Making sex: law's narratives of sex, gender and identity

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From the 1970 decision of Corbett[1] *onwards, legal narratives established two modes of categorising complex social identity in relation to sex and gender. These narratives responded to complex identity questions by attempting to simplify identity by limiting it to biological factors or anatomical and psychological factors.*

I demonstrate that the law's struggle to 'make' sex is reflected to a certain extent by feminism's trajectory, in that feminisms have also attempted to grapple with these complex questions, and often opted for the same simple solutions to the problem of understanding gender, sex and identity. The aim of this paper is to show that some strands of feminist theory, specifically post-structuralist feminist theory, can produce a more progressive and constructive approach to determining sex in their ability to illuminate the complexities of identity. In particular, my aim is to urge those courts that 'make' sex to consider these complexities and the implications that flow from placing transgender people into rigid and narrow categories.

'One is not born a woman, but rather one becomes one'

Simone de Beauvoir, *The Second Sex*

'Once a man, always a man'

Hardberger CJ, *Littleton v Prange* 9 SW 3d 223 (Tex App, 1999)

1. INTRODUCTION

Beauvoir's well-known phrase represents the later twentieth century's attempt to understand sex, gender and identity. Her work lies in the vanguard of those who have highlighted the constructed and political nature of sex, gender and identity and posed a series of critical questions: How do we understand sex and how should we determine it? Should it be determined according to biology? According to anatomy? According to psychology? A combination of these factors, or other factors? Is it fixed at birth or is it something over which some agency can be exercised? What is the role of sex in society and in the operation

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1. *Corbett v Corbett* [1971] P 83.

of the law? Has sex had the same meaning throughout history? Or has the meaning of sex changed over time in relation to different political and cultural paradigms? What is the relation between sex and gender? Are they two distinct concepts?

There are two main views of sex: the first, the dominant approach, is the biological determinist view that biology is destiny and that its meaning is universal. This view is exemplified by the above quotation of Chief Justice Hardberger of the Texas Court of Appeals. The second is the social constructionist view of sex, which challenges biological determinist notions of sex as apolitical and ahistorical. Which view of sex (and gender) is the prevailing and driving force in the law? What are law's responses to the above questions?

The following outline of transsexual cases shows how, from the 1970 decision of *Corbett*[2] onwards, legal narratives established two modes of categorising complex social identity in relation to sex and gender. These narratives responded to complex identity questions by attempting to simplify identity by limiting it to biological factors or anatomical and psychological factors.

I begin this paper by delineating the two main views of sex. I then identify and examine the two main *legal* narratives which have established modes of categorising a person's sex, primarily for the purposes of marriage. The first *legal* narrative determines sex according to strictly biological factors: it enjoys dominance despite widespread criticism of the rigidity of its approach. The second, less dominant, legal narrative determines sex according to the conformity of anatomical and psychological factors: it is identifiable in a more recent stream of cases, which, in my view, consider the relevant issues more broadly. It comes under criticism for its possible over-emphasis on anatomy. There is also a potential third narrative, which determines sex by giving primacy to behaviour and psychology, but this has gained little support in the courts so far. Brought together, these two main narratives constitute the current debate as to whether transgender people[3] should be able to marry or have entitlements to social security and pensions in their non-chromosomal sex. Feeding into this debate is the question of same-sex marriage and whether the union of two persons of the same *chromosomal* sex or the same *appearance* constitutes such marriage. The focus of this paper, however, is how courts understand and 'make' sex.

In outlining these legal narratives I examine their underlying assumptions and weaknesses. In particular, I trace the palpable tension in the law's desire to establish stable categories of social and sexual identity (either through biology or anatomy), in the face of the fluidity of gender (literally embodied in transgender subjects) – a fluidity which refuses traditional modes of categorisation. This tension demonstrates the frailty of law's projection of the legal subject as stable, unified and capable of categorisation.

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

3. By the term 'transgendered people' I mean all those persons whose gender identity does not conform to the rigid gender binary of male/female. It includes those who cross-dress, those who perform in drag, those whose gender presentation is ambiguous, those who live and identify as a sex that differs from the sex they were assigned at birth, those who do not identify as any sex and those who undergo surgery in order to have their anatomy match their self-identified sex. Those in this very last identification are often referred to as 'transsexual', a term which can be used at times interchangeably with the term 'transgender'.

In the second part of this paper, I demonstrate that the law's struggle to 'make' sex is reflected to a certain extent by feminism's trajectory, in that feminisms have also attempted to grapple with these complex questions, and often opted for the same simple solutions to the problem of understanding gender, sex and identity. Since at least the advent of the *Corbett* decision, the debate among feminisms about sex and gender has been intense and protracted. I thus discuss the varying feminist conceptions of the sex/gender distinction and their implications in relation to the question of transgender identity. The aim of this paper is to show that some strands of feminist theory, specifically post-structuralist feminist theory, can produce a more progressive and constructive approach to determining sex in their ability to illuminate the complexities of identity. In particular, my aim is to urge those courts that 'make' sex to consider these complexities and the implications that flow from placing transgender people into rigid and narrow categories.

a. Biological determinist view of sex

The dominant view of sex is the discourse of biological determinism. Generally, it posits that sex is biological, and gender is an effect of sex. In other words, social norms are, or ought to be, grounded on biological facts. No amount of social hange will alter the fundamental biological nature of human beings. This is because biology is understood as a relatively fixed and unchanging given. This theory extends to the belief that biological facts express themselves in the social roles prevalent in their own society.[4] This means that gender roles – behaviour and self-identity – are understood as products of underlying biology.

Biological arguments have been used both against and in support of women's liberation: social theories have looked to biological science for proof of women's 'natural' inferiority, superiority or, most often in the late twentieth century, women's equality in difference.[5] A contemporary example is the assertion of biological differences by Cultural feminists in the 1970s. Conservative groups subsequently harnessed these assertions in order to justify their employment policies which discriminated against women on 'biological' grounds.[6] What is shared by these arguments is the central and unquestioned position of biology as the harbour and root of both the 'natural' and social norms.

b. Social constructionist view of sex

A social constructionist view of sex basically posits that the meaning of sex is historically and politically specific. Its meaning shifts across time and cultures according to particular political impulses. It therefore has no universal or ahistorical meaning.

4. See, for a contemporary example, the discourses of the gene. According to D Nelkin and M Lindee, these discourses 'conform to and complement existing beliefs about identity, family, gender and race': *The DNA Mystique: The Gene as Cultural Icon* (New York: Freeman, 1995) p 197.

5. C Weedon *Feminist Practice and Poststructuralist Theory* (London: Blackwell, 2nd edn, 1996) p 128.

6. *EEOC v Sears, Roebuck and Co* 628 F Supp 1264 (ND Ill, 1986).

One version of this theory is articulated by Thomas Laqueur, who claims that sex as we know it today was invented at some time in the eighteenth century.[7] Perhaps it was the rise of the social contract state that caused women's sexual *difference* to become accentuated in political discourse. Rousseau, for example, stated: 'The male is only male now and again, the woman is always a female ... everything reminds her of her sex.'[8] Laqueur points out that, at this time, anatomical differences between men and women were suddenly given fresh political significance, presumably to justify women's exclusion from the public sphere of the social contract state.

According to Laqueur, until this time of political re-ordering, a hierarchical model of the body had held sway which was represented as the 'one sexed' body. The male anatomy had been projected as *the body model* and all other bodies were interpreted on a hierarchical plane as its inferior versions.[9] The 'inferior' female anatomy, for example, was thought to be an inverted version of the perfect male anatomy, as her reproductive organs were interpreted as underdeveloped and inverted versions of the male genital organs. Thus, at this time, women's anatomy was not seen as inherently different from men's. The new anatomical 'discoveries' of the eighteenth century (which were ostensibly sparked by examinations of the female skeleton which found that women had weaker and different frames) led to the theory that women were not only anatomically inferior, but they were also opposite and complementarily different. Anatomically the sexes were seen as asymmetrical and thus they were asserted to belong to opposite spheres – private and public.

Thus, according to the social constructionist theory, biology became historically portrayed and understood in knowledges as being determinative of one's destiny. This view of the relationship between biology and sex, called biological determinism, proceeded to assert itself as the natural and only possible view of sex. This was despite the fact that it was only in the nineteenth century that it became congealed by a panoply of scientific discourses, such as evolutionism, into a discourse of itself.

But where does the concept of 'gender' fit into the social constructionist view of sex? I will return to this question once I have identified and discussed the two main legal narratives which directly address the question 'What is sex?'.

2. 'WHAT IS SEX?' – LEGAL NARRATIVE NO 1

a. The United Kingdom

The first legal narrative to establish a legal mode of categorising a person's sex for the purposes of marriage law was the English case of *Corbett v Corbett* in 1970.[10] This mode of categorising sex became *the* common law definition. The

7. T Laqueur *Making Sex: Body and Gender from the Greeks to Freud* (Cambridge, Mass: Harvard University Press, 1990); C Gallagher and T Lacqueur (eds) *The Making of the Modern Body: Sexuality and Society in the Nineteenth Century* (Berkeley: University of California Press, 1987).

8. J J Rousseau *Emile* (London: Dent & Sons, 1972) p 324.

9. Eg Aristotle asserted that 'as between male and female, the former is by nature superior and ruler, the latter is inferior and subject': Aristotle *Politics* T Sinclair (trans) (Harmondsworth: Penguin, 1962) p 33.

10. [1971] P 83.

basic issue was the status of the marriage between the petitioner, Arthur Corbett, and the respondent, April Ashley, a post-operative male-to-female ('MTF') transsexual. The High Court was aided by the expert opinions of nine doctors as to Ashley's sex, as well as the testimony of Ashley herself. These conflicting opinions were fairly general in nature, addressing the question of what is sex in relation to a male-to-female transsexual generally. Four factors were identified by these doctors in common as integral to sex (although the weight of each factor was a point of contention): chromosomes, genitals, gonads and psychology. Ormrod J used these general medical opinions to determine sex strictly for the purposes of the heterosexual institution of marriage (and 'for no other purpose'). He rejected the respondent's submission that her sex for the purposes of National Insurance, and other forms of social legal identity, should have a bearing on the determination of her sex for the purposes of marriage. To Ormrod J, there were 'fundamental' differences between marriage and National Insurance identity.[11] In his view, there is no illogicality in one person being legally classified as two different sexes for different legal purposes. This is because, in his view, there is something unique about marriage. He stated: 'Marriage is a relationship which depends on sex and not on gender.'[12]

Ormrod J decided that sex is a biological matter: it is determined at birth if a person's chromosomes, gonads and genitals are congruent. A person's psychological view of their identity is one related to gender, and not sex. While sex relates to one's genitals, it is only the genitals one is born with. The removal of a person's genitals and reconstruction of other genitals affects their gender, but not their sex. For this reason, Ormrod J saw the term 'sex change' as 'redundant' because it is impossible to change one's sex.[13] In addition, he asserted that the word 'assign' is 'apt to mislead since, in fact, it means no more than that the doctors decide the gender, rather than the sex, in which such patients can best be managed and advise accordingly'.[14] Gender in his view is not biological: it is psychological and social. Thus Ormrod J explained the significance of sex, not gender, to marriage:

> '... sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which *the capacity for* natural *heterosexual intercourse is an essential element.* It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.' (emphasis added)[15]

So sex, according to Ormrod J, is 'an essential determinant' of marriage because marriage critically involves the capacity for 'natural' heterosexual intercourse. But what does Ormrod J means by the words 'natural heterosexual intercourse'? Presumably, Ormrod J uses the adjective 'natural' to counter the evidence given

11. [1971] P 83 at 107.
12. [1971] P 83 at 107.
13. [1971] P 83 at 104.
14. [1971] P 83 at 104.
15. [1971] P 83 at 105–106.

by the court's medical inspectors' that there is 'no impediment on "her part" [April's] to sexual intercourse'.[16] As Ashley no longer has a penis, this reference to 'her part' must be to a female sex role, which means that she would be capable of heterosexual intercourse. This evidence did not fit into Ormrod J's view of Ashley's capacity for intercourse. Ormrod J proceeded to reject Ashley's evidence that consummation took place, and instead accepted the petitioner's evidence that no consummation occurred.[17] He stated that, in any event, he would be prepared to hold that April was physically incapable of consummating a marriage because sexual intercourse in the 'true sense' was not possible given Ashley's 'completely artificial cavity'.[18] Thus we see that, according to his biological test, Ashley was capable of neither 'natural' nor 'heterosexual' intercourse with a man because she was not born with the relevant 'natural' female body parts. Perhaps intercourse between the Corbetts would be described as constituting '*un*natural' heterosexual intercourse.[19]

In my view, the following quotation from the judgment *implicitly* explains Ormrod J's view as to why purely biological sex is an essential criteria of marriage. He stated:

> 'Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist 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*.' (emphasis added)[20]

Ormrod J does not make clear what is 'the essential role of a woman in marriage' but he implies, without quite spelling it out, that sex, marriage and 'natural heterosexual intercourse' are about procreation. 'Unnatural' heterosexual sex is 'unnatural' because, presumably, in his view it does not hold the potential for procreation. Here we see the centrality of procreation in the meaning of sex, which is a view consistent with the discourse of biological determinism.

In the UK, the *Corbett* approach has been extended into other parts of the law, despite the fact that it was formulated according to the specificities of

16. [1971] P 83 at 96.

17. After *Corbett*, the common law rule that a marriage could be declared voidable on the grounds of non-consummation owing to the incapacity of one party was given statutory effect in s 12(a) of the Matrimonial Causes Act 1973.

18. [1971] P 83 at 107.

19. See A Sharpe 'Transgender Jurisprudence and the Spectre of Homosexuality' (2000) 14 Australian Feminist LJ 23. Sharpe points out that it is more likely that Ormrod J would describe the relationship as a same-sex relationship. In interpreting the words 'natural heterosexual intercourse', he draws attention to the following words of Ormrod J: 'The mischief is that by over-refining and over-defining the limits of "normal" one may, in the end, produce a situation in which consummation may come to mean something altogether different from normal sexual intercourse': at 108. In my view, this interpretation is persuasive but fails to explain Ormrod J's statement regarding the 'essential role of a woman in marriage'. See below.

20. [1971] P 83 at 106.

the institution of marriage. In *R v Tan*,[21] the High Court extended its application to English criminal law, almost as if the test were uncontroversial, and the test was also recently applied in a sex discrimination matter.[22] It currently retains ascendancy, indicated by the Court of Appeal decisions in *ST (formerly J) v J*[23] and *Bellinger v Bellinger*.[24] In the recent case of *Bellinger*, the Court of Appeal considered a petition for a declaration that the marriage celebrated between the post-operative MTF transsexual appellant and her husband was valid. Here the court considered current medical views of transsexuality to assess whether the *Corbett* approach was still appropriate in determining the sex of a person after the initial assignment at birth.[25] The majority held that the medical evidence demonstrated 'the enormously increased recognition of ... the psychological factors' in current assessments of transsexuality.[26] However, it decided that it was for Parliament and not the court to recognise such social and medical changes. In the view of the majority, this was appropriate given the special position of marriage in society: '[it] is a matter of status ... It affects society and is a question of public policy ... Status is not conferred only by a person upon himself; it has to be recognised by

21. [1983] QB 1053. Here the court decided to extend *Corbett*'s application because 'common sense and the desirability of certainty and consistency demand' it so: at 1064. In this case, Gloria Greaves, a post-operative MTF transsexual, appealed her conviction of living on the earnings of prostitution and her husband's conviction of living on the earnings of the prostitution of another man, on the ground that she was a woman. Although Greaves had been living as a woman for 18 years and had undergone a sex change operation, the court deemed her to be a man for the purposes of the Sexual Offences Act 1967. The court applied the *Corbett* test 'without hesitation': at 1064. In it's view, consistency is desirable. Ironically, this need for consistency was not considered to be desirable by Ormrod J in the case of *Corbett*. Critically, the court in *Tan* made no attempt to demonstrate any similarities between family law and criminal law, or to show that sex was an 'essential determinant' of the relevant crime or of criminal law in general. Furthermore, it did not consider the inconsistency between Greaves' National Insurance identity and her identity for the purposes of the criminal law to be a problem. It appears that no argument was submitted as to an alternative definition of sex and that the submissions were limited to whether the *Corbett* test should apply in criminal law.

22. See the decision of the Employment Appeal Tribunal in *Chief Constable of West Yorkshire Police v A and Secretary of State for Education and Employment* (2002) IRLR 103.

23. [1998] Fam 103. In this case a pre-operative FTM transsexual defendant sought ancillary relief after his marriage with the plaintiff was declared void by reason that the defendant was not male at the time of the ceremony. The plaintiff challenged the defendant's claim for relief on the ground that it was against public policy as the defendant had committed perjury at the marriage ceremony by declaring he was a bachelor. The defendant failed to inform the plaintiff of his birth sex before or during their 18-year marriage. Judging the defendant's claim for ancillary relief on its merits, the court held the defendant's claim unsuccessful.

24. (2002) 2 WLR 411.

25. The majority held that the *Corbett* test was the only basis upon which to decide upon the sex of a child *at birth*. They were more equivocal as to whether the assignment made at birth is immutable given the medical evidence of the possibility that transsexualism is a medical condition with a biological basis by reason of sexual differentiation of the brain *after birth*. However, the majority decided that such findings were 'at such an early state that ... a court could not accept them as clear indications': (2002) 2 WLR 411 at para 55. Thorpe LJ dissented, finding that the evidence was sufficient for the *Corbett* approach to be rejected.

26. (2002) 2 WLR 411 at para 98.

society.'[27] For a court to decide such public policy questions would be an 'imposition' on the public.[28] The *Corbett* test was thus applied, with the result that the appellant's 20-year marriage was declared invalid.[29]

b. The European Community

The *Corbett*[30] approach to sex was accepted by the European Court of Human Rights in a series of cases: *Rees v United Kingdom*;[31] *Cossey v United Kingdom*;[32] *Sheffield and Horsham v United Kingdom*;[33] and *X, Y and Z v United Kingdom*.[34]

27. (2002) 2 WLR 411 at para 99.

28. (2002) 2 WLR 411 at para 104. The court held that if the post-operative gender of transsexuals were recognised, then the preconditions of recognition would be questions of public policy that a court could not decide. This contrasts with the *MT v JT* 335 A 2d 204 (1976) approach: see section 3a. below

The court decided to leave these matters to Parliament, despite the government's failure to act on the Report of the Inter-Departmental Working Group on Transsexual People and its 'failure to recognise the increasing concerns and changing attitudes across Western Europe': at para 96.

29. This case has since been appealed to the House of Lords, whose judgment is presently pending. The matter was heard on 13 March 2002. In my view, the House of Lords is likely to take a bolder approach than that of the Court of Appeal and find that, in the face of legislative inaction, the common law should be changed to reflect current social and medical views of transsexuality which were not extant at the time of *Corbett* over 30 years ago.

Note that the extension of the *Corbett* test to intersex persons was recently rejected in *W v W* [2001] Fam 111. Here, the Family Division Court was asked to determine whether an intersex respondent was male or female at the date of marriage on a petition for nullity by the petitioner. Charles J held that the case did not concern a transsexual and therefore the *Corbett* test was not appropriate, thus distinguishing 'inter-sex' persons from transsexuals. He described the former as suffering partial androgen sensitivity which is caused by mutations of the androgen receptors so that the male body is unable to 'see' testosterone. In this case, the respondent had male chromosomes, ambiguous gonadal sex, ambiguous external genital appearance, no female internal sex organs, female body habitus (eg little body hair) and female gender identity.

30. *Corbett v Corbett* [1971] P 83.

31. (1986) 8 EHRR 56, Series A No 106. See also *Van Oosterwijck v Belgium* (1980) Series A No 4, which is the earliest case before the European Commission of Human Rights. Here a post-operative FTM transsexual brought a case against the government of Belgium for its refusal to alter her birth certificate to reflect her altered sex. The matter was not heard by the European Court of Human Rights due to the claimant's failure to exhaust local remedies.

32. (1990) 3 EHHR 622, Series A No 184. This case was chronologically followed by *B v France* [1992] 2 FLR 249, Series A No 232, where a post-surgical MTF transsexual successfully complained under Art 8 of the Convention that the French court's refusal to order the rectification of her birth certificate or to allow her to have a female forename violated her right to respect for privacy. The decision appears to have turned on particularities of the French civil registration system.

33. (1998) 27 EHRR 163.

34. 22 April 1997, Reports of Judgments and Decisions 1997-II. Here, the applicant was appealing the extension of the *Corbett* approach into the realm of paternity law. X, an FTM transsexual, claimed paternity, under the Human Fertilisation and Embryology Act 1990, of his partner's child, which had been conceived by means of artificial insemination donor. X unsuccessfully argued that the UK's refusal to give him the same recognition as is given to biological men under the Act violated his right to respect for family life under Art 8.

In the first three cases, the transsexual applicants were arguing that the United Kingdom had violated Arts 8 and 12 of the European Convention on Human Rights, which respectively protect the right to respect for privacy and the right to marry. The applicants, Rees, Cossey, Sheffield and Horsham, sought amendment of their birth certificates to reflect their post-operative identity and the right to marry a person of the same biological sex. They argued unsuccessfully that the UK violated these Articles of the Convention due to its adherence to the *Corbett* approach, which refused to recognise their post-operative identity.

In *Rees* and *Cossey*, the majority of the courts read Art 12 of the Convention, 'Men and women of marriageable age have the right to marry and found a family ...', as referring to marriage between persons of the opposite sex, and unquestioningly assumed that 'sex' meant biological sex.[35] The court in *Cossey*, for example, said that 'the [biological] criteria adopted by English law' was 'in conformity with the concept of marriage to which the right guaranteed by Article 12 refers'.[36] It continued: '... attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of the biological criteria for determining a person's sex for the purposes of marriage.'[37] The assumption that sex denotes only biological sex was integral to the majority's interpretation of Art 12 in *Cossey* as being about protection of marriage as the basis of the family. From this it was assumed by some judges that Art 12 encompassed the physical capacity to procreate. This assumption was articulated by some of the Commission judges in *Rees* and described as the 'obvious intention' and 'social purpose' of Art 12.[38]

This series of cases regarding the UK's obligations in respect of Arts 8 and 12 has now been eclipsed by the Court's two recent transsexual decisions (see below).

c. Common law countries

The *Corbett* narrative has been the dominant approach in most common law countries, particularly in the area of marriage law. For example, it was initially followed in Australia[39]

35. *Rees v United Kingdom* (1986) 8 EHRR 56 at para 49; *Cossey v United Kingdom* (1990) 3 EHHR 622 at paras 45–46.

36. *Cossey v United Kingdom* (1990) 3 EHHR 622 at paras 45–46.

37. *Cossey v United Kingdom* (1990) 3 EHHR 622 at paras 45–46.

38. *Rees v United Kingdom* (1986) 8 EHRR 56 at para 28. Of course, if in fact the right to marry in Art 12 is intended to be about procreation (which is spurious in my view), then this explains the significance of a biological interpretation of sex. But such an assumption is never explicitly stated in *Corbett*.

39. *The Marriage of C & D* (1979) 35 FLR 340. This point is contestable as, in a strict sense, this case did not concern transsexualism. The respondent husband was a hermaphrodite/intersex who had been born with the sexual organs of both sexes, had female hormones and had undergone operations to alter his external sex organs to become a male. In her application for a declaration of nullity, the wife asserted that the husband was unable to consummate the marriage. Ostensibly applying *Corbett*, the court declared that as the husband was 'neither man nor woman but a combination of both' he was incapable of entering a valid marriage with either sex: at 345. For commentary, see R Bailley-Harris 'Family Law – Decree of Nullity of Marriage of True hermaphrodite Who Has Undergone Sex-Change Surgery' (1979) 53 Australian LJ 659.

and New Zealand[40] and is still the dominant approach in South Africa.[41]

d. The United States

In the US, the 1971 case of *Anon v Anon*[42] followed the same biological approach, but did not refer to the *Corbett*[43] decision. In this case, the plaintiff sought a declaration as to his marital status with the defendant, who was a pre-operative MTF transsexual at the time of the marriage ceremony. The marriage lasted less than two days before the plaintiff deserted the defendant upon discovering her biological sex. There was no issue as to whether the marriage had been consummated. Here, the court did not hear any evidence from medical witnesses, or even from the defendant herself, as to her sex. The court found that 'as a fact' the defendant was not a female at the time of the ceremony. It gave no test for the determination of sex but quoted the following passage from a case in relation to marriage:

> 'The mere fact that the law provides that physical incapacity for sexual relationship shall be ground for annulling a marriage is of itself *sufficient indication of the public policy that such relationship shall exist with the result and for the purpose of begetting offspring.*' (emphasis added)[44]

Here, the court made explicit that what lies behind the requirement for physical capacity for heterosexual intercourse in marriage and, moreover, what lies implicit in the biological view of sex is *procreation.*

40. In *Re T* (1975) 2 NZLR 449, the court refused the application of an MTF transsexual applicant for an order to change the registration of her birth details. Although this was not a family law case, the Supreme Court here examined the applicant's breasts and vagina and the fact that she was 'capable of playing the part of a female in sexual intercourse': at 450. The court concluded by saying that the question was for the legislature to decide. In other words, the court viewed the biological approach to sex as the natural and uncontentious approach that could only be changed by parliament. The court offered no justification or authority for the decision except for *Corbett.*

41. In *W v W* [1976] 2 SALR 308, the MTF transsexual plaintiff filed for divorce on the grounds of adultery, causing the validity of her marriage to the defendant to come under question. Unlike *Corbett*, it was an uncontested fact that the marriage had been successfully consummated. In this case, the court applied the same biological criteria as in *Corbett*, but without any direct medical evidence and with minimal examination of the issues. The court acknowledged that the wife had breasts and a 'vagina-like cavity', she looked like a woman, was accepted in society as a woman and was capable of having sex with a male '(... despite her inability to procreate)': at 313. It recognised that psychologically the plaintiff regarded herself as a woman, and yet it concluded that there was 'no evidence (nor, one imagines, could there be) to justify a finding that merely on this basis the plaintiff was a woman': at 312. Thus the court held that the plaintiff was a man and the marriage was void. In its reasons, the court never explicitly stated that the *Corbett* biological criteria were necessary for the purposes of procreation, nor that procreation was an essential part of marriage. But it is, arguably, the only explanation for the court's use of such limited criteria in circumstances where consummation and 'normal sexual relations' took place.

42. 325 NYS 2d 499 (1971).

43. *Corbett v Corbett* [1971] P 83.

44. 325 NYS 2d 499 at 500 (1971). Quoting from *Mirizio v Mirizio* 242 NY 74 at 81 (1928).

The 1974 case of *B v B*[45] evidences even greater influence of the biological approach. In this case, the applicant wife sought an annulment of her marriage with the defendant on the ground that he was female. For this purpose, she sought to have her husband physically examined by the court. The court held that the marriage was invalid as the post-operative FTM transsexual husband had no male sexual organs. The court, referring to the defendant's ability 'to perform male functions in a marriage', reasoned thus:

> '... defendant cannot function as a husband by assuming male duties and obligations inherent in the marriage relationship ... Apparently, hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to *function as a man for purposes of procreation*.' (emphasis added)[46]

From this quotation, it appears that the defendant's failure is not only that he has no penis for 'normal' heterosexual intercourse, but also his related failure to be able to procreate. From this, it appears that sex is determined according to the requirement for heterosexual intercourse and also the requirement for procreation.

The biological approach has most recently been followed in the US by the Texas Court of Appeals in *Littleton v Prange*.[47] In this case, Christie Littleton, an MTF transsexual, sued a doctor for medical malpractice resulting in the death of her husband in the capacity of his surviving spouse. The doctor filed a motion for summary judgment, successfully challenging Christie's status, asserting that Christie was a man, and that a biological man cannot be the surviving spouse of another man. Christie had been married to the deceased for seven years and had also amended her birth certificate to reflect her reassigned sex.[48] At the outset, Hardberger CJ, in the majority,[49] phrased the legal question as: 'can a physician change the gender of a person with a scalpel, drugs and counselling, or is a person's gender immutably fixed by our Creator at birth?'[50] He approached the issue first by examining the preponderance of same-sex marriage laws, and 'public antipathy' towards such marriages, before addressing the real question of whether Christie was a man or woman. In addressing this question, he briefly noted the fact that Christie's 'self-identity', her 'outward physical characteristics', her appearance and her psychological view all pointed to her being a woman. But, in drawing his final conclusions, Hardberger CJ considered other factors, giving weight to the fact that sex reassignment surgery 'does not

45. 355 NYS 2d 712 (1974).
46. 355 NYS 2d 712 at 717 (1974).
47. 9 SW 3d 223 (Tex App, 1999).
48. Note that this amendment was made when litigation was proceeding. In the view of Katrina Rose, the timing of this amendment means that Littleton's marriage was legally a same-sex marriage and Littleton therefore 'deserved to lose' her action: 'The Transsexual and the Damage Done: The Fourth Court of Appeals Opens Pandora's Box by Closing the Door on Transsexuals' Right to Marry' (2000) 9 Law and Sexuality 41 at 74.
49. Justice Karen Angelini wrote a concurring opinion. See the dissent of Justice Alam Lopez. In her view, a transsexual's self-identify can be a criteria in the determination of sex. She held that a fact-finder should determine whether a transsexual's sex is reflected by their original or amended birth certificate.
50. 9 SW 3d 223 at 224 (Tex App, 1999).

create the internal sexual organs of a woman', such as those used for procreation, and the fact that Christie was still chromosomally male: 'Biologically a post-operative female transsexual is still a male.'[51] He also discussed several cases, including *Corbett*,[52] concluding from the latter that 'once a man, always a man'.[53]

Hardberger CJ stated that there were no legislative guidelines addressing the question of whether the legislature intended to recognise transsexuals as surviving spouses under the relevant statute.[54] He concluded that in these circumstances the court could not act. He stated: 'this court has no authority to fashion a new law on transsexuals ... we can only interpret the written word of our sister branch of government, the legislature.'[55] He went on to note that there were 'many fine metaphysical arguments' but:

> 'courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the *narrowly defined perimeters of statutes*, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is ... to interpret the statutes of the state and prior judicial decisions.' (emphasis added)[56]

Hardberger CJ then stated that Christie was 'created and born a male ... There are some things we cannot will into being. They just are'.[57] He effectively held that the biological approach was the only possible, natural and appropriate approach in the absence of legislative guidance.[58]

In this case, the court clearly refused to address the complexity of Christie's social identity. While it could have turned to other disciplines, such as science and medicine, for assistance, it instead looked for a simple solution, searching for it in the (non-existent) intentions of the legislature and even the intentions of 'our Creator'. The court refused to accept that social identity may be a fluid concept. Its view reiterates the rigidity of *Corbett*: 'once a man, always a man'. But the above quotation demonstrates at least that the court subconsciously recognised the limitations of its own approach of searching for a solution in 'the narrowly defined perimeters of statutes'.

Littleton has most recently been followed by the Kansas State Supreme Court in *In the Matter of the Estate of Gardiner*.[59] The case involved a challenge to a will where the deceased's spouse was a transsexual. Here, the appellant (the deceased's estranged son) appealed the decision of the Kansas Court of Appeal

51. 9 SW 3d 223 at 230 (Tex App, 1999).
52. *Corbett v Corbett* [1971] P 83.
53. 9 SW 3d 223 at 227 (Tex App, 1999).
54. Part of the question was whether there were any guidelines which would enable a jury, as a fact-finder, to determine the legality of a marriage such as that of Christie. It held that a jury could not make such a determination in the absence of legislative guidelines.
55. 9 SW 3d 223 at 230 (Tex App, 1999).
56. 9 SW 3d 223 at 231 (Tex App, 1999).
57. 9 SW 3d 223 at 231 (Tex App, 1999).
58. This ruling effectively means that gay and lesbian transsexuals can marry their partners. There are reports that such couples have already married in a number of states: see T Flynn '*Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality' (2001) 101 Col LR 392 at 418. Ironically, the prevention of same-sex marriages was the main policy issue that motivated Hardberger J in following a biological approach.
59. 42 P 3d 120 (Kan, 2002).

which held that an MTF transsexual was legally a woman, that therefore her marriage to the deceased was valid and that she had a right to his estate as his surviving spouse. The appellant son challenged the validity of the marriage on the basis of the sex of the deceased's spouse.[60] The Supreme Court held that the issue was one of law, not fact, and thus it decided the matter not on the basis of medical evidence, but through a process of statutory interpretation. The court reasoned that its task was to construe the intent of the Kansas legislature in enacting KSA 2001 Supp 23-101, which allows only traditional marriages between 'two parties who are of the opposite sex'. To determine the meaning of 'sex', as well as 'male' and 'female', the court simply resorted to the authority of a legal dictionary, which provided definitions centred on procreative capacity.[61] From this source, it decided to read these words as not encompassing transsexuals.[62] In addition, it chose to read the legislative silence regarding transsexual marriage as further indication that transsexuals were to be excluded from the statute.

In both these recent US cases, we see the courts 'making' sex along the lines of the *Corbett* biological approach, not in response to current medical and social evidence about the nature of transsexual identity, but in an attempt to avoid being seen to legitimise prohibited same-sex marriages. In this way, the same-sex marriage debate has distracted courts from their primary duty in these cases of addressing the complexity of transsexual identity in the determination of sex.

Overall, the *Corbett* approach can be described, in my view, as a biological determinist approach to the question of sex and gender in its acceptance of the notion that destiny is determined by biology and in its refusal to recognise the social and psychological aspects of sex as being material to the determination to sex. It is evident in the above cases that under this approach, sex is defined as biological sex and hence it is fixed and immutable. Marriage is understood as being about the ability to procreate and the ability to achieve penetrative heterosexual intercourse. The approach allows no room for agency in relation to the category of sex.

Critically, the above decisions fail (and, in some cases, make no attempt) to analyse or articulate why a biological interpretation of sex is necessary in either family law or criminal law. If the ability to procreate were a requirement for both contracting parties to a marriage, then a biological test would understandably be necessary. But such is not the law in any common law

60. In this case, evidence was presented that the deceased knew of the appellant's transsexual nature and that they had enjoyed a 'consummated marriage relationship'.

61. Such an approach was used by the English Industrial Tribunal in the first English case dealing with a transsexual discrimination claim made under the UK's Sex Discrimination Act 1975: *White v British Sugar Corpn* [1977] IRLR 121. In this case, the complainant was a non-operative FTM transsexual whose employment as an electrician's mate was terminated when her biological sex became known. The court stated: '[the Oxford English Dictionary] defines male as of or belonging to the sex which begets offspring or performs the fecundating function. The same dictionary defines female as belonging to the sex which bears offspring.' The court thus used these simplistic definitions to determine that the complainant was a woman (at para 7) and held that she had not been discriminated against on the basis of her sex.

62. *White v British Sugar Corpn* [1977] IRLR 121 at para 9.

jurisdiction discussed above. Furthermore, the biological test does not, in fact, establish that a person has the capacity to procreate – a person may be biologically a woman (ie have a uterus, ovaries, female chromosomes, a vagina etc) and yet still be unable to procreate. These cases form part of a biological discourse which tends to emphasise a woman's role in marriage and society generally as being one of procreation.

3. 'WHAT IS SEX?' – LEGAL NARRATIVE NO 2

a. The United States

The following cases illustrate that there are other legal narratives regarding the question of what is sex, and demonstrate the inherent flaws in the assumption that the biological approach is the natural and only possible approach.

An alternative approach to the question of determining and categorising sex was articulated by the Appellate Division of the Superior Court of New Jersey in *MT v JT* in 1976.[63] In this case, the MTF post-operative transsexual plaintiff sought support and maintenance from her former husband with whom she had been married for over two years and with whom she had lived for over eight years prior to marriage. The defendant husband contended that the plaintiff was a male and that their marriage was void. Unlike *Corbett*,[64] the couple had had a significant relationship and had indisputably had 'intercourse' over the period of their marriage.

In this case, the court rejected the *Corbett* finding that 'sex is somehow irrevocably cast at the moment of birth' and that 'sex in its biological sense should be the exclusive standard'.[65] The court's departure from the *Corbett* view of sex stemmed from 'a fundamentally different understanding of what is meant by 'sex' for marital purposes'.[66] It concluded that 'a person's sex or sexuality embraces an individual's *gender*, that is, one's self-image, the deep *psychological* or emotional sense of sexual identity and character' (emphasis added).[67] The court was of the view that the *Corbett* case had wrongly treated sex and gender as disparate phenomena. To the court's mind, such 'disharmony' between sex and gender was only evident in pre-operative transsexuals whose sex and gender are not 'harmonised'. In its opinion, only the sex of *pre*-operative transsexuals should be classified according to biological criteria.[68] But, for post-operative transsexuals, 'the dual tests of anatomy and gender are more significant'.[69] For marital purposes, 'identity by sex must by governed by the congruence of these standards'.[70] Thus sex for the purposes of marriage was defined as the congruence of anatomy and psychology.

63. 335 A 2d 204 (1976).
64. *Corbett v Corbett* [[1971] P 83.
65. 335 A 2d 204 at 209 (1976).
66. 335 A 2d 204 at 209 (1976).
67. 335 A 2d 204 at 209 (1976).
68. 335 A 2d 204 at 209 (1976).
69. 335 A 2d 204 at 209 (1976).
70. 335 A 2d 204 at 209 (1976).

As to this dual test of anatomy and psychology, the court stated: 'It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and *irreversible* sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life' (emphasis added).[71] Thus the court effectively implied that the law can invest in this dual test because a degree of stability can be established if there is an *irreversible* anatomical change and if there is sound psychological evidence.

The court here did not refer to, or discuss, how other areas of the law classified post-operative transsexuals. It also did not discuss the 'essential determinants' of the institution of marriage, but it did acknowledge that implicit in its reasoning was the assumption that, for the purposes of marriage, 'the sexual capacity of the individual must be scrutinised'.[72] But the scrutiny of this capacity is not in regard to procreation. In the court's view, if a post-operative transsexual is by virtue of medical treatment possessed of the 'full capacity to function sexually as a male or female', then there are no legal barriers.[73] In ruling that the plaintiff was a woman, the court declared it was doing no more than giving 'legal effect to a *fait accompli*, based upon medical judgment and action which are irreversible' (emphasis in original).[74]

While this dual test approach was most articulately expressed in *MT v JT*, it was effectively used in the prior 'name change' case of *In the Matter of Anon.*[75] In this 1968 case, the Civil Court of the City of New York decided that a post-operative MTF transsexual was entitled to change her name from a male name to a female name. Pecora J went straight to the heart of the question 'What is sex?' by recognising that the applicant's surgery meant that she would never again be able to function procreatively or sexually, but that she would be capable of sexual relations as a woman. In his view, anatomical sex ('social sex', as he called it) is only determinative where anatomical sex and psychological sex are harmonised.[76] He posed the following questions:

> 'Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims to be? The answer is not easily arrived at ... Should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions ...? I think not.'[77]

He stated that the difficulty in this matter lay 'not so much in the nature of the problem itself, but in trying to apply, perhaps inadequately, static rules of law to situations such as presented herein, which perhaps merit new rules and/or progressive legislation'.[78] In this statement, he articulated the tension in law's

71. 335 A 2d 204 at 207 (1976).
72. 335 A 2d 204 at 209 (1976).
73. 335 A 2d 204 at 210 (1976).
74. 335 A 2d 204 at 211 (1976).
75. 57 Misc 2d 813 (1968).
76. 57 Misc 2d 813 at 837 (1968).
77. 57 Misc 2d 813 at 836–838 (1968).
78. 57 Misc 2d 813 at 836 (1968).

desire for the formulation and application of static and stable rules even where such static rules are clearly inadequate and inappropriate. While static rules and categories may be appropriate in some areas of the law, say taxation, they are less appropriate when dealing with questions of complex social identity.

The *MT v JT* approach was explicitly followed in the US by the Kansas Court of Appeals in *In the Matter of the Estate of Gardiner* (which was subsequently overruled by the Kansas Supreme Court, as discussed above).[79] Unlike the Kansas Supreme Court, the Court of Appeals considered in some depth the legal and scientific literature regarding transsexuality, as well as the relevant case law. It questioned the applicability of *Corbett*, given its unusual facts, and rejected the reasoning in *Littleton* as a 'rigid and simplistic approach to issues that are far more complex than addressed in that opinion'.[80] In its view, chromosomes should not be the exclusive factor in determining a person's sex. Instead, a court should consider other factors including 'gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity', as well as 'other criteria as science advances'.[81] The court preferred the reasoning and language of *MT v JT*, pointing to its critical inclusion of 'gender' in the legal determination of sex.

This (recently overruled) judgment is significant in its evident recognition of the complexity of the issues involved in the legal determination of a person's sex. At the opening of its decision, the court stated:

> '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. Questions of this nature highlight the tension which sometimes exists between the legal system, on the one hand, and the medical and scientific communities, on the other. Add to those concerns those whose focus is ethics, religions, lifestyle, or human rights, and the significance of a single decision is amplified.'[82]

This quotation evidences the court's understanding of the limiting nature of categories when dealing with questions of complex social identity.

b. The European Community and the United Kingdom

In the European Court of Human Rights, Martens J in *R v Cossey*[83] gave a forceful dissenting judgment which rejected a strictly biological approach to sex. In *Cossey*, as discussed above, the appellant was challenging the UK's adherence to the *Corbett* approach,[84] arguing that it violated both her right to private life and her right to marry under the European Convention on Human Rights. In the

79. 22 P 3d 1086 (Kan App, 2001). See above for discussion of the decision of the Kansas Supreme Court.
80. 22 P 3d 1086 at 1110 (Kan App, 2001).
81. Note that this was the criteria suggested by J Greenberg 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41 ArizLR 265.
82. 22 P 3d 1086 at 1090 (Kan App, 2001).
83. (1990) 3 EHHR 622.
84. *Corbett v Corbett* [1971] P 83.

view of Martens J, the 'essential question' in the case was whether maintaining (or not changing the maintenance of) the biological approach was compatible under Art 8 of the Convention, which guarantees protection of the individual's right to respect for private life. In his view, the maintenance of the biological approach continuously and directly affected transsexuals' private life and should be deemed a continuing interference.[85] He questioned why the determination of sex should not include some psychological and social factors if the person has changed their physical sex. He asked why chromosomes should carry so much legal significance. Judge Martens stated:

> 'To attach so much weight to the chromosomal factor requires further explanation. That explanation, moreover, should be based on at least one relevant characteristic of marriage, for only then could it serve as a legal justification.'[86]

In his view the majority's judgment, which held that marriage means procreation, is flawed for a number of reasons. First, it is unlikely that the Court would allow member state laws to prohibit sterile couples from marrying or to prohibit the marriage of couples who have no intention to procreate. Secondly, such a condition of marriage would mean that all transsexuals would be unable to marry either a man or a woman because gender reassignment makes a person sterile. The result would be that all transsexuals would be completely excluded from the right to marry. But, if the capacity to procreate is not a necessary requirement of Art 12, what then justifies biological/chromosomal sex as being determinative? Judge Martens concluded in *Cossey* that it is 'arbitrary and unreasonable' for the majority of the court to ignore gender reassignment and to retain the criterion of biological sex.[87]

In the recent English Court of Appeal case of *Bellinger*[88] (discussed above), Thorpe LJ dissented, preferring an approach that equates with the dual test in *MT v JT*.[89] Thorpe LJ commented that whilst the *Corbett* test is 'attractive for its simplicity and apparent certainty of outcome, [it] is manifestly incomplete. There is no logic in excluding one vital component of personality, the psyche'.[90] He acknowledged that the admission of psychology as a criterion would probably result in difficulties in application and potentially less certain outcomes. However, he stated, 'we should prefer complexity to superficiality'.[91]

85. Martens J was specifically referring to the example of Mark Rees who was the applicant in the decision preceding *Cossey*: *Rees v United Kingdom* (1986) 8 EHRR 56, Series A No 106. In Martens J's view, this case was wrongly decided in regards to Rees' claim under Art 8.

86. (1990) 3 EHHR 622 at para 33.

87. (1990) 3 EHHR 622 at para 33.

88. *Bellinger v Bellinger* (2002) 2 WLR 411.

89. He held that the *Corbett* test was 'wrong' in light of subsequent medical findings in the past thirty years which evidence that there are postnatal developments that affect one's sex: (2002) 2 WLR 411 at para 155. These developments, which relate to brain sexual differentiation, demonstrate the significance of psychological factors in the determination of one's sex for the purpose of marriage.

90. (2002) 2 WLR 411 at para 132.

91. (2002) 2 WLR 411 at para 132. Thorpe LJ also questioned that validity of Ormrod J's proposition that 'Marriage is a relationship which depends on sex not gender'. He stated: 'The proposition seems to me to be now of very doubtful validity. The scientific changes to which I have referred have diminished the once cardinal role of procreative sex': para 130.

Since the Court of Appeal decision in *Bellinger*, the European Court of Human Rights has heard two transsexual cases, *I v United Kingdom*[92] and *Goodwin v United Kingdom*,[93] and unanimously decided that the UK has breached Arts 8 and 12 of the Convention due to its failure to put in place any reforms. Referring to Thorpe LJ's dissent in *Bellinger* and the Australian case of *Re Kevin*[94] (below), the Court stated that it was not apparent 'that the chromosomal element, amongst all others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals'.[95] In order words, the Court no longer accepts the *Corbett* approach as the inevitable test in regards to marriage and privacy issues.

c. Australia and New Zealand

In Australia, the New South Wales Court of Criminal Appeal refused in *R v Harris and McGuiness*[96] to extend the *Corbett*[97] approach to the question of sex in the criminal law. There, two MTF transsexual respondents appealed their convictions of 'being a male person' attempting to procure the commission of an indecent act. Both had considered themselves women for over 15 years, but their difference lay in the fact that McGuiness was a *pre*-operative transsexual while Harris was a *post*-operative transsexual. According to the two different approaches, this operative status could mean nothing or everything for Harris. The majority decided to reject the application of *Corbett* to the criminal law and to follow the *MT v JT* approach in recognising Harris' operative intervention.

Mathews J described transsexuals as suffering 'a *disharmony between their anatomical sex and their gender identification*' (emphasis added).[98] In the majority, she questioned why the capacity to procreate should be determinative of one's sex, given that it has not traditionally been afforded any significance in law, even in the context of marriage.[99] She also rejected the presence or absence of female sex organs as being decisive of sex: 'Is a woman who has undergone a total hysterectomy to be deprived of her status as a female? ... And I cannot see that the state of a person's chromosomes

92. 11 July 2002, unreported, Application No 25680/94.
93. 11 July 2002, unreported, Application No 28597/95.
94. [2001] Fam CA 1074 (12 October 2001).
95. 11 July 2002; paras 62 and 82 respectively. The applicants complained, in particular, about their treatment in relation to employment, social security and pensions, and their inability to marry either as a man or a woman. Note that while these decisions do not override UK law, they must be taken into account by future courts. The Lord Chancellor has reportedly reconvened the Interdepartmental Working Group on Transsexual People in order to consider the implications of the decisions.
96. (1988) 35 A Crim R 146. Note that this case was followed by *R v Cogley* [1989] VR 799, where the Full Court of the Supreme Court of Victoria decided that the question of a victim's sex (eg in a case of attempted rape of a post-operative transsexual such as this) is a question of fact and should be decided by a jury rather than a trial judge. The court distinguished *Harris* on the ground that it did not involve a jury trial. In my view, leaving the question of a victim's sex/gender provides a transsexual with too much legal uncertainty.
97. *Corbett v Corbett* [1971] P 83.
98. (1988) 35 A Crim R 146 at 161.
99. (1988) 35 A Crim R 146 at 180.

can or should be a relevant circumstance in the determination of his or her criminal liability.'[100] But Mathews J rejected the submission that biological factors should be treated as entirely secondary to psychological ones. She said that this approach 'creates enormous difficulties of proof, and would be vulnerable to abuse by people who were not true transsexuals'.[101] Thus the decision of the majority gave recognition to only *post*-operative transsexuals.

In the minority, Carruthers J declared that the consequence of such an approach that treats sex as mutable 'would be that a person could change sex from year to year'.[102] He stated that 'the law could never countenance' such a view of sex which is dependent on a person's subjective view of 'gender'.[103] The test for sex should be, according to Carruthers J, strictly biological. Carruthers J saw a clear distinction between sex and gender – the former is biological and objectively assessed, whereas the latter is purely subjective. He described the *MT v JT* approach as 'a distortion of the Common Law'.[104] For sex to be anything other than biology, it is for the legislative process. Here, the effect of his judgment is to attempt to naturalise the biological definition of sex as the natural definition. In this judgment, Carruthers J's tone evinces his fear that the common law is threatened by such 'unstable' determinations of sex. His judgment implies that the alternative approach gives the legal subject too much agency which can be abused.

Since *Harris and McGuiness*, the *Corbett* approach has been explicitly rejected by the Family Court of Australia in the decision of *Re Kevin*,[105] wherein a post-operative FTM transsexual applicant sought a declaration of validity of his marriage with a woman. The Attorney-General intervened in the application and submitted that *Corbett* was correct and represented Australian law. Chisholm J rejected this submission and observed that it should be treated as merely persuasive English common law. He undertook a careful analysis of the reasoning in *Corbett* and came to the conclusion that it was flawed and unpersuasive in that it depends on an '"essentialist" view of sexual identity' – an 'assumption that individuals have some basic essential quality that makes them male or female', which is unsupported by the evidence.[106] In his view, there is no formulaic solution to determining sex: instead, all relevant matters need to be considered, including 'the person's life experiences ... the person's self-perception as a man or women, the extent to which the person has functioned in society as a man or woman ...'[107] To assess these factors, Chisholm J considered the testimonial evidence regarding behaviour presented by Kevin's colleagues, friends and family. Ultimately, he framed his decision as one of statutory interpretation, holding that the words 'man'

100. (1988) 35 A Crim R 146 at 180.
101. (1988) 35 A Crim R 146 at 181.
102. (1988) 35 A Crim R 146 at 158.
103. (1988) 35 A Crim R 146 at 158.
104. (1988) 35 A Crim R 146 at 159.
105. [2001] Fam CA 1074 (12 October 2001). This decision is currently on appeal to the Full Court of the Family Court of Australia. It was heard in February 2002.
106. [2001] Fam CA 1074 at paras 107–109.
107. [2001] Fam CA 1074 at paras 329–330.

and 'woman' when used in legislation such as the Marriage Act 1961 have their ordinary contemporary meaning and that meaning includes post-operative transsexuals who have undergone irreversible surgery.[108]

In New Zealand, the biological approach was explicitly rejected in *A-G v Family Court of Otahuhu*, where the New Zealand Attorney-General applied to the High Court for a declaration as to whether two persons of the same genetic sex could enter a valid marriage where one party has undergone sex reassignment surgery.[109] In examining this question, the court noted that New Zealand's law 'has changed to recognise a shift away from sexual activity and more emphasis being placed on *psychological and social aspects of sex, sometimes referred to as gender issues*' (emphasis added).[110]

The court first considered the *Corbett* decision. It examined the decision's emphasis on procreation and sexual intercourse, specifically stating that it is no longer the law that the ability to have sexual intercourse is essential.[111] Nor was the 'ability to procreate ... ever required' in common law or ecclesiastical law.[112] The court rejected the *Corbett* approach, finding it to be unacceptable, and turned to the alternative approach in the cases *M v M*, *MT v JT* and *Harris*, declaring them to be 'compelling'. The court held that the genital *appearance* of a man or a woman was necessary for marriage, but that a valid marriage did not require the capacity to procreate or achieve penetrative sexual intercourse. Ellis J noted that if procreation were to be found an essential factor, this would mean that all transsexuals would be unable to marry, given that sex reassignment surgery involves the removal of procreative organs.[113]

Ellis J found that there were 'no socially adverse effects' from allowing transsexuals to marry in their adopted sex. In considering the possibility that

108. Compare the result of Chisholm J's exercise of statutory interpretation to that in *In the Matter of the Estate of Gardiner* 42 P 3d 120 (Kan, 2002) above. Note also that, with minimal discussion of the issue, Chisholm J purported to draw a 'convenient and workable line' between pre-operative and post-operative transsexuals: [2001] Fam CA 1074 at para 332.

109. [1995] 1 NZLR 603. This was perhaps prompted by the vague and indeterminate decision given on this issue by Aubin J in *M v M* NZFLR LEXIS 133 1991. Here, a post-operative MTF transsexual applicant sought a declaration that her marriage was *in*valid on the ground that she was a biological male at the time of the ceremony. Aubin J of the Family Court of Otahuhu examined whether, for the purposes of family law, other factors can override the chromosomal test in the case of a post-operative transsexual. In his view, the effect of the *Corbett* approach was to produce 'a kind of hermaphroditic mutant', 'a sexual twilight zone'. Aubin J gave no clear test for sex, and his finding, in regard to the post-operative MTF transsexual applicant, was that, 'however elusive the definition of "woman" may be, the applicant came within it for the purposes of and at the time of the ceremony of marriage': pp 12, 11. Aubin J commented that Ormrod J's conclusion in *Corbett* 'seems to flow not so much from the medical evidence which was given in the case as from His Lordship's own finding that certain biological features should be determinative of a person's sex': p 10. Thus he declared the marriage in issue to be valid and held that the applicant wife was a woman at the time of the ceremony.

110. [1995] 1 NZLR 603 at 606.

111. [1995] 1 NZLR 603 at 606. In contrast to the UK (see n 17 above), under the New Zealand Family Proceedings Act 1980, a marriage cannot be declared voidable on the grounds of non-consummation.

112. [1995] 1 NZLR 603 at 606.

113. [1995] 1 NZLR 603 at 607.

such a position legitimises same-sex marriage, he reasoned that it is the *appearance* of heterosexuality,[114] and the *appearance* of a particular sex, that is essential to marriage and the determination of a person's sex. Thus the decision gave primacy to anatomy, with the result that it excluded *pre*-operative transsexuals from being able to marry partners of the same biological sex.

4. THE IMPLICATIONS OF THE SECOND NARRATIVE

The second narrative differs from *Corbett*[115] in that it makes the external body, the anatomical body, constructed or otherwise, determinative. The approach has both advantages and disadvantages. Generally, it is considered to be the more progressive approach because it recognises that sex is changeable. For example, it has been described as reflecting 'a compassionate and humane approach to the sensitivities of human sexuality balanced against the need for reasonable certainty...'[116] It has been praised for the fact that it recognises a degree of agency in the subject over their sex.[117] As demonstrated above, in a number of jurisdictions the adherence to the approach means that post-operative transsexuals are treated as their assigned sex for the purposes of family law, criminal law and also in administrative law (for example, for the purposes of receiving a 'wife's pension').[118]

The disadvantages of this approach are, first, that it has the effect of sanctioning the surgical 'mutilation' of transsexual bodies[119] and, secondly, that it invests in the law a critical categorical distinction between pre-operative and post-operative transsexuals. The words 'conform', 'harmonise' and 'correct' are evidence of the push by this narrative for transsexuals to undergo surgery which generally proves very expensive and painful. These words illustrate the law's impulse to categorise all persons as either male or female by requiring that bodies conform and assimilate to fit these categories. In its privileging of post-operative transsexuals, it effectively leaves pre-operative or non-operative transsexuals unprotected and it sanctions forms of discrimination against them.

The cause of the disadvantages flowing from this approach can be expressed as a possible over-emphasis on anatomy by the courts taking this approach. To counter the fear, expressed by Carruthers J in *Harris*,[120] that the *MT v JT*[121] approach does not entail sufficient stability, courts have focussed on anatomy

114. Ellis J examined the implications of the *Corbett* approach in regards to the question of same-sex marriages. He stated 'If the law insists that genetic sex is the pre-determinant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman and a female to male transsexual can contract a valid marriage with a man. To all outward appearances, such would be same sex marriages': [1995] 1 NZLR 603 at 607.

115. *Corbett v Corbett* [1971] P 83.

116. Lockhart J in *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 at 493.

117. See eg Martens J in *Cossey v United Kingdom* (1990) 3 EHHR 622, Series A No 184 at para 2.7.

118. *See Secretary, Department of Social Security v SRA* (1993) 118 ALR 467.

119. See *Hartin v Director of the Bureau of Records* 347 NYS 2d 515 at 518, where the court describes sex reassignment surgery as 'an experimental form of psychotherapy ... mutilating surgery'.

120. *R v Harris and McGuiness* (1988) 35 A Crim R 146.

121. 335 A 2d 204 (1976).

in order to establish an element of stability. Arguably, however, this desire to establish stability has led to an over-emphasis on anatomy. Some cases which illustrate the consequence of this emphasis are examined below. They accentuate the primacy given to anatomy.

a. The effects of emphasising anatomy

Both *MT v JT* and *In the Matter of Anon*[122] did not provide later courts with guidance as to the level of anatomical conformity required. In *MT v JT*, the court merely stated that sex reassignment surgery must be 'irreversible', but along with later courts, it failed to explain why primacy should be given to such 'irreversible' surgery. The following decisions demonstrate some of the consequences of these points of vagueness.

In the 1993 case of *Department of Social Security v SRA*,[123] the MTF pre-operative transsexual respondent argued before the Federal Court of Australia that full sex reassignment surgery might be dispensed with for reasonable cause, such as cost, unavailability or age. In this case, the respondent sought to receive a wife's pension as the wife of an invalid pensioner. She had not undergone sex reassignment surgery due to its prohibitive cost. Evidence was submitted that although she was anatomically male, 'she dresses, and behaves as a woman' and 'considers herself a woman'.[124] The respondent submitted that the court should uphold the decisions made by two prior tribunals, which held that psychology, as opposed to anatomy, should have primacy in the determination of sex.

The court partly approached the question as one of statutory interpretation. In its view, 'ordinary English usage words such as "male" and "female", "man" and "woman" and the word "sex" relate to anatomical and physiological differences rather than psychological ones'.[125] But the court also attempted to justify the primacy given to anatomy on the ground that anatomy is the test used by society generally. It noted that the respondent still had male genitals. It stated that in these cases, a balance must be sought between the interests of society and the individual. 'Irreversible' surgery, in its view, confirmed a person's psychological attitude. The interests of society demanded conformity between anatomy and psychology. More critically, society needs to be protected from the 'dangers in a male capable, or giving the appearance of being *capable of procreation* being classified by the law as a female' (emphasis added).[126] The court emphasised that it is only the *pre*-operative transsexual that poses these 'dangers', as the *post*-operative transsexual 'is no longer procreatively of his original sex'.[127] Thus the court refused to recognise pre-operative transsexuals as members of their adopted sex for the purposes of administrative law on the ground that such recognition was deceptive in relation to their procreative potential. It therefore rejected the respondent's submission that it take a psychological view.

122. 57 Misc 2d 813 (1968).
123. (1993) 118 ALR 467.
124. (1993) 118 ALR 467 at 468.
125. (1993) 118 ALR 467 at 469.
126. (1993) 118 ALR 467 at 495.
127. (1993) 118 ALR 467 at 495.

These concerns regarding the interests of society seem somewhat unusual, given that this was an administrative law decision. The court did, however, note the need to apply the law consistently. In my view, these 'dangers' do not provide a persuasive ground to distinguish all pre-operative transsexuals in other areas of law. In particular, it should not apply equally to FTM transsexuals who do not pose such 'dangers' to society. Thus the reasons for giving such general primacy to anatomy, and for distinguishing between pre-operative and post-operative transsexuals on the grounds of anatomy, appear less powerful.[128]

In the more recent Australian Administrative Appeals Tribunal case of *Re SRDD v Department of Family and Community Services*,[129] an MTF transsexual, who had lived as a female for 20 years, was seeking to receive the female old-age pension, which can be obtained five years before a male old-age pension. The applicant had undergone an orchidectomy,[130] but she still retained a penis. This she intended to have removed as soon as it could be arranged. The applicant's submission was that precedent was not explicit in requiring that the surgery intended to harmonise psychological and anatomical sex should extend beyond an orchidectomy. She argued that she had satisfied the necessary criterion as the procedure that she had already undergone was 'irreversible'. She pointed out that if she applied for a job, she would be treated as an elderly female.

While the Tribunal confirmed that 'irreversibility' was a criterion, it also held that this irreversible procedure had three essential steps, consisting of the removal of the penis, the removal of the testicles and the construction of an artificial vagina.[131] It said that external genital features must be harmonised, and in this formulation the Tribunal included the vagina as an external genital feature. The Tribunal described this three-step test as 'an objective test to ensure certainty and practicality in administration'.[132] The Tribunal, therefore, categorised the applicant as a 'pre-operative' transsexual as her operation constituted only 'partial reassignment surgery',[133] despite its irreversibility. In concluding, the Tribunal expressed its 'regret that the law in this context has determined that primacy should be accorded to anatomy'.[134] Thus the court effectively established a test whereby transgender people are categorised as pre-operative or post-operative according to the degree of surgical reconstruction of the anatomy they have undergone.

128. There is a certain irony in the fact that these 'dangers' regarding pre-operative transsexuals' procreativity were used by the court to deny them legal recognition for the purposes of administrative law when, at the same time, the inability to procreate is used in the *Corbett* approach to deny post-operative transsexuals legal recognition for the purposes of marriage. The use by the anatomical approach of biological factors such as procreativity (to justify its refusal to give legal recognition to pre-operative transsexuals) is perplexing. It appears that, to a certain extent, courts using both approaches employ, at times, the ability to procreate as a tool to categorise a person's sex for various purposes of the law.

129. [1999] AATA 626.

130. This involves removal of the testicles which triggers the development of female muscle/fat ratio and the development of breasts.

131. [1999] AATA 626 at para 20.

132. [1999] AATA 626 at para 27.

133. [1999] AATA 626 at paras 30, 32.

134. [1999] AATA 626 at para 33.

While the above decisions provide some guidance to claimants, they all concern MTF transsexuals and thus fail to offer assistance as to what constitutes irreversible surgery for a FTM transsexual.[135]

b. Will the second narrative become ascendant?

Despite the problems with the *MT v JT* approach, in my view, it nevertheless remains the preferable approach of the two legal narratives because of the degree of agency and recognition it confers to transsexuals. However, *MT v JT* is not the dominant common law approach in the US or elsewhere. It potentially applies to only 15 US states which have legislation allowing persons to change the sex on their birth certificates after gender reassignment surgery. But, as the cases of *Littleton*[136] and *Gardiner*[137] evidence, courts do not consider the amendment of a transsexual's birth certificate determinative, or even necessarily relevant.

In the UK, the *Corbett* approach is still in ascendancy, although in the cases of *ST (formerly J) v J*[138] and *Bellinger*,[139] mentioned above, there is some indication that the tide may be turning. In *ST v J*, Ward LJ noted that there is a 'discernible tendency in some jurisdictions to grant transsexuals freedom to marry in cases where their psychological sex and their anatomical sex are in harmony'.[140] He quoted at length from the New Zealand judgment of *A-G v Family Court of Otahuhu* and noted that there had been considerable medical advances since *Corbett*. Critically, he stated that it 'may be' that the *Corbett case* 'would bear re-examination at some appropriate time'.[141]

5. THE SEX/GENDER DISTINCTION

In the above two main legal narratives, we have seen courts from both narratives resorting to the use of dictionaries and statutory interpretation to determine the complex question of sex. Clearly, courts believe that legislatures give full consideration to their use of language and to the issue of transsexualism when drafting marriage laws. In their judgments in *ST v J*,[142] both Ward and Neill LJJ were careful in their use of language. They both commented that the wording of s 11 of the Matrimonial Causes Act 1973, which states that a marriage would be

135. Arguably, there should be a different test for what constitutes 'irreversible' surgery for FTM transsexuals, given the wide recognition of the acute difficulty and cost of male genital reconstruction.
136. *Littleton v Prange* 9 SW 3d 223 (Tex App, 1999).
137. *In the Matter of the Estate of Gardiner* 42 P 3d 120 (Kan, 2002).
138. [1998] Fam 103.
139. (2002) 2 WLR 411. See, in particular, the dissent of Thorpe LJ at para 110ff.
140. [1998] Fam 103 at 142.
141. [1998] Fam 103 at 120. The European Court of Human Rights also urged the United Kingdom to keep this area under 'review' in *Sheffield and Horsham* (1998) 27 EHRR 163 at para 60. Note that Ward LJ pointed out in *ST v J* that the New Zealand authorities were of no assistance to the transsexual defendant because his anatomy was not in 'conformation' with his psychology as he had not undergone a penis construction.
142. [1998] Fam 103.

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void if 'the parties are not respectively male and female', could be read to 'indicate a test of gender rather than sex'.[143] Ward and Neill LJJ were here referring to the view that the Act, by using the words 'male' and 'female', rather than 'man' and 'woman', literally specifies parties' gender rather than sex. Apparently, at the time of the Act's enactment in 1971, it was stated that the use of such neutral terminology left the way 'open for a future court, relying on future medical knowledge, to place greater emphasis upon gender in determining whether a person was to be regarded as male or female'.[144] Theoretically, *Corbett*[145] would then only be persuasive, rather than binding, given that it was decided before the introduction of the Act. But this has not been the case so far.

Critics of *Corbett* have referred to the above statement of intention in arguing that Ormrod J was wrong in finding that marriage is about sex, not gender. Bradney is one such critic who says: 'whilst *sex* is a biological matter, *gender* is a question of social status. Marriage thus seems a creature of gender rather than sex' (emphasis added).[146] Like Ormrod J himself, Bradney appears to think that this distinction between sex and gender is critical.

I would like, at this point, to examine the distinction used by both the courts and critics alike between sex and gender. As we have seen, the *Corbett* approach holds sex to be strictly biological, while gender is impliedly everything that is not biological, such as psychology. The *MT v JT*[147] approach holds that sex *for the purposes of marriage* consists of both sex and gender. But sex *generally* is impliedly understood in the decision as anatomical, if not biological, while gender is defined by the court as 'one's self-image, the deep *psychological* or emotional sense of sexual identity and character'.[148] In *Harris*, Mathews J held that sex *for the purposes of criminal law* was both sex and gender, but she generally described transsexuality as a 'disharmony between [transsexuals'] anatomical *sex* and their *gender* identification' (emphasis added).[149]

Interestingly, both these divergent approaches share the same understanding of the general meaning of sex and gender. Both approaches see sex and gender as distinct concepts, and both see gender as relatively subjective. The fact that no court has held that gender in itself is sufficiently determinative also points to the unarticulated assumption that gender is not stable and, therefore, is unreliable as a criterion. It is subject to change, as Carruthers J said. The implication here is that biology, in contrast, is stable and hence is a relatively reliable indicator of sex. The general view is that gender is a social manifestation or a construction.

143. [1998] Fam 103 at 122, 153. This argument was accepted by Charles J in *W v W* [2001] 2 WLR 674 at 708, where he stated that 'on the true construction of the [Act] greater emphasis can be place on gender rather than sex'. The argument was rejected by the majority and Thorpe LJ in dissent in *Bellinger v Bellinger* (2002) 2 WLR 411 at paras 18–23, 148. The majority distinguished Charles J's judgment as dealing specifically with a different disorder within gender dysphoria and not with transsexuality: para 64.

144. S Poulter 'The Definition of Marriage in English Law' (1979) 42 MLR 409 at 424.

145. *Corbett v Corbett* [1971] P 83.

146. A Bradney 'Transsexuals and the Law' (1987) 17 Fam Law 350 at 353.

147. 335 A 2d 24 (1976).

148. 355 A 2d 204 (1976) at 209.

149. (1988) 35 A Crim R 146 at 161. Thus pre-operative and no-operative transsexuals embody the disharmony of sex and gender.

This sex/gender distinction which grounds both approaches was apparently first fully articulated by the medical profession in the 1950s in its attempt to explain transsexuality as a separation between sex (the body/the physical/biology) and gender (the mind/the social/psychology).[150] In medical discourse, sex reassignment surgery is commonly described as the harmonisation of sex and gender. Indeed, in this part of medical science it is often portrayed as the telos. The distinction has also become central in feminist debate since at least the advent of *Corbett*. For example, the distinction has been useful in feminists' struggle against biological determinist views which are used to confine women to 'natural' biological roles in the private sphere – in particular, to the role of procreation.[151]

In the next part of this paper, I explore the history of the sex/gender debate and its current manifestations. This is with a view to examining the usefulness of this sex/gender distinction to an understanding of transsexuality in the law and to feminist politics generally.[152]

6. FEMINISM AND THE SEX/GENDER DISTINCTION

a. 'First wave' feminism

In feminism's 'first wave', feminists influenced by liberal-humanist thought, such as Wollstonecraft, generally tried to negate all signs of sex which evidenced women's difference. Liberal feminists argue that biological differences are minimal and do not limit women's capacity for equality.[153] Women's ability is not the product of sex and biological differences, but a product of differences in education and socialisation. Liberal feminists see the sources of difference between men and women as being rooted in gender, which is understood as cultural, rather than in sex, which is understood as biological. Women's inequality is attributed to culture and the existence of gender roles which regulate male and female behaviour. Sex is not understood as importing any fundamental differences between men and women. The fact, for example, that

150. See eg the work of Dr J Money and Drs J and J Hampson in the 1950s at the John Hopkins University: 'Hermaphroditism: Recommendations concerning assignment of sex, change of sex and psychologic management' (1955) 97 Bulletin of John Hopkins Hospital 284. According to the *Oxford English Dictionary*, the first usage of 'gender' in this sense is recorded in 1963.

151. See below for discussion.

152. It is apparent that the sex/gender distinction debate may be limited to English-speaking feminisms, as the word 'gender' does not figure in the same way in the Romance languages, for example. It appears that non-English, Western European feminisms are more likely to debate the notion of sexual difference: see J Butler 'Feminism by Any Other Name – Interview with Rosi Braidotti' in E Weed and N Schor (eds) *Feminism Meets Queer Theory* (Bloomington: Indiana University Press, 1997) pp 41–42.

153. See eg S Firestone *The Dialectic of Sex* (London: The Women's Press, 1979). Firestone argued that reproductive technologies could assist women in their claim for equality in that it could free them from the oppressive conditions of procreation, a difference which blocks women's access to equality. Thus she asserted a disembodied view of women's capacity for equality. At the same time, she can be construed as positing a biological determinist view in that she characterises biology as providing a natural block to women's equality.

women bear children is seen as an obstacle that can be overcome by public child-care and other such measures of reform.[154] Thus liberal feminism seeks to avoid the dangers of biological determinism by minimalising sexual differences and the role of biology in sexual difference.

b. 'Second wave' feminism

The distinction between sex and gender has been more fully embraced by 'second wave' feminism, in particular Cultural feminism.[155] These feminists see that biological determinism operates by conflating sex and gender, so that gender is seen in the biological determinist framework as solely an *effect* of biology. To Cultural feminists, the sex/gender distinction promises to open up the possibilities of eliminating essentialist views of gender. Feminists use the sex/gender distinction to draw a line between nature and culture in order to distinguish gender as a cultural construct and to divorce women's 'natural sex' from culturally drawn negative characteristics traditionally associated with women. In this framework, gender is cast as the cultural harbour of prevailing norms of masculinity and femininity which have no relation to natural sex.

While gender is cast as socially constructed and a result of patriarchy, *sex* is embraced by Cultural feminism because it is understood as being accessible in a natural and untainted state. Cultural feminism seeks to disarticulate patriarchal gender norms from the understanding of biological sex. This disarticulation would bring to the fore the positive aspects of biological sex and 'true' biological femaleness. Mary Daly, for example, celebrates a new organic female creativity and, through the work of Carol Gilligan and others, women are projected as nurturing, caring and sensitive. According to second-wave Cultural feminism, women's identity is founded on 'true femaleness' based on women's biological nature – their sex and bodies.[156]

Following on from Cultural feminism, Radical feminism likewise considers sex to be the primary division in society and the primary identity category. However, unlike Cultural feminism, Radical feminism does not generally embrace the sex/gender distinction, but sees both as socially constructed.[157] It rejects the liberal feminist view that sexual difference is irrelevant, and emphasises women's sex as fundamentally different. But this fundamental difference, in Catherine MacKinnon's view, for example, is socially constructed by a patriarchal dominance/submission structure. Male-dominated society

154. Or more radical, as that proposed by Firestone: see n 153 above.

155. Radical and Cultural feminists were united in their rejection of liberal feminism's model of equality which, in their view, failed to address or recognise women's embodied differences.

156. Robin West's 'Jurisprudence and Gender' (1988) 55 U Chi LR 1 is commonly cited as the most controversial legal example of Cultural feminism. She argued that modern legal theory did not reflect women's critical experiences of pregnancy, heterosexual intercourse, breast feeding and menstruation, and the intimacy involved in these experiences. Thus West drew sexual difference as rooted in biology, rather than in social constructions of biology.

157. See below for a discussion of how MacKinnon's approach differs from other social constructionist approaches. However, MacKinnon's theory is similar to that of other 'second wave' feminists in that it divides human beings into two internally homogenous and rigid categories, men and women.

constructs women as sexual objects for the use of men. The experience of this subordination is that which constitutes women's identity. She states:

> 'What defines woman [socially] is what turns men on ... Gender socialisation is the process through which women come to identify themselves as such sexual beings ... It is that process through which women internalise (make their own) a male image of their sexuality as their identity as woman, and thus make it real in the world.'[158]

Here MacKinnon identifies women's reality as totally constructed by male views of sex.

c. 'Third wave' feminism

'Third wave' feminists are critical of the acceptance of the sex/gender distinction by first and second 'wave' feminisms. To accept the distinction as useful to feminism is to embrace the idea that there is a distinction between sex and gender. It is to accept a natural relation between sexed bodies (male/female) and culturally constructed genders (masculinity/femininity). Judith Butler, a post-structural feminist, points out that the acceptance of the sex/gender distinction presumes that there is a natural and necessary relation between masculinity and the male subject, and femininity and the female subject. According to Butler, this approach proves useful only when taken to its logical limit because at this point it produces 'a radical discontinuity between sexed bodies and culturally constructed genders'.[159] This radical discontinuity or 'disharmony', which is embodied by transgendered people, questions one of the central presumptions of the binary gender system in that it disrupts the naturalness of the 'harmony' between sex and gender. This disruption is demonstrated, for example, in the above transsexual decisions. In the cases of *MT v JT*[160] and *Harris*,[161] we see the courts' desire to re-establish this assumed 'harmony' between sex and gender.

'Third wave' feminists criticise the 'second wave' conception of sex and biology as a fixed and unchanging given. They point out that the Cultural feminist view that differences between men and women are rooted in sex and biology tends to promote an essentialist view, in that the idea for, example, that women are child rearers becomes fixed through biology as women's essential and natural role. They argue that this 'second wave' view thus comes close to biological determinist views that biology determines destiny.[162] In much the same way as Ormrod J held that sex can be determined without taking into account social or psychological factors, this use of the sex/gender distinction by Cultural feminists assumes that sex can exist outside of cultural discourse,

158. C MacKinnon *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989) pp 110–11.
159. J Butler *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) p 6.
160. 335 A 2d 204 (1976).
161. *R v Harris and McGuiness* (1988) 35 A Crim R 146.
162. Such a reading can be made of M Daly Gyn/*Ecology: The MetaEthics of Radical Feminism* (Boston: Beacon Press 1978).

prior to, and free of, cultural politics. Basically, it presupposes that sex and biology are natural rather than cultural constructs. Butler, for example, calls Cultural feminism's recourse to the idea of an original or genuine feminism 'before' culture, 'a nostalgic and parochial ideal that refuses the contemporary demand to reformulate an account of gender as a complex cultural construction'.[163] In her view, this ideal 'tends to serve culturally conservative aims' and constitutes an exclusionary practice within feminism.[164]

This view of sex being fixed and unchanging is also evident in Radical feminist theory such as MacKinnon's social constructionist view of sex. While many 'third wave' feminists subscribe to a social constructionist view of the category of sex, like that of Laqueur explained above,[165] this approach is not as ahistorical and two-dimensional as that of MacKinnon. Whereas MacKinnon sees sex as simply a product of patriarchal social structures, post-structuralists understand sex as a historical and cultural concept subject to a panoply of forces and discourses. It is a concept articulated by language and its meaning changes over time and cultures. Thus both sex and gender are expressions of specific cultural and historical beliefs about sexual difference. As Joan Scott, another post-structural feminist, expresses it, sex and gender are 'organizations of perception rather than transparent descriptions or reflections of nature'.[166] In relation to Cultural feminism's tendency to find a point of origin or 'Truth' in women's nature, she states: 'If sex, gender and sexual difference are effects – discursively and historically produced – then we cannot take them as points of origin for our analysis.'[167]

Like other post-structural feminists, Butler and Scott consider the meaning of sex as never finally fixed – as an open site of contestation of meaning. Their approach differs from that of MacKinnon's in that they do not use the mechanism of gender construction as all determining and universal. Their approach allows for the possibility of multiple shifts in meaning. Butler, for example, believes that the mechanism of gender construction only proves useful to feminism when it 'implies the *contingency* of that construction' (emphasis in original).[168] This contingency is glimpsed, for example, when sex and gender radically refuse and disrupt presumed harmony, as demonstrated in the phenomenon of transgenderism. This 'contingency' allows the possibility of some element of agency, in that seemingly fixed categories and dichotomies are disrupted and transformed. To draw the mechanism of gender construction as all determining, like MacKinnon, is to come to the same result as 'the position that grounds universal oppression in biology' – biological determinism.[169] In Butler's view, neither biological determinism nor pure social constructionism allow for the possibility of agency.

Butler argues that sex is an effect of gender and that it is as culturally constructed as gender.[170] In this, Butler challenges the nature/culture distinction which is used

163. Daly, n 162 above, p 36.
164. Daly, n 162 above, p 36.
165. See eg Butler and Scott, discussed below.
166. J Scott 'Some Reflections on Gender and Politics' in M M Ferree, J Lorber and B B Hess (eds) *Revisioning Gender* (London: Sage Publications, 1999) p 73.
167. Scott, n 166 above, p 73.
168. Butler, n 159 above, p 38.
169. Butler, n 159 above, p 36.
170. Butler, n 159 above, p 7.

by Cultural feminist theorists to support and elucidate the sex/gender distinction. The idea of a transparent 'nature' that can be known outside of cultural knowledges of it is perpetuated by the nature/culture distinction. The projection of sex as the raw material of culture and the root of gender operates to naturalise the nature/culture distinction and, more critically, to naturalise 'the strategies of domination that that distinction supports'.[171] 'Natural' sex postures as the unquestioned foundation of culture. If sex is seen as political, then, Butler argues, the culture/nature distinction collapses, as does the sex/gender distinction. Butler's project can thus be characterised as one of denaturalising foundational dichotomies and categories used by law and other discourses.

Butler's next move is to argue that if sex is an effect of gender, then 'the distinction between sex and gender turns out to be no distinction at all'.[172] In her view, the distinction should be collapsed as it has no valuable meaning or use (except when pushed to its radical limits).[173] Butler asserts that the elimination of this distinction is strategically necessary in order to oppose and avoid the discourse of biological determinism, which restricts the meaning of gender (and sex) to received notions of masculinity and femininity.

Butler and Scott's view of sex is influenced by the work of post-structuralist thinkers such as Althusser, Saussure, Lacan and, in particular, Foucault. Foucault's work emphasises the historical specificity of meaning and discourses. Discourses are more than ways of producing meaning – discourses such as, for example, legal discourses, constitute the 'nature' of the material body, of sex, of biology (and so forth) as we understand them. Biology and sex do not exist outside their discursive articulation. While law is a powerful discourse because of its institutional basis, it is not the only discourse. It is constantly challenged and influenced by other discourses – such as, in the case of transsexuality, the discourses of medicine, feminisms, culture, state politics and also other conservative forces such as religion. For this reason, there is no discursive unity or uniformity on the question of sex and thus the meaning of sex is never fixed – it is an open site of contestation.

Similarly, the (meaning of) the subject is never fixed. According to a post-structuralist view, the subject is not coherent, stable or unified, but a site of fluidity and constant transformation. Some post-structuralists, such as Butler, understand transsexuality as challenging the liberal humanist notion of the subject as unified, coherent and stable. The law's reliance on this notion of the subject is evidenced by its demonstrated general inability to accommodate and accept the identity of a subject whose sex/gender identity is fluid and mutable. Transsexuality is seen to disturb this picture of subjectivity, as well as making evident the role of biological determinist discourses in law's picture of fixed and unchanging subjectivity.

d. Contestation of Butler's critique of the sex/gender distinction

Butler's strategy of collapsing the sex/gender distinction in order to avoid and oppose biological determinist views of sex, gender and sexual difference has

171. Butler, n 159 above, p 37.
172. Butler, n 159 above, p 7.
173. Butler, n 159 above, p 7.

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been the subject of some criticism. Toril Moi is one such critic who argues that while Butler's critique of the sex/gender distinction succeeds in avoiding biological determinism, it critically fails to fulfil its other objective, which, Moi claims, is to develop a fully historical and non-essentialist understanding of sex or the body.[174] In particular, she criticises Butler for failing to produce a good theory of subjectivity. The problem with Butler's critique, she says, is not with its ultimate goal, but its theoretical machinery, which generates a panoply of new theoretical questions and in 'work that reaches fantastic levels of abstraction without delivering the concrete, situated and *materialist understanding of the body* it leads us to expect' (emphasis added).[175]

Moi's main criticism concerns the materiality of the body, which she believes is overlooked by Butler's critique. She comments: 'if sex is as "discursive" as gender, it becomes difficult to see how this fits in with the widespread belief that sex or the body is concrete and material, whereas social gender norms (discourses) are abstract and immaterial.'[176] In this, she demonstrates her fundamental difference from Butler in that she does not adhere to a Foucauldian analysis of power wherein discourses operate to constitute the meaning of materiality such as the body. She is thus unpersuaded by Butler's theory of materiality in *Bodies That Matter*,[177] which is that matter is an effect of power and that in this way the body is both material and constructed. Moi believes that Butler is going too far in her recoil from essentialism and biological determinism. In Moi's view, the idea of power producing matter is too opaque and does not answer the question of why we think there are two sexes.[178]

Moreover, Moi challenges the natural/cultural, sex/gender dichotomy used by post-structuralists. She says: 'Butler's intense labours to show that sex is as discursively constructed as gender are symptomatic of the common poststructuralist belief that if something is not discursively constructed, then it must be natural.'[179] While this seems to misunderstand the main import of Butler's critique, it does question, with some cause, the assumption in Butler's work that nature is immutable, unchanging, fixed, stable and somehow essentialist. To this extent, Butler's work appears inadvertently to reinforce the sex/gender, nature/culture, fixed/mutable dichotomies – the same dichotomies she hopes to implode. Moi criticises the assumption that, by understanding sex 'as constructed as gender', this will somehow make it easy to change by political action – she points out that there can also be transformation in nature. She states that: 'As for the idea that sex is immutable and gender wholly changeable, we should at least note that transsexuals vehemently insist that it is their gender that is immutable, and not their sex.'[180]

Ultimately, Moi's project seems to be very similar to that of Butler. Both theorists attempt to critique the usefulness of the sex/gender distinction. Moi argues that while Butler is attempting to collapse the distinction, the distinction

174. T Moi *What is a Woman? And Other Essays* (Oxford: Oxford University Press, 2000) pp 30–31.
175. Moi, n 174 above, p 31.
176. Moi, n 174 above, p 46.
177. Moi, n 174 above, pp 9–10.
178. Moi, n 174 above, p 48.
179. Moi, n 174 above, p 58.
180. Moi, n 174 above, p 51.

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nevertheless remains central to Butler's work.[181] She suggests that Butler's project differs little from that of 'second wave' feminism.[182] Meanwhile, Moi's own project is somewhat nebulous. While arguing that a theory of gender and subjectivity based on the work of Simone de Beauvoir successfully avoids the sex/gender distinction, her analysis appears to be rooted in the distinction. This is apparent in her discussion of the work of Katherine Franke and Mary Ann Case.

e. Franke and Case

Franke's work is highly influenced by Butler's critique. She examines how sex discrimination law perceives and constructs sex and sexual difference, in part through an analysis of transsexual cases. Franke's basic argument is that the central mistake of sex discrimination law is its tendency to disaggregate sex and gender. She argues that sex discrimination law is flawed because it is based on the same understanding of the sex/gender distinction as Cultural feminism. It takes biology as its starting point and fails to take account of the fact that biology is only meaningful within cultural discourses – within a gendered frame of reference. In this way, the subject – for example, the transsexual subject – is made to conform to gender norms and stereotypes which are associated with their biology or anatomy. The law allows little room to embrace an identity which departs from these norms.[183] She points out that to define sex in biological or anatomical terms is to negate 'the degree to which most, if not all, differences between men and women are grounded not in biology, but in normativity'.[184]

Franke argues that, ultimately, sex discrimination law 'must abandon its reliance upon biology in favour of an underlying fundamental right to determine gender independent of biological sex'.[185] She advocates that sex – what it means to be a man or a woman – must be understood not in deterministic biological terms, but according to a set of behavioural, performative norms.[186] It must be understood as inhering a degree of agency.

In contrast, Case argues that the problem with sex discrimination law in the US is its tendency to aggregate and conflate sex and gender.[187] An indication of this is the fact that the word 'gender' has already become synonymous with 'sex'. She argues that the concept of gender has been imperfectly disaggregated in the law from sex and sexual orientation, with the result that there has been a continuing devaluation of qualities deemed feminine. In her view, this is evident in cases where discrimination law fails to protect those subjects, especially men, who exhibit feminine qualities. In contrast, a woman exhibiting masculine qualities is more readily accepted.

181. Moi, n 174 above, p 53.
182. Moi, n 174 above, p 58.
183. Moi, n 174 above, p 95.
184. K Franke 'The Central Mistake of Sex Discrimination Law: The Disagreggation of Sex from Gender' (1995) 144 U Penn LR 1 at 3.
185. Franke, n 184 above, at 99.
186. Franke, n 184 above, at 3.
187. M A Case 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 Yale LJ 1 at 3.

Case embraces the sex/gender distinction and notes that she finds herself 'unusually, in some agreement with both Justice Scalia and Richard Epstein'.[188] She quotes Scalia J's preference for 'sex' discrimination rather than 'gender' discrimination because 'the word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.'[189] This use of the sex/gender distinction clearly assumes that sex is biological and outside of the cultural. Case, however, voices her opposition to a biological determinist view (which she calls sociobiology) and states that she sees 'a world of difference between being female and being feminine'.[190] In a footnote, she qualifies this statement by explaining that she does not claim that the relationship between sex and gender is wholly arbitrary. So while she insists, effectively like Franke and Butler, that sex should not determine gender, she nevertheless asserts that there is some 'not wholly arbitrary' relationship between biological sex and gender.

Case then proceeds to list a number of adjectives, such as 'aggressive' and 'affectionate', which psychologists regularly consider to be coded masculine and feminine in Western culture. Her aim is to unravel the reasons why the traditional feminine is devalued in both men and women and to 'protect' it 'without essentialising it, limiting it to women, or limiting women to it'.[191] Here, we can see that Case's strategy is to avoid some of the pitfalls of essentialism which befell radical feminism, while at the same time using the sex/gender distinction advocated by 'second wave' feminism.

f. Moi's position

Moi is critical of Franke and, to a lesser degree, Case. In Moi's view, Case's specific strategy of asking courts to protect traditionally feminine qualities in men as well as women will have 'the reactionary effect' of producing more gender stereotypes.[192] However, she does appear to support and advocate Case's more general strategy in relation to the sex/gender distinction. But does Moi's strategy of effectively retaining the sex/gender distinction[193] assist in addressing the question of determining sex in relation to transsexuality?

Moi focuses on the *Corbett*[194] case and Franke's denunciation of the case as 'biological essentialism'. Franke's conclusion, she says, is that law should abandon its reliance on biology in favour of the fundamental right to determine

188. Case, n 187 above, at 11.
189. Case, n 187 above, at 11, quoting *J E B v Alabama, ex rel T B* 114 S Ct 1419 at 1436 n 1 (1994).
190. Case, n 187 above, at 11.
191. Case, n 187 above, at 105.
192. Moi, n 174 above, p 111.
193. This is clearly contentious. Moi believes that she is avoiding the sex/gender distinction. In my view, she advocates the use of this distinction. Moi's strategy is based on the work of Beauvoir. She claims that Beauvoir's account of woman as 'an open-ended becoming' 'rejects both biological determinism and the limiting distinction between sex and gender': p 83. This claim that Beauvoir successfully avoids the sex/gender distinction is contested by Butler, n 159 above, pp 111–12.
194. *Corbett v Corbett* [1971] P 83.

gender independent of biological sex.[195] To her, 'Franke's argument assumes that the claim that gender is performative secures the conclusion that transsexuals should *always* be legally recognised as being their "target sex".'[196] In this, Moi not only questions whether transsexuals should be always legally considered their 'target sex', but also whether Butler's approach secures this result.

Moi is not convinced that transsexuals should always be legally considered their 'target sex'. Moi confesses the fact that she finds it difficult to come up with an answer as to whether April Ashley should be considered a man or a woman at the time of her marriage.[197] Nevertheless, she is critical of Ormrod J's judgment in *Corbett*, in particular, for its contentious understanding of what matters in a marriage.[198] She reads Ormrod J's judgment as taking the fundamental purpose of marriage to be procreation, which she sees as having the effect that 'infertile or post-menopausal women ... do not qualify as women for the purposes of marriage'.[199] But she also praises Ormrod J's decision to frame his decision narrowly to 'what is April's sex for the purposes of marriage?' She claims that this frame 'helps us to see that the ideological difficulties arising from his decision have little to do with the way he thinks about sex, and rather more the way he thinks about marriage'.[200] Moi believes that the question of April's sex should not be determined according to questions of identity and essence, but according to what it means to be married in contemporary Western society.[201]

Moi does not appear to think that gender is something over which a person can have agency. With reference to the work of Beauvoir, she says sex is something assigned socially by 'the Other'. In her view, 'It is not enough to think of oneself as a woman in order to become one'.[202] Moi believes that the material body makes some significant difference – biological difference – and that both Franke and Butler ignore this fact. She argues: 'It is neither politically reactionary nor philosophically inconsistent to believe both that a male-to-female transsexual remains a biological male *and* that this is no reason to deny "him" the legal right to be classified as a woman.'[203] This last statement is consistent with the positions of Franke and Butler, in that they too reject the biological as the primary determinant. But, unlike Franke and Butler, Moi does not suggest an alternative determinant. Moreover, the idea that sex is socially assigned by 'the Other' does not appear to assist in addressing the legal question 'what is sex'.

Overall, Moi is highly critical of the view she sees embedded in both the law and in Franke's work that a clear-cut decision about a person's sex must be found. She asserts: 'poststructuralist and other sex/gender feminists have failed to address the question of transsexuals adequately because they have no concept of the body as a situation, or of lived experience, and because *they tend to look*

195. Moi, n 174 above, p 93.
196. Moi, n 174 above, p 94.
197. Moi, n 174 above, p 97.
198. Moi, n 174 above, p 98.
199. Moi, n 174 above, p 98.
200. Moi, n 174 above, pp 97–98. But to Ormrod J, marriage is all about sex, as opposed to gender.
201. Moi, n 174 above, p 99. Note that Moi fails to elaborate further on this matter.
202. Moi, n 174 above, p 96.
203. Moi, n 174 above, p 94.

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for one final answer to the question of what sex a transsexual is' (emphasis added). [204] She continues: 'To ask courts to have a clear-cut, all purpose "line" on sex changes is to ask them *not* to engage in new interpretations of the purpose of the different human institutions ...' (emphasis in original).[205]

Moi has a valid point here, which goes straight to the heart of one of the problems that post-structuralists encounter when proposing programmes for legal reform. In asking courts to adjudicate, to establish criteria for a test, they are asking courts to fix one legal meaning. Thus when one meaning or test is established, the possibility of multiple legal meanings is closed off. Nevertheless, it is still necessary to propose a programme or some criteria, because to do otherwise would be to condone the law's treatment of transgendered people like April Ashley (who *do* experience the body as a 'situation', a 'lived experience'). Moi's work is ultimately unhelpful in my view because of its refusal to suggest criteria by which transsexuals' sex can be determined and, moreover, its complacency about the fact that this refusal has the effect of leaving transsexuals' sex in a state of legal ambiguity. Ambiguity is, it is true, celebrated and encouraged by post-structuralists because it disrupts the operation of categories and dichotomies and their limiting and coercive effects. But while poststructuralists suggest that law should allow ambiguity to exist, they do not advance that the law should prescribe it. For law to prescribe ambiguity for all transgendered people would be to deny agency to those who seek an unambiguous identity.[206] Moi fails to recognise that the stating of criteria for a legal test need not mean that these criteria cannot be reviewed and revised in the future. While she is keen to use concrete examples in her theoretical discussion, and to point out issues of materiality, she nevertheless fails to address transsexual issues as involving concrete material subjects.

7 CONCLUSION: IS BUTLER'S CRITIQUE POTENTIALLY USEFUL?

Can the sex/gender strategy articulated by Butler and Franke help develop a more sophisticated and humane understanding of sex and transgender identity in the law? The basic import of Butler and Franke's theory is that biology and anatomy should be discarded in favour of a more behavioural view of sex. Biology is dangerous as *the* determinant because it limits the possibility of agency, in that it allows little space in which to depart from social norms. Those who cannot, or refuse to, conform to these requirements are considered 'gender outlaws'. This means that neither biological sex as Ormrod J understood it (chromosomes, gonads and genitals) nor anatomical sex (from birth or constructed) should be given primacy over one's psychological, social and cultural sex.

We see that the *MT v JT*[207] approach, in its dual test of sex *for the purposes of marriage*, comes close to this understanding of sex. While this approach

204. Moi, n 174 above, p 97.
205. Moi, n 174 above, p 97.
206. Furthermore, the behavioural approach I suggest in the text below would retain a degree of ambiguity in that it would not demand that masculinity be necessarily related to male subjectivity and femininity be related to female subjectivity.
207. 335 A 2d 204 (1976).

makes significant use of the sex/gender distinction terminology in that it centrally discusses the 'harmonisation' of sex and gender, it critically portrays anatomy and the category of sex (for the purposes of marriage law) as potentially construct-able by the subject. But its application in some instances has tended to give primacy to anatomy and thus led to the legal requirement of 'irreversible' and 'full' surgical intervention, irrespective of cost, unavailability or age. Interestingly, Franke mentions *MT v JT* only in a footnote.

Perhaps the approach that comes closer is that articulated by the Australian Administrative Appeals Tribunal in *SRA v Department of Social Security*[208] (which was subsequently overruled by the Federal Court). Here, the Tribunal held that psychological sex should be regarded as the most important factor in determining sex, and that social and cultural identity are also important factors. The Tribunal stated that while sex reassignment surgery could be taken as an indicator of psychological sex, it was not conclusive of its existence because in itself it has no effect upon a transsexual's psychological sex.[209] It further stated that the requirement that a person undergo expensive surgery was unduly onerous.[210] This approach avoids the sex/gender distinction by considering biological sex and anatomy as significant only in their relation to psychology, ie by positioning sex as an effect of gender. By not privileging biology and anatomy, this approach refuses the common impetus to treat them as points of origin (or 'truth') for analysis.

Butler and Franke's desire that sex be ideally understood as behavioural can be read as basically a desire that sex be understood in less rigid terms. As argued above, it is this rigidity in both of the two legal approaches which has the effect, for example, that transsexuals cannot marry persons of either sex (*Corbett* approach[211]), or that only post-operative transsexuals can marry (*MT v JT* approach). In some ways, Butler and Franke's position is similar to that of self-described 'gender outlaw', Kate Bornstein, who rejects the rigid categories of man and woman. For her, transsexuality is about a possibility of self-transformation which is constitutive of gender itself. Bornstein is committed to a notion of becoming and transformation, as the end in itself, rather than in attempting to fix and determine her gender.[212] But, unlike Bornstein's approach, their position can also assist those transsexuals who prefer not to live as gender outlaws – those for whom 'the end' is a determined gender. Given that the law operates on the basis of the notion of a stable subject, why can behaviour and

208. (1992) 28 ALD 361. Note also the judgment of (Australian) Administrative Appeals Tribunal member Brennan in *Re Secretary, Department of Social Security and HH* (1991) 13 AAR 314 at 324, where she said that 'psychological, social/cultural gender identity are the matters of primary importance' in the case of a post-operative MTF transsexual applicant for the old-age pension.

209. (1992) 28 ALD 361 at para 25. See also *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467.

210. It must be noted that the decision was made in the area of social policy and for this reason the Tribunal was able to distinguish it from *R v Harris and McGuiness* (1988) 35 A Crim R 146 and the area of criminal law.

211. *Corbett v Corbett* [1971] P 83.

212. K Bornstein *Gender Outlaw: On Men, Women and the Rest of Us* (New York: Routledge, 1994).

psychology not be understood as providing a sufficiently stable base?[213] Perhaps if law perceived biology and anatomy to be as constructed and stable as psychology, then psychology would no longer be dismissed as too unstable as a determinant. The fact that a transsexual has lived and worked as a woman for 20 years and holds identity documents to the effect that she is a woman, as in the case of *SRDD*,[214] should be sufficiently stable as a determinant of sex. The behavioural/psychological approach advocated would avoid the problems of biological determinism by providing an element of agency, and also avoid the legal sanctioning of surgical 'mutilation' and unjustifiable discrimination among transgender people. As pre-conditions of this agency, the law could require a certified diagnosis of gender dysphoria (the psychological condition which transgendered people generally suffer) as well as the testimony of colleagues, friends and family to demonstrate a history of 'gender dyphoric' behaviour (as occurred in the Australian case of *Re Kevin*[215]).[216]

In this paper, I have demonstrated that since the 1970s the law has devised two modes of determining and categorising identity. These modes illustrate the simplistic approach law employs in relation to complex social identity. I have argued that both these modes fail to account for certain salient factors, although the second mode is to be preferred to the dominant biological mode. In my view, an understanding of the fact that biology and sex are as socially constructed as gender could assist the courts in taking a more humane approach to the question of 'What is sex?'. In this way, a consideration of Butler's strand of post-structuralist feminist thought can aid courts in their huge task of formulating a more socially relevant mode of determining identity and 'making' sex.

213. Note that courts have generally not considered psychology as inhering a sufficient element of stability, despite the current medical evidence that psychology is not mutable. See eg the report of Jaap Doek, 'Literature and research indicate that the prevailing opinion among professionals working with transsexuals is that a person's gender identity cannot be changed because this identity has been definitively formed during the early years (between 2–4 years of age)': *Transsexualism, Medicine and the Law – Proceedings of the Twenty-Third Colloquy on European Law* (The Netherlands: Council of Europe Publishing, 1995) p 210.

214. *Re SRDD v Department of Family and Community Services* [1999] AATA 626.

215. [2001] Fam CA 1074.

216. One commentator, Andrew N Sharpe, argues that this proposed test of psychological, social and cultural harmony is 'not one premised on transgender autonomy' in that it 'transfers control to another locale'. He suggests that we should be cautious of this approach as the psychological component allows continued medical control, while the social and cultural components depend on judicial consideration of community attitudes towards transgender people: *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing Ltd, 2002) pp 77, 78. In my view, it is not realistic to have transgender autonomy as the *sole* premise of such a test because, as every court has made evident, the test must also take into account the public interest in determining sex status. The proposed test is to be preferred as it clearly provides *all* transgender people with a greater level of agency than allowed by the two main legal narratives.