The sexual/gender dicotomy

and the legal permutations of being Transgender

Some notes by Phyllis Frye

Sex is frequently legally defined as between the legs at birth. Birth certificates reflect male for a penis and female for vagina. However, with intersexed children born with both penis and vagina, unfortunately many doctors continue to push the parents to choose within days of birth for either amputation of the penis and scrotum (especially if deformed) or the closing of the vagina (the the penis and scrotum are not deformed.

Sometimes sex is defined legally as chromosomes of XX or XY. This is often inferred from the appearance of a "normal" penis and scrotum or the appearance of a "normal" vagina. However, some children are born with several combinations of X or Y. All of this is discussed in detail by Julie Greenberg in DEFINING MALE AND FEMALE: INTERSEXUALITY AND THE COLLISION BETWEEN LAW AND BIOLOGY, 41 Ariz L. Rev. 265 (1999).

But gender is defined as between the ears as the brain develops and the child begins to attempt to express the internal feeling of gender identity and live that internal feeling through the outward revelation of gender expression. There are no absolutes in either. There is no black and white only varying shades of inbetween, sometimes closer to one extreme or the other and sometimes closer to the middle. Examples are very effeminate gay men who are secure in their male gender identity but have a feminine gender expression as well as the very butch lesbians who are secure in their female gender identity but have a masculine gender expression. Other examples are transsexual children who have extreme gender identity discomfort with the genitals and assigned at birth social gender expression and are allowed to transition as children verses transsexual adults who cope through childhood and even cope through adulthood and may finally transition in their 60's or 70's. Still others are those whose gender identity and gender expression make a full transition, but they stop short of "bottom" surgery for a variety of reasons – financial, medical, comfortable as they are or the deficiencies of the surgical process.

So when it comes to legal sex for the purposes of marriage, the clothed and private "bottom" may not match the social expectations of the visible "top". And some states do not even recognize the reality of full-blown "bottom" surgery (although that is changing)>

So what is the status of the legality of a transgendered person to a non-transgendered person? See Frye and Meiselman, SAME-SEX MARRIAGES HAVE EXISTED LEGALLY IN THE UNITED STATES FOR A LONG TIME NOW, 64 Albany L. Rev. 1031 (2001)

How many permutations can you come up with?

Is marriage to a transgendered person legal as a same-sex or opposite sex marriage?

Before or after Windsor?