Am I Married?

By Denise E. Brogan

Identity exists only as it relates to others.

Introduction

On December 29, 2005, my partner and I, both US citizens, were married in a legally-sanctioned civil ceremony held in Windsor, Ontario in the country of Canada. Were my partner and I a traditional heterosexual couple, our marriage would be recognized anywhere within the borders of the United States through a series of treaties and the practice of comity.[1] The legal recognition of our marriage by the federal government of the United States, or by [most of] the individual states within the country, is complicated by the fact that we are both women, and thus facially foreclosed in that recognition by the federal Defense of Marriage Act (DOMA). Our situation, however, is further complicated by the fact that I am transsexual.

This paper examines the possible effects of my transsexual identity on the states' determination of whether or not to afford me and my spouse the benefits of a legally recognized marriage within the country of our citizenship. It examines first how sex is determined (and proposes an identity based model) and then looks at the institution of marriage through the lenses of transsexuality as well as same-sex unions, revealing a truly irrational and unjust system and finally concludes with a proposal to eliminate gender in the determination of who can marry whom.

[1] The extent to which the legislative, executive, or judicial acts of one nation will be recognized and enforced within another nation, depends on what has been termed the "comity of nations." In re Kandu, 315 B.R. 123, 133 (Bankr. W.D. Wash. 2004) (refusing to recognize validity of Canadian same-sex marriage). "Although there may be a preference for comity when the laws of nations are in alignment, no such preference exists when the laws of a foreign nation are contrary to the sovereign's policy or prejudicial to its interests." Id.

Personal History

I was born in the State of Colorado in 1955. My birth certificate recorded my first name as David and my sex as "male". Despite that, and despite the reinforcement from those around me, I held to the belief that I was not a boy, but a girl. Throughout childhood, I struggled with the fact that I did not conform to the role model of a typical boy – I was happier reading books or dressing in my sisters' clothing than I was being "rough-n-tumble". Eventually, however, I learned to conform; in fact, I enlisted in the US Navy and joined the Navy boxing team in an effort to adopt the gender role to which I'd been assigned. I married a woman, and together we had three daughters. After 17 years of marriage, during which time I continued my attempt at conformity to the male role, I finally quit the struggle to live as a man and decided that I must live out the rest of my life as a woman. My spouse and I divorced; I transitioned to living as a female, eventually having "genital confirming" surgery. I recently re-married a woman, as a woman, under the gender non-restrictive marriage laws of Canada.

What Sex Am I?

In the United States, marriage is tightly controlled by the state and access is granted based on a person's legal sex (in 49 states and the District of Columbia such access is granted only to opposite-sex couples; in Massachusetts it is also granted to same-sex couples). Therefore, in order to address the question of the validity of my marriage, one must necessarily address the "most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes."[2] I contend that it is not so simple. I suggest instead that there are [at least] two models through which we might address that question. I will first address the 'medical model' and follow that with what I call the 'identity model'. Under the former, sex

[2] Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999)

is determined through biological processes, and under the latter, sex is determined through one's interactions with other people, informed by those biological processes.

Medical Model

Although a complete dissertation on the medical model of what comprises sex is beyond the scope of this paper, I refer the reader to a thorough analysis conducted by the intermediate appellate court in In re Gardiner:[3]

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

As one authority has noted, "For most people, these factors are all congruent, and one's status as a man or woman is uncontroversial. For intersexuals [and transsexuals], some of these factors may be incongruent, or an ambiguity within a factor may exist."[4]

The Gardiner court also took note of "[a] study in the respected medical journal, *The Journal of Clinical Endocrinology & Metabolism*, [which] analyzed the brains of homosexual males, heterosexual males, heterosexual females, and male-to-female transsexuals. It concluded:

> Regardless of sexual orientation, men had almost twice as many somatostatin neurons as women. The number of neurons in . . . male-to-female transsexuals was similar to that of the females . . . . In contrast, the neuron number of female-

[3] In re Estate of Gardiner, 29 Kan. App. 2d 92, 100-110 (Kan. Ct. App. 2001), *rev'd by* 273 Kan. 191 (2002).
[4] Greenberg, Julie, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265, 278

> to-male transsexual was found to be in the male range. . . . The present findings of somatostatin neuronal sex differences in the BSTc (a part of the brain) and its sex reversal in the transsexual brain clearly support the paradigm that in transsexuals sexual differentiation of the brain and genitals may go into opposite directions and point to a neurobiological basis of gender identity disorder.' Kruijver, Zhou, Pool, Hofman, Gooren, and Swaab, *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 The Journal of Clinical Endocrinology & Metabolism 2034 (2000).'"[5]

Throughout our country, throughout the world, and far back into history, the designation of a person as male or female has had significant import as to how resources, power, and privilege were allocated. Consider, for example, the case of Levi Suydam who, in nineteenth century Salisbury Connecticut, was not allowed to vote because everyone thought he was a woman. After examination by a medical doctor revealed a penis and scrotum, he was allowed to vote (and his party won the election by a single vote). Later it was learned that he menstruated regularly and had a vaginal opening.[6]

> "In 1967, Polish sprinter Eva Klobukowska was banned from the European Cup because a chromosome test revealed an XXY result, one too many chromosomes to be declared a woman; a few years later, she became pregnant and gave birth to a healthy baby. After 1 in every 400 Olympic competitors in 1996 was eliminated, even though there was nothing unusual about them anatomically, the International Olympic Committee in 1999 suspended gender testing…"[7]

It seems evident, then, that even within the medical model, determining a person's sex is not an easy task, and most certainly not from a cursory external examination as suggested by the Littleton court's assertion, *supra*.

Identity Model

"[N]one of us have individual identities except by reference to collective social experiences"[8]

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[5] Gardiner, p.100-01.
[6] Anne Fausto-Sterling, SEXING THE BODY, Basic Books, 2000 at 30.
[7] MARRIAGE, A CHANGING UNION? ;TRANSSEXUAL WEDDING SHOWS GENDER CAN BE A COMPLEX ISSUE The Houston Chronicle, September 17, 2000
[8] Minow, Martha "NOT ONLY FOR MYSELF" The New Press (1977) p23

If we can't easily rely upon the medical model to determine sex, where then should we turn? The identity theory for sex determination is similar to Judith Butler's theory that gender (and, consequently, sex) is entirely performance-based. Butler argues that gender precedes sexual orientation and even sex.[9] In that, she is describing the way people actually live their lives, as performances of roles. By the way we live, we determine who we are. Our performance of gender, in its viewing by the societal audience, defines our sex. Sex flows, then, from gender.

It seems reasonable to me to assert that an individual's identity, including her sexual identity, is demarcated largely by her interactions with others, informed, certainly, by her biology. If this is not the exclusive definition of identity, it surely forms a substantial element of anyone's identity who lives in a social setting. Consider my sexual identity through the lens of people with whom I interact and who assert some interest in the determination of my sex:

Myself

Certainly an individual's own perception of identity matters, although not perhaps exclusively. I think of myself as a woman. I have thought of myself as female for as long as I can remember. Despite my personal antipathy toward the constructed stereotypes of gender norms, I have largely adopted the stereotypically female norms in my everyday life. My adoption of these norms – in my personal presentation (body type, clothing selection, hair style, manner of speech, etc.) – has contributed significantly to others' acceptance of me as a woman. In other words, I *pass* in everyday life as a woman with everyone with whom I come into contact.

Family

My mother (father is deceased) believed she gave birth to a boy. She based that assessment primarily on the fact that I had a penis at birth. Accordingly, she thought of me as

[9] *See* Butler, Judith, "GENDER TROUBLE"

male for most of my life and considered me her son. However, with my transition to female, she has been successful in altering that perception such that she now thinks of me as a woman and interacts with me exclusively as a woman. I get cards addressed to "my daughter" on my birthday and holidays. Likewise with my siblings, despite their memories of me as a male, they have been completely accepted me as a sister and their interactions with me are as such; their children refer to me as their aunt. My children would seemingly have the most difficult time with such acceptance, since I am their biological father. Nevertheless, my middle daughter describes how she regularly shows family photos to friends in college and, when asked if the picture of me is of her mother, she replies with, "No, that's my dad. Isn't she pretty?" For them, it produces no apparent cognitive dissonance to think of their father in feminine terms.

Finally, and perhaps most importantly, is how I am perceived by my spouse. My spouse is a woman who has self-identified as a lesbian for most of her adult life. In fact, she has had only one long term relationship prior to knowing me, and that was with another woman. She sees me as a woman; indeed, she would not consider a relationship with a man.

Employer/school/peers

Another important signifier of identity for many people is how others they see and work with every day relate to them. How do we know what sex a person thinks we are? How much time do any of us give to that thought? Yet, I suggest that if your coworkers suddenly started calling you "he" when you thought you were a woman (or vice versa), or starting yelling that you were in the "wrong" restroom, you would soon have a good idea of what sex they perceived you to be. A transgendered person pays attention to cues received from others. In my case, everyone I know refers to me in exclusively feminine gendered ways. My employment and school identification cards and official records are all coded as "F"[emale].

Governmental agencies

Moving beyond personal relationships, the government exercises a significant role in validating a person' sexual identity. The federal government, through the US Passport office, has adopted the medical model and will issue a passport declaring its holder to be his or her post-surgical sex. When I applied for my United States Passport, I had to provide a copy of the letter from my surgeon stating that I had undergone full sexual reassignment surgery. With that documentation, my passport was issued, denoting my sex as "F"[emale].

My state of residence, Michigan, relied merely upon my physical appearance (and, likely, my feminine sounding voice) when it validated my sex as female. Despite having a Florida driver's license that indicated my sex was male and having not undergone any surgeries whatsoever, the Secretary of State's office issued me a Michigan driver's license with my sex listed as female, based solely on their interaction with me on the day I applied.

The State of Colorado (my birth state), as represented by the Department of Vital Statistics, however, still thinks of me as a male, as I have never had my birth certificate altered. Although that state offers a procedure where I can submit a copy of my doctor's statement that I have had the appropriate surgical procedures and a copy of a court order changing my name, and Colorado will issue a new birth certificate indicating my sex as female,[10] I have not availed myself of this option.

Sex determination of transsexuals vis-à-vis marriage

The issue of my gender, based on the above, would appear to be settled in every way that matters, with the exception of the "male" designation on an old (I won't say how old) piece of paper, i.e., my birth certificate. However, with respect to the issue of marriage, the courts take a

[10] The procedures for changing a birth certificate vary by state, however, as illustrated by the next two sections.

very unsettled (and unsettling) approach to sex determination. The most recent cases to deal with determining the sex of a transsexual in the legal marriage context used the medical model, but with differing outcomes. In both In re Marriage of Simmons,[11] and Kantaras v. Kantaras,[12] the cases involved female to male transsexuals who, after completing some surgeries and having been on the male hormone testosterone for a number of years, met, married and had children with women (through either artificial insemination or adoption) and then later were involved in divorce and related custody proceedings. In both cases, the wife contended that their marriage was void as a same-sex marriage.

In Simmons, the court [facially] relied on the medical model and called upon expert witness to give testimony as to the husband's sex. The testimony introduced said that Mr. Simmons was "a healthy male with male pattern baldness, the musculature of a male, facial and male body hair, and a male torso, but who still has female genitals, including atrophic or dysfunctional female breasts, atrophic labia, an enlarged clitoris, and a vagina."[13] Although having undergone both a hysterectomy (removal of the uterus) and an oophorectomy (removal of the ovaries), the court ruled that Mr. Simmons had not had enough surgery to qualify as a man as he had never had a penis constructed, and his marriage was thereby ruled void. The court did, however, indicate that had he completed further surgeries (notably a phalloplasty (construction and attachment of a phallus constructed from donor skin of the patient)), the state would have recognized his sex as male for marriage purposes.

In Kantaras, however, the appellate court overturned the findings of the trial court which had judged Mr. Kantaras as male, "based on the persuasive weight of all the medical evidence"[14]

[11] 355 Ill. App. 3d 942 (Ill. App. Ct. 2005)
[12] 884 So. 2d 155 (Fla. Dist. Ct. App. 2004)
[13] Simmons at 948
[14] Kantaras at 156

and found that he was still legally female for marriage purposes, despite having undergone the intense surgical and hormonal treatments referenced in Simmons. The Kantaras court relied upon its "understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth"[15] to determine that Mr. Kantaras could not alter his birth sex from that of a female.

Similarly, the Kansas Supreme Court in In re Gardiner did not consider the intermediate appellate court's findings as to Mrs. Gardiner's sex (based upon complete sexual reassignment surgery and medical testimony as to Mrs. Gardiner's status as a female) to be determinative, and instead ruled that her [presumably] male chromosomes were dispositive of sex, and that she was, therefore, still a male for legal purposes. Although the Gardiner court seemingly relied upon the medical model, it actually found only one element of that model to be dispositive and completely overlooked or ignored the other seven elements.

In contrast, the identity model of sex determination was implicitly considered, and at least in part relied upon, by the trial court in Kantaras (which looked at Mr. Kantaras' relationship with his children, the fact that he works exclusively as a male, the other social interactions in which he engages, etc.), and by the appellate court in M.T. [16] In the former, that view was overruled by the higher court in favor of its partial use of the medical model. In M.T., the court's decision that M.T. was female turned exclusively on her ability to perform sexually as a woman ("it is the sexual capacity of the individual which must be scrutinized"[17]).

The M.T. court also distinguishes B. v. B.,[18] where a female-to-male transsexual's marriage was judged void, like Simmons, although he had had a hysterectomy and a

[15] Id. at 161
[16] 355 A.2n 204 (N.J. Super. 1976)
[17] M.T., at 87
[18] B v. B, 78 Misc. 2d 112 (N.Y. Misc. 1974)

mastectomy, because he "had not received any male organs and was incapable of performing sexually".[19] In this, both the M.T. and the Simmons courts effectively adopted Butler's thesis that sex flows from gender, in that sex is determined exclusively by one's ability to perform their sex. Under the medical model, the reverse is true, i.e., sex is biology, immutable and the determinant of gender.

So, given these two models and the relevant case law, what sex am I for purposes of marriage? At this juncture, it seems evident that the answer is entirely dependent upon what state I was born in and what state I happen to be living in at the time the question arises.

What is 'Marriage'?

Before examining the legal status of my marriage, it would seem appropriate to discuss what is meant by marriage. There is, of course, the "traditional" view that "marriage is the [legal] union between a man and a woman".[20] As one court has observed, "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.[21] And, indeed, few would argue that marriage has historically had any other meaning.[22] For the conservative factions within the country, this is considered both the definitive view and the end of the discussion for the conservative factions within the country. One commentator notes that if questions regarding the definition of marriage or of sex were "posed to our ancestors, [they] would [] have seemed inane."[23] Yet, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because

[19] M.T. at 87-88
[20] Zakaria, Teresa A., SYMPOSIUM: RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND THEOLOGICAL PERSPECTIVES: NOTE: BY ANY OTHER NAME: DEFINING MALE AND FEMALE IN MARRIAGE STATUTES, 3 Ave Maria L. Rev. 349, 385 (Spring 2005)
[21] Baker v. Nelson, 291 Minn. 310, 312 (1971)
[22] See e.g. Goodridge v. Dept. of Public Health, 440 Mass. 309, 319 (2003)
[23] Zakaria, supra at 349

that is what it historically has been."[24] Indeed, relying solely upon tradition seems akin to the Christian churches decrying Copernicus' and Galileo's theories that the Earth revolved around the sun, instead of the reverse. Moreover, the view reduces the role of the state to a mere bystander. In fact, a more liberal definition recognizes that civil marriage is a creation of the state. As such, it must be judged by the same Constitutional rules that are used to evaluate the application of any set of laws. Despite "the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man… [] that history cannot and does not foreclose the constitutional question"[25] of its fair application to all the citizens of the state.

The Court in Goodridge summarized what is at stake both in defining marriage and in regulating access to it, tying it, appropriately, to an act of self-definition:

> Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition. (internal citations omitted).[26]

In what jurisdictions am I married?

My unamended Colorado birth certificate indicates my sex as "male." Thus, despite all outward appearances, not to mention my self-identification and recognition by others as female, and gender-conforming surgery, I am likely still legally considered "male" by the State of Michigan (my residence) for purposes of marriage. Consequently, although I married a lesbian

[24] Id. at 332, note 23
[25] Id. at 320
[26] Id. at 322

in a same-sex marriage according to Canadian law, I am probably legally married in Michigan, and thus in every State, regardless of their unwillingness to recognize same-sex marriages.

In order to fully appreciate the legal confusion engendered (as it were) by my marriage to a woman, consider the following hypothetical situations:

First, if we assume that I had requested that my Colorado birth certificate be amended before I was married, it is likely that my Canadian marriage would not be legally recognized in Michigan or in any other state except Massachusetts. That is, I would likely be considered female in every state pursuant to the Full Faith and Credit Clause of the U.S. Constitution,[27] because the certificate would be changed based on a court order.[28] However, this is far from certain. In both the Gardiner and Littleton cases, the court found reason to not grant full faith and credit to a sister state's change of the plaintiff's birth certificate. Nevertheless, it does seem likely that a hearing conducted pursuant to the Colorado statute would result in a judgment rendering me legally female in that stae, and thereby binding all other states to that conclusion.

Second, if we assume that I had not been born in Colorado, or another state where gender may be changed on birth certificates by court order (or recognized by virtue of surgery itself[29]), but in a state where changes are made by a ministerial act, it is likely that my marriage would be valid in some states – which refuse to recognize changes in gender as "a matter of

[27] Under the Supreme Court's interpretation of the Full Faith and Credit clause judgments (judicial proceedings) are given greater weight than mere public acts or records which are susceptible to a state's "public policy" defense. For a thorough treatment of this subject, see Greenberg, Julie A., YOU CAN'T TAKE IT WITH YOU: CONSTITUTIONAL CONSEQUENCES OF INTERSTATE GENDER-IDENTITY RULINGS, (80 Wash. L. Rev. 819) (2005)

[28] Colorado's statutes provide: ""Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation." C.R.S. 25-2-115 (4) (2005)

[29] New Jersey: M.T, *supra*; Illinois: Simmons, *supra*.

strong public policy" (such as Texas, Ohio, Florida, Kansas or Tennessee[30]) – but may be invalid in other states that do not have such a policy, but do prohibit same-sex marriage.

Third, if we assume that I had neither changed my birth certificate nor had surgery prior to marriage, but did so immediately thereafter, I would be legally married in all states. Even surgery and a change in birth certificate completed after the marriage was validly entered into could not be used by a court to undo this marriage, absent some action of the parties ourselves.[31]

As can be seen by reviewing the above hypothetical examples, the same two people can be married, or not married, in any number of given situations, depending upon surgical status, and modification of birth certificate (and by which process such modification occurs). Moreover, once married, those and other factors affect whether the marriage would be recognized in other states. Such a situation is irrational and, I submit, contrary to what most people would expect of their government. Indeed, as one commentator suggested, "Perhaps our governments, state and federal, shouldn't mess with the gender requirements of couples."[32]

Why Has the Law Gotten This Way?

As exemplified by Littleton, the overriding mission of the courts in cases involving transgender persons seems to be the avoidance of same-sex marriage. "In the end, it appears that the first-wave judges in Corbett, Littleton, and Gardiner rely upon birth biology to the total exclusion of psychological and social criteria in determining a person's sex to assure that they not condone same-sex marriage. All assume that the only way to be certain a marriage is between opposite-sexed partners is for one partner to have male body parts at birth and the other partner

[30] These states all have either statutes or case law that say that the state does not recognize a change in legal sex, irrespective of any surgery or self-identification. Texas: Littleton, *supra;* Kansas: In re Gardiner, *supra*; Ohio: In re Declaratory Relief for Ladrach, 32 Ohio Misc. 2d 6 (Ohio Misc. 1987); Florida: Kantaras, *supra*; Tennessee: *see* Tenn. Code Ann. § 68-3-203.

[31] An attempt to void a marriage that was valid when entered into would be contrary to the U.S. Constitution, Article 1, Section 9, Clause 3 that prohibits the passing of an ex post facto law.

[32] Hare, Heather, Why Outlaw Love and Marriage, Press & Sun Bulletin, Binghampton, NY (2002)

to have female body parts at birth" (internal citations and footnotes excluded).[33] What is it about same-sex marriage is it that produces such results?

Simulating an original

"To simulate is to feign to have what one hasn't."[34]

One principal argument is simply that same-sex marriage isn't marriage in the first place; it's not real. If one of the principal purposes of marriage is to "encourage the creation of stable relationships that facilitate the rearing of children by both of their biological parents"[35] any relationship between same-sex couples cannot, rationally be called "marriage" as they would be unable to procreate (*but see* K.M. v. E.G.[36] (two women in a relationship where one donated her ovum to the other who then, after artificial insemination, carried the fetus to term and delivered. Upon their separation, the court ruled that both were biological parents with rights to custody and visitation). Hence, such marriages are but simulations which have the effect not of extending fundamental rights protections to same-sex couples so much as degrading the base institution upon which it purports to be founded. So goes the argument against same-sex marriage.

She is not really a woman

Professor Greenberg examines how the determination of the sex of transgendered persons is intertwined with the issue of same-sex marriage:

> "As long as laws continue to differentiate between men and women, legal institutions will be required to determine exactly what makes a man a man what makes a woman a woman. Answering this question has become especially critical as courts and legislatures seek to ensure that marriage remains available to only opposite-sex couples."[37]

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[33] Kogan, Terry S., SYMPOSIUM: TRANSSEXUALS, INTERSEXUALS, AND SAME-SEX MARRIAGE, 18 B.Y.U. J. Pub. L. 371, 381 (2004)
[34] Baudrillard, Jean SIMULACRA AND SIMULATION (1994)
[35] Wilson v. Ake, at 1308
[36] 37 Cal.4th 130 (Cal. 2005)
[37] Greenberg, Julie A., ARTICLE: YOU CAN'T TAKE IT WITH YOU: CONSTITUTIONAL CONSEQUENCES OF INTERSTATE GENDER-IDENTITY RULINGS, 80 Wash. L. Rev. 819, 822

Like the concern that same-sex marriage devalues heterosexual marriage by imitation, it would appear that the courts are more concerned with the devaluation of their definitions of sex then they are with the application of justice. Ignoring both the medical model and the identity model evidence presented to it as to the complexities of sex, the court in Littleton suggests that sex is defined by "the Creator" at birth and may not be altered by a "scalpel, drugs and counseling."[38]

This calls into question the determination of the real. Although in the Littleton case, the court decided that Mrs. Littleton was male for legal purposes, it is plausible that it was merely overlaying its own preconceptions onto the plaintiff's body. In everyday life, in every way that could possibly matter to the people with whom she interacts Mrs. Littleton was a woman. She saw herself as female, other people saw her as female, she engaged in vaginal-penile sex with her husband, she displayed the secondary sex characteristics of a woman, the doctors who testified in her case testified that she was "medically a woman"[39]; in short, she performed the role of "woman" in every capacity in her life. Indeed, no one outside the court would argue that her gender was anything but that of a woman. Yet, despite all of this, the court in Littleton finds her to be male, relying on a distinction so fine that no one outside of a medical technologist would be able to distinguish Mrs. Littleton from any other woman married to her husband for seven years. The court determines that it is not the traditional determinants of sex that are dispositive for purposes of entering into a valid marriage, but rather the chromosomes that one has.

[38] Littleton, at 224
[39] Id. at 225

A Proposal for Eliminating Gender As a Basis For Deciding Who May Marry

In legal scholarship it is often the challenge of the scholar to find the core issue, the basic building block of an argument – or, in this case, of an identity – upon which other cases (or identities) may be determined. In cases involving the marriage of transsexuals, courts, for one of the few times in American jurisprudential history, are asked to determine what that basic building block is for purposes of determining a person's sex. In Critical Race Theory,feminist and critical race theories this is called "essentialism" – the reduction of human experience to the lowest common denominator.

Ultimately, there can be no "bright-line" rule, no common denominator, that will encompass all persons and their sexual identity. Historically, courts looked to physicians who looked to genitals and the ability to have sexual intercourse in one manner or another to determine sex (a conflation of the medical and identity models of sex determination). But, genitals were never entirely conclusive as there have always been cases of ambiguous genitalia. Over time, it became known that "women" had a preponderance of a certain type of hormone, estrogen, whereas "men" had a preponderance of a different type of hormone, testosterone – the so-called sex hormones. But, that was subject to even greater variability and was never widely used as a conclusive determinant. Finally, science advanced to the point of being able to discern an even more fundamental building block, the presence (or absence) of a "Y" chromosome in a person's genetic structure. The "Y" chromosome (about ½ the size of the "X" chromosome which carries most of the genetic code) was determined to be the marker for "male". Unfortunately for science and the medical community, however, this has also proven to not be dispositive of sex. Although the preponderance of humans are (statistically) either "XX" (female

labeled) or "XY" (male labeled) there have proven to be many thousands (as much as 1% of the population) of people who are not either.

I propose that there is no rational reason for the segregation of persons into binary categories for purposes of allocating the rights, obligations and benefits conferred by the state when it allows people to enter into the civil union called marriage. As noted in the same-sex marriage cases, *infra*, society has advanced as its primary justification for denying same-sex couples the right to marry the need to foster procreation and the rearing of children in stable dual-parent households. In addition to the irrationality that denying same-sex marriage somehow encourages opposite-sex marriage, is the obvious reality that same-sex couples continue to exist, and continue to seek ways to validate their unions, often by contractual arrangements that mimic many of the rights and obligations of state-sanctioned marriage. "Indeed, the argument that the state must dual-sex its citizens in order to ensure that marriages are procreative is truly absurd. What is more incredulous, however, is that this argument is the strongest one the state has for sex-typing its citizens."[40] While marriage may indeed involve procreation, it means far more than that for the participants.

> What matters to a successful marriage [] is not that each partner's genitals be arrayed in any particular way in relation to the genitals of the other partner. What matters is how a person's body enables him or her to give and to receive sexual and emotional satisfaction from an intimate relationship with a partner. Giving and receiving sexual satisfaction is not limited to bodies that are opposite-sexed or same-sexed or transsexed or intersexed. What the transsexual and intersexual marriage cases teach is that if the state is truly interested in fostering the institution of marriage, it should stop trying to police the body parts that a couple must have in order to marry.[41]

I argue that eliminating consideration of gender for purposes of marriage comports with the U.S. Supreme Court's recognition of marriage as a fundamental right, despite the repeated

[40] Rothblatt, Martine, The Apartheid of Sex, Crown Publishers, Inc., 1995
[41] Kogan, *supra*, at 416

arguments (accepted by lower courts) that marriage is limited, by definition, to "a union of one man and one woman." This proposition is, of course, the very thing that some commentators fear:

> The definition of male and female as these terms are used in marriage statutes should not be altered to reflect a psychological definition of sex. As one gender theorist stated, if sex categories are based on gender identity, "then the man and woman, masculine and feminine, and heterosexual and homosexual dichotomies necessarily become blurred." The distortion of these terms would significantly interfere with the public policy of states to protect traditional marriage.[42]

Marriage Is a Fundamental Right

The primary reason for removing binary gender restrictions on marriage is that it deprives untold thousands of people the right to marry the one with whom they wish to make such a profound commitment. The Supreme Court first referred to marriage in terms that one could construe as fundamental in Griswold v. Connecticut,[43] saying:

> We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[44]

In Loving v. Virginia,[45] the Court elaborated, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[46] As such, it is a right that every citizen of legal age in our country has protected from

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[42] Zakaria, Teresa A., SYMPOSIUM: RETHINKING RIGHTS: HISTORICAL, POLITICAL, AND THEOLOGICAL PERSPECTIVES: NOTE: BY ANY OTHER NAME: DEFINING MALE AND FEMALE IN MARRIAGE STATUTES, 3 Ave Maria L. Rev. 349, 385 (Spring 2005) (internal citations and footnotes omitted)
[43] 381 U.S. 479 (1965)
[44] Id. at 486
[45] 388 U.S. 1 (1967)
[46] Id. at 12

government intrusion. The right is not absolute – the state may regulate marriage under its police powers; however "the State does not contend…that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so…."[47] Further, "[a]lthough Loving arose in the context of racial discrimination, prior and subsequent decisions of [the Supreme] Court confirm that the right to marry is of fundamental importance for all individuals."[48] But doesn't the state have the right to regulate marriage to serve societal purposes, even if it interferes with this fundamental right? Not, for example, when the applicant is in violation of state law by being in arrears in child support from a former marriage.

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. [cites omitted] The statutory classification at issue here [prohibiting persons delinquent in child support payments from obtaining marriage licenses], however, clearly does interfere directly and substantially with the right to marry.[49]

And, not even when the applicant to marry is a prisoner of the state. *See* Turner v. Safley,[50] where the Court struck down a state's denial of a marriage application by a prisoner of the state, referring to decision to marry as "fundamental right" under Zablocki and Loving, and finding that regulation "impermissibly burdens the right to marry".[51]

Moreover, the Court has found that the Fourteenth Amendment to the Constitution "affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…. These matters, involving the

[47] Id. at 7
[48] Zablocki v. Redhail, 434 U.S. 374 (1978)
[49] Id. at 386 -387
[50] 482 U.S. 78 (1987)
[51] Id. at 97

most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[52]

Despite the Supreme Court's repeated rulings that the right to marry is fundamental, a number of courts have refused to extend that right to same-sex couples ("no federal court has recognized that this right includes the right to marry a person of the same sex."[53]), or to even review bans against such marriage through the lens of strict scrutiny as is normally called for when a legislature infringes upon a fundamental right. See, e.g., Samuels v. NY Dept of Health,[54] in which the court reasoned:

> Plaintiffs seek to bring the right to marry the person of their choosing regardless of gender within the protection of the well-recognized fundamental right to marry [cites omitted]. However, we find merit in defendants' assertion that this case is not simply about the right to marry the person of one's choice, but represents a significant expansion into new territory which is, in reality, a redefinition of marriage. The cornerstone cases acknowledging marriage as a fundamental right are laced with language referring to the ancient recognized nature of that institution, specifically tying part of its critical importance to its role in procreation and, thus, to the union of a woman and a man…. To remove from "marriage" a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state (see e.g. Griswold v Connecticut, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]) would, to a certain extent, extract some of the "deep[] roots" that support its elevation to a fundamental right. While such a change of a basic element of the institution may eventually find favor with the Legislature, we are not persuaded that the Due Process Clause requires a judicial redefinition of marriage.

See also, Standhardt v. Super. Ct. of Ariz., ("Implicit in *Loving* and predecessor opinions is the notion that marriage, often linked to procreation, is a union forged between one man and one woman…. In contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of "marriage."").[55]

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[52] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)
[53] Wilson v. Ake, 354 F. Supp. 2d 1298, 1306 (D. Fla. 2005)
[54] 2006 NY Slip Op 1213, 5-6, 811 N.Y.S.2d 136 (App. Div. 2006)
[55] 206 Ariz. 276, 283 (Ariz. App. 2003)

The cases upholding restrictions on same-sex marriage all justify their conclusions with references to outmoded conceptions of gender roles and parenting, using such euphemisms as the State's interest in "ensuring responsible procreation within committed, long-term relationships"[56]; "the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children"[57]; and perhaps most revealing of all, "our society and laws view marriage as something more than just State recognition of a committed relationship between two adults. Our leading religions view marriage as a union of men and women recognized by God…., and society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children."[58]

Unmasked, the justification for gender restrictions on the right to marry are not to further some great societal interest, but to enforce a certain moral code that dictates only heterosexuals should be allowed to raise children. This is not only a debunked social theory, but also contrary to the dictates of the Constitution and the role of the courts to protect individual liberty. As Justice O'Connor declared, "[The Court's] obligation is to define the liberty of all, not to mandate our own moral code."[59]

Marriage of transsexuals

Eliminating the gender restrictions on marriage would also avoid the injustices that have been visited on transsexuals by the so-called "justice system." In Littleton, *supra*, it is difficult to see how justice was served as the case was never tried on its merits – thrown out, says the court, because the seven year marriage of the plaintiff was void and she therefore had no

[56] Standhardt, supra.
[57] Singer v. Hara, 522 P.2d 1187, 1195 (Wash. App. 1974)
[58] Lewis v. Harris, 378 N.J. Super. 168, 185 (App. Div. 2005)
[59] Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992)

standing to sue as the widow in the wrongful death of her husband. It did not matter to the court that both parties to the marriage thought they were married, it did not matter that the state had issued them a marriage license and that they had performed the rituals laid down by state law to enter into that contract. What mattered, said the court, is that the plaintiff-wife had been born with male genitalia (and, presumably, chromosomes) and that created a same-sex marriage, in the eyes of Texas law.

Additionally, eliminating the gender restrictions on marriage would serve to remove a reason for undergoing dangerous and expensive surgeries (which, because of their cost and danger are not available to all transgendered persons who might otherwise pursue them) such as the courts found necessary to be married in M.T., *supra*, and Simmons, *supra*.

Eliminating the gender requirement also has the advantage of not excluding any citizen from the benefits (or obligations) of marriage based purely upon the state's inability (or unwillingness) to classify a person according to a strict and outdated determination of sexual identity. Current case law creates a true problem for intersexuals:

> By logical implication [under Littleton], ambiguous-sex marriages for intersexuals may also be void, since neither the federal nor state legislatures have defined what the terms "male" and "female" actually mean. Perhaps even more cruel is the fact that intersexuals may not have the right to marry anyone under the current prohibition of same-sex marriage. Since intersexuals do not meet the accepted definitions of male or female, a court or legislature could easily construe the law as precluding an intersexual from marrying either sex. If a person had an intersex condition, or that person's spouse had such a condition, the marriage contract may be invalid since the legislature makes no reference to such individuals.[60]

Finally, by removing legal hurdles to marriage placed in the path of those whose fall outside of gender norms, the courts foster the very interests that marriage was intended to serve – a stable, nurturing environment for children (however or by whomever conceived) with two

[60] Michalek, Natalie Brown, NOTE: LITTLETON V. PRANGE: HOW VOIDING TRANSEXUAL MARRIAGE AFFECTS FUNDAMENTAL RIGHT OF MARRIAGE, 52 Baylor L. Rev. 727, 749-50 (2000)

loving and committed parents, and family support for individuals rather than dependence on the public.

Conclusion

My identity as a transsexual, ironically, makes it possible for me to legally marry another woman, thereby emphasizing the absurdities of both the current legal tests for sex determination and the laws prohibiting same-sex marriage. However, by varying a few factual details, I could be deemed legally married in all states, some states, or only Massachusetts. There is no rational basis for this situation, or for denying me, or any other person, the fundamental right to marry based on something as irrelevant and arbitrary as one's government-determined gender.