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The Use of Rules and Standards to Define a Transsexual’s Sex for the Purpose of Marriage: An Argument for a Hybrid Approach

Briana Lynn Morgan*

INTRODUCTION

J'Noel was born with what she called a “birth defect.” Although she felt like a female even before puberty, she still had a penis and testicles. The doctors determined that J'Noel suffered from gender identity disorder, an intersexual condition in which one’s mental sex differs from one’s physical sex. Despite this conflict, J’Noel spent the first part of her adulthood trying to live in the “male” sex that she was assigned, even going so far as to marry a female. After consulting with medical professionals, however, she finally realized that this life was not for her. With medical help and advice, J’Noel began sex reassignment in order to ensure that her external sexual characteristics were congruent with who she was inside.

The procedure, actually a series of many procedures, was extensive, intrusive, time-consuming, and painful. J’Noel underwent electrolysis and thermolysis to remove the hair on her face, neck, and chest. She began to take hormones to promote breast enlargement, increase body fat, reduce muscle mass, and decrease the oiliness of her skin. She had a tracheal shave to change her voice, and a forehead/eyebrow lift and rhinoplasty to make her face look more feminine. After all that, J’Noel and her psychiatrist determined that she must undergo total sex reassignment.
in order to fully treat her disorder. J’Noel therefore underwent surgery where her doctor cut and inverted the penis and used part of the skin to form a female vagina, labia, and clitoris. After the surgery, her doctors determined that she was a fully functioning, anatomical female, who could and should live as a female in every way.

J’Noel did just that. She petitioned for, and received, a new birth certificate from the state determining her sex to be female. She also met a man named Marshall, with whom she was sexually active. After informing him of her history as a man, the two became serious, and Marshall proposed. They were wed soon after under state law.

Sadly, Marshall died only a year later, and J’Noel’s legal problems started soon afterward. Marshall died intestate, and, being his wife, J’Noel expects to receive a share of his estate. Unfortunately, however, Marshall also had a son who had been estranged from his father for some years. This son has petitioned the court to be regarded as the sole heir of Marshall, the father he had not spoken to in years, on the grounds that his father’s marriage with J’Noel was invalid. Marshall’s son argues that J’Noel, a female according to the medical profession, the state, and, most importantly, Marshall, is really a male, and therefore the marriage was an invalid homosexual union. How should the court resolve this issue?

The above facts are based on an actual situation presented in In re Estate of Gardiner, a Kansas Supreme Court case decided in 2002. The circumstances involved in Gardiner were not isolated. In fact, many Americans experience intersexual conditions like J’Noel’s. While the percentage of individuals affected with gender identity disorder and the number who have undergone sex reassignment procedures is difficult to obtain, as many such individuals prefer to remain unknown, according to one article, approximately 6000 people had undergone sex reassignment surgery in the United States by 1983. Another article reported that “[r]ecent medical literature indicates that approximately one to four percent of the world’s population may be intersexed and have either ambiguous or noncongruent sex features.” It has been estimated that “the

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2. 42 P.3d 120 (Kan. 2002).
3. See discussion infra Part I.A for an explanation of intersexual conditions including gender identity disorder.
manner in which the law defines 'male', 'female', and 'sex' will have a profound impact on at least 2.7 million persons in the United States.6

Given the frequency of sex reassignment surgeries in America today, transsexuals are increasingly looking to the courts to provide a solution to their problems. The courts are therefore faced with a reoccurring question: What is the sex of a post-operative transsexual for the purpose of marriage? Because most American states define marriage as between only a "man" and a "woman," is a marriage like J'Noel's valid? What sex is she? Without legislative help to answer these questions, courts have come up with their own tests to resolve the disputes brought before them. To define sex, some courts have focused purely on the chromosomal makeup of the transsexual marriage partner at birth.7 In other words, because J'Noel was born with male chromosomes, a penis and other physical male characteristics, she is male and always will be. Other courts have instead looked to science to develop a modern definition of sex based on many factors, including sexual identity, sex hormones, internal genitalia, and others. These contradictory conclusions have led to confusion and uncertainty in this area of law.

Interestingly, the two approaches the courts are taking in the "definition of sex" area of the law reflects a debate often used in legal scholarship, the rules versus standards debate. Legal scholarship throughout the ages has asked how the choice of the form of a law will affect the law in other, sometimes unintended, ways. The two forms, rules and standards, exist at opposite ends of a form continuum. On the one hand, bright-line rules offer a set law that is to be applied mechanically upon the occurrence of predetermined facts. For example, once a person has both an X-chromosome and a Y-chromosome, he is a male, end of story. A standard, on the other hand, allows for more discretion on the part of the decision-maker to apply context specific facts to a general legal policy. Standards take many forms, including general policy guidelines and/or directives to consider certain factors when determining what the law should be. Courts choosing a standard in the sex-definition area, for example, have determined sex based on a number of factors, including gender identity, chromosomes, and sex assignment.

Given the increasing frequency of these types of cases reaching the legal arena, it is important for courts to have the tools to adjudicate the disputes efficiently, uniformly and in a way that promotes stability and societal values. In this Note, I propose such a tool. More specifically, I

6. Id.

7. Other courts have used similarly rigid tests, relying instead on other factors such as external genitalia. This Note will refer to all these rigid tests as "chromosome tests" for simplicity.
will use the rules versus standards literature to aid in my analysis of what
the proper decision-making strategy of the courts should be. First, Part I
will highlight the current scientific understanding of gender identity dis-
order and the legal status of the transsexuals who suffer from it. In order
to understand the legal context of the debate, Part II will provide an
overview of the case law attempting to define sex for the purpose of
transsexual marriage. Part III goes on to offer a general description of
the rules versus standards debate and will also highlight some of the
theories that have been offered to explain the choice between a rule and
a standard. Part IV will pull out of the case law what general policies and
concerns the courts were attempting to further in choosing a definition of
sex. Part V will use the rules versus standards debate to discern whether
the two forms the courts have chosen do in fact further these policies.
Lastly, in Part VI, I propose that the proper form for a court to use to de-
fine sex is in fact a rule/standard hybrid. Based on current legal, social
and scientific policies, a standard should be utilized that allows a court to
define sex according to many factors, including genital, chromosomal,
and gender identity. However, in order to allow actors within society to
form relationships that they can expect the law to recognize, a more con-
crete rule is required. To that end, this paper proposes that a rebuttable
presumption be used in addition to the multi-factored standard. This au-
thor suggests as a possible presumption that when a transsexual under-
goes sex reassignment surgery after receiving a doctor’s opinion that his
gender identity is incongruent with his physical sex, the court will pre-
sume, absent contradictory evidence, that the person’s legal sex is that of
his congruent sex.

I. THE EXTERNAL CONTEXT OF THE DEBATE

A. DEFINING SEX: THE NEW SCIENTIFIC UNDERSTANDING

Transsexualism is recognized by science as a medical condition re-
quiring treatment for relief. The Diagnostic and Statistical Manual clas-
sifies transsexualism as “gender identity disorder,” which occurs when
there is “a strong and persistent cross-gender identification” and
“[p]ersistent discomfort about one’s assigned sex or a sense of inappro-
priateness in the gender role of that sex.” Medical science has recog-

9. Id.
nized that "many factors contribute to the determination of an individual's sex" including:

1. Genetic or chromosomal sex—XY or XX;
2. Gonadal sex—testes or ovaries;
3. Internal morphologic sex—seminal vesicles/prostrate or vagina/uterus/fallopian tubes;
4. External morphologic sex—penis/scrotum or clitoris/labia;
5. Hormonal sex—androgens or estrogens;

10. Greenberg, supra note 5, at 278. I will call this definition of sex the "multi-factored approach."

11. The list of factors is drawn from Greenberg, supra 5, at 278. The following footnotes will provide brief descriptions of these factors. For a more thorough explanation of the sexual elements of the body and abnormalities that occur within these characteristics, see John Money, Sex Errors of the Body and Related Syndromes (1994).

12. Traditionally, males and females differ in respect to only one pair of the twenty-three chromosome pairs that make up the nucleus of the human cell. Black's Medical Dictionary 489 (39th ed. 1999). In the female nucleus, there are two X-chromosomes, while the male nucleus contains both an X-chromosome and a Y-chromosome. Id. While this may be the "traditional" chromosome structure, in reality, abnormalities occur more often than one would think. According to Black's Medical Dictionary, "[about one in two hundred live-born babies has an abnormality of development caused by a chromosome and two-thirds of these involve the sex chromosomes."

13. The "gonad" is a gland that produces either an ovary or a testes. Id. at 231. The gonad, which appears in the fourth week of gestation, is originally "indifferent" in terms of specific sex. Id. In the presence of a Y-chromosome, however, the gonad develops into a testes, giving the fetus a "male" gonadal sex. Id. This "gonadal differentiation" is considered the first stage of sexual development. Id. The testes, which will descend into the scrotum as "testicles" before birth, is the organ that produces the spermatozoa and the hormone testosterone (which is responsible for the development of the male characteristics). Id. at 542. The ovaries produce the ova (egg cells) and certain hormones required for menstruation. Id. at 403.

14. Considered the second stage of sexual development, the growth of internal genitalia occurs after the development of the gonads. Id. at 231. Once the testes is formed, an "inducer" is produced, which stimulates the development of the internal male organs, and suppresses that of the female internal organs. Id. Without the presence of the testes, the female organs will develop automatically. Id. Fallopian tubes conduct the ova from the ovaries to the interior of the womb. Id. at 190. The uterus is an organ "where the fertilized ovum (egg) normally becomes embedded and in which the embryo and fetus develop." Id. at 573 (emphasis omitted). The vagina is the lower part of the female reproductive tract through which the baby is delivered and through which sperm must travel to fertilize the ovum. Id. at 577.

15. Traditionally referred to as the "genitalia," the external genital differentiation is the third stage of sexual development. Id. at 231. It is again the androgens produced by the testes which stimulates the development of external male organs, and suppresses the development of female organs. Id. The penis is the male sexual organ that carries urine from the bladder and semen from the scrotum. Id. at 418. The scrotum is the pouch of skin that carries the testicles. Id. at 485. The clitoris is the female erectile organ which may be the focus of orgasm. Id. at 108. The labia are the folds of skin that surround the entrance to the vagina. Id. at 303.
(6) Phenotypic sex—facial and chest hair or breasts;\(^{17}\)

(7) Assigned sex and gender of rearing;\(^{18}\) and

(8) Sexual identity.\(^{19}\)

Gender identity disorder is a condition where people “may be seemingly harmonious in all of the first six factors, but do not identify themselves with the sex associated with these factors.”\(^{20}\) In other words, the transsexual’s “biological sex,” consisting of the first six factors, does not conform to his or her “self-identified sex,” or the eighth factor.\(^{21}\) This is a form of intersexuality, which exists when either “(1) [there is a] failure to meet the typical criteria within any one factor; or (2) one or more factors [are] incongruent with the other factors.”\(^{22}\)

Although science has not yet definitively isolated a biological “common denominator” that causes transsexualism,\(^{23}\) research into a link between the brain and gender identity “is providing new data at perhaps geometrical rates.”\(^{24}\) An example is a case study performed by Milton Diamond and H. Keith Sigmundson, published in 1997, on an adult X

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16. Hormones are “chemical messengers” that produce effects in various parts of the body. \(ld.\) at 256. “Androgen” is the general term for a group of hormones, including testosterone, that govern the development of male sexual organs and male secondary sexual characteristics. \(ld.\) at 28. Estrogens are hormones that are responsible for the readiness of the uterus for menstruation and the development of female secondary sexual characteristics. \(ld.\) at 395. Once the levels of androgens or estrogens increase to adult levels, the male or female reaches “puberty,” or the fourth and final stage of sexual development. \(ld.\) at 231.

17. A person’s phenotype is the characteristics that develop as a result of the interaction between the person’s genotype (all of her genetic information encoded in her chromosomes) and the environment. \(ld.\) at 225, 425. The phenotypic sex, therefore, is a general term encompassing the secondary sexual characteristics that result from a sex-specific genetic structure. See \(ld.\) at 425. The secondary sexual characteristics are physical characteristics, such as breasts, pubic hair, facial hair and voice changes, that develop during puberty. \(ld.\) at 486.

18. “Assigned sex” is a term of art in the medical community referring to the sex in which a child’s community has decided to rear him or her. \(Money,\) supra note 11, at 65. Because in some children the many different variables of sex often cannot be classified as all “male” or all “female,” society chooses to rear these children in one or the other sex. \(Id.\) Sex assignment “is the product of a public announcement, an official act through the signing of the birth certificate, and a reiterative routine in all the daily acts of rearing that defines and stereotypes masculine and feminine roles and expectations.” \(Id.\)

19. Sexual identity, also called gender identity, is another term of art referring to the psychological sex of a person. It refers to the body image that one has and the sexual role within which one feels the most comfortable. While most people’s body image is consistent with their other characteristics, this is not the case with transsexuals. See \(ld.\) at 85.

20. Greenberg, supra note 5, at 289 (footnote omitted).

21. \(ld.\) at 267.

22. \(ld.\) at 281.

23. \(ld.\) at 289.

male, John (Joan when living as female) who as a child had experienced a traumatic loss of his penis at eight months.\textsuperscript{25} Scientists at the time, believing that gender was a product of assigned sex and gender rearing (factor seven above) recommended and performed sex reassignment surgery on the infant.\textsuperscript{26} According to the authors, John never accepted his assigned female sex.\textsuperscript{27} As a child, he preferred “boy” toys, played only with his male peers, occasionally urinated standing up, and mimicked his father’s behavior rather than his mother’s.\textsuperscript{28} By fourteen, John confessed to doctors his suspicion that he was really a male, and, after consultation, sex reassignment surgery was deemed necessary and was in fact performed.\textsuperscript{29} John was eventually accepted by his peers as a male, and is now married and raising children with his wife.\textsuperscript{30} The core finding from this study is that in John’s case, anatomical sex was changed by hormones and surgery, but his sexual identity remained fixed.\textsuperscript{31}

Studies such as Diamond and Sigmundson’s on intersexual conditions have led many in the medical community to believe that “the brain ‘differentiates’ \textit{in utero} to one gender or the other and that, once the child’s brain has differentiated, that child cannot be made into a person of the other gender simply through surgical alterations.”\textsuperscript{32} As early as 1997, some scientists were reporting their beliefs that this differentiation occurs due to “intrauterine androgen exposure,” or hormone levels in the womb.\textsuperscript{33} This hormonal exposure may “lead to the misassignment or reassignment of sex at birth from the genetic sex.”\textsuperscript{34} This supports the theory that it is the brain, affected by different hormonal levels, that determines sexual identity, and not one’s external genitalia.\textsuperscript{35} One study published in 2000 researched neuronal sex differences in the brain and found that “in transsexuals sexual differentiation of the brain and genitals may go into opposite directions and point to a neurobiological basis of gender identity disorder.”\textsuperscript{36} The study found that transsexuals exhib-
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panied neuronal qualities in one section of the brain opposite that of their physical sex. These "neuronal differences" were found not to be "the result of changes of sex hormone levels in adulthood," but were instead "likely to have been established earlier during development." The above research furnishes "overwhelming" evidence that "humans are not psychosexually neutral at birth but are . . . predisposed and biased to interact with environmental, familial, and social forces in either a male or female mode." As one court has expressed, "[t]he ultimate conclusion of such studies . . . is that the preeminent factor in determining gender is the individual's own sexual identity as it has developed in the brain." In other words, while physical sex may be changed, sexual identity, established most likely by the brain and not by chromosomes, is immutable.

B. THE LEGAL STATUS OF TRANSSEXUALS TODAY

The legal status of transsexuals in the United States and abroad is in a state of flux. A transsexual diagnosed with gender identity disorder may obtain sex reassignment surgery in all fifty states today. All states but three—Idaho, Tennessee, and Ohio—allow transsexuals to change their sex on their birth certificates. Despite the fact that most jurisdictions support gender transition, most states do not give transsexuals full rights according to their reassigned sex, including the right to marry.

Transsexuals are therefore forced into a "no man's land," where medicine and social policy has accepted their psychological sex, yet the law refuses to allow them to order their lives accordingly. Two scholars have noted that

[t]o allow the operation in the first place, but then to deny it full legal efficacy cannot, after all, be in anyone's interest: that of the subject, that of the persons with whom he or she interacts, or that of the public at large. In other words, it cannot be within that somewhat nebulous concept, the public interest, to deny full legal effect to reassignment.

37. Id.
38. Id. at 2039.
41. See Milton Diamond, Sex and Gender are Different: Sexual Identity and Gender Identity are Different, 7 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 320, 325 (2002).
44. See Greenberg, supra note 5, at 298-99.
The effect of this contradiction cannot be overstated. For many, this state of sexual limbo results in the denial of the right to marry, sex discrimination in employment without equal protection, removal from athletic events, changes in military obligations and rights, and the emergence of liability for criminal sexual offenses.\(^{46}\)

Outside the United States, the legal status of post-operative transsexuals is moving towards the ability to marry. The European Court of Human Rights has noted that according to one study, "over the previous decade there had been an unmistakable trend in the member states of the Council of Europe towards giving full legal recognition to gender reassignment."\(^{47}\) The court also reported that twenty European countries, Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey, and Ukraine, permit a post-operative transsexual to marry a person of their now-opposite sex.\(^{48}\) In fact, the European Court of Human Rights in the 2002 case of Goodwin v. United Kingdom held that England's refusal to recognize the congruent sex of a post-operative transsexual for the purpose of marriage violated her personal rights found in Articles 8\(^{49}\) and 12\(^{50}\) of the Charter of Fundamental Rights of the European Union.\(^{51}\) The court came to this conclusion by deciding that while "[a] conflict between social reality and law" causes "feelings of vulnerability, humiliation and anxiety," there are "no significant factors of public interest to weigh against the interest of [a transsexual] in obtaining legal recognition of her gender reassignment."\(^{52}\) In other words, the court could find no support for the theory that chromosomes determine a person's sex, especially considering the science now available linking transsexualism and the brain, and the "wide international recognition [of transsexualism] as a medical condition for which treatment is provided in order to afford relief."\(^{53}\) The European legal recognition of the right of a transsexual to have his or her sex officially designated as his or her reassigned sex indicates that the current definition of sex is changing worldwide. The world community has reassessed its policies in light of the growing understanding of the transsexual experience.

\(^{46}\) See Greenberg, supra note 5, at 267 n.5.  
\(^{48}\) Id. at 467.  
\(^{49}\) "Everyone has the right to respect for his private... life." Id. at 468.  
\(^{50}\) "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Id. at 478  
\(^{51}\) Id. at 468, 478.  
\(^{52}\) Id. at 473, 452.  
\(^{53}\) Id. at 450.
II. MODERN LEGAL APPROACHES TO DETERMINING A TRANSSEXUAL'S SEX

We have so far looked into the political and scientific advancements that have changed the way the world views the sex of transsexuals. Within this context, a number of courts have been faced with the task of finding a legal definition of sex. Each court in turn has decided to adopt either a rigid test, such as the chromosome test, where a person's sex is determined by her chromosomes, or a multi-factored approach, where a number of factors may be considered to determine a person's sex under the circumstances. It is important to see what normative factors lead to this choice. By analyzing what the rationales were, one can determine whether these rationales actually support the courts' choice.

A. THE BEGINNING OF THE DEBATE

Courts first began to confront the question of how to define a transsexual's sex in the context of whether a person's sex could be changed on her birth certificate. Not surprisingly, early cases in this area tended to find that a person's sex is determined by the sex recorded on the birth certificate. A New York Supreme Court case decided in 1966, Anonymous v. Weiner, is considered the "first case in the United States to deal with transsexualism." In Weiner, a post-operative male-to-female transsexual was denied the ability to change her sex on her birth certificate because, according to the court, the sex designation was not an "error." The court deferred to the findings of the New York Board of Health, which had previously determined, relying on a New York Academy of Medicine study, that sex at birth was the correct sex. The court found that because "[t]he syndrome of transsexualism' involves 'a truly untrodden, controversial and largely unexplored field of medicine,'" it would not substitute its own ideas for that of the agency's specialized medical judgment.

Interestingly, multi-factored approaches can also be found in the early sex-definition cases. Just two years after Weiner, a New York City Civil Court decided the case of Matter of Anonymous, in which a post-

54. See discussion supra Part I.A for an example of the factors that may be considered in a multi-factored approach.
58. Id. at 321–23.
59. Id. at 320, 323 (quoting Harry Benjamin, Clinical Aspects of Transsexualism in the Male and Female, 18 AM. J. PSYCHOTHERAPY 458, 458 (1964)).
operative male-to-female transsexual sought to have his name changed to a female name. In deciding whether gender is always what society deems it to be at birth or whether it is what the individual claims it to be, the court noted that there are various intersexual conditions where society has been proven wrong about the “true gender” of an individual. After assessing the scientific evidence of these known conditions, the court concluded, “to say that the gender of an individual [is] that which society says it to be... would be to disregard the enlightenment of our times.” The court declined the opportunity to simply rely on old notions of how sex was defined by the courts in the past. Instead, it set forth a new test: “Where... with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status.” The support for the new test lay in the fact that older tests, in light of new scientific evidence, simply did not work to determine the correct sex for transsexuals. In an eloquent passage, the Matter of Anonymous court explained why it would not simply accept old notions of what sex meant:

Perhaps the easiest method of disposing of this application would be merely to deny the petition on the grounds that the instant relief prayed for has never before been granted by this or any other court of this State. To do so would, in effect, sweep the problem under the proverbial rug and defer the determination until some time “in futuro.”... [A]ny difficulty presented herein is not so much the nature of the problem itself, but in trying to apply... static rules of law to situations such as that presented herein, which perhaps merit new rules and/or progressive legislation.

Lastly, the court dismissed any argument that the new test would promote fraud. The court pointed out that the post-operative transsexual was “anatomically and psychologically a female in fact” and that any “so-called fraud... exists to a much greater extent” when a birth certificate continued to classify such individuals by their former gender. Matter of Anonymous shows that as early as 1968, the definition of sex in the law had begun to change from a rigid test to a more flexible approach.

61. Id. at 835.
62. Id. at 836–37.
63. Id. at 836–38.
64. Id. at 837.
65. Id.
66. Id. at 836.
67. Id. at 838.
68. Id.
A few years after Weiner, the English Probate, Divorce and Admiralty Division decided the case of Corbett v. Corbett, in which it rejected any attempt to define the sex of transsexuals as anything other than what their sex was determined to be at birth. Although the case is not an American decision, its effect on American transsexual case law was sweeping, with many courts citing the case, and even depending on it for foundation years later. In Corbett, a non-transsexual male, Arthur, sought to annul his fourteen day marriage to a post-operative male-to-female transsexual, Ashley, whom he dated for three years, because, he alleged, his wife was a man and because their marriage had never been consummated. To decide the issue of whether Ashley was a male or a female for the purpose of determining the validity of the marriage, the court heard a great deal of expert testimony. While the Corbett court recognized that science looked to psychological and hormonal factors as well as physical factors to assess one’s sex, it rejected the fact that these factors were used to “determine sex.” According to the court, these factors only helped to determine “the sex in which it is best for the individual to live” who is experiencing “sexual abnormalities.” The court thought that medical professionals only considered operation as a means of making a person happy when their psychological sex happened to be incongruent with their physical sex; therefore, any “operative intervention” should be ignored when defining a person’s sex. The court called any scientific evidence done to prove a brain correlation to transsexualism “purely hypothetical and speculative.”

After brushing science aside and determining that “the biological sexual constitution of an individual is fixed at birth...and cannot be changed,” the Corbett court, referring to the “heterosexual character” of marriage, rejected the argument that anything but “biology” should

70. Id. at 106.
71. See Katrina C. Rose, Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality, 70 UMKC L. REV. 257, 268 (2001) (calling the case a “monumental judgment” with influence that “cannot be understated”); see also In re Estate of Gardiner, 42 P.3d 120, 127–28, 133 (Kan. 2002).
73. Id. at 97–99.
74. Id.
75. Id. at 100 (basing this idea on the testimony of one expert medical witness, Professor C J Dewhurst, FRCSE, FRCOG, Professor of Obstetrics and Gynaecology at Queen Charlotte’s Hospital).
76. Id. at 106.
77. Id.
78. Id. at 104.
The court stated that because "even the most extreme degree of transsexualism in a . . . person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage," the criteria for determining sex must be biological. Undeniably then, the court based its decision to use only physical factors to determine sex on the idea that a male-to-female transsexual cannot ever fulfill a woman's role in marriage, to have children. The court did recognize that other areas of English law such as national insurance policy recognize a transsexual's reassigned sex. However, the court denied the applicability of this fact to the question before it, stating, somewhat cryptically, that, unlike these other areas, "[m]arriage is a relationship which depends on sex and not on gender."

Considering that this case is based on an outdated construct of marriage and over thirty-year-old inadequate scientific knowledge, it is unfathomable that any modern court would use this case as a basis for its decisions. Unfortunately, despite the fact that science now contradicts the court's analysis, no English courts have been willing to overrule the Corbett decision, "[foreclosing] any possibility of full recognition of gender transition in England . . . until Parliamentary action."

B. Legal Scholarship Resulting in a Multi-Factored Approach

The first major American court to adopt a multi-factored approach to defining sex was the Appellate Division of the Superior Court of New Jersey, in the often cited case of M. T. v. J. T. In this case, decided in 1976, a post-operative male-to-female transsexual sought support and maintenance from her non-transsexual male husband after their separation from their two-year marriage. The couple had lived together for seven years before marriage and had been together before and after the wife's operation, which was funded by the husband. The husband attempted to defend against her claim by raising the defense of a void marriage due to the wife's alleged "male" sex. The court first rejected the

79. Id. at 106.
80. Id.
81. Id. at 107.
82. Rose, supra note 71, at 267. At the time of publication of this Note, the English Parliament is considering the "gender recognition bill," which would give legal recognition of the "new gender" of a transsexual. The transsexual would have to show that they have "lived in their new gender for at least two years and that they intend to live that way until death." A Tweak in the Law for a Small But Vulnerable Minority, ECONOMIST, Nov. 15, 2003, at 54.
84. Id. at 205.
85. Id.
86. Id.
Corbett decision, stating that the evidence repudiated the notion that one's physical and psychological sexes were "disparate phenomena," and instead held that "a person's sex...embraces an individual's...deep psychological or emotional sense of sexual identity and character."87 The court placed emphasis on medical opinions which stated that gender identity was established firmly almost immediately after birth and that physical sex was just one of many factors which were "relevant to the determination of sex."88 The court therefore found that a person's sexual capacity "requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female."89 According to the court, the sexual nature of marriage was paramount, and it found that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."90

Along with the scientific foundation, the M.T. court emphasized its obligation to "promote the individual's quest for inner peace and personal happiness."91 Through science, the plaintiff had "become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy," and thus the court would accept her status as female.92 The court saw no "reason grounded in public policy to prevent the person's identification at least for purposes of marriage" to the post-operation sex.93 Implicitly, the court in M.T. rejected the Corbett view that marriage was based on procreation, and focused instead on the important role of sexuality in marriage. Because the transsexual could only fulfill this role in her postoperative sex, the court would recognize her as a female, allowing her to live "a 'fuller and richer life.'"94

In re Kevin,95 an Australian Family Court case decided in 2001, deserves attention as it was the first case to describe and rely upon modern scientific advancements in the understanding of "sex," and has therefore

87. Id. at 208--09.
88. Id. at 205, 207.
89. Id. at 209.
90. Id.
91. Id. at 211.
92. Id.
93. Id. at 210--11.
94. Id. at 206.
enjoyed deserved attention by United States decisions following it. In *In re Kevin*, Kevin, a female-to-male transsexual, and Jennifer, a non-transsexual female, sought a declaration by the Australian family court of the validity of their marriage. Kevin, who underwent all sex change procedures except the construction of a penis or testes, had already been issued a new birth certificate showing his sex to be male, and thereafter married Jennifer, who knew of his sex change procedure.

The court found that in past court decisions such as *Corbett*, “social and psychological” factors to determine sex “have simply been assumed to be irrelevant.” The court rejected that a woman’s “natural” role in marriage was to reproduce, noting this is the only reason to support the assertion that non-biological factors should have been excluded. In the absence of valid legal precedent, the court reviewed the rules of statutory construction, using the then-present legal environment, international case law, medical evidence and national policy to hold that

\[\text{to determine a person's sex for the purpose of the law of marriage, all relevant matters need to be considered ... [including] the person's biological, psychological, and physical characteristics at the time of marriage, including (if they can be identified) any biological features of the person's brain that are associated with a particular sex.}\]

The *In re Kevin* court found that the words “male” and “female” should be given their “ordinary contemporary meaning,” and not the “meaning they had at the time of the legislation.” The court noted that defining the terms using the latter would not work in many situations. For instance, “if the word 'vehicle' were found in legislation that pre-dated the motor car, it might nevertheless be sensible to interpret it as including a motor car.” Also, there was no evidence to show that the legislature, when it adopted the Australian marriage statute in 1961, would have had in mind a biology-only definition of sex. No evidence was put forth showing that the legislature considered transsexuals at all,

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96. It should be noted that because *In re Kevin* was decided in 2001, it was not available for consideration by the *Littleton* court. See discussion infra Part II.C.


98. *Id.* at 3.

99. *Id.* at 25.

100. *Id.* 26–27.

101. *Id.* at 86.

102. *Id.* at 5–6, 35, 37.

103. *Id.* at 35.

104. *Id.*
or that a "traditional" definition of sex would have included only biological factors.\textsuperscript{105}

The court next reviewed the legal and social policy environment finding support therein for a contemporary definition of sex that was not biological factor exclusive.\textsuperscript{106} The court noted that Australian initiatives recognizing a change of sex in criminal and discrimination law, as well as in the law of sex on passports and birth documents, "support the view that there is no insuperable objection to the law recognizing the changed sex of a person who has undergone a sex reassignment procedure."\textsuperscript{107} The court also noted that internationally, "the overall trend, reflected in judicial decisions and other legal and administrative arrangements, is toward increased understanding of transsexuals...reflected in a general tendency to accept that for legal purposes, including marriage, post-operative transsexuals should be treated as members of the sex to which they have been assigned."\textsuperscript{108} Further there are important policy reasons for recognizing the reassigned sex of post-operative transsexuals, including "[respecting] the rights of the individual concerned [by] avoiding further suffering, [marking] acceptance of people who are different,... [assisting] the individuals to integrate into society...[and providing] a convenient and workable line to draw for the law."\textsuperscript{109}

Lastly, the court devoted much time to exploring current medical developments in the understanding of transsexualism.\textsuperscript{110} While the court acknowledged that there was "still doubt" about the reasons for transsexualism, it found that the evidence demonstrated that psychological factors were as much biological as genital, chromosomal and gonadal factors.\textsuperscript{111} The court stated that "[t]he difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally 'biological' characteristics of the brain that are present in transsexuals."\textsuperscript{112} After reviewing much of the scientific evidence noted above,\textsuperscript{113} the court found that

It is obvious that current medical theory and practice is to support [transsexuals] in assigning, or re-assigning their sex in accordance with

\begin{itemize}
  \item[105.] The court pointed out that the discovery of chromosomes did not occur until the 1950s, making their inclusion into the "traditional" definition of sex illogical. \textit{Id.} at 36.
  \item[106.] \textit{Id.} at 71.
  \item[107.] \textit{Id.} at 46.
  \item[108.] \textit{Id.} at 56.
  \item[109.] \textit{Id.} at 84.
  \item[110.] \textit{Id.} at 71–72.
  \item[111.] \textit{Id.} at 71.
  \item[112.] \textit{Id.}
  \item[113.] \textit{See} discussion \textit{supra} Part I.A.
\end{itemize}
their deeply-felt sense of themselves as men or women. . . . [I]f the law were to insist on Kevin being treated as a woman, it would be contrary to the most informed and authoritative medical practice.\textsuperscript{114}

The \textit{In re Kevin} court concluded that "a woman or a female, as those terms are generally understood in Australia today, includes a person who, following surgery, has harmonized psychological and anatomical sex."\textsuperscript{115} The court would determine sex using a case-by-case analysis considering matters such as biological, social, psychological, hormonal, surgical and physical characteristics at the time of marriage and before.\textsuperscript{116} It noted, however, that "[i]t is clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex."\textsuperscript{117}

In the years following \textit{M.T.} and \textit{Corbett}, legal scholars began to participate in the transsexual marriage debate. This scholarship provided a vital link between courts and science, and gave judges valuable tools to bring the law in line with the reality of the transsexual experience. Although there were many such articles written before 1999 that courts may have utilized, this Note will focus on one, a symposium article published in the Arizona Law Review by Julie A. Greenberg.\textsuperscript{118} Greenberg's article, titled \textit{Defining Male and Female: Intersexuality and the Collision Between Law and Biology}, represents one of the most influential articles to synthesize scientific research, legal scholarship, and case law on the issue of the definition of sex in the law. Many prominent cases have cited Greenberg's article for its medical and scientific information\textsuperscript{119} and legal conclusions.\textsuperscript{120} One court, which ultimately adopted a multi-factored definition of sex, quoted fourteen full pages of the article, using it as one of its primary sources of "medical and scientific information."\textsuperscript{121} According to LEXIS/NEXIS, the Greenberg article has also been cited by researchers in thirty-six articles since its publication.\textsuperscript{122}

\textsuperscript{115}. Id. at 43 (quoting Sec'y of Dep't of Soc. Sec. v. SRA (1993) 118 ACR 467).
\textsuperscript{116}. Id. at 86.
\textsuperscript{117}. Id.
\textsuperscript{118}. Greenberg, supra note 5.
\textsuperscript{120}. See Heilig, 816 A.2d at 72 (citing the theory that "sex/gender is not, in all instances, a binary concept—all male or all female").
\textsuperscript{121}. Gardiner, 22 P.3d at 1093–1100.
\textsuperscript{122}. This number derived from a LEXIS/NEXIS search conducted in 2003.
In her article, Greenberg first showed that the binary concept of sex (the theory that people are either one sex or another) is outdated and incorrect.\textsuperscript{123} Implicit in legislation utilizing the terms "sex" and "gender" are the assumptions that only two biological sexes exist and that all people fit neatly into the category male or female. In other words, despite medical and anthropological studies to the contrary, the law presupposes a binary sex and gender model. The law ignores the millions of people who are intersexed. A binary sex paradigm does not reflect reality. Instead, sex and gender range across a spectrum. Male and female occupy the two ends of the poles, and a number of intersexed conditions exist between the two poles.\textsuperscript{124}

Greenberg reported that "[m]illions of individuals are intersexed and have some sexual characteristics that are typically associated with males and some sexual characteristics that are typically associated with females."\textsuperscript{125} She noted that scientists now consider transsexualism, where a person’s sexual identity does not conform to her "biological sex," a form of intersexuality.\textsuperscript{126} She argued that the law, by using a binary system of sex, ignores the reality that one’s biological sex is not a simple indicator of one’s "true sex" for all humans.\textsuperscript{127} Furthermore, Greenberg reported that scientific developments showed a link between gender identity disorder and the brain and demonstrated that one’s sexual identity may be immutable.\textsuperscript{128} Greenberg concluded that "[t]he law should not continue to force intersexuals farther into the deepest recesses of their closet by failing to acknowledge their existence and their self-identity."\textsuperscript{129}

One of the first United States cases to cite Greenberg for her scientific and legal findings was \textit{In re Estate of Gardiner}, which was previously discussed in the Introduction.\textsuperscript{130} This case, decided in 2001 by the Kansas Court of Appeals, ultimately adopted a multi-factored approach for defining sex. When \textit{Gardiner} was decided, many scholars praised the decision as "of major significance to transsexuals," being the first major case since \textit{M.T.} in 1976 to utilize a modern approach to sex determination.\textsuperscript{131} Sadly, as explained below, this case would have no lasting effect, as it was overturned on appeal by the Kansas Supreme Court.\textsuperscript{132}

\begin{itemize}
  \item[123.] Greenberg, \textit{supra} note 5, at 275.
  \item[124.] \textit{Id}.
  \item[125.] \textit{Id}.
  \item[126.] \textit{Id.} at 267.
  \item[127.] \textit{Id}. at 275.
  \item[128.] \textit{Id}. at 271, n.25.
  \item[129.] \textit{Id}. at 327.
  \item[130.] 22 P.3d 1086, \textit{rev’d}, 42 P.3d 120 (Kan. 2002).
  \item[131.] Rose, \textit{supra} note 71, at 261.
  \item[132.] 42 P.3d 120, 136–37 (Kan. 2002).
\end{itemize}
As discussed in the Introduction, Gardiner involved the 1998 marriage of a post-operative male-to-female transsexual, J’Noel, to her husband Marshall Gardiner, who was aware of J’Noel’s gender history. J’Noel successfully petitioned to have her sex changed to “female” on her Wisconsin birth certificate in 1994, and was considered by her doctors at the time to be a “fully . . . functioning, anatomical female.” Marshall Gardiner died intestate in 1999 after one year of marriage. Marshall’s son Joe petitioned to be named Marshall’s sole heir, claiming that the marriage between his father and J’Noel was void as between two men.

The court of appeals first explained why it would ultimately decide to veer away from a chromosome test by pointing out that the understanding of transsexualism had changed too much to adhere to a rigid “biological sex” framework:

Some cases lend themselves to precise definitions, categories, and classifications. On occasion, issues or individuals come before a court which do not fit into a bilateral set of classifications. . . . “It is not the courts that have engendered the diverse composition of today’s families. It is the advancement of reproductive technologies and society’s recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle.”

To help determine the definition of sex in the state’s statute, the court first looked to legislative history, finding that “nowhere is there any testimony that specifically states that marriage should be prohibited by two parties if one is a post-operative male-to-female or female-to-male transsexual.” The court then determined that the question was one of interpretation and looked to science, noting that “we know more and more every year about this complex issue. . . . This case has the benefit of some research which preceding cases on this issue did not.” The court discussed in detail the medical evidence available before it, including studies showing a connection between transsexualism and the brain. The court cited various scientific evidence showing that there was a “neurological basis of gender identity disorder,” and reviewed the medical evidence of intersexuals who “fall outside of the normal male

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133. Gardiner, 22 P.3d at 1091–92.
134. Id. at 1092.
135. Id. at 1090.
136. Id.
137. Id. (quoting In re B.L.V.B., 628 A.2d 1271 (Vt. 1993)).
138. Id. at 1093.
139. Id.
140. Id. at 1093–94.
141. Id. at 1093 (quoting Kruijver et al., supra note 36, at 2034).
chromosomes and genital pattern." The court concluded that due to this new scientific awareness of the causes of transsexualism, "the legal community must question its long-held assumptions about the legal definitions of sex, gender, male, and female." 

The Gardiner court next reviewed case law, in particular, *M. T.* and *Littleton*, a Texas case discussed below, and ultimately found that, in light of the current medical evidence, *M. T.*'s multi-factored approach was the more sound test. The court rejected the use of the chromosome test "as a rigid and simplistic approach to issues that are far more complex than addressed in the *Littleton* opinion." Conversely, the court cited the *M. T.* decision with favor, noting its replacement of "the biological sex test with dual tests of anatomy and gender." Finally, the court concluded that a court must consider what the person's sex was at the time of marriage, not simply what the person's chromosomes were at birth. Sex would be determined by considering what the court called the "Greenberg factors," including, "chromosome makeup,... gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity." The court of appeals further cautioned that this list was not exhaustive, and that other criteria should be considered "as science advances."

C. Legal Scholarship Resulting in a Narrow Chromosome Test

When confronted with the issue of defining sex in the context of transsexual marriage, two often-cited modern cases settled on a rigid chromosome test. These cases are *Littleton v. Prange*, decided in 1999 by the Texas Court of Appeals, and the Kansas Supreme Court's 2002 decision in *Estate of Gardiner*.

In *Littleton*, a post-operative male-to-female transsexual, Christie, brought a medical malpractice suit against a doctor for the wrongful death of her husband, who knew of Christie's sex change. The doctor in

142. *Id.* at 1094–1100. As noted above, the court of appeals in *Gardiner* quoted fourteen full pages of the Greenberg article, using it to discuss intersexed conditions and the eight factors that are used to determine sex. See Greenberg, *supra* note 5, at 278–92; see also discussion *supra* Part I.A for the science available to the court.
143. *Id.* at 1100 (quoting Greenberg, *supra* note 5, at 292).
144. *Id.* at 1102, 1103, 1105–06.
145. *Id.* at 1110.
146. *Id.* at 1103, 1110.
147. *Id.* at 1110.
148. *Id.*
149. *Id.*
150. 9 S.W.3d 223 (Tex. App. 1999).
151. 42 P.3d 120, 135–36 (Kan. 2002).
152. 9 S.W.3d at 224–25.
his defense argued that the marriage was void as between two men, and therefore Christie had no claim.  

Surprisingly, despite all of the scientific and legal advances before it for consideration, the court based its decision on legislative intent and "divine will." The court argued that if the legislature wanted to allow transsexuals to marry persons of their now opposite sex, they would have articulated that specifically. Even if this was not the case, it was clear to the court that any changes made to the transsexual by reassignment were "man-made," but at the core, sex is "immutably fixed by our creator at birth." Using this religious dogma, the Littleton court brushed aside the modem advances in law and science and blindly accepted the genital, gonadal and chromosomal tests, conveniently stating that defining Christie's sex was not within the judiciary's "authority."

The court in Littleton made a feeble effort to address the scientific advances with which it was faced in making its decision. First, the court rejected any argument that science might now consider a post-operative transsexual to be of her reassigned sex. The court called these "metaphysical arguments" involving "matters of the heart... beyond this court's consideration." In other words, the court did not address the scientific advances at all, but instead classified these arguments as "sociological philosophy... involving desire and being, the essence of life and the power of mind over physics." It is reprehensible that a modern court was able to dismiss science as, in essence, opinions no more worthy than the mumblings of opinionated laymen. The Littleton court chose not to address the studies referred to in the Greenberg article, or to recognize the opinions of physicians who testified at Christie's trial that medically, she was a woman.

The court avoided any further discussion of the definition of sex by claiming that the issue was one of "first impression" regarding Texas state law, and by ultimately deferring to the legislature. This argument is ineffective as it ignores the fact that cases adopting a multi-factored

153. Id. at 225.
154. Id. at 224, 230.
155. Id. at 230.
156. Id. at 224, 231.
157. Id. at 230.
158. Id. at 231.
159. Id.
160. Id.
161. The Greenberg article, supra note 5, was certainly before the court for consideration, as pointed out by Justice Angelini in her concurrence in Littleton, 9 S.W.3d at 232.
162. Id. at 225.
163. Id. at 230.
test were also interpreting state law. Contrary to the Littleton court’s opinion, those cases found it necessary to decide the issue of how to define a person’s sex in light of modern advances and in light of the fact that the legislature had not considered the issue, and thus had not foreclosed it.\(^6\) Although the court in Littleton recognized the deep emotional effects of transsexualism\(^6\) and made no argument that the legislature meant to foreclose a transsexual’s ability to marry, the court refused to factor this into its analysis. The Littleton court also failed to address (or even mention) the scientific fact that something other than physical anatomy, i.e. gender identity, may be more appropriate to define sex for transsexuals.\(^6\)

The failure of the court in Littleton to use or address any of these scientific and legal tools in support of its finding makes the opinion rest on shaky ground. No court can cite the opinion as support for anything other than its emphatic belief that sex is a partly religious construct, immutable after birth. Its finding that the legislature alone must address the issue is flawed as it is based on an inapplicable legal proposition that a court cannot “make law when no law exists.”\(^6\) In Littleton, law surely did exist that allowed only marriages between one man and one woman.\(^6\) The courts are required to interpret the meaning of the terms “man” and “woman” used in the statute, a responsibility of all judicial authorities, recognized by the court in Littleton itself, but definitely ignored.\(^6\)

The other major U.S. case to adopt a chromosome test was In re Estate of Gardiner,\(^7\) a case in which the Kansas Supreme Court overturned the decision of the Court of Appeals to use a multi-factored approach. The Supreme Court in Gardiner mentioned, but did not examine, many of the arguments for developing a new test of sex partly by quoting a large portion of the Court of Appeals’ opinion.\(^7\) The court briefly noted Greenberg’s analysis that “sexual identification is not simply a matter of anatomy, as demonstrated by a number of intersex conditions,” but did not discuss any of the scientific studies and developments that the Court

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\(^6\) The court does this implicitly when it refers to the issue as involving “matters of the heart” and “desire and being, the essence of life and the power of mind over physics.” Littleton, 9 S.W.3d at 231.
\(^6\) See M.T., 355 A.2d at 209.
\(^6\) Littleton, 9 S.W.3d at 230.
\(^6\) Littleton, 9 S.W.3d at 230.
\(^7\) In re Estate of Gardiner, 42 P.3d 120, 135–36 (Kan. 2002).
\(^7\) Id. at 126–31.
of Appeals specifically reviewed.\textsuperscript{172} As the Littleton court did, the Supreme Court in Gardiner attempted to remain sympathetic, recognizing "that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal."\textsuperscript{173} However, the court refused to address any of the implications of these facts, declaring that "the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court."\textsuperscript{174} The Gardiner court ignored the argument put forth by the court in M.T., that it had an obligation to allow transsexuals to live a full life when no public policy is harmed.\textsuperscript{175} The Gardiner court also, by referring to the definition of sex as simply a matter of "public policy," implicitly placed medical developments in the understanding of intersexual conditions in the realm of "sociological philosophy," much as the Littleton court did.\textsuperscript{176} The Gardiner court clearly stated the facts of and tests developed by M.T.;\textsuperscript{177} the Court of Appeals in Gardiner,\textsuperscript{178} and In re Kevin.\textsuperscript{179} Conveniently, however, the court avoided countering any of these arguments, relying in the end on a questionable interpretation of legislative intent.

The Supreme Court in Gardiner held that the legislature intended to preclude transsexuals from marrying members of their reassigned sex.\textsuperscript{180} To support this theory, the court relied on legislative history and "common meaning." First, the court stated that Senate Committee legislative history revealed an explicit intent to "affirm the traditional view of marriage" by limiting marriage to two parties of the opposite sex and declaring that "all other marriages are against public policy and void."\textsuperscript{181} Although the court acknowledged that the legislature did not consider a transsexual's ability to marry, it viewed "the legislative silence to indicate that transsexuals are not included."\textsuperscript{182} If the legislature intended to include transsexuals, it could have done so.\textsuperscript{183} The court interpreted this

\begin{itemize}
  \item \textsuperscript{172} \textit{Id.} at 132. For a review of the Greenberg analysis, see discussion \textit{supra} Part II.B. See also \textit{supra} notes 130-149 and accompanying text for the \textit{Gardiner} Court of Appeals' scientific analysis.
  \item \textsuperscript{173} \textit{Id.} at 137.
  \item \textsuperscript{174} \textit{Id.}
  \item \textsuperscript{175} \textit{Id.} at 124; \textit{M.T.}, 355 A.2d at 210-11.
  \item \textsuperscript{176} See \textit{supra} notes 158-160 and accompanying text.
  \item \textsuperscript{177} \textit{Gardiner}, 42 P.3d at 128-29. The court reviewed the facts of the \textit{M.T.} case, and stated its test that sex is determined by the congruence of anatomical and psychological sex.
  \item \textsuperscript{178} \textit{Id.} at 133.
  \item \textsuperscript{179} \textit{Id.} at 133-34. Here again, the court stated the facts of the \textit{Kevin} case and its resulting test that "the law should treat post-operative transsexuals as members of their reassigned sex." \textit{Id.} at 134.
  \item \textsuperscript{180} \textit{Id.} at 135-36.
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{Id.}
\end{itemize}
evidence to mean that "the legislature clearly viewed 'opposite sex' in the narrow traditional sense" which, in its opinion, did not include transsexuals.  

The *Gardiner* court's legislative history interpretation lacks merit for a number of reasons. First, the court did not explain why "the narrow traditional sense" of opposite sex did not include transsexuals. In fact, it did not mention the arguments of either the *Kevin* court or the Court of Appeals in *Gardiner*, which explicitly rejected this argument. Most importantly, the Supreme Court in *Gardiner* conspicuously ignored the Court of Appeals' finding that the purpose of the Kansas amendment restricting marriage to members of the opposite sex was to address the issue of homosexual marriage, not to attempt to define sex. Simply because the legislature "meant to void any marriage between members of the same sex," and referred to anything else as "contrary to the public policy" of Kansas, did not require the court to assume that post-operative transsexuals should not be considered members of their reassigned sex. The Kansas Supreme Court's "against public policy" argument is also undermined by the fact that transsexuals in Kansas may receive sex change operations and also, through an administrative process, amend their birth certificates in the event of sex reassignment. This indicates that it was the policy of the state to validate a transsexual's reassigned sex, but the court did not consider this argument.

Even if no legislative intent were found to define sex as excluding reassigned sex, the Supreme Court in *Gardiner* insisted that the common meaning of "sex," 'male,' and 'female' in everyday understanding [did] not encompass transsexuals" but instead "contemplate[d] a biological man and a biological woman." The Supreme Court decided that a male-to-female transsexual did not fit in the common definition of "female" because there was no ability to produce offspring, no womb, cervix or ovaries, or any change in chromosomes. The court found support for this "common definition" in law dictionaries and in the *Littleton* court's finding that all aspects of the reassigned sex in the transsexual are man-made. In light of the scientific evidence that sex may now be defined differently than it is in these dictionaries, as noted by the Court of Ap-

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184. *Id.*
187. *Id.* at 1093.
188. LAMBDA LEGAL, supra note 43.
189. *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).
190. *Id.*
191. *Id.*
peals, the Supreme Court's reliance on law dictionaries and its refusal to address the scientific developments is unjustifiable. Also, the Supreme Court's dependence on *Littleton* is unsound because *Littleton* made findings based on religious dogma and a shaky interpretation of legislative intent similar to the one presented in *Gardiner*. 192

III. **THE RULES v. STANDARDS DEBATE**

The above analysis of the case law reveals two main approaches that modern courts have used to define sex for the purpose of transsexual marriage. As we have seen, some courts chose to use a narrow chromosome test, while others adopted a more flexible multi-factored approach. After reviewing this case law, it is striking to see the similarities between these two tests and the two forms involved in the historical rules versus standards debate. Almost every area of the law has seen a scholarly debate over which form choice would best further the purposes of the law. Some of these areas include law and economics, 193 property, 194 child custody, 195 speech, 196 and voting rights, 197 just to name a few. 198 The sex definition courts have also unwittingly entered this debate. By choosing to use either a rule (sex = chromosomes) or a standard (sex = the result of multi-factored balancing), these courts are making a choice of form. To decide whether the rationales used in the transsexual marriage cases support these choices, we must consult the general rules versus standards debate.

A. **DEFINING RULES AND STANDARDS**

Before the theories behind form choice are presented, it is helpful to have a general knowledge of the distinction between rules and standards and the debate between the two. As explained above, rules and standards are simply two possible forms in which laws may be set. A rule attempts to set out a specific law that is to be applied mechanically in all situations. A standard, on the other hand, attempts to apply a general

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192. See *supra* notes 150–169 and accompanying text.
198. *Id.* at 74.
policy in each situation, giving the decision-maker greater discretion in deciding how the law should be applied in each case. Although the two forms are often referred to as mutually exclusive, in reality, legal commands often are a mix of both. 199

An example here is in order. Consider an attempt to set a voting age requirement. 200 Assume that the lawmaker is interested in ensuring that those voters who are mature enough to be able to make important and weighty decisions are allowed to vote. A rule setting the minimum voting age at eighteen will surely screen out some immature voters, and allow most of the mature voters the right to vote. However, such a generally applied rule is both over- and under-inclusive. This mechanically applied rule will also entitle immature voters over eighteen to vote, and screen out those under eighteen who are mature enough to participate. Another solution is to give the registrar the power to determine ability to vote, based on maturity, in each circumstance. This standard-based approach will produce better decisions because the registrar can tailor it to the circumstances of the particular case, thereby ensuring that the purposes of the rule are advanced in each case, not simply in the majority of them. However, the registrar in this standard may be tempted to use arbitrary or discriminatory practices in its decision-making. Such abuses will also create a danger that the purposes of the law will not be promoted.

Various authors have attempted to distinguish a rule from a standard. One author points to the fact that rules give content to the law before individuals act, whereas standards allow the law to be defined after action. 201 In the voting age example, the law sets out in advance what “maturity” is, it is reaching age eighteen. In order to vote, it is clear to everyone that they must first reach eighteen. A standard, on the other hand, does not tell the potential voter in advance exactly what is required of her. In fact, this will not be decided until the potential voter attempts to register to vote. Only then, after the potential voter has acted in what she hopes is a mature fashion, will the registrar determine whether she is indeed “mature” under the circumstances.

Another author, Pierre Schlag, explains the difference by pointing out that the two forms have different “triggers” and “responses.” 202 Every law identifies some action or inaction, the “trigger,” that results in some legal consequence, the “response.” 203 A pure rule has “a hard empirical

200. This example is derived from MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15 (1987).
201. Kaplow, supra note 199, at 560.
203. Id.
trigger and a hard determinate response." In other words, the trigger is objectively measurable, and carries a predetermined, set response. A standard, on the other hand, "has a soft evaluative trigger and a soft modulated response." Therefore the response depends on the court’s assessment of the trigger. The author cites a helpful example. A rule stating that "sounds above 70 decibels shall be punished by a ten dollar fine" has a measurable trigger, sounds over 70 decibels, and a set response, ten dollars. It is clear that when the sound rises above 70 decibels, there will be a ten dollar fine. A standard might instead state that "excessive loudness shall be enjoinable upon a showing of irreparable harm." Here, the determination of whether there has been a trigger, i.e. "excessive loudness" creating "irreparable harm" will decide if a response is appropriate.

B. CHOOSING BETWEEN THE TWO FORMS

Knowing now what "rules" and "standards" are, which form is more appropriate for a court to use to define sex? The literature debating the proper choice of form is complex and extensive. This historical debate has lead to the development of various methods by which a decision-maker might choose between the two forms. The following analysis will highlight some of the most prominent methods.

1. Virtues and Vices

Most commonly, the choice between a rule and a standard occurs by balancing the "virtues and vices" of each form. According to this method, "the choice between adopting a rule or a standard is a choice between competing virtues and vices that we typically associate either with rules or standards." This theory represents a circular debate between

204. Id. at 382.
205. Id. at 383.
206. Id.
207. Id.
208. Because of the extensive nature of this debate, it is beyond the scope of this Note to highlight and compare each theory regarding the choice of form. I chose various theories based on their applicability to the definition of sex issue and the interesting questions they raised within this issue. See the articles by Posner and Korobkin, supra note 193, for a different look into the economic efficiency and behavioral science perspectives of the debate.
209. Much of this section highlighting some of the theories behind the choice of form is developed based on the work of Pierre Schlag in his article, Rules and Standards, supra note 202. As I could not cite each time his research has lead to my discovery of the information contained in this section, I would like to acknowledge his general contribution hereto.
210. While each of these theories has been extensively debated and questioned, it is beyond the scope of this Note to outline the entire rules versus standards debate. For a thorough critique of many areas of the debate, see Schlag, supra note 202.
211. Schlag, supra note 202, at 383, 400-18.
212. Id. at 400.
flexibility and certainty, uniformity and individualization, and between various other competing values. Each of these qualities are considered valuable results from a choice of one of the forms. These values, however, are each associated with a vice. For example, flexibility may not be proper when there is great concern about the manipulation of the law, and uniformity is unwise when the law would be over- or under-inclusive. When choosing between a rule and a standard, legal scholars will often break down the choice to a normative decision about which "virtues and vices" are most appropriate for a given legal situation. In other words, what virtues best promote, and alternatively what vices most hinder, a law's given objectives?

The virtues and vices debate has, through time, developed common arguments about the values and faults of each form. On the one hand, rules promote certainty, uniformity, stability, finality, predictability and security. However, these virtues are associated with intransigence, regimentation, rigidity, and closure. Likewise although standards have certain virtues, including flexibility, individualization, open-endedness and dynamism, they also inevitably provoke concerns about manipulability, disintegration, indeterminacy and adventurism. Again, the choice between rules and standards in this context "depends upon which competing virtues (certainty or flexibility) are desired most, or similarly, which alternative vices (rigidity or indeterminacy) are dreaded most."

2. The Lesser of Two Evils

One scholar, Frederick Schauer, suggests that the choice of form should be guided by a case-by-case analysis of the built-in errors of both rules and standards. Standards are more likely to be misapplied due to a misguided decision-maker, either by a lack of understanding or by bias. Schauer explains that judges applying a flexible standard have more opportunity to manipulate that standard to cater to his or her own internal or legal biases, "whether through unconscious bias or conscious ill-will." Also, the more factors the decision-maker is expected to take into account, because of the general limitations on human capacity, "the
greater the likelihood of confusion, miscalculation, or misunderstanding as numerous factors are evaluated and weighed.”

Either of these scenarios leads to a decision that is more likely to deviate from the original purposes of the law. Rules, on the other hand, are most likely to fail by being unable to reach the very best decision in each and every case.

Schauer explains that the errors of rules are produced not by the decision-maker, but by real life. “[F]or life, unlike the factual predicate of a rule, is probabilistic and not universal, variable and not fixed, fluid and not entrenched. As the complexity of experience clashes with the simplicity of a rule, errors are produced even when rules are applied conscientiously.”

Schauer proposes that a form should be chosen based on which type of error—the misguided decision-maker or inaccurate application—is more serious or more likely in any given legal context:

Where decision-makers are likely to be trusted, and where the array of decisions they are expected to make will contain a high proportion of comparatively unique decision-prompting events with serious consequences if they are decided erroneously, we might expect the rule-based mode to be rejected, or at least its stringency tempered. But where there is reason to distrust a set of decision-makers with certain kinds of determinations, and where the array of decisions to be made seems comparatively predictable, errors of rule-based under- and over-inclusion are likely to be less prevalent than decision-maker errors, and consequently the argument for rules will be stronger.

In other words, Schauer proposes that the choice between either a rule or a standard comes down to choosing between the lesser of the two inherent evils. Schauer further explains that the choice of a rule is “an application of the theory of the second-best.” The rule, which is designed to produce the overall best results, should only be used when the standard, which is designed to find the best decision in each case, produces a higher incidence of errors then the general rule would produce.

The basic theory is an easy one: whichever form will produce the very best decision in the greatest amount of cases should be chosen.

Schauer’s theory can be explored using an example of drafting a noise control law. First, assume that the objectives behind the law are

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223. Id.
224. Id. at 149-50.
225. Id. at 149.
226. Id.
227. Id.
228. Id. at 152.
229. Id.
230. Id.
231. As cited above, this example is derived from Schlag, supra note 202, at 381-83.
to deter loud noises that are disruptive of the peace, without unnecessarily hindering the entertainment and noise-making ability of the citizens. A rule, that "sounds above 70 decibels shall be punished by a ten dollar fine," of course carries with it the possibility that it will be over-and under-inclusive. Not all sounds over seventy decibels are undesirable, and sometimes, sounds much quieter can have a greater impact on the peace. A union strike, for example, can get quite heated, but the rule based-approach would penalize the conduct without a look at the speech rights of the strikers or the beneficial effects of the noise. A standard, on the other hand, that "excessive loudness shall be enjoinable upon a showing of irreparable harm," carries its own possibilities of error. What is "excessive" must be determined by the judge in each circumstance. With no guidance as to what "excessive" means, a judge may be free to apply the law in a biased manner, for example, enjoining a union strike as excessive, but not a loud out-door religious service.

Schauer would propose that a decision-maker choose between these two forms by weighing which of the two evils, over- or under-inclusion or possible bias are more likely or more serious. Is there a history of judges proving to be biased against certain types of speech in the jurisdiction in question? Is the speech that might be penalized protected by other rights? Each of these questions should be answered based on the circumstances surrounding the decision, remembering that an optimal position would be to favor the very best decision in as many cases as possible.

3. The "Epistemological Twist"

Another tool offered to facilitate the choice between forms is what Pierre Schlag calls the "epistemological twist" in his article, *Rules and Standards*. This theory holds that when we have imperfect knowledge about the information affecting an issue, standards are most appropriate. Schlag cites one author, Charles Curtis, as a foundation for this theory. Curtis, in his article, *A Better Theory of Legal Interpretation*, argues that a lawmaker's "words should be as flexible, as elastic, indeed as vague, as the future is uncertain and unpredictable." Curtis argues that because legal directives are in reality attempts to control the future, they can only do this to the extent that the future is a known entity. In reality, however, Curtis notes that "what happens in the future is neces-

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232. Id. at 424. Note: epistemology is the study of the grounds and limits of knowledge. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 391.

233. Schlag, supra note 202, at 424.

234. Id. at 399 n.59.


236. Id. at 423–24.
sarily uncertain, inchoate, contingent, only partly foreseeable. If unknown situations may be encompassed within the application of a law, a decision-maker must be given the discretion to apply the law to these facts. Therefore, Curtis argues, a lawmaker must use "imprecise" words, or, in other words, standards. According to Curtis, then, if the lawmaker hopes to control future unknown conduct, a vague standard should be written. The lawmaker will consequently delegate to the decision-maker the proper authority to consider these new facts. If, on the other hand, the lawmaker knows with certainty what types of situations will occur and, within those situations, what types of conduct he does not want to enable, a more precise rule will reach his purposes.

In his critique of Curtis's theory, Schlag argues that it is only the lack of certain kinds of knowledge that will lead to the choice of a standard. In particular, Schlag points out that "when we have difficulties evaluating the normative character of actions (but agree about values), we are more likely to use standards. By contrast, when we lack knowledge (or consensus) about normative values, we are more likely to cast directives in the form of rules." In other words, if we lack knowledge about the values underlying a rule, but know what kinds of facts are likely to arise under it, a rule is most appropriate. If, however, we are unsure of what fact situations are likely to arise, but generally agree on the policies underlying the law, a standard is advised. Schlag's limitation reflects the legal system's hesitancy with delegating a legislative function to the judicial branch. In general, we are comfortable with giving a judge the task of applying a set policy to a certain fact situation, but hesitate to allow the judge to set the policy herself.

4. Strategic Choice to Support a Substantive End

"Form is never purely form, but an anticipation of substance." Some legal scholars have argued that when decision-makers participate in form arguments, in reality, they will pick the form that will help them reach a certain legal or philosophical end. The most influential of these theories was developed by Duncan Kennedy, in his article Form and Substance in Private Law Adjudication. Kennedy argued that the choice of form is intimately connected with one's substantive political vi-

237. Id. at 424.
238. Id. at 424-25.
239. Id. at 425.
240. Schlag, supra note 202, at 425.
241. Id.
242. Id. at 419.
A rule expresses the ideals of individualism and self-reliance while the standard furthers an opposite altruistic ideal. A helpful way to understand Kennedy’s claim is by looking at it through the lens of contract law, which uses both rules and standards. On the one hand, a standard in contract law requires that parties refrain from entering into unconscionable contracts, “ensuring that we don’t take advantage of improvident fellow contractors.” A separate law also dictates that a judge look not for a “substantively fair bargain,” but only for formal consideration. This strict rule favors self-ordering, and “allows us to celebrate when we find a chump to contract with.”

Kennedy argued that rules, through their certainty and general application, allow individuals to take control of the direction of their lives. Because rules allow advanced planning, an individualist feels that “people ought not to rely on their fellows or on government when things turn out badly for them.” When a rule is under-inclusive, “we should not feel too badly about it, because those who suffer have no one to blame but themselves.” On the other hand, the altruist prefers that the law ensure that “the good man is secure in the expectation that if he goes forward in good faith, with due regard for his neighbor’s interest as well as his own, and a suspicious eye to the temptations of greed, then the law will not turn up as a dagger in his back.” In other words, an altruist wants to reward not cunning, but good faith, a state of mind which is most ascertainable through a standards-based approach.

Scholars have emphasized the substantive motives behind form choices from other angles. While they are too numerous to document exhaustively, a few examples are worth noting. First, some feminist scholars have claimed that the different forms appeal to separate male and female traits. For example, one scholar notes that males are associated with “rule orientation, generalization, and nonaccommodating egotism,” while “women speak in ‘a different (moral) voice,’ one that seeks ac-

244. Id. at 1776.
245. Id.
246. This example is derived from Kelman, supra note 200, at 55.
247. Id.
248. Id.
249. Id.
251. Id.
252. Id. at 1739.
253. Id. at 1773–74.
254. See Kelman, supra note 200, at 59.
accommodation among affected parties based in norms of situation-specific fairness. Kelman explains that

[r]ules appeal to the aesthetics of precision, to the psychology of denial or skeptical pragmatism (or, alternatively, of blinding ourselves to imprecision and mistakes or believing it is girlishly utopian to hope for perfection); standards appeal to the aesthetics of romantic absolutism, to the psychology of painful involvement in each situation, to the pragmatism that rejects the need for highfalutin generalities.

According to these arguments, we can conclude that males and females will be drawn to rules and standards, respectively, because of inherent differences in their visions of the world.

Other authors suggest a more calculated subjective motive behind the choice of form. In Joseph Grodin's article, Special Report on California Appellate Justice: Are Rules Really Better Than Standards?, he suggests that the choice between a rule and a standard is partly a choice designed to "favor the protection of certain interests over others." He points out that one scholar, Professor Kelso, favors any choice of form which will act to cut the plaintiff's chance for recovery and will therefore unburden the courts. Kelso therefore favors "rules" in situations in which certainty and predictability mean that there is less of a chance for a plaintiff to win, and therefore, less incentive to litigate. This choice of form is made in order to get to a certain legal end, not simply because the form happens to be congruent with the lawmaker's personal philosophy.

Frederick Schauer, in his book, Playing by the Rules suggests that the use of rules also "reflects the extent of decisional conservatism within the system." He notes that rules "serve as institutions to preserve the past," providing decision-makers with the ability in the present to "do what would otherwise be politically or psychologically impossible." Schauer explains that when the legal system embraces rules they embrace as well those values of intertemporal consistency... stability for stability's sake, unwillingness to trust decision-makers to depart too drastically from the past, and a conservatism committed to the view that changes from the past are more likely to be for the worse than for the better.
According to Schauer, the decision to adopt rules is based in part on one's desire to entrench the legal system in the laws of its "better days," when one feels that the likely changes are simply not good law.

IV. POLICY GOALS BEHIND MARRIAGE REGULATION

It will be helpful to review the polices behind a law defining sex for marriage in order to determine how these policies relate to the rules and standards debate. As the legal analysis above shows, the sex definition issue has arisen in various family law contexts, from child custody to property distribution. In Corbett, the court was asked to decide if the marriage could be annulled, while the M.T. court was faced with the question of spousal support. Kevin reached the direct question of the validity of the marriage, while in Littleton, the court had to decide if the plaintiff was entitled to bring a wrongful death action. Lastly, Gardiner was a case about inheritance rights. In order to reach the broader question, however, each court had to define sex in order to determine the validity of the marriage in the case.

The wide variety of cases cited here demonstrates the inherent difficulty in any attempt to determine one set of uniform policies underlying marriage, or any family law. "Translating a sense of shared values into public policy and legal norms in the family law arena has never been an easy matter." Because marriage affects so many aspects of peoples' lives, it is no wonder that the values underlying it are complex and varied.

Keeping this inherent difficulty in mind, it is still possible to highlight the various concerns these courts had when they chose a particular form. As the legal analysis above shows, the cases which decided upon a rule to determine sex were ultimately concerned with the formulation and protection of expectations, the preference for a uniform law, limiting judicial discretion, and guiding people towards morally acceptable conduct. The cases which adopted a standard to define sex were interested in reflecting social and scientific change, maximizing individual happiness, reflecting current public policy, protecting the family unit, protecting expectations and taking into account the diversity of the circumstances of those who want to marry.

The most important concern of the courts that ultimately adopted a standards-based test seemed to be the need to focus on the rapid changes in science and in the social understanding and acceptance of the transsexual. The first case to note this concern was In re Anonymous, which

refused to find that sex is always determined at birth, because that would “disregard the enlightenment of our times.” Indeed, these courts have found it to be their duty, in the absence of a contrary direction from the legislature, to interpret legislation in light of the current social and scientific reality. This is a reflection of the interpretation maxim that courts are required to interpret the laws to reflect their “ordinary contemporary meaning.” In each of these cases, to find the “ordinary contemporary meaning,” the courts exhaustively studied the purposes of the marriage statues and “the current legal, social and medical environment.”

The court in Kevin noted that legal recognition of reassigned sex would also help to “assist individuals to integrate into society.” More specifically, by allowing transsexuals to order their personal lives through reassignment, and yet refusing to give this sex legal effect, rule-based courts in effect delegate transsexuals to legal “nothingness.” The European Court of Human Rights, in the Goodwin decision, noted that it was “struck by the fact that... gender reassignment which is lawfully provided is not met with full recognition in the law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone.”

The rule courts, on the other hand, were mainly concerned with leaving policy questions to the legislatures to decide. Inevitably, in each case, the courts held that the judiciary should not have the discretion to decide the law. These arguments are reflected in the Gardiner court’s statement, “[i]f the legislature intended to include transsexuals, it could have done so.” While purporting to stay on an objective high-ground, the chromosome courts were at the same time defining moral conduct. These courts made it clear that, according to the legislatures, only “traditional” unions were acceptable. However, the lack of legislative direction on the matter inevitably lead the courts themselves to define what “traditional” meant. To the chromosome courts, this did not include people with incongruent gender conditions.

Lastly, an important policy reflected in all of the cases was the protection of the expectations of the parties who entered into the marriage. In each case reaching this issue, the non-transsexual in the relationship knew about, and often encouraged, his or her spouse’s sex reassignment.

267. Id.
270. See id. at 136–37.
The courts' opinions reflect the need to protect the good faith arrangements that the parties have made as well as the need to help the parties develop plans that will be upheld by the law.

V. USING A RULE OR A STANDARD TO DEFINE SEX

So far, this Note has highlighted the relevant arguments for and against standards and rules and the policies behind the law of marriage. Now, this Note will determine whether the policies favored by the courts are actually furthered by their choices of form. Also, according to the rules versus standards theories, this Note will determine what test a court should use to define sex.

The virtues and vices language would be a good start to this analysis considering the fact that this dialogue is the most commonly used in legal discourse. First, to focus on the virtues of the chromosome rule. The rule's virtues, namely uniformity, stability, predictability, finality and security, line up quite nicely with some of the possible concerns of the chromosome rule courts. In particular, the concern is that without a clear rule, transsexuals will, in essence, never know where they stand. This Note also finds some merit in this argument. While it is in the best interest of a transsexual to be able to marry the person they wish, without a clear rule, the transsexual may be worse off by not knowing how to accomplish this feat. For example, take the holding of the Court of Appeals in Gardiner, which stated that courts should determine sex looking at a number of factors, including, but not limited to, "chromosome makeup, . . . gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity." If a couple, made up of a male and a male-to-female transsexual, want to marry, and also want ensure that the law recognizes their marriage, what kind of direction will they get from this rule? Is it enough that the transsexual has had a surgery? How extensive need that surgery be? How can they be sure that their marriage will be upheld by the law?

While certainty in a marriage law is indeed important, rules such as the chromosome rule come with their own breed of uncertainty. Schlag points out that rules also "necessarily entail uncertainty—but this uncertainty is often difficult to see in concrete situations because we typically defer or exteriorize the uncertainty." In other words, rules like the chromosome test that cut out certain persons from the protection of the law altogether create uncertainty outside of the law. Although this

272. Schlag, supra note 202, at 412.
HYBRID APPROACH TO TRANSSEXUAL'S SEX

bright-line test is "certain" in that it is clear who does and does not fall inside the definition of a certain sex, its application to real life is quite uncertain. Those who do not conform to the generalized definition of sex, i.e. those without naturally congruent sex characteristics, are left without legal directives to guide their conduct. One law allows, and indeed encourages, them to change their sex, while another, the chromosome rule, negates the conduct natural to that sex. Any "certainty" thus created through such a rule is, according to Schlag, arrived at simply by "banishing [these] troublesome concerns."273 The rule is only "certain" if we are able and willing to ignore those for whom the law makes life uncertain.

Certainty is also not exclusively a product of rules. A number of scholars have recognized that standards can create certainty through other mechanisms, such as precedent.274 Here, for example, if a number of cases have, over time, found that a full sex change operation is sufficient evidence that the transsexual is a person of her mental sex, a certain amount of predictability and certainty is produced. While the judge would still have the discretion required for borderline cases, people would be able to better protect their expectations through positive conduct.

According to science and social policy, some flexibility is needed in defining sex, which a multi-factored standard test would provide. As the multi-factored standard courts demonstrated, science has determined that sex cannot be defined in a limited fashion. Also, social policy has in many ways demonstrated a commitment to recognizing the conflicting sex characteristics of the transsexual. Despite this general acceptance of change, neither science nor society has yet to narrow in on a particular definition of sex. This uncertainty calls for a flexible standard, allowing judges to be able to meet each case as it comes before her, in order to determine the sex of the parties.

A rule also has the effect of imposing conformity on all persons wishing to marry, i.e. that they all must marry the person of their opposite chromosomal makeup. Many of the chromosome rule courts have indeed held that a basis for their rule is a desire to promote the "traditional" role of marriage, which, presumably, is the union of opposite physical sex persons in order to have children. This theory of marriage is in direct contradiction with the current view of marriage, however. What constitutes a marriage, and a family for that matter, is in a state of flux. As one legal scholar stated, "[d]iversity, rather than a single model,

273. Id. at 411.
274. See id. at 414.
marks the chosen familial habitats for couples." The court in *M.T.* emphasized that it is intimacy, not the raising of children, that is the building block of a modern marriage. The diverse state of marriages calls for a dynamic definition of marriage, especially where transsexuals are concerned. If it is indeed intimacy which defines marriage, this is not possible when psychologically, a person is only capable of being intimate with someone of a similar physical sex.

We are left with the standards' "vices" of manipulability and adventurism. There is some concern that judges in defining a party's sex will manipulate the law to serve his or her own whim. These are not great concerns in this context. It is first helpful to point out that manipulability is only a concern when the judge's decision would run counter to the policy of the law. For example, Schauer cites as an example of possible decision-maker bias the case of *Palmore v. Sidoti.* In *Palmore,* the United States Supreme Court determined that the best-interest standard gave too much discretion to judges in determining whether a custody arrangement was in the best interest of the child. The Court fashioned a strict rule stating that a court could not take race into account in making the custody decision. The reason for this rule was that a court's "bias, or the less invidious difference in perspective" would actually misguide a judge into deciding upon a custody arrangement that was actually not in the child's best interest.

Here, however, there is no concern that a court, when it decides the sex of the parties before it, will be acting contrary to the policies of the laws it is interpreting. At most, these marriage laws have cited a concern that marriage remains in its "traditional" form. Although the traditional form includes only one "man" and one "woman," the statutes do not define what "traditional" means. Certainly, no court, including those settling on the chromosome rule, has found that any legislature has set a policy against allowing a person to marry the sex opposite to his or her mental sex. In fact, each court faced with the task of defining a transsexual's sex was doing so in the context of an established policy in its jurisdiction denying homosexuals the right to marry. Enabling a court to recognize the gender identity of a transsexual for the purpose of marriage would arguably further this policy. For example, if a male-to-

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277. *Id.* at 151.
278. *Id.*
279. *Id.*
280. While this Author certainly has an opinion about anti-homosexual marriage laws, that debate is beyond the scope of this Note.
female transsexual undergoes reassignment surgery, to the community and to her partner she is a female. If she is then only allowed to marry persons of the sex opposite her chromosomes, she will therefore be allowed to marry females. Indeed, as one article pointed out, the effect of this bright-line rule would be contrary to what society might deem acceptable. Utilizing a standard to determine the true sex of a transsexual is the only device by which the anti-homosexual union policy in these jurisdictions can be furthered.

Another concern of some of the chromosome test courts was fraud. These courts were concerned that transsexuals would be able to "fake" an incongruent mental sex, thereby enabling them to obtain a marriage that is, in essence, a forbidden homosexual union. Interestingly, according to the usual "vices and virtues" debate, manipulation by the parties is a vice of a rule, not of a standard. The argument is that setting a rule, such as "do not drive over 60 miles per hour," will encourage people to maximize undesired conduct. If the party is able to see that they can drive 59 miles per hour without repercussions, they will. On the other hand, a standard such as "drive as is safe," will encourage people to maximize desired conduct, in order to ensure that they lie safely within the law. Here, as well, there is an argument that it is the chromosome rule that will encourage fraud. If a male-to-female post-operative transsexual wants to marry a female, this is arguably bordering on conduct contrary to the anti-homosexual marriage policy, as mentioned above. However, the rule, which draws a clear line only at persons of the same chromosomal makeup marrying, enables such conduct. A standard, on the other hand, would better further the policy against homosexual marriage by ensuring that in each case, the marriage parties are in fact one "man" and one "woman."

Using Schauer's "lesser of two evils" approach leads to the conclusion that a standard would be the optimal form with which to define sex. Again, Schauer’s theory is that the choice between forms is in fact a weighing process, determined by which error, under- and over-inclusion or decision-maker bias and mistakes, is more likely and more serious. When defining a transsexual's sex for the purpose of marriage, the rule's inherent errors are more serious and likely. First, the under-inclusion resulting from a chromosome test is clear and proven. As mentioned above, there are thousands of transsexuals known to be living in the states. In addition, one out of every 1000 persons are thought to have

281. David Link, Same-sex Marriage, with a Twist, SALON.COM, at http://archive.salon.com/mwt/feature/2002/03/22/kansas_ruling/index.html (Mar. 22, 2002) (noting that, after the Gardiner decision, "Kansas, a state which has no ambiguity in its law prohibiting same-sex marriages, is now one of the few places on Earth that requires transsexuals to be homosexual as a condition of marriage").
some intersexual trait. These numbers clearly establish that the chromosome rule does not reach a correct result in every case. The effects are devastating. Transsexuals are left in a no-man’s land. In order to enter into a legally recognized relationship, the transsexual is forced to remain in her incongruent sex state, a tragedy which many of us cannot fathom. On the other hand, she must give up the hope of being in her natural relationship in order to harmonize her conflicting sex traits through reassignment surgery. The standards-based decisions have in fact recognized that there is a public policy against this result. According to the court in M.T., “society has no right to prohibit the transsexual from leading a normal life.” It is the court’s duty, in the absence of contrary public policy, to “promote the individual’s quest for inner peace and personal happiness.”

On the other side, the errors inherent in choosing a standard are neither likely nor serious in the case of defining sex. As was pointed out in the context of the virtues and vices analysis, there is no concern here that a judge will make a decision that is “wrong” in terms of public policy. A judge deciding the sex of the parties before it is not likely to be “mis-guided” by any bias towards one sex or the other. Although the facts will be unique in each case, they are relatively straightforward, promoting an uncomplicated analysis.

The chromosome test courts however were not concerned with judicial bias errors, but errors as a result of fraud by the parties. But fraud is not a serious concern because a court using the standard test will look extensively into the mental, physical and environmental aspects of the transsexual’s case. The court will not recognize a person’s mental sex simply based on the party’s own testimony. The cases that have come before the courts have all involved transsexuals who are either post-operative, or who have provided the court with expert medical evidence proving that their mental sex is incongruent with their physical sex. In fact, the chromosome test courts never dispute this fact, but only reflect a concern about the possibility that fraud may be involved. Additionally, as will be discussed below, rule-like safeguards, such as requiring a doctor’s opinion of mental sex, will also ensure against fraud in these cases.

The next step is to determine whether the epistemological approach to form determination sheds some light on the proper test to be used to determine sex. At first glance, because this issue is complicated, where

282. This assumes, based on the social and scientific arguments above, that the “correct” sex is that of the mental sex.
284. Id. at 211.
the definition of sex is ever-changing and partially unknown, it is tempt-
ing to conclude that standards are the better alternative. The future of
the definition of sex is indeed "uncertain and unpredictable," and the
types of situations that may come before the court are indeed varied and
uncountable. The problem is that whether a standard should be used de-
depends on whether lawmakers want to empower judges to include such
unknown situations in the definition of "male" or "female." As Schlag
points out, only uncertain questions of fact should be left to a judge, not
questions of policy. Therefore, a judge should only use a standard in de-
ciding unknown fact situations when he or she is guided by some set pol-
icy.

However, whether Schlag's distinction applies here is doubtful. The
chromosome rule courts have argued either that there is a clear policy,
which is for "traditional" marriages that do not encompass a union with a
transsexual, or that the policy is unclear, and it is the legislature's job to
make such a decision. Under either of these views, enabling a court to
decide on its own whether a transsexual should be able to marry a person
of her now opposite sex through a standard would be inappropriate. On
the other hand, the multi-factor standard courts have shown that there
are established policies that enable transsexual unions. These policies are
tools by which courts can interpret the directives of the legislature and
glean their underlying values. The multi-factor standard courts took into
account the changing understanding of transsexuals in science and in so-
ciety. These courts interpreted the marriage statutes in a way that re-
flected modern understandings of marriage as not simply baby-making
tools. Also, the courts recognized that legal policy, logically written by
the same legislatures, enables transsexuals in other areas of the law, in-
cluding through sex-change legalization and birth certificate changes.
While it is unlikely that any legislature has decided whether transsexual
unions should be allowed, it is also true that these policies ensure that
courts are not making value choices. Instead, they are deciding complex
legal problems in a way that is required by established legal policies.

Lastly, the various theories of the "form is never purely form" schol-
ars must be considered. It should be acknowledged that judicial decision-
making is based in large part on a judge's various personal, political and
psychological ideals. To deny this fact would be foolish. One can see this
by simply looking at the process for choosing a judge. If each judge was
sure to base his or her decisions purely on legal foundations, there would
be no reason why certain judicial candidates would be favored by one po-
litical group over another. Judges are human, whose ideas about how the
law should work will inevitably be based on more personal considera-
tions. This is not to say that judges inevitably have personal motives be-
hind their choices. It is clear however, that one's personal philosophies will inevitably provide some basis for one's legal philosophies.

That being said, it would be helpful to next look at some of the philosophies that may affect one's choice of form to decide whether any effect may be inappropriate in this context. First, to look at Kennedy's vision of the choice of form being dictated by one's feelings towards altruism, or alternatively, individualism. While this Note cannot put words in Kennedy's mouth, it can attempt to describe how each of these views might be reflected in a definition of sex law. An altruist simply wishes to ensure that he can order his conduct to maximize his own happiness. This requires set rules enabling people both to formulate expectations and expect to have them protected. The chromosome rule is certainly such a clear rule. The problem is that a transsexual is unable to order his conduct according to this rule. Unlike the contracts examples used above, the transsexual cannot go out and change his or her chromosomes to reflect her mental sex. The altruist supports self-reliance, but only while this egoism is "contained by a respect for the rights of others." Without this constraint, the justification for the philosophy, the ability for all to choose to comply with the law, breaks down. Here, the rule does not respect the "rights" of the transsexual, who is not in a position to comply. Consequently, it does not seem that the individualist philosophy could support the chromosome rule. An altruist, on the other hand, might stress the interests of the transsexual and would want to ensure that the law sympathized with the situation in which they find themselves. This would surely call for some sort of legal flexibility so that each person will be given the chance to have the benefits of marriage. A standard in some form would be appropriate.

As discussed above, feminists have described males as associated with nonaccommodation, precision, and skeptical pragmatism and females as associated with accommodation and fairness. Does this necessarily mean that males would be inclined to turn a blind eye to the needs of transsexuals? One can argue that the masculine and feminine traits can be reconciled in the use of a standards-based test. Even if males are pragmatic, in that they find it foolish to hope for "perfection" in an imperfect world, the analysis above shows that more precise results can be reached using a standard rather than a chromosome rule. This is not a "hope" or a romantic notion, but instead a practical answer to the problems created by scientific and social change. Science and social accommodation have shown that what is "male" and "female" is different than what we originally thought. A standard can, working within the frame-

work of the already established marital policies, encompass this change. Females might be drawn to this as this is an accommodation of the very real circumstances of the transsexuals. Males also could feel comfortable in the fact that more precise results are indeed being reached.

Lastly, Schauer's belief that rules are used in a conservative attempt to block change seems to ring true in the rule-based courts' decisions. Indeed, when one reads some of the cases that adopted rules, historical entrenchment is quite clear. \textit{Corbett} held that the essential role of a woman in a marriage is to birth children, while \textit{Littleton} based its decision on the "fact" that sex is "immutably fixed by our creator at birth." These courts used rules to justify outdated and perhaps unpopular statements. If, on the other hand, a standard was used, these courts would be forced to accept the reality that our society is not static, but ever changing. The multi-factored standards courts recognized this even as early as the \textit{Matter of Anonymous} decision in 1968. Clearly, when there is no legislative policy directing the courts to adhere to the past, and when there is contrary legal, social and scientific evidence to show that change is indeed required, the justification for a rule is minimal.

\section*{VI. AN ARGUMENT FOR A HYBRID APPROACH}

The above analysis of rules and standards suggests that there are both benefits and downfalls to choosing a rule or a standard in all contexts. This Note then narrowed in on which of these problems and benefits were applicable and important to the issue of finding a legal definition of sex. In particular, this Author finds the "standard vice" of uncertainty and lack of predictability troubling in this context. Without more direction, transsexuals would find it hard to make choices with set legal consequences. A pure standard, without guidelines for the decision-makers, would send a message to transsexuals that they \textit{can possibly} marry a person of a sex opposite their mental sex, but would not describe at all \textit{how} this is to be done. On the other hand, the chromosome rule comes with its own uncertainty, as it cuts out individuals from the protection of the law altogether, also leaving them with no direction.

The analysis also shows that in the context of our changing understanding of sex in science, society and the law, the "standard virtue" of flexibility is important. Under Schauer's "lesser of two evils" analysis, the chromosome rule carries with it more likely and more serious consequences then a standard. Decision-maker bias was not a concern when defining sex, while under-inclusion would indeed have negative and serious consequences. While not likely, decision-maker mistake, due possibly to fraud by the parties, was a concern that should be addressed. Finally, various personal and political philosophies could affect the
choice of form, but it is clear that a standard would best meet the concerns of each one.

With all of this information as a guide, what form then is most appropriate? Is a rule, defining sex by the chromosomes, or a multifactored standard the correct approach? This Author would suggest that the right test is in fact a hybrid of the two. The above analysis shows that a standard must be used, such as the one developed by the Court of Appeals in *Gardiner*, which stated that courts should determine sex looking at a number of factors, including, but not limited to, "chromosome makeup, . . . gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity." 287 This would ensure that the courts are able to be flexible in defining sex according to established legal, social and scientific advancements. Also, a standard would create a certain level of certainty here, in that it would not cut out deserving people from the protection and benefits of the law.

However, in order to meet the standard concerns discussed above, a little certainty should be placed in the law. This Author suggests that a rebuttable presumption be utilized. A possible presumption would be that if a transsexual has undergone fifty percent or more of the appropriate sex change procedure after a competent and licensed physician has determined that the transsexual's mental sex is opposite that of his or her physical sex, then a court should presume that the transsexual's legal sex is that of his or her mental sex. 288 This presumption can be rebutted by evidence sufficient to show that the person's mental and physical sex were in fact congruent prior to surgery.

A presumption serves a number of functions. First, it serves an evidentiary function. As the court in *In re Kevin* noted, according to the law, "post-operative transsexuals will normally be members of their reassigned sex." 289 This may be because the factors a doctor will weigh in determining the sex of her patient are generally the same factors that are involved in a court's decision. Because the court's determination of sex will likely be based in large part on this medical science, the presumption will serve to assume in evidence what in fact will occur after a thorough evidentiary presentation.

288. For another possible presumption, see the test being developed by the English Parliament, as discussed in ECONOMIST, *supra* note 82, at 54 (the transsexuals must prove that they "lived in their new gender for at least two years and that they intend to live that way until death" to be determined a member of the new gender).
Also, the rebuttable presumption minimizes the chance of fraud that the chromosome rule courts were concerned about. First, the doctor’s opinion ensures that a party cannot defraud a court by electing a sex change procedure solely for the purpose of entering a homosexual union. Presumably a court can trust the claims of a party that are supported by competent medical opinion. Also, the fact that the party is required to have committed to her mental sex through undergoing a sex change procedure will ensure that the party’s feelings are not fleeting. Because sex reassignment procedures are often lengthy, complex and drawn out over time, this Author suggests that only fifty percent of the procedure must be completed to trigger the presumption. Many transsexuals do not choose to undergo every procedure available to reassign their sex. Because of the invasive and personal nature of the procedures involved, it is not for the courts, but for the person and her doctor to decide what is required in order to reach a congruent sex state. For the court’s purpose of avoiding fraud and mistake, however, an arbitrary fifty percent number will ensure that the person has committed to this change. As the European Court of Human Rights stated, “given the numerous and painful interventions involved in such a surgery and the level of commitment and conviction required to achieve a change in social gender role, [it cannot] be suggested that there is anything arbitrary or capricious in the decision taken by someone to undergo gender reassignment.” 2

Lastly, the fact that this presumption is rebuttable by evidence that the person’s mental and physical sex were not in fact incongruent before the reassignment adds an added protection against mistake and fraud.

Most importantly, the presumption, which is in essence a rule, serves a channeling function. Transsexuals will be able to give legal effect to their expectations by following the procedure outlined in the presumption. If a transsexual procures a doctor’s note that her mental and physical sex are incongruent, and thereafter undergoes a sex reassignment surgery, she can rest assured that a court will likely uphold a marriage with a person of her now opposite sex. The presumption would infuse the sex definition procedure with the measure of certainty and predictability needed to allow transsexuals to order their lives. Therefore, the certainty concerns of both the individualist philosophy and of the “virtues and vices” analysis are satisfied.

The hybrid approach of course comes with its own problems, namely that it is under-inclusive and that it removes some of the court’s discretion. 291 The presumption is under-inclusive in that some persons are still

291. As mentioned earlier, an additional problem with the hybrid approach is that it does not enable homosexual marriage. Support for the standard is in fact based largely upon the fact that the
left out of the protection of the law. Of particular concern are those who may not be able to elect a sex reassignment procedure, either for economic or other personal reasons. Consequently, these persons would not be able to ensure that their life arrangements will be protected by the law. It is important to note, however, that the reassignment procedure is not required in order to establish a person's sex as her mental sex. A court can consult other evidence showing that the person's sex is indeed that of her mental sex in order to reach the same conclusion. The presumption merely acts as a mechanism to use to protect expectations, but does not act to cut anyone out of the general protection of the law.

Although a presumption encompassing a greater number of persons could be utilized, such as requiring only a doctor's note determining a person's gender identity, this is not recommended. The reason for this is that the policy behind the standard, which is to look at a number of factors to determine the sex of an individual, would not be met if that process was trumped by simply deferring to one factor. The significance of the flexibility requirement is that the current definition of sex includes many factors, only one of these being a person's gender identity. Although any presumption necessarily removes some of this discretion away from the court, the presumption proposed by this Note will ensure that the same factors the court would have considered are taken into account. As the chromosome rule courts established, courts today are too worried about fraud, mistake and permanency to base their decisions simply on one doctor's opinion. Requiring surgery would ensure the level of commitment to the reassignment required to trump these concerns.

**CONCLUSION**

Unfortunately, although most states have marriage laws restricting marriage to only a “man” and a “woman,” the legislatures have not provided the courts with definitions of what these terms mean. This means that post-operative transsexuals are in a state of flux, unsure of their legal rights under the law. Because of the increasing number of people affected by the ambiguities in these laws, the courts must step in and interpret them.

The current scientific, political and social understanding of gender identity disorder simply does not support the decisions of cases like court must discern the “true” sex of the parties before it in order to further the established policy against homosexual unions. Again, while this consequence is of genuine concern to this author, it is beyond the Note's scope. The courts in the transsexual sex definition cases were faced with established policies against homosexual unions, as is the case in most jurisdictions. A legally legitimate definition of sex for the purpose of transsexual marriage in these jurisdiction must therefore take this policy into account until these laws can be changed.
Littleton and Gardiner. Science has accepted that chromosomes alone are no longer the sole determinant of sex. The medical community recommends sex reassignment surgery for transsexuals and certifies that post-operative transsexuals are persons fully able to function in their reassigned sex. The law supports reassignment decisions by recognizing the reassigned sex on birth certificates and in other areas of daily life.

While the courts must take into account the modern understanding of sex when defining it, they also must consider the implications that their decisions will have. This Note proposes that a rule/standard hybrid test is the proper form through which a court can establish a sex definition. This approach seeks to combine the flexibility of a standard with the certainty of a rule to arrive at a solution that maximizes the number of correct legal decisions. Using this hybrid approach, transsexuals will no longer be forced into a legal "limbo." The law, the community, and, most importantly, the partners themselves will clearly understand what sex is for the purpose of marriage. This approach will also end the grievous predicaments of people like J’Noel, whose only hope of marrying is to a person incompatible with who they really are. J’Noel should be able to treat her disorder and live a healthy, happy, and fulfilling life. This proposal allows just that.