

***Marriage Through Another Lens:
Weighing the Validity of Same-Sex Marriages
By Applying Arguments to Bisexuals and Transsexuals****

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*"Only the human mind invents
categories and tries to force facts into
separated pigeon-holes.... The living
world is a continuum in each and
every one of its aspects. The sooner
we learn this concerning human
sexual behavior the sooner we shall
reach a sound understanding of the
realities of sex."*

*— Alfred Kinsey, Wardell
Pomeroy and Clyde Martin,
Sexual Behavior in the Human Male¹*

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¹ ALFRED KINSEY ET AL, SEXUAL BEHAVIOR IN THE HUMAN MALE 639 (1948).

*"What's in a name? That
which we call a rose by any
other name would smell as
sweet. So Romeo would, were he
not Romeo called, retain that
dear perfection which he owes,
without that title. Romeo, doff
thy name, and for thy name,
which is no part of thee,
Take all myself."*

*—Juliet Capulet,
Romeo and Juliet,
Act II, Scene 2²*

The New People's Army made waves in February 2005 by officiating what was termed the Philippines' first same sex marriage. A *Philippine Daily Inquirer* headline story opened:

DARE to struggle, dare to win ... as married gays. After raiding a few Army camps, two communist guerrillas hid in a forest gorge and fell in love.³

The Communist Party deemed it a progressive move, "a manifestation of the communist movement's recognition of the right to engage in gay relations and to marry."⁴ In 1998, the Party had amended an official policy entitled "On the Proletarian Relationship of Sexes (OPRS)" to include homosexual relations and same-sex marriage. Recognizing the landmark development, the couple "Ka Jose" and "Ka Andres" admitted to initial difficulty in changing the "traditional mindset" of their own

² William Shakespeare, *Romeo and Juliet* in JOHN DOVER WILSON, ED., *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* 788 (London: Cambridge University Press, 1980).

³ Rolando Pinsoy, *Reds Officiate First Gay Marriage in NPA*, *PHIL. DAILY INQUIRER*, Feb. 7, 2005, at A1.

⁴ *Id.*

comrades, biases they attributed to the "prevailing 'patriarchal' culture of Philippine society."⁵

A Letter to the Editor perhaps showed these biases readily, the agitated reader criticizing the Party for fostering Western decadence and questionable ethical standards, "enjoyment of homosexual perversion," being "living witnesses" to the "gay virus," and the "eventual ascension of homosexuals and other sex perverts."⁶ The letter criticized leftist leader Satur Ocampo:

Kung noong araw binabanatan ng Partido ang kabulukang ito ng Kanluraning kultura, ngayon lantaran na ang pagtanggap ng mga Marxistang tulad ni Satur Ocampo na bigo sila sa ... ng kabaklaang ito na talamak na sa loob ng kilusang "rebolusyonaryo."⁷

Nevertheless, "Ka Andres" stated:

Gay cadres adhere to the strong Party discipline. They enhance the prestige of gays in the movement. This has gained positive results through the years. Comrades (male and female) and even the masses have learned to respect and recognize gays and their contribution to the revolution.⁸

Love is the most romanticized, most idealized emotion in Man's broad spectrum. "All thoughts, all passions, all delights, whatever stirs this mortal frame,"⁹ as Samuel Taylor Coleridge described humanity's sacred flame. Countless painters have labored over its depiction, countless poets have yearned to grasp its essence. No vignettes from modern cinema have been etched deeper into society's collective consciousness than the perfect movie kiss, as though the grainy image of Vivien Leigh looking into Clark Gable's eyes¹⁰ can imbue this world with a few fleeting but precious seconds of Utopia. And yet, replace Scarlett's sultry, aristocratic face with

⁵ *Id.*

⁶ Elias Ramiro Diaz, *Letter to the Editor: Homosexuality in the Communist Party*, PHIL. DAILY INQUIRER, Mar. 8, 2005, at A14.

⁷ *Id.* "[If in the past the (Communist) Party condemned this rot in the Western culture, today there is an open admission among Marxists, like Satur Ocampo, that it has failed to stop the homosexuality that has become widespread within the 'revolutionary' movement.]" *Id.*

⁸ Pinsoy, *supra* note 3, at A1.

⁹ Samuel Taylor Coleridge, "Love" in Sir Arthur Thomas Quiller-Couch, ed., *The Oxford Book of English Verse* (Oxford: Clarendon, 1919).

¹⁰ George Cukor and Victor Fleming, dir., *Gone With the Wind* (1939).

that of another man, and one may elicit the most visceral of reactions and cries of the divine order's unraveling.

The New People's Army has only brought to the foreground of national discussion a burning international debate regarding same-sex marriages that was most recently rekindled by a recent Massachusetts decision¹¹ allowing such marriages in that American state, and the city of San Francisco's issuance of marriage licenses to same-sex couples.¹² No less then President George W. Bush responded:

I believe marriage has served society well and I believe it is important to affirm that marriage of a man and woman is ideal, and the job of the president is to drive policy toward the ideal.¹³

Such sentiment, moreover, has sparked moves to amend the United States Constitution itself to explicitly disallow same-sex marriages.¹⁴ Most states, in fact, have enacted laws that prohibit same-sex marriages.¹⁵

The debate, however, is hardly new. The validity of same-sex marriages has been a burning issue in Family Law, all the more since the Netherlands legalized it in 2001 and Belgium followed just in early 2003.¹⁶ This paper, however, does not seek to argue for or against its validity.

¹¹ *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003).

¹² Reuters, *Gay Meets Fetes Same Sex Marriages*, CNN.com, February 19, 2004 at <http://www.cnn.com/2004/US/West/02/19/gay.celebrations.reut/index.html> [1] (last visited February 28, 2004). "Wedding bands, bottles of champagne and cake decorations with same-sex pairs of brides and grooms have been all the rage in San Francisco's largely gay Castro district since officials at City Hall began issuing marriage licenses to gays and lesbians a week ago."

¹³ CNN, *Bush calls heterosexual marriage ideal*, CNN.com, February 27, 2004 at <http://www.cnn.com/2004/ALLPOLITICS/02/27/bush.amendment/index.html> [2] (last visited February 28, 2004).

¹⁴ CNN, *Bush calls for ban on same-sex marriages*, CNN.com, February 25, 2004 at <http://www.cnn.com/2004/ALLPOLITICS/02/24/clcc04.prez.bush.marriage/index.html> (last visited February 28, 2004).

¹⁵ CNN, *State-by-state comparison on same-sex marriages in CNN, Bush calls heterosexual marriage ideal*, CNN.com, February 27, 2004 at <http://www.cnn.com/2004/ALLPOLITICS/02/27/bush.amendment/index.html> [2] (last visited February 28, 2004).

¹⁶ *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2004 (2003) citing Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (Wet openstelling huwelijk), Stb. 2001, nr. 9 (Neth.), translated in Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners (Kees Waaldijk trans.) in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 455-456 (Robert Wintemute & Mads Andenaes eds., 2001); Loi ouvrant le mariage a des personnes de même sexe et modifiant certaines dispositions du Code civil (Feb. 13, 2003) (Belg.), Moniteur Belge, Feb. 28, 2003, 9880-82.

Rather, it seeks to explore the applicability of such arguments to marriage in general, same-sex or otherwise. The issue of same-sex marriage, taken from a broader perspective, challenges traditional concepts of marriage previously thought to be set in stone. From a Constitutional perspective, marriage is part of the expression of one's self-identity,¹⁷ one of the most important aspects of one's fundamental right to live as one chooses. Defining marriage brings this self-identity into sharper focus.

At present, the human sexuality is more diverse than the Man and Woman of Genesis, plus the third category "homosexual" many abstract the rest into. As one columnist wrote, "Is 'not male' taken to mean 'female'?"¹⁸ Gays and lesbians do not encompass other groups, namely bisexuals and transsexuals.¹⁹ These latter two are indubitably distinct from homosexuals, yet have received considerably less attention from legal writers. These two groups, however, provide a sturdy anvil upon which to test the strength of arguments regarding same-sex marriage, since the fundamental nature of the individual's right to marry demands that any such argument must apply to bisexual and transsexual as well as heterosexual. It must be noted that, although bisexuals are largely invisible to the jurist,²⁰ 2003 alone brought the landmark transsexual rulings *Kantaras v. Kantaras*²¹ and *Bellinger v. Bellinger*,²² from two different jurisdictions.

This paper seeks to use bisexuals and transsexuals to analyze the conceptions of marriage presented in discussing same-sex marriage. First, it shall briefly explore the facets of marriage, their underpinnings, and the place of bisexuals and transsexuals within them, drawing from the

¹⁷ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) citing *Zablocki v. Redhail*, 434 U.S. 374, 383-386 (1978).

¹⁸ Christine Burns, *I'm Me, Therefore I Am at* <http://www.trans-health.com/Vol3Iss1/quecn.html> [20] (last visited February 28, 2004). "Yet are classifications of people into 'either/or' boxes a necessity or a hindrance? Do categories of male-female, white-black, straight-gay, Christians-others, 'Us' and 'Them' serve to help in getting to know the stranger you meet on the train or the person you sleep with? Or do binary taxonomies like these actively hinder that process of discovery about another unique human being— setting up systems of stereotypical assumptions or generalisations which actually get in the way of open-minded evaluation of the available data?" *Id.* [2].

¹⁹ The term "transgender" has replaced "transsexual" in the transgender community because it does not emphasize sex reassignment surgery. Jerry Dasti, *Notes, Advocating a Broader Understanding of Sex-Reassignment Surgery Under Medicaid*, 77 N.Y.U.L. Rev. 1738, 1739, n.2 (2002). The nature of this article, however, necessarily emphasizes sex-reassignment surgery, and for simplicity, will use the term "transsexual" all throughout.

²⁰ Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 375 (2000).

²¹ *Kantaras v. Kantaras*, Fla. Cir. Ct., No. 511998 DR005375, 535, February 21, 2003 (hereinafter *Kantaras*) at <http://www.courtty.com/trials/kantaras/docs/opinion.pdf> (last visited February 28, 2004).

²² *Bellinger v. Bellinger*, [2003] UKHL 21.

jurisprudence of the United States, Europe, and other jurisdictions. Then, it shall explore the validity of opposite-sex bisexual, then opposite-sex transsexual marriages. It shall end with what is hoped is a broader understanding of marriage, and the strength of the arguments for and against homosexual marriage.

I. Sexuality's Roots in Privacy and Bifurcating it into Physical and Psychological

Marriage, pared down to its pith, is the fulfillment of an individual's fundamental right to companionship, one held sacred by the rights to due process and to privacy. *Loving v. Virginia* held:

These statutes also deprive the Lovings of liberty without due process of law... The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (internal citations omitted)²³

Further, *Loving* and the line of cases that sanctified the right to marry²⁴ is part of a longer line establishing "the fundamental freedom not to have one's life too totally determined by a progressively more normalizing state."²⁵ *Zablocki v. Redhail* declared:

While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions

²³ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

²⁴ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) cited in *Victoriano v. Elizalde Rope Workers' Union*, G.R. No. 25246, 59 SCRA 54, September 12, 1974. "Without doubt, it (liberty under the Due Process Clause) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) cited in *Lakas ng Bayan v. Commission on Elections*, G.R. No. 47883, 82 SCRA 196, March 25, 1978. "Marriage and procreation are fundamental to the very existence and survival of the race." *Zablocki v. Redhail*, 434 U.S. 374, 383-384 (1978).

²⁵ *Jeb Rubinfeld, The Right to Privacy*, 102 HARV. L. REV. 737, 784 (1989).

that an individual may make without unjustified government interference are personal decisions 'relating to marriage...'²⁶

This right encompasses an entire spectrum of Due Process rights arising from liberty, collectively known as decisional privacy.²⁷ *Eisenstadt v. Baird* emphasized that this right inheres in the individual, and restated it thus:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity... If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person... (emphasis added)²⁸

This right to decisional privacy has been deemed so powerful that it restricts government action against a person's choice to obtain an abortion²⁹ or engage in homosexual sexual relationships.³⁰ Moreover, in the Philippines, dicta in *Ople v. Torres* proposed that privacy is a fundamental

²⁶ *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978) quoting *Carey v. Population Services International*, 431 U.S. 678, 684-685 (1977); *Roe v. Wade*, 410 U.S. 113, 152-153 (1973) cited in *Alunan v. Mirasol*, G.R. No. 108399, 276 SCRA 501, July 31, 1997. *Zablocki* is recognized as the case where the United States Supreme Court unequivocally recognized the fundamental nature of the right to marry. *The Right to Join a Family: Traditional Marriage and the Alternatives*, 93 HARV. L. REV. 1242, 1250 (1980).

See also *Cossey v. United Kingdom*, 1990 13 EHRR 622 (Martens, J., dissenting) quoted in *Bellinger v. Bellinger*, [2001] 1 FLR 389. "There is a growing awareness of the importance of each person's own identity and of the need to tolerate and accept differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one's own life undisturbed are increasingly accepted."

²⁷ *Whalen v. Roe*, 429 U.S. 589, 599 (1977) citing *Roe v. Wade*, 410 U.S. 113, (1973); *Doe v. Bolton*, 410 U.S. 179; *Loving v. Virginia*, 388 U.S. 1; *Griswold v. Connecticut*, 381 U.S. 479; *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Allgeyer v. Louisiana*, 165 U.S. 578. Decisional privacy arguably arose from a line of cases dealing with sex. *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). "...a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, and most prominently vindicated in recent years in the contexts of contraception, and abortion."

²⁸ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). See also *Planned Parenthood of Southern Pa. v. Casey*, 505 U.S. 833, 897 (1992). "There was a time, not so long ago, when a different understanding of the family and of the Constitution prevailed. In *Bradwell v. State*, 16 Wall. 130 (1873), three Members of this Court reaffirmed the common law principle that a woman had no legal existence separate from her husband..."

See also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) cited in *Morfe v. Mutuc*, G.R. No. 20387, 22 SCRA 424, January 31, 1968.

²⁹ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

³⁰ *Lawrence v. Texas*, 000 U.S. 02-102 (2003).

right, implying it must be protected by strict scrutiny.³¹ Finally, the right is recognized in international instruments such as the Universal Declaration of Human Rights³² and the European Convention on Human Rights.³³

Nevertheless, despite or perhaps precisely because of this fundamental nature, *Maynard v. Hill* stated:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.³⁴

Thus, the right to marry must test its weight in the Constitutional balancing against what State interests are claimed in its regulation,³⁵ however heavily the scales naturally gravitate in its favor. In the Philippines, the family is a social institution that the State is mandated to protect by the Constitution³⁶ and international law,³⁷ and, in the words of Justice Jose B. L. Reyes, nothing can be done that "does away with the social aspects of

³¹ *Ople v. Torres*, G.R. No. 127685, 239 SCRA 143, July 23, 1998. "[W]e prescind from the premise that the right to privacy is a fundamental right guaranteed by the Constitution, hence, it is the burden of government to show that A.O. No. 308 is justified by some compelling state interest and that it is narrowly drawn."

³² Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810, 71, Art. 16(1) (1948). "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."

³³ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, Art. 12, entered into force Sept. 3, 1953. "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." See *Sheffield v. United Kingdom*, [1998] 2 FLR 928; *Cossey v. United Kingdom*, [1990] 13 EHRR 622; *Rees v. United Kingdom*, [1986] 9 EHRR 38.

³⁴ *Maynard v. Hill*, 125 U.S. 190, 205 (1888) cited in *In Re: Samuel Bischoff Werthmuller*, G.R. No. 11796, August 5, 1918. Justice George Malcolm articulated the same: "The basis of human society throughout the civilized world is that of marriage. Marriage in this jurisdiction is not only a civil contract, but, it is a new relation, an institution in the maintenance of which the public is deeply interested." *Adong v. Cheong*, G.R. No. 18081, 43 Phil. 43, March 3, 1922.

³⁵ See generally *Estrada v. Escritor*, A.M. No. P-02-1651, August 4, 2003; *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

³⁶ CONST. Art. XV §2. See also FAMILY CODE, Art. 1.

³⁷ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810, 71, Art. 16(3) (1948). "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

marriage in favor of its being a matter of private contract and personal adventure."³⁸

This paper seeks to examine these interests and the balance with respect to bisexuals and transsexuals. Before proceeding, however, a short discussion of gender is in order. The most recent transsexual case, *Kantaras v. Kantaras* from a Florida Circuit Court, began its legal discussion with a seemingly straightforward question:

"The primary issue being faced by all this judicial thinking is what is a man? And what is a woman?"³⁹

Justice Antonin Scalia's definitions of sex and gender help structure a discussion of sexuality. In modern usage, he explained, sex refers to physical characteristics while gender refers to cultural and attitudinal characteristics. Or, sex is to male and female as gender is to masculine and feminine.⁴⁰

Thus, a heterosexual man is male and masculine. However, a transsexual man is male but medically established as psychologically female, someone suffering an "incurable and irresistible"⁴¹ disharmony "between

³⁸ *Tenchavez v. Escano*, G.R. No. 19671, 17 SCRA 674, July 26, 1966. See also *Brown v. Yambao*, 102 Phil. 168, 172, Oct. 18, 1957; *Adong v. Cheong Gee*, 43 Phil. 43, March 3, 1922; *Ramirez v. Gmur*, 42 Phil. 855, Aug. 5, 1918; *Goitia v. Campos*, 35 Phil. 252, Nov. 2, 1916.

³⁹ *Kantaras*, 535. *Kantaras* was a ruling on child custody, which awarded it to Michael Kantaras, a post-surgery female-to-male transsexual. The same perplexing question similarly opened another transsexual case. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 4th 1999).

⁴⁰ *J.E.B. v. Alabama*, 511 U.S. 127, 157, n.1 (1994) (Scalia, J., *dissenting*). These two terms were used similarly in older English cases. *Corbett v. Corbett*, [1971] P. 83; Andrea Loux, *Is He Our Sister? Sex, Gender, and Transsexuals Under European Law*, Web Journal of Current Legal Issues at <http://webjcli.ncl.ac.uk/1997/issue3/loux3.html> (last visited February 28, 2004).

Gender may be further divided into "gender identity" and "gender expression." Gay and Lesbian Alliance Against Defamation (GLAAD), *Transgender Glossary of Terms* at <http://www.glaad.org/media/guide/transfocus.php?PHPSESSID=c23cd7559fccc04a06d0c99c16fc0742> [2-3] (last visited February 28, 2004).

"Gender Identity: One's personal sense of being a man or a woman (or a boy or girl.) For transgender people, their birth-assigned sex and their own internal sense of gender identity do not match.

"Gender Expression: External representation of one's gender identity, usually expressed through 'masculine' or 'feminine' behavior, clothing, haircut, voice or body characteristics. Typically, transgender people seek to make their gender expression match their gender identity, rather than their birth-assigned sex."

⁴¹ *Cossey v. United Kingdom*, 1990 13 EHRR 622 (Martens, J., *dissenting*) quoted in *Bellinger v. Bellinger*, [2001] 1 FLR 389, November 2, 2000.

the psychological and the morphological sex."⁴² The Minnesota Supreme Court described:

He considers himself a normal woman trapped inside a male body. The transsexual male consciously views his male genitals as a symbol of maleness which runs directly contrary to his gender identity as a female. Since his male sex organs are a source of immense psychological distress, the male transsexual seeks their removal and construction of female sex organs in order to make both his sexual identity and his gender identity consistent.⁴³

The defining characteristic is psychological identification with the opposite gender,⁴⁴ though a pre-surgery transsexual exhibits gender non-conformist behavior many people would interpret as a sign of homosexuality.⁴⁵ Moreover, "transsexual" is itself a broad term:

The term may include but is not limited to: transsexuals, intersex people, cross-dressers, and other gender-variant people. Transgender people can be female-to-male (FTM) or male-to-female (MTF)... Transgender people may or may not choose to alter their bodies hormonally and/or surgically.⁴⁶

A homosexual man, on the other hand, is male, but not necessarily feminine. For the context of this paper, which is marriage, the defining

⁴² *Anonymous v. Weiner*, 270 N.Y.S. 2d 319 (Sup. Ct. N.Y. Co., 1966) quoting Benjamin, *Nature and Management of Transsexualism: With a Report on Thirty-one Operated Cases*, 72 WESTERN JOURNAL OF SURGERY, OBSTETRICS AND GYNECOLOGY 105-111 (1964).

⁴³ *Doe v. Department of Public Welfare*, 257 N.W.2d 816, 818-819 (Minn. 1977).

⁴⁴ *Kantaras*, 521-527. Early cases also distinguished the transsexual from the transvestite, though the latter term is seen as derogatory by transgender communities. In *Re Anonymous*, 293 N.Y.S.2d 834 (Civ. Ct. N.Y. Co. 1968). "The petitioner is not a transvestite. 'By definition, the transvestite is content to dress in the clothing of the opposite sex. The transsexual, on the other hand, will be satisfied only if he can become converted into a sexually functioning person of the opposite sex.' (See Wollman, *Surgery for the Transsexual*, *Journal of Sex Research*, vol. 3, No. 2, pp. 145-147.)"

⁴⁵ See, for example, *B v. France*, [1992] 16 EHRR 1. "Miss B., the eldest of five children, adopted female behaviour from a very early age. She was considered as a girl by her brothers and sisters and is said to have had difficulty coping with a wholly segregated scholastic environment. She completed her military service in Algeria, as a man, and her behaviour at the time was noticeably homosexual." B later underwent sex reassignment surgery.

⁴⁶ GLAAD, *supra* note 40, [4]. "Intersex: Describing a person whose sex is ambiguous. There are many genetic, hormonal or anatomical variations which make a person's sex ambiguous (i.e., Klinefelter Syndrome, Adrenal Hyperplasia). Parents and medical professionals usually assign intersex infants a sex and perform surgical operations to conform the infant's body to that assignment. This practice has become increasingly controversial as intersex adults are speaking out against the practice, accusing doctors of genital mutilation." *Id.* [7].

characteristic is attraction to other males, regardless of which gender he⁴⁷ psychologically identifies with. From this definition, one observes that overlap is possible, and neither group defines the other. For example, a Wisconsin appellate court footnoted its use of "he" in *State v. Passarelli*, where George Passarelli was charged with sexually assaulting his wife:

Passarelli testified that he lives and works by the name 'Gina.' The record reflects that he appeared at trial dressed in women's clothing... Passarelli explained that he was a transsexual and a lesbian. The court ruled that there was to be no mention made of Passarelli's decision to dress as a woman.⁴⁸

Finally, a bisexual man is also male, but the defining characteristic is attraction to both males and females,⁴⁹ or being truly "double gaited."⁵⁰ He does not become homosexual simply because he consistently partners with males, and neither does he become heterosexual by consistently partnering with females.

Many state interests presented in the same-sex marriage debate pertain to either sex or gender, but rarely both. This illustrates the utility of bisexuals and transsexuals in analysis. A perceived heterosexual categorization will include bisexuals if it pertains only to sex, and transsexuals if it pertains only to gender. For example, the landmark English case *Corbett v. Corbett* held that no surgery can effect a legal change in sex and stated:

[M]arriage is a relationship which depends on sex and not on gender.⁵¹

⁴⁷ For convenience and brevity, this paper shall use "he" to refer to physically male individuals and "she" for physically female individuals. This follows from *Kantaras*, where female-to-male transsexual Michael Kantaras was almost exclusively referred to as "he," which the judge noted came naturally to the people involved in the litigation, and from other cases such as *X, Y and Z v. United Kingdom*. And, purely for brevity, it uses "he" as a default pronoun, the authors deeming "he or she" or "s/he" to be aesthetically awkward. See *Kantaras*, 15; *X, Y and Z v. United Kingdom*, [1997] 24 EHRR 143. "X is a female-to-male transsexual and will be referred to throughout this judgment using the male personal pronouns 'he', 'him' and 'his'." *Corbett v. Corbett*, [1971] P. 83, 89. "(I shall use 'he' and 'she' and 'his' and 'her' through-out this judgment as seems convenient in the context)"

⁴⁸ *State v. Passarelli*, No. 98- 0912-CR, 98-0913-CR, 1, n.1, Oct. 20, 1998 at <http://www.wisbar.org/rcs/capp/z1998/98-0913.htm> (last visited February 28, 2004).

⁴⁹ Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 375 (2000).

⁵⁰ Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 36 (1995).

⁵¹ *Corbett v. Corbett*, [1971] P. 83, 107.

If any such potential overinclusion exists, it stands to unravel the traditional conceptions of marriage.

II. The many facets of marriage

Marriage has a central place in Philippine society, enshrined in no less than the Constitution:

Marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State.⁵²

The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.⁵³

The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution.⁵⁴

The State shall defend: (1) The right of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood.⁵⁵

The Constitution does not define, however, what marriage is, arguably since the term hardly seems to merit it and has a commonly accepted meaning. *Black's Law Dictionary*, for example, provides: "Legal union of one man and one woman as husband and wife."⁵⁶ The traditional English definition reads, "[T]he voluntary union for life of one man and one woman, to the exclusion of all others."⁵⁷

Although this definition of "one man and one woman" is in neither the Constitution nor the Civil Code,⁵⁸ it was made law after the Family

⁵² CONST. Art. XV §2.

⁵³ CONST. Art. XV §1.

⁵⁴ CONST. Art. II §12.

⁵⁵ CONST. Art. XV §3(1).

⁵⁶ BLACK'S LAW DICTIONARY 972 (Minnesota: West, 1990) citing *Singer v. Hara*, 11 Wash.App. 247, 522 P.2d 1187, 1193.

⁵⁷ *Hyde v. Hyde* [1866] LR 1 PD 130 quoted in *Bellinger v. Bellinger*, [2001] 1 FLR 389, Nov. 2, 2000; *Cossey v. United Kingdom*, [1990] 13 EHRR 622.

⁵⁸ CIVIL CODE, Art. 53. "No marriage shall be solemnized unless all these requisites are complied with:

Code superseded the latter.⁵⁹ Although the drafters left no explicit explanation, one is tempted to infer that the seeming surplusage was added to leave no room for doubt regarding same-sex marriages,⁶⁰ though these were not yet legal anywhere in the world at the time of the Code's drafting.⁶¹ Nevertheless, the Family Code does not definitively bar same-sex marriages because its definition must withstand a due process, privacy, and equal protection attack. Moreover, the description of the right to marry as a fundamental personal right in *Loving* and *Zablocki*, the same implication in the Constitution, and the recognition of privacy as a fundamental right in *Ople* give the aggressor powerful munitions.

Even without mounting such an attack on behalf of homosexuals, however, one can scrutinize the validity of this statutory restriction on marriage simply by examining its inclusion or exclusion of three groups:

- 1) a heterosexual male and a heterosexual female
- 2) a bisexual and a partner of the opposite sex
- 3) a male-to-female (MTF) or female-to-male (FTM) transsexual who has undergone sex reassignment surgery (SRS) and a partner of the opposite post-reassignment sex⁶²

Such an examination highlights whether present conceptions of marriage specifically emphasize physical or psychological characteristics.

-
- (1) Legal capacity of the contracting parties;
 - (2) Their consent, freely given;
 - (3) Authority of the person performing the marriage; and
 - (4) A marriage license, except in a marriage of exceptional character"

⁵⁹ FAMILY CODE, Art. 2. "Art 2. No marriage shall be valid, unless these essential requisites are present:

- (1) Legal capacity of the contracting parties who must be male and female; and
- (2) Consent freely given in the presence of the solemnizing officer."

⁶⁰ "The change in phraseology by amendment of a provision of law indicates a legislative intent to change the meaning of the provision from that it originally had." RUBEN AGPALO, STATUTORY CONSTRUCTION 97 (1998).

⁶¹ See n.4.

⁶² GLAAD, *supra* note 40, [8-9]. "Sex reassignment surgery (SRS): Refers to genital alteration, and is only one small part of transition (see transition below). Not all transsexuals choose or can afford to have SRS. Journalists should avoid overemphasizing the importance of SRS. Preferred term to sex change operation.

Transition: The complex process of altering one's sex. Transition includes some or all of the following: changing one's name and/or sex on legal documents, hormone therapy, and possibly some form of chest and/or genital alteration."

A. Physical characteristics involved in marriage

(1) Anatomical and genetic male and female characteristics

Indeed, what is a man, and what is a woman? In the 1990 Arnold Schwarzenegger movie *Kindergarten Cop*,⁶³ a toddler explained to audiences worldwide: "Boys have a penis, girls have a vagina."⁶⁴

This kindergarten definition, however, is simplistic from a medical viewpoint:

According to medical professionals, the typical criteria of sex include:

1. Genetic or chromosomal sex--XY or XX;
2. Gonadal sex (reproductive sex glands)--testes or ovaries;
3. Internal morphologic sex (determined after three months gestation)-- seminal vesicles/prostate or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia)--penis/scrotum or clitoris/labia;
5. Hormonal sex--androgens or estrogens;
6. Phenotypic sex (secondary sexual features)--facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.⁶⁵

⁶³ Ivan Reitman, dir. at <http://www.imdb.com/title/tt0099938> (last visited Feb. 28, 2004).

⁶⁴ The Movie Quotes Site at <http://www.moviequotes.com/repository/titles/88438.html> (last visited Feb. 28, 2004).

⁶⁵ Mark Strasser, *Harvesting the Fruits of Gardiner: Marriage, Public Policy and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 182 (2003) citing Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999). Kantarus discussed six categories:

Chromosomes are the biological determinant of sex.⁶⁶ However, Professor Mark Strasser notes that the high school science "XX" and "XY" chromosomal definition is not completely precise. Some individuals, for example, have "a variation such as XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO."⁶⁷ This was highlighted in the 1967 European Cup, where Polish sprinter Eva Klobukowska was barred from competing as a woman because she possessed XXY chromosomes. She later became pregnant and gave birth. Further, even with respect to chromosomally normal individuals:

[A]n individual with XY chromosomes who has androgen insensitivity syndrome may develop external female genitalia because of an inability to process androgen. Or, individuals with Congenital Adrenal Hyperplasia (CAH) have XX chromosomes but may nonetheless have a masculine external appearance and demeanor.⁶⁸

Given the fundamental nature of the right to marry, it is difficult to prohibit these people from marrying. Indeed, a strict physical or chromosomal test to determine maleness or femaleness seems appropriate only for strictly physical activities, such as crafting a definition of penetration for rape,⁶⁹ or in professional sports.⁷⁰ For example, the

Chromosomal sex, anatomical or morphological sex, genital or gonadal sex, genital sex, endocrine or hormonal sex, and psychological sex. Kantaras, 522-523.

The House of Lords used: "(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." *Bellinger v. Bellinger*, [2003] UKHL 21.

⁶⁶ Kantaras, 522.

⁶⁷ See *Corbett v. Corbett*, [1971] P. 83. "Various errors can occur at this stage which led to the production of individuals with abnormal chromosome constitutions, such as XXY and XO (meaning a single X only). In these two cases, the individuals will show marked abnormalities in the development of their reproductive organs. The XXY patient will become an under-masculinised male with small, under-developed testes and some breast enlargement. The abnormality will become apparent at puberty when the male secondary sex characteristics, such as facial hair and male physique, will not develop in the normal way. The XO individual has the external appearance of a female, a vagina and uterus but no active ovarian tissue. Without treatment the vagina and uterus remain infantile in type and none of the normal changes of puberty occur. Administration of estrogen, however, produces many of these changes. The individual of course remains sterile."

⁶⁸ Strasser, *supra* note 65, at 182-84, 184 n.23. See also Kantaras, 521-523.

⁶⁹ *Bellinger v. Bellinger*, [2001] 1 FLR 389. "I was referred to a ruling made by Hooper J sitting in the Reading Crown Court on 28th October 1996. The defendant was charged with rape, the victim being a male-to-female transsexual whose artificial vagina had allegedly been raped by the defendant. It was held that, as a matter of law, penile penetration of that vagina was rape." *Goodwin v United*

International Olympic Committee recently called a meeting of medical experts to discuss whether post-surgery male-to-female transsexuals possessed undue advantages over female athletes.⁷¹

In refusing to recognize a transsexual's marriage, the Texas case *Littleton v. Prange* ended, "There are some things we cannot will into being. They just are."⁷² Nevertheless, a bisexual clearly has the right genitalia and chromosomes, and cannot be barred from marriage on anatomical grounds. Today, a post-surgery transsexual likewise has anatomy in his or her favor:

MALES – For males, surgery consists of removal of the testes, hollowing out of the penis, leaving only the skin, constructing a canal between the base of the penis and the anus, invaginating the penile skin so that it lines the new canal, relocating the urethral stump to a position just about the newly constructed canal, and reshaping the scrotal skin to appear as labia. Simulation of the female genital appearance can be quite accurate.

Kingdom, [2002] 35 EHRR 18; *I v. United Kingdom*, [2002] 35 EHRR 447. All three cases refer to the unreported decision *R v. Matthews*.

⁷⁰ In *Re Anonymous*, 314 NYS. 2d 668 (Civ. Ct. N.Y. Co. 1970). "What the true sex of a person is, commonly is easy of determination by the application of accepted tests based on visual inspection. Occasionally refinements of these tests are required, as has been reported to have occurred during the Olympic games when chromosome testing was applied to contestants whose sex was disputed in contests reserved for women."

⁷¹ Steve Nearman, *Transsexual Ruling will Haunt IOC*, *The Washington Times*, Nov. 16, 2003 at <http://washingtontimes.com/sports/20031116-124011-7132r.htm> (last visited Feb. 28, 2004). "What is clear is men have higher levels of testosterone and greater muscle-to-fat ratio and heart and lung capacity than women. However, medical experts assert that a male-to-female gender-crosser takes heavy doses of female hormones, which reduce muscle mass..."

"Polish sprinter Stalislawa Walasiewicz won the women's 100 meters at the 1932 Olympic Games and set 11 world records. But it wasn't until she moved to Cleveland and was innocently caught in the crossfire of a robbery attempt and shot dead in 1980 that an autopsy revealed she owned male sexual organs."

"At the 1966 European Athletics Championships in Budapest, sex testing began, and women competitors were required to disrobe so the medical staff could determine, from their genitals, whether they were indeed women. Of course, many women found this offensive."

"But sex reassignment surgery — which changes the genital organs from one sex to another to match the pre-birth sexual orientation of the brain — has muddied those waters, too. Renee Richards, after a 1975 operation at age 41, would pass the visual test as a woman, but she still has the X and Y chromosome of a man, not the double X of a woman."

"That was the contention of the U.S. Tennis Association, which denied the intimidating 6-foot-tall Richards entry into the 1976 U.S. Open after a reporter exposed her as a former men's amateur tennis champion who had played in several women's tournaments."

See also *Richards v. U.S. Tennis Association*, 400 N.Y.S.2d 267, 271 (1977); Pamela Fastiff, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q. 937 (1992).

⁷² *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999).

FEMALES – For females, sex-reassignment surgery entails masectomy, hysterectomy, and ovariectomy. In more ambitious procedures it includes construction of a phallus, possibly through multiple tube-within-tube skin grafts so that a urethral canal exists in a phallus-shaped structure, perhaps with the implantation of an inflexible splint, and the simulation of a scrotum through skin grafting from the nearby thigh, with implantation of artificial testes. At the present stage of surgical progress functional and cosmetic simulation of female genitalia is more easily achieved than is simulation of female genitalia. Vaginal closure and loss of genital sensation are common postoperative problems in the male-to-female operation.⁷³

Kantaras was the first time American medical community addressed transsexualism in-depth in a legal proceeding.⁷⁴ Judge Gerard O'Brien ruled that Michael Kantaras was male, and that to examine his gender prior to his post-surgery marriage would be to hold him to higher standards than heterosexuals.⁷⁵ The only vestige of Kantaras's femaleness were his XX chromosomes, which he deemed irrelevant to the case. This point is supported by English jurisprudence:

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.⁷⁶

Indeed, with the exception of these chromosomes, a male-to-female transsexual is no different from a woman whose vagina was surgically reconstructed after her pelvis was crushed in an automobile

⁷³ *Kantaras*, 530. This was taken from the testimony of a witness, Dr. Richard Green.

⁷⁴ *Kantaras*, 15. Other cases were tried using extensive medical testimony, but the thousand-page *Kantaras* decision is unprecedented in its meticulous documentation. See, for example *Anonymous v. Weiner*, 270 N.Y.S. 2d 319 (Sup. Ct., N.Y. Co., 1966). "Because of the complexity of the subject which cuts across biology and medicine and projects into the domain of law, the Committee called on a group of specialists in several fields to study the problem. This group included gynecologists, endocrinologists, cytogenetics, psychiatrists and a lawyer." Even early American cases favorable to the transsexual party had scant discussion of the medical facts. See, for example *Darnell v. Lloyd*, 395 F. Supp. 1210 (D. Conn. 1975).

⁷⁵ *Kantaras*, 766.

⁷⁶ *Corbett v. Corbett*, [1971] P. 83 (Thorpe, L.J., *dissenting*) quoted in *Goodwin v. United Kingdom*, [2002] 35 EHRR 18. This was echoed by the House of Lords in *Bellinger v. Bellinger*, [2003] UKHL 21.

accident,⁷⁷ or one whose vaginal cavity was surgically enlarged to permit penetration.⁷⁸ Judge O'Brien also noted that it is "a medical fact" that all men carry estrogen in their testes and all women carry testosterone in their ovaries, both being essential to hormonal makeup.⁷⁹

One notes that Senator Arturo Tolentino wrote in passing:

If through deceit, a marriage is celebrated between persons of the same sex, as when a hermaphrodite succeeds in marrying a man, the marriage is void and inexistent.⁸⁰

Technically, however, a hermaphrodite is an organism with both male and female reproductive organs, and these are found among flowers and invertebrates.⁸¹ Tolentino was likely referring to persons now popularly referred to as "intersexed," who fall under the broad definition of transsexual. These are precisely the people with abnormal chromosomes such as Klobukowska discussed above, and have resulting atypical physical features, including ambiguous genitalia, such as an abnormally large clitoris.⁸² Thus, the senator's sweeping statement must yield to the more accurate medical knowledge of a later decade.

⁷⁷ Petition for Writ of Certiorari, *Littleton v. Prange*, No. 00-25, 16 (July 3, 2000) *quoted in* MarriageWatch.org, *Transsexuality/Gender Issues in American Law*, 5, n.26, Oct. 31, 2000 at <http://www.marriagewatch.org/publications/trans.PDF> (last visited Feb. 28, 2004).

⁷⁸ *SY v. SY*, [1963] P 37 *quoted in* *Bellinger v. Bellinger*, [2001] 1 FLR 389. "The court had to consider a petition for nullity based on the incapacity of the wife to consummate the marriage. The wife's vagina was less than an inch in length but it was possible by surgery for that to be extended to permit full penetration. Willmer LJ rejected the husband's argument that such an operation would not create a vagina but only an artificial cavity. He would have reached the same conclusion in a case in which the wife had no natural vagina at all. 'I find it difficult to see why the enlargement of a vestigial vagina should be regarded as producing something different in kind from a vagina artificially created from nothing'."

⁷⁹ Kantaras, 765.

⁸⁰ I ARTURO TOLENTINO, *CIVIL CODE OF THE PHILIPPINES: COMMENTARIES AND JURISPRUDENCE* 232 (1987).

⁸¹ *Corbett v. Corbett*, [1971] P. 83, 100; Hyper Dictionary at <http://www.hyperdictionary.com/search.aspx?define=hermaphrodite> (last visited Feb. 28, 2004). "An individual which has the attributes of both male and female, or which unites in itself the two sexes; an animal or plant having the parts of generation of both sexes, as when a flower contains both the stamens and pistil within the same calyx, or on the same receptacle. In some cases reproduction may take place without the union of the distinct individuals. In the animal kingdom true hermaphrodites are found only among the invertebrates."

⁸² Intersex Society of North America, *Frequently Asked Questions* at http://www.healthplace.com/communities/gender/intersexuals/intersexuality_faq.htm (last visited February 28, 2004).

(2) Ability to copulate

Beyond having genitalia, the concept of marriage implies that the partners are able to copulate, or specifically, to perform penis-vagina sexual intercourse. The Bible also discusses this:

Let each man have his own wife and each woman her own husband. Let the husband fulfill his duty of husband and likewise the wife...

...

To the unmarried and the widows I say that it would be good for them to remain as I am, but if they cannot control themselves, let them marry, for it is better to marry than to burn interiorly with passion.⁸³

However, the ability to copulate is not a legal requisite of a marriage; again, the Family Code only requires that it be celebrated between a male and a female. Impotence, on the other hand, is merely a ground for annulment if it existed at the time of the marriage.⁸⁴ By definition, the marriage remains valid until annulled, and there is even a presumption of potency,⁸⁵ all of which emphasize that the ability to copulate is not a prerequisite to marry. Moreover, Judge Alicia Sempio-Diy, a member of the drafting committee, wrote:

Impotency due to old age is not a ground for annulment, since one who marries an old partner takes a calculated risk that the latter may be impotent.⁸⁶

Nevertheless, it is obvious that a bisexual is fully capable of penis-vagina intercourse. Post-surgery transsexuals are likewise capable, and even retain the ability to reach orgasm. Despite the greater difficulty in FTM surgery, the "neopenis" even has the "potential to void while standing."⁸⁷ In

⁸³ CHRISTIAN COMMUNITY BIBLE, 1 CORINTHIANS 7:9 (1991).

⁸⁴ FAMILY CODE, Art. 45(5).

⁸⁵ *Jimenez v. Canizarez*, G.R. No. 12790, 109 Phil. 273, August 31, 1960.

⁸⁶ ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 70 (2000). This is supported by American jurisprudence. *TOLENTINO*, *supra* note 80, at 292 *citing* *Hatch v. Hatch*, 110 N.Y.S. 18.

⁸⁷ Kantaras, 758 *quoting* Jarolim L, 85(7) B.J.U. INT. 851-856 (2000). The author was a doctor with the Department of Urology, Charles University of Prague, Czech Republic.

Kantaros, Judge Gerard O'Brien ruled, "As a post operative transsexual, Michael Kantaras, is, by virtue of all his medical treatment, possessed of the capacity to function sexually as a heterosexual male." Michael testified that as a result of hormone treatment, his former clitoris enlarged and elongated to form a small penis, and is capable of erection, penetration, and orgasm.⁸⁸ Finally, the New Zealand decision *Attorney-General v. Otahuhu* opined that the surgically created genitalia need not even be fully sexually functional, and that there are many forms of physical sexual expression.⁸⁹

Parenthetically, a State policy that seeks to discourage habitual penis-anus intercourse between two males would likely not seek to exclude every person who had such an experience from marriage.⁹⁰

(3) *Ability to procreate*

The ability to procreate is even more strongly implied in marriage than the ability to copulate, and the protections for marriage granted by the Constitution are intertwined with those granted to the family. Commentators and jurists likewise intertwine procreation with marriage. *Chi Ming Tsoi v. Court of Appeals* held:

Evidently, one of the essential marital obligations under the Family Code is 'To procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage.' Constant non- fulfillment of this obligation will finally destroy the integrity or wholeness of the marriage. In the case at bar, the senseless and protracted refusal of one of the parties to fulfill the above marital obligation is equivalent to psychological incapacity.⁹¹

Senator Tolentino wrote:

[I]t must be understood as a natural element, because of the very purpose of marriage. Procreation cannot be realized by two

⁸⁸ *Kantaros*, 715.

⁸⁹ *Attorney-General v. Otahuhu Family Court*, 1 N.Z.L.R. 603 (1995) *quoted in* *Bellinger v. Bellinger*, [2001] 1 FLR 389.

⁹⁰ Colker, *supra* note 44, at 30.

⁹¹ *Chi Ming Tsoi v. Court of Appeals*, G.R. No. 119190, 266 SCRA 324, January 16, 1997.

persons of the same sex. The Family Code merely states the obvious.⁹²

Judge Sempio-Diy likewise wrote:

...a requisite that is dictated by biological law, since procreation cannot be realized by two persons of the same sex.⁹³

Procreation is also central to the definition of the Code of Canon Law:

Marriage is defined by the Code as a covenant by which a man and a woman establish between themselves a partnership of their whole life and which, by its very nature, is ordered to the well being of the spouses and to the procreation and the upbringing of children.⁹⁴

The place of procreation has been recognized, moreover, in the earliest of Church traditions:

[T]hat blessing upon marriage, which encouraged them to increase and multiply and replenish the earth... was yet given before they sinned, in order that the procreation of children might be recognized as part of the glory of marriage, and not of the punishment of sin.⁹⁵

However, again, procreation is not a legal requisite of marriage, and, distinguishing impotence from sterility, is not even a ground for an annulment.⁹⁶ Otherwise, couples who plan not to have children would be prohibited from marrying, and the sight of octogenarians renewing their marriage vows would lose all romantic luster. In fact, in discussing the rephrasing of the Family Code definition of marriage, Judge Sempio-Diy recounted:

⁹² TOLENTINO, *supra* note 80, at 232.

⁹³ SEMPIO-DIY, *supra* note 86, at 3.

⁹⁴ Adolfo Dacanay, S.J., *A General Introduction to the Church Law on Marriage in Atenco de Manila* University Theology Department, Marriage and Human Sexuality 151 (2002).

⁹⁵ SAINT AUGUSTINE, THE CITY OF GOD XIV (Marcus Dods trans.), Chapter 21 in 18 GREAT BOOKS OF THE WESTERN WORLD 392 (Chicago: Encyclopedia Britannica, 1952).

⁹⁶ SEMPIO-DIY, *supra* note 86, at 70; TOLENTINO, *supra* note 80, at 293 citing *Sarao v. Guevara*, CA-G.R. No. 4264, G.R. No. 47603; *Turney v. Avery*, 92 N.J.Eq. 473, 112 Atl. 486.

[W]hile the most important object of marriage is procreation or to have a family, the Committee believes that marriage may not necessarily be for procreation or for the parties to have children, but it may also be only for companionship, as when parties past the age of procreation still get married.⁹⁷

The impossibility of procreation is central to Church condemnation of "homosexual acts [which are] intrinsically disordered, inasmuch as they lack their essential and indispensable finality,"⁹⁸ because "procreation is the completed form of union."⁹⁹ Following Saint Augustine's doctrine, every act of intercourse must be open to the potential for human life, something illustrated by the birth of Ishmael to Abraham and Sarah when the latter was ninety years old.¹⁰⁰

Nevertheless, bisexuals are fully capable of procreation, as are transsexuals before any surgery. As for post-surgery transsexuals, they may turn to medical advances such as artificial insemination just like heterosexual but infertile couples.¹⁰¹ Alternatively, they may adopt.

Kantaros demonstrated both. There, FTM transsexual Michael Kantaras adopted Matthew, his wife Linda's son by a previous boyfriend, who was born six weeks before Michael and Linda married.¹⁰² Years before his sex reassignment surgery, however, Michael had spoken to his brother Tom about donating sperm to allow him to father a child.¹⁰³ This way, Linda gave birth to Irina three years into the marriage.¹⁰⁴

⁹⁷ *SEMPRO-DIV*, *supra* note 86, at 1.

⁹⁸ Livio Melina, *Homosexual Inclination as an "Objective Disorder": Reflections of Theological Anthropology in* Ateneo de Manila University Theology Department, Marriage and Human Sexuality 142 (2002) *citing Declaration Persona humana*, CDF, 8, Dec. 29, 1975.

⁹⁹ *Id.* at 147.

¹⁰⁰ CHRISTIAN COMMUNITY BIBLE, GENESIS 17 (1991).

¹⁰¹ Parenthetically, advanced medical techniques such as egg-donor insemination allow lesbian couples to have children that are biologically related to both parents. *Goodridge v. Department of Public Health*, 2002 WL 1299135 (Mass.Super.), *13, n.26, May 7, 2002 *citing* *Culliton v. Beth Israel Deaconess Medical Center*, 435 Mass. 285 (2001).

See also 2Moms2Dads.com, *Baby Book for Alternative Families* at http://www.2moms2dads.com/baby_memory_book.htm [2] (last visited Feb. 28, 2004). "This unique baby book was created especially for gay, lesbian and single parent families celebrating the birth of a child. Parent references are gender neutral. The baby book contains all the pages you would find in a traditional baby book, but is phrased to be friendly to all families. There are even pages to document sperm and egg donor information in addition to surrogate mother information."

¹⁰² *Kantaros*, 17.

¹⁰³ *Kantaros*, 18.

¹⁰⁴ *Kantaros*, 19-20.

B. Psychological and other characteristics involved in marriage

(1) The ability to love, for better or for worse

Justice Florida Ruth Romero proclaimed:

[M]arriage is a sacred and perpetual bond which should be entered into because of love, not for any other reason.¹⁰⁵

Griswold v. Connecticut ended:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁰⁶

This is likewise ingrained in Biblical tradition:

The husband is the head of his wife as Christ is the head of the Church...

As for you husbands, love your wives as Christ loved the Church and gave himself up for her...

...

...Because of this a man shall leave his father and mother to be united with his wife, and the two shall become one flesh.¹⁰⁷

The Code of Canon Law also prescribes "the well-being of both spouses,"¹⁰⁸ *Gaudium et Spes* 49 defining conjugal love as a "free mutual gift of themselves to each other."¹⁰⁹ The present Code, revised in 1983, precisely moved from a contractual formulation of marriage to one that

¹⁰⁵ *Figueroa v. Barranco*, SBC No. 519, 276 SCRA 445, July 31, 1997.

¹⁰⁶ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

¹⁰⁷ CHRISTIAN COMMUNITY BIBLE, EPHESIANS 5:23, 25, 31 (1991).

¹⁰⁸ *Dacanay*, *supra* note 94, at 151.

¹⁰⁹ Michael Dizon, *Psychological Incapacity and the Canon Law on Marriage: An Exegesis on the Psychological Element of Matrimonial Consent*, 75 PHIL. L.J. 368, 370 (2000).

emphasized the relationship and actual "communion of life," with the twin pursuits of procreation and education of offspring, and the good of the spouses or *bonum coniugium*.¹¹⁰

Justice Oliver Wendell Holmes's "bad man,"¹¹¹ however, would point out that love is, again, not an explicit legal requisite for marriage—the Family Code only demands "consent freely given."¹¹² On the other hand, an obligation of "mutual love, respect, and fidelity"¹¹³ is prescribed, but not examined before a couple marries, and its non-observance does not even, in itself, affect the subsistence of the marriage. It is legally possible for a couple who hate each other to marry, so long as they are a man and a woman, and they consent. It is likewise legally permissible to marry solely for motivations from immigration benefits¹¹⁴ to an expected inheritance, the latter evidenced in the Civil Code by:

If the marriage between the surviving spouse and the testator was solemnized in *articulo mortis*, and the testator died within three months from the time of the marriage, the legitime of the surviving spouse as sole heir shall be one-third of the hereditary estate, except when they have been living as husband and wife for more than five years.¹¹⁵

No case depicts a marriage bereft of love better than the *Bedia Santos* saga that has since become part of every freshman Law curriculum:

It was bound to happen, Leouel averred, because of the frequent interference by Julia's parents into the young spouses family affairs. Occasionally, the couple would also start a 'quarrel' over a number of other things, like when and where the couple should start living independently from Julia's parents or whenever Julia would express resentment on Leouel's spending a few days with his own parents.

¹¹⁰ *Id.* at 371.

¹¹¹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

¹¹² FAMILY CODE, Art. 2(2).

¹¹³ FAMILY CODE, Art. 68.

¹¹⁴ Summer Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114, 129-130 (2003). Nastich cited *United States v. Lee*, where an American entered into a marriage of convenience with a Filipina to prevent her deportation, and the couple divorced six months later. The American was not only paid for the sham marriage, but tried to defraud the Navy by accepting benefits for married personnel. *United States v. Lee*, 43 M.J. 794, 796 (N-M Ct. Crim. App. 1995).

¹¹⁵ CIVIL CODE, Art. 900.

On 18 May 1988, Julia finally left for the United States of America to work as a nurse despite Leouel's pleas to so dissuade her. Seven months after her departure, or on 01 January 1989, Julia called up Leouel for the first time by long distance telephone. She promised to return home upon the expiration of her contract in July 1989. She never did. When Leouel got a chance to visit the United States, where he underwent a training program under the auspices of the Armed Forces of the Philippines from 01 April up to 25 August 1990, he desperately tried to locate, or to somehow get in touch with, Julia but all his efforts were of no avail.¹¹⁶

Justice Padilla was constrained to dissent from the ruling:

Is it not, in effect directly or indirectly, facilitating the transformation of petitioner into a 'habitual tryster'... simply because he is denied by private respondent, his wife, the companionship and conjugal love which he has sought from her and to which he is legally entitled?¹¹⁷

Indeed, countless examples in jurisprudence strain a presumed correlation between love and heterosexuality. *Marcos v. Marcos*,¹¹⁸ for example, ruled that a husband who failed to provide support for his family, abandoned them, and allegedly subjected them to physical abuse was not psychologically incapacitated to marry. *Republic v. Dagdag* concluded the same with respect to a husband who always quarreled with his wife, rarely came home, and eventually became a fugitive from the law.¹¹⁹

Finally, *Loving* and *Zablocki* articulate the right to marry as a personal right that inheres in the individual. Assuming love is a requisite, the "one man and one woman" restriction seems to delve into one's personal capacity for love, or precisely what is abhorrent to decisional privacy.

In any case, taking this factor apart from their physical characteristics, it is readily acceptable that bisexuals and transsexuals are as capable of love and *bonum coniugnum* as heterosexuals and as capable of

¹¹⁶ Santos v. Court of Appeals, G.R. No. 112019, 240 SCRA 20, January 4, 1995.

¹¹⁷ *Id.* (Padilla, J., dissenting).

¹¹⁸ Marcos v. Marcos, G.R. No. 136490, 343 SCRA 755, October 19, 2000.

¹¹⁹ Republic v. Dagdag, G.R. No. 109975, 351 SCRA 425, February 9, 2001.

performing the duties mandated in the Family Code, or at least as capable as the star-crossed Leouel and Julia Santos.

(2) Marriage as part of expression of self-identity

Roberts v. United States Jaycees held:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State... [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others.¹²⁰

The due process and privacy protection declared in *Zablocki* extends to the relationship formed in marriage, beyond the individuals themselves. For the same reasons as an individual's capacity for love, it seems difficult to justify delving into the same individual's choice of relationships. Thus, *Lawrence v. Texas* struck down a statute that criminalized sodomy:

The laws involved... have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.¹²¹

¹²⁰ *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) *citing* *Zablocki v. Redhail*, 434 U.S. 374, 383-386 (1978). *Roberts* is the leading case on "expressive association." *Boy Scouts of America v. Dale*, 000 U.S. 99-699, June 28, 2000. Here, the United States Supreme Court ruled that the Boy Scouts of America cannot be forced by the State to reinstate an assistant scoutmaster who was removed after it was discovered that he was a homosexual and gay rights activist. That would amount to undue interference into an association's internal affairs by forcing it to accept a member it does not desire, a member whose presence would affect the group's ability to advocate certain public or private views.

¹²¹ *Lawrence v. Texas*, 000 U.S. 02-102 (2003).

The European Court of Human Rights has made similar rulings,¹²² and, further, its transsexual ruling *I v. United Kingdom* stated that "serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity."¹²³

Nevertheless, bisexuals and transsexuals are as psychologically capable of the same male-female relationships heterosexuals form,¹²⁴ with the same spousal roles. Professor Strasser pointed out:

The New Zealand High Court suggested that it would be cruel and counter-productive not to recognize marriages involving a man and a post-operative male-to-female transsexual. The court reasoned that if 'society allows such persons to undergo therapy and surgery in order to fulfill that desire [to be recognized and able to behave as members of their self-identified sex], then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry.'¹²⁵

Similarly, Judge Martens of the European Commission of Human Rights opined that a transsexual's post-reassignment sex must be recognized both socially and legally, after "the often long and humiliating fight for a new legal identity."¹²⁶ The House of Lords sympathized and agreed appropriate legislation was in order.¹²⁷ All this was vividly demonstrated in *Kantaros*, where, at one point, Irina Kantaras claimed that

¹²² Amicus Curiae Brief of Rights International in *X, Y and Z v. United Kingdom*, *The National Journal of Sexual Orientation Law* at <http://www.ibiblio.org/gaylaw/issue5/transbre.html> (last visited Feb. 28, 2004). "[T]he right to privacy under Article 8 of the European Convention has been interpreted repeatedly by the European Court of Human Rights to extend to an adult's right to participate in private, consensual homosexual activity. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (protection extended to mutual masturbation, oral-genital contact, and anal intercourse between adult men); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988) (protection extended to anal intercourse between adult men); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993) (protection extended to carnal knowledge "against the order of nature")."

¹²³ *I v. United Kingdom*, [2002] 35 EHRR 447.

¹²⁴ Moreover, it may be argued: "The presumption in favor of matrimony is one of the strongest known in law. The law presumes morality, and not immorality; marriage, and not concubinage: legitimacy, and not bastardy." *People v. Borromeo*, G.R. No. 61873, 133 SCRA 106, Oct. 31, 1984.

¹²⁵ Strasser, *supra* note 65, at 215 quoting *Attorney-General v. Otahuhu Family Court*, 1 N.Z.L.R. 603, 607 (1995).

¹²⁶ *Cossey v. United Kingdom*, 1990 13 EHRR 622 (Martens, J., *dissenting*) quoted in *Bellinger v. Bellinger*, [2001] 1 FLR 389.

¹²⁷ *Bellinger v. Bellinger*, [2003] UKHL 21. This also followed from a European Court of Human Rights decision, *Goodwin v. United Kingdom*, [2002] ECHR 1153.

Michael was not really her father because, "You need privates and balls to be a man."¹²⁸

The New Zealand decision also pointed out the bizarre consequences that would result if a transsexual's post-reassignment sex was not legally recognized. "Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her own original sex." Thus, unless she is stripped of the right to marry, a male-to-female transsexual would have to be accorded a legal right to marry a heterosexual female.¹²⁹

(3) Marriage and the upbringing of children

The Constitution mandates the protection of marriage as a social institution, more than a simple relationship. A survey of jurisprudence shows that this doctrine has been a recurring refrain in all specie of cases—Justice Romero even furiously invoked it in awarding damages due to the erasure of a videotape that was the only record of a couple's wedding.¹³⁰

Marriage as an institution, however, is intended for the education of and upbringing of children, taken separately from procreation, and the Constitution asserts that the right of parents is superior to that of the State.¹³¹ *Meyer v. Nebraska* held:

Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own....

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted

¹²⁸ Kantaras, 782.

¹²⁹ Attorney-General v. Otahuhu Family Court, 1 N.Z.L.R. 603, 607 (1995).

¹³⁰ Go v. Court of Appeals, G.R. No. 114791, 272 SCRA 752, May 29, 1997. "No less than the Constitution commands us to protect marriage as an inviolable social institution and the foundation of the family. In our society, the importance of a wedding ceremony cannot be underestimated as it is the matrix of the family and, therefore, an occasion worth reliving in the succeeding years.... When private respondents came home from their honeymoon, however, they found out that the tape had been erased by petitioners and therefore, could no longer be delivered."

¹³¹ JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 78-79 (1996).

their subsequent education and training to official guardians... [I]t hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.¹³²

Further, *Pierce v. Society of Sisters* held:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹³³

This aspect is also in the Canon Law definition.¹³⁴ However, there is no nexus between gender and proficiency in caring for and raising a child.¹³⁵ The State, moreover, does not prohibit unmarried women from bearing children and unmarried couples from raising them, and it is also legal for single individuals to adopt.

Bisexuals and transsexuals are at least as able parents as heterosexuals are expected to be. *Kantaras* precisely awarded child custody to Michael, an FTM transsexual, because he was considered the better parent, in the best interests of the Kantaras children. Comparing Michael to Linda, Judge O'Brien found that Michael scored more favorably on almost all the points he examined:

- 1) Michael was more likely to allow the children continued contact with Linda if custody were awarded to him.
- 2) Michael had supported the family by himself.
- 3) Michael was deemed more morally fit, compared to Linda, who had violated previous court orders and misrepresented certain facts to the children.

¹³² *Meyer v. Nebraska*, 262 U.S. 390, 401-402 (1922).

¹³³ *Pierce v. Society of Sisters of the Holy Names of Jesus*, 268 U.S. 510, 535 (1925).

¹³⁴ Dacanay, *supra* note 86, at 151.

¹³⁵ Ann Reding, Note, *Lofston v. Kearney: Equal Protection Mandates Equal Adoption Rights*, 36 U.C. DAVIS L. REV. 1285, 1312 (2003).

transsexual turned down a teaching post in Botswana because the free education his dependents would be given were not extended to his heterosexual wife's son by artificial insemination.¹⁴⁴

(5) The traditional, heterosexual institution that is marriage

Finally, to sum up all of the above, one might present the United States Defense of Marriage Act (DOMA), which provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹⁴⁵

The United States Congress presented five rationales:

- (1) encouraging heterosexuality;
- (2) preserving government resources;
- (3) defending traditional notions of morality;
- (4) defending and nurturing the institution of traditional, heterosexual marriage; and
- (5) reserving the institution of marriage for procreation¹⁴⁶

The United States is not unique; the now superseded European decision *Sheffield v. United Kingdom*, for example, also interpreted the European Convention on Human Rights' provision on marriage as underpinned by

¹⁴⁴ X, Y and Z v. United Kingdom, [1997] 24 EHRR 143.

¹⁴⁵ P.L. No. 104-199 §2, 110 Stat. 2419 (1996) (codified at 1 U.S.C. §7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)) at <http://www-unix.oit.umass.edu/~lwg450/doma.htm> (last visited Feb. 28, 2004).

¹⁴⁶ Karla Robertson, Note, *Penetrating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory*, 75 DENV. U. L. REV. 1375, 1391 (1998) citing H.R. Rep. No. 104-664.

"the traditional concept of marriage."¹⁴⁷ Such sentiment, moreover, is captured by recent speeches made by President Bush:

The union of a man and a woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith. Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society.¹⁴⁸

Nevertheless, it is clear that none of the above five points apply to bisexuals. Again, for example, a bisexual married to an opposite-sex partner does not become psychologically heterosexual, and neither is he or she encouraged to be. They are clearly within the "traditional, heterosexual marriage," casting doubt at what "natural roots" are really being defended. Finally, again, not all heterosexual couples are capable of procreation due to age or physical problems, but nevertheless have access to a modern medical techniques such as artificial insemination, and adoption. The application of the above points to transsexuals is arguable on each point as well, since one reason they go to great lengths to alter their physical sex is to be able to live as someone of their psychological gender, and enter the "traditional, heterosexual marriage."

If anything, one is tempted to irreverently conclude that the "traditional, heterosexual marriage" sought to be defended is nothing more than penis-vagina sexual intercourse, since such a criteria conceivably embraces any couple who can engage in it into marriage, regardless of actual psychological, gender orientation.¹⁴⁹

III. The Validity of a Bisexual's Marriage under Philippine Law

A. *Bisexuality defined*

A bisexual is an individual who is sexually attracted to both sexes. Definitional axes other than sexual desire are possible, but prove difficult to

¹⁴⁷ *Sheffield v. United Kingdom*, [1999] 27 EHRR 163.

¹⁴⁸ CNN, *Bush calls for ban on same-sex marriages*, CNN.com, February 25, 2004 at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/index.html> [1-2] (last visited Feb. 28, 2004).

¹⁴⁹ Robertson, *supra* note 146, at 1395.

use in analysis. For example, Professor Kenji Yoshino lists possible conduct-based definitions:

- [1] 'Defense Bisexuality' (defending against homosexuality in societies where it is stigmatized),
- [2] 'Latin Bisexuality' (the insertive role in certain 'Mediterranean cultures' is not regarded as homosexual, so that men who participate in same-sex encounters may consider themselves nonetheless heterosexual),
- [3] 'Ritual Bisexuality' (as with the Sambia of Papua-New Guinea, in which younger males fellate older men in order to ingest their 'masculinizing' semen, a practice that is part of a rite of initiation, may continue for years, and is apparently replaced by exclusive heterosexuality after marriage),
- [4] 'Married Bisexuality',¹⁵⁰
- [5] 'Secondary Homosexuality' (more frequently called 'situational bisexuality'—sex with same-sex partners in prisons or other single-sex institutions, in public parks or toilets, or for money),
- [6] 'Equal Interest in Male and Female Partners' (so-called true bisexuality),
- [7] 'Experimental Bisexuality,' and
- [8] 'Technical Bisexuality' (with partners who may be dressed as members of the other sex, or have had some form of gender reassignment: transsexuals or members of a 'third sex' in some cultures).¹⁵¹

Self-identification is another possible axes.¹⁵¹ Nevertheless, Professor Yoshino notes that different axes create and destroy different categories, but are analytically useful in different contexts. For example, conduct is clearly the useful denominator if one explores connections

¹⁵⁰ Yoshino, *supra* note 20, at 371 citing MARJORIE GARBER, VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE 30 (1995).

¹⁵¹ To resummarize, the three main definitional axes are sexual attraction, sexual conduct, and self-identification. Edward Laumann, *et al*, The Social Organization of Sexuality: Sexual Practices in the United States 290 (1994).

between bisexuality and the spread of the Human Immunodeficiency Virus (HIV).¹⁵² For legal discussion, a general sexual attraction towards both sexes remains the most useful definitional threshold.

As emphasized in the preceding section, a bisexual married to an opposite-sex partner is arguably well within the "traditional" concept of marriage. Legislators and judges rarely recognize bisexuality because they see gender as two poles instead of a continuum, and focus on the homosexual on the opposite pole particularly when imposing penalties and exclusions.¹⁵³ Indeed, the Kinsey scale of 0 (heterosexual) to 6 (homosexual), a yardstick developed by sex researchers to describe sexual orientation as a continuum, counts those found from 1 to 5 as bisexuals.¹⁵⁴ Nevertheless, for example, when the American Supreme Court ruled on an amendment to the Colorado State Constitution that read "No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation,"¹⁵⁵ the decision's sole reference to bisexuality was its quotation of the amendment itself.¹⁵⁶ Other legal discussions seem to cloak bisexuality in a similar invisibility, perceiving this category as entirely encompassed by homosexuality.

Even outside the academe and the legal profession, references to bisexuality are scarce in the Philippines. Most are found in gay literature, but thorough analysis reveals such references are to an entirely different matter altogether.

One entry in the University of the Philippines-published *Philippine Gay Culture*, for example, frames the bisexual as the *silabis*, or a "gold-plated, double-edged sword."¹⁵⁷ This includes a male who looks every bit of a "real man," may even be married with children, but who, in all this time, would rather swish and wear skirts and "scream like a woman."¹⁵⁸ However, the *silabis* as defined is but one facet of bisexuality. One that is even questionable at that. The category is based on only one theory of

¹⁵² Yoshino, *supra* note 20, at 372-73 citing Marjorie Garber, *Vice Versa: Bisexuality and the Eroticism of Everyday Life* 30 (1995).

¹⁵³ Colker, *supra* note 50, at 30.

¹⁵⁴ Yoshino, *supra* note 20, at 380 citing Alfred Kinsey, *et al*, *Sexual Behavior in the Human Male* (1948); Alfred Kinsey, *et al*, *Sexual Behavior in the Human Female* (1953). Robertson, *supra* note 146, at 1395.

¹⁵⁵ *Romer v. Evans*, 517 U.S. 620, 624 (1996).

¹⁵⁶ Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 367 (2000).

¹⁵⁷ NEIL GARCIA, *PHILIPPINE GAY CULTURE* 110 (1996).

¹⁵⁸ *Id.*

classification termed "conditional bisexuality." This theory views such an individual as either purely heterosexual or homosexual, but explains that he or she enters into a relationship with someone of the opposite sex for some particular gain or purpose, such as social acceptance.¹⁵⁹ This type of bisexuality is somewhat problematic in that it may actually be argued as a manifestation of an individual who actually suffers from gender dysphoria or transsexualism. This matter shall be elaborated upon later in this paper.

Another portrayal in Philippine gay literature depicts bisexuality as a mere transitional phase. This is called, "transitional bisexuality."¹⁶⁰ As one author narrates:

I went through the stages: from being completely heterosexual until 18, to being bisexual from 18 to 22, and finally to being predominantly gay.¹⁶¹

Other classifications exist, but have received even less discussion, even in gay literature. Further, Professor Kenji Yoshino concludes that bisexuality in general is far less discussed relative to homosexuality in both the academe and popular literature:

Table 1: Online survey from January 1, 1990 to November 30, 1999¹⁶²

American publication or database	Documents mentioning 'homosexuality'	Documents mentioning 'bisexuality'
Los Angeles Times	2,790	121
USA Today	1,768	29
The Wall Street Journal	396	9
Time	240	15
U.S. News and World Report	120	3
The New Republic	144	3
Wilson Web Social	1,122	87

¹⁵⁹ Kathy Labriola, *What is Bisexuality? Who is Bisexual* at <http://www.bayarea.net/~stef/Poly/Labriola/bisexual.html> (last visited on Feb. 7, 2004).

¹⁶⁰ *Id.*

¹⁶¹ Margarita Singco-Holmes, *A Different Love: Being Gay in the Philippines* 212 (1993).

¹⁶² Yoshino, *supra* note 20, at 368.

Sciences Abstract Database		
Wilson Web General Sciences Abstract Database	221	6
Wilson Web Humanities Abstract Database	962	26

Clearly, a legal recognition of bisexuality facilitates a more complete understanding of gender, and in turn, marriage. However, it must be emphasized that even popular culture inadequately defines the category.

In discussing bisexuality, this section focuses on the context of a bisexual married to an opposite-sex partner.

B. Physical Requisites

Again, the Family Code defines:

Marriage is a special contract of permanent union *between a man and a woman* entered into in accordance with the law for the establishment of a conjugal and family life... (emphasis added)¹⁶³

The Code enumerates the essential and formal requisites of marriage:

Art 2. No marriage shall be valid, unless these essential requisites are present:

1. Legal capacity of the contracting parties *who must be male and female*; and
2. Consent freely given in the presence of the solemnizing officer.

Art. 3. The formal requisites of marriage are:

¹⁶³ FAMILY CODE, Art. 1.

1. Authority of the solemnizing officer;
2. A valid marriage license except in the cases provided for in Chapter 2 of this title; and
3. A marriage ceremony which takes place with the appearance of the contracting parties before the solemnizing officer and their personal declaration that they take each other as husband and wife in the presence of not less than two witnesses of legal age. (emphasis added)¹⁶⁴

On the surface, a couple with one bisexual partner meets all these requisites, and they are physically identical to a heterosexual couple. This is borne out even by an in-depth review of these provisions' history.

Before the Family Code took effect in 1988,¹⁶⁵ marriage's requisites were governed by Article 53 of the Civil Code:

No marriage shall be solemnized unless all these requisites are complied with:

1. *Contracting parties of different sexes* having the requisite legal capacity;
2. Consent freely given in the presence of the solemnizing officer;
3. Authority of the person performing the marriage except in marriages in good faith as defined in Art. —.
4. A marriage license, except in marriages of exceptional character as provided in Chapter 2 of this Title. (emphasis added)¹⁶⁶

Deliberating the Family Code, Professor Bautista suggested it be modified to actually specify the male and female sexes instead of merely stating "different sexes." However, Dean Gupit proposed to have the entire

¹⁶⁴ FAMILY CODE, Art. 2-3.

¹⁶⁵ Sempio-Diy, *supra* note 86, at v.

¹⁶⁶ Family Code Committee, May 10, 1983 Minutes, 4.

phrase read as "legal capacity of the contracting parties who must be male and female," and this was eventually approved by the Committee.¹⁶⁷

No other official record sheds light on the underlying intent of Article 2(1). Subsequent commentaries likewise provide little guidance. Judge Sempio-Diy adds that the concept is dictated by biological law, since two persons of the same sex cannot procreate.¹⁶⁸ Tolentino concurs, adding that the Family Code merely stated the obvious.¹⁶⁹ Finally, Rufus Rodriguez merely notes these suggestions by Professor Bautista and Dean Gupit.¹⁷⁰ Even bills introduced by the late Senator Marcelo Fernan that sought to limit marriage to a "biological male" and a "biological female" cited only "harmony with biological law," and was aimed only at homosexuals and post-surgery transsexuals.¹⁷¹

Thus, one concludes that Article 2(1) refers solely to physical sex, and specifically to the potential for procreation, assuming a more specific requisite was intended. Hence, a bisexual can validly marry under Philippine law, so long as it is to an opposite-sex partner.

C. Psychological Requisites

Because a couple formed after a bisexual marries an opposite-sex partner is physically indistinguishable from a heterosexual couple, the question moves from the physical to the psychological plane.

Article 36 of the Family Code states:

A marriage contracted by who, at the time of the celebration was psychologically incapacitated to comply with the essential marital obligations of marriage, shall likewise be void even if such incapacity becomes manifest only after its solemnization.¹⁷²

¹⁶⁷ *Id.*

¹⁶⁸ SEMPIO-DIY, *supra* note 86, at 9.

¹⁶⁹ TOLENTINO, *supra* note 80, at 232.

¹⁷⁰ RUFUS RODRIGUEZ, THE FAMILY CODE OF THE PHILIPPINES ANNOTATED 13 (2002).

¹⁷¹ Marcelo Fernan, Explanatory Note: SB 898 at <http://senate.hipermart.net/sb898.html> (last visited Feb. 28, 2004). See also Christine Herrera, *Gay group gives Fernan a mouthful*, Philippine Daily Inquirer, Aug. 16, 1998 at <http://senate.hipermart.net/gay.html> (last visited Feb. 28, 2004).

¹⁷² FAMILY CODE, Art. 36.

This article was lifted from Canon 1095, Paragraph 3 of the Roman Catholic Church, which took effect in 1983. Among other things, Canon 1095 discusses those who are incapable of assuming the essential obligations of marriage.¹⁷³ This is, in turn, traceable all the way to Saint Augustine's view of marriage as composed of three traditional *bonum fidei*, or values which grant it its innate dignity or goodness: (1) faithful exclusiveness; (2) permanence; (3) procreative orientation.¹⁷⁴ Saint Paul likewise contemplates marriage as concretized in the physical union and sexual exclusivity of the parties, which leads to the birth of children.¹⁷⁵

The emphasis on procreation persisted through the ages, all the way to Canon 1013 of the 1917 Code of Canon Law. It stated that the primary ends of marriage are procreation and the education of the children, with mutual assistance and the remedying of the concupiscence placed second.¹⁷⁶ However, in the 1983 Code, marriage was understood in a more personalistic capacity,¹⁷⁷ and was treated more as a relationship and life partnership instead of a contract that primarily involved where the yielding of rights.¹⁷⁸ Consequently, procreation was given a proportionally decreased significance, given an equal emphasis on the welfare or good (*bonum coniugum*) of the spouses themselves.¹⁷⁹ Thus, the inherent incapacity to relate and give oneself to another became a justifiable basis for a declaration of nullity of marriage.¹⁸⁰ Given such incapacity, the essential element of marriage that is the *bonum coniugum* cannot be fulfilled.

To date, it has fallen to jurisprudence to determine precisely how much of Canon 1095's psychological and psychosomatic factors were grafted into the Family Code via Article 36. The latter was initially inserted into the enumeration for void marriages, phrased as:

Those marriages contracted by any party who, at the time of the celebration, was wanting in the sufficient use of reason or judgment to understand the essential nature of marriage or was psychologically or mentally incapacitated to discharge the

¹⁷³ RODRIGUEZ, *supra* note 164, at 74. The Roman Catholic Church's New Code of the Canon Law took effect on Nov. 27, 1983.

¹⁷⁴ Dizon, *supra* note 78, at 368.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 369.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 371.

essential marital obligations, even if such lack or incapacity is made manifest after the celebration. (emphasis added)¹⁸¹

The exact nature of the initial proposal sparked a lengthy debate among the framers themselves. Justice Caguioa distinguished that it dealt not with a person lacking in judgment with regard to the marriage itself, but one lacking in the actual exercise of judgment.¹⁸² In reaction, Judge Sempio-Diy pointed out that it is quite difficult to distinguish this from insanity, which is itself a ground for voidable marriages.¹⁸³ Justice Caguioa responded that insanity actually vitiates consent to marriage, while psychological incapacity indicates a lack of appreciation of the marital obligations.¹⁸⁴

Other distinctions and characteristics were given. For instance, insanity is deemed curable and has lucid intervals, while psychological incapacity is not and does not. Finally, it was pointed out that psychological incapacity may be with respect only to a particular person, which the framers termed "selective impotency."¹⁸⁵

In the end, Judge Sempio-Diy and Undersecretary Florida Ruth Romero proposed a separate article that would define the apparently vague term:

Art. ____ . Psychological or mental impotency to discharge the essential obligations of marriage may be made manifest:

By the refusal of one party to dwell with the other after the marriage ceremony, without fault of the other party; or

By the refusal or inability of the party primarily obligated to give support to the other or to their common children through causes other than his or her voluntary intent, desire or laziness; or

When either party or both of them labor under an affliction that makes common life as husband and wife impossible or unbearable, such as

¹⁸¹ Family Code Committee, May 10, 1983 Minutes, at 6.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 8.

¹⁸⁵ *Id.*

compulsive gambling or unbearable jealousy or other psychic or psychological causes of like import and gravity.¹⁸⁶

However, this article was never included. In Justice Ricardo Puno's opinion, it was unnecessary, and judges and parties to litigation should simply refer to the minutes of the Committee meetings or consult the members themselves.¹⁸⁷ Later, Judge Sempio-Diy simply summarized the Committee's decision to adopt Article 36 as: (1) a substitute for divorce; (2) a solution to the problem of Church-annulled marriages; and (3) an additional remedy for parties 'imprisoned' by marriage.¹⁸⁸

Amid the confusion surrounding this provision, it is quite clear, nevertheless, that whatever conditions actually constitute psychological incapacity, they should be to the extent as to substantially impair a person's ability to understand and eventually fulfill the essential marital obligations enumerated by our laws. However, this is precisely where problems with analogies relating sexual orientation to the validity of marriage begin.

First, Judge Sempio-Diy cites Dr. Gerardo Ty Veloso and presents "homosexuality in men and lesbianism in women" as reasonable grounds for proving psychological incapacity.¹⁸⁹ In *Republic v. Court of Appeals*, Justice Romero referred to Joseph Zwack's narration of how "favorable annulment decisions by the Roman Rota in the 1950s and 1960s involving sexual disorders such as homosexuality and nymphomania laid the foundation for a broader approach to the kind of proof necessary for psychological grounds for annulment."¹⁹⁰ Justice Puno likewise lectured that homosexuality and lesbianism are examples of psychological incapacity, though he stressed that the "afflicted" party must be unable to assume the essential marital obligations of marriage.¹⁹¹

¹⁸⁶ Committee, July 16, 1987 Minutes, at 7.

¹⁸⁷ *Id.*

¹⁸⁸ SEMPIO-DIY, *supra* note 80, at 42.

¹⁸⁹ *Id.*, 44.

¹⁹⁰ *Republic v. Court of Appeals*, G.R. No. 108763, 268 SCRA 198, Feb. 13, 1997.

¹⁹¹ Ricardo Puno, Lecture on the Family Code, Nov. 19, 1988, University of the Philippines Law Center (on file with the University of the Philippines Law Library).

D. Applying Psychological Incapacity to a Bisexual Married to an Opposite-Sex Partner

Despite Justice Puno's clarification, however, a homosexual orientation remains associated with psychological incapacity in a seeming sweeping generalization and apart from physical characteristics and the significance placed on procreation within marriage. The link, in a gross oversimplification, is that a homosexual male, for example, is by definition attracted to males. Thus, if he marries a female, although the essential and formal requisites of marriage are met, he is psychologically incapable of attraction to his female partner, and the marriage must be declared void.

This proposition, however, rests on the definition of homosexuality. Because the definition of bisexuality is quite different, one may thus argue that this proposition does not apply to it. In other words, a bisexual male is, by definition, sexually attracted to females. Following Justice Puno's explanation, he would thus be capable of assuming the essential obligations of marriage, and Justice Puno's emphasis has been emphasized by the jurisprudence surrounding Article 36.

A survey of the short line of jurisprudence reveals how psychological incapacity rulings coalesce into three main points, none of them applicable to bisexuals as an entire category:

- 1) Incapacity with respect to one's opposite-sex partner
- 2) Incapacity with respect to one's opposite-sex partner specifically in the context of sexual intimacy
- 3) Incapacity with respect to one's children and their care and upbringing

The first point represents the general understanding of psychological incapacity. In *Santos v. Court of Appeals*, the Court stressed that psychological incapacity should refer to "no less than a mental (not physical) incapacity that causes a party to be truly incognitive of the basic marital covenants that concomitantly must be assumed and discharged by the parties to the marriage." These include the mutual obligations to live together, observe love, respect and fidelity and render help and support. Furthermore, it should also be confined "to the most serious cases of

personality disorders clearly demonstrative of an utter insensitivity or inability to give meaning and significance to the marriage."¹⁹²

One infers from this that psychological incapacity is strictly mental, though this is irrelevant to bisexuals because they are physically indistinguishable from heterosexuals. Further, it must retard capacity for a brand of sensitivity and fidelity analogous to the Catholic *bonum coniugium*, but again, the definition of bisexuality does not bear this out with respect to an opposite-sex partner, unlike that of homosexuality.

Next, in *Republic v. Court of Appeals and Molina*, the Court set guidelines for the application of Article 36. Among these were:

(2) The root cause of the psychological incapacity must be (a) *medically or clinically identified*, (b) alleged in the complaint, (c) sufficiently proven by experts... Article 36 of the Family Code requires that the incapacity *must be psychological — not physical. Although its manifestations and/or symptoms may be physical.* The evidence must convince the court that the parties, or one of them, was mentally or physically ill to such an extent that the person could not have known the obligations he was assuming, or knowing them, could not have given valid assumption thereof. Although no example of such incapacity need be given here so as not to limit the application of the provision under the principle of *ejusdem generis*, nevertheless such root cause must be identified as a psychological illness and its incapacitating nature explained. Expert evidence may be given qualified psychiatrist and clinical psychologists.

(3) The incapacity must be proven to be existing at 'the time of the celebration' of the marriage. The evidence must show that the illness was existing when the parties exchanged their 'I do's.' The manifestation of the illness need not be perceivable at such time, but the *illness* itself must have attached at such moment, or prior thereto.

(4) Such incapacity must also be shown to *be medically or clinically permanent or incurable.* Such incurability may be absolute or even *relative only in regard to the other spouse*, not necessarily absolutely against everyone of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not

¹⁹² Santos v. Court of Appeals, G.R. No. 112019, 240 SCRA 20, January 4, 1995.

necessarily to those not related to marriage, like the exercise of a profession or employment in a job. Hence, a pediatrician may be effective in diagnosing illnesses of children and prescribing medicine to cure them but may not be psychologically capacitated to procreate, bear and raise his/her own children as an essential obligation of marriage.

(5) Such illness must be *grave enough* to bring about the disability of the party to assume the essential obligations of marriage. Thus, 'mild characterological peculiarities, mood changes, occasional emotional outbursts' cannot be accepted as *root* causes. The illness must be shown as downright incapacity or inability, nor a refusal, neglect or difficulty, much less ill will. In other words, there is a *natal or supervening disabling factor* in the person, an adverse integral element in the personality structure that effectively incapacitates the person from really accepting and thereby complying with the obligations essential to marriage.¹⁹³

Bisexuality, again, does not by definition disable one's capacity to relate to an opposite-sex spouse. Further, homosexuality is no longer even recognized as a mental disorder. Although it was listed as one over two decades ago by the American Psychiatric Association, and homosexuals were once seen as child molesters and prone to violence and disease, this is no longer the case today.¹⁹⁴ If this holds for homosexuality, it is all the more arguable that bisexuality is not even a "characterological peculiarity," especially in light of studies such as the Kinsey Reports which, as provided earlier, assert that the human sexuality is a continuum.¹⁹⁵ And beyond definitions, the concrete medical evidence of dysfunction demanded by *Molina* simply does not exist.

A subsequent case, *Choa v. Choa*, merely reiterated the Court's views in *Santos* and *Molina*. Here, the petitioner-husband alleged three aspects of his wife's personality as proof of her supposed psychological incapacity: (1) lack of attention to their children, (2) immaturity, and (3) lack of an

¹⁹³ Republic v. Court of Appeals, G.R. No. 108763, 268 SCRA 198, February 13, 1997.

¹⁹⁴ Molly Cooper, *Student Notes: Gays and Lesbian Families in the 21st Century*, 42 FAM. CT. REV. 178, 185 (2004).

¹⁹⁵ Yoshino, *supra* note 20, at 377-88 citing Alfred Kinsey, *et al*, *Sexual Behavior in the Human Male* (1948); Alfred Kinsey, *et al*, *Sexual Behavior in the Human Female* (1953); William Masters and Virginia Johnson, *Homosexuality in Perspective* (1979); Samuel Janus and Cynthia Janus, *The Janus Report on Sexual Behavior* (1993); Kaye Wellings, *et al*, *Sexual Behavior in Britain: The National Survey of Sexual Attitudes and Lifestyles* (1994); Laumann, *supra* note 151.

"intention of procreative sexuality." The Court ruled, "none of these three, singly or collectively, constitutes psychological incapacity."¹⁹⁶ Since two children were actually born during the couple's union, this belied the third contention. With respect to the first two, alluding to the *Molina* guidelines, the Court held that the petitioner had failed to prove that the incapacity, if it did exist, was "medically or clinically permanent or incurable," and that it was "grave enough to bring about the disability of the party to assume the essential obligations of marriage."¹⁹⁷

In several other cases, the Court's ruling similarly frowned upon conditions alleged to be manifestations of psychological incapacity. In *Hernandez v. Court of Appeals*, the husband's alleged habitual alcoholism, sexual infidelity or perversion, and abandonment was also found to be insufficient as grounds for the claim of psychological incapacity charged against him.¹⁹⁸ This decision essentially rejects Judge Sempio-Diy's comment that habitual alcoholism or "the condition by which a person lives for the next drink and the next drink and the next drink" is a ground of psychological incapacity. In *Marcos v. Marcos*, the failure of the husband to provide support for the family, as well as his alleged commission of *physical abuse* and abandonment towards them, were considered inconclusive.¹⁹⁹ In *Republic v. Dagdag*, the fact that the couple involved always figured in quarrels and that the husband rarely came home and who eventually became a fugitive of the law, were deemed inadequate.²⁰⁰ Nevertheless, again, bisexuality is not even deemed a psychological disorder today.

The second point in the framework is culled from *Chi Ming Tsoi v. Court of Appeals*, where the Court linked sexual intimacy and procreation to psychological incapacity:

Evidently, one of the essential marital obligations under the Family Code is 'to procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage.' Constant non-fulfillment of this obligation will finally destroy the integrity or wholeness of the marriage... the senseless and protracted refusal of one of the

¹⁹⁶ Choa v. Choa, G.R. No. 143376, 392 SCRA 641, Nov. 26, 2002.

¹⁹⁷ Choa v. Choa, G.R. No. 143376, 392 SCRA 641, Nov. 26, 2002.

¹⁹⁸ Hernandez v. Court of Appeals, G.R. No. 126010, 30 SCRA 76, Dec. 8, 1999.

¹⁹⁹ Marcos v. Marcos, G.R. No. 136490, 343 SCRA 755, Oct. 19, 2000.

²⁰⁰ Republic v. Dagdag, G.R. No. 109975, 351 SCRA 425, Feb. 9, 2001

parties to fulfill the above marital obligation is equivalent to psychological incapacity.

[L]ove is useless unless it is shared with another... an ungiven self is an unfulfilled self... in the natural order, it is sexual intimacy which brings spouses wholeness and oneness. Sexual intimacy is a gift and a participation in the mystery of creation. It is a function which enlivens the hope of procreation and ensures the continuation of family relations.²⁰¹

This decision later described a "spiritual communion" as a necessary ingredient, viewing marriage as something between "two consenting adults who view the relationship with love *amor gignit amorem*, respect, sacrifice and a continuing commitment to compromise, conscious of its value as a sublime social institution."²⁰² Nevertheless, a bisexual is as capable as a heterosexual of this kind of "spiritual communion" with respect to an opposite-sex partner, both in the context of penis-vagina sexual intercourse and procreation, and in the broader context of love and fidelity described in *Santos*.

Finally, the third point is derived from one of the *Molina* guidelines:

(4) Such incapacity must also be shown to be *medically or clinically permanent or incurable*. Such incurability may be absolute or even *relative only in regard to the other spouse*, not necessarily absolutely against everyone of the same sex. Furthermore, such incapacity must be relevant to the assumption of marriage obligations, not necessarily to those not related to marriage, like the exercise of a profession or employment in a job. Hence, a pediatrician may be effective in diagnosing illnesses of children and prescribing medicine to cure them but may not be psychologically capacitated to procreate, bear and raise his/her own children as an essential obligation of marriage.²⁰³

The definition of bisexuality, however, is entirely unconnected with an individual's ability to care for a child.

In summary, one concludes that the Court has been emphatically stringent in its determinations regarding psychological incapacity. Despite

²⁰¹ *Chi Ming Tsoi v. Court of Appeals*, G.R. No. 119190, 266 SCRA 324, Jan. 16, 1997.

²⁰² *Id.*

²⁰³ *Republic v. Court of Appeals*, G.R. No. 108763, 268 SCRA 198, Feb. 13, 1997.

the absence of a definitive Article 36 ruling regarding sexual orientation, none of these determinations in the three-point framework relate to bisexuality. Thus, one concludes that not even psychological incapacity as already elaborated upon in jurisprudence serves as a bar to a bisexual's marriage.

IV. The Validity of a Transsexual's Marriage under Philippine Law

A. *Transsexualism defined*

Transsexualism is the condition of being in a state of conflict between gender and physical sex.²⁰⁴ The term was first used by David Caldwell in paper concerning a girl who wanted to be a boy, noting that her condition was first referred to as "*psychopathia transsexualis*."²⁰⁵ Today, it is also known as *gender dysphoria*,²⁰⁶ that unhappiness experienced towards one's given sex or sexual identity, which ranges from the mild to the very severe cases.²⁰⁷

The concept is most intimately linked to the inversion pattern of homosexuality.²⁰⁸ Although it sometimes occurs with homosexuality and despite some evidence that both are created by similar mechanisms, transsexualism is distinct from it.²⁰⁹ A homosexual is sexually attracted to persons of the same sex, but is not necessarily discontented with his anatomy. On the other hand, a transsexual feels alienated from his anatomy as contrary to his sexual identity, even at an early age.²¹⁰ Further, transsexuals themselves may be heterosexual or homosexual based on the gender they are attracted to vis-a-vis the gender they identify with.²¹¹

²⁰⁴ Jennifer Reitz, *What Transsexuality is: Definition, Cause and History*, *Transsexuality* at <http://www.transsexual.org/What.html> (last visited Feb. 28, 2004).

²⁰⁵ Ekins and King, *Pioneers of Transgendering: The Popular Sexology of David O. Cauldwell* at <http://www.symposion.com> (last visited Feb. 23, 2004).

²⁰⁶ Kuiper and Cohen-Kettenis, *Gender Role Reversal among Postoperative Transsexuals* at <http://www.symposion.com> (last visited Feb. 23, 2004).

²⁰⁷ Maggi Rohde, ed., *FAQ - Transgenderism* at <http://alt.transgendered> (last visited Feb. 23, 2004).

²⁰⁸ Garcia, *supra* note 107.

²⁰⁹ *Id.*

²¹⁰ AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 4 537 (1994).

²¹¹ *Id.* at 532-33.

Various theories have tried to explain its cause. Some take a physiological angle. Some examine an area in the brain called the "sexually dimorphic nucleus,"²¹² while others claim it is caused by a hormonal imbalance during pregnancy.²¹³ Still others propose that some types of transsexualism are genetic.²¹⁴ Other explanations take a social angle. Some cases of transsexualism result when people are forced into alternative sex roles due to religious, social, or family pressures. Some American men dressed as women to avoid being drafted or to leave the army. Some male homosexuals may feel the need to change their sex in order to correspond with their religious beliefs. Some parents may even dress their children in clothing of the opposite sex because they wanted a child of that sex.²¹⁵

Despite the lack of agreement as to its source,²¹⁶ experts categorize transsexualism into two predominant types. Primary transsexualism occurs in young adults who are gender dysphoric from a young age. As early as five years old, a transsexual may begin wearing items of opposite sex apparel. Often, these are usually lingerie and taken from a mother's or sister's laundry or wardrobe. Occasionally, lingerie will be purchased for personal use.²¹⁷ Secondary transsexualism occurs in middle-aged people who had no strong transgender urges earlier in their lives. This type of transsexualism is

²¹² *Bellinger v. Bellinger*, [2001] 1 FLR 389. "Professor Richard Green, a consultant psychiatrist, is the Research Director of the Gender Identify Clinic at the Charing Cross Hospital, probably the largest of its kind in the world. In relation to the Dutch research, Professor Green considers that the origins of gender identity disorder still remain unsettled. That research is based on a small series of male-to-female transsexuals studied post-mortem. The finding was said to be that the bed nucleus of the strio-terminalis region of the brain was smaller in size than that of typical males and similar in size to that of typical females. Whilst Professor Green regards the interpretation of those findings as being neither refuted nor confirmed, he does accept that the criteria for designating a person as male or female are complex and very probably not simply an outcome of chromosomal, genital or gonadal configuration. He agreed that there is what he called a growing momentum in the direction of acceptance of the existence of sexual differences in the brain that are determined pre-natally and that influence sex-type and sexual behaviours. However for practical purposes the identification of these supposed differences in the brain can still be made only postmortem."

²¹³ *In Re Anonymous*, 314 NYS. 2d 668 (Civ. Ct. N.Y. Co. 1970).

²¹⁴ Rohde, *supra* note 207.

²¹⁵ *Id.*; *Bellinger v. Bellinger*, [2001] 1 FLR 389. "At birth Mrs. Bellinger was registered as male but there was ambiguity about her upbringing in childhood and it seems her mother had wanted her to be a girl and in fact dressed her as such."

²¹⁶ *I v. United Kingdom*, [2002] 35 EHRR 447. "It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain."

²¹⁷ Karen Anne Taylor, *Transgenderism and Information Library at* <http://www.geocities.com/KarenSpecial> (last visited Feb. 23, 2004)

thought to be linked to hormonal changes in the body with the onset of middle age.²¹⁸

B. The Psychological Dimension of Transsexualism

Transsexuals are the most intensely afflicted of the transgendered. Most are painfully aware of their gender incongruity from very early childhood. While transgendered transitioners feel compelled to correct their social gender, transsexuals feel compelled to also correct their physical gender.²¹⁹ They request the removal of their genitals through mutilation surgery, some subjects literally crying to be castrated. In *Van Oosterwijck v. Belgium*, moreover, the transsexual plaintiff attempted suicide before deciding to undergo surgery.²²⁰ This is all the more surprising when one considers that that castration, in psychoanalytic terms, is considered to be the most severe punishment that an individual—male or female—can be threatened with.²²¹

Many transsexuals (and homosexuals) displayed childhood gender non-conformity, with boys displaying girlish behaviour and girls acting tomboyish. A male-to-female transsexual recollected her childhood, for example:

As I approached puberty, the exclusion from both boys and girls increased, as each had reasons for avoiding the shy strange child I was. To boys I was weird because I liked girlish things, and to girls I was icky because I was supposed to be a boy. When they did include me, they wanted me to play the role of 'daddy' or 'boyfriend' or other such role, and I would only be willing to play 'mommy' or my usual, the 'baby' in games of playing house. In every activity my gender dilemma affected me. If I wanted to twirl on the monkey bars I was ridiculed because only

²¹⁸ *Id.*

²¹⁹ Lynn Conway, *Basic TG/TS/IS Information* at <http://www.lynnconway.com> (last visited Feb. 28, 2004).

²²⁰ *D Van Oosterwijck v. Belgium*, [1980] 3 EHRR 557.

²²¹ Michel and Mormont, *Was Snow White a Transsexual?* 2002 Jan-Feb; 28 (1):59-64. Université de Liège, Service de Psychologie Clinique, Belgique.

girls did that, and my stuffed animals were taken away by my vile father, fearful of my love for them.²²²

Only a small minority of such children, nevertheless, become gay or lesbian, and a much smaller proportion become transsexual. Early sexual experience or distant fathers may be a factor in the development of sexual orientation in some boys, but only a minority progress to adult homosexuality, let alone transsexuality.²²³

In one study, researchers observed that of the ten non-homosexual transsexuals in their study sample, nine showed no evidence of effeminacy in childhood. Each sample individual was clearly identified by both male and female peers as a boy and was never referred to as being a sissy. They participated in rough-and-tumble behavior as required and did not engage in girls' activities any more than the other boys in their peer group. All ten were socially withdrawn in childhood, loners who read a great deal, watched television or occupied themselves with private hobbies. Each admitted to being envious of girls and fantasized being a girl, but none actually believed he was a girl.²²⁴

The authors then wrote that the homosexual transsexuals they studied resembled the clinical and then-perceived stereotypical transsexuals. These genetic males were effeminate from earliest childhood. As children they preferred girls as playmates, avoided boyish pursuits and were "mother's helpers." Crossdressing began in childhood, initially for narcissistic satisfaction, but later at puberty to attract male sexual partners. Cross-gender fantasies were frequently tied to identification with movie actresses and drag queens. The authors noted that the homosexual cross-dresser wants to be noticed and to this end often wears flamboyant and colorful clothing and engages in theatrical endeavors.²²⁵

A transsexual is, literally, a mind trapped in a body of the opposite sex.²²⁶ Primary transsexuals are functionally asexual and resolve their

²²² Jennifer Reitz, *To Be Transsexual, Transsexuality* at <http://www.transsexual.org/Feels.html> (last visited Feb. 28, 2004).

²²³ Zucker and Bradley, *Gender Identity Disorder and Psychosexual Problems in Children and Adolescents* (1995).

²²⁴ Person and Ovesey, *The Transsexual Syndrome in Males*, 28 AMERICAN JOURNAL OF PSYCHOTHERAPY 174-193 (1974).

²²⁵ *Id.*

²²⁶ Reitz, *supra* note 222.

dilemma with surgery.²²⁷ As of 1997, one in thirty thousand was thought to be a transsexual, more male than female, and about ten thousand sex-change operations had been performed as of that year.²²⁸ For patients psychologically ready to undergo the process, sex reassignment begins with the administration of appropriate hormones followed by the surgery.²²⁹ Thus, in this context, a *pre-operative transsexual* has begun the hormonal and surgical procedures and is very close to the operation,²³⁰ while *post-operative transsexuals* are those who have undergone the grueling and painful reassignment surgery. Finally, a *non-op transsexual* has undergone all the hormonal treatments but has no desire to proceed with the genital surgery.²³¹ After surgery, it is very difficult to physically distinguish a male-female post-surgery transsexual from a genetic female, although the former remain males chromosomally. On the other hand, only recently did female-male transsexuals gain effective surgical techniques to create the neopenis.

C. Transsexualism jurisprudence: Corbett v. Corbett

Returning to the Family Code, can a post-surgery transsexual be validly married to a person of the opposite sex? Arguably, they constitute a couple with one male and one female. A short line of jurisprudence has tried to answer this issue.

Corbett v. Corbett, a 1970 English case, is recognized as the landmark decision on married transsexuals.²³² Here, Arthur Corbett tried to have his marriage nullified because his wife April Ashley was actually male.²³³ The decision proceeded to discuss Ashley's personal history in almost lurid detail:

After about four years at the Carousel night club, he was introduced to Dr. Burou who practised in Casablanca and who, on May 11, 1960, performed on the respondent a so-called 'sex-change operation,' which 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

²²⁷ Person & Ovesey, *supra* note 224.

²²⁸ Israel & Tarver, *Transgender Care* (1997).

²²⁹ Reitz, *supra* note 222.

²³⁰ Rohde, *supra* note 207.

²³¹ *Id.*

²³² Littleton v. Prange, 9 S.W.3d 223, 226 (Tex. App. 4th 1999).

²³³ Corbett v. Corbett, [1971] P. 83, 89.

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. I have been at some pains to avoid the use of emotive expressions such as 'castration' and 'artificial vagina' without the qualification 'so-called' because the association of ideas connected with these words or phrases is so powerful that they tend to cloud clear thinking.²³⁴

Corbett also closely examined whether the marriage had been consummated:

There is a direct conflict of evidence as to what happened sexually between them... He says that she continued to complain of the abscesses. She says that they had cleared up and that they slept together and on several occasions he succeeded in penetrating her fully but immediately gave up saying: 'I can't, I can't,' and withdrew without ejaculation and burst into tears.²³⁵

Corbett considered two prevailing lines of thought:

(1) Transsexualism is a psychological disorder arising after birth due to some early childhood experiences;

(2) Transsexualism is an organically based condition.²³⁶

It summarized, "Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman."²³⁷ The decision turned on a four-prong criteria to determine a person's sex:

(1) chromosomal factors;

(2) gonadal factors (the presence or absence of testes or ovaries);

²³⁴ *Id.*, 90-91.

²³⁵ *Id.*, 94.

²³⁶ *Law and Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues*, 12 *LAW & SEXUALITY* 87 (2003).

²³⁷ *Corbett v. Corbett*, [1971] P. 83, 106.

(3) genital factors (including internal sex organs); and

(4) psychological factors.²³⁸

Corbett thus ruled the wife was chromosomal male, and that her physically female appearance was but a "pastiche of femininity," a result of skillful surgery.²³⁹ *Corbett*, in short, held that "true sex" was determined at birth and immutable.²⁴⁰ It explained:

[I]f a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and capable of 'marrying' a man. The results would be nothing if not bizzare.²⁴¹

The crux of *Corbett* was one particular sentence:

I have dealt, by implication, with the submission that because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purpose of marriage... These submissions, in effect, confuse sex with gender. *Marriage is a relationship which depends on sex and not on gender.* (emphasis added)²⁴²

The decision emphasized the first three factors—chromosomes, gonads, and genitals—over psychological factors, holding, "[I]t (marriage) is and always has been recognized 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."²⁴³ Thus, in emphasizing sex over gender, *Corbett* mirrors Judge Sempio-Diy and Senator Tolentino's discussion of "biological law," and likewise places it on a higher footing compared to social roles and self-identification.

Before *Corbett* a number of American cases made curt dismissals of the issue, with hardly any discussion. In 1966, *Anonymous v. Weiner* delegated the issue to the New York Academy of Medicine, which upheld

²³⁸ *Id.* at 100.

²³⁹ *Id.* at 105.

²⁴⁰ *Id.* at 104.

²⁴¹ *Id.* at 106.

²⁴² *Id.* at 106-07.

²⁴³ *Id.* at 105.

chromosomal sex and "the public interest for protection against fraud."²⁴⁴ *Weiner* eventually ruled against the homosexual claiming judicial deference to the decision of the medical experts in the Board of Health who had refused to change the birth certificate in question.²⁴⁵ In 1971, without citing any precedents, *Anonymous v. Anonymous* decided against a transsexual, but the case was distinct in that the "wife" only intended to undergo surgical reassignment after the marriage to another man, and the "husband" only discovered his partner's sex after the ceremony.²⁴⁶

Corbett was upheld by a considerable number of subsequent cases. In 1986, a European male transsexual sought to change his birth certificate and have his right to marry a woman upheld.²⁴⁷ Citing *Corbett* as the guiding doctrine, the European Commission of Human Rights found that the "biological definition of sex laid down in *Corbett* has been followed by English courts and tribunals on a number of occasions and for purposes other than marriage."²⁴⁸ Similarly citing *Corbett*, the 1987 American case *In re Ladrach* denied a similar case involving a male-to-female transsexual.²⁴⁹

In 1990, *Cossey v. United Kingdom*, like *Rees*, again upheld the biological criteria. However, the European Commission of Human Rights hinted at a future time wherein transsexual marriages may be accepted and legalized. It is but unfortunate, it said, that at the time, the changes in society and culture were not yet sufficient to warrant the remedy being sought.²⁵⁰ In 1999, in *Littleton v. Prange*, a Texas appellate court dismissed a male-to-female transsexual's wrongful death action against her husband's doctor. The Court phrased its main question as whether or not a doctor can "change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?"²⁵¹ *Littleton* rejected the wife's standing to sue because it held the marriage invalid, and emphasized that it should not wander into the "misty fields of sociological philosophy"²⁵² in interpreting statutes. The decision ended:

²⁴⁴ *Anonymous v. Weiner*, 270 N.Y.S. 2d 319, 322 (Sup. Ct., N.Y. Co., 1966).

²⁴⁵ *Id.* at 323.

²⁴⁶ *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500-501 (Sup. Ct., Queens Co., 1971).

²⁴⁷ *Rees v. United Kingdom*, [1986] 9 EHRR 56.

²⁴⁸ *Id.*

²⁴⁹ *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 832 (1987).

²⁵⁰ *Cossey v. United Kingdom*, [1990] 13 EHRR 622.

²⁵¹ *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 4th 1999).

²⁵² *Id.* at 231.

"There are some things we cannot will into being. They just are."²⁵³

D. Transsexualism jurisprudence: M.T. v. J.T.

Far from all the cases in this international sampling followed *Corbett*, however. In 1968, *In re Anonymous* discounted *Weiner* and ruled for the transsexual:

[S]hould the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.²⁵⁴

However, the case only decided a change of name, not a change of sex in a birth certificate or the issue of a marriage license. In 1970, *In re Anonymous* allowed a change of name because a person has the right to use what name he pleases, but gave the condition that the decision would not be evidence of a change of sex.²⁵⁵ In 1973, however, *Christian v. Randall*, the court held that the fact that a man's former wife was undergoing sex reassignment was insufficient grounds for stripping her of the children.²⁵⁶ Finally, in 1975, *Darnell v. Lloyd* refused to dismiss a case for change of sex in a birth certificate outright. It recognized the humiliation, for example, with a passport declaring one's sex to be the opposite of one's apparent sex. More importantly, it held that "at least tangentially one's fundamental interest in marriage is allegedly implicated," and listed a formidable line of Due Process cases upholding the fundamental natures of the rights to marriage and to privacy.²⁵⁷

In 1976, the American ruling *M.T. v. J.T.* became the first case to find a marriage involving a transsexual valid. M.T., a male-to-female transsexual, sought support and maintenance from her former husband of two years. He then assailed the validity of their marriage on the ground that

²⁵³ *Id.*

²⁵⁴ *In Re Anonymous*, 293 NYS.2d 834, 838 (Civ. Ct. N.Y. Co. 1968).

²⁵⁵ *In Re Anonymous*, 314 NYS. 2d 668, 670 (Civ. Ct. N.Y. Co. 1970).

²⁵⁶ *Christian v. Randall*, 516 P.2d 132, 134 (Colo. App. 1973).

²⁵⁷ *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975) *citing* *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116, 125-27 (1958); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

his wife was a man. The court rejected this, opining that if the psychological choice of the person is medically sound (and not a mere whim), and irreversible sex reassignment surgery had already been performed, society has no right to prohibit the transsexual from leading a normal life.²⁵⁸

Although it upheld *Corbett* in that sex is biological and unchangeable, the court rejected the notion of sex being determined solely at birth. Other factors, it noted, were of equal importance; factors such as self-image or self-identity, for instance. The court ruled that "true sex" in fact, is a person's "self-identity plus the anatomical changes necessary to harmonize the biological with that identity," and the post-surgery harmony of sex and gender made recognition a "*fait accompli*."²⁵⁹ It stated:

[F]or marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.²⁶⁰

M.T. was a landmark ruling because first, it reformulated *Corbett's* criteria by emphasizing the psychological ingredient. Second, it found that *M.T.* not only acquired and possessed female physical qualities, but did in fact engage in sexual intercourse with her husband.

In *In Re Kevin*²⁶¹, an Australian family court recognized the marriage between a female-to-male transsexual and his wife. Unlike in *Corbett*, the judge in this case based his decision on the following conclusions:

1. For the purpose of ascertaining the validity of a marriage under Australian law, the question whether a person is a man or a woman is *to be determined as of the date of the marriage*.
2. There is *no rule or presumption* that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth. Anything to the contrary in *Corbett* does not represent Australian law.

²⁵⁸ *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. App. 1976).

²⁵⁹ *Id.* at 211.

²⁶⁰ *Id.* at 209.

²⁶¹ *In re Kevin* (validity of marriage of transsexual) [2001] Fam CA 1074.

3. In the context of the rule that the parties to a valid marriage must be a man and a woman, the word "man" has its ordinary current meaning according to Australian usage.

4. There may be circumstances in which a person who at birth had female gonads, chromosomes and genitals, may nevertheless be a man at the date of his marriage. Anything to the contrary in *Corbett* does not represent Australian law.

5. In the present case, the husband at birth had female chromosomes, gonads and genitals, but was a man for the purpose of the law of marriage at the time of his marriage, having regard to all the circumstances, and in particular the following:-

(a) He had always perceived himself to be a male;

(b) He was perceived by those who knew him to have had male characteristics since he was a young child;

(c) Prior to the marriage he went through a full process of transsexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;

(d) At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man; and accepted as a man, by his family, friends and work colleagues;

(e) He was accepted as a man for a variety of social and legal purposes, including name, and admission to an artificial insemination program, and in relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;

(f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

6. For these reasons, the application succeeds, and there will be a declaration of the validity of the applicants' marriage.²⁶²

Significantly, *In Re Kevin* went beyond *M.T.* by not stressing the couple's capacity for heterosexual sexual intercourse. Its discussion of transsexual reassignment centered on the self-perception, and the overall perception of his sex by his peers.

By 1997, it became clear that the European perspective had changed radically. *X, Y and Z v. United Kingdom* distanced itself from *Cossey* and found a violation of human rights when a transsexual was disallowed from registering as the father of his wife's son by artificial insemination. The European Court of Human Rights frowned on the stigma placed on the family relations involved and held:

The Commission is further of the opinion that there is a clear trend in Contracting States towards the legal acknowledgement of gender re-assignment. It finds that in the case of a transsexual who has undergone irreversible gender re-assignment in a Contracting State and lives there with a partner of his former sex and child in a family relationship, there must be a presumption in favour of legal recognition of that relationship, the denial of which requires specific justification.²⁶³

In 2002, *Goodwin v. United Kingdom* found:

There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality.²⁶⁴

Thus, the ECHR held *Corbett* outmoded, and that denying the right of a post-surgery male-to-female transsexual to marry a man intruded into the very essence of her right to marry.²⁶⁵ Its companion case *I v. United Kingdom* ruled similarly.²⁶⁶ Thus, in 2003, England's House of Lords expressed great sympathy for transsexuals, and declared:

²⁶² *Id.*

²⁶³ *X, Y and Z v. United Kingdom*, [1997] 24 E.H.R.R. 143, 156.

²⁶⁴ *Goodwin v. United Kingdom*, [2002] 35 EHRR 18.

²⁶⁵ *Id.*

²⁶⁶ *I v. United Kingdom*, [2002] 35 EHRR 447.

[T]he recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates.²⁶⁷

Bellinger v. Bellinger disallowed the marriage in question, but only because it strongly declared an intent to effect *Goodwin* and *I* through legislation, after which the transsexual could legally marry.²⁶⁸ It again rejected *Corbett* and noted, "the application of the Corbett approach leads to a substantially different outcome in the cases of a post-operative intersexual person and a post-operative transsexual person, even though, post-operatively, the bodies of the two individuals may be remarkably similar."

Finally, *Kantaras v. Kantaras* not only recognized the validity of a transsexual's marriage, but granted a female-to-male transsexual custody of the estranged couple's children, concluding he was the more fit parent. According to the Court, Michael Kantaras had accomplished all that medical science required to succeed in the transition from female to male.²⁶⁹ He possessed the capacity to function sexually as any heterosexual male.²⁷⁰

The Court described Kantaras physically:

Michael is visibly male. He has a deep masculine voice, a chin beard and moustache, a thinning hair line and some balding, wide shoulders, muscular arms and the apparent shifting of fat away from the hips toward the stomach. He has a pronounced "maleness" that prompts one to automatically refer to Michael with the pronoun he or him.²⁷¹

²⁶⁷ *Bellinger v. Bellinger*, [2003] UKHL 21, ¶ 45.

²⁶⁸ *Id.*, ¶ 55.

²⁶⁹ *Kantaras*, 760.

²⁷⁰ *Id.*

²⁷¹ *Kantaras*, 761.

His psychological sexual identity need not be elaborated upon since he had, after all, long believed and considered himself as a man.

With regard to his right to marry, the court stressed that genetically heterosexual women who undergo hysterectomy and oophorectomy, post-menopausal women, men with erectile dysfunction and low sperm counts, and men with prostate problems are eligible to marry and may nevertheless be responsible parents to existing, adopted, or artificially inseminated children. The court found transsexuals in a similar situation:

There is no justification in the law to hold a transsexual to a higher standard than all heterosexuals in approaching marriage. Gender is only relevant, as male or female, at the time of application for a license to marry, not at birth. Age is the only requirement to be under oath. None for gender. The statement in *Corbett* that sex is fixed at birth is not the controlling law of Florida.

All heterosexuals are legally qualified to apply for a marriage license without having to prove they are capable of producing a family. Virility is not a requirement of either gender.²⁷²

Corbett, Kantaras pronounced, represented the traditionalist rule that the law and not the facts decided one's sex. the outcome of whether one is male or female. It vehemently rejected law's arbitrary disregard of medical science.²⁷³

Corbett and *M.T.*, in particular, have been dubbed a contrast "between syllogistic deduction and a pragmatic groping for solutions, a compassionate accommodation of legal policy to a novel, relatively uncommon problem."²⁷⁴ However, especially with the powerful declaration in *Bellinger* and *Goodwin*, and the lengthy medical testimony in *Kantaras*, it appears that *Corbett* has been definitively abandoned. Given these, and the fundamental natures of the right to marry and to privacy, there appears to be no reason to exclude a post-surgery transsexual from marriage solely on account of chromosomes.

²⁷² Kantaras, 766.

²⁷³ Kantaras, 767.

²⁷⁴ Swartz, *Updated Look at Legal Responses to Transsexualism: Especially Three Marriage Cases in U.K., U.S. and New Zealand* at <http://www.symposium.com/ijt/ijt0201.htm> (last visited Feb. 28, 2004).

E. Transsexualism and Psychological Capacity for Marriage

The *Corbett* line generally disregarded a person's psychological state and self-perceived gender as an indicator of sexuality. *Corbett* itself, again, emphasized three physical factors over a fourth psychological one. *Littleton*, similarly, set aside testimony by medical experts of the transsexual's belief that she was female since childhood and her consistent efforts to become female. Legally, it ruled, her male internal organs and chromosomes still made her a male.

Assuming one accepts that post-reassignment transsexuals should be legally categorized with heterosexuals with respect to the physical requisites of marriage following the *M.T.* line, one must still ask whether transsexualism might constitute psychological incapacity to marry. That is, does transsexualism impair an individual's capacity to comprehend, appreciate, and fulfill marriage's essential obligations

One must again distinguish transsexualism from homosexuality. Transsexualism refers to a divergence in physical sex and psychological gender, and sex reassignment precisely seeks to reconcile these by altering the former. Regardless of such reassignment, a heterosexual transsexual is, by definition, psychologically identical to a heterosexual of that gender. Sex reassignment affects only the physical makeup of the transsexual. Thus, after sex reassignment, a couple with a transsexual should be, by definition, psychologically indistinct from a heterosexual couple. One cannot apply Article 36 solely because of transsexualism, then.

Next, *Kantaras*⁷ powerfully answers the further questions of psychological capacity with respect to children under *Molina*. It enumerated a number of elements based on which it awarded custody:

- 1) Michael was more likely to allow the children continued contact with Linda if custody were awarded to him.
- 2) Michael had supported the family by himself.
- 3) Michael was deemed more morally fit, compared to Linda, who had violated previous court orders and misrepresented certain facts to the children.

- 4) Michael was more stable and less likely to undermine the relationship of the children with Linda if custody were awarded to him. On the other hand, Linda and her family actively undermined the children's relationship with Michael.
- 5) Michael had shown a more positive interest in advancing the children's schooling, and he was the one who financed it.²⁷⁵

On all points except the children's preference, which the court kept confidential, the transsexual Michael Kantaras was deemed the more dedicated and responsible parent. This was supported by a lengthy recounting of supporting facts. In fact, speaking of psychological health, it was the mother Linda Kantaras who was found to be suffering from a borderline personality disorder.

CONCLUSION

The New People's Army brought to the national fore the burning international issue regarding same sex marriage. It must be highlighted, however, that there is a decidedly legal aspect to the issue's intimate, fundamental nature. Marriage is decidedly a fundamental right given an exalted place in the 1987 Constitution, and gender is a traditionally suspect classification for equal protection. Further, privacy inheres in the individual, and Justice Reynato Puno has proposed that privacy is a fundamental right and restrictions of privacy must be subject to strict scrutiny.²⁷⁶

Given these powerful Constitutional bases, it must thus be emphasized that same sex marriage is not a matter of social policy, but one of individual right. One must recall the admonition of Oxford Professor of Jurisprudence Ronald Dworkin to distinguish principle from policy:

²⁷⁵ Kantaras, 785-790. See also *X, Y and Z v. United Kingdom*, [1997] 24 EHRR 143. "...reference to a research study in which it was reported that in a study of 37 children raised by transsexual or homosexual parents or carers, there was no evidence of abnormal sexual orientation or any other adverse effect (*Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, R. Green, *American Journal of Psychiatry*, volume 135, pages 692-697, 1978)."

²⁷⁶ REYNATO PUNO, LEGISLATIVE INVESTIGATIONS AND THE RIGHT TO PRIVACY 62 (2005), citing *Ople v. Torres*, G.R. No. 127685, 239 SCRA 143, 166, July 23, 1998. Second Davide lecture delivered Feb. 28, 2005, Malcolm Theater, UP College of Law.

But if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle. Consider, for example, the problem of the recent *Spartan Steel* case. The defendant's employees had broken an electrical cable belonging to a power company that supplied power to the plaintiff, and the plaintiff's factory was shut down while the cable was repaired. The court had to decide whether to allow the plaintiff recovery for economic loss following negligent damage to someone else's property. It might have proceeded to its decision by asking either whether a firm in the position of the plaintiff had a right to a recovery, which is a matter of principle, or whether it would be economically wise to distribute liability for accidents in the way the plaintiff suggested, which is a matter of policy

....

I propose, nevertheless, the thesis that judicial decisions in civil cases, even in hard cases like *Spartan Steel*, characteristically are and should be generated by principle not policy.²⁷⁷

Given this classic *Harvard Law Review* article, arguments for or against same sex marriage must turn on Constitutional principle, not social consensus. These principles, it is submitted, are brought into sharp focus by examining their operation on bisexuals and transsexuals.

2003 not only brought the landmark Massachusetts decision allowing same-sex marriage in an American state, it also brought the landmark decisions *Kantaras* and *Bellinger* that radically expanded the legal recognition of married transsexuals. Further, married bisexuals have long since been included within the traditional heterosexual marriage. The latter two categories have been relatively invisible in legal material, especially bisexuals. Marriage, however, is a fundamental individual right, and doctrines regarding it must apply to individuals of all genders, or they are intellectually faulty.

The idea of same-sex marriages challenges the very definition of marriage. Again, this paper does not seek to resolve the complex issue of its legality, but instead seeks to point out that the definitions of marriage proposed in reaction to the issue of same-sex marriages must hold true for heterosexual, homosexual, transsexual, and bisexual alike. Modern discussions have bifurcated sexuality into sex and gender, and definitions of marriage often emphasize one over the other. Heterosexual-centered definitions that focus on

²⁷⁷ Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975).

sex will indubitably include bisexuals, while those that focus on gender will indubitably include transsexuals.

Again, *Loving* held:

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. (internal citations omitted)²⁷⁸

The right to marry is one of the most cherished in the Constitutional order, and it arises from the weighty doctrines of Due Process and decisional privacy. Following *Eisenstadt*, it inheres in the individual, and following *Roberts*, it is indispensable for that associative self-expression that makes a man whole.

Whichever definition of marriage time proves correct stands to change the way every individual perceives oneself. Hopefully, Family Law will emerge with a definition that encompasses every human being. As Robert Frost wrote:

"Ah, when to the heart of man
Was it ever less than a treason
To go with the drift of things,
To yield with a grace to reason"²⁷⁹

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²⁷⁸ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

²⁷⁹ Robert Frost, "Reluctance."