexuals who make manifest their agency in choosing gender transition, while demonstrating sympathy to those whose transition is made necessary by ambiguity or a medical mistake regarding their true sex. She cautions that the new recognition regime continues this strategy of containment by delegating the power to identify the true sex of transsexual and intersex individuals to medico-legal experts rather than allowing transsexual individuals autonomy to choose their gender identity.

INTRODUCTION: "MARRIAGE IS A RELATIONSHIP WHICH DEPENDS ON SEX, AND NOT ON GENDER."²

The last three decades have seen dramatic changes in the legal regulation of transsexuality in the United Kingdom.³ A central theme in this history has been the deployment of the disciplines of medicine and biology to explain and contain the disconcerting facts of transsexual embodiment. Judges and legislators have sought to identify the true nature of transsexualism. The hidden sexual identity of the transsexual has been variously located: first in the immutable facts of transsexuals' birth morphology, then in diagnoses of their psychiatric pathology, and, more recently, in emerging evidence regarding gender-differentiated structures within the brain. Invariably, however, English law's approach to regulating the rights and duties of transsexuals has been founded on inferences regarding the meaning of scientific evidence rather than on the normative justifications for linking legal entitlements, such as marriage to sex and gender.

This article will argue that the history of English marriage law is one in which the most provocative anxieties raised by transsexual spouses have been consciously silenced. It will propose an alternative reading of the classic case of *Corbett v. Corbett*, setting the decision in the context of a little noted line of marriage cases that appear to have involved intersex spouses. It posits that the relationship between these cases should be understood through the lens of Judith Butler's notion of gender

2. *Corbett v. Corbett*, [1971] P. 83, 107.

3. See HOME OFFICE, REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSEXUAL PEOPLE, 2000, at 3 [hereinafter HOME OFFICE REPORT] (estimating that the prevalence of transsexualism, those who suffer from gender dysmorphic disorder, falls between one in 12-17,000 men and one in 60-85,000 women). Between 1997 and 1999, forty-eight sex reassignment surgeries were performed in the United Kingdom, forty-four of which involved males transitioning to females. *Id.*

“performativity.”⁴ The notion of gender identity as a form of performance allows the unpacking of the trope of “pastiche,” which the *Corbett* court uses to characterize the transsexual plaintiff.⁵ The article argues that the reliance upon apparently immutable biological facts in *Corbett* and its progeny aims to quiet certain troubling anxieties about gender that are provoked by the specter of the transsexual, but rather demonstrates that resort to neutral science does not allow an escape from the fraught politics of gender. The article then revisits the intersex exception set out in *Corbett* and considers how it was utilized in the recent marriage cases of *W. v. W.*⁶ and *Bellinger v. Bellinger*⁷ to allow a subcategory of transsexuals to correct their birth registration, while leaving the heterosexual conception of marriage intact. It concludes that while the Gender Recognition Act permits gender transition, it conceptualizes transsexuality and intersexuality as pathological and repudiates the performative nature of gender.

I. THE HIDDEN HISTORY OF THE INTERSEX SPOUSE

Marriage is defined under English common law as “a union for life of one man and one woman to the exclusion of all others.”⁸ The case from which this definition derives, *Hyde v. Hyde*, considered the validity of a polygamous marriage transacted by Mormons in the pre-Union American territory of Utah.⁹ The case determined that only monogamous marriages could be recognized as valid in English courts.¹⁰ The conclusion was thus that English marriage involved only *one* man and *one* woman. The case did not consider whether marriage required the presence of one *man* and one *woman*.

The issue of whether a marriage must be comprised of one man and one woman first emerged in the Court of Appeal in 1970.¹¹ The case arose in

4. See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

5. *Corbett v. Corbett*, [1971] P. 83.

6. [2001] Fam. 111.

7. [2001] EWCA Civ. 1140.

8. *Hyde v. Hyde*, (1866) 1 L.R.P. & D. 130.

9. *Id.*

10. *Id.*

11. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 277 (1999) (stating that medieval Jewish law makes reference to the existence of hermaphrodites and specifies how they are to negotiate sex-segregated rights and duties, including marriage); see also ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 33-35 (2000) (explaining that seventeenth century French law regulated the appropriate gender-linked attire that could be worn by intersexuals); STEPHEN WHITTLE, *RESPECT AND EQUALITY: TRANSEXUAL AND TRANSGENDER RIGHTS* 21-26 (2002) (suggesting that many

response to an application for maintenance made by April Ashley against her estranged husband, Arthur Corbett, Lord Rowallan.¹² Lord Rowallan launched a countersuit arguing that he was not liable for spousal maintenance because no valid marriage had been created.¹³ He claimed the marriage was invalid because both parties to it were male.¹⁴ The *Corbett* case thus raised two questions of first impression: Was the sex of the spouses essential to the validity of a marriage, and, if so, how was the sex of an individual to be determined?¹⁵

April Ashley had been registered as male at birth and raised as a male under the name of George Jamieson.¹⁶ The court found that from late adolescence George had felt that he was really a woman.¹⁷ He had adopted a female persona in dress and deportment, had used hormones to feminize his appearance, and had ultimately undergone a surgical mastectomy, castration, and vaginoplasty.¹⁸ It was in this embodiment that George, now renamed April, met, courted, and married Lord Rowallan, while working as

historical accounts of the regulation of cross-dressing may have involved transgender people). In the absence of any form of medical intervention, adopting the attire and manner of the other sex was the only available form of gender transition. *Id.* See generally EDWARD COKE, THE FIRST PART OF THE INSTITUTION OF THE LAWS OF ENGLAND (1st Am. ed. 1812) (demonstrating that questions regarding the legal sex of intersexuals had emerged in other legal contexts). Lord Coke suggested that questions regarding the eligibility of hermaphrodites to inherit male titles and wealth should be decided in accordance with “the sexe which prevaieth.” *Id.*

12. *Corbett v. Corbett*, [1971] P. 83.

13. *Id.*

14. It is not a coincidence that a number of the cases about the recognition of transsexual identities have emerged in the context of the termination of a marriage because of death or marital breakdown. See, e.g., *W. v. W.*, (2001) Fam. 111 (noting that the repudiation of transsexual identity was used as a strategy to escape paying maintenance to a spouse on divorce); *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (1987) (adopting the reasoning of *Corbett* that birth sex is immutable “true sex”); *M.T. v. J.T.*, 335 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) (rejecting the *Corbett* test and finding that a post-operative transsexual capable of vaginal intercourse is a woman for the purpose of marriage); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) (finding that a marriage ceremony involving a pre-transition transsexual woman did not create a marriage contract). The repudiation of transsexual identity also has been used to avoid potential liability for wrongful death of a spouse due to medical negligence. See *Littleton v. Prange*, 9 S.W.3d 223, 227 (Tex. App. 1999) (stating that *Corbett* concludes that the biological sexual structure of an individual is fixed at birth and cannot be changed by surgery). It also has been used to attempt to exclude a spouse from inheriting the estate of a deceased spouse. See *In re Gardiner*, 42 P.3d 120, 130 (Kan. 2002) (denying the transsexual wife’s claim to inherit under rules of intestacy because the marriage was viewed as same sex and invalid; instead, the estate was awarded to the deceased son who had contested the wife’s claim). The Supreme Court of Kansas commented, “[h]er female anatomy, however, is still all man-made. The body J’Noel inhabits is a male body in all aspects other than what the physicians have supplied.” *Id.*

15. *Corbett*, P. 83 at 83.

16. *Id.* at 89.

17. *Id.* at 90.

18. *Id.*

a female impersonator.¹⁹

Writing for the Court of Appeal, Justice Ormrod identified three roles that the sex of the parties might play in legal relations.²⁰ The broadest category is where sex has no relevance to the validity of the legal relationship, such as most aspects of contract and tort.²¹ The second, smaller category consists of those relations in which sex is a relevant factor, such as an insurance policy that requires different premium amounts depending upon the sex of the insured or a pension plan that has different entitlement ages depending on the sex of the pensioner.²² In these situations, the parties to the contract have chosen to make sex a relevant factor but would be free to vary the contract to exclude the relevance of sex, while retaining a valid legal relationship.²³ The third, extremely narrow category includes those legal relations in which sex is an essential element, such as criminal prohibitions that define rape as vaginal penetration with a penis and require that the victim be female and the perpetrator be male.²⁴

In which category does marriage fit? Judge Ormrod noted that a central element of a valid marriage has been held to be the capacity of the parties to consummate the marriage.²⁵ The definition of consummation as “ordinary and complete” heterosexual intercourse derives from the nineteenth century case of *D-e v. A-g*.²⁶ The case was decided twelve years before divorce became possible under English law, except through the extraordinary measure of a specific act of Parliament.²⁷ This case reflects both a quaint prudishness regarding the diversity of sexual practices and, perhaps, a benevolent impulse to find a basis for ending an unhappy marriage that could not otherwise be terminated. The wife, suffering from a physical abnormality that might now be diagnosed as an intersex

19. *Id.* at 91.

20. *Id.* at 105-06.

21. *Id.* at 105.

22. *Id.* at 105.

23. *Id.* at 105

24. *Id.* at 106 (articulating that offenses such as adultery, rape, and gross indecency, by definition, require a particular sex to have perpetrated it). *See generally* Sexual Offenses Act, 2003, c. 42 (U.K.) (enunciating that English law continues to define rape as an offense that can only be committed by a man, but it can now be applied to assaults perpetrated against men or women). Rape is defined as intentional penetration of the vagina, anus, or mouth of another person with a penis. *Id.* Women and men can, however, now be prosecuted for the offense of assault by penetration, which entails intentional penetration of the vagina or anus of another with a part of the body or anything else. *Id.*

25. *Corbett*, P. 83 at 83.

26. (1845) 1 Rob. Ecc. 279.

27. *See* Divorce and Matrimonial Causes Act, 1857 (U.K.) (allowing divorce to be more broadly available).

condition, was unable to engage in vaginal intercourse.²⁸ The court determined that this incapacity rendered her unable to participate in the fulfillment of the two principal ends of matrimony, namely “the lawful indulgence of the passions” and procreation.²⁹ In his reasoning, Dr. Lushington rejected the notion that other forms of intimacy could constitute consummation:

[L]egally speaking, [other practices are] not intercourse at all. I can never think that the true interests of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of adulterous intercourse, one the greatest evils to be avoided.³⁰

It was in reliance on this Victorian account of marriage that Judge Ormrod determined that marriage is an institution in which it is essential that the parties be of opposite sexes. While companionship and mutual support are important aspects of marriage, he held that it is only the capacity for “natural heterosexual intercourse” that distinguishes marriage from other relationships.³¹ The sexual encounters between Mr. and Mrs. Corbett could not have constituted consummation understood in this way. Their intimacies were, Judge Ormrod held, “the reverse of ordinary and in no sense natural.”³² Indeed, he hints that they were just the sort of “disgusting practices” that marital intimacies were meant to supplant.³³

Having determined that sex is an essential element of marital validity, Judge Ormrod considered how the sex of an individual ought to be determined for purposes of marriage. He stated that for most purposes, where sex is legally irrelevant it can be determined on the basis of social gender, or how one identifies and comports oneself.³⁴ Because marriage is an institution that depends on the physical capacity to engage in heterosexual intercourse, however, sexual identity for purposes of marriage

28. *See D-e*, 1 Rob. Ecc. at 280-81.

29. *Id.* at 298.

30. *Id.*

31. *Corbett v. Corbett*, [1971] P. 83, 105. *See generally* SANDER GILMAN, *MAKING THE BODY BEAUTIFUL: A CULTURAL HISTORY OF AESTHETIC SURGERY* (1999) (demonstrating the medical conception of sexual identity as rooted in the capacity for intercourse rather than reproduction). Gender transition may involve the transformation of genitalia and secondary sex characteristics but generally does not involve the construction of the reproductive organs of the new sex. *Id.* This view may also be shared by some transsexuals who desire to alter their sexual organs but not to acquire the reproductive apparatus related to their new sex. *Id.*

32. *Corbett*, P. 83 at 107.

33. *See generally* Andrew Sharpe, *Transgender Jurisprudence and the Spectre of Homosexuality*, 14 AUSTL. FEMINIST L.J. 23 (2000) (discussing the role of homosexuality in transsexual marriage cases).

34. *Corbett*, P. 83 at 104.

must be determined in accordance with biological factors.³⁵ A medical doctor by training, Judge Ormrod reviewed medical evidence current in 1970 on the issue and identified at least five criteria which could be used to assess the sexual condition of an individual:

(1) Chromosome distribution: Does the individual have xx (female), xy (male), or an atypical chromosomal endowment such as xxy or xo (abnormal combinations)?³⁶

(2) Gonadal structures: Does the individual have testes (male), ovaries (female), or some mix of gonadal structures (true hermaphrodite)?³⁷

(3) Genital configurations: Does the individual have a uterus/vagina or penis/scrotum which have developed within normal parameters? Are these structures absent or have they developed atypically due to some chemical imbalance in utero?³⁸

(4) Psychological factors: Does the individual see himself as a man or a woman?³⁹

(5) Hormonal factors/secondary sex characteristics: Does the individual possess levels of sex-linked hormones appropriate to one sex or the other? Do the body mass, fat distribution, breast development, and hair growth follow a male or a female type?⁴⁰

Considered in her post-surgery embodiment, April Ashley appeared to meet more criteria for a female gender assignment than for a male one, or at least to be appropriately characterized as of indeterminate sex. Her genitalia were female in appearance, her hormone level and physique were that of a woman, and she identified as a woman.⁴¹ Conversely, her

35. *Id.* at 106-07.

36. *Id.*, at 100-01.

37. *Id.*

38. Her symptoms might be consistent with a number of conditions. For example, complete androgen insensitivity syndrome (AIS) would mean that her genitals did not fully masculinize during gestation. At puberty, both estrogen and testosterone are released from the testes but because the body cannot respond to testosterone, the estrogen feminizes the body so that it appears outwardly female and those afflicted generally develop female gender identities. For an account of the syndrome and its effects, see SUZANNE J. KESSLER AND WENDY McKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 49-50 (1978). For a detailed account of the range of disorders which give rise to inter-sex conditions, see Greenberg, *supra* note 11, at 265.

39. *Corbett*, P.83 at 90.

40. *Id.* at 100.

41. *Id.* at 104.

chromosomes continued to identify her as male, while her gonads offered no guidance, having been excised. Justice Ormrod stated that the determination of sex should not be based on the state of the spouse's body at the time of trial or the time of the wedding ceremony, however, but as it was at birth.⁴² The alternative approach, he cautioned, would recognize post-operative transsexuals in their new identities, a result he characterized as "nothing if not bizarre."⁴³

Justice Ormrod did accept, *in obiter*, that there was a medically recognized category of people who are "intersex" because of some organic abnormality.⁴⁴ Such conditions may create a state of incongruity between their chromosomes and other physical attributes or may cause atypical chromosomal endowments that do not track typical male or female morphology. These people, Ormrod suggested, may have no obvious location in the binary gender scheme, so their gender assignment may have to be reevaluated if developments in adolescence or adulthood suggest that the initial assignment was inappropriate.⁴⁵ The court heard expert evidence that April Ashley was in fact suffering from an intersex condition named Klinefelter's syndrome, in which an XY male appears normal at birth but develops a feminized appearance at puberty.⁴⁶ This contention was rejected as either unsupported by available evidence or explained by Mrs. Corbett's long term use of synthetic female hormones.⁴⁷

The court found that, for most individuals, determinations of sex for purposes of marriage should be determined with reference to chromosomal, gonadal, and genital factors present at birth and should ignore surgical and synthetic hormonal alterations.⁴⁸ Where these three former factors are not

42. This approach has been adopted in other areas of law. *See, e.g.*, *R. v. Tan*, [1983] Q.B. 1053 (finding that the *Corbett* test used to determine legal sex for purposes of prosecution for being a male living off the avails of prostitution runs contrary to § 30 of the Sexual Offences Act, 2003 c. 42); *Re P. and G.*, (1996) 2 Fam. 90 (using the *Corbett* test to determine sex for registration on birth certificates). *But see* *A v. Chief Constable of West Yorkshire Police and Another*, [2004] UKHL 21, 29 (affirming that the prohibition of discrimination based on transsexual status and reading *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447 (2002), to prospectively require legal recognition of gender re-assignment in employment discrimination context).

43. *Corbett*, P. 83 at 106.

44. *Id.* at 102.

45. *Id.* at 104 (concluding that biological sex is fixed at birth, if not earlier, and cannot be changed, either by the natural development of organs of the opposite sex or by medical or surgical means). The respondent's operation, therefore, cannot affect her true sex. *Id.* The only cases where the term "change of sex" is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation. *Id.*

46. *Id.* at 102.

47. *Id.* at 102-03.

48. *Id.* at 100 (elaborating that these criteria have been formed by doctors for the specific purpose of systematizing medical knowledge and assisting in deciding the best way to handle patients with sexual abnormalities).

congruent, such as in the case of intersex individuals, the court suggested, again *in obiter*, that greater weight should probably be given to genital criteria over the other two factors.⁴⁹

The *Corbett* court thus found that Mrs. Corbett had not changed her sex.⁵⁰ She was born male and she remained male. As a male, she was clearly not “naturally capable of performing the role of a woman in marriage.”⁵¹ She had merely created “a pastiche of femininity.”⁵² Her transsexualism was an extended form of the sort of drag performance she delivered in her professional life:

Her outward appearance at first sight was convincingly feminine, but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator.⁵³

The court therefore found the marriage void, and Mrs. Corbett was denied both status and maintenance.⁵⁴ This interpretation of the marital relationship is now codified in Section 11(c) of the Matrimonial Causes Act of 1973, which states that a marriage is void *ab initio* if the parties are not respectively male and female.⁵⁵

II. PASTICHE AND THE CONTAINMENT OF GENDER TROUBLE

Estimates of the frequency of intersex conditions vary depending upon the criteria used. One expert suggests that 1.7% of births differ from the norm in some way.⁵⁶ Another is persuaded that doctors are unsure of the sex of one in 1,500 babies.⁵⁷ Yet, an intersex party does not appear in the

49. *Id.* at 102.

50. *Id.* at 104.

51. *Id.* at 106.

52. *Id.* at 104.

53. *Id.*

54. The husband had asked the judge to withhold a decree of nullity, thereby subverting the wife’s application for ancillary relief, but the court found it had no authority to withhold such a decree, even where the void marriage was sham and meretricious. The wife was later denied support on the basis of lack of need. *Id.* This approach was affirmed in *S.-T. v. J.*, (1997) Fam. 103.

55. Under English law prior to 2005, transsexuals were permitted to change identifying documents that refer to their gender role upon producing proof from a medical practitioner that they were living in the gender role of the opposite sex. This meant that they could alter their driving licenses, passports, car registrations, National Insurance cards, and National Health cards to reflect this new gender role. However, while all these might be proof of identity, they refer to elements of identity that do not themselves depend upon sex. Birth certificates, which provide an account of legal status rather than personal identity, could not be altered to reflect a transsexual’s chosen sex, even after complete sex reassignment surgery.

56. See FAUSTO-STERLING, *supra* note 11, at 51.

57. See Alice Domurat-Dreger, ‘Ambiguous Sex’ or ‘Ambivalent Medicine?’ *Ethical Issues in the Treatment of Intersexuality*, 28 HASTINGS CENTER REP. 24 n.6 (1998).

case law on marital validity until 2001 in *W. v. W.*⁵⁸ It is hard to imagine that intersex conditions did not create marital conflicts prior to this point. So where are the intersex spouses? Hints of their presence may be found in the cases defining the nature of the capacity and incapacity to consummate marriage.

In coming to his conclusion, Justice Ormrod distinguished Mrs. Corbett's situation from that of other individuals who require surgery in order to participate in heterosexual intercourse. In particular, he considered and distinguished the decision of the Court of Appeal in *S.Y. v. S.Y.* rendered only seven years earlier.⁵⁹ Until the *Corbett* decision, he noted, all matrimonial cases arising out of developmental abnormalities of the reproductive system had been dealt with as cases in which the marriage was void because one party lacked the capacity to consummate the marriage. The question of the true sex of the allegedly incapable spouse, such as the wife in *D-e v. A-g*,⁶⁰ did not arise. The context of the *Corbett* case appears rather different if we consider the possibility that it was one of a small series of cases involving spouses of indeterminate sex.

S.Y. involved an application by a husband for a decree of nullity based on his wife's physical incapacity to consummate because her vagina was too short to allow her to participate in penetrative intercourse.⁶¹ It was assumed that the wife in *S.Y.* was chromosomally and gonadally female but imperfect genitally, but this is not the only interpretation supported by the evidence.⁶² Her history might be that of an individual with an intersex condition. She appeared female at birth and was raised as a girl. At the age of seventeen, she underwent a medical examination to determine why she had never menstruated. At that time, it was discovered that she did not have a uterus or ovaries and had a very short vagina.⁶³ While medical experts speculated that she might have had undetectable vestigial female reproductive organs, no evidence to this effect was introduced. No evidence was introduced of her chromosomal makeup either. The wife was assumed to be a woman because her external genitalia, although

58. (2001) Fam. 111.

59. (1962) P. 37.

60. (1845) 1 Rob. Ecc. 279.

61. *S.Y.*, P. 37 at 37.

62. See SUZANNE KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 49-50 (1978) (explaining that a person with complete androgen insensitivity syndrome (AIS) has genitals that did not fully masculinize during gestation). At puberty, when both estrogen and testosterone are released from the testes, the body cannot respond to testosterone, thus leaving the estrogen to feminize the body so that it appears outwardly female. *Id.* Those afflicted generally develop female gender identities. *Id.*; see also Greenberg, *supra* note 11, at 278-92 (detailing the range of disorders which give rise to intersex conditions).

63. *S.Y.*, P. 37 at 57.

malformed, appeared female, her general physical appearance was female, and her psychological identification was female.⁶⁴ With regard to these features, she was identical to April Ashley.

The Court of Appeal in *S.Y.*, however, found in the wife's favor.⁶⁵ Lord Justice Wilmer noted that consummation only required penetration, not that intercourse might result in conception.⁶⁶ Nor was it necessary that either party experience pleasurable sensations as a result of the connection. The capacity for penetrative vaginal intercourse might be achieved naturally or might be assisted medically, where surgery was available to cure a physical impediment. The onus was on the spouse seeking to nullify the marriage to prove that the physical defect was incurable by surgery.

Considerable attention was paid to the issue of whether such surgery should be understood as a cure for a defect or the creation of an artificial orifice. Lord Justice Wilmer found that the surgery would repair rather than create a vagina.⁶⁷ He went on to suggest, however, that the possibility that he had misinterpreted the medical evidence should have no bearing on the result:

For myself, I find it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing. . . . If neither the ability to conceive nor the degree of sexual satisfaction to be obtained is a determining factor, what else, it may be asked, remains to differentiate between intercourse by means of an artificial vagina and intercourse by means of a natural vagina artificially enlarged? . . . I do not see why intercourse by means of such a vagina should not be regarded as amounting to "*vera copula*," so as to satisfy the test laid down by Dr. Lushington.⁶⁸

Contrast this view with Justice Ormrod's in *Corbett* that, "I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr. Burou can possibly be described as . . . *vera copula*."⁶⁹

The sympathetic response to the dilemma of the potentially intersex spouse in *S.Y.* is consistent with the approaches that prevailed in the British medical profession at the turn of twentieth century. The French model entailed confronting patients who presented as intersex with the truth of

64. *Id.*

65. *Id.* at 62.

66. *See also* *Baxter v. Baxter* [1948] A.C. 274, 286 (holding that the use of contraceptives, and thus the prevention of procreation).

67. *S.Y.*, P. 37 at 59.

68. *Id.* at 59-60.

69. *Corbett v. Corbett*, [1971] P. 83, 107.

their misidentification at birth and demanding a rectification of their social and legal identity.⁷⁰ British physicians, on the other hand, preferred to find ways of allowing the patient to continue as a member of their social sex through surgical intervention. The fact of the patient's intersex status was often kept from the patient herself. An 1898 case is illustrative. A widow presented at Middlesex Hospital complaining of painful swelling in the groin, which upon examination was identified as a testicle.⁷¹ It was removed and the patient returned to her life believing that she had been cured of an ordinary rupture.⁷² The surgeon's report of the case stated that he thought it neither necessary nor fair to inform her of her true sex.⁷³

Why were S.Y. and April Ashley treated so differently? It appears that April Ashley was not recognized as a real woman because the process of construction of her gender identity was manifest. The wife in *S.Y.*, in company with other potentially intersex spouses involved in incapacity cases, was given the benefit of the doubt because her true birth morphology was hidden. To borrow a term from Judith Butler,⁷⁴ the facts of *Corbett* cause us gender trouble, while those of *S.Y.* allow us to quiet it.⁷⁵

Is it important for the law to prevent the experience of cognitive dissonance some may feel when faced with a person of indeterminate sex? This seems to be a primary objective of Justice Ormrod's decision in *Corbett*. Unpacking his characterization of April Ashley's body as "a pastiche of femininity" provides some guidance as to the nature of the anxiety the court experienced in contemplating the transsexual. This anxiety is contained, rather than overcome, by identifying a limited category of real intersex individuals defined in contrast to the majority of transsexuals. By explaining the existence of a small group of intersexuals with reference to their unfortunate pathology, the broader category of transsexuals is effaced.

Justice Ormrod goes to great lengths to explain that the relationship between the spouses in *Corbett* was not akin to a heterosexual marriage because it was organized around the perverse pleasure of conscious gender

70. ALICE DOMURAT-DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 123 (1998).

71. *Id.* at 94.

72. *Id.* at 122.

73. *Id.* at n.41 (citing Andrew Clark, *A Case of Spurious Hermaphroditism*, 1 LANCET 718, 719 (Mar. 12, 1898)).

74. See BUTLER, *supra* note 4, at 17 (explaining that the cultural matrix only allows for strictly "male" and "female" identities and that, when gender identities fail to conform to the matrix, they are interpreted as developmental problems or logical impossibilities).

75. See Domurat-Dreger, *supra* note 57, at 34 (suggesting that the medical protocol for treating children born with ambiguous genitalia reflects a similar discomfort with bodies that fail to conform to prevailing norms). Dreger characterizes treatment of intersexuality in the United States as deeply informed by the idea that such abnormalities are so grotesque and pathetic that they require immediate normalization. *Id.*

transition.⁷⁶ Arthur Corbett was a transvestite who enjoyed dressing in women's clothing but found it unsatisfying because, he is quoted as saying, "I didn't like what I saw: you want the fantasy to appear right. It utterly failed to appear right in my eyes."⁷⁷ Indeed, he sought out April because of her reputation as a female impersonator. Justice Ormrod describes April's capacity to achieve a simulacrum of femininity as "the key to the rest of this essentially pathetic, but almost incredible story."⁷⁸

When [Arthur] first saw her he could not believe it. He said he was mesmerized by her. "[T]his was so much more than I could ever hope to be. The reality was far greater than my fantasy." In cross-examination he put the same thought in these words: "it far outstripped any fantasy for myself. I could never have contemplated it for myself."⁷⁹

Justice Ormrod identifies his own role as vindicating the real against this fantasy.⁸⁰ Indeed, he ascribes the breakdown of the marriage to the fact that, while Arthur "was still in the grip of his fantasies . . . reality had broken in upon" April and led her to flee the "intolerably false position into which they had got themselves."⁸¹

It is instructive to parse Justice Ormrod's characterization of April Ashley's gender as a "pastiche."⁸² Pastiche has two English meanings. One refers to a work of art that copies the style of another artist. The other refers to a medley made up from or imitating various sources.⁸³ In her book, *Gender Trouble*, Judith Butler explains why pastiche can be a disturbing art form: "pastiche disputes the possibility of an 'original' or, in the case of gender, reveals the 'original' as a failed effort to 'copy' a phantasmatic ideal that cannot be copied without failure."⁸⁴ It is unclear

76. Corbett v. Corbett, [1971] P. 83, 93.

77. *Id.* at 92.

78. *Id.* at 92

79. *Id.*

80. Even if sex reassignment creates the simulacra of a sexual body which reflects desires rather than some noumenal reality, it is not clear why it is the law's role to thwart this desire.

81. *Corbett*, P. 83 at 94-95.

82. *Id.* at 104.

83. See RICHARD WAGNER, *Judaism in Music*, in THE THEATRE: RICHARD WAGNER'S PROSE WORKS 92 (1894) (accusing Jews of having no authentic cultural identity to express and of producing inferior artistic work, which was merely a pastiche of others' styles). Because he does not have intimate knowledge of German Folk culture to draw upon for inspiration, "the Jew musician hurl[s] together the diverse forms and styles of every age and every master." *Id.*

84. Compare BUTLER, *supra* note 4, at 157 n.56 (citing FREDERIC JAMESON, *Postmodernism and Consumer Society*, in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE (Hal Foster, ed.) (1983)), with *Bellinger v. Bellinger*, [2003] UKHL 21, ¶ 57 ("At best, what is provided is no more than an imitation of the more obvious parts of that equipment. Although it is often described as a sex change, the process is inevitably incomplete. A complete change of sex is, strictly speaking, unachievable.").

which definition of pastiche Justice Ormrod had in mind. The different definitions carry different implications for his conception. Was he merely stating that Mrs. Corbett had tried but failed to reproduce a copy of natural femininity? Or did he go further, suggesting that what is so disturbing about Mrs. Corbett's aesthetic enterprise is the commingling of male and female elements in a single individual? I suggest that it was the latter. The justice's discomfort was not merely with the fact that Ashley had produced an inadequate pastiche. Rather, it was by asserting her identity *as a pastiche*, an identity which includes elements from both her birth gender and her chosen gender, that she provoked his anxiety. April's cultivated femaleness commingled with her masculine history called into question the very possibility of essential sexual identities.

Butler's work is useful for making sense of the English legal system's response to transsexuals. Butler notes that feminist theory generally accepts the idea that gender is not the natural expression of sexual embodiment but reflects the social meanings attached to sex.⁸⁵ However, she argues that feminist theory does not go far enough by simply trying to effect a disconnection between female bodies and female gender roles. Rather, we need to understand that the notion of the sexed body is also produced through discourse.⁸⁶ It is discourse that constructs this apparent relationship between pre-discursive sexed bodies and discursively produced genders. We have no direct pre-social experience of the body; we understand it through its social meanings as well. The idea that the sexed body is natural and falls into two distinct and nonoverlapping categories of male and female is just as socially constructed as the idea that these bodies manifest their essential natures in appropriate gender roles and forms of sexual desire.⁸⁷

In place of this conception of the relationship between sex and gender, Butler proposes the notion of gender performativity. She argues that both sexual and gender conceptions are an effect of the repetition of behaviors through time. The link between sex and gender is effected through the social reception of these repeated performances, rather than organized by an underlying substance or essence. For Butler, we learn how to *do* gender identities in the same way that we learn how to manipulate a language, through imitation and gradual command of public cultural idioms. Butler's notion of gender as performance is distinct from the fully conscious self expression of a sovereign liberal subject. Rather, it entails the iteration of

85. BUTLER, *supra* note 4, at 157 n. 56.

86. *See id.*

87. *See id.* at 7 ("As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which 'sexed nature' or 'a natural sex' is produced and established as 'pre-discursive,' prior to culture, a politically neutral surface *on which* culture acts." (emphasis in original)).

norms that precede, constrain, and exceed the performer and are not the simple expression of her will or choices.⁸⁸ Within this framework, the illusion of an essential self who expresses her identity through her actions is “a fantasy instituted and inscribed on the surface of bodies through our performances.”⁸⁹

Butler’s argument provides an analytic tool for identifying the ways in which the law may operate to ascribe meaning to the bodies of transsexuals, as well as to their gender roles. It is precisely because pastiche can have the effect of subverting the fixed binary frame of gender that the *Corbett* judgment sought to contain situations in which it occurs. The binary imagery is not displaced by the transsexual, but its purported naturalness is undermined.

While the performer of gender cannot escape pre-existing categories, she may find some imperfectly theorized space in the interstices between discursive tropes.⁹⁰ If gender categories are produced through repeated acts, they can be affected if people engage in counterintuitive and challenging acts.⁹¹ Those who transgress gender norms are particularly provocative, Butler states, because “the very notion of ‘the person’ is called into question by the cultural emergence of those ‘incoherent’ or ‘discontinuous’ gendered beings who appear to be persons but who fail to conform to the gendered norm of cultural intelligibility by which persons are defined.”⁹²

The presence of transsexual individuals challenges widely held assumptions about the immutable nature of gender. Popular discourse ordinarily assumes gender to be obvious, binary, and unchanging and interprets away inconsistencies in gender presentation. Outside the drag

88. See Moya Lloyd, *Performativity, Parody, Politics*, 16.2 THEORY, CULTURE AND SOCIETY 195, 200 (1999) (cautioning against reading Butler as a defender of liberal autonomy in choosing identities).

89. SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE AND THE BODY 289-90 (1993).

90. See, e.g., KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 52 (1994) (stating that transgressive gender identities may not be consciously adopted). Transsexual commentators take divergent positions on the radicalism of their identities. Some interpret transsexualism as an indication that gender is inessential and fluid and capable of being expressed in multiple rather than binary forms. Conversely, some transsexuals are offended by the suggestion that they are playing with gender norms rather than seeking to express their essential gender identity. Rather than wishing to see the law eradicate gender categories to allow a free play of identity, some transsexual individuals want the law to define their identity, albeit in a manner they deem more accurate.

91. BUTLER, *supra* note 4, at 124.

92. *Id.* at 17; see also CAROLE-ANNE TYLER, FEMALE IMPERSONATION 118 (2003) (noting the feminine’s “uncanny return in impersonation is a fearful reminder that no man is fully masculine and whole, while the lure of the alternative set of values it represents—values linked to another way of relating the self to others, to speech, and to desire, according to feminist theorists like Luce Irigaray—threatens to undermine not only masculinity but also the patriarchal society it sustains”).

club, we either ignore the unconventional gender presentation or simply recategorize the individual in question as a member of the other gender. There is no in-between.⁹³ Thus, we see in *S.Y. v. S.Y.* that the ambiguous message of the wife's body was ignored and she was characterized as female.⁹⁴ Conversely, in *Corbett*, the ambiguity of the wife's gender was made manifest and repudiated. The law found that Ashley was and remained male.⁹⁵ The binary gender system remained intact despite her efforts to blur the categories.⁹⁶

III. CORBETT IN QUESTION: THE INTERSEX EXCEPTION VS. THE BINARY RULE

After *Corbett*, the criteria for determining sex for purposes of English marriage remained static for over thirty years. In 2001, two cases sought to revisit the question and, in particular, to explore the implications of *Corbett*'s intersex exception. Again, the law showed sympathy to the spouse whose intersexuality was characterized as an affliction, while denying recognition to a spouse who appeared to have made a conscious choice to change sex. The first case to arise, *W.v. W.*, dealt with a spouse born with indeterminate sexual characteristics but assigned to the male sex at birth.⁹⁷ Although raised as male, she developed a female body shape and female gender identity at puberty.⁹⁸ In adulthood, she underwent male to female sex reassignment surgery. The court found that she fell within the intersex exception in *Corbett* because there was a natural lack of congruence among the immutable physical indicia of her sex.⁹⁹ The court placed great emphasis on the finding that her initial sex assignment had been in error and that her transsexual surgery had not changed her sex but

93. See KESSLER & MCKENNA, *supra* note 62, at 113-14 (concluding that the attitude that gender is natural is based on certain shared assumptions, such as the following: (1) there are two and only two genders (male and female); (2) one's gender is invariant; (3) genitals are the essential sign of gender; (4) any exceptions to the gender rule are pathological; (5) there are no transfers between genders except ritual ones; (6) everyone must have a gender; (7) the male/female dichotomy is a natural one; and (8) membership in one gender or another is natural rather than ascriptive).

94. See *S.Y. v. S.Y.*, [1962] P. 37.

95. See [1971] P. 83.

96. See JUDITH BUTLER, UNDOING GENDER 218 (2004) (summarizing the psychological and epistemological impact of such refusal of recognition: "[t]o be called a copy, to be called unreal, is thus one way in which one can be oppressed. . . . But to be unreal is something else again. For to be oppressed one must first become intelligible. To find one is fundamentally unintelligible (indeed, that the laws of culture and of language find one to be an impossibility) is to find that one has not yet achieved access to the human").

97. (2001) Fam. 111.

98. *Id.* at 113.

99. *Id.* at 146-47.

correctly assigned her to her natural biological sex.¹⁰⁰ Her husband's application to have the marriage declared void because the parties were of the same sex was thus refused.¹⁰¹

The second case, *Bellinger v. Bellinger*, also involved a male to female transsexual.¹⁰² Mrs. Bellinger was born a physically typical male and classified as such.¹⁰³ She was married to a woman at age twenty-one, but this marriage did not last.¹⁰⁴ At the age of twenty-five, she began the transition to her chosen gender and ultimately underwent full male to female sex reassignment surgery.¹⁰⁵ Some months later, she married Mr. Bellinger, who was fully aware of her history.¹⁰⁶ They remain together after more than twenty years of marriage.¹⁰⁷ Unlike most transsexual marriage cases, the issue of the validity of this marriage did not arise because the marriage had broken down. Rather, Mrs. Bellinger sought a declaration that their subsisting marriage was valid.¹⁰⁸ The respondent Mr. Bellinger filed no objecting reply. It was the Attorney General who elected to intervene to argue the case against granting the declaration.¹⁰⁹

At trial, the lower court applied the *Corbett* test and found that Mrs. Bellinger was male because all the immutable physical elements of her identity—chromosomes, gonads, and genitals—were originally congruent as male.¹¹⁰ In the Court of Appeal, Mrs. Bellinger sought to expand the range of factors considered in determining biological sex. She argued that scientific understanding of the aetiology of sex and gender identity had changed since the *Corbett* decision in 1970. Alongside chromosomal, gonadal and genital factors, courts were now also required to consider the immutable biological factor of brain structure.¹¹¹ While the first three

100. *Id.* at 146; see also FAUSTO-STERLING, *supra* note 11, at 79-80 (noting there is a movement to postpone surgery on intersex infants until they reach an age where they are able to express their understanding of their own sexual identity). Proponents of this approach note that surgery is often performed to soothe the parents of the intersex infant, rather than for the child's physical or mental well-being. *Id.* at 84. They do not propose raising the child without a gender, but leaving whatever gender choice is made by parents and doctors a tentative one which can be ratified or repudiated later in life. *Id.* The affected child could then choose which, if any, surgical options to pursue. *Id.*

101. *W.*, Fam. 111 at 146.

102. [2001] EWCA Civ. 1140.

103. *Id.* at ¶ 3.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. She sought a declaration under the Family Law Act, 1986, c. 55, § 43, Part III, Declaration of Status (Eng.), that the marriage was valid at its inception.

109. *Bellinger*, EWCA Civ. 1140 at ¶ 3.

110. *Id.* at ¶ 4.

111. *Id.* at ¶¶ 8, 50.

criteria were congruent in Mrs. Bellinger at birth, she argued that the fourth factor, brain structure, developed along female lines.¹¹² Her transsexuality, she argued, reflected the incongruity between her female brain and her male body. She argued she should therefore be understood as falling within the intersex exception set out in *Corbett*.¹¹³

In responding to this argument, Madame Justice Butler-Sloss agreed that new evidence suggests that intersex status may not be capable of ready perception.¹¹⁴ Some recent postmortem studies comparing the brains of transsexuals and others show that transsexual men have some elements of brain structure that are more similar to those of women than to those of other men.¹¹⁵ It may be that in these cases, while the body has been configured in one sex, the brain is configured in the other. On this analysis, some transsexuals may in fact be biologically intersex.

While intrigued by this evidence, Madame Justice Butler-Sloss found there was no way of determining whether Mrs. Bellinger fell into this category.¹¹⁶ These gender differentiated brain structures are located in an area that can only be examined through dissection at autopsy.¹¹⁷ Given the current capacities for medical investigation, the best that can be said with regard to a living person, such as Mrs. Bellinger, is that we do not know what sex her brain is.¹¹⁸ In the absence of such direct evidence, the advances in general scientific knowledge could not be brought to her aid. The majority affirmed the relevance of the tri-partite *Corbett* test and the result in the court below.¹¹⁹

In dissent, Justice Thorpe urged the abandonment of a purely biological test.¹²⁰ Taking into account psychological factors, he would have recognized Mrs. Bellinger as a woman under English law.¹²¹ Thorpe also went further and called into question the heterosexual conception of marriage upon which the whole inquiry into sexual identification is predicated. In doing so, he attempted to reconcile the decisions in *Corbett v. Corbett* and *S.Y. v. S.Y.* He argued that there is no essential difference in the capacity to consummate a marriage between a transsexual able to have intercourse and a woman who has had to have surgery in order to become capable of having intercourse in a body congruent with her

112. *Id.* at ¶ 4.

113. *Id.* at ¶ 8.

114. *Id.* at ¶¶ 53, 98.

115. *Id.* at ¶ 53.

116. *Id.* at ¶ 98.

117. *Id.*, at ¶ 55.

118. *Id.* at ¶ 98.

119. *Id.* at ¶ 108.

120. *Id.* at ¶ 146.

121. *Id.* at ¶ 160.

chromosomes.¹²² Both have the capacity to consummate as it is defined under English law.¹²³

The Court of Appeal's decision in *Bellinger* was appealed to the House of Lords.¹²⁴ Before a decision could be rendered, however, the judgment of the European Court of Human Rights in *Goodwin v. United Kingdom*¹²⁵ and *I. v. United Kingdom*¹²⁶ changed the legal background in a significant fashion.¹²⁷ *Goodwin* and *I.* involved post-operative transsexuals who claimed that the United Kingdom's policies on the recognition of gender transition violated their rights to privacy under Article 8 and to marry and found a family under Article 12 of the European Convention on Human Rights.¹²⁸ The European Court of Human Rights repudiated the *Corbett* test, finding that widespread recognition of gender dysphoria as a medical disorder obviates the need identified by United Kingdom courts to determine the aetiology of the disorder.¹²⁹ The European Court found that

122. *Id.*

123. *Id.* at ¶ 130. Thorpe thus found that while a union of a man and woman for life might have been an accurate definition of English marriage at the time of *Hyde* in 1866, it no longer held true in a multicultural social context where the import of marriage for the rights of children and spouses has been much reduced. *Id.* at ¶ 128. In light of these changes, he proposed a new gender neutral definition of English marriage as, "a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations." *Id.*

124. [2003] UKHL 21.

125. 35 Eur. Ct. H.R. 447 (2002).

126. 35 Eur. Ct. H.R. 592 (2002).

127. This was not the first time that the European Court of Human Rights had been asked to review the United Kingdom's treatment of transsexuals. In the 1986 case of *Rees v. The United Kingdom*, the court accepted the government's argument that the intrusion into a transsexual's privacy caused by refusing to alter their legal sex was minimal and was justified upon public policy grounds. 9 Eur. Ct. H.R. 56, ¶ 51 (1986). The court found that the United Kingdom did allow transsexuals to adopt a new social gender by allowing them to change many documents used in ordinary life to reflect their new identity, such as passports, national insurance cards, and driver's licenses. *Id.* at ¶ 19. The court found, however, that the British birth registry system was not designed to be a record of changing events but only of states of affairs as they existed at birth. *Id.* at ¶ 39. To create the capacity to respond to ongoing developments regarding individual identity by allowing changes of legal gender would require an expensive overhaul of this system. The margin of appreciation allowed the UK to decline, on balance, to do so. On the issue of denial of the right to marry, the court stressed that Article 12 protected only traditional notions of marriage. Thus, access to the institution could be limited to those capable of achieving its central purpose, procreation. *Id.* at ¶ 49; see *Cossey v. United Kingdom*, 13 Eur. Ct. H.R. 622 (1991); *Sheffield v. United Kingdom*, 27 Eur. Ct. H.R. 163 (1999) (following *Rees* with more emphatic dissents).

128. *Goodwin*, 35 Eur. Ct. H.R. at ¶¶ H3 and H21.

129. *Id.*; see also DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §302 (4th ed. 1994); WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS §F64 (2006), <http://www.who.int/classificaitons/apps/icd/icd10online/> (listing Gender Identity Disorder as a recognized psychiatric disorder).

the United Kingdom had placed disproportionate emphasis on chromosomal sex as the basis for legal identification, given that people with intersex conditions often have gender identities that do not track their chromosomal sex.¹³⁰ It cited with approval Justice Thorpe's dissent in *Bellinger* in concluding that chromosomes should not always be the decisive factor in determining the sex of transsexuals.¹³¹

The European Court did not parse this evidence in order to identify an ideal definition of gender transition for the purposes of marriage.¹³² It did, however, state that it was incumbent on some instrumentality of the British state, be it the judiciary or the legislature, to produce a workable definition and to allow those who meet it to marry in their new sex.¹³³ The court concluded that the United Kingdom's policy regarding the recognition of gender transition violates Articles 8 and 12 of the European Convention on Human Rights and is not justified by any public policy concerns.¹³⁴

In December 2002, the government announced that it intended to bring forth legislation that would permit transsexuals to change their legal gender and to marry in their new gender.¹³⁵ Most significantly, counsel for the government in the *Bellinger* appeal conceded that since delivery of the *Goodwin* decision, English laws that failed to recognize gender transitions were in principle incompatible with Articles 8 and 12 of the European Convention on Human Rights.¹³⁶

It was in this very changed and charged context that the House of Lords considered the *Bellinger* appeal. The House of Lords rendered a unanimous set of reasons declaring Section 11(c) of the Matrimonial Causes Act incompatible with the Convention, triggering the "fast track" procedures under Section 10 of the Human Rights Act of 1998 for amendment of offending legislation, but declining to offer an alternative definition of gender for purposes of marriage.¹³⁷

130. *Goodwin*, 35 Eur. Ct. H.R. at ¶ 82.

131. *Id.* at ¶¶ 81-82.

132. *Id.*

133. *Id.* at ¶¶ 102-04.

134. *Id.* at ¶ 124.

135. Press Release, Rosie Winterton MP, Government Announcement on Transsexual People (Dec. 13, 2002), <http://www.dca.gov.uk/constitution/transsex/statement.htm>.

136. [2003] UKHL 21.

137. *Goodwin* has also led to re-evaluation of eligibility for spousal survivors' pensions to which transsexual couples would have been entitled had they been allowed to marry in their new sex. See Case C-117/01, *K.B. v. Nat'l Health Serv. Pensions Agency*, 2004 E.C.R. I-541.

IV. THE GENDER RECOGNITION ACT OF 2004: GENDER TROUBLE IN A NEW GUISE

Parliament's response was not to abolish the gender criteria for marital validity but to design a mechanism that would allow transsexuals to exercise their right to marry by allowing them to find a place in the heterosexual marriage paradigm. The Gender Recognition Act of 2004 seeks to get the courts out of the business of defining gender by granting the authority to make those determinations to a panel of medico-legal experts.¹³⁸ These Gender Recognition Panels are empowered to investigate claims of gender transition. The panel receives letters from the applicant's doctors¹³⁹ attesting that the applicant has or has had gender dysphoria,¹⁴⁰ that the applicant has lived in the acquired gender throughout the preceding two years, and that the applicant intends to continue to live in the acquired gender until death.¹⁴¹ These criteria having been met, in most cases, the panel will immediately grant a gender recognition certificate, which allows the recipient's legal gender to be altered.¹⁴² While the Act is a huge step forward, it raises certain troubling issues.

A. Gender Transition is Not Permitted Where it Would Transform a Heterosexual Marriage Into a Same-Sex Marriage

While the Gender Recognition regime was being prepared, Parliament was also developing legislation aimed at offering marriage-like benefits to same-sex couples. The Civil Partnership Act of 2004 is meant to work in tandem with the Gender Recognition Act, providing a form of status for married couples whose marriages are rendered invalid by the gender transition of one of the parties. The option of collapsing the distinction between heterosexual marriage and homosexual relationships was rejected in favor of this more complex scheme.

In a presentation to the Parliamentary Working Group examining

138. See Gender Recognition Act, 2004, c. 7, sched. 1 (U.K.) (providing that the panels will meet in private, must determine the application without a hearing unless they deem one necessary, and must give reasons for their decision).

139. Gender Recognition Act § 3(1) (U.K.).

140. The reference to past affliction assures the inclusion of those whose dysphoria has been alleviated by gender reassignment surgery or other treatment. The Act does not require evidence of completed gender reassignment surgery.

141. Gender Recognition Act §2(1) (U.K.).

142. See Gender Recognition Act §§4(2), 4(3) (U.K.) (establishing that the only exception to this regime will be situations in which the applicant is already party to a marriage or a civil partnership). In such cases, the panel is only able to issue an interim gender recognition certificate. § 4(3). This renders the marriage or partnership voidable for a period of six months. Sched. 2. Only if the relationship is dissolved through annulment, death, or divorce can the interim certificate be converted into a full one. § 5(a). Transsexual spouses will thus face a choice between recognition of their sexual identities and recognition of their existing intimate legal relationships. *Id.*; see also Civil Partnerships Act, 2004, c. 33, §250 (Eng. and Wales) (adding § 5(a) to the Gender Recognition Act).

transsexual issues, the leading transsexual advocacy group, Press for Change, called for the opening of the institution of marriage to all, regardless of the perceived or actual sex of the partners.¹⁴³ It pointed out that a significant proportion of transsexuals would still be excluded from marriage after passage of the Gender Recognition Act because they identified as homosexual in their new gender.¹⁴⁴ They also sought to minimize the implications that the Gender Recognition Act might have on same sex marriage more widely. In arguing that gender recognition should not render an existing marriage invalid, they stated:

[M]arriages already contracted for a certain time (e.g.[,] five years) at the time of the legislation coming into force could be exempted from the requirement to be dissolved. Normal attrition then means that the number of such marriages would diminish over time, and there would be less ability to try and draw parallels between this exception of trans couples *remaining* married and same sex couples *wanting* to marry.¹⁴⁵

While the Gender Recognition Act allows individuals to change their sex, it does not change the essential heterosexuality of English marriage.¹⁴⁶ An applicant under the Gender Recognition Act must include a statutory declaration stating whether s/he is married at the time of the application.¹⁴⁷ If the applicant is unmarried, the panel will issue a *full* gender recognition certificate.¹⁴⁸ If, however, the applicant is married at the time the application is granted, the panel may only issue an *interim* gender recognition certificate.¹⁴⁹ Only a full gender recognition certificate will entitle the individual to claim his acquired legal identity by being entered in the Gender Recognition Register and securing amendment of her/his birth certificate to reflect the acquired gender.¹⁵⁰ Since it began operation, the Gender Recognition Panel has issued thirty-eight interim recognition certificates and 1,307 full recognition certificates.¹⁵¹

143. See HOME OFFICE REPORT, *supra* note 3, at 35 (“The work done in society by long-term partnerships within all sexualities, whether in caring for subsequent or previous generations, or facilitating each other’s careers and the socially valuable work those careers entail, is so important that the commitment of all sorts of couples should be equally valued and recognised.”).

144. *Id.* at 36.

145. PRESS FOR CHANGE, SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS REGARDING THE DRAFT GENDER RECOGNITION BILL 13 (2003) (emphasis in original).

146. The Marriage Act, 1949 is amended to ensure that the prohibitions on marriage within the boundaries of affinity and consanguinity are extended to the acquired sex. Thus a male to female transsexual becomes prohibited from marrying her new husband’s close male relatives. See The Marriage Act, sched. 4. s. 2 (U.K.).

147. Gender Recognition Act §3(6)(a) (U.K.).

148. § 4(2).

149. § 4(3).

150. § 3(3).

151. E-mail from Catherine Dyer, Gender Recognition Secretariat, to Dr. Lisa Fishbayn

Schedule 2 of the Gender Recognition Act amends the Matrimonial Causes Act of 1973 to provide that the issuance of an interim gender recognition certificate renders a subsisting marriage voidable by either party for a period of six months.¹⁵² At this point, three things might happen:

- (1) If the marriage has been annulled on the basis of the interim gender recognition certificate, the court that makes the nullity decree absolute must issue a full gender recognition certificate to the effected party.¹⁵³
- (2) If, during that six-month period, the marriage has otherwise been terminated by divorce or the death of one of the parties, the applicant may apply to a Gender Recognition Panel to have his/her interim gender recognition certificate converted into a full gender recognition certificate. This application must be granted upon the production of proof that the applicant is now unmarried.
- (3) If no nullity action has been brought within six months of the issuance of the interim gender recognition certificate, further applications to void the marriage are barred and the marriage remains valid.¹⁵⁴ Without the dissolution of this marriage, however, it will not be possible for the individual to convert his interim gender recognition into a full recognition certificate.

Thus, those transsexuals who are currently legally married in their birth sex face a choice. They may secure recognition of their new gender identity but only at the price of dissolving their marriages. They may, conversely, preserve their marriages but will then be unable to fully assume their new gender identity. The same conundrum will face parties to a civil partnership who wish to change their legal sex but remain legally

(June 6, 2006) (on file with author).

152. See Matrimonial Causes Act, 1973, c. 18, § 2(2) (U.K.) (amending the Act to provide that a marriage will be voidable if the respondent's gender at the time of marriage was acquired under the Gender Recognition Act). Resort to this and other voidable grounds for annulment remain limited to situations in which action has been brought within 3 years of the date of marriage and has not been condoned by the applicant seeking the declaration. § 13. The acquisition of a new gender is added to the limited category of grounds for nullity which can only be relied on if the applicant demonstrates that s/he was ignorant of this fact at the time of marriage. § 11(c).

153. Gender Recognition Act § 5 (U.K.).

154. Gender Recognition Act § 3 (U.K.).

connected to their current partner.¹⁵⁵

In its submissions on the Act, Press for Change argued for a generous attitude toward these couples, noting that the effect of the law will punish those who have supported their transsexual spouse through a gender transition by denying them the psychological and financial benefits of the recognition of this relationship.¹⁵⁶ The government's Interdepartmental Working Group on Transsexual People acknowledged that "no purpose will be served by insisting that a couple should divorce in order for the transsexual partner's acquired gender to be recognised".¹⁵⁷ It concluded, however, that "it would be very difficult to allow same-sex marriages in this context but no other."¹⁵⁸

The Civil Partnership Act of 2004 allows same-sex couples to register the commencement of their relationships and to dissolve them in accordance with legal norms which are largely identical to those applied to marriage.¹⁵⁹ Couples compelled to divorce under the Gender Recognition Act will be able to immediately enter into civil partnership under the Civil Partnership Act.¹⁶⁰ It does not appear that any mechanism exists to ensure that the marriage and the partnership will be treated as one continuous union for purposes of marriage-linked entitlements. Moreover, the non-transsexual spouse may not identify as homosexual and may not wish to enter into a civil partnership, which redefines their relationship as such.¹⁶¹

155. See Gender Recognition Act, 2004, c. 7, § 5(2) (U.K.).

156. See PRESS FOR CHANGE, *supra* note 145, at 10-14, app. 3.

157. HOME OFFICE REPORT, *supra* note 3, at 22.

158. *Id.*

159. The partnership can only be dissolved on terms that echo the heterosexual regime, with one key exception: the Civil Partnership Act contains no reference to adultery as a ground for dissolution, as adultery is defined only as heterosexual infidelity. See Civil Partnership Act, 2004, c. 33, § 44. A partner may invoke homosexual affairs to end the relationship, but only as a form of intolerable behavior. § 44. The explanatory notes to the Civil Partnerships Bill state that civil partnership offers the same status, rights and obligations as marriage. Stonewall, the leading gay rights advocacy group in the United Kingdom, agrees with this designation: "With civil partnerships you get every right and every privilege—and every responsibility—straight couples get when they marry. It's the same thing. You can even ask your relations for toasters." STONEWALL, *supra*, at 4 (emphasis in original). It has been greeted in the media as tantamount to civil marriage as well. See Alan Cowell, *Gay Britons Signing Up As Unions Become Legal*, N.Y. TIMES, Dec. 6, 2005, at A12.

160. Civil Partnership Act, 2004, 33, § 96 (Eng. and Wales) (allowing for an expedited application procedure for registration within 30 days of application for those whose marriages were dissolved through a Gender Recognition Act process).

161. PRESS FOR CHANGE, *supra* note 145, at 13-14 ("[M]any such relationships survive simply by sidestepping the question of orientation altogether. It is simply not relevant to the relationship—only to a prurient society. It may therefore be an unpalatable 'step too far' to expect the partner to be content with labeling themselves as something they are not—simply to meet the needs of political expediency on the part of a Government which thinks it has found a neat way of keeping the same sex partnership and marriage questions artificially separate.").

B. Applicants May Have to Shape Their Gender Narratives to Suit the Agenda of Medical Experts

Of the estimated 5,000 eligible transsexuals in the United Kingdom, 1,515 have made applications for recognition under the Act.¹⁶² Early evidence regarding the operation of the Act suggests that most applicants are successful.¹⁶³ The high rate of success may reflect the willingness of the tribunal to accommodate applicants and a process of self-selection on the part of applicants. Married applicants may be ambivalent about coming forward. Others may resent having to provide medical evidence to support a gender transition that they view as a political or aesthetic choice.¹⁶⁴

Medical conceptions of transsexualism are mutable and inflected by gender ideology. It is instructive to set the invocation of medical knowledge in *Corbett* and in the Gender Recognition Act in historical context. Medical practitioners have long been the gatekeepers to legal gender recognition. Medicine has played a role in interpreting the bodies of intersexual and transsexual people and has offered shifting accounts of their meaning. In a nineteenth century society in which inheritance rights, proprietary capacity, eligibility for military service, voting rights, and contractual competence were linked to sex, it was important to establish whether an individual had the physical qualifications for male legal personality.¹⁶⁵ The need to identify and regulate the rights of individuals meant that the notion of a person who was both a male full legal subject and a female subject of limited legal capacity was unacceptable. The role of doctors in this context was not provision of a neutral descriptive account of hermaphrodites' bodies but "deciphering the true sex that was hidden beneath ambiguous appearances."¹⁶⁶

1. Defining Sex

The shifting criteria for determining sex have reflected the gender ideology of the time. The distinction between biological sex and social

162. E-mail from Catherine Dyer, *supra* note 151 (noting that thirty-one applications have been refused, twenty-four have been withdrawn without a decision, and thirty-eight have received interim recognition certificates).

163. *See id*; *see also* Claire McNab, *UK: Gender Recognition Statistics*, UKPFC NEWS Archives, July 16, 2005.

164. *See* PRESS FOR CHANGE, *supra* note 145, at 23.

165. *See* FAUSTO-STERLING, *supra*, note 11, at 40; *see also* *Bellinger v. Bellinger*, [2001] EWCA Civ. 1140, ¶ 27 (agreeing that "[t]he social and legal systems have left no room for intersexed subjects"); *Forbes-Semphill v. Forbes-Semphill* (1967) unreported, Scottish Court of Administration, *cited in* WHITTLE, *supra* note 11, at 135 (discussing an exceptional case in which a Scottish lady born Elizabeth Forbes-Semphill was granted a warrant for birth re-registration as a male in the early 1950s). He later changed his name to Ewan Forbes-Semphill, married, and inherited his father's title upon his death. *Id.*

166. MICHAEL FOUCAULT, *HERCULINE BARBIN: BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH CENTURY FRENCH HERMAPHRODITE* viii (1980).

gender was not drawn by Victorian medical practitioners. Accordingly, personal qualities such as aggressiveness/bravery and passivity/modesty were read as indicia of sexual identity.¹⁶⁷ Early twentieth century guidance of how to identify true gender looked to stereotyped personal qualities: a child with high IQ and career ambitions was boyish; one with lower IQ and few career ambitions more likely a girl.¹⁶⁸

Such stereotyping may continue to play a role in some conceptions of appropriate therapy for transsexual patients. Doctors may require as part of

167. See DOMURAT-DREGER, *supra* note 70, at 89-90. Social norms that characterize males as active and females as passive are also reflected in the interpretation of biological information in reproductive biology. Theories of fetal sexual development see fetuses as naturally female unless actively androgenized by male hormones. See Greenberg, *supra* note 11. While both androgen (a male hormone) and estrogen (a female hormone) are shown to have a masculinizing effect on fetuses, many biologists describe estrogen as mimicking the effect of androgen. See FAUSTO-STERLING, *supra* note 11, at 155. Androgen is understood to be an active agent of change; to the extent a hormone associated with femininity also has this capacity, it is understood as mimicking maleness. MARIANNE VAN DEN WIJNGAARD, *REINVENTING THE SEXES: THE BIOMEDICAL CONSTRUCTION OF FEMININITY AND MASCULINITY* 49 (1997). Current research calls into question whether even the existence of somatic differences between the sexes, or between intersex individuals and others, should be seen as the causes or as the effects of gender difference. *Id.* For example, it may be that areas of the brain develop or atrophy in light of the experience of living in accordance with the norms of one's gender. *Id.* Somatic changes may be the *result* of behaviors as well as being their cause. *Id.* at 240. She points to the example of string musicians and the blind braille users. *Id.* Both have areas of the brain linked to finger usage which are more extensive than those used by people without these abilities. *Id.* For example, while increased levels of testosterone correlate with increased levels of aggression, the path of causation is not clear. *Id.* Comparatively greater aggression in men may result from the presence of testosterone in their bodies, but it may also be that acting aggressively causes increased production of testosterone. *Id.*; see also KESSLER & MCKENNA, *supra* note 62, at 60 (hypothesizing that men may have more testosterone in their systems because social norms permit them to engage in more aggressive behavior).

168. See VAN DEN WIJNGAARD, *supra* note 167, at 32 ("These investigations reproduced the social image of masculinity (and males) and associated masculinity with active behavior, career, and intelligence, whereas femininity (and female behavior) was associated with passivity, motherhood, and a lower intelligence level than males. At the same time, the investigations based on the organization theory produced or constructed an image of a biological background that formed the basis for masculinity and femininity and was attributed to the result of hormonal action on the fetal brain." (emphasis in original)). Gender ideology of the active male and passive female also shapes conceptions of appropriate treatment for children born with intersex conditions. *Id.*; see also DOMURAT-DREGER, *supra* note 70, at 27 (describing as troubling the asymmetric ways in which these protocols treat femininity and masculinity). Newborn genetic females, defined as those with no Y chromosomes, are always assigned to the female gender, while genetic males remain male only if they are endowed with an "adequate" penis. *Id.* An "adequate penis" is 2.5 centimetres when stretched at birth. *Id.* A functional penis is one which looks normal, can pass urine and semen and can achieve erections. *Id.* A functional vagina, whether natural or created through vaginoplasty need not have any sensation, lead anywhere, or be self-lubricating. *Id.* It only needs to be large enough to passively receive a normal erect penis. *Id.*; see also SHARON E. PREVES, *INTERSEX AND IDENTITY* 78 (2003) (asserting that the messages conveyed throughout childhood to intersexuals often lead to further confusion in that they are told they are "normal" yet require a little surgical "fixing up" anyway). See generally SUZANNE KESSLER, *LESSONS FROM THE INTERSEXED* (1990) (arguing that the unusual genitalia of intersexuals could be considered to be intact rather than deformed).

the diagnosis of gender dysphoria that the patient see himself in stereotypical gender terms and reject those who have an idiosyncratic interpretation of gender. Claire McNabb describes her experience with gender psychiatrists as one in which the progress of transsexual women, such as herself, was evaluated by assessing the quality of their manicure, cosmetic usage, attire, and employment in gender stereotyped jobs.¹⁶⁹ Doctors may also insist that the patient identify as heterosexual in their new gender and reject those who envision themselves as transgendered and homosexual.¹⁷⁰

By winnowing out those candidates for transition who define their gender identity in idiosyncratic ways and rewarding those who are inclined to inhabit their new gender role according to stereotypes, doctors may actually determine what a legitimate narrative of transsexual identity is.¹⁷¹ Those seeking treatment have little choice but to play the system by offering narratives which fit these criteria in order to achieve their objectives. Indeed, Judith Butler urges transsexuals to manipulate medical practitioners in this way because securing a diagnosis of gender dysphoria may be a necessary step in expressing their autonomy to redefine their gender.¹⁷²

The very need to inquire into the meaning of gender transition itself reflects a concern with the maintenance of gender hierarchy. The anxiety about the definition of gender and gender transition suggests the extreme importance of gender as a category of social organization.¹⁷³ Marjorie Garber asks why, for example, we accept that someone like the singer Cher who undergoes multiple cosmetic surgeries retains her identity, while someone who has their genitalia altered has dramatically repudiated their birth identity.¹⁷⁴ The answer lies in a deep-seated sense that women should not be passing as men because they would be usurping power to which they

169. Claire McNab, Press for Change, *The Devil's Dictionary of Trans Terminology* (Dec. 1998), <http://www.pfc.org.uk/node/594/print> (speculating that many non-transsexual women would fail this arbitrary test for gender categorization).

170. FAUSTO-STERLING, *supra*, note 11, at 102.

171. See, e.g., Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 *YALE J.L. & FEMINISM* 51, 53 (1999) (deploring the rhetorical construction of identity by medical professionals because the stereotypes that accompany transsexual surgery substitute for more thoroughgoing challenges to gender norms).

172. See, e.g., BUTLER, *supra* note 4, at 76 (describing the tension between conceiving gender transition as an expression of personal autonomy and needing to shape the narrative of transition in ways acceptable to medical experts).

173. See Greenberg, *supra* note 11, at 293.

174. MARJORIE GARBER, *VESTED INTERESTS: CROSS-DRESSING AND THE CULTURAL ANXIETY* 185 (1992). An anxiety may be observed where an individual's self-presentation does not cohere with accepted racial stereotypes. Popular anxiety about Jackson's transformation of his African American features into ones which resemble those of a European similarly suggest discomfort with physical transformations which seek to hide or transcend physical differences which underpin social hierarchy.

are not entitled and men should not be passing as women because they are thereby surrendering privileges of which they should not lightly dispose. Surgical alteration of both primary and secondary sex characteristics are viewed as fraught with meaning that does not attach to the surgical alteration of other body parts.

2. *Defining Therapeutic Surgery*

The need to characterize transsexuality as pathology rather than as a chosen mode of existence may also reflect the needs of the medical profession itself. Since the development of techniques for plastic surgery in the eighteenth century, they have been used to alleviate the social and emotional impact of certain bodily configurations. This new discipline claimed that it performed a therapeutic function, rather than a merely aesthetic one. Medical historian Sander Gilman notes that plastic surgery has been treated as politically and morally suspect precisely because it has been deployed to enable people to hide their true identities.¹⁷⁵ Aesthetic surgery has been used to repair the injuries of war, to hide the ravages of congenital syphilis, and to mask ethnic identity (for example, by allowing Jews to pass as non-Jews). It now allows those afflicted by a sense of unhappiness with their sexed bodies to choose a body which better comports with their gender identity. In all these situations, the discipline of plastic surgery has sought to justify its intervention as meeting a genuine medical need rather than as a form of complicity in a dysfunctional act of self-deception or self-mutilation.¹⁷⁶ The acceptance of gender dysphoria as a therapeutic diagnosis is key to this conception of legitimacy. An alternative conception of gender transition as an autonomous act of self-creation does not fit easily within this paradigm.

Even with these flaws, the Gender Recognition Act is a major reform that offers longed for recognition to most transsexuals.¹⁷⁷ The *Corbett* criteria have been supplanted by a process which delegates the power to determine gender transition to a panel of medico-legal experts. While this structure will facilitate the adaptation of gender criteria to changing standards of medical knowledge, it leaves open the possibility that

175. SANDER L. GILMAN, MAKING THE BODY BEAUTIFUL: A CULTURAL HISTORY OF AESTHETIC SURGERY xx1 (1999).

176. A plastic surgeon commenting on an earlier draft of this paper expressed ambivalence about becoming involved in transgender surgery for just this reason. He found it hard to distinguish gender dysphoria from body dysmorphic disorder, viewing both as forms of mental illness which focused anxiety on some part of the body. He believed that they required psychiatric rather than surgical treatment. In body dysmorphic disorder, a patient expresses a strong desire to have a limb removed. Most physicians refuse to comply with such desires, but one Scottish doctor has performed several such amputations. See *Surgeon Defends Amputations*, BBC NEWS, Jan. 31 2000, available at <http://news.bbc.co.uk/1/hi/Scotland/625680.stm>.

177. Gender Recognition Act, 2004, c. 7, § 1 (U.K.).

ideologies of gender will continue to play a role in determining what constitutes an acceptable narrative of gender transition. While the Gender Recognition Act regime is a step forward, it is merely a transformation of the *way* in which English law pathologizes transsexuals, not an affirmation that gender transition may be a legitimate way of structuring one's personal identity.

The Gender Recognition Act does not read gender transition as giving effect to an individual's desire to challenge or move beyond stable gender categories, but as a therapeutic response to their misfortune in failing to fit the binary gender system.¹⁷⁸ The result performs the neat trick of recognizing the reality of transsexual embodiment but strictly confining the significance of this recognition. Transsexuals are not seen as troubling gender outlaws, the natural allies of same sex couples in seeking to break down the essentialist links between sex, gender, and marriage. Rather, they are seen as gender refugees, being offered an end to their exile from their true home in the heterosexual binary paradigm.

178. See Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 336-37 (1999) (relying on Butler to argue that legal rhetoric in cases involving transsexuals reproduces transsexual identity as object).