LEGAL RECOGNITION OF GENDER CHANGE FOR TRANSSEXUAL PERSONS IN THE UNITED KINGDOM: THE HUMAN RIGHTS ACT 1998 AND "COMPATIBILITY" WITH EUROPEAN HUMAN RIGHTS LAW

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I. INTRODUCTION

In the aftermath of World War II, faced with the spread of Stalinist communism into Central and Eastern Europe, the Council of Europe promulgated the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) in 1950; the Council then established the European Court of Human Rights (ECHR) in 1958 to apply and interpret the Convention. The United Kingdom signed the European Convention on November 4, 1950, and ratified it on March 8, 1951. The Convention entered into force in the United Kingdom on September 3, 1953. Or did it?

The reality is that this international convention is not binding on the sovereign United Kingdom in the same sense that the U.S. Constitution is binding on the United States. The Convention provides two procedures for holding member states accountable by the ECHR. There is a procedure for a petition by an individual under Article 25 and an interstate procedure under Article 24. Nevertheless, in 1984, Jochen Frowein, Vice President of the European Commission of Human Rights, referred to the European Convention as "a sleeping beauty, frequently referred to but without much impact." As stated succinctly almost twenty years later: "The [ECHR] can award only money judgments and has no equity jurisdiction. The ECHR has no enforcement authority, and relies on member states to observe their [Council of Europe] treaty obligation to be bound by the judgments of the ECHR."
Rather, the European Convention is structured to place primary responsibility for its enforcement on the signatory states themselves. Article 1 provides, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Further, Article 13 requires each member state to provide "an effective remedy before a national authority" for redressing violations of the Convention.

However, for decades the prevailing view within the legal system of the United Kingdom was that the European Convention was not—to use an American constitutional law concept—incorporated into the law of the United Kingdom. This view was succinctly expressed by Lord Bridge in a 1991 decision:

It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it.

Seven years later, the United Kingdom took the next step and enacted a law to apply the European Convention within the United Kingdom and make "protection of human rights primarily the responsibility of the UK courts"; that law is the Human Rights Act 1998. The Human Rights Act 1998 became effective on October 2, 2000, just over a half century after the United Kingdom signed the European Convention and thereby made the Convention part of British law. As stated by a prominent British academic, the Convention became "internally binding" in the United Kingdom in October 2000 by virtue of the Human Rights Act 1998.

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9 HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 797 (2d ed. 2000).
11 Id. art. 13, 213 U.N.T.S. at 232.
Key provisions of the European Convention relate directly or indirectly to matters of great concern to family law. Article 8 protects the right to respect for private and family life. Article 12 guarantees the right to marry and Article 14 is a prohibition against discrimination.

Thus enactment of the Human Rights Act 1998 clearly had the potential to effect significant changes in British family law. How extensive those changes would be, and how quickly they would be effectuated, could not be known in 1998. Britain is still at the early stages of implementation, and the process of making British domestic law "compatible" with the European Convention is a significantly different process than constitutional adjudication in the United States.

Nevertheless, two decisions of the ECHR in 2002, effectively reversing several earlier cases, have compelled a reexamination of British law as it relates to the status of transsexual persons. The Law Lords of the House of Lords have determined that the longstanding British law that one's gender at birth remains immutable is "incompatible" with the European Convention. This confluence of legal mandates—the Human Rights Act 1998, the ECHR decisions in 2002, and the Law Lords' decision in 2003—have led directly to

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16 European Convention, supra note 10, art. 8, 213 U.N.T.S. at 230.
17 Id. art. 12, 213 U.N.T.S. at 232.
18 Id. art. 14, 213 U.N.T.S. at 232.
19 In the context of this Article, "British family law" does not generally include Scottish family law, which varies in significant ways from the family law of the rest of Great Britain.
23 There is much dispute as to whether the proper legal term is "gender" or "sex." This Article generally uses "gender" unless the context appears to demand otherwise.
the enactment of the Gender Recognition Act 2004,\textsuperscript{26} which comprehensively addresses the legal status of transsexual persons in the United Kingdom.

This Article will examine the history of the legal treatment of transsexual persons in the United Kingdom and by the ECHR. It will look at the process of moving British law in this area from incompatibility to compatibility with the European Convention and examine the provisions of the Gender Recognition Act. It will draw comparisons with the evolving, unsatisfactory, and inconsistent American law on the subject. Finally, this Article will argue that the hypertechnical chromosomal approach to gender identification is as misplaced for transsexual persons as it is largely irrelevant for the vast majority of people who do not suffer from gender dysphoria or gender identity disorder.

II. BACKGROUND: TRANSSEXUALISM

There is a large body of literature on the nature of transsexualism from various points of view, including biological, psychological, and legal perspectives, with no uniformity of opinion regarding etiology or consequences.\textsuperscript{27} The study of transsexualism continues to evolve,\textsuperscript{28} as do the medical techniques for surgical intervention when such intervention is indicated.\textsuperscript{29} The most recent jurisprudential description of transsexualism in the United Kingdom comes from the lead House of Lords decision in Bellinger \textit{v. Bellinger} in 2003:


\textsuperscript{27} See, e.g., \textsc{Bryantully, Accounting for Transsexualism and Transhomosexuality} xiii (2002) (arguing against the "imposition of psychiatric syndromes on gender dysphoric phenomena"); Kurt Schapira et al., \textit{The Assessment and Management of Transsexual Problems}, 22 BRIT. J. HOSP. MED. 63 (1979) (explaining the medical management viewpoint of transsexualism and arguing that a purely medical approach to the issue is inadequate); Douglas K. Smith, \textit{Transsexualism, Sex, Reassignment Surgery, and the Law}, 56 CORNELL L. REV. 963 (1971) (discussing transsexualism from biological perspective).


The indicia of human sex or gender (for present purposes the two terms are interchangeable) can be listed, in no particular order, as follows. (1) Chromosomes: XY pattern in males, XX in females. (2) Gonads: testes in males, ovaries in females. (3) Internal sex organs other than the gonads: for instance, sperm ducts in males, uterus in females. (4) External genitalia. (5) Hormonal patterns and secondary sexual characteristics, such as facial hair and body shape: no one suggests these criteria should be a primary factor in assigning sex. (6) Style of upbringing and living. (7) Self-perception.

In the vast majority of cases these indicia in an individual all point in the same direction. There is no difficulty in assigning male or female gender to the individual. But nature does not draw straight lines. Some people have the misfortune to be born with physiological characteristics which deviate from the normal in one or more respects, and to lesser or greater extent. These people attract the convenient shorthand description of inter-sexual.

Transsexual people are to be distinguished from inter-sexual people. Transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite sex. The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress. 

III. EARLY U.K. DECISIONS ON TRANSSEXUALISM

A. Marital Status: Corbett (1970)

The first reported opinion in Great Britain on the gender of a post-operative transsexual person for purposes of marriage was the 1970 opinion of the High

Court by Judge Ormrod in *Corbett v. Corbett*, which set a mold that has yet to be broken by the British courts. The story of the short-lived marriage of Arthur Cameron Corbett and April Ashley is not a happy one. The parties were in general agreement concerning the primary facts. The husband, Corbett, was married when he met Ashley in November 1960. Ashley had been born George Jamieson in 1935. As early as 1956, Jamieson began taking the female hormone oestrogen and appearing with a troupe of female impersonators using the stage names “Toni/April.” In May 1960, in Casablanca, Jamieson underwent a “sex-change operation.”

As described by Judge Ormrod, the surgery consisted in the amputation of the testicles and most of the scrotum, and the construction of a so-called ‘artificial vagina’, by making an opening in front of the anus, and turning in the skin of the penis after removing the muscle and other tissues from it, to form a pouch or cavity occupying approximately the position of the vagina in a female, that is between the bladder and the rectum. Parts of the scrotum were used to produce an approximation in appearance to female external genitalia.

There was no dispute that at the time he met Ashley, Corbett was aware that Ashley had been born a male and had subsequently undergone a “sex-change operation.” There followed a tumultuous on-again, off-again relationship between Corbett and Ashley over the next three years. During that time, Corbett procured a divorce from his wife, and Ashley obtained a woman’s insurance card from the Ministry of National Insurance. Ashley was not able, however, to persuade the superintendent registrar to change her birth certificate. On September 10, 1963, Corbett and Ashley had a hastily

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32 *Id.* at 37-39.
33 *Id.* at 35.
34 This Article uses the British spelling of “estrogen” when discussing the British cases.
36 *Id.*
37 *Id.*
38 *Id.* at 37.
39 *Id.* at 37-38.
40 *Id.* at 38-39.
41 *Id.* at 38.
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arranged wedding ceremony in Gibraltar. The parties agreed that they had not engaged in "sexual activity in a physical sense" prior to their wedding.

The Corbett-Ashley nuptials are a prime example of the old adage, "Marry in haste, repent at leisure." Between the date of the wedding and the end of their relationship in early December 1963, "[t]hey had been together no more than 14 days in all." There were, in fact, more days of court hearings than days of marital cohabitation, and the litigation was not resolved until February 1970, over six years after the wedding ceremony. Further, there was a factual dispute between the parties as to whether the marriage had been consummated and, if not, who was at fault.

In May 1967, Corbett filed suit against Ashley seeking in the first instance a declaration that their marriage was "null and void and of no effect" because at the time of the ceremony Ashley was male. In the alternative, Corbett sought a decree of nullity on the grounds of Ashley's alleged "incapacity or wilful refusal" to consummate the marriage.

The trial lasted from mid-November 1969 through February 2, 1970, with expert testimony from nine doctors. The primary focus was on whether Ashley was legally a male or female for purposes of marriage in September 1963 when she married Corbett.

Two medical inspectors examined Ashley and reported:

We find that the breasts are well developed though the nipples are of masculine type. The voice is rather low pitched. There are almost no penile remains and there is a normally placed urethral orifice. The vagina is of ample size to admit a normal and erect penis. The walls are skin covered and moist. There is no impediment on "her part" to sexual intercourse. Rectal examination does not reveal any uterus or ovaries or testicles. . . . We

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42 Id. at 39.
43 Id. at 38.
44 Id. at 39.
45 See id. at 33.
46 See id. at 39.
47 Id. at 40. Ashley had attempted to sue Corbett for maintenance in February 1966, but that action did not proceed because of service problems. Id.
48 Id. at 34.
49 Id.
50 Id. at 33, 35.
51 See id. at 35.
also strongly suggest that an investigation into “her” chromosomal sex be carried out by some expert . . . \(^{52}\)

A subsequent chromosomal examination showed Ashley to have XY (i.e., male) chromosomes.\(^ {53}\) Judge Ormrod thus concluded that Ashley “is correctly described as a male transsexual, possibly with some comparatively minor physical abnormality.”\(^ {54}\)

Judge Ormrod noted that there are several criteria for assessing “the sexual condition” of an individual:

All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are—

(i) Chromosomal factors.
(ii) Gonadal factors (presence or absence of testes or ovaries).
(iii) Genital factors (including internal sex organs).
(iv) Psychological factors.
Some of the witnesses would add—
(v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).\(^ {55}\)

However, while the court found these medical criteria relevant, the court cautioned that the criteria “do not necessarily decide[ ] the legal basis of sex determination.”\(^ {56}\) Parsing the issue even more finely, Judge Ormrod disavowed the notion that he was determining Ashley’s “‘legal sex’ . . . at large,” but rather asserted that he was only determining “what is meant by the word ‘woman’ in the context of a marriage.”\(^ {57}\)

Judge Ormrod reasoned that the critical issue was Ashley’s sex at the time of marriage, rather than her gender, because

\(^{52}\) Id. at 41.
\(^{53}\) Id. at 46.
\(^{54}\) Id. at 44.
\(^{55}\) Id.
\(^{56}\) Id. (emphasis added).
\(^{57}\) Id. at 48.
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.  

Using language which resonates in the current debate over same-sex marriage, and which is certain to infuriate many, Judge Ormrod concluded:

Having regard to the essentially heterosexual 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.

Exactly what the learned judge meant by “the essential role of a woman in marriage” was left unexplained. However, based on his conclusion that Ashley could not perform that essential role, Judge Ormrod pronounced “the so-called marriage of 10th September 1963” to be void. One cannot help but wonder whether Judge Ormrod believed that Ashley could perform the essential role of a man in marriage, whatever that role might be.

Although it was unnecessary for the court to address the secondary issue of incapacity or wilful refusal to consummate the marriage, it briefly did. Judge Ormrod found Corbett’s version of events (that his advances had been refused) more plausible than Ashley’s (that there had been some penetration). Ultimately, Judge Ormrod held that the credibility of the parties did not matter

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58 Id.
59 Id.
60 Id. at 49.
61 Id.
because, in his judgment, a male-to-female transsexual is simply not physically capable of consummating a marriage with a male. He explained:

In any event, however, I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by [the surgeon] can possibly be described ... as 'ordinary and complete intercourse' or as 'vera copula—of the natural sort of coitus'... When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres.62

Finding estoppel to be inapplicable,63 Judge Ormrod granted Corbett a decree of nullity, declaring that the marriage was void ab initio.64


In a series of decisions over the next thirty-plus years, British courts have continuously adhered to the views of Judge Ormrod in Corbett. Indeed, in 1983, the British judiciary expanded the Corbett rationale by applying it outside of its stated scope of determining legal sex solely for the purposes of entering into heterosexual marriage. In Regina v. Tan, three persons were criminally prosecuted for various sexual offences65 arising out of the operation of two "disorderly houses."66 Gloria Greaves was convicted of violating section 30 of the Sexual Offences Act 1956,67 which provides: "It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution."68 Like April Ashley, Gloria Greaves had been born a male, but "had undergone both hormone and surgical treatment, consisting in what are called 'sex change operations', consisting essentially in the removal of the external male organs and the creation of an artificial vaginal pocket."69 Further, Brian Greaves was

62 Id. at 49.
63 Id. at 50.
64 Id. at 51.
65 This Articles uses the British spelling of "offences" in discussing this case.
67 Id.
68 Sexual Offences Act, 1956, 4 & 5 Eliz. 2, c. 69, § 30 (Eng.).
convicted of living on the earnings of male prostitution in violation of section 5 of the Sexual Offences Act 1967, based on the earnings of Gloria Greaves.\textsuperscript{70}

On appeal, the Court of Appeal recognized that Gloria Greaves’s status as a male was an essential ingredient of the offences asserted against Gloria and Brian Greaves.\textsuperscript{71} Additionally, the court acknowledged that \textit{Corbett} was limited to defining the sex of a post-operative transsexual for purposes of marriage.\textsuperscript{72} The appellants argued that the \textit{Corbett} rationale should not apply in the context of the two sexual offences acts if the individual “had become philosophically or psychologically or socially female.”\textsuperscript{73}

The Court of Appeal summarily disposed of this argument in one relatively brief paragraph:

\begin{quote}
We reject this submission without hesitation. In our judgment, both common sense and the desirability of certainty and consistency demand that the decision in \textit{Corbett v Corbett} should apply for the purpose, not only of marriage, but also for a charge under § 30 of the Sexual Offences Act 1956 or § 5 of the Sexual Offences Act 1967. The same test would apply also if a man had indulged in buggery with another biological man. That the \textit{Corbett v Corbett} decision would apply in such a case was accepted on behalf of the appellant. It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that Gloria Greaves could live on the earnings of a female prostitute without offending against § 30 of the 1956 Act because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute.\textsuperscript{74}
\end{quote}

Thus, notwithstanding Judge Ormrod’s apparent effort to speak only to the essentials of marriage in \textit{Corbett}, his analysis was applied beyond the realm

\textsuperscript{70} Id. at 14.  
\textsuperscript{71} Id. at 19.  
\textsuperscript{72} Id.  
\textsuperscript{73} Id.  
\textsuperscript{74} Id.
of civil law into the criminal realm in the name of "common sense . . . certainty and consistency." Even in a world in which marriage is generally limited to being between two persons of the opposite sex, can it truly be asserted that the supposed reasons for nullifying a marriage between a male and a male-to-female transsexual person have equal force in determining the sex or gender of a prostitute or one who profits from prostitution? It is certainly true that for whatever—probably myriad—reasons, Corbett and Ashley were unable to fulfill each other's aspirations of marital bliss. However, unquestionably, Corbett knew that Ashley had been born male and, if it had been an issue for Corbett, he presumably realized that Ashley could not have borne him children.

Clearly, even if Brian Greaves knew that Gloria Greaves was born a male, there is no reason to believe that Gloria's customers shared this knowledge. There is no such suggestion in the case, and furthermore, the advertisements for Gloria's services referred to a "lovely tan coloured mistress," the "most equipped mistress in Town," and "madam." Hence, one can only surmise that customers sought and obtained rather specialized services from a person whom they believed to be female. Based on the nature of the advertised services, it is highly doubtful that they expected—or desired—Gloria to bear them children. The fact that Gloria was born male thus appears to have been utterly irrelevant to the criminal enterprise in which Gloria and Brian were engaged.

IV. CHALLENGING THE UNITED KINGDOM'S TREATMENT OF TRANSSEXUALS IN THE EUROPEAN COURT OF HUMAN RIGHTS

A. Legal Recognition of Sex Change: Rees (1987)

Overlapping the Tan case chronologically, was the inevitable claim by a female-to-male transsexual asserting that Britain's refusal to recognize him

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25 *Id.*

26 Could the bearing of children be the undefined "essential role of a woman in marriage" alluded to by Judge Ormrod? If so, there surely are many female wives who are disinclined or unable for various reasons to perform that "essential role." Likewise, there surely are many male husbands similarly disinclined or unable to engage in procreation. Yet, as a general rule, the law does not deem their marriages null and void.

27 The relationship between Brian and Gloria Greaves is not explained in the reported decision.

legally as a male was a violation of the European Convention. The claim resulted in the first decision of the ECHR on the subject, \textit{Rees v. United Kingdom}, in 1986.\textsuperscript{79}

Mark Nicholas Alban Rees was born a female in 1942 and named Brenda Margaret Rees.\textsuperscript{80} Brenda had the physical and biological characteristics of a female child, and accordingly was recorded in the register of births as a female.\textsuperscript{81} From “a tender age,” Brenda “started to exhibit masculine behavior and was ambiguous in appearance.”\textsuperscript{82} In 1970, Brenda began hormone treatments and started to develop secondary male characteristics.\textsuperscript{83} In 1971, Brenda obtained a name change to Brendan Mark Rees.\textsuperscript{84} In May 1974, Brendan underwent surgical treatment for “physical sexual conversion,” with a bilateral mastectomy.\textsuperscript{85} The cost of Rees’s surgeries was borne by the National Health Service.\textsuperscript{86} In 1977, Rees changed his name to Mark Nicholas Alban Rees.\textsuperscript{87} He requested and received a new British passport in that name.\textsuperscript{88}

From 1973 onwards, Rees made several unsuccessful efforts to get private bills through Parliament to recognize his sex as male and to obtain the issuance of a new birth certificate showing his sex as male.\textsuperscript{89} In 1980, through his solicitor, Rees made a formal request to the Registrar General to change his registration from female to male under section 29(3) of the Births and Deaths Registration Act 1953, on the ground that there had been “a mistake in completing the Register.”\textsuperscript{90} He supported this request with a medical affidavit to the effect that a person’s psychological sex is the most important criterion of sex and is predetermined at birth.\textsuperscript{91} The Registrar General refused the request because “in the absence of any medical report on the other agreed criteria (chromosomal sex, gonadal sex and apparent sex),” he was ‘unable to consider whether an error (had been) made at birth registration in that the child

\textsuperscript{80} Id. at 57.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 57-58.
\textsuperscript{87} Id. at 57.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 58.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
was not of the sex recorded.' "92 Except for his birth certificate, all of Rees’s documents eventually showed him to be male.93 The prefix “Mr.” was added to his passport in 1984.94

Rees lodged an application in 1979 with the European Commission on Human Rights complaining that U.K. law did not confer on him the legal status corresponding to his actual condition.95 He asserted violations of Articles 3, 8, and 12 of the European Convention.96 In 1984, the Commission declared the complaints “admissible” under Articles 8 and 12 (but not under Article 3).97 In a report later in 1984, the Commission expressed the unanimous opinion that there had been a breach of Article 8, but not of Article 12.98 As the United Kingdom did not accept the Commission’s report, there followed a hearing commencing in March 1986 before the ECHR.99 The ECHR devoted most of its analysis to the claimed breach of Article 8,100 which states, “Everyone has the right to respect for his private and family life, his home and his correspondence.”101

The gravamen of Rees’s complaint was based on the refusal of the United Kingdom to classify him legally as a male and to issue him a new birth certificate showing that classification.102 Whenever he was in a situation where he was required to produce his birth certificate, doing so caused him “embarrassment and humiliation.”103

Initially the ECHR noted that “although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life.” More importantly, the ECHR observed that any such positive obligations are subject to the State’s “margin of appreciation.”104 The ECHR opined that the refusal to issue a new birth certificate cannot be considered an

92 Id.
93 Id.
94 Id.
95 Id. at 62.
96 Id.
97 Id. Article 3 prohibits torture and inhumane or degrading treatment or punishment. European Convention, supra note 10, art. 3, 213 U.N.T.S. at 224.
99 Id.
100 Id. at 62-68.
101 European Convention, supra note 10, art. 8, § 1, 213 U.N.T.S. at 230.
103 Id.
104 Id.
"interference" hence the issue was whether the United Kingdom had a "positive obligation" to do so, subject to its "margin of appreciation." As the ECHR had previously explained in its *Abdulaziz v. United Kingdom* judgment in 1985:

> However, especially as far as those positive obligations are concerned, the notion of 'respect' [for family life] is not clear cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.

Moreover, the ECHR noted that there was significant disparity among member States in addressing the issue. Several states allowed "transsexuals the option of changing their personal status to fit their newly-gained identity," but not in a uniform manner. Other states had no such option. Because there existed "little common ground between the Contracting States in this area and ... the law appears to be in a transitional stage," the ECHR deemed that Contracting Parties enjoy a "wide margin of appreciation."

The ECHR recognized that "[i]n determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual." The United Kingdom would not recognize Rees as a man for all social purposes; rather he would be regarded as a woman as far as marriage (per *Corbett*), pension rights, and certain employment purposes.

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105 *Id.*
106 *Id.*
109 *Id.* at 64.
110 *Id.*
111 *Id.*
112 *Id.* at 65.
existence of the unamended birth certificate would also prevent him from entering into certain types of private agreements as a man.  

Nevertheless, balancing the interests of the community against Rees’s interests, the ECHR found no positive obligation on the part of the United Kingdom under Article 8 to establish a new type of birth documentation showing, and constituting proof of, current civil status.  

The ECHR also rejected a narrower interpretation of Rees’s complaint, in which he sought an incidental adjustment in the form of an annotation to the present birth register. The United Kingdom conceded that it makes such annotations, for example, in the case of a subsequent adoption. The United Kingdom argued that the requested annotation would mislead the public in the absence of an error or omission at the time of birth. The ECHR noted that if such a change were recorded, it could not mean that the individual had acquired all of the biological characteristics of the new sex. In any event, the fact of the annotation would still reveal the change of sexual identity, unless it were kept secret, which would fundamentally modify the United Kingdom’s system for recording births. Given the United Kingdom’s wide margin of appreciation in this area, there was no violation of Article 8 despite the fact that the United Kingdom cooperated in Rees’s medical treatment.

The ECHR sounded a significant cautionary note, however. Although there was no breach of Article 8 in the present case, that was no guarantee for the future. The ECHR stated, “That being so, it must for the time being be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals.” In other words, the ECHR’s conclusion was not written in stone. To the contrary, “[t]he Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.”

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113 Id.
114 Id. at 66-68.
115 Id. at 65-66.
116 Id. at 66.
117 Id.
118 Id. at 67.
119 Id.
120 Id.
121 Id. (emphasis added).
122 Id. at 67-68 (footnote omitted).
The ECHR quickly dispatched Rees's assertion that the United Kingdom violated his right to marry under Article 12 of the European Convention. It viewed Article 12 as referring to "the traditional marriage between persons of opposite biological sex." Indeed, Article 12 contains the explicit limitation that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." While those national laws cannot restrict or reduce the right to marry in such a way or to such an extent that the very essence of the right is impaired, the United Kingdom's restriction on transsexuals marrying persons of their original sex cannot be said to have such an effect.

While the ECHR unanimously found no violation of Article 12, the right to marry, three of fifteen judges dissented from the finding of no violation of Article 8, the right to respect for private life. The dissenting judges would have found that the United Kingdom could readily have allowed an annotation in the birth register to the effect that there had been a change in Mr. Rees's sexual identity and that it could be possible for him to obtain a short birth certificate indicating only his new sexual identity. Neither of these changes, in the dissenting judges' view, would have entailed a change in the British system of recording civil status.

B. Rees Revisited: Cossey (1990)

Only three years after the Rees decision, the ECHR was once again confronted with a claim by a British transsexual that the United Kingdom's policies violated Articles 8 and 12 of the European Convention. Barry Kenneth Cossey was born in 1954 and registered in the birth register as a male. As a teenager, Cossey "understood that, although she had male external genitalia, she was psychologically of the female sex." In 1972, Cossey assumed the first name of Caroline, which she confirmed by "deed poll" in 1973. A deed poll is enrolled in the Central Office of the Supreme

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123 Id. at 68.
124 European Convention, supra note 10, art. 12, 213 U.N.T.S. at 232.
126 Id.
127 Id. at 69.
128 Id. at 70.
130 Id.
131 Id.
Court, and a new name thus enrolled is valid for purposes of legal identification and may be used for a variety of purposes such as the issuance of a passport and registration on the electoral roll. In 1974, having already had hormone treatments, Cossey underwent gender reassignment surgery in London. According to the ECHR, "[a]s a post-operative female transsexual, she is able to have sexual intercourse with a man."134

In 1976, the United Kingdom issued Cossey a passport as a female. Cossey subsequently had a successful career as a fashion model.135

In 1983, Cossey and an Italian man wished to marry, but the registrar general informed Cossey that such a marriage would be void under English law. In early 1984, Cossey lodged an application with the European Commission on Human Rights asserting that the United Kingdom was violating her rights under Article 8 of the European Convention, the right to respect for private and family life. She additionally invoked Article 12, the right to marry. Interestingly, Cossey married another man in 1989, but that marriage was pronounced void by the English High Court less than a year later.140

As described by the ECHR, there had been no real change of law or practice in the United Kingdom since the decision in the Rees case. The National Health Service carried out gender reassignment treatments, and adults generally were allowed to obtain new, legal names which could be used on a driver’s license or passport. Nevertheless, the United Kingdom would not change or annotate an entry in a birth register for a post-operative transsexual absent medical evidence of an initial error; nor would it issue a new birth

132 Id. at 625.
133 Id. at 624.
134 Id. This finding appears to directly contradict Judge Ormrod’s conclusion in Corbett that such intercourse is, at least, a legal impossibility.
135 Id.
136 Id. Indeed, so successful was Cossey’s sexual transformation that she appeared as a “Bond girl” in the James Bond movie, For Your Eyes Only and on the cover of Playboy magazine. See Well Known TS: Caroline Cossey (TULA) Model, Activist, at http://www.angelfire.com/ak/mysketchbook/famous.html (last visited Mar. 3, 2005).
138 Id. at 629.
139 Id.
140 Id. at 625.
141 Id. at 625-26.
A post-operative transsexual, moreover, could not legally marry a person of her original sex. The European Commission on Human Rights found Cossey's application admissible and concluded that the United Kingdom was in violation of Article 12 of European Convention, but not Article 8. The case was referred to the ECHR by the United Kingdom, and the ECHR, in a decision issued in 1990, found no violation of the Convention.

Cossey tried to distinguish her case from Rees on two grounds: (1) unlike Rees she had a partner of her original sex wishing to marry her and (2) she was socially accepted in her new sex. The ECHR found neither of these distinctions material, nor did it find material the fact that Cossey was a male-to-female transsexual whereas Rees was a female-to-male transsexual. Therefore, the issue became whether the ECHR should depart from its judgment in Rees. While the ECHR is not bound by its previous judgments, it will usually follow them unless there are cogent reasons for not doing so, such as to ensure that the interpretation of the European Convention reflects societal changes and remains in line with present-day conditions.

Despite Cossey's assertions, the ECHR continued to believe that the failure of the United Kingdom to alter the register of births or to issue her a new birth certificate could not be considered an "interference." Rather, the issue remained whether the United Kingdom had a "positive obligation" to do these things. The ECHR noted that there had been no significant scientific developments since Rees and that gender reassignment surgery still did not result in the acquisition of all the biological characteristics of the other sex. While there had been "certain developments" in the law of some of the member States of the Council of Europe (COE), there still was a diversity of practice on the issue; thus Contracting States still enjoyed a wide margin of appreciation. Accordingly, it could not "at present" be said that a departure

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142 Id. at 626-28.
143 Id. at 628.
144 Id. at 622, 629.
145 Id. at 638.
146 Id. at 638-39.
147 Id. at 639.
148 Id.
149 Id.
150 Id.
151 Id.
152 Id. at 641.
153 Id.
from the Court's earlier decision is warranted in order to ensure that the interpretation of Article 8 on the point at issue remains in line with present day conditions."

Turning briefly to Article 12, the right to marry, the ECHR again relied on Rees. It noted that any inability on Cossey's part to marry a woman did not stem from any legal impediment (although it is difficult to discern how she might have consummated such a marriage). Nor was her legal inability to marry a man out of conformity with Article 12: "attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purpose of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry."

In addition to the already cited caveat in Cossey that the United Kingdom was not at present in violation of the Convention, there were two other signals in Cossey that should have given the United Kingdom cause for concern. In Rees, only a few years earlier, the vote by the ECHR finding no violation of Article 12 was unanimous; in Cossey, the vote on that issue was fourteen to four. Also, in Rees, the vote finding no violation of Article 8 was twelve to three; in Cossey, it was ten to eight.

A number of dissenting opinions were filed in Cossey, two of them particularly noteworthy. Judge Martens argued that if a transsexual is to achieve any degree of well-being, after treatment, "the new sexual identity which he has thus acquired must be recognised not only socially but also legally." The transsexual's "rebirth" can only be completed when his newly acquired sexual identity is fully and in all respects recognized by law. The refusal of the United Kingdom to do so did indeed, in Judge Martens's view, constitute an interference with Cossey's rights under Article 8. According to Judge Martens, the ECHR should have so held and then let the United

154 Id. (emphasis added).
155 Id. at 642.
156 Id.
157 Id. at 642-43.
158 See supra note 126 and accompanying text.
160 See supra note 126 and accompanying text.
162 Id. at 643-65.
163 Id. at 645.
164 Id.
165 Id. at 651.
Kingdom deal with the technical issues, rather than have itself been drawn into those issues.\textsuperscript{166} As to the right to marry under Article 12, Judge Martens pointed out some of the difficulties with Judge Ormrod’s opinion in \textit{Corbett}: he noted that it certainly would not be permissible for a member State to limit marriage to persons who can prove an ability to procreate.\textsuperscript{167} Since only the chromosomal factor is incapable of being changed, Judge Martens asked why this factor should be made decisive.\textsuperscript{168} A male-to-female transsexual is capable of intercourse with a male and, moreover, “marriage is far more than a union which legitimates sexual intercourse and aims at procreating.”\textsuperscript{169} To the Judge Martens, the effect of the United Kingdom’s rule was to reduce the post-operative transsexual’s right to marry to such an extent that the very essence of the right was impaired.\textsuperscript{170} Although there had been no scientific developments since \textit{Rees}, there had been societal developments.\textsuperscript{171} Whereas the ECHR in \textit{Rees} had assumed that only five member States made it possible for post-operative transsexuals to have their new sexual identity fully recognized by the law, Judge Martens found that fourteen member States had made some such provision at the time that \textit{Cossey} was being decided.\textsuperscript{172}

A much shorter dissenting opinion of Judges Palm, Foighel, and Pekkanen echoed several of Judge Martens’s points and then cut to the heart of the matter:

\begin{quote}
The only argument left against allowing Miss Cossey to marry a man is the fact that biologically she is considered not to be a woman. But neither is she a man, after the medical treatment and surgery. She falls somewhere between the sexes. In this situation a choice must be made and the only humane solution is to respect the objective fact that, after the surgical and medical treatment which Miss Cossey has undergone and which was based on her firm conviction that she is a woman, Miss Cossey is psychologically and physically a member of the female sex and socially accepted as such.\textsuperscript{173}
\end{quote}

\begin{flushright}
\textsuperscript{166} Id. at 654. \\
\textsuperscript{167} Id. at 656-57. \\
\textsuperscript{168} Id. at 657. \\
\textsuperscript{169} Id. at 658. \\
\textsuperscript{170} Id. at 659. \\
\textsuperscript{171} Id. at 660. \\
\textsuperscript{172} Id. at 661. \\
\textsuperscript{173} Id. at 665.
\end{flushright}
C. Attempting to Side-Step Rees and Cossey: X, Y and Z (1997)

In the mid-1990s, three British citizens brought to the ECHR another challenge to the United Kingdom’s treatment of post-operative transsexuals in family law, but without directly attacking the marriage prohibition as in Rees and Cossey. This third unsuccessful challenge culminated in the ECHR’s decision in X, Y and Z v. United Kingdom in 1997.174 “X,” a female to male transsexual, was born in 1955 and works as a college lecturer in Manchester, England.175 Since 1979, he has lived with “Y,” a woman born in 1959, whom he could not marry under British law.176 “Z” was a child born in 1992 to Y as a result of artificial insemination by donor (AID).177

After an initial refusal, a hospital ethics committee had agreed to provide the AID treatment.178 They asked X to acknowledge himself as the father within the meaning of Britain’s Human Fertility and Embryology Act 1990.179 Y was impregnated with sperm from an anonymous donor, and Z was born as a result.180 Prior to Z’s birth, X had enquired of the registrar general whether he could be listed as the father of Y’s child.181 The Registrar General ultimately decided that only a biological man could be regarded as a father for the purposes of registration.182 As a registered female at birth, X could not be considered a biological man under U.K. law. When Z was born, X and Y were

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176 Id. at 147.
177 Id.
178 Id.
179 Id.
180 Id.
181 Id.
182 Id.
not allowed to register X as the father, and that part of the register was left blank. Z was, however, given X's surname on the register.

Under the Human Fertility and Embryology Act 1990, where an unmarried woman gives birth as a result of AID with the involvement of her male partner, the partner (not the sperm donor) is treated for legal purposes as the father of the child.

Additionally, under U.K. law, "parental responsibility" (i.e., all the rights and duties of a parent) automatically vests in the mother and, if she is married, in her husband. A father who was not married to the mother at the time of a child's birth may apply for a court order granting him parental responsibility, or he may attain it by a written agreement in a prescribed form with the mother. Parental responsibility cannot vest in any other person unless a "residence order" in respect of the child is made in his or her favor. Such an order settles the arrangements to be made as to the person with whom the child is to live. Where a court makes a residence order in respect of any person who is not the parent or guardian of a child, that person is automatically vested with “parental responsibility” for the child, as long as the residence order remains in force.

X, Y, and Z asserted that the lack of recognition of X as Z's father denied them respect for their family and private life in contravention of Article 8 of the European Convention. They further asserted that the resulting position in which they were placed was discriminatory in violation of Articles 8 and 14 (a non-discrimination provision) taken together.

In 1994, the Commission declared the complaints admissible under Articles 8 and 14. In a report in 1995, the Commission concluded that there had been

\[183 \textit{Id. at } 148.\]
\[184 \textit{Id.}\]
\[185 \textit{Id.}\]
\[186 \textit{Id. at } 149.\]
\[187 \textit{Id.}\]
\[188 \textit{Id.}\]
\[189 \textit{Id.}\]
\[190 \textit{Id.}\]
\[191 \textit{Id.}\]
\[192 \textit{Id. at } 150.\]
\[193 \textit{Id.}\]
\[194 \textit{Id.}\]
a violation of Article 8 and that it was unnecessary to reach the Article 14 issue.195

Before the ECHR, the United Kingdom argued that the concept of “family life” did not apply to the relationships between X and Y, or X and Z.196 The United Kingdom asserted that X and Y should be viewed as two women living together since X was still legally a female.197 The government conceded, however, that it would be difficult to maintain that there was no family life if X and Y applied for and received a joint residence order for Z.198 However, inasmuch as X had undergone gender reassignment surgery and had lived with Y in all appearances as her male partner since 1979, as they had jointly applied for and had been granted treatment for AID, as X had been involved throughout the AID process, and as X had acted as Z’s father throughout her life, the ECHR readily concluded that “de facto family ties link the three applicants.”199

The applicants maintained that there had been significant societal developments since the ECHR’s decision in Rees: first, the European Parliament and the Parliamentary Assembly of the Council of Europe had called for the recognition of transsexual identity; second, the Court of Justice of the European Communities had decided that dismissal of a transsexual for a reason related to gender reassignment was illegal discrimination; and third, recent research suggested that transsexuality has a physiological basis in the structure of the brain.200 The applicants argued that these developments undercut the reasoning in Rees and Cossey, and that the ECHR should now hold that the notion of respect for family life and/or private life required States to recognize the present sexual identity of post-operative transsexuals for legal purposes.201

However, the applicants also argued that their claims were different from those in Rees and Cossey, that X was not trying to amend his birth certificate but rather to be named Z’s father on her birth certificate.202 Further, they asserted that the State’s margin of appreciation should be narrower on this issue because of the interests of the child in having her social father recognized

195 Id.
196 Id. at 166.
197 Id.
198 Id.
199 Id.
200 Id. at 167.
201 Id.
202 Id.
as her legal father. The United Kingdom, of course, argued for a wide margin of appreciation because of the complex issues involved and because there was not yet a broad consensus on these issues among the member States.

The ECHR found the issues presented to be distinguishable from those in Rees and Cossey. It recognized that it had previously held that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child’s integration into the family. All of its prior cases on these issues related to family ties between biological parents and their children, however. The ECHR noted that there was no common European standard as to the granting of parental rights to transsexuals, nor as to the manner in which the societal relationship between a child conceived by AID and the person who performs the role of father should be reflected in law. Given the lack of common ground, the ECHR concluded that the United Kingdom was entitled to a wide margin of appreciation.

Against that wide margin of appreciation, the ECHR deemed that the applicants’ concerns could be largely obviated by the simple expedient of X and Y jointly applying for a residence order. Similarly, concerns about Z not being able to inherit from X though intestacy could be overcome by X making out a will.

The ECHR felt that the United Kingdom was justified in being cautious: it was concerned that there would be an inconsistency in the law if X were allowed to be listed as Z’s father on her birth certificate but was still legally a female. This was the obvious “Achilles’ heel” in X arguing that it was not necessary to overrule Rees and Cossey in order to grant him relief in this case.

Given the complexities of the issues, the lack of uniformity among the Contracting States and the United Kingdom’s resultant wide margin of

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203 Id.
204 Id. at 167-68.
205 Id. at 168.
206 Id. at 168-69.
207 Id. at 169.
208 Id.
209 Id.
210 Id. at 171.
211 Id. at 170-71.
212 Id. at 170.
appreciation, the ECHR concluded that the fact that U.K. law did not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of Article 8. The vote on this issue was fourteen to six. The ECHR briefly disposed of the Article 14 discrimination issue, concluding that it was tantamount to a restatement of the Article 8 complaint and raised no separate issue. That vote was seventeen to three.


Only a year after the X, Y and Z decision, two new applicants came before the ECHR, asserting that the United Kingdom’s treatment of transsexuals violated their rights under the European Convention and resulting in the ECHR’s July 1998 opinion in Sheffield and Horsham v. United Kingdom. Miss Kristina Sheffield, a British citizen and London resident, was born in 1946 and registered as a male. Prior to gender reassignment surgery, Sheffield married a woman and had one child by that marriage. In 1986, Sheffield began treatment for gender identity disorder. Interestingly, Sheffield was advised by the psychiatrist and surgeon that she was required to get a divorce as a precondition to gender reassignment surgery. She did so. Sheffield eventually underwent the surgery. She changed her name by deed poll to Kristina Sheffield, and obtained a driver’s license and passport in that name.

Subsequent to the divorce, Sheffield’s former spouse obtained a court order to terminate Sheffield’s contact with their daughter on the basis that contact with a transsexual was contrary to the child’s interests; as of the date of the
decision, Sheffield had not seen the child in twelve years.\textsuperscript{225} Sheffield’s birth certificate and various governmental records continued to record her original name and gender.\textsuperscript{226} She had, she claimed, suffered public humiliation and discrimination as a result of the United Kingdom’s official records continuing to show her as a male and, hence, as a transsexual.\textsuperscript{227}

Miss Rachel Horsham, a British citizen and Dutch resident, was born in the United Kingdom in 1946 and registered at birth as a male.\textsuperscript{228} By the age of twenty-one, Horsham realized she was a transsexual.\textsuperscript{229} She left the United Kingdom in 1971 and led her life abroad as a female.\textsuperscript{230} She underwent gender reassignment surgery in Amsterdam in 1992.\textsuperscript{231} Although she obtained an order from a Dutch court that she be issued a new birth certificate by the Registrar of Births in The Hague, recording her new name and the fact that she was of the female sex, the United Kingdom refused to amend her original birth certificate.\textsuperscript{232} She wished to marry her male partner and live with him in the United Kingdom, but could not do so, as the United Kingdom would not consider her to be validly married even if the marriage was valid where entered into.\textsuperscript{233}

The European Commission on Human Rights found in both cases a violation of Article 8, respect for the applicants’ private lives.\textsuperscript{234} In both cases, the Commission found that neither Article 12 nor Article 14 gave rise to a separate issue and that there was no violation of Article 13.\textsuperscript{235} Once again, as in \textit{Rees} and \textit{Cossey}, the ECHR defined the issue as being whether the United Kingdom had failed to comply with a “positive obligation” to ensure respect for the applicants’ rights to respect for their private lives.\textsuperscript{236} The ECHR found that the essence of each applicant’s claim was the continued insistence of the United Kingdom on the determination of gender according to

\textsuperscript{225} Id. The Supreme Court of Nevada has upheld termination of a natural father’s parental rights under similar circumstances. Daly v. Daly, 715 P.2d 56 (Nev. 1986).
\textsuperscript{226} Sheffield and Horsham, 27 Eur. H.R. Rep. at 168.
\textsuperscript{227} Id. at 168-69.
\textsuperscript{228} Id. at 169.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Id. at 169-70.
\textsuperscript{234} Id. at 172-73.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 190.
biological criteria alone and the immutability of gender information once it is correctly entered on the birth register.\textsuperscript{237}

The ECHR found no noteworthy legal development since the \textit{Cossey} decision despite its own decision in a case brought by a transsexual against France where it had found that France had violated the applicant’s right to respect for private life; it distinguished that case based on the French legal system’s civil status system.\textsuperscript{238} Despite submissions by the amicus group Liberty, regarding legal developments in Europe, the ECHR still found a lack of a common approach to gender classification of transsexuals.\textsuperscript{239} Similarly the ECHR found no definitive developments in the area of medical science to settle conclusively the doubts concerning the causes of transsexualism.\textsuperscript{240} The ECHR also found significant that “it still remains established that gender reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex despite the increased scientific advances in the handling of gender reassignment procedures.”\textsuperscript{241}

Based on these findings, the ECHR, by a vote of eleven to nine, found no violations of the applicants’ Article 8 rights to respect for their private lives.\textsuperscript{242} Rather, the failure of the United Kingdom to legally recognize their new gender had not given rise to detriment of sufficient seriousness as to override the United Kingdom’s margin of appreciation in this area.\textsuperscript{243}

Nevertheless, the majority issued a strongly worded caution:

Having reached those conclusions, the Court cannot but note that despite its statements in the \textit{Rees} and \textit{Cossey} cases on the importance of keeping the need for appropriate legal measures in this area under review having regard in particular to scientific and societal developments, it would appear that the respondent State has not taken any steps to do so. The fact that a transsexual is able to record his or her new sexual identity on a driving licence or passport or to change a first name are not innovative

\textsuperscript{237} \textit{Id.} at 191.
\textsuperscript{238} \textit{Id.} at 177, 192 (distinguishing B. v. France, App. No. 13343/87, 16 Eur. H.R. Rep. 1 (1992)). In B., the ECHR noted a variety of ways in which “the lot of transsexuals could be seen to be much harder in France than in England.” \textit{B.}, 16 Eur. H.R. Rep. at 29-34.
\textsuperscript{239} Sheffield and Horsham, 27 Eur. H.R. Rep. at 192-93.
\textsuperscript{240} \textit{Id.} at 192.
\textsuperscript{241} \textit{Id.}
\textsuperscript{242} \textit{Id.} at 197.
\textsuperscript{243} \textit{Id.} at 193.
facilities. They obtained even at the time of the Rees case. Even if there have been no significant scientific developments since the date of the Cossey judgment which make it possible to reach a firm conclusion on the aetiology of transsexualism, it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area needs to be kept under review by Contracting States.244

By a vote of eighteen to two, and with a very short analysis, the ECHR found no violation of Article 12, the right to marry.245 With an equally short analysis, the ECHR unanimously found no violation of Article 14, the prohibition of discrimination.246

V. ADOPTION OF THE HUMAN RIGHTS ACT 1998

On November 9, 1998, Her Royal Highness Elizabeth II gave royal assent to the Human Rights Act 1998 (HRA).247 Although the bill that became the HRA had been presented for its first reading in the House of Lords in October 1997,248 enactment of the HRA was the culmination of a political effort going back over decades.249 There had been a debate in the House of Commons on the United Kingdom adopting a Bill of Rights in 1975.250 In 1977, Lord Wade introduced a Bill of Rights in the House of Lords.251 Indeed various bills to enact a United Kingdom Bill of Rights were passed in the House of Lords in 1979, 1981, and 1985, but were not proceeded with in the House of

244 Id. at 193-94.
245 Id. at 194-95, 197.
246 Id. at 195-97.
248 Id.
249 A full review and analysis of the complex political history of the HRA is beyond the scope of this Article. There are a number of books that include the subject. See BLACKBURN, supra note 247, at 5-14; see also PETER RIDDELL, PARLIAMENT UNDER BLAIR 51-54, 97 (2000); JOHN WADHAM & HELEN MOUNTFIELD, BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998, at 4-9 (1999).
250 WADHAM & MOUNTFIELD, supra note 249, at 6.
Commons. During the eighteen years of the Thatcher and Major Conservative governments, there was no move by those administrations to adopt a Bill of Rights.

In its "Manifesto" for the 1997 General Election, the Labor Party made a commitment to redefine the status of the European Convention in British domestic law. Labor issued a "Green Paper" entitled Bringing Rights Home, which concluded: "We aim to change the relationship between the State and the citizen, and to redress the dilution of individual rights by an over-centralising government that has taken place over the past two decades."

In a subsequent Labor government “White Paper” entitled Rights Brought Home: The Human Rights Bill, it was proposed to enhance the status of the European Convention in United Kingdom domestic law. The White Paper noted:

It takes on average five years to get an action into the [ECHR] . . . and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts—without this inordinate delay and cost. It will also mean that the rights will be brought much more fully into the jurisprudence of the courts throughout the United Kingdom and their interpretation will thus be far more subtly and powerfully woven into our law.

Despite the time and money required to take a case to the ECHR, there was concern that the United Kingdom was the subject of a disproportionate number of successful claims: "The fact that Britain has one of the highest number of cases brought before the Court of Human Rights, with over half of the violations having been found after 1990, clearly indicates that human rights are

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252 Blackburn, supra note 247, at 8.
253 Id. at 9-10.
256 Loveland, supra note 254, at 620.
257 Id. (quoting Rights Brought Home: The Human Rights Bill, CM 3782 ¶ 1.14 (1997)).
currently not adequately protected and again underlines the need for this Bill.\textsuperscript{258}

When Home Secretary Jack Straw subsequently introduced the bill into the House of Commons, he commented: "This is the first major Bill on human rights for more than 300 years. It will strengthen representative and democratic government. It does so by enabling citizens to challenge more easily actions of the state if they fail to match the standards set by the European Convention."\textsuperscript{259}

The original concept of Labor's reform program was a two-step process for securing human rights. First, the European Convention would be incorporated into U.K. domestic law. Then, after some period of time, the United Kingdom would develop its own indigenous constitutional Bill of Rights.\textsuperscript{260}

In a general sense, and although it remains a matter of some academic debate, passage of the HRA carried out the first part of the plan. Robert Blackburn, Professor of Constitutional Law at King's College, University of London, flatly states the general legal consensus that the task of incorporating the European Convention into U.K. domestic law is "now accomplished by the Human Rights 1998."\textsuperscript{261} Perhaps writing hyper-technically, Helen Fenwick and Gavin Phillipson of the University of Dublin, assert:

The HRA does not "incorporate" the Convention rights into substantive domestic law, since it does not provide that they are to have the "force of law," the usual form of words used when international treaties are incorporated into domestic law. Instead, under [section] 1(2) of the HRA, certain of the rights... are to "have effect for the purposes of this Act."\textsuperscript{262}

As will be seen, for present purposes, the prevailing view is that the HRA has brought Convention rights to the United Kingdom to be determined by U.K. courts. Nevertheless, as will also be seen, the significance of a judicial finding of a violation of such rights is quite different from a finding by a U.S. court of a violation of the U.S. Bill of Rights.


\textsuperscript{259} Baker, \textit{supra} note 251, at 3.

\textsuperscript{260} BLACKBURN, \textit{supra} note 247, at xxviii.

\textsuperscript{261} \textit{Id}.

\textsuperscript{262} FENWICK & PHILLIPSON, \textit{supra} note 255, at 857.
VI. REPORT OF THE INTERDEPARTMENTAL WORKING GROUP ON TRANSSEXUAL PEOPLE (2000)

Finally, in April 1999, after enactment of the HRA but before its effective date, the Home Secretary set up an Interdepartmental Working Group on Transsexual People. The Working Group was given the following terms of reference: “to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexual people, having due regard to scientific and societal developments, and measures taken in other countries to deal with this issue.” The Working Group solicited input from various groups and individuals advocating on behalf of transsexual people, including Liberty and Press for Change.

The Working Group’s Report, issued in April 2000, cited studies suggesting that in the United Kingdom there are 1300 to 2000 male-to-female and 250 to 400 female-to-male transsexual people. Primary concerns of transsexual people were their “wish to have a birth certificate showing their new gender, to marry in that gender and, most importantly, the grant of legal recognition of their acquired gender for all purposes.” The Report related the history of the legal treatment of transsexual people by the United Kingdom and briefly discussed some of the decisions of the ECHR in cases brought by transsexual people against the United Kingdom.

The Working Group identified three options: “to retain the status quo and leave the law unchanged; to issue birth certificates showing a transsexual person’s new name and, possibly sex; and to grant full legal recognition of the acquired gender.” The Working Group believed that the middle ground of

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264 Id.
265 Many members of the transsexual community prefer the terms “transsexual people” or “transsexual person” to “transsexuals” or “transsexual.” See How to Respect a Transsexual Person, at http://www.kisa.ca/respect.html (last visited Mar. 3, 2005). This Article has used terminology as given in primary sources being discussed.
266 WORKING GROUP REPORT, supra note 263, at 4-5, 41.
267 Id. at 3.
268 Id. at 3-4.
269 Id. at 6-18.
270 Id. at 4.
271 Id. at 5, 25.
issuing new birth certificates without full legal recognition of the acquired gender would be both unworkable and unsatisfactory:

The issue of certificates might, in some circumstances, save transsexual people some embarrassment. But unless this carried with it recognition for some or all legal purposes it would not do much to relieve their underlying concerns.

We also considered whether, following the issue of a short certificate showing the holder's new name and gender, a transsexual person might be formally recognised as a member of their new sex for certain specific purposes but not in all respects. But we have not been able to identify any areas in which recognition could be given without leading to confusion and uncertainty. We were very doubtful whether there could be a halfway house between the present position and full legal recognition for all purposes.\textsuperscript{272}

The Report strongly suggested the course of full legal recognition:

We think that there needs to be a formal stage when the change of gender is recognised so that the legal position is clear, even though the stage at which a transsexual person may apply for the order may not be fixed. Full legal recognition could be given by means of a Court Order which defined the date and process from which the applicant acquired the new gender. Legislation would be needed to define the grounds on which such an Order could be made. The Registrar General would re-register the birth on the basis of the information provided by the Court, as happens now where a person is adopted.\textsuperscript{273}

The Working Group added a number of significant caveats. First, no change in legal status could completely eradicate information concerning the gender into which the individual was born: "But there would be no rewriting of history and the legislation would have to make it clear that in certain circumstances access could be given to records held in the person's previous identity, for example in connection with criminal investigations or medical

\textsuperscript{272} \textit{Id.} at 19 (subheadings omitted).
\textsuperscript{273} \textit{Id.} at 20.
Second, difficult decisions would have to be made in individual cases as to the point at which that person would be entitled to be recognized in the acquired gender. In the continuum of treatment this might be after some period of living in the new gender role, undergoing hormonal treatment or after surgery. Indeed, different individuals, for a variety of reasons, might stop at different places within each stage. Another caveat was the concern as to whether, as is the case in several countries, transsexual people must be provably sterile before they can be recognized in their new gender. Still another problem involves the transsexual person in a pre-existing marriage. Since the United Kingdom does not allow same-sex marriage, it might be required that any pre-existing marriage be dissolved as a precondition to legal recognition in the new gender. One relatively minor concern is that the United Kingdom currently has different ages for men than for women to be eligible for a state retirement pension: sixty-five for men, but only sixty for women. Thus, full legal recognition would, for this purpose, benefit male-to-female transsexual people, but prove a disadvantage for female-to-male transsexual people.

A consultation paper to the Working Group suggested the interesting concept of a two-stage procedure to deal with the problem of people who revert to their original gender. Persons would first undergo a change in "social gender," filing a "statutory declaration" with the registrar general of their intention from a certain date to live in their new gender. The registrar general, it was proposed, would issue a Receipt of the Statement of Intention (ROTSI). This would enable the applicant to obtain various new official and civic documents in the new name and gender. No less than two years after

274 Id.
275 Id.
276 Id.
277 Id. at 20, 41. For the extraordinary case of an individual who first underwent male to female surgery and then female to male surgery, see Doctor Gave Me a Sex Change I Didn't Want, DAILY EXPRESS (London), Feb. 19, 2004, at 3.
278 WORKING GROUP REPORT, supra note 263, at 21.
279 Id. at 20-21.
280 Id. at 23. The age differential will be gradually phased out during the years 2010-2020.
281 Id. at 41-44.
282 Id. at 42.
283 Id.
284 Id. at 43.
issuance of the ROTSI, those who wished to do so could apply for full re-
registration in the new gender with issuance of a "Gender Confirmation
Certificate."\footnote{285}

Although, as noted, the Working Group apparently favored some methodol-
ogy of full legal recognition of a transsexual person's new gender, it concluded
by suggesting that the Government "may wish to put the issues out to public
consultation."\footnote{286}

VII. MODERN CHALLENGE TO CORBETT IN THE
COURT OF APPEAL: BELLINGER (2001)

Thirty years after Corbett, a new case arose in the British court system
which addressed the legality of a marriage between a man and a post-operative
male-to-female transsexual.\footnote{287} While not necessarily legally significant, the
purported marriage in Belling v. Bellinger could not have been more
different from the Corbett-Ashley train wreck. Whereas Corbett and Ashley
barely cohabited after their wedding ceremony, remaining together for less
time than they were apart before the final break-up and lacking a satisfactory
sexual relationship,\footnote{288} the Bellingers had lived together for some two decades
since their marriage ceremony in 1981.\footnote{289} Whereas Corbett sought a decree of
nullity after Ashley allegedly had rebuffed his efforts to consummate the
marriage,\footnote{290} Elizabeth Ann Bellinger sought a judicial declaration that her
marriage to Michael Jeffrey Bellinger was valid, and Mr. Bellinger did not
oppose her petition.\footnote{291} Rather, her petition was opposed by the Attorney
General, who intervened in the proceedings.\footnote{292}

Mrs. Bellinger was born a male in 1946.\footnote{293} At the age of twenty-one, she
 stil a male) married a woman, but that marriage ended in divorce a few years
later.\footnote{294} Following the divorce, she began to dress and live as a woman, and

\begin{itemize}
  \item \footnote{285} Id.
  \item \footnote{286} Id. at 25.
  \item \footnote{288} See supra text accompanying notes 43-46.
  \item \footnote{289} Bellinger, [2002] 1 All E.R. at 311.
  \item \footnote{290} See supra text accompanying notes 47-49.
  \item \footnote{291} Bellinger v. Bellinger, [2003] 2 All E.R. 593, 595 (H.L.).
  \item \footnote{292} See id. at 595-96.
  \item \footnote{293} Bellinger, [2002] 1 All E.R. at 313.
  \item \footnote{294} Id.
\end{itemize}
after various stages of treatment, underwent gender reassignment surgery in 1981. In May 1981, she went through a marriage ceremony with Mr. Bellinger, who was fully aware of her background. On the marriage certificate, Mrs. Bellinger described herself as a "spinster." A chromosomal test in 1999 showed that she had normal male chromosomes.

The High Court received extensive affidavits from three experts in the field of gender identity disorder. Although Judge Johnson observed that there had been a marked change in social attitudes towards transsexuals since Corbett had been decided in 1970, he concluded that the medical criteria set out by Judge Ormrod in Corbett remained valid. Since Mrs. Bellinger correctly had been registered as a male at birth, Judge Johnson held that she remained male at the time of the marriage ceremony; he thus refused to grant her requested declaration.

The Court of Appeal affirmed but, significantly, one of the three appellate judges dissented. Looking to the Corbett decision, the majority concluded that Parliament had enacted the Corbett rule into statutory law:

The judgment of [Judge Ormrod] was not appealed and its conclusions were put on a statutory basis in the Nullity of Marriage Act 1971, § 1 of which stated:

'A marriage which takes place after the commencement of this Act shall be void on the following grounds only, that is to say . . . (c) that the parties are not respectively male and female.'

Section 1(c) was re-enacted in § 11(c) of the Matrimonial Clauses Act 1973, which applies to the present proceedings.

The majority also considered the medical evidence presented in the High Court. Louis Gooren, Professor of Endocrinology at the Free University

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295 id.
296 Id.
297 Id.
298 Id. at 314.
299 Id.
300 Id.
301 Id.
302 Id. at 314-16.
303 Id. at 316.
304 Id. at 318-25.
Hospital, Amsterdam, clearly viewed transsexualism as a medical condition. He maintained, "[I]t is no longer tenable to claim [that] the genetic or gonadal criterion determines one’s status as male or female." Rather, Professor Gooren suggested that gender status is determined by "sexual differentiation" in the brain. He cited a study he had co-authored in 1995, which stated, "[R]esearch into the human brain structure carried out post mortem showed that a biological structure in the brain distinguished male-to-female transsexuals from men."

Richard Green, a consultant psychiatrist and research director of the Gender Identity Clinic at the Charine Cross Hospital, in contrast, reported that transsexualism is a psychiatric disorder. He was highly critical of Corbett: "The Corbett criteria are too reductionistic to serve as a viable set of criteria to determine sex. They also ignore the compelling significance of the psychological status of the person as a man or a woman." However, Professor Green viewed the theory of a biological central nervous system basis for male transsexualism as "neither refuted nor conformed [sic]." He noted that the Dutch study was conducted on a small sample of male transsexuals and that studying the brain of a transsexual can only be done after death. While acknowledging that Mrs. Bellinger’s brain could not be dissected during her lifetime and that she still possessed male XY chromosomes, Professor Green concluded: "At present the patient is functioning as a woman, not as a man. From that perspective the petitioner’s sex could be judged to have changed."

Mr. Timothy Terry, consultant urological surgeon at the Leicester University Hospitals, which have a Gender Identity Disorder Group, gave this assessment:

The psychological profile of [male-to-female] transsexuals is female by medical definition. The only biological factor which has not changed in such individuals is their chromosomal

305 Id. at 318.
306 Id. at 319.
307 Id.
308 Id. (quoting Zhou, Hofman, Gooren & Swaab, A Sex Difference in the Human Brain and Its Relation to Transsexuality, 378 NATURE 68 (1995)).
309 Id. at 320.
310 Id. at 321.
311 Id.
312 Id.
313 Id. at 322.
makeup. The paper reported in *Nature* in 1995 would suggest this in itself may be irrelevant in the sexual development of transsexuals. Accepting that transsexualism is a medically recognised condition and that such patients undergo appropriate medical and surgical treatment to achieve their chosen sexual orientation it seems to me irrelevant to consider the chromosome makeup of an individual as the critical factor when determining the rights of that individual in the society in which he/she lives.\(^{314}\)

Based on these reports, the majority found that “the gender assignment at birth of a transsexual in accordance with the Corbett criteria cannot be challenged.”\(^{315}\) The question became whether assignment at birth is immutable.\(^{316}\) Relying on the statements by Professor Green and Mr. Terry, the majority deemed transsexualism to be a psychiatric rather than medical condition, according to presently accepted medical knowledge.\(^{317}\)

The majority posited three additional factors not taken into account by Judge Ormrod in *Corbett* in determining sex: (a) psychological, (b) secondary sexual characteristics, and (c) brain differentiation.\(^{318}\) According to the majority, factors (b) and (c) were not realistic; nothing in the medical evidence suggested secondary sexual characteristics as a primary factor, and brain differentiation cannot be assessed in living people.\(^{319}\) As for factor (a), the majority created something of a “Zeno’s paradox”:

There was no medical evidence, other than the psychological, upon which the court could come to a conclusion different from the criteria set out by [Judge Ormrod]. Although the psychological factor was strongly relied upon by Professor Green, he did not suggest a clear point at which the psychological changes had reached a stage, with or without hormonal treatment and reassignment surgery, at which a person should be seen to have become a member of the sex into which he/she was not born.\(^{320}\)

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\(^{314}\) *Id.* at 323.

\(^{315}\) *Id.*

\(^{316}\) *Id.*

\(^{317}\) *Id.*

\(^{318}\) *Id.* at 324.

\(^{319}\) *Id.*

\(^{320}\) *Id.* at 325.
The majority further reviewed the case law in the United Kingdom post-
Corbett, case law from other countries (including an early case from the
United States which will be discussed infra pp. 402-409), and the various
decisions of the European Court of Human Rights. The majority also cited
The court had inquired of the Attorney General as to any steps being taken by
any governmental department to implement any of the recommendations of the
report or to prepare a consultation paper for public discussion. The majority
expressed chagrin with the Lord Chancellor’s response:

To our dismay, we were informed that no steps whatsoever have
been, or to the knowledge of Mr. Moylan were intended to be,
taken to carry this matter forward. It appears, therefore, that the
commissioning and completion of the report is the sum of the
activity on the problems identified both by the Home Secretary
in his terms of reference, and by the conclusions of the members
of the working party. That would seem to us to be a failure to
recognise the increasing concerns and changing attitudes across
western Europe which have been set out so clearly and strongly
in judgments of members of the European Court of Human
Rights at Strasbourg, and which in our view need to be addressed
by the United Kingdom.

After this lengthy discussion of the medical and legal situation of
transsexuals, the majority produced remarkably brief and admittedly
unsatisfactory “[g]eneral conclusions.” The majority explained that, for
“obvious reasons,” it is necessary to assign the sex of a child at birth. It
further declared that changes in social attitudes toward transsexuals “cannot
be ignored.” The majority also focused on the lack of legislation delineating
the point at which a person can change his gender status for purposes of
marriage. The majority cited German legislation under which a change in

321 Id. at 325-32.
322 Id. at 332.
323 Id. at 332-33.
324 Id. at 333.
325 Id. at 333-35.
326 Id. at 333.
327 Id.
328 Id.
gender can only be recognized where the person: (i) has lived for at least three years in the new gender, (ii) is unmarried, (iii) is of age, (iv) is permanently sterile, and (v) has undergone an operation by which clear resemblance to the new sex has been achieved.\textsuperscript{329} In the majority’s view, the setting of such conditions is a matter of public policy—not for the courts.\textsuperscript{330} Ultimately, the majority concluded that Mrs. Bellinger’s gender status is a question for the court, assessing the facts against a clear statutory framework.\textsuperscript{331} In the absence of such a framework, the court should not act to fill the gap; the majority therefore held that Mrs. Bellinger’s appeal must be dismissed.\textsuperscript{332}

With both unease and prescience, however, the majority noted:

\begin{quote}
We would add however, with the strictures of the European Court of Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the Inter-departmental Working Group for public consultation merits action by the government departments involved in these issues. The problems will not go away and may well come again before the European court sooner rather than later.\textsuperscript{333}
\end{quote}

Judge Thorpe dissented at some length.\textsuperscript{334} Although he noted the decisions of the ECHR, he focused on domestic law, especially \textit{Corbett}.\textsuperscript{335} In \textit{Corbett}, Judge Ormrod cited expert opinion that there are at least four criteria for assessing the sexual condition of an individual: (i) chromosomes, (ii) gonads, (iii) genitalia, and (iv) psychology.\textsuperscript{336} Judge Ormrod also found agreement among the experts that the biological sexual constitution of an individual is fixed at birth at the latest.\textsuperscript{337} He further found that sex is an essential determinant of the relationship of marriage because marriage is and always has

\begin{footnotes}
\textsuperscript{329} Id. at 334.
\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id. at 334-35.
\textsuperscript{333} Id. at 335.
\textsuperscript{334} Id. at 335-50.
\textsuperscript{335} Id. at 338-42.
\textsuperscript{336} Id. at 339.
\textsuperscript{337} Id.
\end{footnotes}
been recognized as a union of a man and a woman. Judge Ormrod consequently reasoned that the law should look only at the first three factors, i.e., the biological factors, and disregard the psychological factor, in determining a person's sex for purposes of marriage. Judge Ormrod's stated rationale for focusing solely on the biological factors was that the experts confused sex with gender and that marriage depends on the former and not on the latter.

Judge Thorpe examined each of Judge Ormrod's propositions in turn. First, Judge Thorpe observed that although the experts in Corbett had agreed, thirty years earlier, that the biological sexual constitution of an individual is fixed at birth at the latest, the three experts in Bellinger rejected this view. Judge Ormrod's second fundamental proposition, that marriage is and always has been the union of a man and a woman, has been eroded, in Judge Thorpe's view, by enormous societal changes since Victorian times when Lord Penzance sought to define marriage "throughout Christendom" as "the voluntary union for life of one man and one woman, to the exclusion of all others." Judge Thorpe would "redefine marriage as a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations." Skipping to Judge Ormrod's fourth proposition, that marriage depends on sex and not on gender, Judge Thorpe argued that it is now of doubtful validity. In any marriage, one or both of the parties may have to accommodate physical factors of the other which affect the essential sexual dimension of the couple's relationship. Moreover, Judge Thorpe stated that gender rather than sex has steadily increased as a defining characteristic of an individual. In Judge Thorpe's view, it is Judge Ormrod's third proposition that sex should be determined solely on physical rather than psychological factors,

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338 Id.
339 Id. at 339-40.
340 Id. at 340.
341 Id. at 340-41 (quoting Hyde v. Hyde, [1861-1873] All E.R. 175, 177 (L.R.-R.&D.)).
342 Id. at 341.
343 Id.
344 Id.
345 Id.
346 Id.
which has the most direct bearing on the outcome of the case.\textsuperscript{347} Although it may be more complicated for judges to consider the psychological dimension in determining gender, a test without consideration of the psychological factor is "manifestly incomplete."\textsuperscript{348}

Judge Thorpe noted that a court had recently relied heavily on psychological factors in a nullity action involving an "inter-sex male-to-female."\textsuperscript{349} In that case, the Family Division found the wife to be female at the date of the marriage, although at birth her chromosomal sex was male, her gonadal sex was male, and her genital sex was ambiguous but more male than female.\textsuperscript{350}

Judge Thorpe then turned to the Attorney General's three main arguments: first, that expert opinion did not show that Mrs. Bellinger was and always was female or had become female; second, that the complexities of the issues demanded that any change come from Parliament; and three, that acceding to Mrs. Bellinger's petition would create enormous difficulties, even in the context of the transsexual's right to marry.\textsuperscript{351}

Judge Thorpe considered the first argument to be contrary to the expert testimony that Mrs. Bellinger was psychologically a female and that, post-operatively, her only remaining male feature is chromosomal.\textsuperscript{352}

The Attorney General's second argument, that the issue should be dealt with legislatively, required a fuller response. Judge Thorpe was sensitive to the concept of Parliamentary supremacy, but he noted that Parliament had failed to provide any definition of the words "male" and "female" in section 11(c) of the Matrimonial Causes Act 1973.\textsuperscript{353} Moreover, this statutory provision had not been previously judicially construed, so it was the duty of the court to construe it in light of the moral, ethical, and societal values as they are now.\textsuperscript{354} Additionally, the Attorney General had admitted that the government was taking no action to implement any of the suggestions of the Report of the Inter Departmental Working Group on Transsexual Persons, thus leaving a legal void.\textsuperscript{355}
As to the Attorney General’s third argument, that any relaxation of the present clear-cut boundary would produce enormous practical and legal difficulties, Judge Thorpe acknowledged “that to give full legal recognition to the transsexual’s right to acquire (perhaps not irreversibly) his or her psychological gender gives rise to many wide-ranging problems, some profoundly difficult.” 356 The only issue, however, was to recognize the validity of a marriage of a post-operative transsexual in her new gender, a far more limited question. 357 While there might arise difficult cases in the future, the cases of “fully achieved post-operative transsexuals” would be manageable. 358 Other countries within Europe already recognized the ability of transsexuals to marry in their acquired gender without too much apparent difficulty, as did the common law jurisdiction of New Zealand. 359

Judge Thorpe did not question that the Corbett decision was correct when it was handed down in 1970. 360 Subsequently, however, knowledge of transsexualism had developed. In 1980, for example, the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) introduced the diagnosis of transsexualism for gender dysphoric individuals who met certain diagnostic criteria. 361

Cutting to the heart of the matter, Judge Thorpe opined:

To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seems right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth. 362

356 Id. at 346.
357 Id.
358 Id.
359 Id. at 346-47.
360 Id. at 347.
361 Id.
362 Id. at 348.
Judge Thorpe noted that the United Kingdom lagged years behind other European countries on this issue.\textsuperscript{363} He concluded:

One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage. I would have allowed this appeal.\textsuperscript{364}

\section*{VIII. The European Court of Human Rights’ About-Face: Goodwin and I (2002)}

In July 2002, on the fifth and sixth challenges to the United Kingdom’s treatment of transsexuals to reach the European Court of Human Rights, the ECHR finally and clearly found violations of the European Convention. \textit{Goodwin v. United Kingdom} involved an individual who had been born a male in 1937.\textsuperscript{365} In the mid-1960s, Goodwin was diagnosed as a transsexual, but nevertheless married a woman and had four children by her.\textsuperscript{366} In the mid-1980s, Goodwin began serious treatment for transsexualism, culminating in gender reassignment surgery in 1990.\textsuperscript{367} At some point, Goodwin got divorced, but she “continued to enjoy the love and support of her children.”\textsuperscript{368}

Goodwin asserted violations of Articles 8, 12, 13, and 14 of the Convention.\textsuperscript{369} She claimed a number of job-related, economic, and personal difficulties resulting directly or indirectly from the United Kingdom’s refusal to alter her legal records and to treat her as a female.\textsuperscript{370} She claimed that she had been sexually harassed by colleagues at work and was not able to pursue a case of sexual harassment in the Industrial Tribunal because she was

\begin{itemize}
  \item \textsuperscript{363} \textit{id.}
  \item \textsuperscript{364} \textit{id.} at 350.
  \item \textsuperscript{366} \textit{id.} at 455.
  \item \textsuperscript{367} \textit{id.}
  \item \textsuperscript{368} \textit{id.}
  \item \textsuperscript{369} \textit{id.} at 447.
  \item \textsuperscript{370} \textit{id.} at 455-56, 478.
\end{itemize}
considered in law to be a man. When she started a new job, she was required to provide her National Insurance (NI) number, which allowed her employer to trace back her identity, leading to problems at work. The Department of Social Security (DSS) refused to issue her a new NI. Additionally, the DSS Contributions Agency informed Goodwin that she would be ineligible for a state pension at the age of sixty (the eligibility age for women) and that she would have to continue to make pension contributions until she turned sixty-five (the eligibility age for men). In a number of instances, Goodwin chose to forego various advantages which were conditional upon producing her birth certificate. She also was required to pay the higher motor insurance premiums applicable to men.

On the personal level, Goodwin asserted that she currently enjoys a “full physical relationship” with a man, but that she and her male partner cannot marry under U.K. law.

Initially the ECHR addressed the issue of stare decisis. It acknowledged that it had addressed the United Kingdom’s failure to give legal recognition to the acquired gender of post-operative transsexuals in several prior cases. The ECHR generally does not adhere to the doctrine of stare decisis, but neither does it simply ignore its own precedent from one case to the next. As the ECHR had explained in another case decided a few months before Goodwin:

The applicant’s counsel attempted to persuade the Court that a finding in this case would not create a general precedent or any risk to others. It is true that it is not this Court’s role under Article 34 of the Convention to issue opinions in the abstract but to apply the Convention to the concrete facts of the individual case. However, judgments issued in individual cases establish

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371 Id. at 455.
372 Id. at 455-56.
373 Id. at 456.
374 Id.
375 Id.
376 Id. One cannot help but wonder whether male-to-female transsexuals as a group drive more safely than do men in general.
377 Id. at 478. The Court’s decision is not clear as to whether Goodwin and her partner actually wished to marry. Id.
378 Id. at 448.
379 Id.
precedents albeit to a greater or lesser extent and a decision in this case could not, either in theory or practice, be framed in such a way as to prevent application in later cases.380

Notwithstanding the several precedents already cited in which the ECHR had found that the United Kingdom's refusal to legally recognize sex changes did not violate the Human Rights Convention, the ECHR in Goodwin felt compelled to consider the matter afresh:

While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolving approach would indeed risk rendering it a bar to reform or improvement.381

The ECHR then proceeded to find such "good reason" to depart from its prior judgments, although it is difficult to ascertain how the situation was truly different in 2002 than it had been in 1998, when the ECHR decided Sheffield and Horsham, or than it had been when the earlier cases were decided. The Goodwin court found that the "stress and alienation arising from the discordance between the position in society assumed by the post-operative transsexual and the status imposed by law which refuses to recognize the change in gender cannot be regarded as a minor inconvenience arising from a formality."382 Exactly how this situation was more serious or difficult for Goodwin than it had been for Sheffield or Horsham or, for that matter, Cossey or Rees over a decade earlier, is left unexplained.

382 Id. at 449.
The ECHR found it illogical for a state to authorize and subsidize the treatment and surgery alleviating the condition of the transsexual and then to refuse to recognize the legal implications of the result. Nevertheless the cost of Rees’s surgery was borne by the National Health Service. So was Cossey’s. The United Kingdom had “made it possible for X to undergo the surgery which brought his physiology into conformity with his psychology.” In a partly dissenting opinion in Sheffield and Horsham, it was noted that the United Kingdom subsidizes gender reassignment surgery. Why it was any less logical in 2002 than previously for the United Kingdom to subsidize gender reassignment surgery but not legally accept the reassignment is not explained by the ECHR. Additionally, is the ECHR in Goodwin suggesting that the United Kingdom would not run afoul of the European Convention if it simply refused to subsidize treatment for gender dysphoria? Surely that would not be a result favored by the transsexual community.

The ECHR was able, somewhat more forthrightly, to point to British acknowledgments of the unsatisfactory nature of the state of the law regarding transsexuals in the United Kingdom, expressed by the Interdepartmental Working Group on Transsexual People and in the Court of Appeal decision in Bellinger. On the other hand, an updated submission by the interest group, Liberty, revealed no change since the Sheffield and Horsham decision in the number of Member States of the Council of Europe giving full legal recognition of gender reassignment. Liberty did cite a 2001 decision from Australia that validated a transsexual’s marriage in his new gender.

In reply to Goodwin’s various complaints implicating Article 8 of the European Convention, the right to respect for private life, the United Kingdom argued that there was still no generally accepted approach to these matters among the Contracting States, and in view of the margin of appreciation, the United Kingdom’s lack of legal recognition of Goodwin’s new gender did not

383 Id.
389 Id. at 449, 464-65, 473-74.
390 Id. at 466.
391 Id. at 466-67 (citing In re Kevin, [2001] Fam. 1974).
The United Kingdom argued that Goodwin did not suffer "practical and actual detriment and humiliation on a daily basis" as most of her documents had been reissued to show her new name and acquired gender. It argued that a fair balance had been struck between the rights of the individual and the general interest of the community.

The Court, as before, deemed this to be a matter of whether the United Kingdom had failed to comply with a "positive obligation" to ensure the rights of a transsexual within its "margin of appreciation." Nevertheless, the Court also stated (perhaps loosely), "It must be recognized that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity."

The Court acknowledged that there remained a "lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection." Unlike its resolution in prior cases, however, the Court merely stated that "in accordance with the principle of subsidiarity," it is up to the Contracting State "to decide on the measures necessary to secure Convention rights within their jurisdiction" within its "margin of appreciation."

In striking the balance between the individual and the state, the Court concluded unanimously that the United Kingdom was in violation of Article 8:

Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings. In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society

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392 Id. at 469.
393 Id.
394 Id. at 470.
395 Id. at 470-71.
396 Id. at 472 (emphasis added).
397 Id. at 475.
398 Id.
cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone is [sic] not quite one gender or the other is no longer sustainable.\textsuperscript{399}

With a much shorter analysis, the Court likewise unanimously found the United Kingdom to be in breach of Article 12, the right to marry.\textsuperscript{400} The Court acknowledged that Article 12 refers explicitly to the right of "men and women" to marry.\textsuperscript{401} The Court nevertheless was "not persuaded" that it can still be assumed that the terms must refer to a determination of gender by purely biological criteria.\textsuperscript{402} Rather, "[T]he applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."\textsuperscript{403}

Turning to the appropriate remedies, the Court found it inappropriate to award damages to Goodwin. Her financial losses were not clear-cut; while she had not been able to retire as a woman at age sixty, she had kept working and enjoying a salary.\textsuperscript{404} It was really the lack of legal recognition that was at the heart of her complaints, and thus the finding by the Court of violation of the Convention, "with the consequences which will ensue for the future, may in these circumstances be regarded as constituting just satisfaction."\textsuperscript{405}

Unable to enjoin the United Kingdom to change its laws regarding transsexuals, the Court set forth the United Kingdom's future obligations in language depressingly reminiscent of the U.S. Supreme Court's "with all deliberate speed" edict for desegregation in 1955.\textsuperscript{406} The European Court of Human Rights simply declared:

\textsuperscript{399} Id. at 476.
\textsuperscript{400} Id. at 478-81, 484.
\textsuperscript{401} Id. at 478-79.
\textsuperscript{402} Id. at 479.
\textsuperscript{403} Id. at 480. The Court unanimously found there to be no separate issue arising under Article 14 (freedom from discrimination) and no violation of Article 13 (effective remedy before a national authority). Id. at 447, 481-82, 484.
\textsuperscript{404} Id. at 483.
\textsuperscript{405} Id. The Court did award Goodwin costs and expenses in a somewhat smaller amount than she requested. Id. at 483-84.
The Court has found that the situation, as it has evolved, no longer falls within the United Kingdom’s margin of appreciation. It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant’s, and other transsexuals’, right to respect for private life and right to marry in compliance with this judgment.  

On the same day as the Goodwin decision, the Court also handed down its decision in the companion case of I. v. United Kingdom. This case also involved a male-to-female transsexual. In language often identical to that in the Goodwin case, the Court reached all the same conclusions as it had in Goodwin.

IX. Bellinger in the House of Lords (2003)

A. The Holdings

In April 2003, some nine months after the decisions of the ECHR in Goodwin and I., the Law Lords of the House of Lords handed down their decision on the appeal in Bellinger. In her appeal, Mrs. Bellinger not only reasserted that her purported marriage in 1981 to Mr. Bellinger was valid under British law, but also asserted for the first time before the Law Lords that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with Articles 8 and 12 of the European Convention.

Lord Nicholls of Birkenhead reviewed the state of the law in the United Kingdom and in overseas jurisdictions, the decisions of the courts below, the decisions of the ECHR, and developments in the United Kingdom since Goodwin. Lord Nicholls noted that in December 2002 the British government had announced its intention to bring forward “primary legislation” which would allow transsexuals who could demonstrate that they had taken decisive steps toward living fully and permanently in the acquired gender to marry in

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409 Id. at 975.
410 Id. at 975-99.
412 Id. at 596.
413 Id. at 598-601.
LEGAL RECOGNITION OF GENDER CHANGE

that gender. The legislation (which had not yet been published even in draft outline) would also deal with other issues arising from the legal recognition of acquired gender.

Lord Nicholls expressed great sympathy for persons in Mrs. Bellinger's situation:

My Lords, I am profoundly conscious of the humanitarian considerations underlying Mrs Bellinger's claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress. I have this very much in mind.

Nevertheless, Lord Nicholls concluded that the House of Lords, sitting in its judicial capacity, should not grant Mrs. Bellinger the primary relief she sought: legal recognition of her marriage to Mr. Bellinger. Such recognition would, in Lord Nicholls's view, give the terms "male" and "female," as used in section 11(c) of the Matrimonial Causes Act 1973, "a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex."

Lord Nicholls explained:

This would represent a major change in the law, having far-reaching ramifications. It raises issues whose solution calls for extensive inquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to

414 Id. at 601.
415 Id.
416 Id. at 602.
417 Id. at 603.
418 Id.
introduce comprehensive primary legislation on this difficult and sensitive subject.\textsuperscript{419}

Lord Nicholls deemed the following issues to be beyond judicial competence: (1) At what point in the continuum of treatment is it appropriate for the law to deem that a transsexual has acquired the new gender? Would the individual have to be unmarried. Would the individual have to be sterile? (2) What implications would legal recognition for purposes of marriage entail for other purposes? (3) Would recognition for purposes of marriage mean the legalization of same-sex marriage?\textsuperscript{420}

However, speaking for the unanimous bench, Lord Nicholls \textit{did} grant Mrs. Bellinger a declaration that insofar as U.K. law makes no provision for recognition of gender reassignment for purposes of marriage, it is incompatible with Articles 8 and 12 of the European Convention.\textsuperscript{421} The declaration of incompatibility was mandated by the ECHR's decision in \textit{Goodwin}.\textsuperscript{422}

Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote, and Lord Rodger of Earlsferry each concurred in both parts of the judgment, denying Mrs. Bellinger's petition for legal recognition of her marriage, but granting her petition for a declaration of incompatibility with the European Convention.\textsuperscript{423}

\textbf{B. Implications of "Incompatibility"}

A finding by the highest court in the United Kingdom, the Law Lords of the House of Lords, that a statutory law is incompatible with an international treaty to which the United Kingdom had bound itself and which had long since entered into force in the United Kingdom and subsequently been incorporated into its domestic law, is not equivalent to a finding by the United States Supreme Court that a statute violates the U.S. Constitution.

Exactly two hundred years before \textit{Bellinger}, in \textit{Marbury v. Madison}, Chief Justice Marshall set the template for American constitutional law:

\textsuperscript{419} \textit{Id.}
\textsuperscript{420} See \textit{id.} at 603-05.
\textsuperscript{421} \textit{id.} at 605-06.
\textsuperscript{422} \textit{id.}
\textsuperscript{423} \textit{id.} at 606-14.
It is emphatically the province and duty of the judicial department to say what the law is. . . .

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. . . .

[A] law repugnant to the constitution is void.\textsuperscript{424}

The finding by the House of Lords in \textit{Bellinger} has no such direct effect. The Human Rights Act 1998 provides both the authority for, and limitations of, a declaration that British law is incompatible with the European Convention. Section 2, Interpretation of Convention Rights, provides in subsection (1):

\begin{quote}
A court or tribunal determining a question which has arisen in connection with a Convention right \textit{must} take into account any—(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, . . .

Whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.\textsuperscript{425}
\end{quote}

As a practical matter, this provision compelled the House of Lords in \textit{Bellinger} to take into account the ECHR’s decision in \textit{Goodwin}, which was directly on point and clearly not distinguishable.

The House of Lords might have utilized section 3(1) of the HRA to finesse the problem through statutory interpretation: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”\textsuperscript{426} The House of Lords did not believe it could interpret the term “female” in the Matrimonial Causes Act 1973 to include a male-to-female transsexual even though

\textsuperscript{424} Marbury v. Madison, 5 U.S. 137, 177-78, 180 (1803).


\textsuperscript{426} \textit{Id.} § 3(1).
Parliament had not provided a statutory definition of the term. Lord Nicholls opined:

I am firmly of the view that your Lordships' House, sitting in its judicial capacity, ought not to accede to the submissions made on behalf of Mrs Bellinger. Recognition of Mrs Bellinger as female for the purposes of 11(c) of the 1973 Act would necessitate giving the expressions 'male' and 'female' in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.\(^{427}\)

Addressing the issue in more detail, Lord Hope, in his concurring opinion, added:

If it could be said that the use of the words 'male' and 'female' in 11(c) of the 1973 Act was ambiguous, it would have been possible to have regard to [the \textit{Goodwin}] decision in seeking to resolve the ambiguity. But, for the reasons which I have given, I do not think that there is any such ambiguity. Then there is 3(1) of the Human Rights Act 1998, which places a duty on the courts to read and give effect to legislation in a way that is compatible with the convention rights if it is possible to do so. But we are being asked in this case to make a declaration about the validity of a marriage ceremony which was entered into on 2 May 1981, and 3(1) of the 1998 Act is not retrospective . . . . The interpretative obligation which 3(1) provides is not available.\(^{428}\)

Lord Hobhouse, more in accord with Lord Nicholls, stated:

The threshold question is whether, by applying 3, it is possible, as a matter of interpretation, to 'read down' 11(c) of the 1973 Act so as to include additional words such as 'or two people of the same sex one of whom has changed his/her sex to that of the opposite sex.' This would in my view not be an exercise in interpretation however robust. It would be a legislative exercise

\(^{427}\) \textit{Bellinger}, [2003] 2 All E.R. at 603.
\(^{428}\) \textit{Id}. at 609.
Failing to resolve the problem through statutory construction (or deconstruction), the House of Lords had little choice but to employ section 4(a) of the HRA: "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."\(^{430}\)

In *Bellinger* in the House of Lords, the Lord Chancellor argued that although section 11(c) of the Matrimonial Causes Action 1973 as so interpreted was incompatible with Articles 8 and 12 of the European Convention,\(^{431}\) a judicial declaration to that effect would serve no useful purpose because the U.K. government was already under an obligation to amend the offending legislation by virtue of the *Goodwin* and *I.* decisions under HRA § 10(1)(b).\(^{432}\) Lord Nicholls rejected this argument. "[I]t is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record that the present state of statute law is incompatible with the Convention."\(^{433}\)

As noted by Lord Nicholls, "[a] declaration of incompatibility triggers the ministerial powers to amend the offending legislation under the 'fast track' procedures set out in section 10 and Schedule 2 of the Human Rights Act 1998."\(^{434}\) Under section 10, "if a provision of legislation has been declared under section 4 to be incompatible with a Convention right," then "[i]f a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."\(^{435}\)

However, in contradistinction to American constitutional jurisprudence per *Marbury*, the effect in *Bellinger* of the judicial declaration of incompatibility is not to nullify the legislation. Unless the legislation were amended, a "fully realized" post-operative transsexual in the United Kingdom would remain legally a member of his original gender, unable to marry someone of that gender.

\(^{429}\) *Id.* at 613.

\(^{430}\) HRA, *supra* note 425, § 4(2).

\(^{431}\) *See Bellinger*, [2003] 2 All E.R. at 601.

\(^{432}\) *Id.* at 606.

\(^{433}\) *Id.*

\(^{434}\) *Id.*

\(^{435}\) HRA, *supra* note 425, § 10(1)(a), (2).
In *Loving v. Virginia* in 1967, the U.S. Supreme Court ruled that Virginia’s anti-miscegenation law, barring whites and blacks from marrying each other, was unconstitutional.\(^{436}\) Accordingly, by virtue of that decision, the marriage of Mildred Jeter, a Negro woman, and Richard Loving, a white man, became legal, and their criminal convictions for getting married were overturned notwithstanding Virginia’s statute.\(^{437}\)

In *Bellinger*, despite the House of Lords’ holding that the statute preventing the Bellinger’s marriage from being legal violates their human rights, which have been incorporated into British domestic law, their marriage remained invalid.\(^{438}\)


In addition to the mandates from the ECHR in *Goodwin* and *I.* in July 2002 and from the House of Lords in *Bellinger* in April 2003, that the United Kingdom must in some fashion legally recognize the acquired gender of transsexuals, in January 2004 a third mandate issued, this one from the European Court of Justice (ECJ). *K.B. v. Nat’l Health Serv. Pensions Agency* involved K.B., a female, and her significant other, R., a person who was born and registered at birth as a female, but who, in the words of the ECJ, “following surgical gender reassignment, has become a man.”\(^{439}\) Contrary to their wishes, R. and K.B. have not been able to marry in the United Kingdom, although their union was celebrated in an “adapted church ceremony.”\(^{440}\) K.B. wished to name R. as the beneficiary of her National Health Service (NHS) widower’s pension if she should predecease R., but the NHS Pensions Agency informed her that she could not do so because she and R. were not legally married.\(^{441}\)

K.B. unsuccessfully challenged this refusal domestically, first before the Employment Tribunal and then before the Employment Appeal Tribunal (London).\(^{442}\) She next took her case to the Court of Appeal of England and Wales (Civil Division), which stayed the case and referred the following

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\(^{437}\) *Id.* at 2, 12.

\(^{438}\) *Bellinger*, [2003] 2 All E.R. at 605-06.


\(^{440}\) *Id.*

\(^{441}\) *Id.* ¶ 13.

\(^{442}\) *Id.* ¶¶ 14-15.
question to the ECJ for a preliminary ruling: "Does the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the material dependent's benefit to her widower, constitute sex discrimination in contravention of Article 141 [European Community] and Directive 75/117?"  

EC Treaty Article 141 provides:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Article 1 of Council Directive 75/117 provides:

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay," means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

Article 3 of the Directive further provides: "Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay."

The ECJ acknowledged that the requirement that individuals be married in order for the surviving partner to receive the deceased partner's pension cannot be regarded per se as discriminatory on the basis of sex. In this case, however, the ECJ found inequality of treatment related to a necessary precondition for the grant of such a pension: the capacity to marry.

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443 Id. ¶ 16.
446 Id. art. 3.
448 Id. ¶ 30.
The ECJ cited the ECHR's decisions in *Goodwin* and *I* for the proposition that the United Kingdom's refusal to allow a couple in K.B. and R.'s situation to marry violates Article 12 of the European Convention. Accordingly, the ECJ ruled:

Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. and R. from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.

However, like the ECHR in *Goodwin* and *I*, the ECJ did not attempt to mandate the appropriate solution to this incompatibility:

Since it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation— as the European Court of Human Rights has accepted (*Goodwin v United Kingdom*, § 103)— it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.

XI. THE GENDER RECOGNITION ACT 2004

Even while *Bellinger* was pending in the House of Lords, the U.K. government announced in June 2002 that it would reconvene the Working Group on Transsexual People to reconsider the legal issues affecting transsexuals. The Working Group's agreed terms of reference were: "In the light of the report of the Interdepartmental Working Group on Transsexual People and more recent relevant developments, to re-examine the implications

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449 *Id.* § 33.
450 *Id.* § 34.
451 *Id.* § 35.
of granting full legal status to transsexual people in their acquired gender; and to make recommendations.\textsuperscript{453}

Baroness Scotland of Asthal, in response to Parliamentary questions, stated that the Working Group, which met in July 2002 shortly after the ECHR had issued the \textit{Goodwin} and \textit{I.} decisions, "[had] been tasked additionally with considering urgently the implications of [those] judgments."\textsuperscript{454}

On December 13, 2002, Rosie Winterton, MP, Parliamentary Secretary at the Lord Chancellor's Department, issued a formal Government Announcement that stated:

\begin{quote}
We will aim to publish, in due course, a draft outline Bill to give legal recognition in their acquired gender to transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the gender acquired since they were registered at birth. That will make it possible for them (if otherwise eligible) to marry in their acquired gender.

The Government is committed, therefore, to legislating as soon as possible to give transsexual people their Convention rights.\textsuperscript{455}
\end{quote}

On July 11, 2003, the one-year anniversary of the \textit{Goodwin} and \textit{I.} decisions, the U.K. government published a draft Gender Recognition Bill (GRB) for pre-legislative scrutiny by the Joint Committee on Human Rights.\textsuperscript{456} In announcing publication of the draft bill, Lord Filkin, Parliamentary Under-Secretary at the Department for Constitutional Affairs, explained that the bill would "establish a Gender Recognition Panel with the power to decide applications from transsexual people seeking legal recognition in their acquired gender."\textsuperscript{457}

On November 27, 2003, the government formally introduced the GRB in the House of Lords.\textsuperscript{458}

\textsuperscript{453} \textit{Id.}

\textsuperscript{454} \textit{Id.}


\textsuperscript{457} \textit{Id.}

\textsuperscript{458} U.K. Dep't for Constitutional Affairs, Introduction and Background to the Gender
Recognition Bill, published in November 2003, the government cited the Goodwin, I., and Bellinger decisions. The government’s Final Regulatory Impact Assessment (RIA), also issued in November 2003, noted, “All other signatories to the [European] Convention, with the exception of Ireland and Andorra, provide transsexual people with legal recognition in their acquired gender.” The RIA recognized at least two types of risks: risk to the well-being of transsexual people who suffer embarrassing and distressing situations due to legal non-recognition (according to Press for Change, eighty percent of transsexual people seriously contemplate suicide) and risk to the United Kingdom of further legal challenges if it fails to rectify breaches of Convention rights. The RIA estimated that there are 5000 transsexual people in the United Kingdom. If ten percent of them brought legal challenges in the face of continuing inaction to remedy human rights breaches, and if each were ultimately awarded costs in the same amount as the ECHR has ordered the U.K. government to pay Christine Goodwin (£28,800), the total costs would amount to £14.4 million. This figure does not include the cost to the Government of defending such cases. Thus the option of doing nothing to rectify the United Kingdom’s incompatibility with the Convention was not a viable one.

This left two options: a remedial order issued by government Ministers (as authorized by Schedule 2 of the HRA) amending section 11(c) of the Matrimonial Cause Act 1973 to enable transsexual people to marry in their acquired gender, or legislation to address full legal recognition for transsexual people’s acquired gender. The government opted for comprehensive legislation, rather than a remedial order which would amend the Matrimonial Cause Act 1973 but leave other concerns unresolved.

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459 Id.


461 Id.

462 Id.

463 Id.

464 Id.

465 See id.

466 Id.

467 Id.

468 Id. In light of the ECJ decision in K.B. two months later, this was evidently a wise choice.
The Gender Recognition Bill was passed by the House of Lords on February 10, 2004.\textsuperscript{469} The Bill passed the House of Commons with technical amendments in late May 2004.\textsuperscript{470} The House of Lords accepted those amendments in June 2004.\textsuperscript{471} On July 1, 2004, two years after the \textit{Goodwin} decision, Her Royal Highness Elizabeth II gave her Royal Assent to the Bill, thereby making it the Gender Recognition Act 2004 (GRA).\textsuperscript{472}

The text of the GRA is fascinating both for what it says and what it fails to say. At the core of the Act is the ability of an adult (at least eighteen years of age) to apply for a "gender recognition certificate" on the basis of "(a) living in the other gender, or (b) having changed gender under the law of a country or territory outside the United Kingdom."\textsuperscript{473}

Each application is to be determined by a Gender Recognition Panel which must have at least one legal member and one medical member (either a registered medical practitioner or a chartered psychologist).\textsuperscript{474} An application based on the individual's living in the other gender must be granted if the applicant—

(a) has or has had gender dysphoria,
(b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
(c) intends to continue to live in the acquired gender until death, and
(d) complies with [certain evidentiary] requirements.\textsuperscript{475}

The evidence required to prove "living in another gender" is set forth as follows:

(1) An application under section 1(1)(a) must include either—
   (a) a report made by a registered medical practitioner practising in the field of gender dysphoria and a report made by

\textsuperscript{470} \textit{Id.}
\textsuperscript{471} \textit{Id.}
\textsuperscript{472} \textit{Id.}
\textsuperscript{474} \textit{Id.} § 1(3), sched. 1, § 1(2).
\textsuperscript{475} \textit{Id.} § 2(1).
another registered medical practitioner (who may, but need not, practise in that field), or
(b) a report made by a chartered psychologist practising in that field and a report made by a registered medical practitioner (who may, but need not, practise in that field).
(2) But subsection (1) is not complied with unless a report required by that subsection and made by—
(a) a registered medical practitioner, or
(b) a chartered psychologist,
practising in the field of gender dysphoria includes details of the diagnosis of the applicant's gender dysphoria.
(3) And subsection (1) is not complied with in a case where—
(a) the applicant has undergone or is undergoing treatment for the purpose of modifying sexual characteristics, or
(b) treatment for that purpose has been prescribed or planned for the applicant,
unless at least one of the reports required by that subsection includes details of it.
(4) An application under section 1(1)(a) must also include a statutory declaration by the applicant that the applicant meets the conditions in section 2(1)(b) and (c).

Any application under section 1(1) must include—
(a) a statutory declaration as to whether or not the applicant is married,
(b) any other information or evidence required by an order made by the Secretary of State, and
(c) any other information or evidence which the Panel which is to determine the application may require, and may include any other information or evidence which the applicant wishes to include.\(^{476}\)

Noticeably absent is any requirement of any specific type or quantum of treatment. Specifically, there is no requirement that the applicant have undergone hormonal treatment of any type or duration, nor that the applicant have had any gender reassignment surgery. In this regard, the GRA goes well beyond the mandate of the ECHR in Goodwin which referred specifically to

\(^{476}\) Id. § 3.
"post-operative transsexuals." Nor, unlike, for example, Germany, is there a requirement that the applicant be sterile. The Parliamentary Bill Manager, Dr. Emran Mian, has informed the author that the U.K. government has no intention of drafting either subordinate legislation or regulations spelling out more specific substantive requirements, but rather will leave the specifics for the Gender Recognition Panels to determine on a case-by-case basis.

If the Gender Recognition Panel grants the application of a person "living in the other gender," it must issue that person a "gender recognition certificate." If the applicant is not married, the certificate is to be a "full" gender recognition certificate. If, however, the applicant is married, the certificate is an "interim" gender recognition certificate.

An interim gender recognition certificate allows its recipient to apply, within six months of its issuance, for a decree of nullity of marriage on the grounds that the marriage is voidable. Upon issuing the nullity decree, the court "must" also issue the applicant a full gender recognition certificate and send a copy to the Secretary of State. Alternatively, if, within six months of the issuance of an interim gender recognition certificate, the applicant's marriage is dissolved or annulled on another ground or the applicant's spouse dies, the applicant may then apply to the Gender Recognition Panel for a full gender recognition certificate.

An applicant whose application is rejected by a Gender Recognition Panel may appeal on a point of law to the High Court or the Court of Session.

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477 *See supra* text accompanying note 399.
478 *See supra* text accompanying note 329.
481 *Id.* § 4(2).
482 *Id.* § 4(3).
483 *Id.* sched. 2. In Scotland, this would be grounds for divorce rather than nullity. *Id.* § 5(1)(B).
484 *Id.* § 5(1).
485 *Id.* § 5(2).
486 *Id.* § 8.
The general effect of a full gender recognition certificate is as follows:

(1) Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman).

(2) Subsection (1) does not affect things done, or events occurring, before the certificate is issued; but it does operate for the interpretation of enactments passed, and instruments and other documents made, before the certificate is issued (as well as those passed or made afterwards).  

If the individual who receives a full gender recognition certificate has a U.K. birth register entry, the Secretary of State must send a copy of the certificate to the appropriate Registrar General.  

Schedule 3 contains detailed provisions for the registrar general to maintain a Gender Recognition Register, provide cross-referencing to the original registration index, and issue new short certificates which do not reveal that there has been a change of gender.

Although the individual who has received a full gender recognition certificate is then deemed to have legally acquired the new gender for purposes of the Matrimonial Causes Act 1973, no member of the clergy is obliged to solemnize the marriage of such a person. However, there is no such exemption in relation to Register Offices.

The significance of allowing clergy in the Churches of England and Wales to refuse to perform such marriages is that they would otherwise be under a legal obligation to do so. Some clergy would find this offensive. The Bishop of Winchester, Michael Scott-Joynt, has stated that such a marriage

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487 Id. § 9(1), (2). Note the interchangeable use of the terms “gender” and “sex.”
488 Id. § 10.
489 Id. sched. 3.
490 Id. sched. 4, ¶ 3.
would constitute a same-sex marriage. However, after over three decades of taking the position that a post-operative transsexual person maintains his original gender and thus cannot marry someone of that gender because that would be tantamount to same-sex marriage, the U.K. government is now taking pains to articulate the opposite point of view. In its answers to Frequently Asked Questions, the Department for Constitutional Affairs explains:

*Does enabling transsexual people to marry in their acquired gender amount to sanctioning same-sex marriage?*

No, UK law allows marriage between a male and a female. If, for example, someone registered as male at birth is later legally recognised as being a woman, and then marries a man, that is not a same-sex marriage. Marriages contracted by transsexual people once their change of gender has been legally recognised will be valid marriages between a male and a female—not same-sex. The Government has no plans to introduce same-sex marriage.

The GRA contains provisions that are intended to allow one party to a marriage to seek an annulment if that party was unaware at the time of the marriage that the other party "had become the acquired gender," i.e., was not originally of the opposite sex. Again, the Department of Constitutional Affairs has explained:

This is not in any way to imply that it is not perfectly in order for transsexual people to marry in their acquired gender, once they have that gender legally recognised. It is, however, the sort of issue one would expect people to reveal to a prospective spouse and where that has not happened and the spouse feels unable to come to terms with it, the Bill provides for them to bring their marriage to an end.

Interestingly, acquisition of a new legal gender does not affect whether the individual is the mother or father of pre-existing children: "The fact that a

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494 See GRA FAQ, supra note 491. The United Kingdom is, however, proposing a same-sex civil partnership registration scheme. *Id.*
495 GRA, supra note 473, sched. 4, ¶ 4-6.
496 See GRA FAQ, supra note 491.
person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child. The official rationale for this provision is that, "The continuity of parental rights and responsibilities is thus ensured." Thus, for example, if Christine Goodwin were to obtain a gender recognition certificate giving her the legal status of a female, she would nevertheless remain the legal father of her four children. Conversely, X, who was born female and had female-to-male reassignment surgery before his female partner was artificially inseminated, would presumably be recognized as Z's father if he obtained a gender recognition certificate.

The GRA contains quite detailed, technical provisions regarding various pension schemes, the essence of which is to treat those who have obtained a gender recognition certificate as being of the acquired gender for pension purposes where a pension scheme treats males and females differently. These provisions would address prospectively a situation of the sort raised by Christine Goodwin that, because she was deemed to be male, she was not eligible for her state pension at age sixty and had to continue to pay into the pension fund until age sixty-five, the age of eligibility for males. The NHS Pension issue raised by K.B. in the European Court of Justice will be able to be resolved after passage of the GRA: K.B. can have her partner, R., obtain a gender recognition certificate so that the couple can then get married.

The GRA amends the Sex Discrimination Act 1975 to prohibit discrimination on the basis that an individual "has become the acquired gender." This expands existing protections for transsexual people in employment and vocational training contained in regulations adopted in 1999. However, until the transsexual person actually obtains a gender recognition certificate, an employer may be able to demonstrate that a specific job requires a person born into the required gender for that job.
The GRA also addresses the contentious issue of participation in competitive sports.507 This issue was brought to the fore a quarter century ago when Renee Richards—who, as Richard Raskind, had been ranked thirteenth nationally in men's thirty-five-and-older tennis—successfully sued the U.S. Tennis Association for the right to compete in the women’s division.508 A body responsible for regulating a “gender-affected sport” may restrict or prohibit persons whose gender has become the acquired gender under certain circumstances. A “gender-affected sport” is one where “the physical strength, stamina or physique of average persons of one gender would put them at a disadvantage to average persons of the other gender as competitors in events involving the sport.”509 Participation by a person of the acquired gender may be restricted or prohibited if necessary to secure either fair competition or the safety of competitors.510

The GRA would not change the result in Regina v. Tan.511 In construing a “gender specific (criminal) offence” (i.e., one where the crime involves sexual activity and is dependent on the gender of either the perpetrator or the victim), the fact that a person has become the acquired gender will not prevent a prosecution as if the person had not changed genders.512 Thus, Gloria Greaves (born male) could still be prosecuted as a male prostitute, and Brian Greaves could still be prosecuted for living off the earnings of a male prostitute (Gloria) even if Gloria had obtained a gender recognition certificate recognizing her as female.

The final provision of the primary legislation addresses persons who have had a legal change of gender outside the United Kingdom.513 The United Kingdom will not regard such persons as having changed gender based solely on a foreign order.514 Thus, such persons will not be deemed legally married in the United Kingdom by reason of having entered into a foreign post-recognition marriage.515 However, their marriages will become valid in the United Kingdom if they obtain full gender recognition certificates in the

507 GRA, supra note 473, § 19.
509 GRA, supra note 473, § 19(4).
510 Id. § 19(2).
511 See supra text accompanying notes 66-78.
512 GRA, supra note 473, § 20.
513 Id. § 21.
514 Id. § 21(1).
515 Id. § 21(2).
United Kingdom (and have not entered into a later, valid marriage in the meantime). 516

XII. THE UNSETTLED AND UNSATISFACTORY STATE OF AMERICAN LAW

In its November 2003 *Introduction and Background to the Gender Recognition Bill*, the U.K. Department for Constitutional Affairs states: “There is no single common approach in other countries to the transsexual condition and the complex issues it raises. However, all other EU Member States except Ireland already give legal recognition to gender change, as do many other countries in Europe and the Commonwealth and many American States.” 517 The source for the claim about the United States was a briefing paper prepared by Press for Change. 518 The briefing paper, entitled *Notes on International Policy on Transsexual People*, contains the following pertinent assertions:

USA

— All but two states have some provisions that allow the amendment or a new birth certificate or birth record to be issued
— Tennessee and Ohio are two exceptions where no alteration to birth certificates are [sic] allowed
— Process and procedure of gender change varies (sic) between states

PENNSYLVANIA

— Must have reassignment surgery
— Has petitioned the county court for name change
— May also petition the Department of Health, Division of Vital [R]ecords, to change birth record
— Evidence Medical Affidavit stating irreversible surgery
— Court ordered name change
— Vital [R]ecord [sic] will issue new certificate stating new name and gender only

516 Id. § 21(4).
517 Introduction GRB, supra note 458; see also GRA FAQ, supra note 491.
— Will not be apparent that gender reassignment has taken place

MISSISSIPPI
— Will amend birth record by striking through name and sex and annotating the new name and gender and effective date
— Will issue photostatic copy of birth record including hand written amendments in miniature for (sic) as a birth certificate

All following states issue new birth certificate on production of certificate from surgeon that carried out reassignment surgery

ILLINOIS
NEW JERSEY
ALABAMA
HAWAII
MARYLAND
NORTH CAROLINA
PENNSYLVANIA
VIRGINIA

In all other states an amended birth certificate will be issued showing the sex has changed[ ]

The driving licence is the most common form of identification in the States.
It is issued by the Department of Public Safety in each state
It show’s (sic) name and sex
Change of name is easy through a name permit
Gender indication, until recently, could not be changed. 519

To the extent that the DCA’s Introduction and Background to the GRB and the Press for Change briefing paper on which it is based imply that many or most American states would allow transsexual persons to remarry in their acquired gender, they are misleading.

Many U.S. states may indeed permit post-operative transsexual persons to acquire an amended birth certificate indicating their new gender; however, the

519 Id.
unsupported claim that all but two states do so is certainly questionable. For example, although the Pennsylvania Department of Health Division of Vital Records has no pertinent regulations, it does have a process for issuance of a new birth certificate. When an individual inquires about obtaining a revised birth certificate, the Division of Vital Records' Birth Correction Unit sends out a form letter stating:

We are in receipt of your letter asking for information concerning our policy for sex reassignment surgery. The sex reassignment policy in the State of Pennsylvania is in keeping with the U.S. Department of State policy concerning passports. The change that you are requesting is composed of two separate procedures. First, you must submit a certified copy of a Court Order change of name. The Court Order must bear the signature of the judge and the raised seal of the court.

Secondly, a surgical procedure is necessary to change the sex designation listed on your birth record. After you have accomplished this, please submit a statement from the physician who performed the sex reassignment surgery. The doctor's statement must specify that the sex reassignment is successfully completed, and that you are fully functioning within the newly assigned gender.

If the Court Order (which) changes your name also includes a directive to Vital Records [tp] change the sex designation, you may disregard the procedure which requires a Dr's statement. We are holding your certified copy and/or fee in our files pending your reply.

520 In his exhaustive 809-page slip opinion decision in In re Marriage of Kantaras, Judge Gerrard O'Brien found, "There are fifteen (15) states that by law or administrative regulation permit such an amendment." In re Marriage of Kantaras, No. 98-5375CA, slip op. at 763 (Fla. Cir. Ct. 2002), rev'd on other grounds 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

521 See 28 PA. CODE § 1.3 (2004).

522 Letter from Pennsylvania Department of Health, Division of Vital Records (sample letter on file with author). See also In re Dickinson, 4 Pa. D. & C.3d 678 (1978), in which the Court of Common Pleas of Philadelphia opined that if the post-operative male-to-female transsexual had been born in Pennsylvania it would have ordered her birth certificate to be changed to show the female sex; as she was born in Indiana, the court "requested" the Indiana State Board of Health to change the name and sex on her birth record. Id. at 680-81.
While it is certainly possible that many post-operative transsexual people in the United States, whether or not they have obtained new birth certificates, have gotten married in their acquired gender, it does not follow that their marriages would be found valid if challenged. Just as Mrs. Bellinger obtained a marriage certificate as a woman and married a man, only to be told by the U.K. courts decades later that her marriage was void, so Americans entering into marriages in similar circumstances may find those marriages declared invalid years after the wedding ceremony and even after the death of one of the spouses. The reported case law is scant, and it is mixed, although generally following the Corbett view.

In M.T. v. J.T. in 1976, the Superior Court of New Jersey, Appellate Division, found valid a marriage between a man and a post-operative male-to-female transsexual who had had her birth certificate changed by the State of New York, where the marriage occurred. The New Jersey court expressly rejected Judge Orrod's rationale in Corbett. The court did not explicitly rely on M.T.'s amended New York birth certificate, but rather simply concluded:

In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did do so here. In so ruling we do no more than give legal effect to a Fait accompli, based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.

The decision in M.T. nevertheless has not gained general acceptance in the United States.

524 Id. at 208-09.
525 Id. at 211.
In 1987, in *In re Ladrach*, the Probate Court of Stark County, Ohio, refused to authorize a post-operative male-to-female transsexual to have her birth certificate "corrected" to indicate her sex as female, and further refused to issue her a marriage license to marry a male. With regard to the right to marry, the Ohio court cited both *M.T.* and *Corbett*, and found the latter "particularly important because of the reasoning of Judge Ormrod, who was also a medical doctor." The court found no authority in Ohio law to issue a marriage license for the applicant to marry a male.

In 1999, in *Littleton v. Prange*, an appellate court in Texas refused to recognize a marriage that took place in Kentucky between a man and a post-operative male-to-female transsexual who had obtained a legal name change. After her husband died, Christie Littleton filed a medical malpractice action under the Texas Wrongful Death and Survival Statute. The defendant doctor successfully asserted that the plaintiff lacked standing because she was not a lawful surviving spouse. "During the pendency of [the] lawsuit, Christie amended the original birth certificate to change the sex and name." Nevertheless, following *Corbett*, the Texas court found that Christie legally remained a male: "The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court. There are some things we cannot will into being. They just are."

In 2002, in *In re Estate of Gardiner*, the Kansas Supreme Court declared invalid a marriage between a male and a post-operative male-to-female transsexual. The wife, J'Noel, had obtained an amended birth certificate in Wisconsin, pursuant to Wisconsin statutes, to state that she was female. She had argued in the trial court that the Wisconsin court order directing the issuance of the amended birth certificate was entitled to full faith and credit in

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527 *Id.* at 832.
528 *Id.*
530 *Id.* at 225.
531 *Id.*
532 *Id.* at 231.
533 *Id.*
534 *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).
535 *Id.* at 125-26.
On appeal, J'Noel argued that her marriage was valid under Kansas law. Construing the Kansas marriage statute, the Court held:

The words "sex," "male," and "female" in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to "produce ova and bear offspring" does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the Littleton court noted, the transsexual still "inhabits . . . a male body in all aspects other than what the physicians have supplied." J'Noel does not fit the common meaning of female.  

In 2003, in *In re Marriage License for Nash*, an Ohio appellate court affirmed the denial of a marriage license to a female and post-operative female-to-male transsexual. The transsexual, Jacob B. Nash, had obtained an amended birth certificate from Massachusetts in 2002 "with a designation as a male." On the parties' first application for a marriage license, they failed to declare Nash's former marriage to a male, which had ended in divorce. When the trial court discovered the omission, it rejected the application, finding Nash's explanation that the omission was a "mere oversight" to lack credibility. The parties filed a second application for a marriage license properly disclosing Nash's previous marriage. The trial court scheduled an evidentiary hearing on this application, but on the advice of counsel, "Nash refused to answer any questions pertaining to Nash's sex reassignment surgeries." The trial court rejected the second application, finding that Nash's refusal to permit the court to make reasonable inquiry

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536 *Id.*
537 *Id.* at 135 (citation omitted).
539 *Id.* at *2.
540 *Id.* at *3.
541 *Id.*
542 *Id.* at *4.
543 *Id.*
prevented the court from determining if the requirements for a marriage license had been met.⁵⁴⁴

On appeal, the applicants argued, first, that they had been denied equal protection because they were held to a higher evidentiary standard than were other applicants and, second, that the Ohio courts were bound to give full faith and credit to Nash's corrected Massachusetts birth certificate.⁵⁴⁵ The appeals court readily disposed of the equal protection issue:

Moreover, in the face of the evidence before the court, the court was not only permitted to require additional information from Nash, as well as conduct an evidentiary hearing on the matter, it was required to do what was necessary to insure that the issuance of the marriage license was proper and valid. In other words, this case was not the usual case and the court was required to treat this case accordingly. In doing so, the applicants' equal protection rights were not violated.⁵⁴⁶

With regard to the full faith and credit argument, the court noted that the amended Massachusetts birth certificate would, under Massachusetts law, only constitute prima facie evidence of the facts recorded, not conclusive proof.⁵⁴⁷ It was rebutted by the evidence in Nash's original birth certificate that Nash was born female.⁵⁴⁸ Following In re Estate of Gardiner, Lin re Ladrach, and Littleton, the court found Nash to be biologically a female and thus not eligible under Ohio law and public policy to marry another female.⁵⁴⁹

Most recently, in July 2004, in Kantaras v. Kantaras, an appellate court in Florida reversed a trial court and declared void ab initio a marriage between a female and a female-to-male transsexual.⁵⁵⁰ The husband, Michael, had been born a female and underwent gender reassignment surgery in 1987.⁵⁵¹ He met his future wife, Linda, in 1988, and she learned of his gender reassignment.⁵⁵²

⁵⁴⁴ Id.
⁵⁴⁵ Id. at *6.
⁵⁴⁶ Id. at *10.
⁵⁴⁷ Id. at *12.
⁵⁴⁸ Id. at *13.
⁵⁴⁹ Id. at *16-*25. Judge Judith A. Christley dissented. Id. at *29-*34.
⁵⁵¹ Id.
⁵⁵² Id.
Linda gave birth to a son by a former boyfriend in June 1989.\textsuperscript{553} The parties married in July 1989.\textsuperscript{554} On the marriage license, Michael represented that he was a male.\textsuperscript{555} Linda had a daughter in 1992 through artificial insemination.\textsuperscript{556} In 1998, Michael filed for divorce and custody.\textsuperscript{557} Linda counterclaimed for annulment, asserting that the marriage was void ab initio, that Michael's adoption of her son violated Florida's ban on homosexual adoption, and that Michael was not the biological or legal father of her daughter.\textsuperscript{558} Reversing the trial court, the Florida court of appeal concluded:

The controlling issue in this case is whether, as a matter of law, the Florida statutes governing marriage authorize a postoperative transsexual to marry in the reassigned sex. We conclude they do not. We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth. Therefore, we also conclude that the trial court erred by declaring that Michael is male for the purpose of the marriage statutes.\textsuperscript{559}

Thus, ironically, American law has evolved in the exact opposite direction from the law of the European Court of Human Rights. After the \textit{M.T.} decision by the Superior Court of New Jersey in 1976 recognized the validity of a marriage of a transsexual in her acquired gender, no final, appellate American case has followed suit.\textsuperscript{560} To the contrary, the courts in \textit{In re Ladrach, Littleton, In re Estate of Gardiner, In re Marriage License,} and \textit{Kantararas} have all denied such a right.\textsuperscript{561}

\textsuperscript{553} Id.
\textsuperscript{554} Id. at 155-56.
\textsuperscript{555} Id. at 155.
\textsuperscript{556} Id. at 156.
\textsuperscript{557} Id.
\textsuperscript{558} Id.
\textsuperscript{559} Id. at 157. The court remanded for further consideration of the custody issues. \textit{Id.} at 161.
\textsuperscript{560} At least one unreported trial level decision has found a valid marriage under these circumstances. \textit{See} ACLU News 11-26-97, \textit{CA Court Rules Transgendered Dad is Male; Custody Case Will Proceed to Trial} (Nov. 26. 1997) (ACLU Newsfeed bulk e-mail), http://legalminds.lp.findlaw.com/list/news/msg00002.html.
\textsuperscript{561} Most recently, in February 2005, an appellate court in Illinois found invalid a marriage between a female and a female-to-male transsexual. \textit{In re Marriage of Simmons,} Nos. 1-03-2284, 1-03-2348 (consolidated), 2005 Ill. App. LEXIS 127. The husband had obtained a
The issue of the legal treatment of transsexual persons is a serious matter of both process and substance. The process by which the United Kingdom has moved from non-recognition of acquired gender, starting with *Corbett* in 1970, to enactment of the Gender Recognition Act in 2004, has been a long and complicated one. Few legal professionals or academics, much less the general public, could have foreseen that passage of the Human Rights Act 1998 would ultimately lead to a *domestic* legal requirement in the United Kingdom to recognize transsexual people’s acquired gender. As of November 1998, when the HRA received royal assent, the European Court of Human Rights had upheld the United Kingdom’s refusal to recognize acquired gender four times: *Rees* (1986), *Cossey* (1990), *X, Y and Z* (1997), and *Sheffield and Horsham* (July 1998). When the ECHR reversed course in 2002 with *Goodwin* and *I.* the HRA mandated compliance.

The *Bellinger* decision in the House of Lords may appear frustrating and puzzling, especially to American-trained lawyers. The Law Lords in essence ruled that the Bellingers were not legally married, although they had a right to be. Nevertheless, on a matter so laden with public policy implications, there is a clear value to the sort of deliberative, legislative process in which the U.K. government ultimately engaged, with the involvement of a well-respected working group providing study and analysis.

The appellate courts in the United States that have rejected acquired gender recognition in the marital context have uniformly noted that any change must come from the legislature. The argument can certainly be made that denying marriage license as a male. Prior to the wedding the husband had taken testosterone for several years. Six years into the marriage, he underwent a hysterectomy and a bilateral salpingo oophorectomy, and subsequently obtained a new birth certificate as a male. However, he never had additional available surgeries in order to be medically considered completely sexually reassigned. Given these facts, the trial court simply found that he remained a female. The appellate court concluded that the judgment of the trial court was not against the manifest weight of the evidence. Accordingly it had no occasion to address the American and other precedents involving transsexual persons who have completed sexual reassignment.

562 "[I]t is this court’s opinion that the legislature should change the statutes, if it is to be the public policy of Ohio to issue marriage licenses to post-operative transsexuals." *In re Ladrach,* 513 N.E.2d 828, 832 (Ohio Prob. Ct. Stark County 1987). "In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals.” Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999). “[T]he validity of J’Noel’s marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.” *In re Estate of Gardiner,* 42 P.3d 120, 137
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a post-operative transsexual person the right to marry in the acquired gender is a violation of the (limited) constitutional right to marry and thus should simply be struck down by American courts as were the miscegenation laws in Loving. Nevertheless the U.K. Gender Recognition Act demonstrates that difficult questions would remain as to where along the continuum of treatment the law should recognize gender change.

It appears that the United Kingdom has chosen in effect to gloss over this critical issue in the GRA by not requiring any specific type or amount of treatment, but rather leaving individual decisions up to gender recognition panels with little specific guidance, and limited grounds for appeal. Such an approach might well be unworkable in the United States and contrary to American fundamental notions of due process. Absent clear standards there could be widely disparate results. One gender recognition panel could deny acquired gender recognition where in identical circumstances another panel might grant it. The notion that no specific hormonal or surgical treatment is required could, theoretically at least, lead to a homosexual transvestite being authorized to have changed gender despite retaining the body of a person of the original gender. The lack of specific requirements to guide the implementing panels could also run afoul of the nondelegation doctrine.

Obviously, if individual states decide to permit marriage between any two unmarried adults, without regard to their gender, who are not barred by consanguinity or otherwise, and the U.S. Constitution is not amended to bar


Whether advances in medical science support a change in the meaning commonly attributed to the terms male and female as they are used in the Florida marriage statutes is a question for the legislature. Thus, the question of whether a post-operative transsexual is authorized to marry a member of their birth sex is a matter for the Florida legislature and not the Florida courts to decide.

Kantaras, 884 So. 2d at 161.

563 See Lewis Carroll, Through the Looking Glass (And What Alice Found There) 124 (Alfred A. Knopf, Inc. 1984) (1872) (" ‘When I use a word,’ ” Humpty Dumpty said, in rather a scornful tone, “ ‘it means just what I choose it to mean—neither more nor less.’ ”)


such marriages, the central issue raised in Cossey would be eliminated in those states at the state level. Difficult marriage issues would remain, however. Would such a marriage be recognized in other states? Would the federal government recognize such a marriage for Social Security, federal tax, or a variety of other federal purposes, or would it refuse under the Defense of Marriage Act? And, some of the secondary issues addressed in the GRA, such as sports participation, would also remain.

It may be too much to expect that many, if any, American jurisdictions could engage in the sort of deliberative legislative process undertaken by the United Kingdom leading up to enactment of the GRA, generally free of rancor, sound bites, and hysterical condemnations of those advocating diverse points of view. But it is high time that this process began. The insistence on chromosomes trumping all other considerations for gender identification for purposes of marriage is simply cruel. As eloquently expressed by Judge Martens, dissenting in Cossey:

I think that these indeed are the essential points. The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate. In doing so he goes through long, dangerous and painful medical treatment to have his sexual organs, as far as is humanly feasible, adapted to the sex he is convinced he belongs to. After these ordeals, as a post-operative transsexual, he turns to the law and asks it to recognise the fait accompli he has created. He demands to be recognised and to be treated by the law as a member of the sex he has won; he demands to be treated, without discrimination, on the same footing as all other females, or, as the case may be, males. This is a request which the law should refuse to grant only if it truly has compelling

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reasons, for . . . such a refusal can only be qualified as cruel. But there are no such reasons.569

Indeed, if one is genuinely opposed to same-sex marriage (an issue on which this article has assiduously taken no position), barring post-operative transsexual persons from marrying in their acquired gender can lead to unpropitious results. If Mrs. Bellinger cannot marry Mr. Bellinger because the law insists based on her chromosomes that she remains male, then it follows that she, with female appearance including female breasts and a surgically constructed vagina, can only marry a female! This is not a mere hypothetical possibility. Consider the case of Michele Kämmerer and Janis Walworth.570 Kämmerer was born male and had been married twice as a man, and was the father of two children. Kämmerer transitioned (started living full-time as a woman) in 1991. Kämmerer met Walworth (a female from birth) a few years later at a gathering for post-operative transsexual women. Wearing “an embroidered skirt with the little bells on the waist” and looking “undoubtedly feminine,” Michele Kämmerer married Janis Walworth in London. Because of the United Kingdom’s insistence prior to passage of the GRA in July 2004 that a male-to-female transsexual person remains male, the marriage was a perfectly legal, heterosexual marriage.

For the same reason, Utah was compelled to allow the marriage of Nicole (a male-to-female transsexual) and Marlene Cline.571

While it does not appear that there is any reported American case on the legality of a post-operative transsexual marrying a person of his or her post-operative gender, the reasoning of In re Ladrach, Littleton, In re Estate of Gardiner, In re Marriage License for Nash and Kantaras surely would compel a result that such unions would be heterosexual and lawful.

Unless those people who find homosexuality to be abhorrent wish the law to sanction such unions, which to all intents and purposes and to all appearances are homosexual in nature, then—if for no humanitarian reason—it is time for American legislatures to realize that there are many transsexual persons in this country and to address their legal status as Great Britain has finally done. Likewise, for humanitarian reasons, the time has come for American legislatures to follow Britain’s lead and study and address the

570 Chris Beam, For Better or For Worse?, 8 OUT 60, 60-61 (May 2000).
571 See id. at 65.
marital rights of post-operative transsexual persons in a reasoned and realistic fashion.