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TRANSGENDER MARRIAGE: WHICH CAME FIRST, THE MARRIAGE OR THE TRANSITION?

By Meghan Chrisner

I. INTRODUCTION

“Waaaaah! Waaaaah!” The first initial joyous cries of a newborn are followed by the proclamation of, “It’s a boy!” or “It’s a girl!” Upon a cursory look at a newborn’s genitalia, the infant’s sex is identified and declared as either male or female. While this is a seemingly trivial moment, for transgender individuals it is a defining moment they cannot escape for the rest of their lives.

Transgender individuals are born with the physical genitalia of one sex, but at some point come to realize they identify with and are more comfortable living as the opposite gender. Transsexuals often feel trapped in a body of a wrong sex. The feelings they experience revolve around transitioning, or to die trying.¹ One male-to-female transgender describes the experience like this: “The feeling of young adulthood as a transsexual was for me best described by Schizoid Denial and Crumbling Survival.”²

Transgender individuals are often confused as homosexual, cross-dressers, gay, queer, or other labels reflecting non-conformity. Much of this confusion can be dispelled by a simple understanding of the terms sex, gender and sexual orientation.

Sex is the term used to describe one’s status as a man or a woman based on biological factors.³ The two sexes society recognizes are male and female. Some individuals born with one

¹ What is Transsexuality, <http://www.transsexual.org/What.html> (last visited April 30, 2010).

² To Be Transsexual, <http://www.transsexual.org/Feels.html> (last visited April 30, 2010).

³ Julie A. Greenberg, *Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 271 (1999).

or two additional X or Y chromosomes are recognized as having an intersexed condition.⁴ This is unrelated to transgenderism and sexual orientation. One's sex is established for legal purposes on a birth certificate, but often follows one for life through other legal documents.

Gender refers to the attitudinal or cultural qualities that are characteristic of a particular sex.⁵ Although an individual may be biologically female, she may self-identify her gender as male and thus choose to exude masculine characteristics, and vice versa for males. Other transgenders choose to denounce the idea of sex and gender altogether, choosing that neither/nor suits them best. Sexual orientation refers to whether an individual prefers romantic and sexual relationships with those of the same sex or the opposite sex. The terms are confusing, but each has a clear and separate meaning.

In recent years transgenderism has become more public. As more transgender individuals successfully complete transition and/or sex reassignment surgery (SRS), petition for name changes, sex changes, and marriage licenses, there is a growing need for uniformity across all states to treat transgender individuals consistently as one sex or the other. Particularly for transgenders who are married at the time of transition, or those who wish to marry post-transition, there are a myriad of ways in which states may regard (or fail to recognize) the individual's sex and sex for the purposes of marriage.

States are not uniform in how each recognizes the sex of transgender individuals. For instance, some states will not legally change an individual's sex, while other states will amend birth certificates to reflect one's self-identified sex, while others still will issue new birth certificates listing one's new sex without any indication of one's previous sex. To create further

⁴ *Id.* at 281.

⁵ *Id.* at 274.

confusion and inconsistency, states recognize sex for the purposes of marriage on separate grounds than for the purposes of identification.

All states have statutes in place to define marriage. While statutory schemes do not define “man” and “woman” for the purposes of marriage, state courts have interpreted what characteristics state’s base sex on for the purposes of marriage. Leaving aside the jurisdictions that permit same-sex couples to marry,⁶ some states hold that each partner’s sex is based on their sex at birth, other states establish a person’s sex based on the ability to perform penile-vaginal intercourse, while others require the potential for procreation. The standards determining what one’s sex is for the purposes of marriage are not parallel to what one’s sex is for the purposes of legal recognition.

Despite the fact that all states except Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and most recently, the District of Columbia⁷ require marriage to be between a man and a woman, consider the following: an opposite-sex couples where one partner is transgender and the other is not. Essentially this means both partners are of opposite biological composition, but one of the partner’s identifies as the same sex as the other partner, resulting in a prima facie same-sex couple. For all intents and purposes the couple is of the same sex in appearance and lifestyle, while biologically and on paper the couple is opposite-sex (unless the transgender individual has an amended birth certificate.) Because the partners are biologically opposite sex, as indicated on their birth certificates, and their marriage is technically between one man and one woman, it is a prima facie same-gender marriage under the guise of a legally opposite-sex marriage.

⁶ Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia.

⁷ Same Sex Marriages, Civil Unions and Domestic Partnerships, <http://www.ncsl.org/default.aspx?tabid=16430> (last visited April 29, 2010).

Also consider: an opposite-sex couple previously married subsequently experiences one partner transitioning to the same sex as the other partner. Depending on what the state's law bases an individual's sex for the purposes of marriage, it is possible for a marriage to be null and void upon sex reassignment surgery or a sex change on one's birth certificate. Instantaneous void marriages are a legal concern that needs immediate attention and reform. As marriage is a fundamental right⁸ and a valued institution, uniform criteria must be established that clearly outlines the definition of "sex" for the purposes of marriage for transgender individuals.

Some states may recognize a transgender female-to-male individual as a male and married to a female, while other states may deem the same person a female and thus the marriage to a female void.⁹ The inconsistency among states in recognizing transgender marriages becomes even more problematic when individuals in transgender marriages die intestate, divorce or separate, are hospitalized and family members do not qualify for family visitation rights or cross state lines. Challenges can be brought to question the validity of marriages or whether an individual is a legally recognized "family member" permitted for hospital visitation. Further, because each state is free to define sex as it wishes, a transgender person's sex can change as state borders are crossed.¹⁰

If a marriage that includes a transgender individual is in fact challenged and considered void based on the transgender individual's lack of legal standing to marry the other person, his or her parental rights can be threatened.¹¹ Without reforming federal and state laws to become

⁸ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁹ Unless the state recognizes same-sex marriages.

¹⁰ Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and The Unmaking of Families in TRANSGENDER RIGHTS*, 32, 33 (Paisley Currah, Richard M. Jung, & Shannon Price Minter ed., 2006).

¹¹ Marika E. Kitamura, *Once a Woman, Always a Man? What Happens to the Children of Transsexual Marriages and Divorces*, 5 Whittier J. Child & Fam. Advoc. 227, 241-242 (2005).

consistent, there is a gaping hole in marriage law that deprives transgender individuals and their partners of the fundamental right to marriage.¹²

The remainder of this paper addresses the terminology surrounding transgender marriage, transgender case law, marriage pre-transition, marriage post-transition, the United States Supreme Court and transgender, as well as the Full Faith and Credit Clause and the Defense of Marriage Act.

II. BACKGROUND

A. Terminology

Before delving further into the issues facing transgender marriage, several terms and definitions need to be examined and understood. So much of this area of the law is lost in translation that it becomes necessary to understand the individual pieces before considering the whole picture.

1. Gender

Gender describes the cultural qualities that are characteristic of a particular sex.¹³ Gender is one's psychosexual identity of a deep feeling of being either male or female.¹⁴ It refers to characteristics that are stereotypically perceived to be masculine or feminine.¹⁵ Most individuals perceive their gender to be congruous with their biological sex.¹⁶ Because an individual's gender is a central component of one's identity, the determination of one's gender should rest with the

¹² Loving, 388 U.S. 1.

¹³ Julie A. Greenberg, 41 Ariz. L. Rev., at 274.

¹⁴ Leslie Dubois-Need & Amber Kingery, *Transgendered in Alaska: Navigating the Changing Legal Landscape for Change of Gender Petitions*, 26 Alaska L. Rev. 239, 244 (2009); See Samantha J. Levy, *Transforming Notions of Equal Protection: The Gender Identity Class*, 12 Temp. Pol. & Civ. Rts. L. Rev. 141, 143 (2002).

¹⁵ Nan D. Hunter, Courtney G. Joslin, & Sharon M. McGowan, *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People*, 173 (4th ed., 2004).

¹⁶ Samantha J. Levy, 12 Temp. Pol. & Civ. Rts. L. Rev. 141, 143-144.

individual.¹⁷ One's autonomy and self-determination is stifled when states decide what sex one can or cannot be recognized as. State's deciding truly personal identifying characteristics such as gender is an infringement on the right to autonomy and privacy. Society and courts typically use the terms gender and sex interchangeably, and although gender and sex are inter-dependent, they are substantively different identifiers of an individual. Legal recognition that gender, and ultimately sex, are self-identified may affect change in social views of gender and sex.

2. Sex

Sex is the term to describe the biological make-up of an individual's body. The United States uses a binary paradigm to define sex legally: one is either male or female. However, sex better fits a spectrum model with male and female at the end poles, with several identities in the middle.¹⁸ The binary model of male/female gender is grounded in the belief that gender is naturally determined by the biology of an individual's body and that one's gender is a natural result of his or her sex.¹⁹ When an individual recognizes that his or her gender does not match his or her biological and physical body, he or she is considered gender dysphoric and/or to have gender identity disorder (GID).

According to United States laws, there are two neat boxes into which all individuals must legally fit: male and female. Some individuals do not fit the typical male or female genital makeup, physical appearance, or chromosomal structure.²⁰ These individuals are often considered intersexed. Several cultures, historical texts, religions and other countries recognize a

¹⁷ Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 395-396 (2001).

¹⁸ Julie A. Greenberg, 41 Ariz. L. Rev., at 275.

¹⁹ Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law* 36 Colum. Hum. Rts. L. Rev. 713, 719 (2005).

²⁰ For more information on intersexuals and the law please see Julie A. Greenberg, 41 Ariz. L. Rev. 265.

third sex.²¹ While intersexed conditions are not indicative of transgenderism, the two are related because courts are troubled by and do not know what to do with individuals of undefined gender and/or sex.

3. Transgender

Gender identity refers to an individual's self-identification as male or female.²² The term transgender refers to a person whose gender identity or expression does not conform to the social expectations for their sex assigned at birth.²³ Transgenders often understand themselves as belonging to the opposite sex from what their genitals and biology would suggest.²⁴ The United States Supreme Court has defined transgender as, “[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,” and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change.²⁵ Transgenders can be male-to-female (MTF) or female-to-male (FTM).

Transgender individuals typically take steps to live their lives as the sex that corresponds their self-identified gender. Many transgenders seek sexual reassignment surgery (SRS) to alter their body to reflect their gender identity,²⁶ while others simply live their lives as the opposite sex. The first step for transgender's to receive medical treatment is a diagnosis of gender identity

²¹ Julie A. Greenberg, 41 Ariz. L. Rev., at 275-278

²² Diagnostic and Statistical Manual of Mental Disorders 535 (Michael B. First ed., 4th ed. text revision 2000).

²³ Paisley Currah, Richard M. Jung, & Shannon Price Minter, *Introduction in TRANSGENDER RIGHTS*, xiii, xiv (Paisley Currah, Richard M. Jung, & Shannon Price Minter ed., 2006).

²⁴ Mary Coombs, *Queer Matters: Emerging Issues In Sexual Orientation Law: Sexual Dis-Orientation: Transgendered People And Same-Sex Marriage*, 8 UCLA Women's L.J. 219, 238 (1998).

²⁵ *Farmer v. Brennan*, 511 U.S. 825, 829 (1994) (quoting American Medical Association, *Encyclopedia of Medicine* 1006 (1989)).

²⁶ Stephanie Markowitz, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 Cardozo J.L. & Gender 705, 708 (2008).

disorder (GID) by a mental health professional.²⁷ A diagnosis of GID is often statutorily required to petition for a name or sex change.

According to the Diagnostic and Statistical Manual of Mental Disorders (DSM), GID is characterized by strong and persistent cross-gender identification, accompanied by persistent discomfort with one's assigned sex.²⁸ To be diagnosed with GID, an individual must present with strong and persistent cross-gender identification, and persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.²⁹ Adults with GID are preoccupied with their desire to live as the opposite sex and are uncomfortable functioning as or being regarded by others as their assigned sex.³⁰

Gender non-conforming individuals who meet the criteria set out by the DSM are eligible³¹ to begin transitioning from living as their birth gender to living as the gender with which they identify.³² It is a process of psychological and physical care that both enables and requires transgenders to then conform to the expected norms of their transitioned gender.³³ GID is recognized as a serious medical condition and, if left untreated, can cause great dysfunction and distress in the individual.³⁴ The standards outlined in the Harry Benjamin International

²⁷ The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Identity Disorder 6 (6th ed. 2001); <http://www.wpath.org/documents2/socv6.pdf> (last visited Apr. 30, 2010).

²⁸ Diagnostic and Statistical Manual of Mental Disorders at 535.

²⁹ *Id.* at 576.

³⁰ *Id.* at 576.

³¹ Eligibility is defined by the Harry Benjamin International Gender Dysphoria Association. Once eligibility is established, a patient must also meet readiness criteria to begin treatment. <http://www.wpath.org/documents2/socv6.pdf> (last visited Apr. 30, 2010). Whether health insurance covers the costs of treatment is dependent on the insurance company and presents a host of other concerns not discussed here.

³² Franklin H. Romeo, 36 Colum. Hum. Rts. L. Rev. 713, 725.

³³ *Id.* at 725.

³⁴ Diagnostic and Statistical Manual of Mental Disorders at 576-582.

Gender Dysphoria Association (HBIIGDA) Standards of Care lead most practitioners to conclude that treatment, including counseling, medical, and surgical, may indeed be medically necessary.³⁵

4. Sexual Orientation vs. Gender Identity

There is often confusion and assumptions about the difference between sexual orientation and gender identity. If someone is transgender, such a categorization is conflated with homosexuality. To be clear, gender identity indicates what gender an individual identifies with, despite his or her biological sex and has nothing to do with sexual orientation.³⁶ Whereas sexual orientation describes whether one is sexually attracted to and interested in pursuing romantic relationships with men or women or both.³⁷ Common names for sexual orientation categories are heterosexual, homosexual and bisexual. Gender identity is independent of sexual orientation.

5. Voidable and Void

Transgender marriages are found to be void in several cases mentioned in this paper. A marriage is void when it is determined to be of no legal affect and therefore null.³⁸ A marriage is considered voidable when it has the potential to be void; it is valid until it is annulled.³⁹ Transgender's who procure a marriage by the "duck test" typically have marriages that are voidable because while they are valid, they have the potential to be void because they are voidable.

B. Changing your Sex Legally

States have the power to legislate laws to determine an individual's sex legally. Most state legislatures and courts have not expressly decided on the legal sex status of transgender

³⁵ The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Identity Disorder; <http://www.wpath.org/documents2/socv6.pdf> (last visited Apr. 30, 2010).

³⁶ Paisley Currah, *Gender Pluralisms under the Transgender Umbrella in* TRANSGENDER RIGHTS, 3, 23.

³⁷ Judith Butler, *Undiagnosing Gender in* TRANSGENDER RIGHTS, 274, 277-278.

³⁸ *Black's Law Dictionary* 1604 (8th ed., 2004).

³⁹ *Id.* at 1605.

individuals.⁴⁰ For transgender individuals, a legal change in sex aligns their documentation as an individual with their self-identified sex. Further, a legal sex change is recognition that one is legally recognized as a man or a woman. For many transgenders, this is a very big step in the transition process to becoming their self-identified gender.

One's sex is determined at birth upon a cursory glance at a baby's genitals and accordingly recorded on his or her birth certificate. Birth certificate amendments are typically permitted to correct records that were inaccurately recorded.⁴¹ Birth certificate amendments are also one of the most useful forms for transgender individuals to be recognized legally as the sex with which they identify.⁴² Most states have statutory guidelines in place to issue new or amended birth certificates when changes are made. There are a variety of approaches states use to handle amended birth certificates.

- Deny any change or amendment
- Permit an amendment by crossing out the originally indicated sex and manually annotate the new sex⁴³
- Attach an amended version of one's birth certificate to the original birth certificate⁴⁴
- Issue an entirely new birth certificate indicating one's "new" sex without indicating the certificate is amended⁴⁵

While an amended birth certificate will correctly reflect an individual's self-identified sex, his or her sex and name assigned at birth remain and are merely struck out, or a new

⁴⁰ Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 Fla. L. Rev. 745, 758 (2000).

⁴¹ Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and The Unmaking of Families in* TRANSGENDER RIGHTS, 32, 36.

⁴² Whether birth certificate amendments were intended to be used by transgender individuals is undocumented.

⁴³ Nan D. Hunter, *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People*, at 178; See Stephanie Markowitz, 14 Cardozo J.L. & Gender at 717.

⁴⁴ *Id.*

⁴⁵ *Id.*; See <http://www.drbecky.com/birthcert.html> (last visited Apr. 30, 2010).

certificate is issued but is labeled amended; the amended certificate does not replace the original.⁴⁶

Most states do have a birth certificate amendment statute, however such amendments are not always for the purposes of transgender individuals to amend their sex. Many transgender individuals do successfully utilize this statutory construct to be legally recognized as their self-identified sex.

Twenty six jurisdictions have issued statutes expressly permitting transitioned transgender individuals to legally change their name and sex:⁴⁷ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Utah, Virginia and Wisconsin.⁴⁸

Twenty states have general statutes authorizing birth certificate changes either administratively or via court order: Alaska, Delaware, Florida, Idaho, Indiana, Minnesota, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, West Virginia and Wyoming.⁴⁹

⁴⁶ Stephanie Markowitz, 14 Cardozo J.L. & Gender at 715; See <http://www.drbecky.com/birthcert.html> (last visited Apr. 30, 2010).

⁴⁷ Nan D. Hunter, *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People*, at 178.

⁴⁸ Ala. Code § 22-9A-19(d) (LexisNexis 2010); Ariz. Rev. Stat. § 36-337(A)(3)(a)-(b) (LexisNexis 2010); Ark. Code Ann. § 20-18-307(d) (2010); Cal. Health & Safety Code §§ 103425, 103430 (Deering 2009); Colo. Rev. Stat. § 25-2-115(4) (2009); Conn. Gen. Stat. § 19a-42 (2010); D.C. Code Ann. § 7-217(d) (LexisNexis 2010); Ga. Code Ann. § 31-10-23(e) (2010); Haw. Rev. Stat. Ann. § 338-17.7(a)(4)(B) (LexisNexis 2010); 410 Ill. Comp. Stat. 535/17(1)(d) (2010); Iowa Code § 144.23(3) (2010); Ky. Rev. Stat. Ann. § 213.121(5) (LexisNexis 2010); La. Rev. Stat. Ann. § 40:62 (2010); Md. Code Ann., Health-Gen. § 4-214(5) (LexisNexis 2010); Mass. Ann. Laws ch. 46, § 13(e) (LexisNexis 2010); Mich. Comp. Laws Serv. § 333.2831(c) (LexisNexis 2010); Mo. Rev. Stat. § 193.215(9) (2010); Neb. Rev. Stat. Ann. § 71-604.01 (LexisNexis 2010); Nev. Admin. Code § 440.130 (2010); N.J. Stat. Ann. § 26:8-40.12(a) (2010); N.M. Stat. Ann. § 24-14-25(D) (LexisNexis 2010); N.C. Gen. Stat. § 130A-118(b)(4) (2010); Or. Rev. Stat. § 432.235(4) (2009); Utah Code Ann. § 26-2-11(1) (2010); Va. Code Ann. § 32.1-269(E) (2010); Wis. Stat. Ann. § 69.15(1)(a) (2009).

⁴⁹ Alaska Stat. § 18.50.320 (2010); Del. Code Ann. tit.16 § 3131 (2010); Fla. Stat. Ann. § 382.016 (LexisNexis 2010); Idaho Code Ann. § 39-250 (2010), see also Idaho Admin. Code r.16.02.08.201

Kansas, Maine and New York State⁵⁰ all permit transgender individual's to amend their records, but require administrative proceedings.⁵¹

Tennessee is the only jurisdiction that has expressly adopted legislation prohibiting the legal amendment of sex based on SRS.⁵² Ohio implicitly does not permit individuals to amend the sex indicated on their original birth certificates.⁵³

While a legal sex change may seemingly change one's sex for all intents and purposes, courts may ignore the sex designation on legal documents. Even if a state does change one's birth certificate and legally recognizes one's self-identified sex, it does not signify that the state will apply one's amended sex to the individual for the purposes of marriage. In fact, several courts reject a state's issuance of an amended birth certificate as recognition of an individual's post-transition sex.⁵⁴ Amending a birth certificate is largely an administrative change that is not protected as a final court judgment would be by the Full Faith and Credit Clause.⁵⁵ Accordingly,

(2009); Ind. Code Ann. § 16-37-2-10(b) (LexisNexis 2010); Minn. Stat. § 144.218(4) (2009); Miss. Code Ann. § 41-57-21 (2010); Mont. Code Ann. § 50-15-204 (2009); N.H. Rev. Stat. Ann. § 5-C:10(III), § 5-C:107(II) (LexisNexis 2010); N.D. Cent. Code § 23-02.1-25 (2010), *See also* N.D. Admin. Code 33-04-12-02 (2009); Okla. Stat. tit. 63, § 1-321 (2009); 35 Pa. Stat. Ann. § 450.603 (2010); R.I. Gen. Laws § 23-3-21 (2010); S.C. Code Ann. § 44-63-150 (2009); S.D. Codified Laws § 34-25-51 (2009); Tex. Health & Safety Code §§ 191.028, 192.011 (2009); Vt. Stat. Ann. tit. 18, § 5075 (2010); Wash. Rev. Code Ann. § 70.58.055 (LexisNexis 2010); W. Va. Code Ann. § 16-5-25 (LexisNexis 2009); Wyo. Stat. Ann. § 35-1-424 (2010).

⁵⁰ New York City maintains separate jurisdiction over birth certificates.

⁵¹ Kan. Admin. Regs. § 28-17-20 (2010); Me. Rev. Stat. Ann. tit. 22, § 2705 (2009); N.Y. Comp. R. & Regs. tit. 10, § 35.2 (2010).

⁵² Tenn. Code Ann. § 68-3-203(d) (2010).

⁵³ Ohio Rev. Code Ann. § 3705.15 (LexisNexis 2010); *See* U. S. States and Canadian Provinces: Instructions For Changing Name And Sex On Birth Certificate, <http://www.drbecky.com/birthcert.html> (last visited Apr. 30, 2010).

⁵⁴ Paisley Currah, *Gender Pluralisms under the Transgender Umbrella in TRANSGENDER RIGHTS*, 3, 3.

⁵⁵ Alice Newlin, *Should A Trip From Illinois To Tennessee Change A Woman Into A Man?: Proposal For A Uniform Interstate Sex Reassignment Recognition Act*, 17 Colum. J. Gender & L. 461, 480 (2008).

despite a legal sex change, for the purposes of marriage transgender individuals may not be held to be the sex their legal documents purport them to be.⁵⁶

C. Marriage and Sex

Transgender individuals are often legally categorized based on biological criteria that do not align with their self-identified sex.⁵⁷ For the purposes of marriage, this presents problems for transgender individuals. Born one sex, later identifying and attempting to marry as another sex, transgender individuals are often unsuccessful in marrying because of federal and state laws in place. Research indicates that during the 1980's, transgender individuals were required to get a divorce before a surgeon would perform genital surgery, and that this requirement persisted into the 1990's.⁵⁸ In 1997, the International Conference on Transgender Law and Employment Policy⁵⁹ updated the Health Law Standards of Care for Transsexualism.⁶⁰ The first standard in part reads, "If the patient is married, the physician may not require divorce, but may also require the spouse to sign a waiver of liability form."⁶¹ Principle five states that it is unethical to discriminate in the provision of sex reassignment services based on marital status.⁶² This confirms that it was in fact once required that a divorce be procured prior to SRS.

At the federal level, The Defense of Marriage Act (DOMA) defines marriage as a "legal union between one man and one woman as husband and wife, and the word spouse refers only to

⁵⁶ Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?*, 52 Fla. L. Rev. 745, 758-759 (2000).

⁵⁷ Julie A. Greenberg, 41 Ariz. L. Rev. at 292.

⁵⁸ Phyllis Raldolph Frye & Alyson Dodi Meiselman, "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Article Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now, 64 Alb. L. Rev. 1031, 1039 (2001).

⁵⁹ Also known as the Transgender Law Conference.

⁶⁰ Health Law Standards of Care for Transsexualism, <http://www.transgenderlegal.com/health1.htm> (last visited May 2, 2010).

⁶¹ *Id.*

⁶² *Id.*

a person of the opposite sex who is a husband or a wife.”⁶³ DOMA does not define “man” and “woman” for the purposes of the federal statute. While it is seemingly self-evident what is a man and what is a woman, it is not obvious with transgender individuals. Most states have adopted marriage statutes limiting marriage to one man and one woman, or to two people of the opposite sex.⁶⁴ In the absence of clear statutory definitions of the terms male, female and opposite sex, the definition of marriage is ambiguous and is left to the courts for an interpretation of the meaning.⁶⁵

D. Sex for the Purposes of Marriage

For the purposes of marriage, states do not have clear statutory definitions of who can marry who. States base sex for the purposes of marriage on any one of three types of standards: (1) sex, (2) physical capacity, or (3) chromosomes.

1. Sex

In some states, whatever sex one was determined to be at birth follows as one’s sex for the purposes of marriage. If a state permits an amendment to a birth certificate for the category of sex, for the purposes of marriage the state may cast one’s birth sex as their sex despite amended legal documents. Other states may permit the amended sex to stand as one’s sex for the purposes of marriage.

2. Physical Capacity

Other states consider one’s physical capacity to define his or her sex. The two categories of physical capacity for the purposes of marriage that states have set out are: (1) penis to vagina

⁶³ Defense of Marriage Act, 1 U.S.C. § 7 (2010).

⁶⁴ Julie A. Greenberg, *The Road Less Traveled: The Problem with Binary Sex Categories in TRANSGENDER RIGHTS*, 51, 65.

⁶⁵ Julie A. Greenberg, *The Road Less Traveled: The Problem with Binary Sex Categories in TRANSGENDER RIGHTS*, 51, 64; See Andrew N Sharpe, *Transgender Jurisprudence Dysphoric Bodies of Law*, 91 (2002).

penetration (PVP), and (2) ability to procreate. Both categories require that both partners have the respective state required physical capability as a prerequisite to marriage. It is unclear how states determine whether the standards are met. Particularly states following the procreation model, the ability to procreate is as yet undetermined until it has occurred. If applied as stated, procreation requirement states would preclude sterile or infertile individuals from marrying.

State's following the PVP scheme make marriage available to post-operative transgenders who undergo sex reassignment surgery (SRS). If a transgender individual successfully completes SRS, he or she will have the ability to effectuate PVP with his or her partner.

3. Chromosomes

Some states base sex for the purposes of marriage on an individual's chromosomal make-up.⁶⁶ States with this standard for determining sex for the purposes of marriage is problematic for transgender individuals who live and identify as one sex but are chromosomally another. It is also problematic for intersexed individuals who may present with non-traditional chromosome patterns.

While several state courts' definitions of sex for the purposes of marriage do not preclude transgender individuals from marrying, some do. It is inconsistent for states to permit a legal change of one's sex but to not recognize that legal sex change for the purposes of marriage.

B. Transgender Case Law

Transgender case law falls into two camps: pro-recognition and anti-recognition. Pro-recognition cases accept transgender individuals as the sex their gender identifies with. Anti-recognition cases do not recognize transgender individuals as the sex their gender identifies as,

⁶⁶ This is problematic for intersexed individuals because they do not present with the binary XX or XY chromosomes.

but rather as the sex they were born. Courts in California and New Jersey are pro-recognition as they have held post-operative transgender individual to be their post-operative self-identified sex for the purposes of determining the validity of their marriage.⁶⁷ In contrast, Kansas, New York, Ohio and Texas are anti-recognition; state courts have held that the post-operative transgender is considered to be their sex assigned at birth, in accordance with *Corbett v. Corbett*.⁶⁸

1. The Leading Case: *Corbett v. Corbett*

In 1970, the English decision *Corbett v. Corbett* became the leading transgender case law that was and continues to be considered, although not always followed, in transgender cases across United States courts. The court considered the validity of the marriage of Arthur Corbett, a man, and April Ashley, a post-operative transgender woman.⁶⁹ The court held that sex is determined at birth and by a congruence of chromosomal, gonadal, genital factors and psychological factors.⁷⁰ Despite undergoing SRS and that her genitalia reflected a reconstructed vagina ample in size to admit an erect penis, the judge ruled that April Ashley was incapable of consummating her marriage.⁷¹ Her reconstructed vagina was not considered “natural,” but rather an “artificial cavity” and accordingly, she was not a woman for the legal purposes of marriage.⁷²

⁶⁷ *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004); See Nan D. Hunter, *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People*, at 179 (the Florida decision mentioned in the text was appealed and reversed.)

⁶⁸ *Corbett v. Corbett*, 2 All E.R.33 (P. 1970) (U.K.); See Nan D. Hunter, *The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People*, at 179.

⁶⁹ *Id.*; See Andrew N Sharpe, *Transgender Jurisprudence Dysphoric Bodies of Law*, at 40.

⁷⁰ Andrew N Sharpe, *Transgender Jurisprudence Dysphoric Bodies of Law*, at 41.

⁷¹ *Corbett v. Corbett*, 2 All E.R.33 (P. 1970) (U.K.); See Andrew N Sharpe, *Transgender Jurisprudence Dysphoric Bodies of Law*, at 94-95.

⁷² Andrew N Sharpe, *Transgender Jurisprudence Dysphoric Bodies of Law*, at 94-95.

2. Anti-Recognition Cases of Transgender Marriages

a. Ohio: *In re Declaratory Relief for Ladrach* (1987)

In *In re Declaratory Relief for Ladrach* a MTF transsexual was barred from applying for a marriage license to marry a male, because she was technically female.⁷³ Based on Ohio state statutes, it permits marriage of male persons and female persons.⁷⁴

As Ms. Ladrach's birth certificate indicated she was in fact male, and Ohio law did not permit persons of the same gender to marry, Ms. Ladrach proceeded to petition for a birth record correction.⁷⁵ This application was denied based on an interpretation of the Ohio statute that birth certificate amendments are only permitted to correct errors if in fact the original entry was in error.⁷⁶ Because there was no error in the designation of Ladrach as a "boy" on his birth certificate, the correction of birth record was dismissed by this court.⁷⁷

Thus, because Ms. Ladrach could not amend her birth certificate to read "girl", she was precluded from marrying a male in the state of Ohio.⁷⁸ The court did not answer the question of whether Ms. Ladrach could have married a male if in fact the Ohio statute did permit her to amend her birth certificate to be aligned with her self-identified sex.

b. Texas: *Christie Lee Littleton v. Dr. Mark Prange* (1999)

In 1999 the Texas Court of Appeals invalidated the marriage of Christie Littleton, a male-to-female post-operative transgender woman, and her deceased husband, Jonathan Littleton.⁷⁹

⁷³ *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, (1987).

⁷⁴ *Id.* at 829.

⁷⁵ *Id.* at 829-830.

⁷⁶ *Id.* at 830.

⁷⁷ *Id.* at 830-831.

⁷⁸ *Id.* at 831-832.

⁷⁹ *Littleton v. Prange*, 9 S.W.3d 223, 225 (1999); *See* Ruthann Robson, *Reinscribing Normaility? The Law and Politics of Transgender Marriage in* TRANSGENDER RIGHTS, 299, 302.

When Christie Littleton filed a wrongful death suit on behalf of her husband, the court questioned whether she even had standing to bring such a suit as the validity of her marriage was in question based on the fact that she is transgender.⁸⁰

Using her birth certificate as evidence of her maleness, rather than her genitals, the Texas Court of Appeals ruled that when God created Christie Littleton, a male-to-female transsexual, God created a man whom neither the law nor the medical community could turn into a woman.⁸¹ Despite the fact that Christie Littleton had an amended birth certificate reflecting her name and sex change, the court ruled that the original birth certificate listing her as a male was controlling.⁸² The Texas Court of Appeals believed it was in the legislature's province to decide the guidelines governing transgender marriage.⁸³ As a result, Christie Littleton's wrongful death suit brought on behalf of her late husband was dismissed.

When a court invalidates a marriage, the law engages in a legal fiction that the marriage never existed.⁸⁴ Despite the fact that the couple filed taxes "married filing jointly" tax returns for six years, and that Christie Lee was forced to cover her husband's child support payments when he could not, this was just nonexistent once the court ruled Christie and Jonathan's marriage was void.

⁸⁰ Littleton, 9 S.W.3d at 225.

⁸¹ Julie A. Greenberg, *The Road Less Traveled: The Problem with Binary Sex Categories in* TRANSGENDER RIGHTS, 51, 66; *See* Ruthann Robson, *Reinscribing Normaility? The Law and Politics of Transgender Marriage in* TRANSGENDER RIGHTS, 299, 302.

⁸² Littleton, 9 S.W.3d at 231; *See* Ruthann Robson, *Reinscribing Normaility? The Law and Politics of Transgender Marriage in* TRANSGENDER RIGHTS, 299, 302.

⁸³ Littleton, 9 S.W.3d at 230.

⁸⁴ Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families in* TRANSGENDER RIGHTS, 32, 40.

c. Kansas: *In the matter of the Estate of Marshall G. (J’Noel) Gardiner (2002)*

J’Noel Gardiner and Marshall Gardiner were married when Marshall died intestate in 1999, and Marshall’s son challenged J’Noel’s right to the estate.⁸⁵ Ms. Gardiner was born a male, but identifies as female and after transitioning to a female by undergoing sexual reassignment surgery, Ms. Gardiner had her birth certificate amended.⁸⁶ Ms. Gardiner was subsequently married to Joseph M. Gardiner, III. Marshall’s son alleged that he was the heir because the marriage between J’Noel and Marshall was void as J’Noel was a not a woman, but a man.⁸⁷ The Kansas Supreme Court invalidated J’Noel Gardiner’s marriage on the ground that she is legally male.⁸⁸

The court had two lines of case law it could have followed to determine J’Noel’s sex for the purposes of marriage: judge the validity of marriage according to the sexual classification assigned to the transsexual at birth; or judge the SRS procedures as a means of unifying a divided sexual identity and determine the transsexual’s sex for the purposes of marriage at the time of marriage.⁸⁹

Instead, the Supreme Court of Kansas looked to the legislative interpretation of the words “sex”, “male” and “female,” ultimately holding that these words to not encompass transsexuals.⁹⁰ The court interpreted the legislature to view “opposite sex” in the narrow traditional sense and that any marriages broader than this are against public policy and void.⁹¹ The Supreme Court of

⁸⁵ In the Matter of the Estate of Marshall G. Gardiner, 273 Kan. 191, 194 (2002).

⁸⁶ In the Matter of the Estate of Marshall G. Gardiner, 273 Kan. at 194.

⁸⁷ *Id.* at 194-195.

⁸⁸ *Id.* at 215; See Taylor Flynn, *The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families in TRANSGENDER RIGHTS*, 32, 39.

⁸⁹ In the Matter of the Estate of Marshall G. Gardiner, 273 Kan. at 195-196.

⁹⁰ *Id.* at 212-213.

⁹¹ *Id.* at 215.

Kansas held fast to the view that one's sex as determined at birth is one's sex for life.⁹² Ms. Gardiner's marriage was void as against public policy.⁹³

d. Florida: *Kantaras v. Kantaras* (2004)

A Florida circuit court held Michael Kantaras to be legally male for the purposes of marriage based on the fact that he had FTM SRS to alter his anatomy from female to male.⁹⁴ However, on appeal, the Court of Appeals of Florida reversed, holding that “the question of whether a postoperative transsexual is authorized to marry a member of their birth sex is a matter for the Florida legislature and not the Florida courts to decide.”⁹⁵ Because the Florida legislature had not addressed this issue, the court held that it did not have the authority to make such a determination. The Florida statute governing marriage does not authorize a postoperative transsexual to marry as the reassigned sex as sex is an immutable trait determined at birth.⁹⁶ The marriage was void ab initio.⁹⁷

3. Cases Recognizing Transgender Marriage

a. New Jersey: *M.T. v. J.T.* (1976)

In 1976, Superior Court of New Jersey recognized that gender identity plays a role in determining sex. The court upheld the marriage of a transsexual woman by declaring her sex to legally be female.⁹⁸

⁹² Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families in* TRANSGENDER RIGHTS, 32, 37.

⁹³ Samuel E. Bartos, *Letting “Privates” Be Private: Toward a Right of Gender Self-Determination*, 15 *Cardozo J.L. & Gender* 67, 70 (2008).

⁹⁴ *Kantaras v. Kantaras*, 884 So. 2d 155, (Fla. Dist. Ct. App. 2004).

⁹⁵ *Id.*; See Courtney G. Joslin & Shannon M. Minter, *Lesbian, Gay Bisexual and Transgender Family Law*, 498-499 (2009).

⁹⁶ *Id.* at 161.

⁹⁷ *Id.* at 161.

⁹⁸ *M.T. v. J.T.*, 355 A.2d 204, 211 (1976).

J.T. and M.T. met when M.T. was anatomically a male. M.T. subsequently underwent SRS and lived as a post-operative female, after which the parties married. M.T. and J.T. lived as husband and wife, and enjoyed a normal sex life including PVP intercourse.⁹⁹ When M.T. and J.T. split up, M.T. filed for support and maintenance. J.T. indicated to the court that M.T. was in fact male and that their marriage was void.¹⁰⁰

To determine her sex, the court considered the changes made to M.T.'s genitalia; its appearance and function for the purposes of PVP was important to the court.¹⁰¹ An expert witness physician's opinion was that M.T. was female and could no longer be considered male since she could not function as a male sexually either for recreation or procreation.¹⁰²

The court noted the definitive issue to be whether the marriage between a male and a post-operative transsexual who has changed her external genitalia to female is to be regarded as a lawful marriage between a man and a woman.¹⁰³ In reliance on the majority medical position that gender identity is chief among the components determining sex, the court recognized M.T.'s self-designated sex as female.¹⁰⁴

The New Jersey Superior Court disagreed with the court in *Corbett* which said that sex is cast and remains static at the moment of birth. Here, the court had a fundamentally different understanding of the term "sex" for marital purposes and found sex to be connected with gender.¹⁰⁵ The court stated that when birth anatomy and gender identity are in conflict, the role

⁹⁹ *Id.* at 205-206.

¹⁰⁰ *Id.* at 204-205.

¹⁰¹ M.T., 355 A.2d at 206; See Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families* in TRANSGENDER RIGHTS, 32, 37-38; See Ruthann Robson, *Reinscribing Normality? The Law and Politics of Transgender Marriage* in TRANSGENDER RIGHTS, 299, 300.

¹⁰² M., 355 A.2d 204 at 206.

¹⁰³ *Id.* at 208.

¹⁰⁴ *Id.* at 205-207; See Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families* in TRANSGENDER RIGHTS, 32, 35.

¹⁰⁵ M.T., 355 A.2d at 208-209.

of anatomy is merely secondary.¹⁰⁶ The court affirmed the trial court's ruling that M.T. and J.T. were in fact married and that J.T. was obligated to support M.T.¹⁰⁷

b. California: *Vecchione v. Vecchione* (1997)

In an unpublished case, California's Orange County Superior Court held that the marriage of a woman, Kristie, and a female-to-male transsexual man, Joshua, was valid for the purposes of joint custody.¹⁰⁸ Kristie attempted to invalidate the marriage since her husband was born female and California does not recognize same-sex marriage.¹⁰⁹ The court based its decision on its acceptance of the state statute that permits a new sex designation on the birth certificate, and declared that the law showed that "California recognizes the post-operative gender of a transgendered person."¹¹⁰ Based on this decision, California law recognizes the post-operative sex of a transsexual person for the purposes of marriage (as well as custody).¹¹¹

C. Defense of Marriage Act & Full Faith and Credit

The Defense of Marriage Act was enacted in two parts in September of 1996, to "define and protect the institution of marriage."¹¹² While it seemingly has no impact on transgender individuals, for the purposes of marriage DOMA is significant. Because a transgender individual's sex for the purposes of marriage depends on a state's interpretation, a transgender individual may be a different sex in different states and accordingly, his or her marriage may be valid or void.

¹⁰⁶ Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families in* TRANSGENDER RIGHTS, 32, 35.

¹⁰⁷ M.T., 355 A.2d at 211.

¹⁰⁸ Human Rights Campaign, *California Custody and Visitation Law*, <http://www.hrc.org/issues/parenting/421.htm> (last visited Apr. 30, 2010).

¹⁰⁹ Samuel E. Bartos, 15 Cardozo J.L. & Gender at 71-72.

¹¹⁰ *Id.*

¹¹¹ Courtney G. Joslin, *Lesbian, Gay Bisexual and Transgender Family Law* at 498.

¹¹² Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

For the purposes of federal law, the first part of DOMA defines marriage to be “the legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”¹¹³ The statute does not define ‘man,’ ‘woman’ or ‘opposite sex.’

The federal statute’s second component says that no state shall be required to give effect to or respect a relationship between persons of the same sex that is treated as a marriage under the laws of another state.¹¹⁴ This clause protects the rights of states to formulate their own policy regarding the legal recognition of same-sex marriage. While it DOMA is meant to affect the recognition of same-sex marriages, it also affects transgender marriages. For example, state A may recognize a FTM as a male and thus able to marry a female, but state B may recognize a FTM as a female and thus his marriage to another female would be void, assuming the state does not recognize same-sex marriage.

Same-sex marriage is legally performed and recognized in five jurisdictions: Massachusetts, Iowa, Connecticut, Vermont, New Hampshire, and most recently, Washington D.C.¹¹⁵ Based on DOMA, marriages performed for same-sex couples in these states are not required to be recognized or honored in other states. DOMA serves as a carve-out for states to reject same-sex marriages performed in other states. It is an exception to the Full Faith and Credit Clause, which states: “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.”¹¹⁶

¹¹³ Defense of Marriage Act, 1 U.S.C. § 7 (2010).

¹¹⁴ Defense of Marriage Act, 28 U.S.C. § 1738C (2010).

¹¹⁵ Same Sex Marriage, Civil Unions, and Domestic Partnerships, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last visited May 7, 2010).

¹¹⁶ U.S. Const. art. IV, § 1; *See* Defense of Marriage Act, 28 U.S.C. § 1738C (2010).

Further, because many of the measures in place to amend or change a name or sex on a birth certificate are largely administrative rather than formal judicial proceedings, the changes are not entitled to full faith and credit in other states.¹¹⁷ The Full Faith and Credit Clause only requires other states to recognize and honor final judgments. Thus administrative changes, such as changes to birth certificates, does not provide any concrete protection to transgender people seeking to rely on their new legal status for the purpose of marriage or other rights.¹¹⁸

III. ANALYSIS

The problem of transgender transition post-marriage is whether the marriage is valid, void or voidable. Because there is no definition of male or female for the purposes of marriage on either the federal or state level, there is a clear encumbrance upon transgender individuals who are married when they transition.

Depending on what jurisdiction an individual transitions within, their pre-existing marriage may be void as of the moment of SRS;¹¹⁹ or when their birth certificate is amended;¹²⁰ or when procreation is no longer possible.¹²¹ Further issues arise when post-marriage transitioned couples travel interstate as each state has a different basis for sex, as well as a different standard of sex for the purposes of marriage.

Essentially the inquiry is two-fold: how do we define a transgender's identity in terms of the sex binary our legal system uses; and how is it applied for the purposes of marriage. While amended birth certificates may prove meaningful, a transgender's self-identified sex may not

¹¹⁷ Alice Newlin, 17 Colum. J. Gender & L. at 479-480.

¹¹⁸ *Id.* at 480.

¹¹⁹ If the state bases sex for marriage on the possibility of PVP or appearance of genitalia.

¹²⁰ If the state bases sex for marriage on the birth certificate.

¹²¹ If the state bases sex for marriage on the possibility of pro creation.

carry through from an amended birth certificate for the purposes of marriage, ultimately eradicating all meaning behind the amended birth certificate.¹²²

What is going on here? Are states making half-assed attempts at recognizing that transgenderism is real, by allowing them to change their sex, then to later deny them the right to marriage as that sex? What's the point of allowing transgender individual's to change their sex on their birth certificate and other legal documents if it does not apply to marriage? It seems it's not about recognition of a self-identified sex at all, but about same-sex marriage. Maybe states do not care what sex we are at all, but only care that same-sex marriage isn't recognized.

A. First Comes Marriage, Then Comes Transition

When opposite-sex couples are married prior to one partner transitioning, it is a traditional marriage between one man and one woman. However, when one partner transitions to the same gender as the other partner, is the marriage still recognized as between one man and one woman? Or, is it a same-sex marriage because that's what it looks like on its face?

The state's ability to police the relationship between gender and sex is the central problem for securing the rights of transgender individuals.¹²³ As an initial premise, what is the transgender individual's legal sex post-transition. The second inquiry is whether for the purposes of marriage the same individual is male or female, determining whether the marriage is valid, void or voidable. Because no definitions of male and female are written into laws, courts are left to make these determinations.

B. First Comes Transition, Then Comes Marriage

Part of the problem with state's policing sex and gender for the purposes of marriage is that it doesn't work. More often than states would like to admit, couples pass the "duck test:" if it

¹²² Stephanie Markowitz, 14 *Cardozo J.L. & Gender* at 706.

¹²³ Paisley Currah, *The Transgender Rights Imaginary* 4 *Geo. J. Gender & L.* 705, 713 (2003).

walks like a duck, looks like a duck, quacks like a duck – well then – it must be a duck. In terms of marriage, this means that a couple presents as an opposite sex couple in two different instances: a biologically same-sex couple where one partner later transitions and a biologically opposite-sex couple where one partner later transitions.

The first is a transgender individual marrying his or her non-transgender partner in a heterosexual relationship. Both partners were born the same sex, and one partner transitioned. The couple appears to be a heterosexual opposite-sex couple for all intents and purposes, including an amended birth certificate, despite the fact that both individuals are biologically the same sex. Thus their marriage goes unnoticed because on the face of the relationship, it is an opposite-sex union, but merely scratching the surface would indicate that both partners are biologically the same sex.

The second instance is when a couple like Ms. Jessica Wicks and Ms. Robin Manhart. Both partners were born opposite-sexed but one partner later transitioned. Both women identify as and consider themselves to be women in a same-sex relationship. The couple was legally married in Texas in 2000. Despite the fact that they both embrace the same gender identity and are in what they consider a same-sex relationship, one of their birth certificates reads “boy” and the other reads “girl” and thus they could legally marry even though outwardly they appear to be a same-sex couple.¹²⁴

Both types of couples pass the “duck test” because on paper, whether their documents are amended or unamended, one partner appears to be male and the other partner appears to be female and the clerk certifying the marriage license does not notice that in fact in instance one the two individuals were biologically the same sex and in instance two the two individuals identify and present as the same sex. In either case, it is recognition of a same-sex relationship on

¹²⁴ Phyllis Raldolph Frye & Alyson Dodi Meiselman, 64 Alb. L. Rev. at 1033.

one level or another by the law. Unfortunately, this only turns out to be an administrative perk for transgender individuals. Passing the “duck test” in either instance is recognition of same-sex unions under the guise of transgender individuals.

This is proof of how the legal assumptions about sex and gender are binary-fixed. If you’re actually a same-sex couple, your union cannot be unrecognized. But if one of the partners in what appears to be a same-sex couple is in fact transgendered, or one partner in a transgender opposite-sex union happens to be of the same biological sex, both unions have the potential to be recognized, albeit perhaps also avoidable.

C. The Standards are Broken

Courts have not yet dealt with a case of a couple marrying as opposite-sex, and then at some point during the marriage have one partner transition to the same sex as the other partner, ultimately becoming a prima facie same-sex couple. Courts have dealt with couples who have married or attempted to marry after one partner transitioned. Three cases held marriages where one partner was transgender to be void ab initio based on the fact that the legislature of each state had not interpreted the statute to apply to transgender individuals,¹²⁵ and a fourth case rejected a transgender woman and non-transgender man from applying for a marriage license based on the fact that Ohio would not permit her to amend her birth certificate.¹²⁶

Two cases recognized that marriages with one transgender partner are valid.¹²⁷ The Superior Court of New Jersey recognized that gender identity is a key component in determining one’s sex. The unpublished decision by the Orange County Superior Court of California held the

¹²⁵ Kantaras, 884 So. 2d 155; Gardiner, 273 Kan. 191; Littleton, 9 S.W.3d 223.

¹²⁶ In re Declaratory Relief for Ladrach, 513 N.E.2d 828, (1987).

¹²⁷ M.T. v. J.T., 355 A.2d 204, 211 (1976); See Courtney G. Joslin, *Lesbian, Gay Bisexual and Transgender Family Law* at 498.

marriage of a FTM individual married to a female to be valid based on the state statute permitting individuals to change the sex designation on one's birth certificate.¹²⁸

The standards legislatures and courts have put in place to determine whether a transgender individual is one sex or another for the purposes of marriage fail to consider the application of the standards to non-transgender individuals. Courts that rely on chromosomes as a guideline for marriages between a man and a woman, neglect to consider intersexed individuals who may present with non-traditional chromosomal patterns. Such a rule precludes intersex individuals from participating in the institution of marriage, a fundamental right set out by the Supreme Court of the United States in *Loving v. Virginia*.¹²⁹ Basing sex for the purposes of marriage on chromosomes is over-inclusive it reaches individuals it does not intend to prevent from marrying.

Courts that rely on procreation as the standard of whether a couple can legally marry neglects to consider couples who are sterile, infertile, require artificial insemination or require a surrogate. While procreation is historically recognized as one purpose of opposite-sex unions, it is but one important social impact of the institution of marriage. Based on this standard, couples who cannot reproduce independently of medical interventions or surrogacy cannot legally marry. This standard of whether individuals can marry is only enforced in the context of transgender marriage, as there are no known cases of a man and a woman unable to marry because of infertility or sterility. If such a standard is selectively enforced, its application is discriminatory to transgender individuals. Basing sex for the purposes of marriage on the ability of the couple to procreate is meant to preclude and only applies to transgender marriages.

¹²⁸ Courtney G. Joslin, *Lesbian, Gay Bisexual and Transgender Family Law* at 498.

¹²⁹ *Loving*, 388 U.S. 1.

The standard for marriage of PVP, is reflective of a move in the right direction. It recognizes that marriages are often intimate and as a floor requirement, anatomically male and female genitals are necessary for the purposes of marriage. While this requires transgender individuals to undergo SRS, an expensive endeavor, it at least considers transgender's self-identified gender as their sex post-operation. This standard is more favorable for MTF transgenders than it is for FTM transgenders. The medical technology is available to create female genitalia from male genitalia and male genitalia from female genitalia. However, creating male genitalia from female genitalia is much more difficult, as it requires removal of the vagina and subsequent surgery, possibly several, to create a functional penis with the ability to become erect. Whereas creating female genitalia from male genitalia requires removal, labiaplasty and vaginoplasty surgeries to create a functional vaginal cavity.¹³⁰ A reconstructed vagina functions so long as a penis can be inserted, whereas a reconstructed penis only functions if it has the ability to become erect and thus it is more complicated surgically for FTM transgender individuals. Thus, while PVP is an effective standard for recognizing some transgender individuals as their post-transition sex, it is not available to those who do not wish to undergo SRS, cannot afford to do so, or have surgical results that are non-functioning.

States that classify an individual's sex based on chromosomes, the ability to procreate or PVP, creates a sex-based classifications system to determine whether an individual is qualified for a state-created right.¹³¹ This is unconstitutional for two reasons: it treats men and women differently, and establishes rules that determine whether a person is male or female.¹³²

¹³⁰ Stephanie Markowitz, 14 Cardozo J.L. & Gender at 706.

¹³¹ Julie A. Greenberg, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings* 80 Wash. L. Rev. 819, 863 (2005).

¹³² *Id.*

D. The United States Supreme Court and Transgender

While there are no United States Supreme Court cases directly addressing transgender marriage, there is but one case opinion that even mentions the word transsexual or transgender.¹³³ The highest court of the land has not yet ruled on or opined about the status of transgender individuals and marriage. However, the Supreme Court has decided both Due Process and Equal Protection cases that lay out key groundwork for the future of transgender marriages. As both involve same-sex relationships, perhaps decisions supporting a variety of sexual orientations is paving the way for transgender recognition as well.

In striking down Texas law criminalizing sodomy laws, *Lawrence v. Texas* interpreted a fundamental promise in the Constitution of personal liberty.¹³⁴ Private intimate consensual sexual conduct was found to be a substantive Due Process right under the Fourteenth Amendment of the Constitution, a personal liberty into which the government may not intrude.¹³⁵ The decision invalidated same-sex sodomy laws throughout the United States, as well as opposite-sex sodomy laws.¹³⁶ Such individual rights to liberty under the Due Process Clause of the Constitution give everyone the right to engage in most sexual conduct without government intervention.¹³⁷ While the Court invalidated a criminal statute, the decision establishes sexual conduct to be within the realm of privacy. As sexual conduct is largely related to sexual orientation and gender identity, when these paths converge *Lawrence* will be a supporting decision for transgender protections.

¹³³ *Farmer v. Brennan*, 511 U.S. 825 (1994) (an incarcerated inmate alleged prison officials violated the Eighth Amendment because the inmate, a pre-operative transsexual, was housed with those of the same biological sex.)

¹³⁴ *Lawrence v. Texas*, 539 U.S. 588 (2003).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

In 1996, the Supreme Court decision in *Romer v. Evans* held Colorado's state constitutional Amendment 2, which disallowed homosexual and bisexual persons the right to seek and receive legal protections from discrimination, to be unconstitutional.¹³⁸ In Justice Kennedy's words, under the amendment "[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint."¹³⁹ Amendment 2 was both too narrow and too broad. "It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."¹⁴⁰ Accordingly, the Court's holding reaffirmed the Equal Protection guarantees of the Fourteenth Amendment by finding the Colorado state constitutional amendment repugnant to the Constitution of the United States of America.¹⁴¹ Shutting down Colorado's proposed Amendment 2 is recognition of the need for protections for all sexual orientations. The next logical step is recognition for all gender identities.

Although neither *Lawrence* nor *Romer* addressed the concerns of transgender individuals, the decisions are a step in the right direction. Supreme Court recognition of the need to protect sexual conduct and sexual orientation is a logical stepping stone to establishing and recognizing protections for transgenders, intersexed, bi-gendered and bi-sexed individuals. *Lawrence* and *Romer* set out that there are groups of people who deserve express protection by the Supreme Court against state intrusion into their private lives.¹⁴² Along with the support of *Carolene* footnote four, there is a sincere hope that transgender individuals will be the next group securing the protection they need. With this Supreme Court precedent in place, future cases concerning transgenders will be based on the freedoms and protections afforded homosexual individuals.

¹³⁸ *Romer v. Evans*, 517 U.S. 620 (1996).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Samuel E. Bartos, 15 *Cardozo J.L. & Gender* at 88.

The most important Supreme Court decision for transgender individuals and marriage is *Loving v. Virginia*. An interracial couple had violated Virginia state laws prohibiting whites from marrying blacks. The court found that restricting the freedom to marry because of racial classifications violated the meaning of the Equal Protection Clause of the Fourteenth Amendment.¹⁴³ The opinion notes: “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”¹⁴⁴

Although this decision does not address transgender individuals, it serves as meaningful precedent that marriage is in fact something that is particularly fundamental to the pursuit of happiness. The Supreme Court has yet to hear same-sex marriage cases or transgender marriage cases, but *Loving* is strong precedent in favor of marriage as a fundamental right. If the Supreme Court found same-sex marriage bans to be in violation of the Equal Protection Clause, transgender individuals would be permitted to marry regardless of any case law or legislative standards.

Another Supreme Court decision, *Zablocki v. Redhail*, is also an important case to the furtherance of transgender rights to marry. In *Zablocki*, a father challenged a Wisconsin state law prohibiting him to marry because he had child support arrears. In applying a standard close to strict scrutiny, the Court determined that, “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”¹⁴⁵ This is applicable to transgender marriage issues because transgenders are classified by the standard a state or state court has set for the determination of sex for the purposes of marriage. This classification system prevents transgenders from marrying whom they wish which is a

¹⁴³ *Loving*, 388 U.S. at 12.

¹⁴⁴ *Loving*, 388 U.S. at 10.

¹⁴⁵ *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

direct infringement on their fundamental right to marry. If a transgender marriage case were to reach the Supreme Court, *Zablocki*'s holding may be the final piece of the puzzle to creating a true fundamental right to marry.

Beyond the fundamental right to marry, it is important to note that transgenders can be identified as an as-yet unprotected minority group. In 1938, Justice Stone authored one of the most famous footnotes in the history of the Supreme Court of the United States: “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”¹⁴⁶ The purpose of the footnote was to make clear that the Court is to always be a body protective of an assisting such minorities.¹⁴⁷

As the state marriage laws and DOMA stand, transgender individuals are an insular minority prohibited from reaping the benefits of the social and governmental institution of marriage without a rational basis. Perhaps transgendered individuals need to be included along with other minority groups to be protected by the Supreme Court against unwarranted state intrusion into their private lives.¹⁴⁸ But until a transgender marriage case reaches the Supreme Court, the crossroads between *Carolene* footnote four, *Loving*, *Romer*, *Lawrence* and *Zablocki* wait.

There are no political processes in place to protect the existing or future marriages of transgender individuals. Without uniformity of marriage standards across state lines, no transgender individual can comfortably travel cross state lines without effectively changing their legally recognized sex and/or marital status. It is essentially a restriction on the freedom to travel

¹⁴⁶ U.S. v. *Carolene Prod. Co.*, 304 U.S. 144, 153 at n4 (1938).

¹⁴⁷ Samuel E. Bartos, 15 *Cardozo J.L. & Gender* at 88.

¹⁴⁸ *Id.*

and becomes a commerce issue for transgender individuals. Crossing state lines has the potential to change a transgender's sex, sex for the purposes of marriage and the validity of his or her marriage.¹⁴⁹ Full Faith & Credit does not protect one's amended sex, sex for the purposes of marriage or the validity of one's marriage. Pursuant to DOMA, sister states do not have to honor same-sex marriages performed and recognized in other states.¹⁵⁰ Because states may regard transgender marriage as a same-sex marriage, such marriages may be void upon crossing state lines. Further, Full Faith and Credit only requires sister states to honor judicial decrees and thus birth certificates amended administratively do not fall within the scope of Full Faith and Credit.¹⁵¹

This also has a significant impact on custody rights for transgender individuals who split up. In *Kantaras*, Michael's parentage was challenged because their first child was biologically Linda's but Michael's by adoption, and the second was by artificial insemination.¹⁵² When Linda petitioned for sole custody, she claimed that her marriage to Michael was void because he was biologically a female and Florida does not permit same-sex marriages.¹⁵³ Further, she claimed that since Florida prohibits same-sex adoption, his adoption of her two biological children was also void.¹⁵⁴ The issue of custody was remanded to the trial court. It is clear that there are very real concerns about the procurement of sex changes, marriages and adoptions by transgender individuals that are later challenged on legal grounds. The determination of transgender parentage is just another ancillary concern to transgender marriage that must be addressed.

¹⁴⁹ Alice Newlin, 17 Colum. J. Gender & L. at 480.

¹⁵⁰ *Id.* at 480.

¹⁵¹ *Id.* at 480.

¹⁵² *Kantaras*, 884 So. 2d 155.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Carolene's footnote four serves as a beacon of light that the discrete and insular minority of transgender individuals will one day be availed of a "more searching judicial inquiry." The Supreme Court must take up the issue of same-sex marriage, and perhaps it will with *Perry v. Schwarzenegger*, currently on appeal to the United States District Court for the Northern District of California.¹⁵⁵ The case challenges California's constitutional amendment of Proposition 8, declaring that marriage is restricted to opposite-sex couples only.¹⁵⁶ The interstate problems and custody concerns surrounding transgender marriage could be simply solved if same-sex marriages were recognized by all states via federal mandate.¹⁵⁷ If same-sex marriage was federally mandated to all states of the union the agony courts go through to define male and female for the purposes of marriage, the redirection of the issue back to the legislature and the couples left without recognition would all be moot because a sex determination would no longer matter for the purposes of marriage. Of course this would not be possible unless DOMA's provision allowing states to not honor same-sex marriages performed out of state was overturned. Even if same-sex marriages will not be performed by all states, it is the mere recognition of marriages performed by other states that would address the concerns of transgender marriages.

III. CONCLUSION

Whether an infant pops out a screaming boy or a screaming girl, the laws should not be too quick to judge a child by its genitals and brand it a boy or a girl for eternity. Our laws must understand gender-identity as something that is less obvious than a penis or a vagina.

¹⁵⁵ *Perry v. Schwarzenegger*, <http://www.equalrightsfoundation.org/our-work/perry-v-schwarzenegger/> (last viewed May 7, 2010).

¹⁵⁶ *Id.*

¹⁵⁷ Such a mandate may implicate state sovereignty issues that are not addressed in this paper.

Other countries, states and cities have taken their own approach to this marriage, sex, and sexual orientation related conundrum. Consider New York City's Administrative Code § 8-102

(23). It states:

The term "gender" shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.¹⁵⁸

This statute is an express recognition of what transgenderism is and embraces the idea of self-determination of one's gender-identity. This is an important step for transgender individuals to proclaim their own sex regardless of what sex an individual is determined to be at the moment of birth.

Australia took an interesting approach to recognizing transgenderism in *In re Kevin*. It held that for the purpose of ascertaining the validity of a marriage under Australian law, the question of whether a person is a man or a woman for the purposes of marriage is to be determined as of the date of the marriage.¹⁵⁹ While this is helpful to individuals who transition first and then subsequently decide to marry, it does not serve transgender individuals who transition after already marrying.

Several European countries have established uniform laws that define the legal sex of a transsexual person for all purposes as they self-identify their own sex.¹⁶⁰ This is a model that can be followed in the United States to remove the confusion and guessing about the status of a transgender's legal sex, marriage post-transition, SRS, parentage, or birth certificate change.

There is a clear need for transgender individuals to be treated uniformly across state borders because there are clear divides between state statutes and court holdings as to the

¹⁵⁸ N.Y.C. Code § 8-102 (23).

¹⁵⁹ *In re Kevin* (2001) 28 Fam. L.R. 158 (Australia).

¹⁶⁰ Courtney G. Joslin, *Lesbian, Gay Bisexual and Transgender Family Law* at 488-494.

definition of sex for the purposes of marriage. Couples who experience a transitioning partner post-marriage need to know how this transition will impact their marriage. Will an amended birth certificate be sufficient to make the marriage void? Or will it take SRS? Does the SRS have to be a functioning success? Or maybe the marriage will stand no matter the circumstances. In the same vein, couples who would like to marry post-transition need to know their rights as well. Is an amended birth certificate enough for a post-transition opposite-sex couple to marry? Does it require SRS? Does the SRS have to be a functioning success? No matter the outcome, state and federal statutes need to become uniform so transgender individuals can know their legal rights as a transitioned individual before taking steps to make the transition post-marriage or before deciding to marry post-transition.

While there is no quick answer to legally recognizing transgender individuals as their self-identified sex and their marriages, the least that can be done is to provide them with a bright line rule as to what is a male, what is a female, and how it applies for the purposes of marriage. The legislature has not defined male and female for the purposes of marriage, leaving courts to deal with challenges to transgenders who are married. If same-sex marriage was legal, this issue would be moot.

There are three potential answers to this problem. The first is for a case to reach the United States Supreme Court and for it to turn out decision stating same-sex marriage is a fundamental right under the United States Constitution. This would dispel any invalidation of marriages based on any standard to determine sex because it would not matter either partner's sex biologically, self-identified, or legally recognized. The second would be a legislative enactment permitting every individual to indicate his or her own gender on his or her self-

identified sex, rather than other factors. The third is to legislate for a federal mandate requiring all states to honor same-sex marriages.

Despite the fact that we are all branded as a boy or a girl at our first breath, the legislature and judiciary must recognize that this branding is not determinative of one's self-identified sex. As more transgender individuals transition to the gender with which they best identify, legislatures and judiciaries must become more aware and understanding of transgenderism.

For the Brunner's, a middle-aged married couple that experienced a MTF transition, they worry that their marriage could potentially be in legal limbo.¹⁶¹ "We always worry about the day someone does question our situation," said Robyn Brunner.¹⁶² The possible realm of what can, should and might happen is endless, but what is very clear is the need for legislation or court decisions to solidify where transgenders and marriage stand.

¹⁶¹ Tina Kelley, *Through Sickness, Health and Sex Change*, N.Y. Times, Apr. 27, 1008.

¹⁶² *Id.*