

factors were congruent and were male. The doctors also recommended that his "history" as a male be hidden from him.⁴⁹

This surgical alteration case made headlines in 1973 when the doctors involved in the surgical alteration reported that the child and the parents had successfully adapted to the sex/gender alteration. Thus, texts in sociology, psychology, and women's studies were rewritten to argue that "this dramatic case . . . provides strong support . . . that conventional patterns of masculine and feminine behavior can be altered. It also casts doubt on the theory that major sex differences, psychological as well as anatomical, are immutably set by the genes at conception."⁵⁰

For more than twenty years, the scientific literature continued to report that the surgical alteration was successful and the child's sexual identity was female. This case made headlines again in 1997 when Milton Diamond and Keith Sigmundson reported in the *Archives of Pediatrics and Adolescent Medicine* that the boy who was turned into a girl was now living as a man.⁵¹

According to the Diamond and Sigmundson report, David had always thought of himself as different from other girls. As a child, he preferred "boy" toys and preferred to mimic his father's rather than his mother's behavior. He also preferred to urinate in a standing position although he had no penis. Because of the cognitive dissonance, David (who was called Brenda during his life as a girl) often had thoughts of suicide.

At twelve, Brenda was put on an estrogen regimen. She rebelled against the regimen and often refused to take the medication. At fourteen, Brenda confessed to a doctor that she had suspected that she was a boy since second grade. At that point, the doctors agreed with Brenda that she should be remasculinized.

At age fourteen, Brenda became David and returned to living as a male. David received male hormone shots and a mastectomy. He underwent surgery to reconstruct a phallus at ages fifteen and sixteen. David was eventually accepted as a boy by his peers. He married and helped raise his wife's children. Sadly, David committed suicide in 2004 after his identical twin brother also committed suicide.

David was not born an intersex person. He became an intersex person when doctors removed his penis, constructed external female genitalia and administered female hormones. Despite this intervention, David always felt that he was not a female.

The significance of this and other similar reports is that they exemplify the difficulties law and medicine must confront in defining sex. At birth, David's sex factors were congruent and were male. After the original inter-

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vention, he was turned into an intersex person with male chromosomes and ambiguous genitalia, but he was treated by society as if he were female. Once he decided to live as a male, he had his body remasculinized to the extent possible, and society and legal institutions recognized him as a male.

The reports about David and other intersex persons, whose self-identities do not conform to their assigned genders, have forced the medical and psychiatric communities to question their long-held beliefs about sexual identity formation. Just as current scientific studies have caused the scientific communities to question their beliefs about gender identity formation, the legal community needs to more carefully question its assumptions about the legal definitions of the terms *male* and *female*.

Legal Definitions of Male and Female

Although scholars in law and other disciplines are beginning to recognize the complex and nonbinary nature of sexual categories, some legal institutions have been slow to acknowledge these developments. Traditional jurisprudence requires that individuals be classified into discrete and often binary categories, even though such categories do not reflect reality. Legal scholars have criticized this traditional binary system for its failure to adequately protect individuals in a society in which people do not fall neatly into two opposite classifications. The inadequacies of a bijurisprudence system have been exposed in a variety of areas including race, sexual orientation, and disability law. In addition, legal scholars have begun to criticize the bisexual/bigender system that limits the sex and gender categories to only male and female.

Just as some scholars in the multiracial discourse are calling for a rejection of binary categories that measure race by rules like the one-drop rule, but minimize the more important factor of racial self-identification, legal scholars and institutions must determine whether sexual categories should be limited to the two traditional classifications of male and female or whether sex categorization should be expanded to include intersexuality as a sex category. Even if traditional notions of justice require the rejection of multisexual categories in favor of a binary system, how the categories male and female are defined must be reexamined. Legal institutions must explore whether the law should continue to rely on traditional sex criteria such as chromosomes, genitalia, and gonads to define a person's legal sex or whether these factors should be subordinated to self-identified sex.

The remainder of this chapter analyzes the sex determination issue that has been litigated the most frequently: how a person's legal sex is determined for purposes of marriage. Courts first began to struggle with this issue in the

1970s, when only a handful of cases were litigated.⁵² During the past decade, the number of lawsuits determining the legal sex of a transsex person has increased dramatically in the United States and other countries.⁵³ Thus far, no clear consensus has been reached about how the law will determine a person's legal sex for purposes of marriage.

Most states have adopted marriage statutes that limit marriage to one man and one woman, or two people of the opposite sex.⁵⁴ Even in states in which no legislation exists, most courts assume that a valid marriage requires a union of one man and one woman.⁵⁵ Originally, this presumption was based on the courts' belief that the "marriage relationship exists for the purpose of begetting offspring" or that heterosexual intercourse is an essential element on which the family is built.⁵⁶ Given the number of legal marriages between people who cannot procreate or do not intend to procreate, the current intent of these statutes appears to be to ensure that the state does not sanction gay and lesbian marriages.

Although a majority of states have adopted statutes that either define a marriage as a union between a male and a female or prohibit marriages between individuals of the same sex, none of these statutes define or attempt to define how to determine a person's legal sex. The Defense of Marriage Act also defines marriage at the federal level as a "legal union between one man and one woman as husband and wife, and the word spouse refers only to a person of the opposite sex who is a husband or a wife."⁵⁷ When Congress adopted DOMA, however, it also failed to define these terms.

Because legislators have failed to define the terms *male* and *female* or *man* and *woman*, courts in the United States and other countries have been forced to define these terms when two people who are arguably of the same sex seek a marriage license or when someone seeks to void a marriage based on the legislative prohibition against same-sex marriages. In these cases, the courts have split sharply over how to define the terms. Most of the older cases and some of the more recent cases have relied solely on biological criteria at birth and have ignored self-identified sex and medical or surgical intervention. Some courts, however, have given more weight to scientific advances about gender identity formation and the importance of an individual's self-identified sex.

Since 1970, when a court was first asked to determine the legal sex of a transsex person for purposes of marriage, until the turn of the century, almost every court that addressed this issue determined that transsex persons could not marry in the gender role that comported with their self-identified sex. Courts in Australia,⁵⁸ Canada,⁵⁹ England,⁶⁰ South Africa,⁶¹ Singapore,⁶² New

York,⁶³ Ohio,⁶⁴ and Texas⁶⁵ ruled that the gender role that they had been assigned to at birth violated the European Court of Human Rights' Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁶ During this same time, New Jersey,⁶⁸ and California⁶⁹—decided in their self-identified gender role.

The earlier cases that ruled against transsex persons were assigned to them at birth did so based on biological criteria. Some relied on a combination of biological indicators, such as chromosomes, gonads, and genitalia.⁷⁰ In other cases, courts relied on the sex indicators at birth and did not consider medical or surgical alteration that had occurred. Some courts ruled that a person's inability to beget offspring rendered a marriage invalid.⁷¹ Finally, some courts have ruled that transsex persons are only capable of creating "artificial" children and do not recognize.⁷²

On the other hand, the earlier cases that ruled in favor of transsex persons could marry in their self-identified gender role based on social and psychological aspects, rather than the biological indicators. These courts rejected the biological indicators, such as chromosomes, genitalia, and gonads and instead emphasized psychological factors.⁷³

Beginning in the mid-1990s, a number of cases in appellate courts rendering opinion in favor of transsex persons. Transsex sex activists formed organizations that advocated for their rights and increased public awareness of the issues. The more recent cases have increased. Transsex persons have brought cases primarily to determine whether they should be granted an annulment or a divorce. Recent courts have ruled that a person's right to be a legal parent is not affected by their sex.⁷⁴ The increased stakes involve large amounts of money.⁷⁵ The increased stakes involve large amounts of money. Finally, the scientific advances about gender identity formation has called into question some long-standing assumptions about sexual identity formation.⁷⁶

Although many courts have started to focus on the importance of psychological factors, some courts focus solely in terms of chromosomes and

...litigated.⁵² During the past decade, the legal sex of a transsex person has varied in many states and other countries.⁵³ Thus far, no one knows how the law will determine a person's legal sex. Many states have statutes that limit marriage to one person of the opposite sex.⁵⁴ Even in states in which the law presumes that a valid marriage requires a heterosexual relationship, this presumption was based on the assumption that a valid marriage requires a relationship exists for the purpose of procreation. Intercourse is an essential element of a legal marriage between a man and a woman, and to procreate, the current intent of the parties is that the state does not sanction gay or lesbian marriages. Many states have adopted statutes that either define a person's legal sex as male or female or prohibit marriages between persons whose legal sex is defined by these statutes. The Defense of Marriage Act defines a "legal union between one man and one woman whom the word spouse refers only to a husband or a wife."⁵⁷ When Congress passed the Act, it defined these terms. The Act defines the terms *male* and *female* or *male* and *female* as persons whose sex and other countries have been defined by their legal sex and who are arguably of the same sex. The Act seeks to void a marriage based on the sex of the parties to the marriage. In these cases, the courts have relied on the terms. Most of the older cases relied solely on biological criteria and medical or surgical intervention. There is more weight to scientific advances and the importance of an individual's self-identity in determining the legal sex of a person. At the turn of the century, almost no one knew that transsex persons could marry with their self-identified sex. In South Africa,⁶¹ Singapore,⁶² New

York,⁶³ Ohio,⁶⁴ and Texas⁶⁵ ruled that transsex persons could marry only in the gender role that they had been assigned at birth. In addition, the European Court of Human Rights consistently held that countries that refused to allow transsex persons to marry in their self-identified gender roles did not violate the Convention for the Protection of Human Rights and Fundamental Freedoms.⁶⁶ During this same time, only three jurisdictions—New Zealand,⁶⁷ New Jersey,⁶⁸ and California⁶⁹—declared that transsex persons could marry in their self-identified gender role.

The earlier cases that ruled that transsex persons are legally the sex assigned to them at birth did so based on a number of questionable grounds. Some relied on a combination of biological sex indicators, including chromosomes, gonads, and genitalia.⁷⁰ In these cases, the courts relied on the status of the sex indicators at birth and did not consider any medical intervention or surgical alteration that had occurred. Other courts focused on the transsex person's inability to beget offspring as a proper justification for finding the marriage invalid.⁷¹ Finally, some courts decided that surgical intervention is only capable of creating "artificial" sex attributes that courts do not have to recognize.⁷²

On the other hand, the earlier cases that ruled that transsex persons could marry in their self-identified sex roles focused more on psychological and social sex aspects, rather than the biological sex attributes present at birth. These courts rejected the rulings that heavily relied on chromosomes, genitalia, and gonads and instead emphasized the overriding importance of social and psychological factors.⁷³

Beginning in the mid-1990s, a number of occurrences led to an increase in appellate courts rendering opinions on this topic. First, transsex and intersex activists formed organizations that provided information about these issues and increased public awareness of the topic. Second, the issues at stake in the more recent cases have increased. The earlier sex determination cases were brought primarily to determine whether the parties should be granted an annulment or a divorce. Recent court rulings have had the potential to affect a person's right to be a legal parent⁷⁴ or the ability to obtain large sums of money.⁷⁵ The increased stakes involved have resulted in more trial court opinions being appealed. Finally, the scientific research on sexual identity formation has called into question some long-held assumptions about the roots of sexual identity formation.⁷⁶

Although many courts have started to rely on scientific studies and focus on the importance of psychological sex, a number of courts still define sex solely in terms of chromosomes or some combination of chromosomes,

gonads, and genitalia. During the past decade, courts in Texas,⁷⁷ Kansas,⁷⁸ Florida,⁷⁹ Ohio,⁸⁰ and England⁸¹ have rejected self-identity as a proper determinant of a transsex person's legal sex. On the other hand, during this same time, courts in California,⁸² Maryland,⁸³ Australia,⁸⁴ New Zealand,⁸⁵ and the European Court of Human Rights⁸⁶ have adopted a more humane approach and have ruled that self-identified sex should be a critical determinant of legal sex.

Courts That Reject Self-Identification as a Proper Indicator of Legal Sex

The recent cases that have rejected self-identified sex in favor of biological factors have not provided an extensive analysis of the literature available on sex determination. For example, the Texas Court of Appeals relied on religious rhetoric and ruled that when God created Christie Littleton, a male-to-female transsexual, God created a man that neither the law nor the medical community could turn into a woman. Therefore, the court ruled that as a matter of law, Christie was a male. Although the court recognized that its decision raised profound philosophical, metaphysical, and policy concerns, it did not address these concerns, but instead ruled that because Christie had been born with a "male body," she was legally still a male.⁸⁷

Three years later, when the Kansas Supreme Court was asked to determine whether a male-to-female transsexual could be declared a legal wife, the court ruled as a matter of law that transgender persons remain the sex that they were assigned at birth. Although the Kansas Supreme Court had extensive scientific evidence before it that had convinced the Kansas Court of Appeals to adopt a multifactor test, the Kansas Supreme Court reversed the court of appeals and instead chose to use *Webster's New Twentieth Century Dictionary's* definitions of male and female. According to the dictionary and the court, *male* is defined as "designating or of the sex that fertilizes the ovum and begets offspring: opposed to female." *Female* is defined as "designating or of the sex that produces ova and bears offspring: opposed to male."⁸⁸ Courts in Florida⁸⁹ and Ohio⁹⁰ have followed the Kansas approach and also have relied on the dictionary to determine legal sex. Therefore the implication in Kansas, Florida, and Ohio is that people incapable of begetting or bearing offspring are neither males nor females.

Courts That Accept Self-Identification as a Proper Indicator of Legal Sex

In contrast to the few courts that have relied on one or only a few biological sex indicators, most of the courts that have considered this issue during the

past decade have adopted a more humane approach in determining legal sex. Most courts in Florida,⁹² the court of appeals in the family courts in Australia⁹⁵ and the European Court of Human Rights⁹⁷ have rejected biological sex indicators. Courts that have reviewed medical and social evidence have ruled that self-identified sex should be a critical determinant of legal sex.

Many of these courts have reviewed medical and scientific advances, including genetic, gonadal, hormonal, phenotypic, and self-identity.⁹⁸ Courts that base their decisions on evidence that proves that sex is not fixed should comport with self-identified sex.

The time at which the sex is determined is also important. The cases that reject medical and scientific evidence and determine sex at birth and cannot be changed have held that a person's legal sex is determined at the time the marriage license is issued.¹⁰⁰ For transsex persons who have had hormone treatment, the time frame that the sex assigned at birth are dispositive, transsex individuals should not be required to comply with their self-identified sex for the purpose of the marriage control sex determination because after surgery a person's biological sex indicator that would be their chromosomes.

Finally, and more important, courts that have reviewed their rulings on transgender persons and have ruled that transsex persons cannot be declared legal wives but the European Court of Human Rights has ruled that transsex persons this right violates their rights. In 2002 the European Court of Human Rights issued a series of rulings in which it had ruled that a person's sex was based solely on biological criteria and that member states that refuse to change their official documents to

decade, courts in Texas,⁷⁷ Kansas,⁷⁸ rejected self-identity as a proper determinant. On the other hand, during this same decade, courts in Australia,⁸⁴ New Zealand,⁸⁵ and the European Court of Human Rights⁹⁷ have adopted a more humane approach and have considered the long-term legal and societal effects of their rulings.

Self-Identified Sex as a Proper Indicator of

Self-identified sex in favor of biological sex. In *Christie Littleton*, a male-to-female transsexual, the court ruled that as a matter of public policy, the court recognized that its ruling would be unworkable. Although the court recognized that its ruling would be unworkable, it ruled that because Christie had been born male, she was still a male.⁸⁷

The Kansas Supreme Court was asked to determine whether Christie could be declared a legal wife. The court ruled that as a matter of public policy, transsexual persons remain the sex they were born. The Kansas Supreme Court had previously ruled that because Christie had been born male, she was still a male.⁸⁷ The Kansas Supreme Court reversed the ruling. According to the dictionary and Webster's *New Twentieth Century*, the sex that fertilizes the ovum is male. The court ruled that the sex that fertilizes the ovum is defined as "designating or signifying: opposed to male."⁸⁸ Courts in other jurisdictions have also relied on this approach and also have relied on the implication in Kansas, that a person who begetting or bearing offspring

Self-Identified Sex as a Proper Indicator of

on one or only a few biological criteria. In *Christie Littleton*, the court considered this issue during the

past decade have adopted a multifactor and interdisciplinary approach to determining legal sex. Most courts, including trial courts in California⁹¹ and Florida,⁹² the court of appeals in Kansas,⁹³ the court of appeals of Maryland,⁹⁴ the family courts in Australia⁹⁵ and New Zealand,⁹⁶ and the European Court of Human Rights⁹⁷ have rejected the older narrow approach. Instead, these courts have reviewed medical and psychological evidence and have considered the long-term legal and societal effects of their rulings.

Many of these courts have also emphasized the importance of considering medical and scientific advances, rather than relying on historical, dictionary, or religious definitions of male and female. For example, the court of appeals of Kansas emphasized that sex should be determined by considering genetic sex, gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.⁹⁸ Courts that base their determinations on medical and scientific evidence that proves that sex is multifactored typically find that legal sex should comport with self-identified sex.

The time at which the sex determination is made will also be critical. The cases that reject medical and surgical alterations typically rule that sex is determined at birth and cannot be changed, unless a mistake occurred when the sex was recorded on the birth certificate.⁹⁹ On the other hand, most courts have held that a person's legal sex for purposes of marriage should be determined at the time the marriage license is issued, rather than at the time of birth.¹⁰⁰ For transsexual persons who have undergone surgical and hormonal treatment, the time frame that the court uses will be critical. If sex features at birth are dispositive, transsexual individuals will be treated as the sex that does not comport with their self-identities. If, instead, sexual features at the time of the marriage control sex determination, their legal sex will comport with their self-identities because after surgical and hormonal intervention, the only biological sex indicator that would be opposite to their self-identities would be their chromosomes.

Finally, and more important, these courts have considered the effects of their rulings on transgender persons and society. Not only have a number of courts ruled that transsexual persons can marry in their self-identified sex roles, but the European Court of Human Rights has ruled that a nation that denies transsexual persons this right violates the European Convention on Human Rights. In 2002 the European Court of Human Rights refused to follow a series of rulings in which it had upheld a country's sex determination that was based solely on biological criteria. Instead, it reversed itself and ruled that member states that refuse to allow postoperative transsexual persons to change their official documents to indicate their postoperative sex violate

articles 8 and 12, which protect the right to privacy and the fundamental right to marry.¹⁰¹

Conclusion

Transgender individuals do not fit conveniently into binary systems; they cannot easily be categorized as either males or females. Many legal institutions have imposed their need to maintain clear distinctions between the sexes on persons who do not fit neatly into distinct groups.

Until recently, the medical community also recommended that intersex persons be surgically and/or hormonally altered at an early age so that they have the physical appearance of only one sex. This recommendation is based on the questionable assumption that obviously intersex individuals would be so scorned by society that they would suffer severe humiliation and psychological trauma. This assumption ignores a substantial body of case histories, compiled primarily between 1930 and 1960, before surgical intervention became the norm, that describe well-adjusted intersex persons. Early surgical intervention to alter intersex persons so that they appear to be clearly male or female is currently being seriously questioned by some intersex individuals and by some medical experts.

Surgical alteration of intersex persons is also based on the assumption that sexual identity can be manipulated easily. Recent medical studies now suggest that sexual identity cannot necessarily be medically controlled via surgery and hormones. How sexual identity is established is as yet unclear.

The medical community is learning that sex and gender cannot easily be defined by biological factors alone. Just as the medical system's binary sex categories that de-emphasize self-identity are now being questioned by medical authorities, legal institutions must also examine how the law should define sex. Legal authorities must determine whether a binary legal system that traditionally categorizes people according to their chromosomes or the appearance of their genitalia at birth is appropriate.

If legal institutions choose to regulate behavior based on a person's sex, they must clearly define their terms. If they insist on clinging to a binary system, they must find a way to define male and female so that the rights and obligations of intersex persons are clearly delineated.

Society, the medical community, and the law must acknowledge the existence of intersexuality. Currently, intersexuality is often viewed as a shameful secret to be hidden and borne in silent suffering. "To share such a secret is to invite ridicule and rejection; to keep such a secret condemns one to a life of loneliness and isolation."¹⁰² The law, by clinging to a binary system that blindly ignores the existence of intersex persons and the importance of self-identity,

reinforces the perception that intersex is the reality of intersexuality. The law silences intersex persons further into the deepest recesses of their existences and their self-identity.

Notes

For a more detailed discussion of the issues discussed in this chapter, see Julie A. Greenberg, "Defining Male and Female: Law and Biology," *Arizona Law Review* 44 (2002): 101-120. This article provides an update of the issues first discussed in this chapter.

1. A recent survey of the medical literature estimates that the number of people living with intersex conditions may be as high as 2 percent of the population. See Charuvastra, Amanda Derryck, Anne Fausto-Sterling, and Lee, "How Sexually Dimorphic Are We?," *Journal of Interpersonal Violence* 15 (2000): 151.

2. John Money, *Sex Errors of the Body: A Study of Transsexuals, Transvestites, and Their Families* (New York: Basic Books, 1966).

3. This chapter focuses on the marriage of intersex persons. For a discussion of the cause of the 1,049 federal rights linked to legislative developments on same-sex marriage, see Greenberg, "Defining Male and Female: Law and Biology," *Arizona Law Review* 44 (1999): 266, 274. For a thorough analysis of the legal implications of sex determination, including employment discrimination, equal protection, athletic competitions as a female, the obligation to marry, and other issues, see Greenberg, "Defining Male and Female: Law and Biology," *Arizona Law Review* 44 (1999): 266, 274. For a thorough analysis of the legal implications of sex determination, including employment discrimination, equal protection, athletic competitions as a female, the obligation to marry, and other issues, see Greenberg and Marybeth G. Greenberg, "The Constitutional Consequences of Interstate Commerce Clause Preemption," *Arizona Law Review* 80 (2005): 819.

4. Alice Domurat Dreger, "Ambiguous Gender: Issues in the Treatment of Intersexuality," *Hastings Center Report* 18 (1988): 18.

5. *Ibid.*

6. *Ibid.*

7. For a comprehensive anthropological study of intersexuality, see Gilbert Herdt, ed., *Third Sex, Third Gender: Beyond Binary and Dualistic Sex Categories* (New York: Zone, 1996).

8. Julianne Imperato-McGinley et al., "Sex Reassignment Surgery in Transsexuals: A Study of the Inherited Form of Male Pseudohermaphroditism," *Journal of Clinical Endocrinology and Metabolism* 27, 1974, 1213.

9. *Ibid.*

10. *Ibid.*

11. Gilbert Herdt, "Mistaken Sex: Cultural Construction of Intersex in Guinea," in Herdt, *Third Sex, Third Gender*, 4.

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e law must acknowledge the ty is often viewed as a shame-ing. "To share such a secret is ret condemns one to a life of o a binary system that blindly e importance of self-identity,

reinforces the perception that intersexuality is unacceptable. It also ignores the reality of intersexuality. The law should not continue to force intersex persons further into the deepest recesses of their closets by failing to acknowledge their existences and their self-identities.

Notes

For a more detailed discussion of the issues discussed in this chapter, see Julie A. Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology," *Arizona Law Review* 41 (1999): 266. This chapter summarizes and provides an update of the issues first discussed in the Arizona article.

1. A recent survey of the medical literature from the last half of the twentieth century estimates that the number of people who deviate from the sexually dimorphic norm may be as high as 2 percent of live births. See Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee, "How Sexually Dimorphic Are We?" *American Journal of Human Biology* 12 (2000): 151.

2. John Money, *Sex Errors of the Body and Related Syndromes: A Guide to Counseling Children, Adolescents, and Their Families*, 2nd ed. (Baltimore, MD: Brooks, 1994).

3. This chapter focuses on the marital implications of sex determination because of the 1,049 federal rights linked to marital status and the recent judicial and legislative developments on same-sex marriage. For a detailed discussion of the other legal implications of sex determination, including sex indicators on official documents, employment discrimination, equal protection violations, the ability to participate in athletic competitions as a female, the obligation to serve in the military, and liability under some criminal statutes, see Julie A. Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology," *Arizona Law Review* 41 (1999): 266, 274. For a thorough analysis of the constitutional implications of these rulings, see Julie A. Greenberg and Marybeth Herald, "You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings," *Washington Law Review* 80 (2005): 819.

4. Alice Domurat Dreger, "Ambiguous Sex'—or Ambivalent Medicine? Ethical Issues in the Treatment of Intersexuality," *Hastings Center Report* 28 (1998): 24, 27-28.

5. Ibid.

6. Ibid.

7. For a comprehensive anthropological and historical perspective, see Gilbert Herdt, ed., *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* (New York: Zone, 1996).

8. Julianne Imperato-McGinley et al., "Steroid 5-Alpha-Reductase Deficiency in Man: An Inherited Form of Male Pseudohermaphroditism," *Science*, December 27, 1974, 1213.

9. Ibid.

10. Ibid.

11. Gilbert Herdt, "Mistaken Sex: Culture, Biology, and the Third Sex in New Guinea," in Herdt, *Third Sex, Third Gender*, 420.

12. Francisco Valdes, "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of Sex, Gender, and Sexual Orientation in Euro-American Law and Society," *California Law Review* 83 (1995): 1, 102.
13. Serena Nanda, "The Hijras of India: Cultural and Individualized Third Gender Role," in *The Many Faces of Homosexuality: Anthropological Approaches to Homosexual Behavior*, ed. Evelyn Blackwood (New York: Harrington Park, 1986), 35.
14. Rabbi Alfred Cohen, "Tumtum and Androgynous," *Journal of Halacha and Contemporary Society* (1999), <http://www.daat.ac.il/daat/english/journal/cohen-1.htm>.
15. Henry A. Finlay, "Sexual Identity and the Law of Nullity," *Australian Law Journal* 54 (1981): 115, 120n51.
16. Henry de Bracton, *On the Laws and Customs of England*, trans. Samuel E. Thorne, vol. 2 (Cambridge, MA: Harvard University Press, 1968), 31.
17. E. Coke, *The First Part of the Institutes on the Laws of England*, vol. 1, Institutes 8.a (1st American ed. 1812; 16th European ed. 1812).
18. Money, *Sex Errors of the Body and Related Syndromes*, 4.
19. John Money and Patricia Tucker, *Sexual Signatures: On Being a Man or a Woman* (Boston: Little, Brown, 1975), 6.
20. Robert Pool, *Eve's Rib: Searching for the Biological Roots of Sex Differences* (New York: Crown, 1994), 67.
21. Money, *Sex Errors of the Body and Related Syndromes*, 25.
22. Pool, *Eve's Rib*, 68.
23. *Ibid.*, 70-71.
24. Anne Fausto-Sterling, "The Five Sexes: Why Male and Female Are Not Enough," *Sciences*, March-April 1993, 20-21.
25. Money, *Sex Errors of the Body and Related Syndromes*, 49-57.
26. *Ibid.*, 31-33.
27. *Ibid.*
28. *Ibid.*
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52. See, for example, *Corbett v. Corbett*, 383 A.2d 204 (N.J. 1976); *B. v. B.*, 355 N.Y.S.2d 499 (N.Y. Sup. Ct. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1974); *In Marriage of W. v. W.*, [1976] 2 SALR 308.
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54. For a discussion of these statutes, see *Goodridge v. Department of Public Health*, 353 Mass. 456 (2003).
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