

“UNTIL DEATH (OR SEX CHANGE) DO US PART”: ADVOCATING FOR ADOPTION OF THE EUROPEAN LEGAL APPROACH TO VALIDATING MARRIAGES INVOLVING POST-OPERATIVE TRANSSEXUALS

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INTRODUCTION

Imagine that you and your husband have recently celebrated your thirtieth anniversary. Unfortunately, shortly after celebrating this momentous occasion, your spouse must undergo surgery to correct an urgent medical condition. Tragically, while in surgery, the surgeon commits an error that takes the life of your husband. You bring a medical malpractice suit against the surgeon. The surgeon responds with a motion for summary judgment. On what grounds does he base his motion? The surgeon claims that you, even though a post-operative male-to-female transsexual, are still legally male and therefore barred from being married to another man. Even though neither you nor your husband have done anything wrong, the court grants summary judgment to the surgeon and essentially rules that you can never be anything but a male because you were born a male. With one tap of a gavel, your thirty year marriage is swiftly invalidated.

Unfortunately, situations like the one described above do exist. Only a minority of states has ruled on the issue of the validity of marriages involving post-operative transsexuals, and the majority of these states have invalidated such marriages.¹ Conversely, while the United Kingdom originally invalidated marriages involving post-operative transsexuals,² the European Court of Human

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¹ See *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (holding that any marriage not between people of the opposite sex, determined by their biological sex at birth, is invalid); *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (holding that a post-operative male-to-female transsexual is not a woman within the meaning of the marriage statutes and that such a marriage is void against public policy); *In re Ladrach*, 32 Ohio Misc. 2d 6 (Prob. Ct. 1987) (holding that a post-operative male-to-female transsexual could not obtain a marriage license to marry a male); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (holding that a marriage between a man and a post-operative male-to-female transsexual was not valid). *But see* *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding marriages involving post-operative transsexuals valid).

² See *Corbett v. Corbett*, [1971] P. 83 (Eng.) (holding that valid marriages depend on whether the parties are of opposite sex as determined by sex at birth). There are no reported decisions in the United States regarding what happens to the validity of an existing marriage when one of the spouses undergoes

Rights recently held that European governments refusing to recognize these marriages have violated the European Convention for the Protection Of Human Rights and Fundamental Freedoms (hereinafter “Convention”).³

The United States Supreme Court has held that marriage is a fundamental right, subject only to “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship.”⁴ Yet despite this, post-operative transsexuals often find themselves unable to exercise this fundamental right because of judicial decisions. Courts using birth sex to determine the sex of post-operative transsexuals have ruled that these individuals are only able to marry individuals of the opposite sex from their birth sex; however, this option is not available to post-operative transsexuals because these marriages would essentially resemble same-sex marriages, another form of marriage strongly against the policy of most states. Despite the “guarantee” of this fundamental right, post-operative transsexuals in Europe enjoy more security in their marriages than the majority of post-operative transsexuals in the United States.

Since post-operative transsexuals in the United States cannot ensure security in their marriages, American courts need a new approach to determine sex for purposes of marriage. Part I of this Article discusses three legal approaches used by courts in both the United States and Europe—focusing on decisions of English courts and the European Court of Human Rights—to rule on the validity of marriages involving post-operative transgendered individuals. Then, Part II discusses why American jurisdictions should adopt the European approach to ensure that the validity of marriages involving post-operative transsexuals no longer remains in flux.

I. CURRENT LEGAL APPROACHES TO MARRIAGES INVOLVING POST-OPERATIVE TRANSSEXUALS

A. *Sex at the Time of Birth Approach*

Even though using chromosomes to determine a post-operative transgender person’s sex for the purpose of the marriage is the predominant approach in the United States, this view has only been recognized by courts for less than forty years. The English Probate, Divorce, and Admiralty Division first applied this decision in the widely-cited case *Corbett v. Corbett*.⁵ *Corbett* addressed the

sex reassignment surgery. See KAREN MOULDING & NAT’L LAWYERS GUILD, LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMM., I SEXUAL ORIENTATION AND THE LAW § 9:15 (2010).

³ See *I v. United Kingdom*, 36 Eur. Ct. H.R. 967 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447 (2002) (both holding that the United Kingdom government had violated Article 12 of the Convention by refusing to recognize post-operative transsexuals’ acquired sex for marriage purposes).

⁴ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

⁵ *Corbett v. Corbett*, [1971] P. 83 (Eng.).

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validity of a marriage between the petitioner and the respondent, a post-operative male-to-female transsexual.⁶

To determine whether the Corbetts' marriage was legally valid, the court had to determine a way to figure out whether the respondent was female or whether she remained a male despite her sex reassignment surgery. To assist in this task, the court heard evidence from various expert witnesses, all of whom had conducted extensive studies of sexual matters, including transsexuality.⁷ All of the medical witnesses testified that the medical community uses four criteria for determining the sex of an individual.⁸ These include chromosomal factors, gonadal factors, genital factors, and psychological factors.⁹

Using these criteria, the court determined that the respondent was biologically male for the purposes of marriage and, therefore, the marriage between petitioner and respondent was void.¹⁰ The court argued that biological criteria should carry more weight in determining the validity of a marriage.¹¹ Furthermore, the court reasoned that "sex is clearly an essential determination of the relationship called marriage, because it is and always has been recognised [sic] as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element."¹² The respondent possessed XY chromosomes and had possessed male gonads and genitalia before the surgery; therefore, she was not "naturally capable of performing the essential role of a woman in marriage."¹³ The court also believed the respondent was not capable of heterosexual intercourse because it thought this type of intercourse could not be completed by using a "completely artificial cavity" such as the one constructed for the respondent.¹⁴

⁶ *Id.* at 84-85. Mr. Corbett challenged the validity of his marriage by arguing that the respondent was male at the time of marriage and that she was unable to or refused to consummate the marriage. The respondent countered by arguing that the court should find the marriage valid because she had undergone sex reassignment surgery before the marriage ceremony and because the petitioner had known about her desire to undergo this operation and live like a woman before the marriage occurred. *Id.* Throughout this Article, I refer to post-operative transsexuals by using pronouns or possessive adjectives referring to their acquired sex, not their birth sex.

⁷ *Id.* at 97. The petitioner called Professors Dewhurst and Dent and Dr. Randell as expert witnesses. *Id.* Professor Dewhurst served as the Professor of Obstetrics and Gynecology at Queen Charlotte's Hospital, Professor Dent served as Professor of Human Metabolism at University College Hospital, and Dr. Randell served as Consultant Psychiatrist at Charing Cross Hospital. *Id.* The respondent called Dr. Armstrong, a Consultant Physician at Newcastle Royal Infirmary, Professor Mills, a Professor of Medicine at the University of Cambridge, and Professor Roth, Professor of Psychiatry at the University of Newcastle-on-Tyne. *Id.*

⁸ *Id.* at 100.

⁹ *Id.*

¹⁰ *Id.* at 106.

¹¹ Corbett v. Corbett, [1971] P. 83, 106 (Eng.). According to the court, the respondent was a biological male because she had XY chromosomes, had had testes before the operation, and didn't have any evidence of female sex organs. *Id.* at 104.

¹² *Id.* at 105.

¹³ *Id.* at 106.

¹⁴ *Id.* at 107.

In the United States, Ohio became the first jurisdiction to apply *Corbett's* reasoning.¹⁵ In *In re Ladrach*, the court, relying heavily on *Corbett*, determined that no authority existed in Ohio to issue a marriage license to a post-operative male-to-female transsexual and a male.¹⁶ The court did mention the New Jersey decision of *M.T. v. J.T.*;¹⁷ however, it characterized its reasoning as a “very liberal posture” and instead chose to rely on *Corbett*, a seventeen-year-old precedent.¹⁸ The court also determined that since the case was one of first impression in Ohio, it was for the legislature to determine whether Ohio public policy allowed the issuance of marriage licenses to post-operative transsexuals.¹⁹

Twelve years later, the Court of Appeals of Texas adopted the reasoning expressed in both *Corbett* and *Ladrach*.²⁰ In 1977, Lee Cavazos legally changed his name to Christie Lee Cavazos.²¹ Christie went through sex reassignment surgery between November 1979 and February 1980.²² She then married Jonathan Littleton in 1989.²³ In 1996, Christie filed a medical malpractice suit against Dr. Prange under the Texas Wrongful Death and Survival Statute as Jonathan's surviving spouse.²⁴ Dr. Prange responded with a motion for summary judgment, claiming that Christie was still legally a man and as such could not validly be married to another man.²⁵ The court determined that the “body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.”²⁶ Therefore, since Texas did not allow same-sex marriages, the court felt it had no choice but to invalidate the marriage between Christie and Jonathan.²⁷ However, *Littleton* is striking in that it is the only case to date to draw a dissent. According to Justice Lopez, the majority should not have assumed “that gender is accurately determined at birth.”²⁸ Also, she argued that the presence of a birth

¹⁵ See *In re Ladrach*, 32 Ohio Misc. 2d 6 (Prob. Ct. 1987).

¹⁶ *Id.* at 10. In *Ladrach*, Elaine Francis Ladrach, born Edward Franklin Ladrach, had originally petitioned the probate court for a name change in 1986, arguing that he intended to undergo sex reassignment surgery later in the year and was currently taking female hormones. *Id.* at 6. The court granted the name change. *Id.* Later, Elaine Ladrach and her fiancé asked the probate court to issue a marriage license. *Id.* Ladrach presented a letter from her physician stating that he had performed sex reassignment surgery for Elaine on September 8, 1986, and that she should now be considered a woman. *Id.* The court denied the marriage license because Elaine's birth certificate still referred to her as male. *Id.* Elaine then filed an application to change her birth certificate so it read “Girl” instead of “Boy;” however, this application was dismissed without prejudice by the court. *Id.* at 7. Ladrach then filed her complaint for declaratory judgment. *Id.*

¹⁷ *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976); see discussion *infra* Part I.B.

¹⁸ *Ladrach*, 32 Ohio Misc. 2d at 9-10.

¹⁹ *Id.* at 10.

²⁰ See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

²¹ *Id.* at 224.

²² *Id.*

²³ *Id.* at 225.

²⁴ *Id.*

²⁵ *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 233 (Lopez, J., dissenting) (emphasis added).

certificate showing the birth of a male did not prove that Christie was Jonathan's surviving spouse because her amended birth certificate replaced her original.²⁹

Three years after the *Littleton* ruling, the Kansas Supreme Court became yet another to hold that the terms "sex," "male," and "female" do not include post-operative transsexuals.³⁰ Essentially, the *Gardiner* court's ruling created three sex categories: male, female, and transsexual. Like the *Ladrach* and *Littleton* courts, the *Gardiner* court also reasoned that since the legislature had declared the public policy of Kansas to only allow marriages between males and females, it was for the legislature, not the court, to change this policy.³¹ Florida is the most recent state to focus on chromosomes and birth sex.³² The court in *Kantaras v. Kantaras*, without giving specific reasons why, stated its agreement with the *Ladrach*, *Littleton*, and *Gardner* courts that the meanings of "male" and "female" can only refer to "immutable traits determined at birth."³³ Likewise, the court eventually passed the issue to the Florida legislature for an ultimate decision.³⁴ Since *Kantaras*, no American jurisdiction has ruled on the validity of a marriage involving a post-operative transgendered individual.

B. Sex at the Time of Marriage Approach

Fortunately, not all American courts deciding on the validity of a marriage where one of the parties is a post-operative transgendered person have followed the *Corbett* ruling. Instead, two American jurisdictions, New Jersey and California, have rejected the *Corbett* court's ruling for one that encompasses a physical and psychological approach to determining sex for the purposes of marriage.³⁵ In 1976, six years after the *Corbett* court had ruled the Corbetts' marriage invalid, the

²⁹ *Id.* (Lopez, J., dissenting).

³⁰ *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002). *Gardiner* involved the validity of a marriage between J'Noel Gardiner and Marshall Gardiner. *Id.* at 122. J'Noel was originally born male, but her birth certificate had been amended in Wisconsin, the state of issuance, after she underwent sex reassignment surgery. *Id.* Marshall knew about J'Noel's prior history as a male before the marriage, and the two married in 1998. *Id.* Marshall died intestate in 1999, and J'Noel filed a request that letters of administration be given to her as his surviving spouse. *Id.* at 123. Joe, Marshall's son from a previous marriage, argued that he was sole surviving heir because the marriage between J'Noel and Marshall was invalid because J'Noel was born a man. *Id.*

³¹ *Id.* at 136-37.

³² *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004). *Kantaras* involved the validity of a marriage between Linda and Michael Kantaras. *Id.* at 155. Michael, born Margo, changed his name to Michael in 1986 and underwent sex reassignment surgery in 1987. *Id.* He met Linda in 1988 and told her about his surgeries and becoming a male. *Id.* In 1998, Michael filed for dissolution of the marriage; Linda answered and asked that the marriage be dissolved or annulled because it violated the Florida law banning same-sex marriage. *Id.* at 156.

³³ *Id.* at 161.

³⁴ *Id.*

³⁵ See *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). The California case, *Vecchione v. Vecchione*, was an unreported divorce proceeding. For details about the case, see Greg Hernandez, *Judge Rules Transsexual in Custody Case Is Male*, L.A. TIMES, Nov. 26, 1997.

Appellate Division of New Jersey in *M.T. v. J.T.* held valid a marriage between a male and a post-operative male-to-female transsexual.³⁶

The New Jersey court heard testimony from plaintiff's medical doctor who had treated her both before and after her sex reassignment surgery and also from a doctor who specialized in behavioral therapy and sexual dysfunctions.³⁷ Despite testimony by defendant's expert witness that plaintiff was still male because she did not possess female organs,³⁸ the court still determined that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."³⁹ By deciding this, the New Jersey court expressly rejected the reasoning of the *Corbett* court because of the several criteria that are relevant to determining the sex of an individual.⁴⁰ The court also noted that an individual's sexuality encompasses that individual's gender and psychological sense of sexual identity.⁴¹ Therefore, since M.T. had harmonized her gender and genitalia through sex reassignment surgery, the court viewed her as female for purposes of marriage and held that she could validly marry a male.⁴²

Effectively, the *M.T.* court attempted to shift the focus for determining an individual's sex away from chromosomes and birth sex to a standard that encompasses both physical and psychological features. The court's test can be summed up as such:

Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such

³⁶ *M.T.*, 355 A.2d at 211. In *M.T.*, the plaintiff and defendant had met in 1964, and the plaintiff had informed the defendant of her desire to be a woman upon meeting him. *Id.* at 205. In May 1971, plaintiff went through sex reassignment surgery for "the removal of male sex organs and construction of a vagina." *Id.* This operation was paid for by J.T. *Id.* M.T. and J.T. were married in August 1972, over a year after M.T. underwent sex reassignment surgery. *Id.* M.T. brought the action when defendant left her in October 1974 and failed to support her since. *Id.*

³⁷ *Id.* at 205-06. Dr. Ihlenfeld, her medical doctor, testified that he had known of no other way to change her gender identity to agree with her male body other than sex reassignment surgery, and that he no longer considered her to be male because she could not sexually function as a male for purposes of "recreation or procreation." *Id.* at 206. Dr. Samuels, a doctor specializing in behavioral therapy and sexual dysfunctions, also classified M.T. as female. *Id.* To Dr. Samuels, determining how consistently the person lived in the gender role was most important in determining whether an individual should undergo sex reassignment surgery. *Id.* If an individual went through sex reassignment surgery to remove male organs, then Dr. Samuels would classify that individual as female. *Id.*

³⁸ *Id.* at 206-07.

³⁹ *Id.* at 209.

⁴⁰ *Id.* at 208-09.

⁴¹ *M.T. v. J.T.*, 355 A.2d 204, 208-09 (N.J. Super. Ct. App. Div. 1976).

⁴² *Id.* at 211.

conformity requires changes of a statistical nature, then such changes should be made.⁴³

The California court later applied this test in *Vecchione v. Vecchione*, where it found that a post-operative female-to-male transsexual had to be legally recognized as a male.⁴⁴ *Vecchione* was decided in 1997;⁴⁵ since then, no other American court has applied this reasoning to a case concerning the validity of a marriage in which one party is a post-operative transgendered person.

C. Sex as a Right of Privacy Approach

In recent years, the European Court of Human Rights has introduced yet another approach to determining a person's sex for purposes of marriage.⁴⁶ Both applicants to the European Court of Human Rights based their arguments on violations of Articles Eight and Twelve of the Convention.⁴⁷ Article Eight of the Convention states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁴⁸

⁴³ *Id.* at 210.

⁴⁴ Hernandez, *supra* note 35. "In a written opinion, Orange County Superior Court Judge Gary Ryan wrote that California recognizes the postoperative gender of all transsexual people." *Id.* Kristie Vecchione had attempted to argue that her marriage to Joshua Vecchione was invalid because Joshua remained a female despite his sex reassignment surgery. *Id.* As such, she argued that the marriage had to be invalid because California didn't recognize same-sex marriages. *Id.* However, the court placed great weight on a California state statute allowing individuals to change their sex designation on their birth certificates and found that Joshua's post-operative sex had to be legally recognized. Taylor Flynn, *The Ties that Don't Bind: Transgender Family Law and the Unmaking of Families*, in *TRANSGENDER RIGHTS* 32, 36 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006).

⁴⁵ Hernandez, *supra* note 35.

⁴⁶ *See I v. United Kingdom*, 36 Eur. Ct. H.R. 967 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447 (2002).

⁴⁷ *I*, 36 Eur. Ct. H.R. at 984-96; *Goodwin*, 35 Eur. Ct. H.R. at 468-81.

⁴⁸ European Council of Human Rights, Convention for the Protection Of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>. In 1998, the United Kingdom implemented the Human Rights Act, which gives domestic effect to the Convention. Robert Reed, *Transsexuals and European Human Rights Law*, in *SEXUALITY AND HUMAN RIGHTS: A GLOBAL OVERVIEW* 49, 55 (Helmut Graupner & Phillip Tahmindjis ed., 2005). Therefore, the European Court of Human Rights has jurisdiction to hear cases regarding domestic laws violating the Convention when member states have enacted domestic legislation giving effect to the Convention. *Cf. id.*

The court in both *I* and *Goodwin* determined that the United Kingdom government had breached Article Eight of the Convention.⁴⁹ The court realized that principles of legal certainty meant that it should not depart from precedents without good reason;⁵⁰ however, the court also realized the need to examine the state of transsexuals in the United Kingdom “in the light of present-day conditions.”⁵¹ While noting that surgery and hormonal treatments cannot change chromosomes, the court refused to hold to the idea that the chromosomal element of sex should be the decisive factor for the purposes of determining a post-operative transsexual’s sex.⁵² The court determined that the interests of the applicants in obtaining legal recognition of their gender violated Article Eight because the United Kingdom government could not prove any significant issues of public interest that would prevent this recognition.⁵³ After the court’s decision, European states party to the Convention could no longer continue to deny legal recognition to a post-operative transsexual’s change of sex.

It was not enough for the court to find violations of Article Eight; instead, the court also had to determine if the United Kingdom government had also violated Article Twelve of the Convention. Article Twelve states: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”⁵⁴ According to the court, the second aspect of Article Twelve—the right to found a family—does not depend on the first aspect; therefore, the inability of any couple to conceive cannot eliminate their right to marriage.⁵⁵ Also, even though European states party to the Convention can limit this right through national laws, these laws cannot “restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.”⁵⁶ Also, since the court found that under Article Eight of the Convention a test of “congruent biological factors” could no longer be the decisive test for determining the sex of a post-operative transsexual, this test should not be the decisive test for determining whether a post-operative transsexual should enjoy the right to marry guaranteed under Article Twelve.⁵⁷ Therefore, while European states still had the right to determine the conditions under which a post-operative transsexual could establish that gender reassignment had been completed, the court held that states party to the Convention could no longer, under any circumstances,

⁴⁹ *I*, 36 Eur. Ct. H.R. at 993; *Goodwin*, 35 Eur. Ct. H.R. at 478.

⁵⁰ *I*, 36 Eur. Ct. H.R. at 987; *Goodwin*, 35 Eur. Ct. H.R. at 471.

⁵¹ *I*, 36 Eur. Ct. H.R. at 988; *Goodwin*, 35 Eur. Ct. H.R. at 472.

⁵² *I v. United Kingdom*, 36 Eur. Ct. H.R. 967, 990 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 474 (2002).

⁵³ *I*, 36 Eur. Ct. H.R. at 993; *Goodwin*, 35 Eur. Ct. H.R. at 478.

⁵⁴ Convention for the Protection Of Human Rights and Fundamental Freedoms, *supra* note 48.

⁵⁵ *I*, 36 Eur. Ct. H.R. at 994; *Goodwin*, 35 Eur. Ct. H.R. at 479.

⁵⁶ *I*, 36 Eur. Ct. H.R. at 994; *Goodwin*, 35 Eur. Ct. H.R. at 479.

⁵⁷ *I*, 36 Eur. Ct. H.R. at 995; *Goodwin*, 35 Eur. Ct. H.R. at 479.

bar transsexuals from enjoying the right to marry guaranteed under Article Twelve.⁵⁸

Essentially, even though the European Court of Human Rights realized that fewer states allowed transsexuals in their post-operative sex to get married than allowed the sex change itself,⁵⁹ states party to the Convention could not continue to impair post-operative transsexuals' privacy rights by effectively imposing absolute bans on their rights to legal recognition of their changed sex and their rights to marry, both guaranteed by the Convention. By shifting the focus away from individualistic inquiries into birth sex, immutable characteristics, and the ability to function sexually within the acquired sex, the European Court of Human Rights recognizes that the focus should be on whether the right to privacy has been violated and, if so, what the violating government can do to remedy the situation.

II. ADVOCATING FOR THE ADOPTION OF THE EUROPEAN APPROACH IN AMERICA

The question remains: should American courts continue to focus on *Corbett*, an English case decided almost forty years ago? Since *Corbett* is not binding on American courts, American courts do not have to blindly follow it. *Corbett* has been rejected by the European Court of Human Rights;⁶⁰ yet American courts are also not bound to follow these opinions. The rejection of *Corbett* leaves American courts in a difficult position—should they continue to hold that birth sex determines the validity of a marriage, or should they recognize a right to privacy and a fundamental right to marry for post-operative transsexuals? Currently, American approaches are not adequate because they unduly focus on the ability to function sexually, completely deny the right to marry to post-operative transsexuals, and harm other individuals such as those with intersex conditions.

A. Current Approaches Unduly Focus on the Ability to Function Sexually and Procreate

Current American approaches to the validity of marriages involving post-operative transsexuals unduly focus on the ability of the post-operative transsexual to participate in intercourse after undergoing the operation. In today's society, it appears that ideas concerning traditional purposes of marriage are waning.⁶¹ Traditional ideas that the primary purposes of marriage are based on the ability to have sexual intercourse and procreate are steadily being overshadowed by a greater emphasis on the "psychological and social aspects of the companionship of the sexes."⁶² Therefore, since the European approach involves an analysis of a right to

⁵⁸ *I v. United Kingdom*, 36 Eur. Ct. H.R. 967, 995 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 480-81 (2002).

⁵⁹ *I*, 36 Eur. Ct. H.R. at 995-96; *Goodwin*, 35 Eur. Ct. H.R. at 480.

⁶⁰ *See I*, 36 Eur. Ct. H.R. at 967; *Goodwin*, 35 Eur. Ct. H.R. at 447.

⁶¹ *See Reed*, *supra* note 48, at 83.

⁶² *Id.*

privacy and a fundamental right to marry, this approach would fall more in line with society's current views and ideas on marriage.

American jurisdictions holding that sex is fixed at birth often focus on intrusive inquiries into the lives of transsexuals.⁶³ For example, in the *Kantaras* case, the Florida court devoted itself to almost a single issue in determining whether Michael Kantaras was male or female: whether he had a "penis deemed sufficient for penetration."⁶⁴ To determine this, the court asked whether he could urinate while standing, whether he used sexual aids on his wife during intercourse, what sexual positions he used, and whether he could have what was referred to as "normal sex."⁶⁵ This private information was broadcast by *Court TV* so that viewers could learn the "sensational," intimate details of Michael Kantaras's sex life.⁶⁶ Other courts have focused on these intimate details, claiming it is necessary to determine whether a post-operative transsexual is male or female for the purposes of marriage.⁶⁷

Even though some American courts have determined that congruence of physical sex and gender identity determine whether a post-operative transsexual is male or female for the purpose of marriage, these courts have still pried into individuals' private, intimate lives. For example, in *M.T. v. J.T.*, the New Jersey court essentially ruled that even though M.T. was female for the purposes of marriage, heterosexual intercourse determines sex and gender identity.⁶⁸ In *M.T.*, the court heard testimony from Dr. Ihlenfeld, M.T.'s medical doctor. Dr. Ihlenfeld testified that after sex reassignment surgery, M.T. "had a vagina and labia which were 'adequate for sexual intercourse' and could function as any female vagina, that is, for 'traditional penile/vaginal intercourse.'"⁶⁹ Overall, the court reasoned that the "sexual capacity of the individual . . . must be scrutinized" to determine the "psychological and emotional orientation to engage in sexual intercourse as either a male or a female."⁷⁰ While the court analyzed M.T.'s

⁶³ See Flynn, *supra* note 44, at 38.

⁶⁴ *Id.*

⁶⁵ *Id.* Flynn does not describe what Kantaras's wife's attorney meant by "normal sex;" however, one could assume that this referred to whether Kantaras was able to vaginally penetrate his wife.

⁶⁶ *Id.*

⁶⁷ See *In re Estate of Gardiner*, 42 P.3d 120, 122 (Kan. 2002). In *Gardiner*, J'Noel had been asked whether she and Marshall were sexually intimate during a trip to Utah, and she answered by stating that Marshall had an orgasm on this trip. *Id.*; cf. *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999) (stating that "transsexual medical treatment" cannot create a womb, ovaries, or cervix in a post-operative male-to-female individual).

⁶⁸ See Ruthann Robson, *Reinscribing Normality? The Law and Politics of Transgender Marriage*, in *TRANSGENDER RIGHTS* 299, 300 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006).

⁶⁹ *M.T. v. J.T.*, 355 A.2d 204, 206 (N.J. Super. Ct. App. Div. 1976). Dr. Ihlenfeld also testified that he considered M.T. to be a female because she "could not function as a male sexually either for purposes of 'recreation or procreation.'" *Id.*

⁷⁰ *Id.* at 209.

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gender identity to determine if she was male or female, a large part of its analysis was based on her ability to engage in heterosexual intercourse.⁷¹

Curiously, using approaches strongly based on the ability to perform “normal” heterosexual intercourse seems antithetical to the widespread American notion that sexual intimacy should be kept private and that what happens sexually between two individuals should be kept secret behind the bedroom door. This strong focus on a married couple’s sexual habits also goes against what the United States Supreme Court decided in the groundbreaking case of *Lawrence v. Texas*.⁷² In *Lawrence*, the Court held that individuals are “entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁷³ While focusing on a criminal statute, the Court’s opinion had a more widespread effect, as Justice Kennedy, writing for the majority, stated, “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”⁷⁴ Courts scrupulously focusing on the sexual lives of individuals married to post-operative transsexuals have not criminalized the behavior; however, they have effectively demeaned these individuals and made the details of their private intimate lives public for everyone to see and hear.

Even though *Lawrence* was decided by the Court either before or around the same time as the various court decisions focusing on the ability to engage in heterosexual intercourse,⁷⁵ its holding shows it is high time for American courts to fashion an approach to marriages involving post-operative transsexuals—an approach that would be substantially similar to the one fashioned by the European Court of Human Rights in *I and Goodwin*. In *I and Goodwin*, the European Court of Human Rights reasoned that post-operative transsexuals, under Article Eight of the Convention, have a legitimate interest in public recognition of their acquired gender after undergoing sex reassignment surgery.⁷⁶ Likewise, Article Twelve of the Convention guarantees the right to marry and form a family; however, the right to form a family does not depend on the first right, so a couple cannot be precluded from marriage solely because of an existing condition that does not allow them to bear children.⁷⁷ Since no medical technology, however advanced, allows post-operative male-to-female transsexuals to produce eggs and post-operative female-

⁷¹ See *id.* at 206, 207, 211.

⁷² *Lawrence v. Texas*, 539 U.S. 558 (2003). At issue in *Lawrence* was a Texas statute criminalizing sodomy between two individuals of the same sex. *Id.* at 562.

⁷³ *Id.* at 578.

⁷⁴ *Id.* at 562.

⁷⁵ The only case focusing on sex at the time of birth decided after the *Lawrence* decision was *Kantaras*, decided in 2004. See *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004).

⁷⁶ *I v. United Kingdom*, 36 Eur. Ct. H.R. 967, 933 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 476-77 (2002).

⁷⁷ See *I*, 36 Eur. Ct. H.R. at 994; *Goodwin*, 35 Eur. Ct. H.R. at 479.

to-male transsexuals to produce sperm,⁷⁸ married couples where one party to the marriage is a post-operative transsexual cannot bear children. Yet, in a society that focuses more on the social aspects of marriage, such as companionship,⁷⁹ continuing to focus on the ability to conceive children and perform intercourse seems an outdated approach. After all, “many couples . . . cannot conceive children; if the state does not deny them rights to marriage, neither should it deny the transsexual.”⁸⁰ The current American approaches, heavily focused on the ability to procreate and perform heterosexual intercourse, unfairly punish transsexuals for something medical science cannot change while they still allow non-transsexuals who cannot or choose not to procreate to enjoy the benefits of marriage. Since these approaches discriminate solely based on whether an individual has undergone sex reassignment surgery, American courts should fashion an approach similar to the European one—one that would focus on privacy rights and the fundamental right to marry—and further promote the *Lawrence* holding that all consenting adults are entitled to privacy for their intimate relationships.

*B. Current Approaches Completely Deny the Right to Marry to
Post-Operative Transsexuals*

As mentioned earlier, the United States Supreme Court has determined there is a fundamental right to marry.⁸¹ The Court has also recognized that a “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁸² The *Zablocki* Court emphasized that every state regulation of marriage does not have to be scrupulously scrutinized; rather, the state has the authority to impose “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship”⁸³

Even though the Court has determined such a fundamental right exists, certain groups of Americans still do not enjoy this right; one of these groups is post-operative transsexuals. Cases such as *Kantaras*, *In re Estate of Gardiner*, *Littleton*, and *In re Ladrach* that focus on birth sex to determine the validity of a marriage evidence a belief that a post-operative transsexual cannot marry an individual who is of the opposite sex of the transsexual’s acquired sex.⁸⁴ Hypothetically, if a post-operative male-to-female transsexual married a male after

⁷⁸ See Kevin Tallant, Note, *My “Dude Looks Like a Lady:” The Constitutional Void of Transsexual Marriage*, 36 GA. L. REV. 635, 661 (2002).

⁷⁹ See Reed, *supra* note 48, at 83.

⁸⁰ Tallant, *supra* note 78, at 661.

⁸¹ See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

⁸² *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁸³ *Zablocki*, 434 U.S. at 386.

⁸⁴ See *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999); *In re Ladrach*, 32 Ohio Misc. 2d 6 (Prob. Ct. 1987).

going through sex reassignment surgery, courts following the sex at the time of birth approach would invalidate this marriage and look at it as a same-sex marriage—an institution not recognized by the majority of states.⁸⁵ Essentially, the validity of this marriage comes down to chromosomal makeup, and despite advances in medical science and technology, a post-operative male-to-female transsexual can do nothing to change her XY chromosomal pattern to an XX pattern. Therefore, even though outwardly this marriage would appear to be between a male and female and therefore valid, courts utilizing the sex at the time of the birth approach would invalidate it because two males with XY chromosomes cannot legally marry in the majority of states.

So, if a post-operative male-to-female transsexual cannot marry another male, even after sex reassignment surgery, can she still exercise her fundamental right to marry by marrying a woman? According to the birth sex approach and the courts' heavy reliance on chromosomes, one would think this would be possible. However, these courts would still hold this marriage invalid, and in many states, it is highly probable that the state would not allow such a marriage to occur in the first place, even if the birth certificate of the post-operative male-to-female has been changed to reflect her new sex.⁸⁶ Even though a male-to-female transsexual and a female would have different chromosomal patterns, a court or a clerk in charge of issuing marriage licenses would see something quite different: two females with the same sexual anatomy coming in to apply for a marriage license.⁸⁷ Since outwardly this would look like same-sex marriages, most states would not allow this situation either.⁸⁸

Adopting the right to privacy approach used by the European Court of Human Rights would not only allow post-operative transsexuals to marry, it would also allow courts to more firmly uphold the fundamental right to marry guaranteed by *Zablocki* and *Loving*. According to the European Court of Human Rights, consenting adults have the right to marry whom they wish, and state regulations of marriage cannot unduly impede this right.⁸⁹ Likewise, if the majority of American courts that have ruled on this issue would cease focusing on birth sex and instead

⁸⁵ Currently, six states and the District of Columbia recognize the right of same-sex couples to marry. See *Marriage Equality and Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf (last visited Aug. 31, 2011). The six states are Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. *Id.* Same-sex marriage was legal in California between June 16, 2008 and November 4, 2008; however, same-sex marriage was overturned by a statewide constitutional amendment in November 2008. See *id.* Marriage equality was signed into law in Maine on May 6, 2009; however, this law was repealed by a ballot measure in November 2009. *Id.*

⁸⁶ Some states have laws or administrative policies allowing transsexuals to change their sex designations on birth certificates. MOULDING, *supra* note 2, § 9:16.

⁸⁷ See Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 TUL. J.L. & SEXUALITY 87, 115 (2003).

⁸⁸ See HUMAN RIGHTS CAMPAIGN, *supra* note 85.

⁸⁹ See *I v. United Kingdom*, 36 Eur. Ct. H.R. 967, 994 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 479 (2002).

focus on the fundamental right to marriage and the privacy rights inherent in marriage, post-operative transsexuals would no longer be precluded from marrying anyone. One possible way for courts to implement this approach would be to follow the path taken by the United Kingdom government after the European Court of Human Right's rulings in *I* and *Goodwin*. After *Goodwin*, the government introduced legislation to give legal recognition to transsexuals' acquired sex.⁹⁰ This legislation would provide for legal recognition for those transsexuals who can "demonstrate that they have taken decisive steps towards living fully and permanently in the gender acquired since they were registered at birth."⁹¹ Nowhere does this legislation mention only post-operative transsexuals; therefore, it is entirely possible this approach could encompass pre-operative transsexuals who demonstrate that they have taken steps toward living in their acquired gender.

If American courts adopted a similar approach, it could allow transsexuals to marry in their acquired gender.⁹² The majority of states do allow transsexuals to change their sex on their birth certificates; therefore, by allowing such changes, these states are in effect acknowledging that changing one's sex is legally possible.⁹³ Currently, given the state of same-sex marriage in America,⁹⁴ an approach encompassing both pre- and post-operative transsexuals may not be accepted. Starting with an approach allowing post-operative transsexuals to marry within their acquired gender would allow them to exercise their fundamental right to marry and would also ensure more privacy for those who wish to exercise this right. If this approach is effective, it could then be expanded to include pre-operative transsexuals and provide them with a right to marry whom they wish. Ultimately, adopting this approach based on privacy may not only provide transsexuals with the fundamental right to marry, but it may also serve as a catalyst for more states to accept and allow same-sex marriages.

*C. Current Approaches Harm Not Only Transgendered Individuals,
but Also Intersexed Individuals*

Current approaches not only deny the right to marry to transgendered individuals, but they also call into question the validity of marriages where one party is an intersexed individual. Courts focusing on birth sex often apply a plain-meaning interpretation to determine the definitions of the words "male" and "female" in the marriage statutes. For example, the Kansas Supreme Court used both *Black's Law Dictionary* and *Webster's New Twentieth Century Dictionary* to determine that "male" and "female" do not encompass transsexuals.⁹⁵ *Black's Law*

⁹⁰ Reed, *supra* note 48, at 86.

⁹¹ *Id.*

⁹² *See id.*

⁹³ *See* MOULDING, *supra* note 2, § 9:16.

⁹⁴ *See* HUMAN RIGHTS CAMPAIGN, *supra* note 85.

⁹⁵ *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

Dictionary, as quoted by the *Gardiner* court, defined “sex” as the “[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female.”⁹⁶ The *Gardiner* court went further and used *Webster’s New Twentieth Century Dictionary* to define “male” as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to female” and “female” as “designating or of the sex that produces ova and bears offspring: opposed to male.”⁹⁷ The court then used the plain meaning of these definitions to determine the meaning of “male” and “female” for the Kansas marriage statutes; since transsexuals were not specifically mentioned in these definitions, the court determined they did not fit the traditional meanings of male and female.⁹⁸ Other courts focusing on birth sex have focused heavily on the chromosomal patterns of the parties to the marriage; if the husband did not have an XY pattern or the wife did not have an XX pattern, these courts declared the marriage void as per the states’ public policies against same-sex marriage.⁹⁹

Transsexuals are not the only group harmed by the courts’ focus on birth sex. Intersexed individuals could also find their marriages called into question. Estimates show that the number of intersexed children born each year in the United States ranges from one thousand to fifteen thousand.¹⁰⁰ For intersexuals, the criteria most often used to determine sex are either “ambiguous or incongruent.”¹⁰¹ Intersexed individuals may have chromosomal patterns including, but not limited to, XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO.¹⁰² These “abnormal” chromosomal patterns may cause individuals to experience a wide array of hormonal disorders, such as Androgen Insensitivity Syndrome (“AIS”), 5-Alpha-Reductase Deficiency (“5-A-R-D”), Congenital Adrenal Hyperplasia (“CAH”), and Progesterin-Induced Virilization (“PIV”).¹⁰³

⁹⁶ *Id.* (quoting BLACK’S LAW DICTIONARY 1375 (6th ed. 1999)).

⁹⁷ *Id.* (quoting WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY (2d ed. 1970)).

⁹⁸ See Karly A. Grossman, *Transsexuals and the Legal Determination of Sex*, 39 FAM. L.Q. 821, 829 (2005).

⁹⁹ See discussion *supra* Part II.B.

¹⁰⁰ GERALD N. CALLAHAN, BETWEEN XX AND XY: INTERSEXUALITY AND THE MYTH OF TWO SEXES 7 (2009). According to Dr. Callahan, “[i]t seems probable that the correct number is nearer to the lower estimate than the higher one.” *Id.*

¹⁰¹ Natalie Brown Michalek, Note, *Littleton v. Prange: How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage*, 52 BAYLOR L. REV. 727, 731 (2000).

¹⁰² *Id.*

¹⁰³ *Id.* at 732-34. AIS affects about one out of every 20,000 genetic males. *Id.* at 732. These individuals have an XY chromosomal pattern; however, a receptor defect does not allow the testes to process androgens. *Id.* Without androgen, the fetus develops as a female and forms external female genitalia but no internal reproductive organs. *Id.* Individuals with 5-A-R-D have an XY chromosomal pattern but appear female at birth because of the body’s failure to convert testosterone to the more powerful form of androgen needed to develop male external genitalia. *Id.* at 733. These individuals’ bodies will become masculine upon puberty. *Id.* Individuals with CAH have XX chromosomes and ovaries; however, they are often raised as males because an abundance of androgen during fetal development causes external genitalia to more resemble male genitalia. *Id.* at 733-34. Individuals with PIV have XX chromosomes, but have an abundance of male hormones. *Id.* at 734. These individuals often have clitoral hypertrophy but still appear female in all other aspects. *Id.*

Sex is assigned at the time of an individual's birth according to the designation given by the birth attendant on the birth certificate.¹⁰⁴ Practically, sex is determined by examining the child's external genitalia.¹⁰⁵ However, in cases of uncertainty, "doctors analyze the various characteristics of the child to make a diagnosis, and then they assign a sex based on the likeliest outcome of that diagnosis."¹⁰⁶ Starting in the 1950s, doctors often recommended genital surgery for those infants born with ambiguous genitals so that those children "could be characterized as conventional males or females."¹⁰⁷ Even though modern doctors are more amenable to an approach that "caution[s] . . . surgical intervention . . . , genital surgery remains a common practice."¹⁰⁸ Because of this, individuals with these conditions may be assigned the "wrong" sex and then have a strong desire to change sex upon going through puberty.¹⁰⁹ Others with intersexed conditions may not choose to align their outward appearance with their gender identity.

The presence of intersexed individuals has three implications for marriage, especially transsexual marriage. First, intersexuality challenges the legal field's insistence on having marriage be a union between a man and a woman.¹¹⁰ The mere existence of intersexed individuals who have not had surgery creates a possibility of allowing individuals who are neither clearly male nor female to marry.¹¹¹ Second, foreign courts dealing with the issue of intersexuality have determined an individual's psychological sex is more important when determining sexual identity.¹¹² Third, the presence of intersexuality would force courts to allow intersexed individuals to choose their sex for the purpose of marriage.¹¹³

Despite these implications, most American courts would probably disregard them and apply the birth sex approach used to determine the validity of marriages involving post-operative transsexuals to marriages involving intersexed individuals. Three of the four American state courts focusing on a birth sex approach have reasoned that it is for the legislative branch, not the judicial branch, to determine if

¹⁰⁴ Julie A. Greenberg, Symposium, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

¹⁰⁵ Skylar Curtis, Comment, *Reproductive Organs and Differences of Sex Development: The Constitutional Issues Created by the Surgical Treatment of Intersex Children*, 42 MCGEORGE L. REV. 841, 843 (2011).

¹⁰⁶ *Id.*

¹⁰⁷ Laura A. Zaccone, Note, *Policing the Policing of Intersex Bodies: Softening the Lines in Title IX Athletic Programs*, 76 BROOK. L. REV. 385, 404 (2010).

¹⁰⁸ *Id.* at 406. Proponents of this approach "urge that surgery be performed as soon as possible . . . to maximize the child's psychological well being and ultimate conformity with the assigned gender." Samantha S. Uslan, Note, *What Parents Don't Know: Informed Consent, Marriage, and Genital-Normalizing Surgery on Intersex Children*, 85 IND. L.J. 301, 305 (2010).

¹⁰⁹ *Cf.* James McGrath, *Are You a Boy or a Girl? Show Me Your Real ID*, 9 NEV. L.J. 368, 391 (2009).

¹¹⁰ Terry S. Kogan, *Transsexuals, Intersex, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 408 (2004).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 409.

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the words “male” and “female” as used in the state marriage statutes encompass post-operative transsexuals.¹¹⁴ Only one, the *Gardiner* court, has specifically stated that legislative silence on the matter means transsexuals are not included within the meanings of the words.¹¹⁵ Even though these courts only resolved the issue of how to determine the validity of marriages involving post-operative transsexuals, their reasoning could logically be applied to determine the validity of marriages where one—or both—spouses are intersexed.

Currently, according to the reasoning of the American courts, the only individuals who qualify as males for the purposes of marriage are those with XY chromosomes and who have the ability to fertilize ova. Likewise, the only individuals who qualify as females for the purposes of marriage are those who have XX chromosomes and are able to produce ova and bear children. Yet, nature shows that thousands, if not millions, of individuals have an intersex condition, and as mentioned above, many of these individuals do not know they differ from the sex assigned to them at birth until their bodies change at puberty—some may not even realize it until they undergo some sort of genetic testing.¹¹⁶ If intersexed individuals do not know about their condition until undergoing some sort of genetic testing, it is reasonable for them to wish to marry according to the sex assigned to them at birth. However, according to the courts who look at birth sex, these individuals do not fit the definitions of “male” and “female” because they do not have either XX or XY chromosomal patterns and often cannot bear children. Since they do not fit the current definitions, intersexed individuals, just like post-operative transsexuals, are in danger of having their marriages invalidated by courts simply because of conditions with which they were born and of which they may not be cognizant.

Adopting the European approach based on privacy rights would alleviate these worries. As mentioned before, the European Court of Human Rights has held that Article Twelve of the Convention guarantees the right to marry and start a family; however, the right to start a family is not dependent on the right to marry.¹¹⁷ Likewise, the right to marry should not be dependent on the right to start a family, as many American courts have effectively ruled in determining that, for the purposes of marriage, males and females must have XY or XX chromosomes and have the ability to produce children. This determination harms many more

¹¹⁴ See *Kantaras v. Kantaras*, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004); *Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. App. 1999); *In re Ladrach*, 32 Ohio Misc. 2d 6 (Prob. Ct. 1987). The federal Defense of Marriage Act (“DOMA”) has also not clearly defined “male” or “female;” therefore, states are free to define these terms as they wish without violating the tenets of DOMA. See John A. Fisher, *Sex Determination for Federal Purposes: Is Transsexual Immigration Via Marriage Permissible Under the Defense of Marriage Act?*, 10 MICH. J. GENDER & L. 237, 243-44 (2004).

¹¹⁵ *In re Estate of Gardiner*, 42 P.3d 120, 136 (Kan. 2002).

¹¹⁶ See CALLAHAN, *supra* note 100, at 3-7.

¹¹⁷ *I v. United Kingdom*, 36 Eur. Ct. H.R. 967, 994 (2003); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 447, 479 (2002).

than post-operative transsexuals; indeed, it harms the approximately two-and-one-half million to ten million intersexed individuals thought to exist in the American population.¹¹⁸ The *Littleton* court stated that an individual's gender is "immutably fixed . . . at birth,"¹¹⁹ yet it conveniently chose to forget that many individuals have chromosome patterns "immutably fixed at birth" that do not fit the "normal" patterns of XX and XY. By ignoring this reality, courts still leave open the question of validity of marriages involving intersexuals, and it is likely that these courts would apply the same approach to invalidate these marriages. By adopting the European approach, American jurisdictions could shift the focus away from chromosomes, birth sex, and the ability to reproduce and instead guarantee the fundamental right to marry for both post-operative transsexuals and intersexed individuals.

CONCLUSION

Article Nine of the International Bill of Gender Rights (hereinafter "IBGR") states:

Given that all human beings have the right to free expression of self-defined gender identities, and the right to sexual expression as a form of gender expression, all human beings have a corresponding right to form committed, loving relationships with one another, and to enter into marital contracts, regardless of their own or their partner's chromosomal sex, genitalia, assigned birth sex, or initial gender role.

Therefore, individuals shall not be denied the right to form committed, loving relationships with one another or to enter into marital contracts by virtue of their own or their partner's chromosomal sex, genitalia, assigned birth sex, or initial gender role, or on the basis of their expression of a self-defined gender identity.¹²⁰

While this provision embodies an idea not yet embraced by any court, American or European, it still provides a goal for the judiciary to work towards. Article Nine of the IBGR mentions nothing about the right to privacy and the fundamental right to marry, but it appears that these concepts serve as the foundations upon which the IBGR rests and therefore seems closely related to the rulings of the European Court of Human Rights in *I and Goodwin*. By adopting the

¹¹⁸ Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They are Allowed to Wear on the Job, Which Restroom They are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 168 (2000).

¹¹⁹ *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999).

¹²⁰ Phyllis Randolph Frye, *Appendix: The International Bill of Gender Rights, in TRANSGENDER RIGHTS* 327, 330 (Paisley Currah, Richard M. Juang, & Shannon Price Minter, eds., 2006). The IBGR was first adopted in 1993 by the International Conference on Transgender Law and Employment Policy. *Id.* at 327. The IBGR has subsequently been reviewed and amended in 1993, 1994, 1995, and 1996. *Id.* The IBGR is meant to contain universal rights for all people "regardless of sex or gender." *Id.* The IBGR has no force of law unless it has been adopted or recognized by legislative bodies, courts of law, administrative agencies, or international organizations; however, in recent years some of its principles have appeared in various legislative initiatives to protect transgender rights. *Id.* at 328.

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reasoning espoused by the European Court of Human Rights, American jurisdictions would rightly shift the focus to upholding privacy rights and the right to live in a chosen sex rather than continuing to focus on an outdated idea that a valid marriage revolves around sexual capacity and functions. By continuing to focus on birth sex and immutable characteristics such as chromosomes, American courts have, in effect, called into question the validity of more marriages than those involving a post-operative transgendered individual; arguably, these courts could also call into question the validity of marriages where one party has an intersex condition. In adopting an approach basing validity of marriages on privacy rights rather than on chromosomes or the capacity for heterosexual intercourse, American courts may forge a path towards greater acceptance of not only marriages involving post-operative transsexuals, but also marriages involving same-sex couples.