



4-11-2015

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Recommended Citation

Michelle Cass, *Divorcing Gender From Marriage: A Feminist Perspective on the Jurisprudence of Transgendered Marriage*, 4 DePaul J. Women, Gender & L. (2015)

Available at: <https://via.library.depaul.edu/jwgl/vol4/iss1/3>

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**DIVORCING GENDER FROM MARRIAGE:
A FEMINIST PERSPECTIVE ON THE JURISPRUDENCE OF
TRANSGENDERED MARRIAGE**

Abstract

Sex is an immutable characteristic; says who? As transgendered people and LGBTQQ (lesbian, gay, bisexual, transgender, queer, questioning) issues gain more traction and recognition, the clear contours of sex and gender are fading, and a more fluid concept of gender is emerging. However, the American legal system lags behind the mutability of gender in an environment where the conceptualization and understanding of gender is becoming ever more nuanced and complex. This is most apparent in the law's treatment of transgendered marriage: a marriage involving at least one person who identifies as transgendered. A transgendered person can be defined as a person who identifies as a gender that is different than the gender assigned based on his or her sex at birth, inclusive of those who have or have not transitioned, had sex-reassignment surgery, executed a name change, or modified the gender marker on his or her legal documents. The law's rigid response to the complications that transgendered marriage presents in the wake of unlawful same-sex marriage, is to wholly negate the importance of recognizing gender, and instead, to look primarily to a person's sex for guidance.

This article explores the jurisprudence underpinning lawful and null transgendered marriages from a feminist perspective. Specifically, it describes the history and current state of jurisprudence as it relates to transgendered marriage. This review of the legal landscape identifies the law's sex-based thresholds for defining gender, which result in the validation or invalidation of a transgendered marriage. Analyzing these thresholds implicates the way in which the law serves to control gender identity and reinforces traditional gender roles in society. This in turn reveals the insidious undercurrent of bias and patriarchy permeating the annals of the justice system as it relates to gender and transgendered identity. Ultimately, this article exposes the woefully inadequate state of jurisprudence today as it

relates to transgendered marriage and gender, and posits that this is due in large part to non-lgbtqq¹ identifying white male dominance.

¹ Lesbian, gay, bisexual, poly sexual, transgender, queer, and questioning.

INTRODUCTION

This paper explores transgendered marriage in order to expose the inherent bias and patriarchy that leaves the jurisprudence of transgendered marriage in flux and chaos. Specifically, it uses a three-part framework for understanding how gender is controlled in cases involving transgendered marriage. This three-part framework, in part, is based upon the thresholds that courts use to validate and invalidate transgendered marriage, and acts as a tool to explore the harm and inequity present in transgendered jurisprudence. Part I explains the gender binary and provides guiding definitions of the terms *transgender* and *transgender marriage*. Part II reviews the history and current state of courts' treatment of transgendered marriage through the three-part framework that the paper identifies. The first limb of the framework explains the manner in which biological designation of gender or assignment of sex at birth is controlling; the second discusses the ability to consummate a marriage as evidence of the marriage's validity; and, the third concerns gender marker changes on legal documents or sex reassignment surgery as factors to determine the validity of a marriage. Part III analyzes the ways in which courts control gender formation, identity, and social binary-gender conformation, in addition to the subsequent harm this causes. Lastly, Part IV explores the ways in which transgendered jurisprudence is motivated by patriarchy, which results in bias and inequitable treatment of transgendered persons. In short, the state of transgendered jurisprudence controls gender identity and formation in harmful ways, and uses marriage as a perverse tool to perpetuate the gender binary and patriarchal control.

I. EXPLORING THE GENDER-BINARY AS IT RELATES TO TRANSGENDERED MARRIAGE

A. The Gender Binary

The gender binary, a rigid western conception that gender is comprised only of two biological sexes, is eroding. Unpacking gender and discovering its rich complexities and multidimensional continuum of possibilities is nothing new for anthropologists and historians who

have documented countless examples of individuals living outside of the scope of the gender-binary. Not surprisingly, the concept of the gender binary is imploding in the United States as attention to the mutability of gender increases in pop culture, media, and politics. However, the American legal system lags behind this progress, and fails to recognize the mutability of gender, including unfixed gender roles. In fact, the American legal system openly constrains the construct² of gender, and thereby the formation of gender identity, to the gender binary—a patriarchal-dominant construction. This lag is most evident when examining the jurisprudence of transgendered marriage.

The alternative is to define gender in a multidimensional and non-linear capacity, where a gender spectrum is not merely a line between male and female, but a circle with various points of gender that are not linearly related.³ Conversely, the gender binary presupposes and reinforces the notion that sex and gender are predetermined: that sex is biologically determined and that gender is socially constructed.⁴ The dangers of this construction are that it gives sex more legitimacy because it is assigned by a neutral third party at birth, as opposed to gender which can be/is self-identified. Thus, self-determined gender can be mistrusted and considered less legitimate.⁵ This bias is reflected in courts' treatment of transgendered marriage; particularly where judges recognize biological sex as opposed to self-identified gender as a mechanism for legitimizing or delegitimizing marriages involving transgendered persons, further discussed in Part II.

B. Transgendered Marriage Defined

² FAQ: if “gender is a social construct”, aren’t feminists saying that gender doesn’t really exist at all?, FINALLY, A FEMINIST 101 BLOG (July 21, 2008), <http://finallyfeminism101.wordpress.com/2008/07/21/faq-if-gender-is-a-social-construct-arent-feminists-saying-that-gender-doesnt-really-exist-at-all>.

³ See Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 261 (2005) (describing a three-dimensional non-linear space termed the “gender galaxy”).

⁴ *Id.*

⁵ *Id.*

To understand the concept of what this paper terms *transgendered marriage*, it is most important to think about what it means to be transgendered. The fluidity of gender makes it inherently difficult to adequately and comprehensively define what it means to be transgendered. For the sake of clarity, “transgendered” is defined for purposes of this paper as a person’s identification as a gender beyond or opposite of the biological sex assigned at birth. This is broad, and purposefully so, because transgendered persons defy and transcend gender stereotypes, unlike persons who identify their gender within the neat contours of the traditional binary-gender classification system. Arguably, sex and gender are biologically and socially constructed, and so this definition makes specific use of the word *assigned* as it pertains to sex. To be transgendered can mean many, often disparate, things and can manifest itself in varying ways. Some posit that to be transgendered is to encompass all genders, though others would disagree.⁶ For instance, some male-to-female (MTF) transgender persons are masculine lesbians, while some female-to-male (FTM) transgender persons are masculine heterosexual.⁷ Some transgender persons do not identify as either female or male, but as a third or other gender, such as ‘trans’, ‘boy-girl’, ‘shinjuku boy’⁸, ‘boi’, ‘girl-boy-girl’, ‘third gender’, ‘fourth gender’, ‘no gender’, or ‘bi-spirit.’⁹ As Dylan Vade notes, “[s]ome transgender people choose to alter their bodies medically and some do not. Some transgender people want to alter their genitalia, and some do not. The ways to be transgender are endless.”¹⁰

With this in mind, ‘transgendered marriage’ is the concept of a marriage involving a person who identifies as transgendered and another person, who may identify as being gay, transgendered, straight, lesbian, queer, bisexual, pansexual, or questioning. Marriage for purposes

⁶ *Id.*

⁷ Vade, *supra* note 4, at 261.

⁸ SHINJUKU BOYS (Second Run DVD, 1995). (This documentary follows three “onnabes” through their lives in Tokyo, Japan. Onnabes are women who live their lives as men and have girlfriends, but do not typically identify as lesbians).

⁹ Vade, *supra* note 4, at 260-61.

¹⁰ *Id.*

of this article includes marriages recognized by the state at one point in time, even if later invalidated by the judiciary. This definition guides the exploration of the jurisprudence of transgendered marriage, and acts as a conduit to explore and uncover the ways in which patriarchal notions of the gender binary are deeply anchored in the American legal system.

II. THE HISTORY AND CURRENT STATE OF THE JURISPRUDENCE OF TRANSGENDERED MARRIAGE

To understand the prevailing treatment of transgendered marriage by courts, it is important to distinguish between sex and gender. While some posit that there should not be a distinction between sex and gender because such a distinction denies legitimacy to some transgendered persons, each term is defined separately in this article precisely because this is the paradigm under which United States courts operate.¹¹

Olga Tomchin provides a useful definition of ‘sex’ as “the legal fiction that occurs when the appearance of an infant's genitals at birth (as formalized by an “M” or “F” on a birth certificate) results in each person's placement into a legal category of “male” or “female.”¹² While gender is broadly defined by Julia Greenberg as “the cultural or attitudinal qualities . . . characteristic of a particular sex.”¹³

With these distinctions in mind, three predominant approaches guide courts in their treatment of transgendered marriage: 1) A biological designation of gender or assignment of sex at birth as controlling legal gender identity, and thereby recognizing or nullifying a marriage 2) the ability to consummate a marriage as evidence of the marriage’s validity, and 3) having a gender marker change on a legal document or sex reassignment surgery as a factor or determining factor

¹¹ See Vade, *supra* note 4, at 262 (the distinction of sex and gender by courts is posited to be harmful to transgendered persons. Specifically, this dichotomy gives sex more important, making it more real; thus, a transgendered person’s self identification of gender is less legitimate).

¹² Olga Tomchin, *Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People*, 101 CAL. L. REV. 813, 824 (2013).

¹³ Julie A. Greenberg, *Defining Male and Female: Interspecificity and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

to validate a marriage. These three methods guide the analysis of the ways in which the legal system controls gender identity formation and identification through the jurisprudence of transgendered marriage. Most importantly, these differing approaches signify a split in the judicial system's treatment of like people— an obvious equal protection violation, and evidence of lurking bias and patriarchal influence, discussed further in Part IV.

Currently the state of the jurisprudence of transgendered marriage is one in flux. The judicial system lacks a uniform approach by which to classify legitimate marriage when one party is transgendered. As a result, there is a lack of predictability as to whether a person's marriage, birth certificate, gender-marker change, or sex-reassignment surgery will be legally recognized or discriminated against. Specifically, even once a person can change his or her legal sex designation in a state, there is no full faith and credit extended to this modification in other states.¹⁴ A state's respective policy as it relates to recognizing gender identity and the various implications that such recognition, or lack thereof, may have on a person's life is largely left to the state legislature; such legislative deference is thus used as a mechanism by the judiciary to skirt equal protection violation arguments brought by transgendered persons.¹⁵

These variances in the law disadvantage transgendered persons and their families, while simultaneously facilitating formal discrimination. Essentially, courts only designate status to transgendered people who fit narrow gender stereotypes, engage in heterosexual sex, or medically alter their bodies; and even then, some court's refuse to recognize self-identified gender, thus denying transgendered people dignity.¹⁶ Virtually no case law exists where a court accepts without

¹⁴ Alice Newlin, *Should A Trip from Illinois to Tennessee Change A Woman into A Man? : Proposal for A Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 463 (2008).

¹⁵ *Id.* See also *In re Marriage License for Nash*, 2003-Ohio-7221 (Ohio Ct. App. Dec. 31, 2003).

¹⁶ Vade, *supra* note 4, at 253, 256 (2005).

question a person's self-identified gender and/or sex.¹⁷ The following cases, analyzed through the three-part framework, demonstrate this failure by exposing the variances in the law.

A. Biology and Assignment of Sex at Birth as an Immutable Determination of Legal Gender

One of the most influential cases in the history of transgendered marriage jurisprudence is a 1970's English case by the name of *Corbett v. Corbett*.¹⁸ The Corbett case was the first English case in which a court determined whether a transgendered person could legally marry under his or her self-identified gender.¹⁹ In *Corbett*, the transgendered party, April Ashley, underwent sex-reassignment surgery to transition from being male to female, and began taking estrogen.²⁰ Three years after her transition, Ashley married a man, but shortly after the marriage ceremony each sought an annulment on grounds of willful refusal, or inability to consummate the marriage.²¹ The presiding judge, notably a doctor, held that sex is determined at birth, and is an immutable characteristic unable to be altered medically or legally later in life.²² This irrefutable biological designation of "legal" sex and gender completely strips an individual of the right to form self-identified gender. However, the *Corbett* court's reasoning was relied upon in several of the first cases in the U.S. involving transgendered marriage, and has not entirely disappeared from American jurisprudence.²³ Two such cases are *Anonymous v. Anonymous*, and *In re Ladrach*; both cited respectively over 200 times and still considered valid case law.²⁴

¹⁷ Vade, *supra* note 4, at 253, 256 (2005).

¹⁸ *Corbett v. Corbett*, (1970) 2 All E.R. 33.

¹⁹ *Notes*, 5 Ottawa L. Rev. 583 (1971-1972).

²⁰ *Corbett*, (1970) 2 All E.R. 33.

²¹ *Id.*

²² Alice Newlin, *Should A Trip from Illinois to Tennessee Change A Woman into A Man? : Proposal for A Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 468-69 (2008); *In re Ladrach*, 513 N.E.2d 828, 832 (Prob. 1987); *Corbett*, (1970) 2 All E.R. 33.

²³ Julie A. Greenberg, *Defining Male and Female: Interspecificity and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 299-300 (1999).

²⁴ *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971); *In re Ladrach*, 513 N.E.2d at 828.

Anonymous v. Anonymous is the first United States case to determine the validity of transgendered marriage.²⁵ In *Anonymous*, a 1971 New York case, the plaintiff testified that he did not know he had married a man, despite having spent time with his soon-to-be wife at a “prostitution house” in late 1968.²⁶ Perhaps even less believable was his testimony that three months of time elapsed in which he never saw her unclothed, nor had sexual relations with her.²⁷ The court adopted the facts that the evening following the wedding ceremony the drunken groom reached for his new wife while in bed and discovered that she had a penis.²⁸ The wife told the husband that she planned to have sex-reassignment surgery, which she in fact had performed in 1970.²⁹ The husband traveled overseas for the army, but remained in contact with the wife.³⁰ Between the years of 1969 and 1970, the husband received the wife’s medical bills, shared a portion of his military pay with her, and bailed her out from jail on a prostitution charge.³¹ Finally in the spring of 1970, the husband petitioned for divorce in New York. The *Anonymous* Court found that the parties never lived together nor had a sexual relationship.³² The court held that the marriage was invalid.³³ It reasoned that *in fact* the defendant was not a female, but male at the time of the ceremony, and despite her sex reassignment surgery and self-identification as female, she was legally a male.³⁴ Further, the court reasoned, “mere removal of the male organs, would not, in

²⁵ *Anonymous*, 325 N.Y.S.2d at 499.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Anonymous*, 325 N.Y.S.2d at 500.

³¹ *Id.*

³² *Id.*

³³ *Anonymous*, 325 N.Y.S.2d at 500.

³⁴ *Id.*

and of itself, change a person into a true female.”³⁵ Like *Corbett*,³⁶ the court implicitly viewed sex as unequivocally biologically determined.³⁷

Similarly, in *In re Ladrach*, a 1987 Ohio case, the court heavily relied on *Corbett* to uphold the lower court’s refusal to issue a marriage license to a transgendered person.³⁸ Here, a MTF transgendered person sought to marry a male after having had sex-reassignment surgery.³⁹ In an attempt to obtain her marriage license, the MTF transgendered person applied for and was denied a change of gender on her birth certificate.⁴⁰ Instead, to obtain the marriage license, she was forced to seek a declaratory judgment that she was female.⁴¹ The court reasoned that because the marriage applicant had male genitalia at birth and there was no chromosomal evidence denying that the person was still male, the MTF transgendered person would remain legally male.⁴² It further reasoned that a person’s “true sex” is the sex biologically determined and assigned at birth; not self-identified, not post-operative—determined singularly by biology.⁴³ Note that this case does not preclude a transgendered person from marrying someone of their same self-identified gender, and then later transition to the same sex as their spouse.⁴⁴ Considering this outcome, the desire to constrain gender to the gender binary and biological sex creates paradoxes in the law. This outcome is perversely irrational precisely because the current state of transgendered jurisprudence is irrational.

³⁵ *Anonymous*, 325 N.Y.S.2d at 500.

³⁶ *Corbett*, (1970) 2 All E.R. 33.

³⁷ Luke Boso, *A (Trans)gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 LAW & SEXUALITY 143, 157-58 (2009).

³⁸ *See In re Ladrach*, 513 N.E.2d at 832.

³⁹ *Id.* at 828

⁴⁰ *Id.*

⁴¹ *Id.* at 829.

⁴² *In re Ladrach*, 513 N.E.2d at 832; Boso, *supra* note 37, at 158.

⁴³ *Ladrach*, 513 N.E.2d at 832.

⁴⁴ Greenberg, *supra* note 14, at 303.

In *In re Estate of Gardiner*, J’Noel Gardiner was a transgendered woman whose husband’s family petitioned to deny J’Noel any right to her husband’s inheritance after his death.⁴⁵ Mr. Gardiner’s family argued that because J’Noel was never a woman, she was not legally married to Mr. Gardiner.⁴⁶ The court held that the marriage was invalid, and J’Noel had no right to Mr. Gardiner’s estate.⁴⁷ The court reasoned that despite J’Noel’s sex reassignment surgery, hormone replacement therapy, electrolysis, and tracheal shave, that J’Noel’s gender was male, because this was her gender assigned at birth.⁴⁸

Lastly, in *Kantaras v. Kantaras*, Respondent Michael had sex- reassignment surgery and transitioned from FTM prior to meeting his wife Linda, Petitioner.⁴⁹ Linda knew Michael was transgendered prior to marrying him.⁵⁰ Linda birthed a child via artificial insemination from Michael’s brother’s sperm three years into her marriage with Michael, and Michael adopted Linda’s child born from a previous boyfriend a few months after marrying Linda.⁵¹ Michael petitioned for divorce and for custody of both children.⁵² Linda claimed, though she had been married to Michael for nine years, that the marriage was invalid because Michael was a woman.⁵³ The court held that the marriage was invalid and Michael was denied custody.⁵⁴ The court reasoned that the marriage was void because it involved members of the same sex, and despite Michael’s self-identified gender, that the statutory meanings of male and female are those, “immutable traits determined at birth.”⁵⁵

⁴⁵ *In re Estate of Gardiner*, 42 P.3d 120, 120 (Kan. 2002).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Kantaras v. Kantaras*, 884 So. 2d 155, 156 (Fla. Dist. Ct. App. 2004).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* (In divorce and custody cases, one tactic utilized to gain custody of a child is for a party to use someone’s transgendered status to nullify the marriage and, therefore, their custodial rights).

⁵⁴ *Kantaras*, 884 So. 2d at 162.

⁵⁵ *Id.*

Although the rule that biologically determined sex controls gender identity has been largely abandoned, several state courts and statutes continue to focus on gonads, external sex characteristics, and even the ability to procreate or consummate the marriage to determine marriage validity.⁵⁶ It is important to notice in the next section that the argument that the ability to consummate a marriage is a legitimate threshold for validating a marriage closely parallels the reasoning in transgender marital cases focusing on biological sex. Each is grounded in male-centric notions of gender and gender stereotypes.

B. Ability to Sexually Consummate Marriage: A Determinative Factor in Considering the Legality of Transgendered Marriage

Some courts have shifted the focus from the pure-biology rationale adopted from *Corbett*⁵⁷ to a focus on external designees of sex and gender: gonads and sexual intercourse. One seminal case that used ability to consummate as a factor in upholding a marriage between a transgendered person and a non-transgendered party was *M.T. v. J.T.*, a 1987 New Jersey case.⁵⁸ Here, M tried to annul the marriage to J, because J was, according to M, “not a woman.”⁵⁹ J’s genitalia had to be examined, and J’s doctor testified that J had sex-reassignment surgery, and that her genitalia were identical to female genitalia.⁶⁰ Notably, the doctor also testified that J was able to have normative heterosexual intercourse.⁶¹ The court held that the marriage was valid, reasoning that the best test was to determine if a person’s anatomy matched his or her perceived gender, then this was the person’s “true sex.”⁶² Here, the court expressly rejects *Corbett*.⁶³ Thus, if a person undertakes gender-reassignment surgery and can engage in hetero- normative sex, then that person may legally marry, but only someone of his or her opposite gender.

⁵⁶ Newlin, *supra* note 15, at 468-69.

⁵⁷ *Corbett*, (1970) 2 All E.R. 33.

⁵⁸ *M. T. v. J. T.*, 355 A.2d 204, 204 (N.J. Super. Ct. App. Div. 1976).

⁵⁹ *M. T.*, 355 A.2d at 211.

⁶⁰ *Id.*

⁶¹ *M. T.*, 355 A.2d at 211.

⁶² *Id.*; Greenberg, *supra* note 14, at 301.

⁶³ *In re Gardiner*, 42 P.3d at 125.

Under this definition, essentially a marriage between a post-operative MTF transgendered person and a non-transgendered female would be null, precisely because this would be considered a same-sex marriage. Notably, in *M.T. v. J.T.*, J had sex reassignment surgery after marrying M.T., and M.T. paid for the surgery.⁶⁴ However, M.T. was employing a common tactic used by parties in divorce cases: using biological gender as a weapon to invalidate marriage and obtain custody.

Also compare *B. v. B.*, where Mark was a FTM transgendered man who underwent hormone replacement therapy and a hysterectomy and mastectomy, but had not had sex-reassignment surgery.⁶⁵ Mark married a woman who believed he was a man at the time of the marriage.⁶⁶ The wife later moved for annulment on the grounds of sexual incapacity, which were valid grounds for petitioning for dissolution of marriage at that time in New York.⁶⁷ Ultimately, the court held that the marriage was invalid.⁶⁸ It reasoned that because Mark lacked the male genitalia necessary for penetrative intercourse, he could not fulfill the obligations and duties of a husband.⁶⁹ Specifically, the court found he did not have the “necessary apparatus to enable defendant to function as a man for the purposes of procreation.”⁷⁰

The *B* Court openly controls gender based on the ability to procreate and fulfill hetero-normative gender roles, limiting the construction of gender in a traditional patriarchal framework, while also demanding that transgender people choose medical alteration of their bodies in exchange for legal rights. This case demonstrates the encroachment into privacy and self-identity the court is willing to make in order to perpetuate a binary gender system one in which biology is monolithic.

⁶⁴ *M.T.*, 355 A.2d. at 205.

⁶⁵ *B v. B.*, 355 N.Y.S. 2d 712, 715 (N.Y. Sup. Ct. 1974).

⁶⁶ *Id.* at 713.

⁶⁷ *Id.* at 717.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *B v. B.*, 355 N.Y.S. 2d at 717; Greenberg, *supra* note 14, at 303.

Similarly, some courts are creating a pathway to validating transgendered marriage (and control the definition of “marriage”) by using rigid, gender-controlling mechanisms such as gender marker changes on legal documents and sex-reassignment surgery. And for some courts still, sexual reassignment surgery or changing the gender on legal documents is not enough to legally recognize self-identified gender.

C. Gender Marker Changes and Sex Reassignment Surgery as the Thresholds for Legal Marriage

Several American courts have adopted a framework to adjudicate the legality of transgendered marriage based on formal mechanisms. The first of these are state mechanisms, whereby a transgendered person can apply for name and gender changes on legal documents such as birth certificates, passports, and drivers licenses. Though not every state will grant these requests⁷¹, and some states require a doctor’s approval in writing, proof of hormone therapy, or of sex-reassignment surgery. A name change usually requires petitioning for the amendment in probate court. Some courts then recognize these amended legal documents as the procedural threshold for that person’s self-identified gender to be legally recognized.

Next are informal medical mechanisms, whereby a person can engage in sex/gender reassignment surgery and hormone replacement therapy.⁷² Some courts require that sex-reassignment surgery occur prior to changing the gender designation on a person’s birth certificate.⁷³ Still other courts refuse to recognize self-identified gender even when someone seeks remedy through legal document changes and sex-reassignment surgery.

It is significant that these mechanisms have personal and monetary costs, and can be “outing” events. And, their coercive nature is taxing: demanding that a transgendered person

⁷¹ Lambda Legal, Changing Birth Certificate Designations: State-by-State Guidelines, (February 2, 2015), <http://www.lambdalegal.org/know-your-rights/transgender/changing-birth-certificate-sex-designations>.

⁷² Alice Newlin, *Should A Trip from Illinois to Tennessee Change A Woman into A Man? : Proposal for A Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 468-69 (2008) (discussing how courts in New Jersey and California have ruled that transgendered people legally acquire their post operative sex).

⁷³ “Advising Transgender Clients” NTFAM MA-CLE 395.

modify his or her body, undergo a name change, or designate one of two genders on legal documents carries costs. Further, these changes are required irrespective of whether sex reassignment or a specific gender marker is an accurate designation and whether such changes are desired—all simply to gain legal recognition and rights. A person must submit to the binary, and/or physically modify his or her body for legal privileges. This forced choice is a clear illustration of the coercive power over how gender is formed and identified. The following cases demonstrate how these factors act as thresholds to validating or invalidating marriage and the resulting prevarication of justice.

In *In re Marriage of Nash*, a 2003 Ohio case, the Petitioner, a FTM post-operative transgendered man, sought a marriage license, which did not issue because he omitted his previous marriage (when he was legally female) from his application; an evidentiary hearing was held to determine petitioner Nash's gender.⁷⁴ When previously living as a male, Nash had sex reassignment surgery and had the gender markers changed from female to male on his driver's license and Massachusetts-issued birth certificate.⁷⁵ However, the Ohio court held that it was not error to deny Nash a marriage license.⁷⁶ It reasoned that Nash's gender was a legal impediment to issuing the marriage license.⁷⁷ It further noted that since every petition for a marriage license in Ohio is subject to scrutiny, Nash's license was treated like every other petition for a license, and thus no equal protection violation occurred.⁷⁸ Additionally, Nash's Massachusetts birth certificate was only *prima facie* evidence of the facts recorded on the certificate itself.⁷⁹ Essentially, the gender change on Nash's Massachusetts birth certificate need not be recognized as fact, just evidence to weigh against the female gender indicated on his original birth certificate— what the court

⁷⁴ *In re Application for Marriage License for Nash*, 2003 Ohio 7221 (Ohio Ct. App, 2003).

⁷⁵ *Id.* at 2, ¶4.

⁷⁶ *Id.* at 49.

⁷⁷ *Id.* at 20-23.

⁷⁸ *Id.* at 49.

⁷⁹ *In re Nash*, 2003 Ohio 7221 at 26.

considered his “real” gender.⁸⁰ And, because Ohio has a clear public policy prohibiting same sex marriage, the amended birth certificate need not be given full faith and credit under Ohio law.⁸¹ Perhaps unsurprisingly, this case echoes the earlier Ohio case: *In re Ladrach*⁸², where a person’s gender is largely biologically determined according to Ohio courts.

Similarly in the 2005 Illinois case *In re Marriage of Simmons*, the Petitioner was FTM, had his internal sex organs removed, but still maintained external female genitalia.⁸³ The Appellate Court upheld the trial court’s finding that the marriage was invalid, and upheld the lower court’s termination of the father’s parental rights.⁸⁴ The Appellate Court reasoned that because the petitioner retained his female genitalia, that it was not an abuse of discretion for the trial court to have determined that he was legally female.⁸⁵ It further reasoned that, “the mere issuance of a new birth certificate cannot, legally speaking, make petitioner a male.”⁸⁶ Here, it is evident that the Court was looking for a modification of genitalia to “match” the Petitioner’s self-identified gender in order to render the marriage, custody of his child, and the Petitioner’s gender legally valid. *Simmons*⁸⁷ is a complete and gross distortion of justice: although Petitioner used his birth certificate to establish his gender with the Court, the Court moved the ball, thereby denying him a legal remedy. There was no avenue for which Petitioner could establish his gender, other than having sex reassignment surgery.

In *Littleton v. Prange*, an especially egregious Texas case that came down in 1999, Christie, post-operative MTF, was not permitted to bring a wrongful death action after her spouse’s death.⁸⁸

⁸⁰ *In re Nash*, 2003 Ohio 7221 at 26.

⁸¹ *Id.* at 29.

⁸² *In re Ladrach*, 513 N.E.2d at 828.

⁸³ *In re Marriage of Simmons*, 355 Ill. App. 3d 942, 946 (1st Dist. 2005).

⁸⁴ *Id.* at 956. (Notably, the doctor in this case testified that additional surgeries were needed before the petitioner could completely be sexually reassigned, and therefore he was truly still female).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *In re Simmons*, 355 Ill. App. 3d at 946.

⁸⁸ *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

The Appellate Court held that she was legally male and therefore had no standing because she was not a surviving spouse under the law: the long-term marriage was invalid.⁸⁹ Christie and her husband Jonathon married in Kentucky, and later moved to Texas.⁹⁰ During the marriage, they filed joint tax returns and engaged in sexual intercourse.⁹¹ During the trial for the wrongful death suit, Christie changed her gender designation on her birth certificate from male to female, which the trial court recognized.⁹² On appeal however, the court found that the trial court had erroneously interpreted the Texas statute governing amendments to birth certificates.⁹³ It reasoned that the statute only contemplated amendments to correct inaccuracies at the time of birth.⁹⁴ Justice Hardberger asked, “Can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?”⁹⁵ The Appellate Court sided with biology, rejecting both gender marker changes and sexual reassignment surgery as indicative of legally valid gender.

The *Littleton* case brings the three-part framework full circle, and demonstrates a jurisprudence in flux; one that is desperately clinging to controlling gender and the institution of marriage through a rigid formulation of what constitutes legal gender, and thereby marriage. Next, the three-part framework will be used to analyze the way in which gender formation and identity is controlled and gender stereotypes perpetuated by the jurisprudence of transgendered marriage.

II. BINARY SEX-CLASSIFIED GENDER THRESHOLDS REINFORCE TRADITIONAL HETERO-NORMATIVE GENDER ROLES IN SOCIETY

A. Controlling Gender Identity and Gender Roles Through the Law

⁸⁹ *Prange*, 9 S.W.3d at 231.

⁹⁰ *Prange*, 9 S.W.3d at 231.

⁹¹ Newlin, *supra* note 15 at 464.

⁹² *Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 224.

The three-part framework is partly used to explore the case law that comprises transgender jurisprudence, and it also serves as a tool to expose the law’s control over both gender formation and gender roles in society. To begin, looking at the *Anonymous* case, the first in American transgender jurisprudence, the court relied on the gender binary and biology to refute the mutability of gender through hormones or surgery.⁹⁶ This reliance on the gender binary and biology signals that American courts reject self-identified gender, and instead value hetero-normative constructions of gender, which are firmly entrenched in the patriarchal tradition. Defining gender based upon the notion that sex is immutable at birth, forecasts gender, and purposefully makes gender rigid, not fluid. It fails to place gender on a continuum, and forces the law’s analytic framework and conception of gender to focus on gonadal, chromosomal, and genital tests. In essence, in accordance with the law, gender is not chosen; rather, it is predetermined at birth. This predetermination squarely places gender in the hands of the doctor, of society, of law—everyone but the person. By doing so, the law demands gender identity formation in strict conformance with gender stereotypes and hetero-normative qualities. Thus, gender is grounded in pre-determined characteristics immutably given at birth because of one’s gonads. The resulting stereotypes based on a gender binary are thus inevitable and held sacred: ‘Girls are bad at math, boys are good at science’; ‘Boys will be boys;’ and, ‘Girls should play with dolls, boys should play with trucks.’ The stereotypes are endless, and yet all constrained to the gender binary.

In addition, by focusing on biology, the law places preference on hetero-normative stereotypes of gender to which people must conform. The law does so by using the circular logic that we must use hetero-normative stereotypes because these characteristics originate in our biological makeup; they are predetermined. The law assumes a hetero-normative endpoint, and thus people who do not neatly fit into the “normal” framework are cast as deviant, perverse, and

⁹⁶ *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct.1971).

beyond the law's protection.⁹⁷ Therefore, unless a person fits the law's binary conception of gender, they will not be afforded legal-rights, like the ability to marry. Thus, we see self-identified heterosexual couples denied marriage because one party is transgendered, and simultaneously see same-sex couples' marriages upheld when the parties married as a legal male and a legal female, and then one party transitions to the same gender as the other spouse later during the marriage.

Additionally, cases like *Anonymous* and *B v. B*, further demonstrate the law's preference for hetero-normative gender by focusing on penetrative sex.⁹⁸ These cases strictly enforce what is considered "normal" or protected sex under the law, and that which is deviant. Thus, for a marriage to be valid, a man must be able to penetrate, and a woman must be able to receive vaginal penetration. Therefore, hetero-normative sex is valued as quintessential to marriage.⁹⁹ This value judgment serves to reinforce traditional gender roles where women should be able to please a man during marriage by having sexual intercourse, as well as serve her core function: to produce progeny—a perverse throwback to Henry VIII perhaps. In turn, men must be able to perform sexual intercourse in order to provide a woman with the ability to fulfill the motherhood role. At their core, these cases insidiously reinforce the necessity of women to be able to sexually pleasure and procreate for their husbands. And though failure to consummate remains valid grounds to invalidate marriage in some states¹⁰⁰, affecting hetero-normative and transgendered couples alike, simply because it also affects heterosexuals does not make it less biased. Failure to consummate as part of transgendered marriage jurisprudence still demonstrates a legal protection for the necessity of sexual intercourse during marriage.

⁹⁷ Abigail W. Lloyd, *Defining the Human: Are Transgendered People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 157 (2005).

⁹⁸ *Anonymous*, 325 N.Y.S.2d at 499; *B v. B*, 355 N.Y.S.2d at 712.

⁹⁹ *See* *MT v. JT*, 355 A.2d at 204.

¹⁰⁰ For example, see Ohio, New York, and Connecticut.

This focus on consummation is incredibly controlling on gender and freedom.¹⁰¹ One logical step beyond consummation is the ability to produce a child— alsoan aspect used to invalidate transgendered marriages. It should be noted that marriage among heterosexual couples are not invalidated because one party cannot produce progeny. Thus, we see transgendered people being held to a higher and therefore inequitable standard, as courts again focus on what is naturally determined as opposed to what is self-identified.

Courts in cases such as *Nash*, *Simmons*, and *Prange*, control gender conformation by either accepting or rejecting legal and medical mechanisms used to establish self-identified gender.¹⁰² Specifically, these cases evaluate legal documents and actual body modification; arguably, the most clear illustration of how the law controls gender. Thus, courts concomitantly control gender while also rejecting self-identified gender, thereby creating schizophrenic jurisprudence as varying states validate and invalidate gender disparately.¹⁰³ By requiring that a person medically alter his or her body, courts are forecasting that for self-identified gender to be legally recognized in marriage, genitalia and self-identified gender must conform. This requires a transgendered person who does not identify as either gender or perhaps as poly-gender to identify within the binary: ‘Check a box: male or female.’¹⁰⁴ This is identity stripping because it forces a transgendered person who may not wish to alter his or her body and undergo an expensive or risky medical procedure to do just that. It also requires a transgendered person to conform to the gender binary and thus hetero-normative stereotypes of gender: if you identify as female, you cannot have a penis and you must marry a man, and if you identify as male, you must have a penis, and you cannot marry a man.

¹⁰¹ Instead, this could be used as grounds to petition for divorce.

¹⁰² *Nash*, 2003 Ohio 7221; *Simmons*, 355 Ill. App. 3d at 948; Littleton, 9 S.W.3d, at 231.

¹⁰³ See *Vecchione v. Vecchione*, No. 95D003769 (Cal. Super. Ct., filed Apr. 23, 1996) (holding that FTM spouse is legally male and was validly married to a woman, and the court awarded him 50 percent custody of their child. California recognized sexual reassignment as a means for transgendered people to legally marry).

¹⁰⁴ Newlin, *supra* note 15, at 484.

And, you must identify as either male or female only. This gender-molding reinforces stereotypes of what bodies should look like: matching genitalia and gender are required for legal affirmation.

Thus, the law bends and mutates the existing gender continuum by placing a collar around the neck of gender; thereby exposing the law's proclivity for the male-dominated tradition of defining gender through the binary.

B. Harm Caused by Defining Gender Based on Sexual Prowess and Legal Designations

At its core, controlling gender through legal designations, sexual reassignment procedures, consummation, and biology, does what some deem to be violence to the transgendered community and thereby society.¹⁰⁵ Because the ways in which courts recognize legal gender are rigid, they force people into identifying their gender in ways that may conflict with their sense of self. This rigidity ultimately strips the transgendered person of fundamental personhood and dignity. This denial in turn allows the law to demand that transgendered people perpetuate a fraud upon themselves and society by checking a box, having a surgery, or marrying the opposite sex in order to be legally, and perhaps socially, validated. It denies that gender can vary throughout a lifetime, and that gender may be poly or none.¹⁰⁶ The binary does not account for some FTM's who want to have facial hair and give birth to a child, or have a mastectomy but not genital reassignment surgery. So while some courts provide a pathway by which transgendered people can validly marry, the path is paved with briars and glass, reflecting only two options: male or female. In short, this stripping of personhood is harmful and denigrating and should not remain part of modern jurisprudence.

Further, by using consummation as a threshold for validating marriage, this jurisprudence is inherently oppressive to women. Requiring consummation objectifies a woman as a sex object first

¹⁰⁵ Lloyd, *supra* note 97, at 157.

¹⁰⁶ Vade, *supra* note 4, at 267.

and foremost. She must be able to please her man and provide the *sexualem cupientibus*¹⁰⁷ necessary for a “good, normal marriage.” This threshold also establishes hetero-normative sex as the gold standard. Often, courts control a woman’s sex and control gender, demanding that both conform to traditional patriarchal notions of the normal and the good in order to receive legal protections. It is no surprise to see this philosophy born out in transgendered jurisprudence.

Lastly, for those transgendered persons who wish to engage in sexual reassignment surgery or to obtain gender marker changes, both sexual reassignment surgery and gender-marker changes require a certain social-economic prowess. First, your state must have providers who will provide hormone therapy, gender-reassignment, and psychological services. In addition, you must have the financial capacity to pay for these medical procedures. For example, sexual reassignment surgery can be upwards of \$30,000.00 and is not covered by health insurance.¹⁰⁸ Similarly, the fees associated with a name change, birth certificate amendment, and social security gender marker amendment, can be economically prohibitive if taken in totality, assuming a person wants all genders to match on his or her legal documents. This requires time and money. Thus, by requiring these modifications, which have financial components, the law is controlling gender by not recognizing that these procedures and amendments should be publicly and privately subsidized.¹⁰⁹ Further, as discussed in Part IIC, even for those transgendered persons with the economic means to alter gender markers and undergo sexual reassignment surgery, courts may not recognize these changes as modifying their gender assigned at birth.¹¹⁰ The inequities are endless in this labyrinth of laws constructed to protect the gender binary.

¹⁰⁷ Sexual gratification.

¹⁰⁸ Sex Reassignment Surgery, ENCYCLOPEDIA OF SURGERY, <http://www.surgeryencyclopedia.com/Pa-St/Sex-Reassignment-Surgery.html#b>, (last visited November 25, 2013).

¹⁰⁹ *Id.* (Through government aid and private insurance benefits).

¹¹⁰ *See In re Ladrach*, 513 N.E.2d at 828.

IV. THE UNDERCURRENT OF BIAS AND PATRIARCHAL CONTROL OVER THE MANNER IN WHICH COURTS DEFINE SEX AND GENDER

By acknowledging that the law controls gender formation and identity and the resultant harm of that control, the web of bias and patriarchy that permeates transgendered jurisprudence is exposed. The relationship between bias and patriarchy is closely interwoven, and thus I will discuss them in tandem. Requiring gender to be defined solely within the binary implicates favor for hetero-normative gender stereotypes at a basic level. The tradition of defining gender based upon external factors, rather than internal identity, is simplistic and uniform, non-threatening, and easily controlled. Conversely, recognizing the gender continuum tugs at traditional masculinity, mutates it, inverts it, and perhaps destroys it. Using marriage as a mechanism to ratify the gender binary simultaneously denies the validity of self-identified gender in no uncertain terms. This framework serves only to protect men who value traditional masculinity and traditional gender roles. Rather than recognize a more relational concept of gender that allows people to self-identify, patriarchy maintains rigid categories of gender in the law and society.

Further, making marriage gendered is inherently patriarchal. Marriage, at its advent, was used to reinforce the notion that women and children were property and provided legal and social-institutional order by recognizing future legatees.¹¹¹ By continuing to define marriage as the union between a man and a woman, and then further controlling the way in which the law legally validates whether a person is a man or a woman, the law utilizes marriage as a proxy to control gender conformity. Simply put, if a transgendered person wants to marry, he or she must conform to the law's definition of and the courts' interpretation of his or her self-identified gender. Tying gender to the goal of marriage exerts control in a perverse way and effectively uses marriage as a club to beat someone's gender into "normal" shape.

Lastly, transgendered jurisprudence serves men by using marriage as a proxy to control gender and maintain white-male dominated notions of gender. Wherein marriage reinforces traditional gender roles, the way that bodies should look, and perhaps most damning, that the ability to have sexual intercourse and procreate are prerequisites for valid marriage. These thresholds control gender roles, gender identity, and gender freedom. Because these mechanisms are a perversion, we naturally find that the state of the jurisprudence of transgendered marriage is one in flux. As social awareness of the gender continuum grows, courts are flailing for justifications to define gender rigidly. Thus, no sound, uniform body of law exists. Failure to achieve uniformity perpetuates inequality, confusion, and chaos. It further evidences a jurisprudence that is not on firm footing in the law, regardless of its reliance on science— an ever-changing field. The present state of transgendered jurisprudence places transgendered people in the unique position of having their personhood controlled, discriminated against, and denied. There is no rational basis to justify the reason for this to be the case, and thus we see the harm that patriarchy continues to perpetuate on society without justification. Gender must be divorced from marriage.

CONCLUSION

The jurisprudence of transgendered marriage must change. As marriage equality and nonconforming gender becomes more publicly prevalent, the bias that permeates the United States legal system's treatment of transgendered marriage should be diminished. The law's use of biology, sexual consummation, gender marker changes, and sexual reassignment surgery as thresholds to validate marriage perpetuates discrimination against transgendered persons who wish to marry. These thresholds present equal protection concerns and causes social harm. Perhaps more insidious is that these thresholds born out of the case law, are reinforced as legitimate through a patriarchal lens and demand conformity to the gender binary. Transgendered marriage threatens traditional gender roles, masculinity, and a white male dominated conception of the way in which gender is formed or determined. This patriarchal approach should be smashed. Such an approach denies personhood and dignity at a basic level. It denies people the legitimacy to live and marry as they choose. It is not simply imperfect justice, it is immoral and against the ethos of our constitutional principles. The basis for validating marriage in the wake of laws prohibiting same-sex marriage creates additional conditions for transgendered persons in an effort to exclude non-traditional participants from an institution that some consider to be traditional and sacred. Regardless, marrying is a right, and self-identity is sacred, and to deny either is wrong.