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TRANSGENDER STERILISATION REQUIREMENTS IN EUROPE

ABSTRACT

The possibility of individuals procreating post-transition has long stalked debates on transgender rights. In 1972, Sweden became the first European jurisdiction to formally acknowledge preferred gender. Under the original Swedish law, applicants for gender recognition were explicitly required to prove an incapacity to reproduce – either through natural infertility or through a positive act of sterilisation. Across the Council of Europe, 22 countries continue to enforce a sterilisation requirement. When considering reforms to their current gender recognition rules as recently as 2015, the Polish executive and the Finnish legislature both rejected proposals to remove mandatory infertility provisions. This article critiques the rationales for transgender sterilisation in Europe. It places transgender reproduction, and non-traditional procreation, in the wider context of European equality and family law. Adopting a highly inter-disciplinary framework, the article explores legal, social, medical and moral arguments in favour of sterilisation, and exposes the weak intellectual and evidential basis for the current national laws. The article ultimately proposes a new departure for Europe's attitude towards transgender parenting, and argues that sterilisation should not be a pre-condition for legal recognition.

KEYWORDS

Transgender – Sterilisation – Europe – Equality – Legal Gender Recognition – Children

INTRODUCTION

The possibility of transgender individuals procreating post-transition has long stalked debates on transgender rights.¹ For many observers, the image of a man giving birth, or a woman producing sperm, is so ‘inconceivable’ that, rather than eliciting concern or rejection, it simply creates a sense of farce, even ‘absurdity’.² When Rosenblum, in his call to ‘unsex mothering’, proclaimed that he ‘was, until recently, a pregnant man’³, academic colleagues lauded the author’s transgressive intent but were quick to emphasise that a pregnancy relationship, properly understood, was not actually in existence. For others, however, transgender reproduction represents a more serious, possibly dangerous, shift in cultural norms.⁴ Instead of offering a harmless retreat into anti-reality, the pregnant man and ‘begetting woman’ are an existential threat.⁵ Commenting on public reactions to Thomas Beatie – an American

¹ E Parker, ‘Male pregnancy and queer utopia in Paul Magrs’s “Could it be Magic?”’ (2014) 28(6) *Textual Practice* 1035; SD More, ‘The Pregnant Man-An Oxymoron?’ (1998) 7(3) *Journal of Gender Studies* 319, 323; P Currah, ‘Expecting Bodies: The Pregnant man and Transgender Exclusion from the Employment Non-Discrimination’ (2008) 36(3 & 4) *Women's Studies Quarterly* 330, 330.

² I Aristarkhova, ‘Man as Hospitable Space: The male pregnancy project’ (2009) 14(4) *Performance Research* 25, 27.

³ D Rosenblum, ‘Unsex Mothering: Toward a New Culture of Parenting’ (2012) 35 *Harvard Journal of Law and Gender* 57, 58.

⁴ K Mitu, ‘Transgender Reproductive Choice and Fertility Preservation’ (2016) 18(11) *AMA Journal of Ehtics* 1119, 1922-1923.

⁵ Emma Parker writes that ‘critics agree that the pregnant man is typically presented as comic or monstrous’. Parker (n 1), 1037. Feminist scholars have also criticised the notion of the pregnant man as an attempt to misappropriate the female experience of reproduction; see S. Velasco, *Male Delivery: Reproduction, Effeminacy, and Pregnant Men in Early Modern Spain* (Nashville: Vanderbilt University Press, 2006) xiii–xiv.

transgender man who revealed his pregnancy in 2008⁶ – Currah recalls expressions of ‘disbelief’, ‘annoyance’ and ‘revulsion’.⁷ Post-transition reproduction is not only considered abnormal. It is also deviant⁸ and must be avoided wherever possible.

Fear over transgender procreation has had a profound impact on the way European jurisdictions legally recognise gender. In 1972, Sweden became the first European country to formally acknowledge transgender persons’ preferred identity.⁹ Under the original Swedish law, applicants for gender recognition were explicitly required to prove an incapacity to reproduce – either through natural

⁶ T Beatie, ‘Labor of Love’ *The Advocate* 14 March 2008, at <
<http://www.advocate.com/news/2008/03/14/labor-love>>.

⁷ Currah (n 1), 330.

⁸ S B Bergman, *The Nearest Exit May be Behind You* (Vancouver: Arsenal Pulp, 2009) 145; see also J Landau, ‘Reproducing and Transgressing Masculinity: A Rhetorical Analysis of Women Interacting with Digital Photographs of Thomas Beatie’ (2012) 35(2) *Women's Studies in Communication* 178, 186.

⁹ SFS 1972:119; Lag (1972:119); see also, J Garland, ‘The Legal Status of Transsexual and Transgender Persons in Sweden’ in J M Scherpe (eds), *The Legal Status of Transsexual and Transgender Persons* (London: Intersentia, 2015) 281.

infertility or through a positive act of sterilisation.¹⁰ Across the Council of Europe¹¹, 22 countries¹² (out of 41 jurisdictions which permit gender recognition) continue to enforce a sterilisation requirement.¹³ When considering reforms to their current gender recognition rules as recently as 2015, the Polish Executive¹⁴ and the Finnish legislature¹⁵ rejected proposals to remove mandatory infertility provisions. In Ukraine and the Czech Republic, requirements for ‘removal of sexual organs and mammary glands’ and the ‘disabling of the reproductive function’ were explicitly enshrined in national law as part of 2011 and 2014 reforms.¹⁶ In France, the Cour de Cassation held, in a 2013 judgment, that the French

¹⁰ Ibid.

¹¹ The Council of Europe is a 47-member grouping of European states, which is dedicated to the protection of human rights. Among the members of the Council of Europe are all 28 Member States of the European Union. The members of the Council of Europe are also State Parties to the European Convention on Human Rights, which is overseen by the European Court of Human Rights. The Council of Europe has a number of political institutions, including a Secretary General, Committee of Ministers and Parliamentary Assembly (This information was taken from the official website of the Council of Europe at < <http://www.coe.int/en/web/about-us/who-we-are> > accessed 16 April 2017).

¹² Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Finland, Georgia, Greece, Kosovo, Latvia, Lithuania, Luxembourg, Macedonia, Russia, Montenegro, Romania, Serbia, Slovakia, Slovenia, Switzerland, Turkey and Ukraine.

¹³ Transgender Europe, ‘Trans Rights Europe Index 2016’ *TGEU Website* 10 May 2016 at < <http://tgeu.org/wp-content/uploads/2016/05/trans-map-B-july2016.pdf> > accessed 3 November 2016.

¹⁴ Transgender Europe, ‘Polish President Duda vetoes Polish Gender Accordance Act’ *TGEU Website* 2 October 2015 at < <http://tgeu.org/tgeu-statement-polish-president-duda-vetoes-polish-gender-accordance-act/> > accessed 3 December 2016. The current Law and Justice Party dominated parliament has refused to reconsider Poland’s sterilisation requirement.

¹⁵ Transgender Europe, ‘The Finnish Government should Respect Human Rights of Trans People’ *TGEU Website* 22 October 2015 at < <http://tgeu.org/the-finnish-government-should-respect-human-rights-of-trans-people/> > accessed 3 December 2016.

¹⁶ For Ukraine, see Human Rights Watch, ‘Allegation letter regarding the legal gender recognition procedure in Ukraine, as specified in Order No. 60 of the Ministry of Health of Ukraine’ *Human Rights Watch Website* 27

parliament was entitled to impose infertility as part of that country's gender recognition procedures (amended in October 2016).¹⁷

In recent years, the European Court of Human Rights ('ECtHR') has increasingly scrutinised transgender sterilisation requirements.¹⁸ In its landmark 2017 opinion, *AP, Garçon and Nicot v France*¹⁹, the Court held that, by conditioning gender recognition on submission to 'a sterilisation operation or medical treatment creating a high probability of sterilisation',²⁰ France had violated the applicants' right to private life under Art. 8 of the European Convention on Human Rights ('ECHR').²¹ Prior to that decision, a similar conclusion had been reached by national courts in Germany²², Sweden²³ and Italy.²⁴ These judgments are a welcome affirmation of transgender rights, particularly the protection of bodily integrity. Yet, as a critical evaluation of Europe's sterilisation requirements, they provide only limited (often superficial) analysis. In particular, both European and national judges have largely failed to engage with the justifications which lawmakers offer in support of sterilisation. While the existing case law rejects infertility clauses as a disproportionate breach of physical autonomy, it has not meaningfully critiqued their rationales. Indeed, statements from the ECtHR,²⁵ as well as the highest

April 2015 at < <https://www.hrw.org/news/2015/04/27/allegation-letter-regarding-legal-gender-recognition-procedure-ukraine-specified> > accessed 3 December 2016. For Czech Republic, see B Hevelkova, 'The Legal Status of Transsexual and Transgender Persons in the Czech Republic' in Scherpe (n 9), 131.

¹⁷ French Cour de Cassation, Judgment 10-26.947 (13 February 2013).

¹⁸ *YY v Turkey* ECtHR 10 March 2015.

¹⁹ ECtHR 6 April 2017.

²⁰ *Ibid*, [135].

²¹ *Ibid*.

²² Federal Constitutional Court of Germany, 1 BvR 3295/07 (11 January 2011).

²³ Stockholm Administrative Court of Appeals, *Socialstyrelsen v NN*, Mål nr 1968-12 (19 December 2012).

²⁴ Constitutional Court of Italy, 221/2015 (21 October 2015)

²⁵ *YY* (n 18), [41]; *AP, Garçon and Nicot* (n 19), [132].

courts in Germany and Sweden,²⁶ reveal a general assumption that, irrespective of disproportionality, transgender sterilisation requirements do pursue valid aims.²⁷

The failure to properly assess the justifications for sterilisation creates tangible disadvantages for Europe's transgender population, even where sterilisation requirements are ultimately considered to be disproportionate. These justifications, and more specifically the cultural and scientific beliefs which they reflect, have an influence outside the narrow context of legal gender recognition. Labelling transgender individuals as incapable child-carers may not justify sterilisation, but it can legitimise national rules which withhold custody or reduce employment rights. To the extent that Europe's judges accept – even implicitly in order to expedite a finding of disproportionality – unproven rationales for infertility, they facilitate and encourage wider discrimination against Europe's transgender population. According to Strangio, '[i]f we establish in law and social discourse that bodies must be coherently sexed to be legitimate, we make spaces for the harassment and violence levied upon those whose bodies transgress those expectations'.²⁸ Indeed, both the European Union's Fundamental Rights Agency ('EU FRA'),²⁹ and the Human Rights Commissioner of the Council of Europe³⁰, have recently documented the exponentially higher rates of inequality suffered by transgender communities. Unless judges are willing to confront discriminatory rationales for transgender sterilisation, and to acknowledge that transgender procreation poses no threat to society, it is unlikely that Europe will be able to reduce the current high levels of transphobic abuse.

²⁶ BvR 3295/07 (n 22), *NN* (n 23).

²⁷ *Ibid.*

²⁸ C Strangio, 'Can Reproductive Trans Bodies Exist?' (2015) 19 *City University of New York Law Review* 223, 243.

²⁹ Fundamental Rights Agency of the European Union, *Being Trans in the EU – Comparative Analysis of the EU LGBT Survey Data* (Luxembourg: Publications Office of the European Union, 2014).

³⁰ Human Rights Commissioner of the Council of Europe, *Human Rights and Gender Identity – Issue Paper* (Strasbourg: COE, 2009).

This article critiques the rationales for transgender sterilisation in Europe. It places transgender reproduction, and non-traditional procreation, in the wider context of European equality and comparative family law. Adopting a highly inter-disciplinary framework, the article explores legal, social, medical and moral arguments in favour of sterilisation, and exposes the weak intellectual and evidential basis for the current national laws. The article ultimately proposes a new departure for Europe's attitudes towards transgender parenting, and argues that sterilisation should not be a pre-condition for legal recognition.

The article proceeds in five parts. Part I offers a broad overview of the sterilisation requirement. It introduces key terms, contextualises the right to gender recognition in Europe, identifies common rationales for transgender sterilisation and briefly describes national and supra-national resistance. In Parts II-IV, the article shifts to critique the three central arguments which have been raised in support of sterilisation requirements: the need for legal certainty (Part II), enforcing child protection (Part III) and preserving natural reproduction (Part IV). The article illustrates how each of these claims either lacks a sufficient normative or scientific basis, or can be achieved without requiring transgender infertility.

Part II demonstrates that a definitive child-parent relationship is not contingent on transgender sterilisation. Transgender procreation is no less legally certain than other non-normative (and even normative) reproductive scenarios accepted across Europe. In Part III, the article addresses concerns over child welfare and protection. Part III questions whether possible future discrimination, encouraged by prejudice, justifiably restricts transgender persons engaging in otherwise unobjectionable procreation. Similarly, Part III also explores existing social science research which suggests that, far from creating disadvantage, transgender parents are just as capable of raising healthy children as their non-transgender counterparts. Finally, moving away from quasi empirical claims towards more normative objections, Part IV considers whether transgender procreation constitutes an unnatural, socially undesirable reproductive practice. Challenging the proposition that procreative capacities naturally determine gender, Part IV argues that women and men are not defined by their ability to bear

or beget children. Giving birth should not undermine a transgender man's legal gender, nor should producing sperm affect a transgender female's status. Finally, in Part V, the article makes concluding observations and argues that Europe's lawmakers, as well national judiciaries, are yet to offer a compelling, coherent justification for sterilising applicants for gender recognition.

I. THE STERILISATION REQUIREMENT: AN OVERVIEW

A. Transgender Identities and the Right to Legal Gender Recognition

Transgender (hereinafter 'trans') is an umbrella term which refers to all individuals whose gender identity (one's internal sense of gender and self) and/or gender expression differs from the legal gender that was assigned at birth.³¹ While there are no definitive statistics for Europe's trans population, it is estimated that as many as 0.60% of people may have a gender variant identity.³² Like the 'cisgender' population – a term derived from the Latin word 'cis' ('on this side of') and referring to persons who identify with their birth-assigned gender – trans individuals form diverse and varied communities.³³

³¹ See: S Whittle, *Respect and Equality: Transsexual and Transgender Rights* (London: Routledge, 2002).

³² A Flores and others, *How Many Adults Identify as Transgender in the United States* (Los Angeles: UCLA, 2016) 2 at < <http://williamsinstitute.law.ucla.edu/research/how-many-adults-identify-as-transgender-in-the-united-states/>> accessed 3 December 2016.

³³ Transgender Equality Network Ireland, 'Trans Terms' *TENI website* at < <http://www.teni.ie/page.aspx?contentid=139>> accessed 3 December 2016. The term 'cisgender' is not linked to the English language pejorative phrase, 'sissy'. It is used to illustrate that there is no single ('normative') experience of gender.

There is no single trans narrative or experience.³⁴ While many individuals seek to live in their ‘preferred gender’ (‘transition’³⁵) through medical intervention, others prioritise legal and social recognition.³⁶ Some trans people cannot or will not alter their sex characteristics, including their reproductive capacities, but place great importance on private and public affirmation of their preferred identity. Legal gender recognition has particular significance for trans populations. Without a passport or birth certificate which confirms their lived gender, trans populations may be unable to access basic rights and services, including public transportation, postal services and even marriage.³⁷

The right to legal gender recognition is the product of a decades-long legal fight waged by Europe’s trans advocates. Following numerous unsuccessful applications,³⁸ the ECtHR finally acknowledged a general entitlement to gender recognition in *Goodwin v UK*,³⁹ holding that the UK’s failure to offer Christine Goodwin an amended birth certificate violated her right to private life under Art. 8 ECHR.⁴⁰ The *Goodwin* case was a landmark moment for trans rights in Europe. The ECtHR’s reasoning was subsequently adopted by other global human rights actors, including the UN Human Rights Committee

³⁴ Throughout his memoir, the trans author, Jamison Green, discusses the many and varied ways in which trans persons, particularly trans males, express and live a trans identity; J Green, *Becoming a Visible Man* (Vanderbilt University Press, 2004).

³⁵ ‘Transition’ refers to a process whereby an individual ‘transitions’ to living in their preferred gender. There is no ‘standard’ procedure for transitioning.

³⁶ O Tomchin, ‘Bodies and Bureaucracy: Legal Sex Classification and Marriage-Based Immigration for Trans* People’ (2013) 101 California Law Review 813, 843.

³⁷ United Nations Development Programme, *Transgender Health and Human Rights* (2013) 21-23.

³⁸ *Rees v UK* [1987] 9 EHRR 56; *Cossey v UK* [1991] 13 EHRR 622; *Sheffield and Horsham v UK* [1999] 27 EHRR 163.

³⁹ *Goodwin v United Kingdom* [2002] 35 EHRR 18.

⁴⁰ *Ibid*, [93].

and the UN High Commissioner for Human Rights.⁴¹ While a minority of outlier European states continue to withhold gender recognition,⁴² most individuals within the Council of Europe can access procedures for recognising preferred gender.

Yet, while *Goodwin* established a general right to recognition, it allowed individual State Parties to determine the precise conditions of access.⁴³ In consequence, different European jurisdictions have adopted radically different rules. Twenty-three countries currently require trans persons to dissolve an existing marriage before obtaining legal gender recognition.⁴⁴ Dissolution requirements are intended to ease political and social concerns that gender recognition would become a Trojan horse for same-gender marriage. There is a general belief that, by '[r]ecognising the [preferred] gender of a married person', the law 'would convert that person's marriage into a same-sex marriage'.⁴⁵ Throughout the Council of Europe, legal recognition is also generally restricted to those persons who have achieved the age of majority. Only five European jurisdictions – Ireland, Sweden, Malta, Norway and the Netherlands – acknowledge the preferred gender of individuals under 18 years and, in all five countries, minors confront a more onerous or restrictive framework than trans adults.⁴⁶ In a majority of countries, children

⁴¹ UNHRC 'Concluding observations of the United Nations Human Rights Committee on report of Ireland' (30 July 2008) UN Doc CCPR/C/IRL/CO/03, [8], United Nations High Commissioner for Human Rights, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, (17 November 2011) UN Doc No A/HRC/19/41, [84(h)].

⁴² TGEU Index (n 13). The states are San Marino, Cyprus, Andorra, Albania, Lichtenstein and Macedonia.

⁴³ *Goodwin* (n 39), [85].

⁴⁴ TGEU Index (n 13).

⁴⁵ The Equality Authority of Ireland, *Observations on the Revised General Scheme of the Gender Recognition Bill 2014*, (Dublin: Walsh Printers, 2014) 25.

⁴⁶ TGEU Index (n 13).

are either *de jure* or *de facto* excluded from the gender recognition process.⁴⁷ Express prohibitions are enforced in numerous European jurisdictions, including Spain, Portugal, Belgium, Poland, Czech Republic and Ukraine.⁴⁸

The requirements that trans individuals modify their body are perhaps the best unknown (and most widely expected) pre-conditions for gender recognition. In 23 European states, applicants for recognition must submit to gender confirming surgeries.⁴⁹ While there is no standard or uniform surgical process, required interventions usually focus on genital alterations, chest modifications and the removal of internal organs. Until 2004,⁵⁰ every European country, which formally acknowledged a person's preferred gender identity, required that the individual be infertile or sterilised. In 2017, 22 countries across the Council of Europe (a majority of states that acknowledge preferred gender) continue to withhold legal recognition until an applicant proves that he or she cannot reproduce.⁵¹ Article 62bis(3)(2) of the Belgian Civil Code provides that an individual must 'no longer be capable of producing children in accordance with his or her previous gender'. Similarly, in Finland, s. 1 of the Transsexuals (Confirmation of Gender) Act requires proof that an applicant 'has been sterilized or is for some other reason incapable of reproducing'. In other jurisdictions, such as Ukraine, sterilisation

⁴⁷ In Europe, jurisdictions, such as Croatia, Moldova and Switzerland do not explicitly prohibit or restrict acknowledging the preferred gender of children. Yet, there is little evidence that trans minors in these countries are successfully navigating the recognition process.

⁴⁸ TGEU Index (n 13).

⁴⁹ Ibid.

⁵⁰ In 2004, the United Kingdom enacted the Gender Recognition Act 2004 which specifically omitted a requirement that individuals submit to either surgical intervention or sterilisation in order to obtain a Gender Recognition Certificate.

⁵¹ TGEU (n 13).

forms part of a wider obligation to undergo gender confirming surgeries.⁵² As noted, s. 29(1) of the new Czech Civil Code defines ‘sex change’ surgery to include ‘the disabling of reproductive function’.⁵³

B. Justifications for the Sterilisation Requirement

Europe’s lawmakers and judges have offered no single justification for conditioning gender recognition on sterilisation. From the existing case law, policy debates and literature, however, one can identify three central justifications – legal certainty, child welfare and natural reproduction – buttressed by two initial presumptions.

First, relying upon what Emens refers to as ‘immutable nature’,⁵⁴ there is a presumption that that only (legal) women are capable of giving birth to children and that (legal) men produce sperm. Describing the gender recognition rules enshrined in Art. 40 of Turkey’s Civil Code, Atamer observes the unchallenged presumption that, if an individual retains the ability to conceive a child, the law must, as a matter of nature, confer a female status upon that person.⁵⁵ According to Ellis, Wodjnar and Pettinato, pregnant men create political and cultural unease because they destabilise ‘social norms that define a pregnant person as woman and a gestational parent as mother’.⁵⁶ Second, there is also a widespread

⁵² HRW (n 16).

⁵³ Hevelková (n 16), 131.

⁵⁴ Comments of E Emens in D Rosenblum, ‘“A Pregnant Man?” A Conversation’ (2010) 22 Yale Journal of Law and Feminism 207, 228.

⁵⁵ YM Atamer, ‘The Legal Status of Transsexual and Transgender Persons in Turkey’ in Scherpe (n 9), 317-321.

⁵⁶ SA Ellis, DM Wojnar and M Pettinato, ‘Conception, pregnancy, and birth experiences of male and gender variant gestational parents: it’s how we could have a family’ (2014) 60(1) Journal of Midwifery Women’s Health 62, 64.

(unproven) assumption that Europe's trans population would not want to reproduce.⁵⁷ While scholars, such as de Sutter et al.⁵⁸ and Wierckx et al.,⁵⁹ have documented strong reproductive desires among European trans communities, there is still a prevailing belief that trans men would suffer distress conceiving a child and that trans women would reject producing sperm.⁶⁰ Indeed, the rights monitoring organisation, Human Rights Watch, reports that some European authorities even refuse to accept that an individual is trans if they desire to maintain their natural reproductive capacities.⁶¹ In the United Kingdom, where Parliament omitted a sterilisation clause from the Gender Recognition Act 2004 ('the 2004 Act'), Whittle and Turner recall that Judge Harris, President of the First Gender Recognition Panel, still required 'confirmation that gender reassignment surgery [which would sterilise the individual] had been undergone, or at the very least was intended to be undergone'.⁶²

Within national courts and legislatures, trans procreation is frequently opposed as undermining legal certainty. The vista of a man giving birth or a woman begetting children threatens, so the argument goes, the ability of Europe's family law systems to efficiently and coherently function. Nishitani

⁵⁷ A. Kassam, 'Breastfeeding as a trans dad: 'A baby doesn't know what your pronouns' *The Guardian* 20 June 2016 at < <https://www.theguardian.com/society/2016/jun/20/transgender-dad-breastfeeding-pregnancy-trevor-macdonald> > accessed 3 December 2016.

⁵⁸ P de Sutter and others, 'The Desire to have Children and the Preservation of Fertility in Transsexual Women: A Survey' (2002) 6(3) *The International Journal of Transgenderism* at < http://www.iiav.nl/ezines/web/ijt/97-03/numbers/symposion/ijtvo06no03_02.htm > accessed 3 December 2016.

⁵⁹ K. Wierckx and others, 'Reproductive Wish in Transsexual Men' (2011) 27(2) *Human Reproduction* 483.

⁶⁰ L. Nixon, 'The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility and Family-Building Issues Facing Transgender People' (2013-2014) 20 *William and Mary Journal of Women and Law* 73.

⁶¹ HRW (n 16).

⁶² S. Whittle and L. Turner, "'Sex Changes'? Paradigm Shifts in "Sex" and "Gender" Following the Gender Recognition Act?' (2007) 12(1) *Sociological Research Online* at <http://www.socresonline.org.uk/12/1/whittle.html> > accessed 3 December 2016.

observes fears that trans procreation can ‘cause confusion and complications to the parentage and family order’.⁶³ In defending the necessity of its sterilisation requirement in *AP, Garçon and Nicot*, the French Government argued that the need to guarantee a reliable and coherent civil status in France justified the alleged interference with applicants’ bodily integrity rights.⁶⁴ If *mater semper certa est*, what is the status of a legal male who conceives a child?

Sterilisation provisions are also promoted as a means of protecting child welfare.⁶⁵ Summarising European debates on gender recognition Kohler, Recher and Ehrhart observe a concern that, where trans persons are allowed to reproduce, their children will suffer from discrimination and prejudice.⁶⁶ Just as homophobia has been raised in opposition to same-gender adoption, there is a sense that trans parents should not subject children to social, economic and legal transphobia. In addition, there are doubts over the capacity of trans individuals to fulfil the parental role.⁶⁷ In 36 jurisdictions across Europe, applicants for gender recognition must present a diagnosis of either transsexualism, gender dysphoria or gender identity disorder.⁶⁸ Irrespective of the clinical implications, the diagnosis unequivocally signifies that the individual has a mental health concern. Dickey, Ducheny and Ehrhart write that ‘[t]hose opposing [trans procreation]...propose that a [trans]identity is inherently pathological and subsequently question whether a [trans] person is an appropriate candidate...whereas others question whether [trans] people

⁶³ Y Nishitani, ‘The Legal Status of Transgender and Transsexual Persons in Japan’ in Scherpe (n 9), 378.

⁶⁴ *AP, Garçon and Nicot* (n 19), [105]-[106].

⁶⁵ L. Karaian, ‘Pregnant Men: Repronormativity, Critical Trans Theory and the Re(conceive)ing of Sex and Pregnancy in Law’ (2013) 22(2) *Social and Legal Studies* 211, 222.

⁶⁶ R Kohler, A Recher and J Ehrhart, *Legal Gender Recognition in Europe* (Berlin: TGEU, 2013), 62.

⁶⁷ Ibid. See also, D Brothers, W C L Ford and the University of Bristol Centre for Reproductive Medicine Ethics Advisory Committee, ‘Gender reassignment and assisted reproduction: An ethical analysis’ (2000) 15(4) 737; TF Murphy, ‘Commentary: Crossing Cultural Divides: Transgender People Who Want to Have Children’ (2012) 21 *Cambridge Quarterly of Healthcare Ethics* 284.

⁶⁸ TGEU (n 13).

are “fit” to be good parents’.⁶⁹ Both medical and policy decision-makers have argued that mental distress associated with gender identity should automatically disqualify trans persons from becoming parents. Indeed, de Sutter et al note that, even within Europe’s trans communities, there are persons who ‘believe the psychological trauma they had to go through because of their gender dysphoria would impair a normal parent-child relationship’.⁷⁰

Finally, across Europe, infertility requirements are imposed as a means of protecting the ‘normative nature’ of reproduction. Even if legal men and women *can* and *want* to conceive or beget children, there are, it is argued, reasons why this *should* not happen.⁷¹ In an important 2011 judgment, the German Constitutional Court struck down the sterilisation clause under s. 8 of the Federal Transsexual Act 1980 (‘the 1980 Act’).⁷² However, in its published opinion, the Court nevertheless warned that allowing trans individuals to procreate (using their natural reproductive organs) after gender recognition ‘contradict[s] the concept of the sexes and would have far-reaching consequences for the legal order’.⁷³ In a European context, centred around what Fineman calls ‘the sexual family’⁷⁴ – ‘a heterosexual relationship between a man and a woman...romanticized in the glorification of the nuclear family...[which] is central to traditional family law ideology’⁷⁵ – sterilisation requirements reinforce comprehensible, normatively desirable procreative standards. Indeed, given that the ‘politics and practices of reproduction have

⁶⁹ L M Dickey, K M Ducheny and R D Ehrbar, ‘Family Creation Options for Transgender and Gender Nonconforming People’ (2016) 3(2) *Psychology of Sexual Orientation and Gender Diversity* 173, 174.

⁷⁰ de Sutter and others (n 58).

⁷¹ Atamer (n 55). Similar arguments have been raised against trans reproduction outside of Europe (e.g. K Nelson, ‘The Small Person Acquisition Project’ *The Current* 2011 at <<http://thirdcoastfestival.org/library/982-the-small-person-acquisition-project>> accessed 3 December 2016.)

⁷² BvR 3295/07 (n 22).

⁷³ Ibid.

⁷⁴ M A Fineman, ‘The Neutered Mother’ (1992) 46(3) *University of Miami Law Review* 653, 662-666.

⁷⁵ Ibid, 663.

historically rested on one key certainty...that only women were the bearers of babies'⁷⁶, post-transition reproductive threatens to invert 'traditional notions of gender'.⁷⁷

C. Challenging the Sterilisation Requirement

Europe's sterilisation requirements have not gone unchallenged. In 2015, the United Nations (UN) High Commissioner for Human Rights called upon states to '[issue] legal identity documents, upon request, that reflect preferred gender...[while] eliminating abusive preconditions, such as sterilization'.⁷⁸ The Parliamentary Assembly of the Council of Europe has recently recommended that State Parties 'abolish sterilisation...as a necessary legal requirement to recognise a person's gender identity'.⁷⁹ As noted, these soft-law recommendations have now been explicitly endorsed by the ECtHR in *AP, Garçon and Nicot v France*.⁸⁰ The Court observed that sterilisation requirements place applicants for legal gender recognition in an 'insoluble dilemma'.⁸¹ Either trans individuals forfeit their reproductive capabilities, and thus sacrifice their bodily integrity, or they refuse medical intervention and forgo their fundamental right to be acknowledged in their preferred gender.⁸² Such an ultimatum confronts applicants with an impossible choice, and is not compatible with a state's positive obligations under Art. 8 ECHR.⁸³

⁷⁶ J Maher, 'A pregnant man in the movies: The visual politics of reproduction' (2008) 22(2) Continuum 279, 279.

⁷⁷ Landau (n 8), 183.

⁷⁸ United Nations High Commissioner for Human Rights, 'Discrimination and violence against individuals based on their sexual orientation and gender identity', (4 May 2015) UN Doc No A/HRC/29/23, [79(i)].

⁷⁹ Parliamentary Assembly of the Council of Europe, 'Discrimination against Transgender People in Europe' (22 April 2015) Resolution 2048 (2015), [6.2.2].

⁸⁰ *AP, Garçon and Nicot* (n 19).

⁸¹ *Ibid*, [132].

⁸² *Ibid*.

⁸³ *Ibid*, [135].

Starting with the 2004 Act, a number of European jurisdictions, including Norway, Denmark, Sweden, and Malta have removed infertility clauses from their national gender identity laws.⁸⁴ As noted, in 2011, the German Constitutional Court held that sterilisation was incompatible with the Basic Law right to physical integrity.⁸⁵ In Sweden, the Stockholm Administrative Court of Appeals also invoked physical integrity to strike down sterilisation in the original 1972 Act.⁸⁶ In reasoning closely followed by the ECtHR in *AP, Garçon and Nicot*, the Stockholm court suggested that, where it is an absolute condition for obtaining gender recognition, consent to sterilisation cannot be considered as ‘voluntary’.⁸⁷ In Italy, the Constitutional Court held that, in determining the relationship between a person’s preferred and assigned genders, ‘the protection of health’ should be the priority.⁸⁸ While gender confirming surgeries, and the removal of natural reproductive organs, may assist some trans persons to achieve better mental health, it should not be a pre-condition for legal gender recognition.

This growing body of case law, and the actions of national policy makers, is an important affirmation of Europe’s trans population. Against a background where trans individuals, across the continent, experience disproportionate rates of physical violence,⁸⁹ emphasising bodily integrity rights is a symbolic statement that all actors – both state and non-state – should respect trans autonomy. Yet, while courts and law makers increasingly prohibit the operation of trans sterilisation, they have largely failed to

⁸⁴ K Knight and N Goshal, ‘Recognizing the Rights of Transgender People’ *Human Rights Watch*, 13 February 2016), at < <https://www.hrw.org/news/2016/02/13/recognizing-rights-transgender-people>> accessed 3 December 2016; TGEU (n 13); ILGA-Europe, ‘Its Official – France Adopts a New Legal Gender Recognition Procedure’ *ILGA-Europe website* 12 October 2016 at < <http://ilga-europe.org/resources/news/latest-news/france-adopts-new-legal-gender-recognition-procedure> > accessed 3 December 2016.

⁸⁵ 1 BvR 3295/07 (n 22).

⁸⁶ *NN* (n 23).

⁸⁷ *Ibid.*

⁸⁸ 221/2015 (n 24).

⁸⁹ FRA EU (n 29), 10.

consider the reasons why such requirements are imposed in the first place. *AP, Garçon and Nicot*, as well as the various national court judgments on sterilisation, clearly assert that enforced infertility is a not a proportionate interference with trans private lives. However, the decisions offer little in the way of critical reflection on the legitimacy of the aims which that interference purports to pursue. Similar patterns are observable in legislative action against infertility requirements. The British parliamentary debates on the landmark Gender Recognition Act 2004 reveal considerable concern for the physical integrity of trans individuals. Yet, as with their judicial counterparts, the members of Parliament demonstrated little evidence that they were engaged with, and seeking to refute, common arguments against trans reproduction.⁹⁰ To the extent that (a) the rationales for infertility reflect historic prejudice against trans communities and (b) that they may continue to justify restricting trans rights in other contexts, it is increasingly necessary to properly evaluate the legal, scientific and moral arguments on which they are based.

II. CERTAINTY IN FAMILY LAW

A primary justification against procreation post-transition is that legal men giving birth, or legal women begetting children, would impermissibly destabilise Europe's family law systems. When Sweden enacted its original gender recognition law in 1972, a core rationale for sterilisation was maintaining legal certainty.⁹¹ If trans individuals, who have been acknowledged in their preferred gender, can nevertheless procreate using their natural reproductive capacities, there is a fear that any resulting children will be confused about their genetic origins or denied important family relationships.⁹² Where

⁹⁰ HL Deb vol 651 cc63-5WA 11 July 2003; HL Deb vol 657 cc257-8 08 January 2004; HL Deb vol 656 cc1060-92 10 February 2004; HL Deb vol 656 cc1093-5 11 February 2004; HC Deb vol 418 cc48-108 23 February 2004; HC Deb vol 418 c108 23 February 2004.

⁹¹ *NN* (n 23).

⁹² Kohler, Recher and Ehrt (n 66), 62.

a trans man conceives and gives birth to a child, is he a ‘mother’, ‘parent’ or, if intending to raise the child with his female partner, a legal father?

The need for legal certainty has played, and continues to enjoy, a primary role in shaping European responses to trans identities. As recently as 2011, the German federal government, when defending the sterilisation requirement in the 1980 Act, relied upon the supposed incompatibility of trans reproduction within a family law system based on child-bearing women and sperm-producing men.⁹³ As noted above, legal certainty and stability was also the main defence offered by the French government in *AP, Garçon and Nicot*.⁹⁴ In jurisdictions, such as Ireland, Malta and the United Kingdom, which formally acknowledge preferred gender, the law expressly states that gender recognition cannot alter, or erase, existing family law obligations.⁹⁵ An Irish trans woman, who has gained paternal rights through providing sperm for conception, cannot lose, or relinquish, her paternal status merely because she has been affirmed in her female identity.⁹⁶ In *JK, R (on the application of) v Secretary of State for the Home Department*, Hickinbottom J, considering whether a trans woman could be re-registered as female, or a ‘parent’, on her child’s birth certificate, observed that the desires of trans parents have to be balanced against ‘the public interest in having coherent administrative systems’.⁹⁷

Without doubt, promoting certainty in family law is a legitimate goal. The proper administration of family-centred policies would be hampered if state authorities could not identify existing familial

⁹³ 1 BvR 3295/07 (n 22).

⁹⁴ *AP, Garçon and Nicot* (n 19), [105]-[106].

⁹⁵ (UK) Gender Recognition Act 2004, s. 12; (Ireland) Gender Recognition Act 2015, s. 19; (Malta) Gender Identity, Gender Expression and Sex Characteristics Act 2015, s. 3(2).

⁹⁶ Section 19 of Ireland’s Gender Recognition Act 2015 states that ‘[t]he fact that a gender recognition certificate is issued to a person shall not affect the status of the person as the father or mother of a child born prior to the date of the issue of the certificate’.

⁹⁷ [2015] EWHC 990 (Admin), [101].

relationships. To the extent that gender recognition rules might obstruct or destabilise a coherent family law system, there would be a compelling justification for circumscribing, or appropriately limiting, those rules. As noted, UK and Irish law currently removes the possibility that a self-identified male, who becomes a child's legal mother at birth, can subsequently be recognised as a legal father through gender recognition – irrespective of the role that he actually plays within the family unit. However, in both jurisdictions, this limitation has been largely accepted by trans advocates as necessary to ensure there is clarity regarding parental status and obligations.⁹⁸ In the same way, if it could be shown that pregnant men (or women begetting children) impermissibly confuse or undermine national family law rules, there could be a legitimate justification for sterilisation (which would have to be considered as part of a wider proportionality assessment). Yet, does trans procreation (post-gender recognition) create greater uncertainty than is already accepted throughout Europe? If pregnant men are no more confusing than heterosexual adoption, or IVF, there is no logic in sterilising only trans people. Indeed, even if pregnant men do precipitate increased legal uncertainty, are there less onerous solutions than enforced infertility?

Wierckx et al write that there are significant similarities between trans procreation patterns and the way in which Europe's heterosexual (or homosexual) cisgender populations have children.⁹⁹ Where a trans man gives birth ('the birth father'), the child has a direct relationship with his or her birth parent. Although the child is not raised by a birth 'mother', this is similar to cisgender adoption which is permitted in all 47 State parties to the European Convention. Unlike in the adoption scenario, however, the child of the trans man is actually raised by his or her birth parent, who just happens to have a male legal gender. If family law really does emphasise the importance of maintaining biological familial

⁹⁸ In the United Kingdom, where trans advocates raised numerous concerns about the operation of the 2004 Act during the recent Transgender Equality Inquiry (conducted by the House of Commons Select Committee on Women and Equalities between August and December, 2015), there were no calls to remove, or amend, the effect of legal recognition on parental rights.

⁹⁹ Wierckx and others (n 59), 486.

relationships (a right which has been reinforced by numerous ECtHR judgments¹⁰⁰), a birth father raising his child may be preferable to childrearing where neither parent has given birth.

Where a birth father (who subsequently raises the child) also provides the egg for conception, the child has a direct relationship with at least one genetic parent. The birth father is a ‘natural parent’ in all three senses of Baroness Hale’s (in)famous tripartite definition of that term – genetic, gestational and social and psychological.¹⁰¹ The child will have a genetic relationship with both social parents if the trans man has procreated with a cisgender male partner, who provides the sperm for conception.¹⁰² In such a situation, there is no biological difference between trans reproduction and typical procreation between heterosexual cisgender couples. In both cases, the child knows the identity of, and is raised by, the two individuals who provided all the genetic material for his or her conception. The same is true where a trans woman naturally procreates with her cisgender female partner.

Where, on the other hand, a trans man reproduces with a cisgender female partner, the couple will have to use a sperm donor. Once again, however, this is similar to scenarios where heterosexual (or lesbian) couples use a sperm donor. Like the typical case of heterosexual sperm donation, there are two persons with opposite legal genders, one of whom intends to gestate the child and both of whom intend to play formally distinct (i.e. ‘father’ and ‘mother’) roles in the child’s life. The extent to which any child knows the sperm donor’s identity will depend upon what information the trans man and his female partner disclose, or the extent to which the child has a legal right to access that identity information.

¹⁰⁰ *Kruskovic v Croatia* ECtHR 21 June 2011; *Mandet v France* ECtHR 14 January 2016; *Keegan v Ireland* ECtHR 26 May 1994.

¹⁰¹ *Re R (Children) (Residence: Same-Sex Partner)* [2006] UKHL 43, [33]-[35].

¹⁰² This may also arise where a trans man procreates with a trans female partner who has not undergone sterilisation: see ‘Transgender Couple Expecting Their First Baby, The “Father” Is Pregnant By The “Mother”’ *The Whistler* 13 March 2016 at <<https://www.thewhistler.ng/story/transgender-couple-expecting-their-first-baby-the-father-is-pregnant-by-the-mother>> accessed 3 December 2016.

What is clear, however, is that a child's ability to trace the genetic origins of a sperm donor will not be hindered merely because his or her birth parent is trans. Where a trans man and his female partner decide not to disclose a sperm donor's identity, their child will be no less certain about his or her genetic origins than the children of heterosexual cisgender couples who make a similar choice.

In the United Kingdom, it might even be argued that children, who know that their birth parent has a trans history and who wish to trace their donor parent, have an advantage over the children of heterosexual cisgender couples.¹⁰³ Under the UK's human fertility and embryology regime, the progeny of sperm donations have a right to access information regarding their donor parent.¹⁰⁴ They do not, however, have an initial right to be informed that the sperm donation took place. Thus, for the children of cisgender heterosexual couples, enjoying their right to obtain information depends on parental willingness to reveal third-party participation.¹⁰⁵ For children who know that their birth parent is a trans male, however, if their other parent is a cisgender female, it is obvious that a sperm donation was required. In such circumstances, the children are already on notice about third party intervention, and they are better-placed to seek out information when they reach the statutory age threshold.¹⁰⁶

The supposedly unacceptable scenarios which arise from trans procreation, and which justify imposing sterilisation requirements, are increasingly permitted for cisgender heterosexual couples across Europe. According to T'Sjoen, van Caenegem and Wierckx, '[o]ne should look at...situations that are similar...[t]he only unique aspect of this group is the gender transition...[a]ll other elements, such as same sex parenthood, use of donor gametes, and social stigma, can also be found in other groups of

¹⁰³ Andrew Bainham makes this argument in the context of same-gender lesbian parents: See A. Bainham, 'Arguments about Parentage' (2008) Cambridge Law Journal 322, 335-336.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

parents’.¹⁰⁷ If European states accept increased uncertainty for cisgender procreation, there is ‘no reason to apply other criteria to [trans] individuals’ familial relations’.¹⁰⁸ Promoting family certainty cannot legitimise sterilisation requirements to the extent that they are exclusively directed towards applicants for legal gender recognition.

One must acknowledge, however, that non-normative reproduction is not universally embraced across Europe. The failure to harmonise family law rules throughout the European Union illustrates the different, often diametrically opposed, rules which Member States have adopted for regulating families.¹⁰⁹ While T’Sjoen, van Caenegem and Wierckx are correct that trans procreation mirrors increasingly accepted reproductive practices, it is also true (as discussed in Part IV) that, against Europe’s prevailing ‘sexual family’ framework, those practices still face strong resistance in many parts of the continent. In countries, such as France and Austria, fears over genetic and legal certainty have circumscribed the options available to cisgender heterosexual couples.¹¹⁰ To the extent that a jurisdiction rejects, or limits, donor insemination and surrogacy for non-trans individuals (and that

¹⁰⁷ G T’Sjoen, E Van Caenegem and K Wierckx, ‘Transgenderism and Reproduction’ (2013) 20(6) *Reproductive Endocrinology* 575, 576.

¹⁰⁸ M Sabaletto, ‘Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework’ (2011) 33 *Human Rights Quarterly* 43, 70.

¹⁰⁹ K. Boele-Woelki, ‘The Road Towards a European Family Law’ (1997) 1(1) *Electronic Journal of Comparative Law* at < <http://www.ejcl.org/11/abs11-1.html> > accessed 3 December 2016; see also K. Boele-Woelki (eds), *Perspectives for the Unification and Harmonisation of Family Law in Europe* (Oxford: Intersentia, 2003).

¹¹⁰ *Parillo v Italy* [2015] 62 EHRR 8; *SH and Others v Austria* ECtHR 3 November 2011; ‘Fertility Treatment Bans in European Raise Controversy, Questions’ *CBS website* 13 April 2012 at < <http://www.cbsnews.com/news/fertility-treatment-bans-in-europe-raise-controversy-questions/> > accessed 3 December 2016; Kajsa Ekis Ekman, ‘All Surrogacy is Exploitation – The World Should Follow Sweden’s Ban’ *The Guardian* 25 February 2016 at < <https://www.theguardian.com/commentisfree/2016/feb/25/surrogacy-sweden-ban> > accessed 3 December 2016;

rejection does not itself violate the European Convention¹¹¹), surely that state has a stronger justification for also restricting similar forms of trans reproduction?

In addition, while trans reproduction can be framed, in legal terms, as mirroring the typical heterosexual cisgender narrative, the actual biology involved often reflects same-gender parenting. During the parliamentary debates on the 2004 Act, Lord Tebbit expressed concern that omitting a sterilisation clause would allow family formations where both partners were ‘capable of giving birth to children’.¹¹² For Lord Tebbit, such a scenario inevitably gave rise to same-gender relationships.¹¹³ Where a trans man procreates with his cisgender female partner, the child will be raised by two parents who, irrespective of legal gender, both have (what are popularly considered to be) ‘female’ sex-characteristics. On the other hand, if the trans man procreates with a cisgender male partner, the question of same-gender biology disappears but the child then has two parents who have the same legal gender. While same-gender parenting is now permitted in the United Kingdom,¹¹⁴ and in many other Western European states,¹¹⁵ this is still a minority position. Across the Council of Europe, concerns about legal status and genetics, reinforced by ethical and moral debates, mean that 32 countries still exclude same-gender couples from joint adoption, 30 countries do not permit second-parent adoption and lesbian couples can only access IVF in 12 countries. While the European Court of Human Rights has applied

¹¹¹ *Mennesson and Others v France* ECtHR 26 June 2014; *Wagner and JMWL v Luxembourg* ECtHR 28 November 2007.

¹¹² HL Deb vol 656 cc1093-5 11 February 2004.

¹¹³ Ibid.

¹¹⁴ Children and Adoption Act 2002; Human Fertilisation and Embryology Act 2008.

¹¹⁵ Across the Council of Europe, LGB couples are allowed jointly adopt in 15 jurisdictions; Ireland, France, United Kingdom, Netherlands, Denmark, Norway, Spain, Portugal, Luxembourg, Belgium, Sweden, Andorra, Iceland, Malta. LGB couples are allowed engage in second-parent adoption in all those fifteen countries, as well as in Slovenia and Germany.

strict scrutiny to parenting-restrictions based solely on sexual orientation¹¹⁶, State parties retain a significant margin of appreciation. To the extent that trans procreation reproduces – explicitly or otherwise – impermissible same-gender parenting norms, many European jurisdictions may argue that it transgresses the established boundaries of family formation. Where a jurisdiction legitimately controls family structures for cisgender persons, there is a compelling argument that similar considerations can be applied to the trans population. However, in the context of trans reproduction, can legal certainty be achieved without sterilising applicants for gender recognition?

In its 2011 decision, the German Constitutional Court observed that ‘it can be ensured by law that the children concerned will, in spite of a parent’s legal gender reassignment, always be legally assigned a father and a mother’.¹¹⁷ If fears over legal uncertainty are motivating European sterilisation clauses, those fears can be addressed through legal, rather than physical, interventions. In Denmark, the designation of parental status operates separately from legal gender recognition.¹¹⁸ Danish law does not require that trans persons undergo any medical treatment before they access legal recognition.¹¹⁹ A person who obtains recognition is treated, for most legal purposes, as having the preferred gender. However, where a trans man, who has accessed recognition, gives birth to a child, the Danish Children’s Act requires that the individual be designated as the child’s ‘mother’.¹²⁰ A trans woman, who provides sperm for reproduction, will be treated as the child’s father.¹²¹ The Danish system offers an alternative model for jurisdictions that are concerned about uncertain family structures. Similar rules apply as part

¹¹⁶ *Salguiero da Silva Mouta v Portugal* [2001] 31 EHRR 47; *EB v France* [2008] 47 EHRR 21; *X v Austria* [2013] 57 EHRR 14.

¹¹⁷ 1 BvR 3295/07 (n 22).

¹¹⁸ NV Munkholm, ‘The Legal Status of Transsexual and Transgender Persons in Denmark’ in Scherpe (n 9), 170-172.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

of the Dutch and German Civil Codes¹²² and, collectively, these jurisdictions demonstrate that it is possible to create certainty in parent-child relationships, while avoiding the need to sterilise applicants for legal gender recognition.

One can question, however, whether designating a trans man as his child's 'legal mother', or a trans woman as her child's 'legal father', actually encourages, rather than decreases, legal confusion. Where a trans man, in a heterosexual relationship, gives birth, he will generally adopt the 'father' role. This man raises his children in his preferred male gender.¹²³ He interacts with his children as a man, and is understood by wider society as being a man. The 'social reality', as referred to in the ECtHR case law¹²⁴, for such families is based on the birth parent's male identity. Under the Danish model, the only institution that does not respect and acknowledge the gender of these male birth parents is the law. However, as a result, whenever birth fathers, and their children, engage with the law – applying for schools, health care etc. – they face a system which is confused, unclear and incapable of catering for their specific family needs. Registering trans men as mothers and trans women as father's risks increasing legal uncertainty. It fails to take account of the social reality and does not promote the best interests of the child.

III. CHILD WELFARE

A second aim of sterilisation is to protect any future child from the potential dangers of having a trans parent, in particular a parent who has played a non-normative role (e.g. woman producing sperm) in the

¹²² M van den Brink, P Reuß and J Tigchelaar, 'Out of the Box? Domestic and Private International Law Aspects of Gender Registration' (2015) 17(2) European Journal of Law Reform 282, 291-292; see also s. 1591 of the German Civil Code.

¹²³ P. Dunne, 'Recognising transgender parenthood on birth certificates: *R (JK) v Secretary of State for the Home Department*' (2015) 3 International Family Law 230.

¹²⁴ *Kroon v Netherlands* [1991] 19 EHRR 263, [40]; see also *Wagner* (n 111), [132].

child's conception.¹²⁵ There are well-documented concerns – among medics and policy makers – that trans parents expose children to increased harm and that such minors will face risks which are not present in cisgender family structures.¹²⁶ In her 1974 memoir, 'Conundrum', charting her journey through the transition process, the British author, Jan Morris, cites an overwhelming fear that her children 'might be teased or mocked at school' because of their parent's trans status.¹²⁷ According to Dierckx et al, '[c]hildren with a transgender parent may experience difficulties due to transphobia in society'.¹²⁸ Since the earliest legislative moves towards affirming trans identities, there has been a clear emphasis on avoiding 'possible future discrimination of the child'.¹²⁹ Indeed, in the recent English case of *J v B and The Children*¹³⁰, Peter Jackson J refused a trans woman direct contact with her five children because, on the available evidence, it was clear that contact would result in the children being marginalised by their orthodox Jewish community, a result which would not promote the welfare of the children.¹³¹

In many respects, concern over discrimination is not without merit. According to the largest EU-wide survey of trans experiences, conducted by EU FRA in 2012, 54% of trans respondents did feel 'personally discriminated against or harassed because they were perceived as trans'.¹³² Europe's trans communities (and, by extension, their families) experience higher rates of unequal treatment in

¹²⁵ Kohler, Recher and Ehrt (n 66), 62.

¹²⁶ Ibid; Brothers, Ford and Bristol (n 67), 737; Murphy (n 67), 285.

¹²⁷ J Morris, *Conundrum* (London: Faber and Faber, 2002) 107.

¹²⁸ M Dierckx and others, 'Families in Transition: A Literature Review' (2016) 28(1) *International Review of Psychiatry* 36, 38.

¹²⁹ SD More, 'The Pregnant Man-An Oxymoron?' (1998) 7(3) *Journal of Gender Studies* 319, 323.

¹³⁰ [2017] EWFC 4.

¹³¹ Ibid, [177].

¹³² FRA EU (n 29), 9.

employment, healthcare and accessing goods or services.¹³³ In the specific field of parent-child relationships, 24% of survey respondents ‘who attended school/university themselves *or [had] a child/children in school/at university* say they felt personally discriminated against’ [emphasis added].¹³⁴ As *J v B* illustrates, inequality arising from parental gender identity is not a mere academic or hypothetical concern. Describing the lived-experience of trans families in Ireland, Church, O’Shea and Lucey observe that, in order to avoid social stigma, ‘children [of trans individuals] would not allow their parent to be seen with them in public nor have any contact with their friends’.¹³⁵ In the Ukraine, the desire to avoid child discrimination is so strong that, in addition to prohibiting future procreation, the Ministry of Health required that applicants wait until their offspring have reached the age of majority.¹³⁶

Yet, should the potential for discrimination justify a sterilisation requirement? Anti-trans bias does not prove that trans individuals are unfit parents, nor that ‘reproduction in this family setting is ethically unacceptable’.¹³⁷ Discrimination on the basis of gender identity merely proves that a cross-section of Europe’s population is prejudiced against trans individuals. If policy makers believe that the children of trans parents will experience discrimination, the appropriate response is to address the existence of prejudice in society.¹³⁸ Sharpe writes that ‘disgust and revulsion are emotional responses conditioned

¹³³ Ibid, 9-10.

¹³⁴ Ibid, 9.

¹³⁵ HA Church, D O’Shea and JV Lucey, ‘Parent-Child Relationships in Gender Identity Disorder’ (2014) 183 *Irish Journal of Medical Science* 227, 280.

¹³⁶ HRW (n 16).

¹³⁷ Wierckx and others (n 59), 486.

¹³⁸ H Thompson, ‘A Time for Change: Removing Discrimination From Same-Sex Adoption’ *New Zealand Human Rights Blog* 18 September 2014 at <<http://nzhumanrightsblog.com/newzealand/a-time-for-change-recognising-the-rights-of-parents-in-same-sex-adoption/>> accessed 3 December 2016. See also, J Tackacs, I Szalma and T Bartus, ‘Social Attitudes Toward Adoption by Same-Sex Couples in Europe’ (2016) 45(7) *Archives of Sexual Behaviour* 1787, 1789.

by systemic transphobia...and...should not be viewed as sufficient in meeting a threshold of harm'.¹³⁹ Anti-trans attitudes are not a legitimate justification for compromising trans fertility. Any other conclusion would mean that, every time law makers (or a section of society) wish to curb minority freedoms, they could simply whip up discriminatory sentiments against that group. It certainly would not be appropriate to require that biracial couples undergo sterilisation because of lingering 'anti-miscegenation' attitudes. Similarly, it might be interesting to consider, in the context of *J v B*, whether Peter Jackson J would have felt enabled to refuse direct contact had 'J' been a gay man rather than a trans woman.

As noted in Section I, child welfare arguments are also framed through the fear that, in addition to third-party discrimination, trans parents themselves may cause harm to any offspring. There are doubts – expressed by both policy makers and members of the trans community – that a person's trans history renders him or her unfit to undertake the parenting role.

In *PV v Spain*, the European Court of Human Rights upheld a Spanish court's decision to limit a trans woman's contact with her son.¹⁴⁰ The ECtHR ruled that the national court had not committed discrimination because contact had been restricted pursuant to a mental health assessment. The national authority had therefore acted in the best interests of the child.¹⁴¹ However, while it is clear that no parent – cisgender or trans – should enjoy childcare responsibilities unless they are emotionally fit for the task – it is striking that the Strasbourg judges gave no consideration to the troubling social norms which have historically defined the trans-medico relationship.¹⁴² The fact is that, whether a European

¹³⁹ A Sharpe, 'Criminalising Intimacy: Transgender Defendants and the Legal Construction of Non-Consent' (2014) *Criminal Law Review* 207, 221.

¹⁴⁰ *PV v Spain* ECtHR 30 November 2010.

¹⁴¹ *Ibid*, [36].

¹⁴² For a thorough discussion of the historical relationship between medicine and gender identity, see P Burke, *Gender Shock: Exploding the Myths of Male and Female* (New York: Double Day, 1997).

jurisdiction adheres to the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) or the International Classification of Diseases (WHO ICD) ¹⁴³ – expressing a trans identity is *ipso facto* considered pathological. Even where trans individuals experience no mental distress or emotional instability, the mere fact that they are trans is indicative of pathology. While the applicant in *PV* may well have been unfit for regular contact with her son, it is incumbent upon European courts to ensure that medical assessments actually reflect the capacity to provide care, and do not simply reproduce historic prejudice against trans parenting. It may be instructive that, according to Ferrer Riba and Lamarca Marques, following the ECtHR judgment in *PV*, Spain's lower courts used the decision to justify numerous subsequent restrictions on trans parental rights.¹⁴⁴

The notion that trans individuals are incapable or unstable parents is not supported by the existing medical and social scientific evidence. While there is a need for greater research,¹⁴⁵ it appears that a parent's trans status 'does not have a negative influence on the psychosexual or gender identity development of...children'.¹⁴⁶ De Sutter et al write that 'studies have shown that most transsexual individuals are very well adapting to their post-transition life and are capable of establishing a normal

¹⁴³ The Diagnostic and Statistical Manual of Mental Disorders (DSM-V) is the official diagnostic guidelines of the American Psychiatric Association. It's fifth edition, DSM-V, the manual conflates trans identities with 'gender dysphoria'. While the inclusion of gender dysphoria remains controversial among many trans communities, it is seen as an improvement, at least linguistically, upon the previous reference (DSM-IV) to 'gender identity disorder'. The International Classification of Diseases is the official diagnostic guidelines of the World Health Organisation. ICD-10, the current version of the guidelines, makes reference to transsexualism. There is currently a debate as to whether the 'transsexualism' diagnoses should be removed from, or replaced within, the forthcoming edition (ICD-11) of the guidelines.

¹⁴⁴ J Ferrer Riba and A Lamarca Marques, 'The Legal Status of Transgender and Transsexual Persons in Spain' in Scherpe (n 9), 276.

¹⁴⁵ Dierckx and others (n 128), 37-38.

¹⁴⁶ T'Sjoen, Van Caenegem and Wierckx (n 107), 576. See also: Dickey, Ducheny and Ehrbar (n 69) 174.

relationship with children'.¹⁴⁷ McGuinness and Alghrani observe that '[t]here is no evidence to indicate a child's welfare would be adversely affected by being raised by a parent who has undergone sex reassignment surgery'.¹⁴⁸ There is no reason to believe that, as a general class, trans persons are any less capable of raising children than Europe's cisgender population.

For those children who do encounter difficulties with a parent's transition, the research identifies 'two primary factors'¹⁴⁹: the 'age of the child' and the 'absence of a positive relationship between the two parents'.¹⁵⁰ An adolescent whose parent transitions in an environment of domestic conflict, including separation and divorce, may be more adversely affected than a young child whose parent transitions with spousal support. Both of these primary factors are less likely to negatively impact upon children after legal gender recognition. A trans man, who has obtained recognition, reproduces in circumstances where he has already undertaken his transition and where his partner knows his gender identity. There is a reduced possibility, therefore, of gender-related strife which would harm a child's welfare. Where the couple decide to procreate, one can assume that the man's trans status is not an issue for his partner (and vice versa for trans women). Similarly, if children benefit from earlier transitions, surely there is more likely to be a positive outcome where the parent has already transitioned before birth. As Wierckx et al note, in such a situation, 'the child will not experience the moment of transition and the accompanied emotional and social difficulties'.¹⁵¹

¹⁴⁷ de Sutter and others (n 58).

¹⁴⁸ S McGuinness and A Alghrani, 'Gender and Parenthood: The Case for Realignment' (2008) 16 Medical Law Review 261, 270.

¹⁴⁹ T White and R Ettner, 'Adaptation and adjustment in children of transsexual parents' (2007) 16(4) European Child and Adolescent Psychiatry 215, 219.

¹⁵⁰ Ibid.

¹⁵¹ K Wierckx and others, 'Sperm Freezing in Transsexual Women' (2012) 41 Archives of Sexual Behaviour 1069, 1070.

In relation to concerns regarding mental illness, it is important to note that some trans persons only ever approach healthcare services as a box-ticking exercise.¹⁵² They obtain a diagnosis of gender dysphoria or gender identity disorder because, in 36 states across the Council of Europe, it is a requirement for legal gender recognition.¹⁵³ In reality, trans individuals may not experience a level of mental distress which should disqualify them from becoming parents.¹⁵⁴ They are happy, well-adjusted individuals, who simply want a legal status which reflects their true selves. Much of the distress which trans communities experience has no inherent link with gender identity. It is the product of a culture which stigmatises and shames gender diversity.¹⁵⁵ Laws which undermine and deny the capabilities of trans parents encourage, and reproduce, such a culture. It seems particularly unreasonable to require that applicants for recognition obtain a diagnosis, irrespective of necessity, and then use that diagnosis to limit their family rights.

Even where trans persons do experience distress because of their gender identity, there is still little justification for absolutely prohibiting trans reproduction. As a general rule, psychological or psychiatric difficulties do not entitle state officials to sterilise individuals. Where trans persons with mental health concerns do have children, social services may subject that family structure to increased surveillance. However, just as in the cisgender population, an applicant for recognition's mental health can only justify sterilisation in the rarest of cases.

¹⁵² FRA EU (n 29), 41. See also, W. Bockting, 'Are Gender Identity Disorders Mental Disorders?

Recommendations for Revision of the World Professional Association for Transgender Health's Standards of Care' (2009) 11 International Journal of Transgenderism 53, 58.

¹⁵³ TGEU (n 13).

¹⁵⁴ H J Tobin, 'Against the Surgical Requirement for Change of Legal Sex' (2006-2007) 38 Case Western Reserve Journal of International Law 393, 398.

¹⁵⁵ Bockting (n 152), 58.

Trans parenthood, and its effects on children, is undoubtedly still an emerging area for research. Von Doussa, Power and Rigg speak of ‘only a handful of studies’ existing on the topic.¹⁵⁶ In such circumstances, it is perhaps unsurprising that Europe’s policy makers would proceed with caution. As with the legal recognition of trans minors, the first, and foremost, consideration must be the wellbeing and best interests of any affected children. However, although quantitatively restricted, all existing data, since the 1970s, has indicated that young people are not adversely impacted by trans parenthood. James-Abra et al can cite ‘no empirical evidence demonstrating that the well-being of the children of trans people is compromised’.¹⁵⁷ They conclude that there is ‘no justification for excluding trans people from [parenting]’.¹⁵⁸ While it is perhaps premature to adopt a definitive position, the existing research does favour setting ‘the presumption in favour of transgender men and women’ having a right to procreate.¹⁵⁹

IV. PRESERVING NATURAL REPRODUCTION

The first two objections can, to a certain extent, be viewed as quasi-empirical enquiries: Does trans procreation reduce certainty in family law? Does trans parenting compromise the welfare of children? Although reaching a definitive conclusion on both these questions may be difficult (even impossible), the effect of trans reproduction on both the legal system and children’s wellbeing is (at least facially) subject to measurement. The final justification for sterilisation, however, relates less to what the tangible impacts of trans procreation *are*, and focuses more on normative arguments about how proper reproduction, and the creation of new life, *ought* to be. Sterilisation requirements are promoted as a

¹⁵⁶ H von Doussa, J Power and D Riggs, ‘Imagining parenthood: the possibilities and experiences of parenthood among transgender people’ (2015) 17(9) Culture, Health and Sexuality 1119, 1127.

¹⁵⁷ S James-Abra and others, ‘Trans peoples experiences with assisted reproduction services: a qualitative study’ (2015) 30(6) Human Reproduction 1365, 1366.

¹⁵⁸ Ibid.

¹⁵⁹ Murphy (n 67), 55.

means of preserving the supposedly ‘natural’ and proper link between child birth and legal women.¹⁶⁰ Writing about shifting attitudes towards trans individuals in Eastern Europe, Havelkova describes the imposition of an ‘operative solution’ – which would remove a trans man’s uterus and a trans woman’s testes – in order to ‘cure and normalise’ trans individuals, avoiding the possibility of future non-normative reproduction.¹⁶¹ If individuals, who are formally recognised as male by society, retain the capacity to conceive children, gender recognition will become a vehicle for inverting the natural order.¹⁶²

This argument relies upon an understanding – long evident in European debates on trans rights – that physical sex characteristics determine legal gender.¹⁶³ In perhaps Europe’s most famous trans rights litigation, *Corbett v Corbett (Otherwise Ashley)*, Ormrod J ruled that April Ashely could not be a legal female for the purposes of English marriage law because she lacked the ‘biological’ attributes which are ‘essential’ for the ‘role of a woman in marriage’.¹⁶⁴ Every human being, so the argument goes, is born with unambiguously male or female body traits (e.g. breasts for women, testes for men, etc.) and these physical traits determine whether a person is male or female, including whether they have a male legal gender or a female legal gender.¹⁶⁵ If sex determines gender, and pregnancy is a female characteristic, all persons who can become pregnant must be assigned the ‘female’ status. Writing in 2016, Kassam observes that, despite changing attitudes and practices in modern parenting, there is still

¹⁶⁰ Nixon (n 60); Karaian (n 65).

¹⁶¹ Hevelkova (n 16), 130.

¹⁶² J. Hempel, ‘My Brother’s Pregnancy and the Making of a New American Family’ *Time* 12 September 2016 at <<http://time.com/4475634/trans-man-pregnancy-evan/>> accessed 3 December 2016.

¹⁶³ *Corbett v Corbett (otherwise Ashley)* [1971] P 83. For a wider history of legal gender recognition in Europe see, J M Scherpe and P Dunne, ‘Comparative Analysis and Recommendations’ in Scherpe (n 9), 615.

¹⁶⁴ *Ibid*, 106.

¹⁶⁵ C Ainsworth, ‘Sex Redefined’ (2015) *Nature* 518 at <<http://www.nature.com/news/sex-redefined-1.16943>> accessed 2 March 2015> accessed 3 December 2017.

a persisting belief that '[i]f you're giving birth, you're a mother'.¹⁶⁶ Sterilisation requirements reinforce and legitimise Europe's orthodox reproductive binary.

There are many reasons why it is troubling to define gender identity through the lens of a supposedly natural or universal notion of human reproduction. When the German Constitutional Court speaks of an established 'concept of the sexes',¹⁶⁷ which pregnant men or begetting women would destabilise, to what exactly are the judges referring? It is clear that, across Europe, many individuals are not born with unambiguously male or female body traits.¹⁶⁸ Persons who exhibit intersex variance¹⁶⁹ challenge the idea of rigid, natural male-female binary, and their experiences are increasingly being accommodated through possibilities for not registering an infant's gender (e.g. Germany¹⁷⁰, Malta¹⁷¹).

However, perhaps more important for present purposes, the idea that sex characteristics – including the ability to conceive children or to produce sperm – determines legal gender is highly contestable. If sex defines legal gender, surely this undermines, or even negates, the right to legal gender recognition? Commenting on the status of trans persons under the European Convention, Gonzalez-Salzberg notes

¹⁶⁶ Kassam (n 57).

¹⁶⁷ 1 BvR 3295/07 (n 22).

¹⁶⁸ Commissioner for Human Rights of the Council of Europe, *Human Rights and Intersex People* (Strasbourg: COE, 2015) 13-16.

¹⁶⁹ Persons who have an intersex variance are born with sex characteristics (such as chromosomes, genitals, and/or hormonal structure) that do not belong strictly to male or female categories, or that belong to both at the same time.

¹⁷⁰ Germany's Civil Status Act 2013 provides that, where a child is diagnosed as having an intersex disorder, there is no requirement that the child be immediately registered as male or female at the point of birth.

¹⁷¹ Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 creates the possibility that a child's legal gender need not be registered before the age of majority.

that ‘understanding...sex as biological also means that it is immutable’.¹⁷² While, in *Corbett*, Ormrod J may have too readily dismissed the consequences of gender confirming healthcare, the judge was correct that, according to current scientific knowledge, persons who undertake a medical transition do not obtain all the physical traits (e.g. chromosomes) associated with their preferred gender.¹⁷³ A trans man who seeks to legally affirm his male gender will never be able to produce sperm for procreation. Similarly, despite recent movements towards uterus implantation,¹⁷⁴ there is currently no way for trans women to conceive and bear children. Sex-as-gender (in particular, sexed-reproductive-capacities-as-gender) is a biological destination to which surgery and hormones cannot fully transport applicants for gender recognition. Instead, in affirming a right to recognition, the 41 European jurisdictions must accept that biology is only one factor contributing to legal gender.

Rosario speaks of gender as ‘a biological, psychological and cultural phenomenon’.¹⁷⁵ Along with biological traits, such as pregnancy, additional considerations, including self-identification, gender expression and social perception, all influence a person’s gender.¹⁷⁶ The question is what relative weight

¹⁷²DA Gonzalez-Salzberg, ‘The Accepted Transsexual and the Absent Transgender: A Queer Reading of the Regulation of Sex/Gender by the European Court of Human Rights’ (2013-2014) 29 *American University International Law Review* 797, 806.

¹⁷³ The European Court of Human Rights expressly acknowledged the current limitations of medical transitions in *Goodwin* (n 39, [82]): ‘[I]t also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex.’

¹⁷⁴ M Brännström, ‘Uterus transplantation and beyond’ (2017) 28 *Journal of Materials Science: Materials in Medicine* 70. See also, C Johnston, ‘Womb transplants: first 10 British women given go-ahead’ *The Guardian* 30 September 2015 at < <https://www.theguardian.com/lifeandstyle/2015/sep/29/10-women-receive-go-ahead-for-first-ever-womb-transplants-in-uk>> accessed 16 April 2017.

¹⁷⁵ V Rosario, ‘Quantum sex: intersex and the molecular deconstruction of sex’ (2009) 12(2) *GLQ: A Journal of Lesbian and Gay Studies* 12(2) 267, 280.

¹⁷⁶ L M Giosa, M Victoria Schiro and P Dunne, ‘The legal Status of Transsexual and Transgender Persons in Argentina’ in Scherpe (n 9), 574.

the various factors should be afforded. Even if the ability to conceive a child is not wholly determinative of legal womanhood, surely sterilisation can be justified if biology remains the dominant influence? However, are physical characteristics, such as testes and a uterus, really *the* essential elements of male and female gender in Europe? It is arguable that – rather than following biology – gender is primarily formed through expression, attribution and the conscious (or subconscious) adoption of gendered roles.¹⁷⁷ According to Vade, '[g]ender is one's own specific way of interacting with and presenting oneself to the world'.¹⁷⁸ Post-structuralists, most notably Butler¹⁷⁹, have characterised gender as a 'discursive construct, something that is produced, and not a "natural fact"'.¹⁸⁰ Whatever definition or conceptualisation one ultimately adopts, the fact remains that human beings interact with each other daily on the basis of 'a small number of visual cues and a ton of assumption'.¹⁸¹ As Green points out, in almost no circumstances do individuals stop to confirm whether their assumptions actually accord with biology.¹⁸²

Against this background, and when subject to proper critique, the 'natural' link between biological characteristics, such as the capacity to bear or beget children, and legal gender is tenuous. Using biology to determine status cannot be administered in a rational, principled manner. It is unclear what physical traits are so essential that their presence or absence can define legal gender. The law in the Ukraine

¹⁷⁷ S Brill and R Pepper, *The Transgender Child: A Handbook for Families and Professionals* (New York: Cleis Press Inc, 2008) XV.

¹⁷⁸ D Vade, 'Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender that is more Inclusive of Transgender People' (2004-2005) 11 *Michigan Journal of Gender and Law* 253, 276.

¹⁷⁹ J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

¹⁸⁰ S Salih, *Judith Butler* (London: Routledge, 2002) 51.

¹⁸¹ J Serano, *Whipping Girl: A Transsexual Woman on Sexism and Scapegoating of Femininity* (Seal Press: California, 2007) 51-52.

¹⁸² Green (n 34), 2.

requires removal of internal reproductive organs while, in the Czech Republic, those organs need only be permanently disabled. In Spain, applicants for gender recognition need undergo neither surgery nor sterilisation, but there must be the development of secondary sex characteristics¹⁸³, usually by way of hormone therapy.¹⁸⁴ Is it more important that a woman have her prostate and testes removed rather than simply disabled? Why is it more important that men have facial hair, or masculine body fat distribution (the consequence of cross-sex hormones) than proving the absence of their uterus? In Western Europe, neighbouring jurisdictions, such as Belgium (e.g. sterilisation) and the Netherlands (e.g. no physical interventions),¹⁸⁵ which share strong cultural links, have adopted radically different views about the essentiality of sex characteristics, and the relationship between reproduction and legal gender. According to Tomchin, such ‘differing interpretations demonstrate that there is no consensus on which body parts are necessary for someone to be considered a man or a woman’.¹⁸⁶

There is no doubt that only persons who have a uterus can conceive children.¹⁸⁷ As noted, trans women who undergo full genital reconstructive surgery still cannot conceive or bear children because they cannot (at present) obtain a fully functioning uterus. However, does conceding that nature limits childbirth to persons with a uterus mean that only legal women can give birth (and that people who conceive children cannot be legal men)? The latter statement pre-supposes that all individuals with a uterus are naturally legal women. However, the link between a uterus and the female legal gender is a

¹⁸³ Act 3/2007 of 15 March 2007.

¹⁸⁴ Ferrer Riba and Lamarca Marques (n 144), 270-271.

¹⁸⁵ For an overview of the radical differences between the medical requirements in Belgium and the Netherlands, see W Pintens, ‘The Legal Status of Transgender and Transsexual Persons in Belgium and the Netherlands’ in Scherpe (n 9), 118-120.

¹⁸⁶ Tomchin (n 36), 842; see also Ainsworth (n 165) and Tobin (n 154), 409.

¹⁸⁷ D Spade, ‘Documenting Gender’ (2009) 8 Dukeminier Awards Best Sexual Orientation & Gender Law Review 37, 220.

consequence of law, not nature.¹⁸⁸ According to Ryan, ‘the concept of pregnancy as feminine is only a social mandate and not a biological reality’.¹⁸⁹ There is no ‘natural’ rule that persons with a uterus automatically must be legal women, or that legal women must automatically have a uterus.¹⁹⁰ Indeed, as the facts of *Z v A Government Department and the Board of Management of a Community School*¹⁹¹ illustrate, some legal women in Europe may be born without a functioning uterus or, in rare cases, with no uterus at all. Rather, the law makes a policy choice to assign all persons with a uterus to the female legal gender.

When analysing Europe’s sterilisation requirements, there is a sense that opposition to male pregnancy is less about ‘nature’ and more about societal attitudes towards proper reproduction. Fausto-Sterling suggests that discomfort with trans bodies reflects the challenge that they pose to accepted ‘gender divisions’: ‘we must control those bodies which are so unruly as to blur the borders’.¹⁹² In a European framework, which remains tightly anchored to Fineman’s ‘sexual family’ model, procreation which threatens that model is a source of significant social anxiety. To the extent that individuals deviate from a binary ‘woman/mother/conception – man/father/begetter’ schema, their reproductive possibilities are circumscribed by traditional procreative conventions. According to Weismann, the existing rules of ‘repronormativity’ have a particularly detrimental impact on lesbian, gay, bisexual and trans (‘LGBT’)

¹⁸⁸ Ibid. See also Emens (n 54), 229.

¹⁸⁹ M. Ryan, ‘The Gender of Pregnancy: Masculine Lesbians Talk about Reproduction’ (2013) 17(2) *Journal of Lesbian Studies* 119, 125.

¹⁹⁰ VM Gutierrez and BE Hernandez-Truyol comments in D Rosenblum and others, ‘Pregnant Man? A Conversation’ (2010) 22 *Yale Journal of Law and Feminism* 207, 231.

¹⁹¹ Case 362/12 [2014] 3 CMLR 20, at [35].

¹⁹² A Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2008), 8.

persons.¹⁹³ As these individuals necessarily engage in a-typical procreation, they automatically destabilise the sexual family model and are more vulnerable to social censure. There is evidence that, while same-gender *relationships* are increasingly accepted across the European Union, same-gender *parents* continue to encounter substantial opposition.¹⁹⁴ It may be that, while the law should not interfere with private conduct, society is more willing to set minimum standards for reproductive conduct. McCandless and Sheldon place trans procreation within this wider context of cultural anxiety over queer parenting.¹⁹⁵ Trans individuals face limitations in their procreative choices not because they violate any natural link between normative reproduction and legal gender. On the contrary, they are sterilised precisely because trans procreation reveals that no such link exists and exposes the ‘tensions inherent in continuing to map our legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings’.¹⁹⁶

In such circumstances, rather than fearing the unnaturalness or abnormality of trans reproduction, one should embrace and celebrate the transformative, possibly emancipatory, potential of trans procreation. Until the emergence of Europe’s intersex rights movement in the mid-1990s,¹⁹⁷ doctors would routinely assign new born infants to the male legal gender if the baby exhibited an ‘adequate’ penis (‘one that is

¹⁹³ A Weissman, ‘Repronormativity and the Reproduction of the Nation-State: The State and Sexuality Collide’ (2016) *Journal of GLBT Family Studies* 1, 3-6.

¹⁹⁴ European Union Agency for Fundamental Rights, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II – The Social Situation* (Vienna: FRA EU, 2009), 35.

¹⁹⁵ J McCandless and S Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73(2) *Modern Law Review* 175, 200-202.

¹⁹⁶ *Ibid*, 202.

¹⁹⁷ M. Carpenter, ‘The Human Rights of Intersex People: Addressing Harmful Practices and the Rhetoric of Change’ (2016) 24 *Reproductive Health Matters* 74; see also Commissioner for Human Rights COE (n 168).

[capable] of penetrating a female's vagina'¹⁹⁸). A child was assigned to a female legal gender if there was evidence of female 'reproductive capability'. These interventions, which are still carried out across Europe,¹⁹⁹ reflect and reproduce widely entrenched notions about the proper status of men and women. According to Greenberg, 'men are defined based upon their ability to penetrate females and females are defined based upon their ability to procreate'.²⁰⁰ Law and medicine collude to construct a dominant male identity, which exercises its power by penetrating women who are themselves only valued for their role as mother and child bearer. However, what shifts would occur in this gender disequilibrium if legal women had the capacity to impregnate men? In a Europe where both legal men and legal women give birth, can only women be viewed through the lens of motherhood? Would the idea of 'motherhood', with all its social connotations, even exist? For many people, it is because trans reproduction potentially emancipates women from sex-based stereotyping that such procreation creates unease.²⁰¹ Boyd writes that '[o]ur narrow definitions of gender roles may be broadening, but our visceral response to the blurring of those roles is still one of shock or confusion'.²⁰²

¹⁹⁸ Julie A. Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41 Arizona Law Review 265, 271.

¹⁹⁹ Commissioner for Human Rights COE (n 168), 19-28. For recent condemnation of practices in individual European states, see, *inter alia*, UN CPRD 'Concluding observations of the United Nations Committee on the Rights of Persons with Disabilities on the initial report of Italy' (6 October 2016) UN Doc CRPD/C/ITA/CO/1, [45]-[46]; UN CEDAW 'Concluding observations of the United Nations Committee on the Elimination of Discrimination against Women on the combined seventh and eighth periodic reports of France' (25 July 2016) CEDAW/C/FRA/CO/7-8, [18].

²⁰⁰ Greenberg (198), 271.

²⁰¹ Jamison Green writes that individuals may resist allowing persons to 'freely express their gender' because it would hinder the 'ability to know whether to treat another as an equal, an inferior or a superior human being'. Green (n 34), 184.

²⁰² H Boyd, *My Husband Betty – Love, Sex and Life with a Crossdresser* (New York: Thunder's Mouth Press, 2003), 27.

Of course, given the changing nature of trans reproduction, and the extent to which trans fertility has only become a core medical and legal concern in the past decade, it would be premature to exclude any possibility that challenging gendered-assumptions could have future, unintended consequences. For European lawyers, one obvious area of concern – which has not yet been raised in national sterilisation debates – is the potential impact of pregnant men on the European Union’s pregnancy non-discrimination rules. In *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV- Centrum) Plus*,²⁰³ the European Court of Justice held that a woman who experiences unfavourable employment treatment because of pregnancy can claim sex discrimination.²⁰⁴ The woman is entitled to bring her action irrespective of whether she can prove that a comparably placed male individual was treated better. The rationale for adopting this *sui generis* non-comparator model is clear: pregnancy is exclusively experienced by women; pregnancy discrimination arises against women because of a gendered characteristic which men do not share; it is therefore inappropriate to compare the situation of a pregnant woman with a non-pregnant man. A similar conclusion was reached by the Supreme Court of Canada in *Brooks v Safeway Canada Ltd*²⁰⁵ and by the United States Congress as part of the Pregnancy Discrimination Act 1978.

Where both legal women and legal men can become pregnant, is it tenable to maintain a discrimination test which focuses solely on womanhood? Given the long history of sterilisation requirements across Europe, it is unsurprising that national courts have yet to specifically rule on the position of pregnant men in employment discrimination cases. Within wider social commentary, however, there are undoubtedly strong feminist objections to ‘decentering “women”²⁰⁶ from’ political and legal debates

²⁰³ [1990] E.C.R. I-3941.

²⁰⁴ *Ibid*, [12].

²⁰⁵ [1989] 1 S.C.R. 1219.

²⁰⁶ Strangio (n 28), 233.

over reproductive justice.²⁰⁷ As reproductive service providers increasingly neutralise their gendered-language to accommodate non-female pregnant individuals, there is a fear that – both symbolically and substantively – women’s identities are being erased. Scholars and commentators point to the fact that, whether or not legal men can conceive children, pregnancy is a biological (and social) phenomenon which overwhelmingly affects female-identified lives, and which remains a primary obstacle to women’s professional advancement.²⁰⁸ Strangio writes that the ‘idea of shifting from talking about “pregnant women” to “pregnant people” can evoke traumatic memories of the [American] Supreme Court’s refusal to protect pregnant people from discrimination under a sex discrimination theory’.²⁰⁹ In *Geduldig v. Aiello*, the all-male Court, framing pregnancy in gender-neutral terms, denied the plaintiff relief under Title VII of the federal Civil Rights Act 1964 on the basis that she had been discriminated against as a pregnant person (which was not a protected characteristic) rather than as a woman.²¹⁰ Similarly, in Europe, if persons who are acknowledged to be men can conceive children, it may be more difficult for the law to emphasise the gendered dynamics of pregnancy.

For some scholars, however, the requirement to redefine pregnancy in non-gendered terms represents an opportunity rather than a detriment. Authors, such as Rosenblum, have longed advocated a process of ‘unsexing’ reproduction,²¹¹ which would more accurately reflect the multiple roles which individuals play in procreation and child-rearing. For Karaian, to the extent that Europe’s current pregnancy

²⁰⁷ E Burkett, ‘What Make’s A Woman’ *The New York Times* 6 June 2015 at < <https://www.nytimes.com/2015/06/07/opinion/sunday/what-makes-a-woman.html>> accessed 16 April 2017; S Ditum and J Kermode, ‘Should Feminists Talk about “Pregnant People”?’ *The New Statesman* 30 September 2016 at < <http://www.newstatesman.com/politics/feminism/2016/09/should-feminists-talk-about-pregnant-people>> accessed 16 April 2017.

²⁰⁸ Ibid.

²⁰⁹ Strangio (n 28), 230-231.

²¹⁰ [1974] 417 U.S. 484, 494.

²¹¹ See generally, Rosenblum (n 3); see also Karaian (n 65), 222-226.

protections are incapable of embracing trans masculine and non-binary identities, there is justification for 'reconceiving of pregnancy as a ground of discrimination divorced from sex'.²¹² Indeed, for Williams, de-gendering pregnancy may potentially enhance the social position of women. She questions how women benefit from rules which reinforce and mandate their 'special place in the scheme of human existence when it comes to maternity'.²¹³ How these arguments would play out in practice remains open to doubt. While a utopian vista of unsexed reproduction may have intuitive appeal, it is unclear how a gender-neutral law would have appeared to Mrs Dekker when she was being refused employment because of a physical trait which no male applicant would have faced.

At a practical level, one can argue that, considering the small number (if any) of legal males who will ever claim pregnancy discrimination, EU member states can still properly maintain a gender-equality model, while also providing exceptional relief to male petitioners. The fact that trans men can become pregnant does not lessen the gendered ways in which many women experience pregnancy discrimination. Indeed, where pregnant men are themselves treated inferior, their experience, even as men, will be informed by the same patriarchal norms which devalue pregnancy because of its association with women. Recognising that a small number of trans men become pregnant does not detract from the gendered context in which pregnancy discrimination arises.

²¹² Karaian (n 65), 222.

²¹³ WW Williams, 'The Equality Crisis: Some Reflections On Culture, Courts, and Feminism' (1981) 7 Women's Rights Law Reporter 175, 195.

CONCLUSION

In July 2016, Britain's Daily Telegraph newspaper published a headline warning '[s]ex change men "on brink" of having babies following NHS treatment'.²¹⁴ The notion of trans procreation has profoundly impacted European attitudes towards gender identity and continues to shape national rules for recognising preferred gender. Across the Council of Europe, trans individuals in 22 countries must prove their infertility before obtaining gender recognition. According to Veale et al, the 'loss of fertility resulting from hormone blockers, hormones, and surgeries [is] considered the "price to pay" for transition'.²¹⁵ Trans persons, who seek to live a fully-actualised life in their affirmed gender, must forgo reproduction to achieve that goal.

Europe's judges and policymakers are increasingly challenging trans sterilisation. The Parliamentary Assembly of the Council of Europe, national courts and, most recently, the ECtHR have all condemned infertility clauses as a disproportionate breach of European rights norms. Yet, while these actions represent progress, they largely fail to confront the baseline rationales which motivate sterilising applicants for gender recognition. Judges may be willing to rule that mandatory infertility is not a proportionate breach of the European Convention but they have been less quick to confront the legitimacy of sterilisation. In some ways, this may simply reflect traditional European methods of legal

²¹⁴ 'Sex change men "on brink" of having babies following NHS treatment' *The Daily Telegraph* 31 July 2016 at < <http://www.telegraph.co.uk/news/2016/07/31/sex-change-men-on-brink-of-having-babies-following-nhs-treatment/> > accessed 3 December 2016.

²¹⁵ JF Veale and others, 'Prevalence of Pregnancy Involvement Among Canadian Transgender Youth and its Relation to Mental Health, Sexual Health, and Gender Identity' (2016) *International Journal of Transgenderism* 1 < https://www.researchgate.net/profile/Jaimie_Veale/publication/307089397_Prevalence_of_pregnancy_involvement_among_Canadian_transgender_youth_and_its_relation_to_mental_health_sexual_health_and_gender_identity/links/582a4d8508aef19cb805581d.pdf > accessed 17 April 2017.

analysis. Judges, who ultimately strike down sterilisation requirements as disproportionate, may prefer deference to elected legislatures in identifying legitimate policy goals. Yet, the rationales for sterilisation have influence far beyond the gender recognition context. Questions over trans mental health might be insufficient to warrant sterilisation, but they can be decisive in deciding parental rights over children. The Daily Telegraph's headline illustrates that, while arguments about bodily integrity were sufficient to affirm trans procreative rights under the 2004 Act, they have not quelled the social opprobrium attaching to the actual exercise of those rights.

This article has directly challenged the European justifications for sterilisation as a precondition for legal gender recognition. Critiquing assumptions about legal certainty, child welfare and natural reproduction, the article concludes that sterilisation requirements rely upon a weak, discriminatory and logically-inconsistent framework. Pregnant men and begetting women are certainly uncommon. They fit into neither the sexual family model nor general cultural understandings about normative reproduction. Yet, neither group represent a threat to society and the families that they raise. European policy makers have failed to offer a compelling rationale for trans sterilisation and such requirements should not form part of Europe's gender recognition rules.