

# Fordham Urban Law Journal

---

Volume 30 | Number 6

Article 6

---

2003

## Does a Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage

Randi E. Frankle

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Randi E. Frankle, *Does a Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage*, 30 Fordham Urb. L.J. 2007 (2003).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol30/iss6/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# Does a Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage

## **Cover Page Footnote**

J.D. candidate, Fordham University School of Law, 2004; B.A., History, cum laude, State University of New York at New Paltz, 2000. I would like to thank Professor Tracy Higgins for her guidance and insight as well as the editors and staff of the Fordham Urban Law Journal for helping me shape and polish this Comment. Most of all, I would like to thank my family, my father for inspiring me to be an overachiever, my mother for her never ending support, and Matt, Gordon, Gina, and Michelle for all their support and encouragement throughout this process.

# DOES A MARRIAGE REALLY NEED SEX?: A CRITICAL ANALYSIS OF THE GENDER RESTRICTION ON MARRIAGE

Randi E. Frankle\*

## INTRODUCTION

Marriage seems like an uncomplicated institution at first blush. Many people, beginning in childhood, think that marriage is something for which they should strive as a routine part of adult life. It seems that much of a person's life, particularly in the younger years, is devoted to finding that "special someone." A problem often arises, however, when that special someone is not who society expects, such as when that person is of the same-sex, is transsexual, or the individual is intersex.<sup>1</sup> The topic of marriage then seems to become extremely complicated.

Opponents of same-sex marriage argue that marriage should remain limited to a union between one man and one woman.<sup>2</sup> This definition categorically excludes homosexuals, transsexuals, and, presumably, intersex individuals. The most common rationale for limiting marriage in this manner, however, is circular: marriage should be limited to between one man and one woman because

---

\* J.D. candidate, Fordham University School of Law, 2004; B.A., History, *cum laude*, State University of New York at New Paltz, 2000. I would like to thank Professor Tracy Higgins for her guidance and insight as well as the editors and staff of the *Fordham Urban Law Journal* for helping me shape and polish this Comment. Most of all, I would like to thank my family, my father for inspiring me to be an overachiever, my mother for her never ending support, and Matt, Gordon, Gina, and Michelle for all their support and encouragement throughout this process.

1. An "intersex" individual is someone with ambiguous sex genitalia or both male and female sex characteristics. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 1007 (17 ed. 1993); Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics, & the Law*, 11 ANNALS HEALTH L. 195, 195 (2002); see Kishka-Kamari Ford, Note, "First Do No Harm" – The Fiction of Legal Parental Consent to Normalizing Surgery on Intersex Infants, 19 YALE L. & POL'Y REV. 469, 470 (2001).

2. See, e.g., Anita K. Blair, *Constitutional Equal Protection, Strict Scrutiny, and the Politics of Marriage Law*, 47 CATH. U. L. REV. 1231, 1238 (1998) (arguing that defining marriage as between one man and one woman does not abridge anyone's constitutional rights); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 582 (1999) (advocating for limiting marriage to one man and one woman by attempting to rebut the arguments for recognizing marriage between two people of the same sex).

that is the way it has always been.<sup>3</sup> Nevertheless, many other long-standing practices have changed to reflect changing social values.<sup>4</sup>

The legal limitation on the definition of marriage to the union of a man and a woman has drawn courts into the difficult business of adjudicating sexual identity, raising concerns of fairness and individual freedom.<sup>5</sup> For example, courts have had to determine whether a transsexual is defined by pre or post-operative sexual identity.<sup>6</sup> Even more problematic are situations involving intersex individuals. If a person's genitalia or chromosomes are ambiguous, binary classification into "male" or "female" is virtually impossible.<sup>7</sup> Indeed, an intersex individual may be precluded from legally marrying *anyone* because she meets the definition of neither man nor woman.<sup>8</sup>

Marriage is a fundamental right,<sup>9</sup> therefore, it is questionable that an intersex person could be constitutionally precluded from exercising that right altogether.<sup>10</sup> This entire group of people should not be deprived of their fundamental right to marry merely because they do not fit the definition of "male" or "female." Nev-

---

3. See *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (stating that marriage has always been considered as the union of one man and one woman and holding that there is no constitutional protection of marriage between persons of the same sex); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (noting that marriage has always been defined as between one man and one woman); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 748-54 (1998) (asserting that marriage, by definition, is a unique relationship between one man and one woman because heterosexual marriage has always been the preferred relationship); see also Anne B. Brown, Note, *The Evolving Definition of Marriage*, 31 SUFFOLK U. L. REV. 917, 943-44 (1998) (concluding that same-sex marriages should not be legalized because, in part, polls indicate that a majority of Americans still view marriage as a union between only one man and one woman). There are also arguments that the fundamental right to marry does not include same-sex marriage by definition because marriage is inevitably linked to procreation, which homosexuals cannot do. See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 224-26 (1998) (acknowledging some of the arguments advanced by opponents of same-sex marriage).

4. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating Virginia's racial restriction on marriage); see also *Brown v. Bd. of Education of Topeka*, 347 U.S. 483, 493 (1954) (holding school segregation unconstitutional). These practices, preventing interracial marriages and prohibiting racially integrated schools, were long-standing practices that no longer reflected society's values.

5. See *infra* Parts I.A., C.

6. See *infra* Part I.C.

7. See Hermer, *supra* note 1, at 195-96 (noting the difficulties that arise when classifying an infant with ambiguous genitalia into binary categories).

8. See *infra* Part I.C.1.b.

9. See *infra* Part I.A.1.

10. See *infra* Part II.A.1.

ertheless, because they do not fit these definitions, there are considerable problems in determining whom they are legally able to marry.<sup>11</sup> The question then is, who is the “opposite sex” of an intersex person for the purposes of marriage?

Part I of this Comment discusses the constitutional protection of the right to marry, intersex conditions, and case law regarding intersex, transsexual, and same-sex marriage. Part II discusses the consequences for marriage when it is narrowly defined, not only for intersex people, homosexuals, and transsexuals, but also for heterosexuals. Part III presents the resolution reached by most courts and proposes an alternative solution. Part III also asserts that because an intersex person is a combination of both male and female characteristics, she should be able to self-designate her gender and, even if she has physical characteristics that are mostly female,<sup>12</sup> be able to marry either a man or a woman. Further, this Comment argues that if an intersex person can marry either a man or a woman, then a male-to-female transsexual and a genetic woman<sup>13</sup> must also be able to marry either a man or a woman because all are similarly situated and must be treated alike under the Equal Protection Clause of the Fourteenth Amendment.

## I. BACKGROUND

### A. Constitutional Protection of Marriage

#### 1. *The Fundamental Right of Marriage*

For over sixty years, beginning with *Skinner v. Oklahoma*, the United States Supreme Court has recognized that the right to marry is a “basic civil right.”<sup>14</sup> Generally, classifying a right as a basic civil right means that the exercise of that right cannot be unreasonably burdened by the government.<sup>15</sup> Further, both *Loving v. Virginia*<sup>16</sup> and *Zablocki v. Redhail*<sup>17</sup> reaffirmed the Court’s holding

11. See *infra* Part II.A.1.

12. Many intersex conditions result in female physical characteristics. See *infra* Part I.B.

13. The terms “genetic man” or “genetic woman” will be used to refer to persons whose gender identity, sex at birth, and chromosomes conform.

14. 316 U.S. 535, 541 (1942). Although the case before the Court involved a marriage between a genetic male and a genetic female, the Court did not specifically hold that this type of marriage is the only type that is constitutionally protected. *Id.*

15. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384-87(1978) (holding that the right to marry is of fundamental importance and invalidating a Wisconsin statute because it unreasonably burdened that right).

16. 388 U.S. 1, 12 (1967).

17. 434 U.S. at 383.

in *Skinner*, stating that “marriage is a fundamental right” and giving the right to marry constitutional protection.<sup>18</sup> Marriage is a fundamental right that everyone should be able to exercise and, at least, can exercise when in a seemingly heterosexual relationship. Problems arise, however, when a person attempts to exercise that right in an untraditional manner, that is, attempting to marry someone who is not of the “opposite sex.” Nonetheless, marriage remains a fundamental right and cannot be unreasonably impinged upon.<sup>19</sup>

The Supreme Court has consistently held that if a statute or classification affects a fundamental right, heightened judicial scrutiny is required.<sup>20</sup> In *Zablocki*, the Court stated that since the right to marry is of fundamental importance, a “classification that significantly interferes with the exercise of that right” requires “critical examination of the state interests advanced.”<sup>21</sup> When a fundamental right is affected, any classification that has no bearing on the asserted state interest or that is deliberately discriminatory will not be upheld.<sup>22</sup>

---

18. *Id.*

19. *Id.* at 386; *see also* *City of Mobile v. Bolden*, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting) (stating that “if a classification impinges upon a fundamental right explicitly or implicitly protected by the Constitution . . . strict judicial scrutiny is required.”).

20. *Zablocki*, 434 U.S. at 383. Heightened judicial scrutiny indicates that the Court is using more than mere rational basis review. In this context specifically, the Court required the statute be “supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Id.* at 388; *see also* *Cent. State Univ. v. Am. Ass’n of Univ. Professors*, 526 U.S. 124, 127-28 (1999) (noting that the Court has “repeatedly held” that unless a classification involves a fundamental right, no heightened scrutiny is required); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that the equal protection clause requires heightened scrutiny if the exercise of a fundamental right is jeopardized); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (stating, “where a law classifies in such a way as to infringe [on] constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that heightened scrutiny is required “. . . when state laws impinge on personal rights protected by the Constitution.”).

21. *Zablocki*, 434 U.S. at 383 (internal quotations omitted).

22. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (holding that a “bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”); *Zablocki*, 434 U.S. at 406 (Stevens, J., concurring); *see* *Turner v. Safley*, 482 U.S. 78, 97 (1986) (holding unconstitutional a regulation that prohibited prisoners from marrying because it unreasonably burdened the right to marry and was not sufficiently related to the state’s penological interests).

## 2. *Marriage and Equal Protection*

A discussion of marriage and its categorical limitations necessarily implicates the Equal Protection Clause.<sup>23</sup> Equal protection jurisprudence dictates that “all persons similarly situated should be treated alike.”<sup>24</sup> Depending on the classification at issue, courts use different levels of scrutiny: race-based classifications require strict scrutiny;<sup>25</sup> gender-based classifications are subject to intermediate scrutiny;<sup>26</sup> and all other classifications must merely pass a rational basis review.<sup>27</sup> In addition, a classification or restriction which burdens a fundamental right will be subject to heightened scrutiny even if the classification does not involve a suspect class, such as race or gender.<sup>28</sup>

In *Zablocki*, the Supreme Court stated that a classification that significantly interferes with a person’s ability to exercise a fundamental right “cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate

23. The Fourteenth Amendment states, in part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Any restriction placed on marriage, therefore, must be applied equally to all similarly situated persons. *See, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472, 2486 (2003) (O’Connor, J., concurring) (stating that treating the “same conduct differently based solely on the participants” violates the Equal Protection Clause and concluding that moral disapproval alone cannot, and has not ever been, “a legitimate government interest under the Equal Protection Clause because legal classifications cannot be drawn for the purpose of disadvantaging the group burdened by the law.”); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (stating that the Equal Protection Clause prohibits a state from legislating different treatment of persons on the basis of an arbitrary or unreasonable classification).

24. *Lawrence*, 123 S. Ct. at 2484 (O’Connor, J., concurring); *City of Cleburne*, 473 U.S. at 439.

25. Strict scrutiny is defined as requiring a compelling governmental interest and a narrowly tailored statute. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (holding that the Equal Protection Clause requires strict scrutiny of all race-based classifications).

26. A statute meets intermediate scrutiny if there is an important governmental objective and the means are substantially related to that objective. *Nguyen v. I.N.S.*, 533 U.S. 53, 60-61 (2001) (stating that gender-based classifications must pass intermediate scrutiny).

27. Rational basis review is satisfied if the statute is reasonably related to a legitimate government interest. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 357 (2001) (stating that rational basis review is properly applied to general social and economic legislation). The Court has, however, used “a more searching form of rational basis review” in some circumstances, such as where “the challenged legislation inhibits personal relationships,” to strike down legislation under the Equal Protection Clause. *Lawrence*, 123 S. Ct. at 2485 (O’Connor, J., concurring).

28. *Zablocki*, 434 U.S. at 388; *see supra* note 20 and accompanying text.

only those interests.”<sup>29</sup> Classifications that burden the fundamental right to marry, particularly when applied to similarly situated persons, must be examined under this level of heightened scrutiny.<sup>30</sup> The state must demonstrate an important interest and the legislation must be closely tailored to serve that interest.<sup>31</sup> This is the standard the Supreme Court sets in *Zablocki*.<sup>32</sup> At times, courts have circumvented standards and tests that would otherwise seem to apply where homosexuality or gender nonconformity are concerned.<sup>33</sup> It is possible that the Court would define the right to marry as narrowly as the right to marry a person of the opposite sex, or even as the right to marry a person with opposite chromosomes, but thus far has defined the right as the right to marry.<sup>34</sup>

*a. A Brief Overview of Same-Sex Marriage Jurisprudence*

There have been several cases challenging the denial of marriage licenses to same-sex couples.<sup>35</sup> The national debate on this issue, however, was not sparked until 1993, when the Hawaii Supreme Court held that the denial of a marriage license to a same-sex couple, based on the sex of each partner, presumptively violated the state constitution’s equal protection clause.<sup>36</sup> The court held the restriction was a classification based on sex and treated it as a suspect class for purposes of the state constitution’s equal protection clause.<sup>37</sup> The restriction, therefore, was subject to strict scru-

---

29. *Zablocki*, 434 U.S. at 388. The Court has also held that classifications that “invade or restrain” fundamental rights asserted under the Equal Protection Clause “must be closely scrutinized and carefully confined.” *Harper v. Virginia State Board of Elections*, 383 U.S. 633, 669 (1966).

30. *Zablocki*, 434 U.S. at 383.

31. *Id.* at 388.

32. *Id.*

33. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (defining the privacy right asserted extremely narrowly, as the right to engage in homosexual sodomy, in order to uphold a Georgia anti-sodomy statute instead of following the trend of previous privacy cases), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) (stating that the court was relying on the multi-factor test, but relying primarily on presumed chromosomes); *Baehr v. Lewin*, 852 P.2d 44, 57-58 (Haw. 1993) (defining the privacy right asserted as the right to same-sex marriage, instead of the right to marry).

34. *Zablocki*, 434 U.S. at 383; *see infra* Part I.A.2.a.

35. *See, e.g.*, *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187, 1188 (Wash. Ct. App. 1974).

36. HAW. CONST. art 1, § 5; *Baehr*, 852 P.2d at 67.

37. HAW. CONST. art 1, § 5; *Baehr*, 852 P.2d at 63-64.



tiny.<sup>38</sup> Hawaii has since passed a constitutional amendment banning same-sex marriage,<sup>39</sup> but the court's decision sparked a feverish debate between advocates of same-sex marriage and its opponents.<sup>40</sup>

Advocates of same-sex marriage present several arguments.<sup>41</sup> One of the central arguments is a due process claim; marriage is a fundamental right, and same-sex couples should be able to exercise that right.<sup>42</sup> This argument, however, failed in the courts.<sup>43</sup> Courts frame the right as a "right to same-sex marriage" instead of simply the right to marry.<sup>44</sup> In *Baehr*, the court acknowledges the fundamental right to marry, but states that the right to same-sex marriage is not "implicit in the concept of ordered liberty" or "so rooted in the traditions and collective conscience of our people" that it should have constitutional protection.<sup>45</sup>

Other arguments, grounded in gender discrimination<sup>46</sup> and equal protection claims, have also failed.<sup>47</sup> According to this argument,

38. *Baehr*, 852 P.2d at 63-64. The court remanded holding that the State must assert a compelling interest and the statute must be narrowly tailored in order to be valid under the state constitution. *Id.* at 67-68.

39. HAW. CONST. art 1, § 23 (stating "[t]he legislature shall have the power to reserve marriage to opposite-sex couples"). The Hawaii legislature limited marriage to opposite sex couples by declaring that the only valid marriage contract shall be between a man and a woman. HAW. REV. STAT. ANN. § 572-1 (1998).

40. For example, scholars and commentators wrote numerous articles advocating for the freedom to marry while Congress subsequently enacted The Defense of Marriage Act ("DOMA"), which states that no state is required to recognize any same-sex relationship that is treated as a marriage in any other state. 28 U.S.C. § 1738C (1996); see Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J. L. & POL'Y 61, 62 (1999) (advocating the inclusion of homosexuals in the "marriage franchise"); Mark Strasser, *Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. L. SCH. ROUNDTABLE 61, 62 (2000) (arguing that bans on same-sex marriage are analogous to anti-miscegenation statutes and violate the Equal Protection Clause).

41. See, e.g., Katz, *supra* note 40, at 73-97 (discussing the fundamental right aspect of marriage and the equal protection gender discrimination argument).

42. See Heather Hodges, *Dean v. The District of Columbia: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U. J. GENDER & L. 93, 102-04 (1996) (discussing the advancement of a due process argument); see also Katz, *supra* note 40, at 73-77 (discussing the due process claim that marriage is a fundamental right).

43. See, e.g., *Baehr*, 852 P.2d at 57 (holding that there is no fundamental right to same-sex marriage); Hodges, *supra* note 42, at 102-04 (discussing various cases in which the due process claim was rejected).

44. See *Baehr*, 852 P.2d at 57.

45. *Id.*

46. See Katz, *supra* note 40, at 88-92 (discussing the gender discrimination argument); see also Strasser, *supra* note 40, at 74-80 (discussing the ban on same-sex marriage as discrimination on the basis of sex).

47. See, e.g., Hodges, *supra* note 42, at 118-21 (discussing the decision in *Dean v. District of Columbia*, 653 A.2d 307, 363-64 (D.C. 1993), that the ban on same-sex

by allowing men to marry women, but not allowing women to marry women, unequal treatment of women as compared to men exists.<sup>48</sup> Opponents of same-sex marriage argue that men and women are treated equally because each can marry someone of the opposite sex.<sup>49</sup> Although the gender discrimination argument has failed in the courts, there are still Equal Protection issues yet to be addressed.<sup>50</sup>

## B. Intersex Conditions

An intersex individual has at least one of several conditions that make determining gender problematic. By definition, an intersex individual displays physical sex characteristics that are ambiguous, that is, a combination of male and female characteristics.<sup>51</sup> When ambiguity is present at birth, it can perplex doctors and parents as they attempt to classify the newborn into one of only two categories, male or female.<sup>52</sup>

Several conditions can cause intersexuality. Certain hormonal disorders, such as androgen insensitivity syndrome (“AIS”) and 5-

---

marriage does not trigger an equal protection claim). Although the *Baehr* court acknowledged that there was an equal protection problem, the state circumvented this by adopting a constitutional amendment that allowed the legislature to limit marriage to opposite sex couples, which they subsequently did. *See supra* notes 37-39 and accompanying text.

48. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 216 (1994) (noting the difficulty in distinguishing between a woman who wishes to be with a woman and a man who wishes to be with a woman); *see also* Strasser, *supra* note 40, at 79 (noting the view that the ban on same-sex marriage treats men and women alike). The counter-argument is that both men and women can marry a person of the opposite sex. Dent, *supra* note 2, at 608 (asserting that traditional marriage treats everyone the same because everyone may marry a person of the opposite sex). That is, a man who wishes to marry a woman and a woman who wishes to marry a woman are not considered similarly situated. *See id.*

49. *See* Dent, *supra* note 2, at 608.

50. For example, it is questionable whether allowing a man to marry a genetic woman and not allowing the same man to marry a male-to-female transsexual is constitutional because both appear to be similarly situated with their respect to marry an externally physical female. *See* Coombs, *supra* note 3, at 258-260 (discussing the effect of gender discrimination arguments on the transgendered); *see also* Shana Brown, Comment, *Sex Changes and “Opposite Sex” Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons’ Amended Legal Sex for Marital Purposes*, 38 SAN DIEGO L. REV. 1113, 1152-56 (2001) (discussing transsexuals right to marry); Kristine J. Namkung, Comment, *The Defense of Marriage Act: Sex and the Citizen*, 24 U. HAWAII L.REV. 279, 294-304 (2001) (discussing Equal Protection jurisprudence and the Defense of Marriage Act).

51. TABER’S CYCLOPEDIA MEDICAL DICTIONARY 1007 (17th ed. 1993); Hermer, *supra* note 1, at 195-96.

52. Ford, *supra* note 1, at 470-71.

Alpha-Reductase Deficiency (“5-A-R D”), cause the external genitalia to be incongruent with the individual’s chromosomes.<sup>53</sup> Intersexuality can also result from several chromosomal conditions. For example, an individual may have an unusual number of sex chromosomes, either more than two or only one.<sup>54</sup> A person born with visible, physical ambiguity is also considered intersex on the basis of that ambiguity.<sup>55</sup> In addition, most individuals affected by an intersex condition are infertile.<sup>56</sup>

### 1. *Hormonal Disorders*

An individual with either AIS or 5-A-R D usually develops in utero as a physical female.<sup>57</sup> A fetus affected by AIS has XY (male) chromosomes and inter-abdominal testes, but is unable to process androgens.<sup>58</sup> The fetus then develops as a physical female by default.<sup>59</sup> In most cases, the child is classified as a genetic female at birth.<sup>60</sup> The disorder is usually not discovered until puberty, when the individual fails to menstruate.<sup>61</sup>

A second disorder, 5-Alpha-Reductase Deficiency, is similar to AIS in that the child is designated a genetic female at birth.<sup>62</sup> With 5-A-R D, however, the fetus is unable to convert testosterone into dihydrotestosterone, the hormone which causes the development

53. Hermer, *supra* note 1, at 206; *see also infra* Part I.B.1.

54. Katrina Rose, *The Transsexual and the Damage Done: The Fourth Circuit Court of Appeals Opens PanDOMA’s Box by Closing the Door on Transsexuals’ Right to Marry*, 9 LAW & SEXUALITY 1, 16-17 (1999-2000) (noting that an individual with chromosomes other than XX or XY is considered intersex); *see infra* Part I.B.2.

55. TABER’S CYCLOPEDIA MEDICAL DICTIONARY 1007 (17th ed. 1993); Hermer, *supra* note 1, at 205; *see Ford, supra* note 1, at 470 (discussing various physical ambiguities).

56. *See Hermer, supra* note 1, at 205-09; *see also* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 283-88 (1999).

57. Greenberg, *supra* note 56, at 286-88.

58. Hermer, *supra* note 1, at 206-07. Androgens are the hormones that are responsible for the development of secondary male sex characteristics. Medical Dictionary at <http://www.medical-dictionary.com> (last visited April 5, 2003); *see* Intersex Society of North America, *What Is Androgen Insensitivity Syndrome?*, at <http://www.isna.org/faq/faq-ais.html> (last visited April 5, 2003). This disorder affects approximately 1 in 13,000 chromosomal males. *See* Intersex Society of North America, *Frequency: How Common Are Intersex Conditions?*, at <http://www.isna.org/faq/frequency.html> (last visited April 5, 2003).

59. Greenberg, *supra* note 56, at 288.

60. Hermer, *supra* note 1, at 206-07.

61. *Id.*

62. *Id.* at 207.

of male genitalia, so the fetus develops ambiguous genitalia.<sup>63</sup> A person affected with 5-A-R D is usually raised as a female.<sup>64</sup> During puberty, however, the body will masculinize and the disorder is discovered.<sup>65</sup>

Another hormonal disorder, congenital adrenal hyperplasia (“CAH”), occurs when a chromosomal female<sup>66</sup> is exposed to abnormally high amounts of androgens during fetal development.<sup>67</sup> The individual usually has a fully developed uterus and ovaries, but also develops masculine external genitalia due to the exposure to high levels of androgen.<sup>68</sup> This individual may have an abnormally large clitoris that resembles a penis, no visibly apparent vagina, excessive hair, and possibly a deep voice.<sup>69</sup>

## 2. Chromosomal Disorders

A person could have a variety of combinations of sex chromosomes, such as XXY, XYY, or X, yet be completely unaware of this condition for some time.<sup>70</sup> Most chromosomal disorders are not discovered until puberty, if they are discovered at all.<sup>71</sup> All of these chromosomal conditions cause, at least, a “misidentification”

---

63. *Id.* (discussing the physical ambiguity as a “significantly small penis . . . variable degrees of scrotal development, and undescended testes.”).

64. *Id.*

65. *Id.* (noting that with penile growth and testicular descent, the person’s gender identity may shift from female to male).

66. A chromosomal female is defined as a female with XX chromosomes. *Id.* at 205-06.

67. Hermer, *supra* note 1, at 206; Medical Dictionary, at <http://www.medical-dictionary.com> (last visited April 5, 2003).

68. Hermer, *supra* note 1 at 206.

69. Medical Dictionary, at <http://www.medical-dictionary.com> (last visited April 5, 2003); see Hermer, *supra* note 1, at 206. Hermer notes that most intersex individuals with this disorder in the United States are raised as females, but are occasionally raised as males. *Id.*

70. Many of these disorders are not discovered until puberty, therefore, the child, and possibly the parents, are unaware of the condition for eleven to twelve years. Greenberg, *supra* note 56, at 283-85.

71. For example, in the Australian case *In re Marriage of C. and D.*, 35 F.L.R. 340 (Austl. 1979), the husband was unaware of his intersexuality until age twenty-one. See Leane Renee, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER SOC. POL’Y & L. 343, 366 (1997) (discussing the Australian court’s decision to invalidate an eleven year marriage because the husband was anatomically both male and female, therefore, there was never a union between a man and a woman).

of sex at birth because they cause the physical appearance of one sex or gender while the chromosomes indicate another.<sup>72</sup>

*a. Klinefelter Syndrome*

Males<sup>73</sup> with Klinefelter Syndrome have two or more X chromosomes and a Y chromosome.<sup>74</sup> Persons with this condition have a penis and testes, although smaller than normal, and discover the disorder only when breasts develop during puberty.<sup>75</sup> Most individuals with this syndrome are raised as males and their gender identity is male.<sup>76</sup> In addition, many males with this syndrome take hormones in order to appear more masculine after feminizing during puberty.<sup>77</sup>

*b. Turner Syndrome*

Turner Syndrome, another chromosomal abnormality, exists when only one X chromosome is present, causing a failure of the gonads to respond to pituitary hormone stimulation.<sup>78</sup> Thus, the individual has limited sexual maturation.<sup>79</sup> A person with Turner Syndrome appears physically female, but has nonfunctioning gonads that cannot be defined as either testes or ovaries.<sup>80</sup> This condition is not evident at birth and may be overlooked for some time.<sup>81</sup> These individuals are usually diagnosed during puberty be-

72. "Misidentification" is used because the child is identified as one gender, but has unapparent characteristics of another gender leaving no way to tell at birth with which gender that child will identify.

73. A child with this syndrome is usually identified as male at birth. Greenberg, *supra* note 56, at 283.

74. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 1056 (17th ed. 1993); Greenberg, *supra* note 56, at 283.

75. Greenberg, *supra* note 56, at 283.

76. *Id.* Identifying as male indicates that the person views himself as a man and is comfortable in that gender. See Coombs, *supra* note 3, at 237-42 (discussing sexual identity in terms of transgenderism). Individuals whose gender identity does not conform to their physical sex characteristics are said to have gender dysphoria. Greenberg, *supra* note 56, at 288.

77. Greenberg, *supra* note 56, at 283.

78. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 2058 (17th ed. 1993); Greenberg, *supra* note 56, at 284.

79. TABER'S CYCLOPEDIA MEDICAL DICTIONARY 2058 (17th ed. 1993).

80. Greenberg, *supra* note 56, at 284. The gonads of a person affected by this syndrome are unidentifiable and often referred to as "streak." *Id.*

81. *Id.*

cause there is limited breast development and a failure to menstruate.<sup>82</sup>

### c. Swyer Syndrome

Yet another chromosomal abnormality that is not apparent until puberty is Swyer Syndrome.<sup>83</sup> In this situation, the person has XY chromosomes, but the Y chromosome is missing the sex-determining segment.<sup>84</sup> Without this segment, the fetus is unable to produce masculinizing hormones or develop testes and develops as an externally physical female.<sup>85</sup> This condition, again, is generally diagnosed when the individual fails to develop breasts or menstruate at puberty.<sup>86</sup>

### 3. Physical Ambiguity

Another form of intersexuality is the presence of ambiguous genitalia at birth, including clitoromegaly,<sup>87</sup> micropenis,<sup>88</sup> or hypospadias.<sup>89</sup> These conditions are usually surgically “corrected” at birth.<sup>90</sup> The infant is assigned a gender, which is recorded on the birth certificate, determining this person’s legal sex regardless of her psychological or chromosomal identity.<sup>91</sup>

## C. Case Law Regarding Intersex Individuals

Marriage, in every state, is limited to a union between one “man” and one “woman.”<sup>92</sup> In other words, marriage is limited to

---

82. *Id.* Also, Greenberg notes that individuals with this syndrome are able to menstruate and can also carry a child to term, though only through in vitro fertilization, with proper hormonal treatment. *Id.* at 284 n.110.

83. *Id.* at 284.

84. *Id.*

85. *Id.*

86. *Id.*

87. Clitoromegaly is defined as an enlarged clitoris. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 401 (17th ed. 1993).

88. Micropenis is defined as an abnormally small penis. *Id.* at 1216; *see also* Medical Dictionary, at <http://www.medical-dictionary.com> (last visited April 5, 2003).

89. Hypospadias is defined as an abnormal opening of the male urethra on the underside of the penis or a urethral opening into the vagina. *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 950 (17th ed. 1993). These ambiguities may be caused by one of the hormonal or chromosomal disorders discussed in Parts I.B.1 or I.B.2. *See Hermer, supra* note 1, at 205-09.

90. Ford, *supra* note 1, at 470-71. Currently, there is a substantial amount of debate occurring as to whether intersex infants' physically ambiguous genitalia should be surgically altered at birth. *See id.*

91. *Id.* at 471-72.

92. *See, e.g.,* CAL. FAM. CODE § 300 (1994); LA. CIV. CODE ANN. art. 89 (1999); ME. REV. STAT. ANN. tit. 19-A, § 650 (1998); N.D. CENT. CODE § 14-03-1 (2001);

apparently heterosexual couples.<sup>93</sup> Though there is much debate over whether to give full marriage rights to same-sex couples,<sup>94</sup> a question also remains as to whom intersex individuals can validly marry.<sup>95</sup> Since their sexual characteristics are ambiguous, the question arises: when are intersex individuals considered to be in an apparently heterosexual relationship?<sup>96</sup> If their chromosomal makeup is incongruent with their physical sex characteristics, or their physical sex characteristics are ambiguous at best, then what criteria determine whether they are in a heterosexual marriage for the purposes of these statutes? Is it even possible for an intersex person to be a part of an opposite sex couple? There are no recent United States cases challenging the validity of a marriage where one of the partners is intersex, and few United States cases involving this issue in general.<sup>97</sup> Case law involving marriages where one partner is a transsexual is analogous, however, because post-operatively they also have ambiguous sex characteristics. These cases can be examined in the absence of case law involving the intersex.

---

TEX. FAM. CODE ANN. § 2.001 (1998). All of the statutes limit marriage to a union between one man and one woman, without defining these terms, or invalidate marriages between persons of the same sex, and are only a few examples of a majority of state statutes. Even though Vermont has a comparable civil union statute, the state still does not recognize same-sex marriage. Although two people in a civil union receive the same tangible benefits as a married couple, VT. STAT. ANN. tit. 15, § 1204 (2000), available at <http://www.sec.state.vt.us/otherprg/civilunions/civilunionlaw.html> (last visited April 5, 2003), the separate classification implies a “second-class” citizen status. See, e.g., Evan Wolfson, *All Together Now*, THE ADVOCATE, Sept. 11, 2001, available at [http://www.freedomtomarry.org/ftm\\_blueprint.htm](http://www.freedomtomarry.org/ftm_blueprint.htm) (last visited July 4, 2003).

93. These couples are “apparently” heterosexual because the law would presumably validate a marriage between a lesbian woman and a gay man, neither of whom are heterosexual, but the couple appears to be. See *supra* note 92 and accompanying text. These statutes base the restriction solely on physically being male or female, there is no mention of sexual identity. *Id.*; see also Strasser, *supra* note 40, at 74-80 (discussing the implications of a statute tailored to the orientation of the parties).

94. Compare The Freedom to Marry Collaborative, at <http://freedomtomarry.org> (last visited April 5, 2003), and Strasser, *supra* note 40, at 61 (asserting that the same-sex marriage ban violates the equal protection clause), with Dent, *supra* note 2, and Wardle, *supra* note 3 (both supporting the limitation on marriage).

95. See *infra* Part II.A.1.

96. Apparent heterosexuality is the necessary condition according to the statutes because, presumably, a lesbian could marry a gay man with no problem. See *supra* notes 92-93 and accompanying text.

97. There seems to be only one U.S. case that involved a challenge to a marriage where one of the partners was a “hermaphrodite.” This case was decided in 1878. The brief opinion stated that because the appellant knew of his wife’s “malformation” when he entered the marriage, he had no right to complain thirteen years later. *Peipho v. Peipho*, 88 Ill. 438, 438 (1878).

1. *Transsexual Case Law as a Guide*a. *Littleton v. Prange*<sup>98</sup>

Christie Lee Littleton, although her chromosomal makeup was never tested, was born with normal male genitalia.<sup>99</sup> Christie identified as being female since she was approximately three years old.<sup>100</sup> She underwent sex reassignment surgery in her twenties and had her birth certificate legally changed to reflect her female gender.<sup>101</sup> Christie then married a genetic man, Jonathon Littleton,<sup>102</sup> with whom she lived for seven years.<sup>103</sup> Upon his death, Christie initiated a wrongful death action against one of Jonathon's doctors in her capacity as Jonathon's surviving spouse.<sup>104</sup> The doctor challenged Christie's standing, asserting that she could not legally be Jonathon's surviving spouse because she was legally a man and Texas does not allow marriage between two people of the same sex.<sup>105</sup>

The Court of Appeals of Texas, Fourth District, determined that the issue of whether Christie was a man or a woman was a matter of law, thus the judge, rather than a jury, would decide the issue.<sup>106</sup> Although the court mentioned such factors as gonads, genitalia, chromosomes, and psychological makeup as being important to determine Christie's sex,<sup>107</sup> it primarily considered genitalia at birth

---

98. 9 S.W.3d 223 (Tex. App. 1999).

99. *Id.* at 224.

100. *Id.* See *supra* note 76 and accompanying text for an explanation of the phrase "identify as."

101. *Littleton*, 9 S.W.3d at 225.

102. There was no allegation of fraud or misrepresentation in the case; Christie stated in her affidavit that Jonathon was fully aware of her surgery. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 230. The court used the factors used in *Corbett v. Corbett*, 2 All E.R. 33, 44 (1970), to determine this issue. *Littleton*, 9 S.W.3d at 230-31. *Corbett* is an English case that used four factors (gonads, genitalia, chromosomes, and psychological identity) to determine the sex of a transsexual who fraudulently induced her husband into believing she was a genetic woman. *Corbett*, 2 All. E.R. at 44. Further, the Court of Appeals did not fully explain why it decided to treat this issue as a matter of law. The defendant doctor moved for summary judgment. *Littleton*, 9 S.W.3d at 229. The test for summary judgment is, viewing the facts most favorable to the non-moving party, determining whether there is a genuine issue of material fact. *Id.* at 232 (Lopez, J., dissenting). The court refused to look at Christie's amended birth certificate and looked at her original birth certificate instead. *Id.* at 231. The two documents seem to raise a genuine issue of material fact as to Christie's sex. *Id.* at 232 (Lopez, J., dissenting). If the court had found the issue of determining Christie's sex a matter of fact instead of law, then the case would have gone to a jury.

107. *Littleton*, 9 S.W.3d at 227.



and presumed chromosomes.<sup>108</sup> The court relied heavily on the fact that Christie was physically male at birth and deduced from this fact that Christie must have male, or XY chromosomes.<sup>109</sup> The court then stated, “[M]ale chromosomes do not change with either hormonal treatment or sex reassignment surgery.”<sup>110</sup> The court concluded that because Christie presumably had male chromosomes, she was still male and, therefore, could not be legally married to another male.<sup>111</sup>

b. *In re Estate of Gardiner*<sup>112</sup>

This case also involved a challenge by a third party to a marriage where one of the partners was a transsexual.<sup>113</sup> J’Noel Gardiner was born with normal male genitalia, but viewed herself as female from puberty.<sup>114</sup> J’Noel’s chromosomes are presumably untested.<sup>115</sup> She underwent sex reassignment surgery beginning in 1991, completed reassignment in 1994, and eventually married a genetic male, Marshall Gardiner.<sup>116</sup> As in *Littleton*, there was no evidence of fraud in J’Noel and her husband’s one-year marriage.<sup>117</sup> Marshall Gardiner died intestate; his son then challenged the validity of the marriage, alleging that J’Noel was a man for the purposes of marriage in Kansas.<sup>118</sup>

---

108. *Id.* at 230-31.

109. *Id.* at 230. Christie’s chromosomes were never tested, therefore, Chief Justice Hardberger was assuming her chromosomal makeup solely from her physical appearance at birth. *Id.* at 231. Additionally, Chief Justice Hardberger relied on Christie’s original birth certificate and not her amended one. *Id.* An inference could be drawn that because Texas allows one to amend the sex on her birth certificate that they implicitly recognize that a change in sex is possible. *See, e.g.,* Coombs, *supra* note 3, at 256 (discussing a case in which a California court held that a California statute recognized the validity of one’s post-operative sex by providing for a change of gender designation on a birth certificate). The court dispelled this inference by interpreting the intention of the legislature, stating the amendment was intended for “inaccuracies.” *Littleton*, 9 S.W.3d at 231.

110. *Littleton*, 9 S.W.3d at 230.

111. *Id.* at 231.

112. 42 P.3d 120 (Kan. 2002).

113. *Id.* at 121-22.

114. *Id.*

115. *See id.* at 122-23 (discussing J’Noel’s medical history and failing to mention her chromosomes, only discussing her physical sex at birth and her sex reassignment surgery).

116. *Id.* J’Noel began reassignment in 1991 with electrolysis and finished in 1994 with the construction of a vagina, labia, and clitoris. *Id.*

117. *Id.* The petitioner, the deceased’s son, alleged that J’Noel never told her husband about her sex reassignment, but there was no evidence to support this allegation. *Id.*

118. *Id.* at 123.

The Kansas Supreme Court discussed the relevant cases at length, but relied mainly on *Littleton*.<sup>119</sup> The court cited *Littleton* with approval, noting that a male-to-female transsexual may appear to be a woman, but medical science cannot change a person's legal sex from male at birth to female.<sup>120</sup> Although the court acknowledged that by deeming male-to-female transsexuals male, *Littleton* would allow a male-to-female transsexual to marry a woman,<sup>121</sup> it attempted to avoid the loophole by relying on a 1970 version of Webster's Dictionary to define male, female, and sex.<sup>122</sup> The court followed the dictionary's definition and defined male as one who begets offspring and female as one who produces ova and bears offspring.<sup>123</sup> The court stated that these definitions simply do not encompass transsexuals.<sup>124</sup> The court concluded that since J'Noel did not fit within the meaning of female, she could not legally be married to a male.<sup>125</sup>

c. *In re Ladrach*<sup>126</sup>

Elaine Frances Ladrach is a male-to-female transsexual who attempted to obtain a marriage license from the state of Ohio to marry a genetic male.<sup>127</sup> As in the previous two cases, Elaine was born with normal male genitalia and was designated male on her birth certificate.<sup>128</sup> Elaine's chromosomes were also untested.<sup>129</sup> She underwent sex reassignment surgery and appeared externally physically female.<sup>130</sup> Elaine sought a declaratory judgment that she

---

119. *Id.* at 135. The court discussed *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), *Anonymous v. Weiner*, 270 N.Y.S.2d 319 (Sup. Ct. 1966), *In re Ladrach*, 513 N.E.2d 828 (Ohio 1987), *Corbett v. Corbett*, 2 All E.R. 33 (1970), but ultimately based its decision on the *Littleton* view that a transsexual "inhabits . . . a male body in all aspects other than what the physicians have supplied." *Gardiner*, 42 P.3d at 135 (internal quotations omitted).

120. *Gardiner*, 42 P.3d at 135 (relying on the "ordinary meaning" of male and female and stating that transsexuals do not fit within these definitions).

121. *Id.* at 126. A male-to-female transsexual in Texas can apparently marry a genetic woman because she is legally male. *See infra* note 168 and accompanying text.

122. *Gardiner*, 42 P.3d at 135.

123. *Id.*

124. *Id.*

125. *Id.* at 137.

126. 513 N.E.2d 828 (Ohio 1987).

127. *Id.* at 829. The majority in *Littleton* relied, in part, upon this case in their analysis. *Littleton v. Prange*, 9 S.W.3d 223, 228-29 (Tex. App. 1999).

128. *Ladrach*, 513 N.E.2d at 829.

129. *Id.* at 830.

130. *Id.* The doctor conceded that if Elaine's chromosomes were to be tested, they would probably be male. *Id.*

be deemed female for all legal purposes, including amending her birth certificate and obtaining a marriage license as a female.<sup>131</sup>

The Ohio Probate Court, applying a similar analysis to that in *Littleton*, determined that because Elaine was physically a male at birth and presumably had male chromosomes, she was not entitled to change her birth certificate or obtain a marriage license as a female.<sup>132</sup> The court primarily relied on a 1966 New York Supreme Court case where that court based its decision on a recommendation of the New York Academy of Medicine that the sex listed on birth certificates should not be changed to help “psychologically ill” people.<sup>133</sup>

*d. M.T. v. J.T.*<sup>134</sup>

*M.T. v. J.T.* represents one of the few favorable cases for transsexuals. In this case, M.T., a transsexual, filed a complaint for maintenance and support after J.T., a genetic male, left the marriage.<sup>135</sup> There was no allegation of fraud,<sup>136</sup> in fact, J.T. paid for M.T.’s sex reassignment surgery.<sup>137</sup> M.T. was born a physically normal male, but felt as though she were a woman since at least age fourteen.<sup>138</sup> The court noted that no one, to its knowledge, had tested M.T.’s chromosomes.<sup>139</sup> She underwent full sex reassignment in 1971 and married J.T. one year later.<sup>140</sup>

In determining M.T.’s sex, the court noted that the sex reassignment surgery gave M.T. the physical appearance of a woman and that she was able to engage in heterosexual sex.<sup>141</sup> After hearing testimony from several expert medical witnesses, the trial court found that M.T. was psychologically a female throughout her life and the sex reassignment surgery conformed her outward appear-

---

131. *Id.* at 829-30.

132. *Id.* at 832.

133. *Id.* at 830-31 (citing *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) which denied an application to amend the birth certificate of a transsexual based on these recommendations).

134. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

135. *Id.* at 205.

136. *Id.* (indicating that J.T. paid for the sex reassignment surgery, negating any fraud implication).

137. *Id.*

138. *Id.*

139. *Id.* at 206.

140. *Id.* at 205.

141. *Id.* at 206.

ance to her psychological identity.<sup>142</sup> M.T., therefore, was legally female at the time of the marriage.<sup>143</sup>

In affirming the trial court, the New Jersey Appellate Division held that a post-operative transsexual's genitalia and identity can be harmonized through medical treatment.<sup>144</sup> In view of the fact that M.T. "has become physically and psychologically unified and fully capable of sexual activity," the court held she should be considered a woman for marital purposes.<sup>145</sup> Unlike previous cases, the court recognized the change of sex from male to female by using a multi-factor test.<sup>146</sup> The court did not rely solely on chromosomes or a pronouncement that sex is "fixed by the Creator at birth."<sup>147</sup> The court looked at all of the indicia of sex, including physical appearance and gender identity, and concluded that chromosomes were only a small part of the analysis.<sup>148</sup>

## II. EXTRAPOLATING THE CASE LAW

### A. Consequences for Marriage

#### 1. *Impact on an Intersex Individual's Right to Marry*

Although there are no recent United States cases directly challenging the validity of a marriage involving an intersex person, the impact of decisions such as *Littleton* and *In re Gardiner* on intersex people is considerable.<sup>149</sup> It is estimated that one in two thousand infants in the United States is affected by an intersex condition.<sup>150</sup> Even more people may unknowingly have ambiguous chromosomes, that is, neither XX nor XY, but a different combination.<sup>151</sup>

---

142. *Id.* at 211.

143. *Id.* at 207.

144. *Id.* at 211.

145. *Id.*

146. In *Littleton v. Prange*, 9 S.W.3d 223, 227 (Tex. App. 1999), the court used a multi-factor test by stating that gonads, chromosomes, genitalia, and psychological makeup are important, but relied on presumed chromosomes. In contrast, the New Jersey Appellate Division examined and gave considerable weight to each of these factors in determining M.T.'s sex. *M.T.*, 355 A.2d at 208-10.

147. See *Littleton*, 9 S.W.3d at 224, 231 (answering in the affirmative Chief Justice Hardberger's question whether "a person's gender [is] immutably fixed by our Creator at birth" by stating "Christie was created . . . male" and holding her male as a matter of law).

148. *M.T.*, 355 A.2d at 206-07.

149. See *supra* Part I.C.

150. Hermer, *supra* note 1, at 195.

151. Greenberg, *supra* note 56, at 283.

After *Littleton* and others, a far greater number of people are excluded from marriage than originally anticipated.<sup>152</sup>

*Littleton* purports to conform to Texas's ban on same-sex marriage, announcing that because the plaintiff presumably has XY chromosomes, she is male and cannot marry another male.<sup>153</sup> Since intersex people either have both male and female or otherwise ambiguous physical characteristics, or they have chromosomes that are inconsistent with their physical characteristics, the question remains: Who may an intersex person legally marry?<sup>154</sup>

If a person was raised as a woman, has female external genitalia, but recently discovered that she has AIS and has XY chromosomes, would the Court of Appeals of Texas, Fourth Circuit, still deem this person a man?<sup>155</sup> The court might say that this situation is distinguishable because this person was created this way and did not voluntarily undergo sex reassignment surgery.<sup>156</sup> The court might also say her sex at birth was female because sex is determined by external genitalia at birth and, therefore, she is legally a female despite her chromosomes.<sup>157</sup> If the latter is the case, the court is determining legal sex on the basis of physical characteristics at birth alone.

The next issue that arises is classification of an intersex person who has 5-A-R D.<sup>158</sup> For example, if a child was designated female at birth, but whose body masculinized at puberty, would a court deem this person a man because she has XY chromosomes?<sup>159</sup>

152. See *supra* Part I.C. After decisions such as *Littleton*, the reach of the exclusion extends to every person who unknowingly has chromosomes that are inconsistent with their external physical characteristics. See *infra* Part III.

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

154. See, e.g., INTERSEX SOCIETY OF NORTH AMERICA, INTERSEXUALITY AND THE LAW, at <http://www.isna.org/library/legal.html> (last visited April 5, 2003) (discussing the questions that arise after *Littleton*).

155. This has implications for heterosexual marriage as well. If a woman never realizes that she has AIS or has a chromosomal makeup other than XX, then her marriage could be challenged and found invalid. See *Littleton*, 9 S.W.3d at 231 (basing determination on presumed chromosomes; if actual chromosomes were tested, it is possible that the court would rely directly on chromosomes); Katrina C. Rose, 70 U. MO. KAN. CITY L. REV. 257, 262 (2001) (noting that some people are unaware their chromosomes are not "XX" or "XY").

156. The court in *Littleton* relied on the fact Christie was born a man, implying that her gender was "immutably fixed by [the] Creator at birth." *Littleton*, 9 S.W.3d at 224, 231.

157. See, e.g., *id.* at 231 (stating that Christie's sex at birth was male and that "some things we cannot will into being. They just are.").

158. See *supra* Part I.B.1.

159. See *Littleton*, 9 S.W.3d at 230 (deeming, in effect, a person with XY chromosomes male).

Klinefelter Syndrome also poses a serious problem for courts because the individual appears physically male at birth, yet develops breasts during puberty.<sup>160</sup> Would a court deem this person a man because male genitalia were present at birth even though there are XX chromosomes? Or does the presence of a Y chromosome make a person male? In these situations, the court may use physical sex at birth to determine the person's gender.<sup>161</sup> Sex, however, is not always clear at birth.<sup>162</sup> These questions will continue to surface if the courts continue to adjudicate gender.<sup>163</sup>

If marriage is a fundamental right,<sup>164</sup> limited to opposite sex, or apparently heterosexual couples, classifying an intersex person becomes extremely important.<sup>165</sup> The courts will have to define what constitutes an "opposite sex" couple in order to determine whether that couple may exercise their fundamental right to marry.<sup>166</sup>

The hypothetical case where a physical female discovers that her chromosomes are neither XX nor XY and she is not, therefore, in one of the two binary categories of male and female, illustrates the difficulty courts face in defining an "opposite sex" couple. Courts faced with this situation could find this person to be a woman if female genitalia were present at birth and she was raised as a female, regardless of her chromosomal make up.<sup>167</sup> This is arguably incongruous with a court deciding that a person who identifies as a woman and has chosen to conform her external physical character-

---

160. See *supra* Part I.B.2.a.

161. See *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (holding J'Noel a male for purposes of marriage because she was born a male and transsexuals do not fit within the meaning of "male" and "female").

162. See *supra* Part I.B.

163. See *Rose*, *supra* note 54, at 10 (noting that doctors are discovering a great many variations in chromosomal combinations). This indicates that there are a variety of conditions, some possibly not yet known, that could be considered intersex and would fall outside the traditional definition of man or woman. A problem could arise if a person with either condition allowed his or her body to change and identified as the opposite sex of that which they were designated at birth. For example, if a person with 5-A-R D who was designated female at birth identified as a male, allowed his body to masculinize, and underwent full sex reassignment surgery, would the presence of male physical characteristics and male chromosomes be enough for the Texas court? Or would this person still be considered female because there were female physical characteristics at birth?

164. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

165. An intersex person's right to marry a particular person depends solely on his or her classification as male or female because the couple needs to be apparently heterosexual. See *supra* notes 92-93 and accompanying text.

166. See *Coombs*, *supra* note 3, at 251-58 (discussing various courts' approaches to classifying transsexuals into either male or female).

167. See *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (stating that Christie was created and born a male).

istics to that of a woman is not a woman because of her chromosomes. Yet the latter is what can be inferred from *Littleton*; that if a person has XY chromosomes, that person will be deemed a man for purposes of marriage, regardless of whether the person was raised as a female.<sup>168</sup>

A person who is a combination of the binary characteristics may thus be entirely deprived of their fundamental right to marry because for whomever they choose, there is an argument that it is a same-sex marriage.<sup>169</sup> Excluding an entire group of citizens from exercising their fundamental right to marry because they fail to conform to traditional definitions of “male” and “female” has no rational basis and serves no legitimate purpose.<sup>170</sup> Excluding individuals classified as intersex from marriage would be unconstitutional because a group of people cannot legitimately be denied a fundamental right without a sufficiently important governmental interest.<sup>171</sup> Since an intersex individual is a combination of male

---

168. *Id.* Two or three lesbian couples in Texas have been able to obtain marriage licenses and legally marry because one of the women is a male-to-female transsexual. See *Lesbian Couple Get a Marriage License*, SAN ANTONIO EXPRESS-NEWS, June 12, 2001, available at 2001 WL 22457047; see also John Gutierrez-Mier, *Two More Women Obtain County Marriage License: One Member of Couple Was Born a Man*, SAN ANTONIO EXPRESS-NEWS, Sept. 21, 2000, available at 2000 WL 27329428. Since she presumably has XY chromosomes, she is deemed a man and is able to marry a genetic woman. *Id.*

169. See Coombs, *supra* note 3, at 257-60 (discussing the difficulties courts face in determining an opposite sex couple when one of the parties is a transsexual); see also *supra* Part I.C.

170. There does not seem to be a legitimate, rational reason why this group of people could be excluded from marriage based on the fact that they are a combination of male and female characteristics—especially considering there is an argument that the couple is “opposite sex” when one of the partners is intersex. See generally Coombs, *supra* note 3 at 224-26 (discussing transgender marriages as a challenge to opponents of same-sex marriage); see also *Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O’Connor, J., concurring) (stating that the Court is likely to apply “a more searching form of rational basis review” when the legislation “inhibits personal relationships”); *Zablocki v. Redhail*, 434 U.S. 374, 406 (1978) (Stevens, J., concurring) (stating that clumsy, irrational classifications cannot withstand the heightened scrutiny involved when a fundamental right is affected).

171. See *Zablocki*, 434 U.S. at 388 (holding a classification that significantly interferes with a fundamental right must be supported by important state interests and closely tailored to effectuate those interests). The interest most often asserted in retaining the limitation on marriage to between one man and one woman is preservation of public morals, that is, marriage is a unique relationship between a man and a woman with a public status that the state has an interest in regulating. See Wardle, *supra* note 3, at 751. This interest, though, does not seem sufficient to support the total exclusion of intersexuals nor does the exclusion seem closely tailored to serve this interest because it potentially excludes individuals who would otherwise fit within the definition of “male” and “female,” such as those who are unknowingly intersex.

and female sex characteristics, that person could potentially marry either a man or a woman because, regardless of the sex of the partner, there is an argument that the couple is apparently heterosexual.<sup>172</sup> If this person can marry either a man or a woman, then there seems to be no rational reason why others should be limited by their gender.<sup>173</sup>

## 2. *Impact on Marriage Between Two People of the Same-Sex*

Intersex classification problems and decisions regarding transsexual marriages also have a considerable impact on the same-sex marriage debate.<sup>174</sup> Many of the issues that arise in defining an opposite sex couple also arise when defining a same-sex couple. The court in *Littleton* found that Christie and Jonathon's marriage was a same-sex marriage, prohibited by Texas,<sup>175</sup> even though Christie's physical anatomy was female and Jonathon's was male.<sup>176</sup> If anatomy is irrelevant, the court would have to dismiss a challenge to any couple who had the same external anatomy, but opposite sex chromosomes.<sup>177</sup> Most people would consider a couple where both partners have the same external genitalia to be same-sex, but apparently these courts, were they to be faithful to their own analysis, could not.<sup>178</sup>

Defining a same-sex couple, as noted, presents several questions. For instance, how would courts classify a couple where one partner is intersex and displays both male and female external physical characteristics or an intersex person who has chromosomes that are inconsistent with her anatomy? In the preceding section, it was

---

*See supra* Part II.A.1; *supra* note 155 and accompanying text; *see also Lawrence*, 123 S. Ct. at 2486 (O'Connor, J., concurring).

Moral disapproval of a group . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause . . . we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

*Id.* (internal citations omitted).

172. *See infra* Part III.

173. *See infra* Part III.B.

174. *See Coombs, supra* note 3, at 220-23.

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

176. *Id.* at 230-31.

177. *See supra* note 168. Any of the marriages mentioned would have to be upheld under this rationale. To date, the case law addressing same-sex marriage has not examined this argument.

178. *See In re Estate of Gardiner*, 42 P.3d 120, 125 (Kan. 2002); *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio 1987); *Littleton*, 9 S.W.3d at 230-31.



noted that a court could deem an intersexual who had AIS<sup>179</sup> a woman because she was created that way.<sup>180</sup> This seems inconsistent with the *Littleton* conclusion because Christie had female external organs and presumably male chromosomes.<sup>181</sup> If a court were to adhere to the reasoning in *Littleton*, it could find that an individual with AIS is a male for the purposes of marriage.<sup>182</sup> This is illustrated by male-to-female transsexuals legally marrying genetic females in Texas.<sup>183</sup> In other words, there is no difference between an intersexual who has XY chromosomes but external female anatomy and a post-operative male to female transsexual who has XY chromosomes.<sup>184</sup> The fact that one person was born with external female genitalia and the other person was not would be a completely arbitrary distinction.<sup>185</sup> Both were born the way they are, one with AIS and the other with gender dysphoria,<sup>186</sup> and should not be treated differently with respect to their right to marry a genetic woman.<sup>187</sup>

Further, in *Gardiner*, the court stated that J'Noel does not fit within the definition of female, therefore, she is not a female.<sup>188</sup> J'Noel, however, also fails to fit into the traditional meaning of male.<sup>189</sup> She does not have male external genitalia nor can she beget a child.<sup>190</sup> Following the logic of the Kansas Supreme Court,

---

179. That is, female external anatomy, but chromosomes that were tested to be male.

180. See *Littleton*, 9 S.W.3d at 231 (relying on the fact that Christie was born with male genitalia and stating, “[T]here are some things we cannot will into being. They just are.”). If the court were to deem this person female, then she could not legally marry a genetic female.

181. *Id.* at 230-31.

182. Since this individual would have external female characteristics and male chromosomes, just as Christie Littleton, the court could potentially deem this individual male. See *id.* at 230.

183. See Phyllis Randolph Frye & Allison Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 ALB. L. REV. 1031, 1033-34 (2001) (observing that several couples that appear to be same-sex, but one partner is a male-to-female transsexual have gotten legally married in Texas); see also *supra* note 168 and accompanying text.

184. Both individuals have the same chromosomal makeup and physical characteristics.

185. See Frye & Meiselman, *supra* note 183, at 1047-57 (discussing the implications of the *Littleton* decision).

186. See *supra* note 76 and accompanying text.

187. See *supra* Part I.A.2.

188. *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

189. *Id.* J'Noel falls outside the court's definition of male because she cannot beget offspring. *Id.*

190. *Id.*

J'Noel is neither male nor female and, therefore, cannot legally marry *anyone*.<sup>191</sup>

According to the preceding, transsexuals are deprived of the fundamental right to marry.<sup>192</sup> Intersex people would also be precluded from marrying because they, too, do not come within the court's "traditional" definition.<sup>193</sup> If these definitions are used in distinguishing between an opposite sex couple and a same-sex couple, either more couples would fit into the same-sex category or more people would fall outside of either category.<sup>194</sup> Such narrow definitions of "male" and "female" exclude more people than first evident.<sup>195</sup> This threatens to change the status of any apparently heterosexual marriage with any slight chromosomal or physical variation into a same-sex marriage, and possibly invalidate it completely because one partner is neither male nor female.<sup>196</sup>

### 3. *Similarly Situated Individuals*

Equal protection doctrine states that similarly situated individuals are to be treated alike.<sup>197</sup> If similarly situated individuals are treated differently with respect to the exercise of a fundamental right, heightened scrutiny is required.<sup>198</sup>

An intersex individual is neither clearly a man nor clearly a woman. If an intersex person who has external female characteristics, but male chromosomes, identifies as a heterosexual female, she would probably be able to marry a genetic man without much of a

---

191. The Kansas Supreme Court did find J'Noel male for the purposes of marriage. *Id.* at 137. Evidently, J'Noel would be permitted to marry a woman even though the couple would be apparently homosexual because both partners would have external female characteristics. The court may void this marriage on public policy grounds though because both individuals appear to be female and the marriage would appear to be same-sex.

192. See Coombs, *supra* note 3, at 221.

193. For example, a person with AIS would have external female genitalia, but no uterus. Therefore, she would never be able to bear a child. Also, an individual with Swyer Syndrome and XY chromosomes never develops testes, and therefore would not be able to beget a child. See *supra* Parts I.B.1-2.

194. See *supra* Part I.B.

195. See *supra* note 143 and accompanying text; see also *supra* Part I.C & II.A.1.

196. See Frye & Meiselman, *supra* note 183, at 1049-56.

197. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating that "all persons similarly situated should be treated alike"); see also *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) (O'Connor, J., concurring) (quoting *City of Cleburne* and stating, "The Equal Protection Clause . . . is essentially a direction that all persons similarly situated be treated alike.").

198. See *City of Cleburne*, 473 U.S. at 470 (Marshall, J., concurring) (indicating that when fundamental rights are involved, similarly situated individuals deserve to be treated equally and heightened scrutiny is required when they are not).

problem.<sup>199</sup> She could also arguably marry a genetic woman under a *Littleton* analysis, or any state that relies on chromosomes to determine gender.<sup>200</sup> A male-to-female transsexual would be similarly situated to this individual with respect to her right to marry a genetic woman because she also has external female sex characteristics and male chromosomes.<sup>201</sup> Thus, it could be argued that even though the court may attempt to treat these two individuals differently, equal protection doctrine requires that they be treated the same.<sup>202</sup>

A genetic woman who identifies herself as a lesbian is similarly situated to the individuals discussed above. All three individuals are in seemingly same-sex couples.<sup>203</sup> The intersex woman, the male-to-female transsexual, and the lesbian are all externally physically female; the only difference in sex characteristics between the three individuals is their chromosomal makeup. If the first two are able to marry a genetic woman despite outwardly appearing to be a same-sex couple, then arguably the lesbian must also be able to marry a genetic woman.<sup>204</sup> Denying a group of people the ability to exercise a fundamental right in the same manner as another group, on the basis of one's chromosomes, is unreasonable. No

199. If the individual was raised as a female and identified as such, it is possible that a court using the multiple factor test would lend little weight to her chromosomes because she is in the same position as, for example, a genetic woman who has undergone a hysterectomy. Both women are externally physically female and raised as such, but neither have internal female sex organs. See Part III.A.

200. See *supra* note 168 and accompanying text. This individual has the same characteristics as a male-to-female transsexual. This loophole was avoided by the *Gardiner* court by adhering to a narrow definition of male and female. *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

201. Under a *Littleton* analysis, a male-to-female transsexual can presumably legally marry a genetic woman. *Littleton v. Prange*, 9 S.W.3d 223, 230-31 (Tex. App. 1999); see *supra* note 168 and accompanying text. If a male-to-female transsexual is able to marry a genetic woman because of the *Littleton* loophole, then this intersex woman could marry a genetic woman as well. Conversely, if this intersex woman is able to marry a genetic woman, then presumably so could a male-to-female transsexual.

202. See *City of Cleburne*, 473 U.S. at 439; see also *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (stating that the Equal Protection Clause forbids states from treating people differently based on criteria that is unrelated to the objective of the statute . . . "so that all persons similarly circumstanced shall be treated alike" (internal quotations omitted)). Distinguishing between the two on the basis that the intersexual was raised as a female and the transsexual was not is irrational because both appear physically the same, the only difference in their sex characteristics is their chromosomes. Chromosomes alone are an arbitrary factor to determine a person's sex or gender. Therefore, it is unlikely that this would pass the heightened scrutiny required when burdening a fundamental right. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).

203. That is, both women have external physical characteristics that are female.

204. See *supra* Part I.A.

person has control over their chromosomes, and it is possible not to know one's exact chromosomal makeup.<sup>205</sup>

### III. RESOLUTION

As long as the opposite-sex limitation on marriage remains, gender issues will continue to surface. When faced with a case that challenges the validity of a marriage based on the sex of the participants, the court must determine the legal sex of each individual.<sup>206</sup> It is important to discuss how the courts decide whether to deem an individual male or female. In the cases discussed in this Comment, the courts tend to use a multi-factor test to determine the individual's sex.<sup>207</sup> This section discusses the multi-factor test and then presents an alternate solution.

#### A. The Multiple Factor Test

Applying this test, the courts use such factors as chromosomes, gonads, genitals, and psychological identity to determine gender.<sup>208</sup> This test has some value because it allows courts to weigh a variety of factors and characteristics when determining into which category a person fits. This alleviates reliance on chromosomes, ameliorating some of the problems associated with marriages involving an intersex partner.<sup>209</sup> This test also offers flexibility, allowing the

---

205. See *Rose*, *supra* note 155, at 262; *supra* Part I.B. Although a state may place reasonable regulations on marriage, this restriction could not survive heightened scrutiny because it directly interferes with the fundamental right to marry in a substantial way, is not closely tailored, and could not be supported by sufficiently important state interests. *Zablocki*, 434 U.S. at 386-88 (holding statutes that "significantly interfere with the exercise of a fundamental right" invalid "unless it is supported by sufficiently important state interests and closely tailored to effectuate only those interests"). The restriction would not be closely tailored because marriages could be invalidated if one person does not know her chromosomal makeup. See *supra* Part II.A.1. Also, the arguments in support of the opposite sex limitation on marriage, such as preservation of public morals or heterosexual marriages as the preferred societal relationship, ultimately fail because it would be possible for a seemingly heterosexual marriage to be invalidated on the basis of one partner's chromosomes under this restriction. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2486 (2003) (O'Connor, J., concurring) (noting that moral disapproval alone is not a sufficient rationale to satisfy the Equal Protection Clause). Compare *supra* Part II.A.1, and *supra* Part I.C., with *Wardle*, *supra* note 2, at 753-54, and *Dent*, *supra* note 1, at 587-99.

206. See *supra* Part I.C.

207. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Sup. Ct. App. Div. 1976); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

208. *In re Estate of Gardiner*, 42 P.3d 120, 135-36 (Kan. 2002); *M.T.*, 355 A.2d at 208-09; *Littleton*, 9 S.W.3d at 227.

209. See *supra* Part II.A.1.

court to give self-identification more weight.<sup>210</sup> An intersex person, however, by definition, has ambiguous sex characteristics, and thus, her self-identified sex should be determinative; that is, the sole factor relied upon by a court in that circumstance.<sup>211</sup> This would allow some intersexuals to decide to be in an opposite sex couple.<sup>212</sup>

The multiple-factor test would also relieve problems associated with post-operative transsexual marriages because their physical appearance and gender identity will conform, leaving chromosomes as the only factor on one side, while the other characteristics are on the other. In addition, this test would solve any problems with opposite-sex couples in which one partner is unknowingly intersex because, again, the majority of factors would be either male or female, with only the chromosomes weighing on the other side. Applying this test, courts use a variety of factors and determine a person's gender by looking at whether she is predominantly female or predominantly male.

There are significant problems, however, with the multiple-factor test. There is no clear indication as to how many of these factors, or even which ones, are sufficient to indicate maleness or femaleness.<sup>213</sup> This further illustrates the arbitrary nature of the determination.<sup>214</sup> In addition, this test would not help any intersex individual whose self-identified sex is the same as the sex of the person she wishes to marry.<sup>215</sup> The same problem would arise for any post-operative transsexual who wants to marry someone of the same sex as their post-operative sex.<sup>216</sup> Also, this test does nothing in terms of allowing same-sex marriage because it still restricts who is legally able to marry whom. In application, any judicial test un-

---

210. *See supra* Part I.C.1.d.

211. *See supra* Parts I.B. & II.A.1. If all the factors on each side, male and female, are relatively equal, then self-determination should be determinative because a court should not be able to impose its own idea of what an individual's gender is. *See infra* Part III.B.

212. If an intersex person wants to marry a genetic man, she could identify herself as a woman for marriage purposes and, thus, be in an opposite sex couple. A question still remains whether the courts should ask a person to change her identity in order to exercise a fundamental right.

213. *See supra* Part I.B (discussing the variety of factors and weight given to those factors by each court).

214. *See supra* Part II.A.1.

215. This could possibly be circumvented by changing one's self-identification, but is that something society should require of a person?

216. *See supra* Part II.

justifiably endorses the view that courts are able, and should, adjudicate a person's sex and gender identity.<sup>217</sup>

### B. Allowing Marriage Between Any Two People

The restriction on marriage, limiting it to between two people of the opposite sex, has only created problems.<sup>218</sup> The limitation forces courts into the business of determining a person's legal sex, sometimes regardless of how she identifies herself.<sup>219</sup> The limitation has been narrowed further so that in some states it no longer means between one physical man and one physical woman, but only between a person with XY chromosomes and a person with XX chromosomes.<sup>220</sup> This limitation forces courts or legislatures to define who is a "man" and "woman."<sup>221</sup> The courts are forced to place people into one of two categories even when the person does not seem to fit in either.<sup>222</sup> Through this limitation on marriage judges and legislators are allowed to impose their own ideas of what a man or a woman should be onto society.<sup>223</sup>

This is not a decision that should be left to the courts to decide. If the government cannot unreasonably search one's home,<sup>224</sup> prevent adults from obtaining contraception,<sup>225</sup> or criminalize private, consensual, intimate conduct,<sup>226</sup> then courts should not, in applying a state's marriage laws, be permitted to question the sex or gender of a person. Allowing them to do so only leads to extremely inconsistent and arbitrary results throughout the country.<sup>227</sup> An intersex person has no viable option if courts simply decide that sex or gender is binary and act as the sole decision-makers, determining which individuals fall into each category.

Imposing these categorical definitions on marriage, as the case law illustrates, is socially constructing gender to conform to the traditional view that men are masculine and woman are feminine

---

217. See Coombs, *supra* note 3, at 257-64; see also Rose, *supra* note 155, at 261-63, 299-301.

218. See *supra* Parts I.C. & II.

219. See *Littleton v. Prange*, 9 S.W.3d 223, 226 (Tex. App. 1999).

220. *Id.* at 230-31.

221. See *supra* Part I.C.

222. See *id.*

223. See *id.*

224. U.S. CONST. amend. IV.

225. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

226. *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

227. See *supra* Part I.C.

under the guise of biology and chromosomes.<sup>228</sup> The limitation on marriage effectively punishes those who cross gender boundaries. Accordingly, a court, despite *Littleton*, would probably find a woman who later finds out she has AIS and XY chromosomes to still be a woman, because she did not intentionally cross any gender boundary.<sup>229</sup> This woman is not situated differently from the woman who has both male and female genitalia but identifies as a woman, or the psychological woman who was born with a penis but chose to change her physical body to conform to her psychological identity. To treat these women differently, allowing one “XY” woman to marry a genetic man and not the others, violates the Equal Protection Clause because similarly situated individuals are being singled out for disfavored treatment with respect to their fundamental right to marry.<sup>230</sup>

If courts remain involved in determining a person’s gender, an intersex individual should be able to self-designate because the physical characteristics are ambiguous.<sup>231</sup> This self-designation should be the determining factor. The only rational conclusion for an intersex individual is allowing her to marry either a man or a woman because her sex characteristics are ambiguous, and therefore, with either a man or a woman she could potentially be in an opposite sex couple.<sup>232</sup> The only distinction between an intersex individual who is externally physically female, a male-to-female transsexual, and a lesbian is the chromosomal makeup. This distinction is arbitrary because many people do not know their exact chromosomal makeup or how a slight variation may or may not have an effect on their lives.<sup>233</sup> It would be incredibly difficult, therefore, for a state to provide a sufficiently important interest to justify allowing one to marry a genetic female and not the others because all three couples would appear same-sex.<sup>234</sup> Further, distinguishing the couples on the basis of their chromosomes would

---

228. *See id.*

229. *See supra* Part II.A.1.

230. *See supra* Part II.

231. *See supra* Part I.B.

232. An intersex individual’s sex characteristics are ambiguous from birth even though the ambiguity was not visible at the time, therefore, the court cannot legitimately rely solely on physical sex designation at birth to determine this person’s gender.

233. *See Rose, supra* note 49, at 262; *supra* Part I.B.

234. A public morals assertion might fail because all of the couples appear same-sex.

not be closely tailored.<sup>235</sup> This chromosomal distinction is unreasonable and has no rational relationship to the purpose of the limitation on marriage.<sup>236</sup>

Allowing individuals the opportunity to marry whomever they choose would prevent unjust adjudication of sex and gender in marriage.<sup>237</sup> Decisions such as *Littleton* and *Gardiner* demonstrate the illogical results that follow from a judicial determination of gender identity.<sup>238</sup> Courts should not spend time weighing each indicator of sex in an attempt to classify individuals who may not be classifiable in the binary system<sup>239</sup> and should not seek to change a person's identity, gender or otherwise. The logical conclusion, aside from denying any couple that does not fit the "XY" and "XX" model the right to marry, is to allow marriage between any two people.<sup>240</sup> Any two people who wish to marry should be able to do so.

### CONCLUSION

Marriage is a fundamental right and must be available to every person, regardless of whether her chromosomal makeup conforms with her external sex characteristics.<sup>241</sup> Every person, regardless of the sex of the person they choose to marry, must be able to exercise her fundamental right to marry with that person.<sup>242</sup>

Limitations on marriage affect a greater number of people than is first evident.<sup>243</sup> That is, an apparently heterosexual marriage could be successfully challenged if one person is unknowingly intersex.<sup>244</sup> Confining marriage to between two people of the oppo-

---

235. The classification would not be closely tailored to the public morals interest because it could invalidate apparently heterosexual couples if the chromosomal makeup deviated at all from XX and XY.

236. A distinction based on chromosomes bears no rational relationship to any of the arguments set forth by opponents of same-sex marriage because a person could appear to be in a traditional heterosexual marriage, yet have chromosomes that are inconsistent with their identity and physical appearance. Compare *Wardle*, *supra* note 2, at 748-56, and *Dent*, *supra* note 1, at 593-607, with *supra* Part I.B., and *supra* Part II.A.1.

237. See *supra* Part II.

238. See *supra* Part I.C.

239. See *id.*

240. See *supra* Part II.

241. See *supra* Part II.

242. See *supra* Part II.

243. See *supra* Part II.A.1.

244. See *supra* Part II.A.2.



site sex leads to problems deciding what an opposite sex couple is and who defines an opposite sex couple.<sup>245</sup>

Invariably, courts are in the position of adjudicating a person's gender in order to decide if a marriage is valid.<sup>246</sup> Do we really want courts to do this? Even if a person's gender is ambiguous or fails to fit into one of only two categories, this is not a legitimate reason to refuse her the fundamental right to marry.<sup>247</sup> An intersex person should be able to self-designate – courts should not be able to assign her a sexual identity. This would allow an intersex individual to marry either a man or a woman.<sup>248</sup> If this person can marry either a man or a woman, equal protection demands that other, similarly situated individuals must be able to do the same.<sup>249</sup> If so, then why retain any “opposite sex” requirement on marriage at all? The sex criterion for determining a legal marriage should be eliminated.

---

245. *See supra* Part I.B.

246. *See supra* Part I.B.

247. *See supra* Part II.

248. *See supra* Part II.A.1.

249. *See supra* Part II.A.3.

