Chapter 11
Unequal Protection for Sex and Gender Nonconformists

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Introduction

The days when only women could be flight attendants and only men could be pilots are a distant memory. The Equal Protection Clause and hundreds of federal, state, and local constitutional provisions and statutes prohibit almost all facially discriminatory regulations based on a person's sex. The original goal of this legislation was to eliminate societal barriers to equal opportunities for men and women. When legislators adopted these statutes, however, they assumed that sex was binary and easy to establish. Therefore, they never felt the need to define the terms "male," "female," "sex," and "gender."

This failure is especially problematic for people who do not fall neatly into the male/female binary norm. Millions of people have an intersex condition or are transgender. Both groups suffer societal discrimination in a number of areas. First, people with an intersex condition and transgender people may find that government-created tests for determining their legal sex often rely on irrational contradictory factors. These tests could lead to invalidation of their marriages and their right to be considered legal parents. Second, transgender people and people with intersex traits may suffer discrimination in a variety of settings including employment, housing, and the provision of health care.

This chapter examines whether the government violates the Equal Protection Clause in two contexts: (1) when the government establishes an illogical "sex" test for determining who qualifies as a male or female, and (2) when the government discriminates against transgender people or people with an intersex condition by subjecting them to differential treatment. The second part of this chapter describes the people who suffer discrimination because of their failure to meet traditional sex and gender binary stereotypes. The third part provides an introduction to the Equal Protection Clause. The fourth and fifth parts analyze whether governmental treatment of people with an intersex condition and transgender people violates the Equal Protection Clause. The fourth part focuses on state-created sex classification systems and explains why current government "sex" tests do not meet the rigorous review standard mandated by intermediate scrutiny. The fifth part examines sex discrimination jurisprudence and concludes that differential governmental treatment of people with an intersex condition or transgender people constitutes impermissible "sex" discrimination. This chapter concludes that sex classification systems and other governmental acts that rely on sex and gender stereotypes violate the Equal Protection Clause.

Sex and Gender Nonconformists

Courts have relied on inaccurate sex and gender stereotypes when they have determined whether a person qualifies as a male or female or whether someone has been subjected to discrimination because of "sex." This section explains why sex-based binary classification systems based on sex and gender stereotypes do not reflect reality for the millions of people who have an intersex condition or who are transgender.

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People with an Intersex Condition or Difference of Sex Development (DSD)

Millions of people do not have sex markers that are all clearly male or clearly female. They have what is known as an intersex condition, or DSD.[1] Although doctors and activists in the intersex community continue to debate exactly what conditions qualify as "intersex," the term is often used to include anyone with a congenital condition whose sex chromosomes, gonads, or internal or external sexual anatomy do not fit clearly into the binary male/female norm.[2]

Some intersex conditions involve an inconsistency between a person's internal and external sex features. For example, some people with an intersex condition may have a female body type, female-appearing external genitalia, no internal female organs, and testicles.[3] Other people with an intersex condition may be born with external genitalia that do not appear to be clearly male or female. For example, a girl may be born with a larger than average clitoris and no vagina.[4] Similarly, a boy may be born with a small penis or no penis.[5] Some people with an intersex condition may also be born with a chromosomal pattern that does not fall into the binary XX/XY norm.[6]

Not all intersex conditions are apparent at the time of birth; some conditions become evident as a child matures.[7] In some conditions, a child whose genitalia appeared to be female at birth will masculinize in puberty.[8] Other intersex conditions may be discovered at puberty when the adolescent fails to develop typical male or female traits. For example, the condition may be discovered when a girl reaches puberty and fails to menstruate.[9]

Because experts do not agree on exactly which conditions fit within the definition of intersexuality and some conditions are not evident until years after a child is born, it is impossible to state with precision exactly

1 The meaning of the term "intersex" has varied and is still a topic of debate, JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 131–32 (2012); M. Morgan Holmes, *Straddling Past, Present and Future*, *in* CRITICAL INTERSEX 1, 1 (Morgan Holmes et al. eds, 2009).

2 *Intersex FAQ*, INTERSEX INITIATIVE, http://www.ipdx.org/articles/intersex-faq.html (last updated June 29, 2008); *What Is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/what_is_intersex (last visited Nov. 6, 2012).

3 For example, women with complete androgen insensitivity syndrome (CAIS) have XY chromosomes and normal functioning testes. Because of a receptor defect, their bodies are unable to process the testosterone produced by the testes and *in utero* their bodies follow the female developmental path. External female genitalia will form but no internal female reproductive organs (uterus and fallopian tubes) will develop. *See* Melissa Hines et al., *Psychological Outcomes and Gender-Related Development in Complete Androgen Insensitivity Syndrome*, 32 ARCHIVES SEXUAL BEHAV. 93, 93 (2003). For a more detailed description of this and other intersex conditions, *see* ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 52–53 (2000); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 281–92 (1999) [hereinafter *Defining Male and Female*].

4 For example, infants with partial androgen insensitivity syndrome (PAIS) have XY chromosomes and their bodies are able to partially process the androgens produced by their testes. Their genitalia will partially masculinize. S. Faisal Ahmed et al., *Phenotypic Features, Androgen Receptor Binding, and Mutational Analysis in 278 Clinical Cases Reported as Androgen Insensitivity Syndrome*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 658, 658 (2000).

5 *See, e.g.*, William G. Reiner & Bradley P. Kropp, *A 7-Year Experience of Genetic Males with Severe Phallic Inadequacy Assigned Female*, 172 J. UROLOGY 2395 (2004).

6 For example, a number of people have chromosomal patterns that vary from the typical XX and XY patterns. People have been found with XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO (signifying only one sex chromosome). In addition, some people have a mosaic chromosomal pattern, where some chromosomes are XX and some are XY. ROBERT POOL, EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES 70, 71 (1994).

7 *See, e.g.*, Julianne Imperato-McGinley et al., *Steroid 5 Alpha-Reductase Deficiency in Man: An Inherited Form of Male Pseudohermaphroditism*, 186 SCI. 1213 (1974).

8 For example, people with 5-alpha-reductase deficiency have XY chromosomes and testes but appear phenotypically female at birth. Despite a female appearance during childhood, by the onset of puberty the body will masculinize. The testes descend, the voice deepens, muscle mass substantially increases, and a penis that is capable of ejaculating develops from what was thought to be the clitoris. *Id.*

9 For example, sometimes physicians are unaware that an infant with typical female genitalia at birth has CAIS if the testes are nestled in the abdominal cavity. The condition may not be discovered until puberty, when the girl fails to menstruate. *See* Hines et al., *supra* note 3, at 93.

how many people have an intersex condition. Most experts agree, however, that approximately 1–2 percent of people are born with sexual features that vary from the medically defined norm for male and female.[10] These variations may relate to chromosomal structure, internal reproductive organs, or external genitalia. Children with ambiguous external genitalia are not as common. Approximately one in 1,500 to one in 2,000 births involve a child who is born so noticeably atypical in terms of external genitalia that a specialist in sex differentiation is consulted and surgical alteration of the external genitalia is considered.[11]

The term "intersex" itself is controversial. Many doctors favor abandoning the term "intersex" in favor of the term "disorder of sex development" (DSD). Some who support the use of DSD terminology have argued that the term "disorder" should be dropped and the initial "D" should stand for difference rather than disorder.[12]

Transsexuality and Transgenderism

Some people are confused about how intersexuality compares to transsexuality and transgenderism. Generally, intersexuality refers to a condition in which a person's biological sex markers are not all clearly male or female, while transgenderism and transsexuality are used to describe behaviors or identities of people whose gender expression, gender identity, or both, do not necessarily conform with the binary sex norm or may be different from the sex assigned to them at birth.[13] Not all communities use the terms "transgender" and "transsexual" consistently and different groups and individuals have strong feelings about which term they prefer.

One major LGBT organization, GLAAD, suggests the following definitions:

> Transgender: An umbrella term (adj.) for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF) … Transgender people may or may not decide to alter their bodies hormonally and/or surgically.
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> Transsexual (also Transexual): An older term which originated in the medical and psychological communities. While some transsexual people still prefer to use the term to describe themselves, many transgender people prefer the term *transgender* to *transsexual*. Unlike *transgender*, *transsexual* is not an umbrella term, as many transgender people do not identify as transsexual.[14]

The University of San Francisco Medical Center defines the terms as follows:

> Transgender: literally "across gender"; sometimes interpreted as "beyond gender"; a community-based term that describes a wide variety of cross-gender behaviors and identities. This is not a diagnostic term, and does not imply a medical or psychological condition.
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> …
>
> Transsexual: a medical term applied to individuals who seek hormonal (and often, but not always) surgical treatment to modify their bodies so they may live full time as members of the sex category opposite to their

10 Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Hum. Biology 151, 161 (2000).

11 *Id.* Some experts place the number of genital anomalies at birth as 1 in 4,500. Peter A. Lee et al., *Consensus Statement on Management of Intersex Disorders*, 118 Pediatrics e488 (2006).

12 For a more detailed discussion of the debates regarding terminology, *see* Greenberg, *supra* note 1, at 118–19; Holmes, *supra* note 1, at 6–7; and Alyson K. Spurgas, *(Un)Queering Identity: The Biosocial Production of Intersex/DSD*, *in* Critical Intersex, 97, 97–111 (Morgan Holmes et al. eds, 2009).

13 *See GLAAD Media Reference Guide—Transgender Glossary of Terms*, GLAAD, http://www.glaad.org/reference/transgender (last updated May 2010).

14 *Id.*

> birth-assigned sex (including legal status). Some individuals who have completed their medical transition prefer not to use this term as a self-referent.[15]

Experts differ on the prevalence of transgenderism. Numbers from recent studies range from a low of 1 in 104,000 to a high of 1 in 200.[16]

Sexual Orientation

A person's sexual orientation is determined by the person's sexual attraction. Heterosexuals are sexually attracted to the "opposite" sex. Gays and lesbians are sexually attracted to people of the "same" sex. Bisexuals are sexually attracted to people of "both" sexes.

Society and legal institutions often inappropriately conflate the distinct concepts of biological sex, gender identity, and sexual orientation. Biological sex features do not necessarily dictate a person's gender identity. Similarly, biological sex features and gender identity do not necessarily control a person's sexual orientation.

Most people meet societal sex and gender stereotypes; their sex markers are all congruent, they self-identify as the gender assigned to them at birth, and they are heterosexual. Millions of people, however, do not fit this stereotype. A person born with all male biological sex features may have a female gender identity and may live as a female. That same person, however, may be sexually attracted to women. In other words, a natal male may choose to live as a female, but may still prefer to have sex with another woman. Biological sex does not control gender identity, and neither biological sex nor gender identity can be used to predict a person's sexual orientation.

The following chart illustrates prevailing societal presumptions about men and women and the groups that directly challenge those assumptions.

	Societal Assumptions about Males	**Societal Assumptions about Females**	**Challengers**
Sexual/Reproductive Anatomy	Penis, scrotum, testicles, XY chromosomes	Clitoris, labia, vagina, uterus, fallopian tubes, XX chromosomes	People with an intersex condition
Sexual Orientation	Toward Women	Toward Men	Gays, lesbians, and bisexuals
Gender Identity	Male	Female	Transgender people
Gender Presentation	Masculine	Feminine	People who do not conform to gender stereotypes and norms

Because lesbians, gays, bisexuals, transgender people (LGBTs), and people with an intersex condition do not fit societal binary sex and gender norms, they suffer from pervasive discriminatory practices.[17] The Equal Protection Clause protects people from "invidious discrimination in statutory classifications and other

15 *Transgender Terminology*, Univ. of Cal., S.F., Ctr. of Excellence for Transgender Health, http://www.transhealth.ucsf.edu/trans?page=protocol-terminology (last visited Nov. 6, 2012).

16 For a comparison chart of various research studies, *see* A.B. Kaplan, *The Prevalence of Transgenderism-An Update*, Transgender Mental Health, (Feb. 13, 2012), http://tgmentalhealth.com/2012/02/13/the-prevalence-of-transgenderism-an-update/. Researchers report that the incidence of transgenderism is higher in cities and in more tolerant cultures. *Id.*

17 Jennifer C. Pizer, Brad Sears, Christy Mallory, & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012), available at http://digitalcommons.lmu.edu/llr/vol45/iss3/3/. *See infra* notes 133–39 and accompanying text for a discussion of these discriminatory practices. Discrimination against people with an intersex condition is not as well documented because many people with an intersex condition do not share information about the fact that they have an intersex condition with other people. The major area in which people with an intersex condition suffer from sex stereotyping is in the provision of health care. *See* Julie A. Greenberg, *Health Care Issues*

governmental activity."[18] Thus, transgender people and people with an intersex condition may be able to bring equal protection claims based on government-created sex classification systems and other governmental activity that results in discrimination because of sex.

An Introduction to the Equal Protection Clause

The purpose of the Equal Protection Clause is to ensure that the government does not subject its citizens to arbitrary classifications.[19] Depending on the classification at issue, the Supreme Court will apply one of three levels of scrutiny to the government action: strict scrutiny, intermediate scrutiny, or rational basis review. Under each level, the court will apply a two-step analysis. First, it will assess the government purpose for the classification. If the government purpose is considered valid, the court will then analyze the relationship between the government purpose and the means used to accomplish the government's goal.

The Supreme Court applies strict scrutiny when the discrimination involves a suspect classification.[20] The Court has applied strict scrutiny to governmental classification systems based upon race, national origin, and sometimes alienage.[21] Under strict scrutiny analysis, the court places the burden on the government to prove that: (1) it has a compelling interest for its classification and (2) the means the government has chosen to accomplish the compelling goal are narrowly tailored for that purpose.[22] Most state actions cannot survive strict scrutiny because few government justifications qualify as compelling and the means used to accomplish the governmental goal are subject to a searching judicial inquiry.[23]

Sex classifications are subject to an intermediate level of review.[24] Sex-based classifications require that the government prove: (1) an important or exceedingly persuasive justification for its classification and (2) that the means used to accomplish the important justification are substantially related to the government's goal.[25] Although intermediate scrutiny is technically less demanding than strict scrutiny, most government sex-based classifications also fail equal protection requirements.

Courts apply the lowest level of review, rational basis review, to all other legislative classifications.[26] Under rational basis analysis, a challenger must prove that either: (1) no legitimate governmental objective for the government classification exists, or (2) rational means are not used to achieve a legitimate governmental objective.[27] It is easy to establish that a legitimate purpose exists and rational means were used to accomplish that purpose. Therefore, almost all government classifications are considered constitutional under this low level of review.[28]

Although the Supreme Court has formally recognized only three levels of scrutiny, in recent cases the Court seems to be applying a form of heightened rational basis review, often referred to as rational basis

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Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?, 45 Loy. L.A. L. Rev. 849 (2012) available at http://digitalcommons.lmu.edu/llr/vol45/iss3/5 [hereinafter Health Care Issues].

18 Harris v. McRae, 448 U.S. 297, 322 (1980).

19 Reed v. Reed, 404 U.S. 71, 76 (1971); Frontiero v. Richardson, 411 U.S. 677, 683 (1973); City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432, 446 (1985).

20 Mass. Bd. of Ret. v. Murgia, 427 U.S. 312 (1976). The Court has also applied strict scrutiny to government actions that limit fundamental rights, including the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to vote, Reynolds v. Sims, 377 U.S. 533 (1964), and the right to marry Zablocki v. Redhail, 434 U.S. 374 (1978). The state sex classification systems discussed *infra* in the fourth part also burden the fundamental right to marry and to travel and thus should be subjected to strict scrutiny. *See* Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 Wash. L. Rev 819, 855–62 (2005).

21 *Cleburne*, 473 U.S. at 440; *Frontiero*, 411 U.S. at 688.

22 Gratz v. Bollinger, 359 U.S. 244, 270 (2003).

23 Fisher v. University of Texas, 133 S.Ct. 2411(2013).

24 United States v. Virginia, 518 U.S. 515, 524 (1996); Miss. Univ. v. Hogan, 458 U.S. 718 (1982).

25 *Virginia*, 518 U.S. at 524.

26 Mass. Bd. of Ret. v. Murgia, 427 U.S. 312 (1976).

27 Heller v. Doe, 509 U.S. 312, 319–20 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307, 313–14 (1993).

28 Heller v. Doe, 509 U.S. 312, 319–20 (1993); FCC v. Beach Communications, Inc., 508 U.S. 307, 313–14 (1993) (classifications not involving fundamental rights or suspect classifications are accorded a strong presumption of validity).

with bite, when determining whether classifications based on sexual orientation violate the Equal Protection Clause.[29] Under a rational basis with bite analysis, the Court has struck down government classifications that are motivated by "a bare desire to harm a politically unpopular group."[30]

Transgender people and people with an intersex condition may bring an action for violation of their right to equal protection in two scenarios. First, when the government establishes tests for determining whether a transgender person or a person with an intersex condition is a male or a female and thus qualifies for a sex-based right, the government is creating a sex classification system that may violate the Equal Protection Clause. Second, when a government actor engages in discrimination against people based on their transgender or intersex status, the government may be engaged in impermissible sex discrimination under the Equal Protection Clause.[31]

Governmental Sex Classification Systems that Rely on Chromosomes, the Ability to Reproduce, Religious References, or Gender Stereotypes to Determine who Qualifies as a Male or Female Violate the Equal Protection Clause

Very few laws in the United States differentiate between men and women. The only major areas where a person's sex is legally significant is in the context of marriage and the use of gender-segregated facilities such as restrooms, locker rooms, and housing in college dormitories and prisons.[32]

Some states still define marriage as a union of one man and one woman and refuse to recognize marriages between people of the same sex.[33] Until 2013, the Defense of Marriage Act (DOMA)[34] also limited the definition of marriage for federal purposes to "one man and one woman." In 2013, the Supreme Court of the United States ruled that the portion of DOMA that denied validly married same-sex couples the same federal rights as opposite-sex married couples was unconstitutional.[35] The Court declined to rule on whether all state laws limiting the right of same sex couples to marry are unconstitutional.[36] The Court had an opportunity to review this issue again during its 2014 term, but it refused to grant certiorari in a number of cases involving same-sex marriages.[37] In 2015, the Supreme Court granted certiorari in four same-sex marriage cases.[38] If the Supreme Court fails to rule in these cases that all states must allow same-sex couples to wed, people who are considered the same sex will continue to be barred from marrying in some states.

Even if the Supreme Court mandates same-sex marriage in all states, sex determination will still be important because public spaces including restrooms, dressing rooms, and locker rooms remain segregated by sex. In addition, state universities and prisons determine housing based on a person's sex.

29 *See*, Romer v. Evans, 517 U.S. 620 (1996); United States v. Windsor, 133 S.Ct. 2675 (2013).

30 *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Romer, 517 U.S. 620; United States v. Windsor, 133 S.Ct. 2675.

31 The lawsuit against the government actor would be brought as a § 1983 claim. 42 U.S.C. § 1983.

32 Until recently, the government also treated men and women differently in terms of military rights and responsibilities. The government had banned women from serving in combat positions in the military and women are excluded from selective service registration requirements. *See*, Military Selective Service Act, 50 U.S.C. §§471–73. In 2013, the Pentagon removed the combat exclusion. Elizabeth Bumiller & Thom Shanker, *Pentagon Is Set to Lift Combat Ban for Women*, N.Y. TIMES, Jan. 23, 2013 http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html?pagewanted=all&_r=0.

33 For an updated analysis of the states that prohibit same-sex marriages, *see* Freedom to Marry, http://www.freedomtomarry.org/states/.

34 1 U.S.C. § 7 (1997).

35 United States v. Windsor, 133 S.Ct. 2675 (2013).

36 Hollingsworth v. Perry, 133 S.Ct. 2652 (2013). The Court did not address the validity of California's Proposition 8 same-sex marriage ban because it ruled that the Proposition 8 proponents lacked standing to bring the appeal to the Ninth Circuit and the Supreme Court. *Id.* at 2668.

37 Many More Same-Sex marriages Soon, but Where?, http://www.scotusblog.com/2014/10/many-more-same-sex-marriages-soon-but-where/.

38 Obergefell v. Hodges, 135 S.Ct 1039 (2015); Tanco v. Haslam, 135 S.Ct. 1040 (2015); DeBoer v. Snyder, 135 S.Ct. 1040 (2015); Bourke v. Beshear, 135 S.Ct. 1041 (2015).

As long as state laws continue to differentiate between men and women, legal institutions will be required to determine exactly what makes a man a man and what makes a woman a woman. Thus far, state legislatures have failed to include tests for determining a person's sex in their marriage statutes. Instead, they have left it to the courts to determine a person's legal sex when a marriage is challenged based upon a person's inability to qualify as a husband or wife.[39] In other areas, such as restroom use, some states have proposed specific "sex" tests for purposes of determining access to sex-segregated facilities.[40] When courts and legislatures create tests for establishing a person's legal sex, the tests must not violate the right to Equal Protection.

Government Tests that Determine whether Someone Qualifies as a Man or a Woman are Sex Classification Systems that Must Survive Intermediate Level Scrutiny under the Equal Protection Clause

When courts or legislatures establish a person's legal sex, they are creating a sex classification system. To pass constitutional scrutiny, such tests should be subjected to heightened scrutiny because the government is establishing a sex-based classification system.[41]

Since the 1970s, transgender people have argued that state sex classification systems that ignore a person's gender self-identity violate the Equal Protection Clause.[42] In the early cases, the courts inappropriately analyzed whether individuals who "change their sex" are entitled to a heightened level of scrutiny as a suspect class.[43] These courts universally determined that transsexuals were not a suspect class and thus government classifications systems that treated transsexuals as their birth sex, as opposed to the sex that accords with their gender identity, did not violate the Equal Protection Clause under rational basis review.[44]

The courts in these early cases were not focusing on the appropriate issue. The critical question to ask is not whether the discriminated-against group is suspect; it is whether the state is employing a classification

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39 Although no state statute limiting marriage to one man and one woman addresses whether transgender people are allowed to marry in accord with their natal sex as opposed to their current gender self-identity, a majority of states have adopted statutes allowing transgender people to amend their birth records to reflect their gender self-identity. Drbecky.com, http://www.drbecky.com/birthcert.html (last visited Mar. 31, 2014). An amended birth certificate cannot necessarily be used to determine the right to marry. Some courts have looked to the sex on the birth certificate to determine a transgender person's legal sex for purposes of marriage. *See, e.g.*, Radtke v. Misc. Drivers and Helpers Union Local 638, 2012 WL 1094452 (D. Minn. 2012); *In re* Lovo-Lara, 23 I. & N. Dec. 746, 752 (2005), 2005 WL 1181062; *In re* Ladrach, 513 N.E.2d 828, 831 (Ohio Probate 1987) ("It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled.") *Id.* Other state courts have ruled that the sex designated on the birth certificate does not necessarily determine the person's ability to marry in that gender role. *See, e.g.*, *In re* Nash, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003); *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

40 Proposed bills in Florida and Texas regarding bathroom and locker rooms access determine sex in terms of the sex identified at birth. http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0583__.docx&DocumentType=Bill&BillNumber=0583&Session=2015. Texas further defines birth sex in terms of chromosomes, http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB01748I.pdf#navpanes=0.

41 A comparison to race classification systems illustrates why these classification systems should be subjected to heightened scrutiny. When states had statutes prohibiting mixed-race marriages, they needed to establish the race of each spouse to determine whether the marriage was of two people of the same race or of different races. If the state adopted the "one drop" rule as its race test, no one would argue that such a test was not a race-based classification system subject to strict scrutiny. Similarly, when the state adopts a test for determining whether two people are of different sexes, such a test is a sex-based classification and should be subjected to intermediate scrutiny.

42 The sex tests discussed in this section may violate other constitutional mandates as well. For a thorough discussion of all the constitutional implications of these rulings, including Full Faith and Credit, the dormant Commerce Clause and the right to travel, *see* Greenberg & Herald, *supra* note 20.

43 *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F. 2d 659, 663 (9th Cir. 1977); G.B. v. Lackner, 145 Cal.Rptr. 555, 568 (Cal. Ct. App. 1978) (Scott, J., dissenting); Terry v. E.E.O.C, No. CIV.A.80-C-408, 1980 WL 334 at *3 (E.D. Wis. 1980); Doe v. Postal Service, No. CIV.A.84–3296, 1985 WL 9446 at *4 (D.D.C. 1985).

44 *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F. 2d 659, 663 (9th Cir. 1977); G.B. v. Lackner, 145 Cal.Rptr. 555, 568 (Cal. Ct. App. 1978) (Scott, J., dissenting); Terry v. E.E.O.C, No. CIV.A.80-C-408, 1980 WL 334 at *3 (E.D. Wis. 1980); Doe v. Postal Serv., No. CIV.A.84–3296, 1985 WL 9446 at *4 (D.D.C. 1985).

system that is suspect. The appropriate level of scrutiny to apply should not be based on whether people who "change their sex" have been determined to be a "suspect group"; it should be based upon whether the state is creating a suspect classification system.[45]

For example, if a state determines that a person with female-appearing genitalia and breasts is a male because she has XY (male) chromosomes, the state is establishing a chromosomal test for determining sex. Such a test must survive heightened scrutiny under the Equal Protection Clause. An analysis of the scenario presented to the court in Kansas[46] illustrates why these determinations should be treated as sex-based classifications subject to intermediate scrutiny. J'Noel Gardiner, a male-to-female transgender person, amended her Wisconsin birth certificate and other official documents to indicate that she is a female. When J'Noel wanted Kansas to recognize her Wisconsin birth certificate and treat her as a female for purposes of determining the validity of her marriage, the Kansas court refused to do so. To reach this conclusion, the court needed to establish a test to determine whether J'Noel qualified as a male or a female.

In reaching its conclusion that J'Noel was legally a man, the court relied on Webster's dictionary to determine J'Noel's sex. According to the court:

> Webster's New Twentieth Century Dictionary (2nd ed.1970) states … "[m]ale" is defined as "designating or of the sex that fertilizes the ovum and begets offspring: opposed to *female*." "Female" is defined as "designating or of the sex that produces ova and bears offspring: opposed to *male*."[47]

Under this test, the court determined that J'Noel was a male.[48] If instead, the Kansas court had been asked to determine the legal sex of Jennifer, a woman born in Wisconsin and identified as a female at birth, Kansas would have recognized Jennifer's status as a female, even if Jennifer had been unable to bear children. In both scenarios, Kansas would be creating rules to establish who qualifies as a woman to determine who is entitled to become a legal wife. It would thus be creating a sex-based classification system that is valid only if it satisfies intermediate scrutiny.

Under intermediate scrutiny, the state must establish an important or exceedingly persuasive justification for its classification system[49] and the chosen definition may not be based on administrative convenience or stereotypes of what it means to be a "real" woman.[50]

Rules that Bar Transgender People or People with an Intersex Condition from Marrying in the Gender Role that Comports with their Gender Self-Identity Violate the Equal Protection Clause

The state's interest in creating marriage sex tests is not important or exceedingly persuasive If states are allowed to limit marriage to one man and one woman,[51] they will also need to establish a test for determining who qualifies as a man or a woman if one of the spouses is transgender or has an intersex condition.[52] A number

45 *See, e.g.*, William N. Eskridge, *Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062 (2002).

46 *In re* Estate of Gardiner, 42 P.3d 120, 133 (Kan. 2002).

47 *Id.* at 135.

48 Ironically, under this test J'Noel and the millions of other people who are infertile and can neither bear nor beget would be determined to be neither male nor female. In the United States, approximately 6.1 million women, or about 10 percent of the female reproductive age population, are infertile. *Infertility Fact Sheet*, Women'sHealth.Gov, http://www.womenshealth.gov/publications/our-publications/fact-sheet/infertility.cfm#a (last visited Aug. 7, 2013).

49 United States v. Virginia, 518 U.S. 515, 524 (1996).

50 *Id.*

51 The author believes that government prohibitions against same-sex marriage should be declared unconstitutional. Although the United States Supreme Court had the opportunity to address this issue in Hollingsworth v. Perry, 133 S.Ct. 2652 (2013), it declined to do so and dismissed the case for lack of standing. The Court has agreed to address state prohibitions against same-sex marriage this term. *See*, Obergefell v. Hodges, 135 S.Ct 1039 (2015); Tanco v. Haslam, 135 S.Ct. 1040 (2015); DeBoer v. Snyder, 135 S.Ct. 1040 (2015); Bourke v. Beshear, 135 S.Ct. 1041 (2015).

52 In addition to marriage and sex-segregated facilities discussed in this chapter, a person's sex may be relevant in determining their right to participate in athletic events as a female. This issue involves Equal Protection principles if the

of courts have established tests for determining a person's sex for purposes of marriage. These cases all involved marriages in which one of the spouses was transgender.[53]

A California trial court,[54] a New Jersey Appellate Court,[55] a federal district court interpreting Minnesota law,[56] and an immigration court interpreting North Carolina law[57] ruled that the transgender spouses had legally changed their sex and that their unions were valid marriages.[58] The Supreme Court of Kansas,[59] the Court of Appeal of Florida,[60] the Court of Appeals of Texas,[61] the Court of Appeals of Ohio,[62] the Appellate Court of Illinois,[63] and two lower courts in New York[64] ruled that the sex assigned at birth had not changed and the marriages involving transgender spouses were invalid. In reaching these decisions, the courts relied on chromosomal makeup,[65] reproductive capacity,[66] and religious references[67] to determine a person's legal sex.

In the cases that refused to recognize the transgender spouses' self-identified gender as their legal sex for purposes of marriage, the courts relied on three purported state interests to justify their rulings: (1) the state's public policy against same-sex marriage,[68] (2) the inability of a post-operative transgender person to engage in procreative intercourse,[69] and (3) the inability of a state to change the sex fixed by "our Creator."[70]

Although few courts have expressly relied on their public policy against same-sex marriages, the courts that have denied the right of transgender people to marry in the role that comports with their gender self-

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state is establishing the sex classification system for athletic events.

53 No cases in the United States have involved a spouse with an intersex condition. The validity of a marriage involving a spouse with an intersex condition has been litigated in England, W v. W, [2001] Fam. 111 (Eng.) and Australia, *In the Marriage of C. and D. (falsely called C.)* (1979) 35 F.L.R. 340, *overruled* by Attorney Gen. v. Kevin (2003) 172 F.L.R. 300. In *W v. W*, the court conducted an analysis similar to the analysis the courts have conducted in cases involving a transgender spouse. Whether courts in the United States would apply the same "sex tests" as they apply in cases involving a transgender spouse to cases involving a spouse with an intersex condition is unclear. Only two courts in the United States that had been asked to determine the legal sex of a transgender person have referred to people with an intersex condition. In both cases, the courts acknowledged that they may need to modify the "sex test" they applied to the transgender spouses if they are asked to determine the legal sex of a person with an intersex condition. The courts declined to establish a rule for people with an intersex condition because the issue had not been presented to the court. *See*, *In re* Estate of Gardiner, 42 P.3d 120, 133 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223, 232 (Tex. App. 1999) (Angelini, J., concurring).

54 Vecchione v. Vecchione, Civ. No 96D003769, reported in L.A. Daily J., Nov. 26, 1997, at 1.

55 M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div 1976).

56 Radtke v. Misc. Drivers and Helpers Union Local 638, 2012 WL 1094452 (D. Minn. 2012).

57 *In re* Lovo-Lara, 23 I. & N. Dec. 746, 752 (2005), 2005 WL 1181062.

58 In addition to these four courts, an appellate court in Kansas and a Florida trial court also ruled that transgender people could legally change their sex and marry in the sex role that comports with their gender self-identity. These two decisions were reversed on appeal. *See*, *In re* Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001); *rev'd* 42 P.3d 120, 135 (Kan. 2002); *In re* Marriage of Kantaras v. Kantaras, No. 98–5375CA (Fla. Cir. Ct. Feb 21, 2003), *available at* http://www.transgenderlaw.org/cases/kantarasopinion.pdf *rev'd* Kantaras v. Kantaras, 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

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

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

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

62 *In re* Nash, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003). An Ohio probate court reached a similar result. *In re* Ladrach, 513 N.E.2d 828 (Ohio Probate 1987).

63 *In re* Marriage of Simmons, 825 N.E.2d 303 (Ill. App. 2005).

64 Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971); B v. B, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

65 *See*, *e.g.*, Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

66 *See*, *e.g.*, *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (Sup. Ct. 1971); B v. B, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

67 *See*, *e.g.*, Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

68 *See*, *e.g.*, *In re* Nash, 2003 WL 23097095 at *5–7 (Ohio Ct. App. Dec. 31, 2003); *In re* Marriage of Simmons, 825 N.E.2d 303, 308 (Ill. App. 2005); Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999); Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004); *In re* Estate of Gardiner, 42 P.3d 120, 135–37 (Kan. 2002).

69 *See*, *e.g.*, *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002); *In re* Nash, 2003 WL 23097095 at *6 (Ohio Ct. App. Dec. 31, 2003); B v. B, 355 N.Y.S.2d 712, 717 (N.Y. Sup. Ct. 1974; Anonymous v. Anonymous, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971).

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

identity have all cited their state's law prohibiting marriages of two people of the same sex.[71] At least one court has expressly used its view on same-sex marriage to justify denying a female-to-male transgender person the right to marry as a man.[72] In *In re Nash*, Jacob Nash's birth certificate indicated that he was a male, but the Ohio Court of Appeals concluded that the state was not obligated to issue a marriage license to Jacob and his future wife because the state would then be issuing a marriage license to a same-sex couple.[73]

In other words, the Ohio court decided to ignore the sex designation on Jacob's amended birth certificate and instead determined that Jacob was female. The Ohio court's reasoning on this matter was circular. A court cannot use a public policy against same-sex marriage to invalidate a marriage until after it determines the sex of the parties. Jacob's marriage is a same-sex marriage only if he is legally a woman. Whether Jacob is a man or a woman for purposes of marriage depends upon how the state determines a person's sex. Thus, Ohio's public policy against same-sex marriage could not be used to determine Jacob's sex.

A few courts have focused on the inability of transgender people to engage in procreative sexual intercourse.[74] The Kansas Supreme Court focused on the inability of transgender people to reproduce offspring when it invalidated a marriage in which the wife was transgender.[75] The court created a sex classification system that relied on dictionary definitions of sex. The dictionary provided that males are the sex that fertilize the ovum and beget offspring and females are the sex that produce ova and bear offspring.[76] This justification is unlikely to survive even rational relationship review under the Equal Protection Clause because no state requires proof of fertility as a condition of marriage.[77] Furthermore, because transgender people who have undergone surgery and hormonal treatment can neither bear nor beget, reliance upon the ability to reproduce implies that transgender people are neither males nor females and thus would be barred from marrying anyone. Denying transgender people the right to marry because of their infertility violates their fundamental right to marry.[78]

One state, Texas, refused to treat a male-to-female transgender person as a woman by ruling that medicine and law cannot change the sex that was "immutably fixed by our Creator at birth."[79] State actions based

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71 *See, e.g.*, *In re* Nash, 2003 WL 23097095 at *6 (Ohio Ct. App. Dec. 31, 2003); *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002); Kantaras v. Kantaras, 884 So.2d 155, 157 (Fla. Dist. Ct. App. 2004).

72 *In re* Nash, 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

73 *Id.* at *5.

74 In discussing sexual intercourse, some courts focused on the procreative aspect of the marital relationship. *See, e.g.*, *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002). Other courts also discussed the capacity to engage in penetrative sexual intercourse. *See, e.g.*, B v. B, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974). Although the court in *B. v. B.* discussed the transgender husband's inability to engage in sexual intercourse, the court linked this inability to the husband's lack of procreative capacity. The court stated,

> [D]efendant "does not have male sexual organs, does not possess a normal penis, and in fact does not have a penis." Apparently, hormone treatments and surgery have not succeeded in supplying the necessary apparatus to enable defendant to *function as a man for purposes of procreation* (emphasis added). In the same way surgery has not reached that point that can provide a man with something resembling a normal female sexual organ, transplanting ovaries or a womb. Those are still beyond reach. *Id.* at 717.

The final reference to ovaries and a womb indicates that the court's key concern was procreative ability because a transgender woman with a vagina can engage in penetrative intercourse, but she is not capable of bearing children. In contrast, when the New Jersey court treated a male-to-female transgender person as the legal wife, it did consider her ability to engage in sexual intercourse unrelated to reproductive ability. M.T. v. J.T., 355 A.2d 204, 209–10 (N.J. Super. Ct. App. Div 1976).

75 *See, e.g.*, *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002). Courts in Florida and Ohio cited this portion of the Gardiner decision with approval in reaching the same conclusion. Kantaras v. Kantaras, 884 So.2d 155, 159 (Fla. Dist. Ct. App. 2004); *In re* Nash, 2003 WL 23097095 at *6 (Ohio Ct. App. Dec. 31, 2003).

76 *Gardiner*, 42 P.3d at 135l.

77 Although reproductive capacity is not a prerequisite to marriage, whether marriage is an institution linked to procreative capacity is still being debated. Justice Alito, in his dissenting opinion in *United States v. Windsor*, 133 S.Ct. 2675 (2013) (Alito, J. dissenting) stated his belief that the Court should not resolve whether marriage should be "viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship" as opposed to a "consent-based institution marked by strong emotional attachment and sexual attraction." *Id.* at 2716.

78 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (involving a prison inmate's right to marry); Loving v. Virginia, 388 U.S. 1, 12 (1967) (involving a mixed-race couple's right to marry).

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

solely on religious justifications are unconstitutional.[80] States cannot use religion to justify their actions in the absence of a neutral secular basis for their decisions.[81] Vague religious references cannot qualify as an important government interest under the Equal Protection Clause.[82]

Refusing to recognize people's self-identified sex as their legal sex for purposes of marriage based on reproductive incapacity or religious references cannot be considered important or exceedingly persuasive justifications that can withstand equal protection intermediate level scrutiny. It is also questionable whether they would even be considered legitimate state interests under the lower level rational basis analysis.[83] Until the United States Supreme Court resolves the issue, states could continue to argue that the state's interest in limiting marriage to one man and one woman qualifies as an important state interest.[84] Courts cannot use the state's interest in limiting marriage to heterosexual unions, however, to determine that transgender people are barred from marrying in the gender role that matches their self-identity. Instead, the court must establish a "sex test" that is substantially related to the state's interest in limiting marriages to one man and one woman.

Marriage sex tests that rely on chromosomal analysis and reproductive incapacity are not substantially related to an important government interest In the event that a court finds that any of the state interests discussed above qualify as important government interests, the court must still examine the means the state uses to accomplish the government's goal.[85] To pass intermediate scrutiny, the means used must be substantially related to the important government goal and cannot be based on gender stereotypes.[86]

Courts are divided about the test to use to determine a person's legal sex. Some jurisdictions focus on gender self-identity while other jurisdictions rule that transgender people forever remain the sex assigned to them at birth.

Jurisdictions that emphasize gender self-identity as the only factor or the critical factor for determining a person's legal sex for purposes of marriage rely on scientific developments regarding sex and gender formation. These jurisdictions acknowledge that a number of factors could be used to determine a person's sex, including chromosomes, gonads, internal reproductive organs, hormones, phenotype, assigned sex, and gender self-identity.[87] In focusing on gender self-identity, these jurisdictions recognize the complex nature of sex and gender formation and their court decisions reflect current scientific knowledge on the subject.

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80 Gillette v. United States, 401 U.S. 437, 452 (1971); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Webster v. Reproductive Health Serv., 492 U.S. 490, 566 (1989).

81 *Id.*

82 McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 881 (2005) (the Establishment Clause requires the "Government to stay neutral on religious belief, which is reserved for the conscience of the individual").

83 *See infra* notes 105–16 and accompanying text.

84 The likelihood that such arguments will be successful has diminished after the Supreme Court's ruling in *United States v Windsor*, 133 S.Ct. 2675 (2013). In *Windsor*, the Court ruled that federal laws could not grant federal benefits to opposite-sex married couples and deny legally married same-sex couples the same rights. Justice Scalia, in his *Windsor* dissent, addressed whether the Court's ruling could be used to strike down state laws prohibiting same-sex couples from marrying. *Id.* at 2709–11 (Scalia, J., dissenting). "[T]he real rationale of today's opinion … is that DOMA is motivated by a "'bare … desire to harm'" couples in same-sex marriages (citation omitted). How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. *Id.* at 2709. Since the Supreme Court's decision in *Windsor*, almost every court that has considered the issue has determined that same-sex marriage bans are unconstitutional. Freedom to Marry, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts.

85 For purposes of this analysis, this section presumes that the state has a valid interest in engaging in sex assignment. As discussed above, it is questionable whether any state interest articulated thus far could be considered important or exceedingly persuasive.

86 United States v. Virginia, 518 U.S. 515, 524 (1996).

87 *See, e.g.*,Radtke v. Misc. Drivers and Helpers Union Local 638, 2012 WL 1094452 (D. Minn. 2012); *In re* Lovo-Lara, 23 I. & N. Dec. 746, 752 (2005), 2005 WL 1181062; M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div 1976); *In re* Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001); *rev'd* 42 P.3d 120, 135 (Kan. 2002); *In re* Marriage of Kantaras v. Kantaras, No. 98–5375CA (Fla. Cir. Ct. Feb 21, 2003), *available at* http://www.transgenderlaw.org/cases/kantarasopinion.pdf, *rev'd* Kantaras v. Kantaras, 884 So.2d 155 (Fla. Dist. Ct. App. 2004); Attorney General v. Kevin, (2003) 172 F.L.R 300.

Studies support the finding that transgenderism has a biological basis.[88] More important, standard medical protocol recognizes that there is no "cure" for transgenderism; the appropriate treatment for transgender people is to facilitate their wellbeing in their gender self-identity. Experts recommend that transgender individuals live in their self-identified gender role.[89]

Courts and legislatures in jurisdictions that understand the nature of transgenderism have recognized the right of transgender people to have their gender self-identity legally recognized. For example, in 2002, the European Court of Human Rights ruled that states that deny transgender people the right to be recognized as their self-identified sex violate Article 8 (relating to the right to privacy) and Article 12 (relating to the right to marry and found a family) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[90] In 2004, the European Court of Justice issued a similar ruling.[91] In 2004, Great Britain, which for decades had been one of the countries that provided sparse protection to transgender people, passed sweeping legislation to provide them legal rights that recognize and protect their ability to be legally recognized as their self-identified sex.[92] A number of courts in the United States have adopted this approach.[93]

Other jurisdictions in the United States, however, have rejected gender self-identity as the test to determine a person's legal sex for purposes of marriage and instead have ruled that transgender people remain the sex assigned

88 Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68 (1995). Frank Kruijver et.al, *Male to Female Transsexual Individuals Have Female Neuron Numbers in the Central Subdivision of the Bed Nucleus of the Stria Terminals*, 85 J. OF CLIN. ENDOCRINOLOGY AND METABOLISM 2034 (2000).

89 *The Harry Benjamin International Gender Dysphoria Association's Standards Of Care For Gender Identity Disorders, Sixth Version*, World Prof. Ass'n for Transgender Health, http://www.wpath.org/documents2/socv6.pdf (last visited Aug. 7, 2013). ("The Overarching Treatment Goal … of psychotherapeutic, endocrine, or surgical therapy for persons with gender identity disorders is lasting personal comfort with the gendered self in order to maximize overall psychological well-being and self-fulfillment"). *Id.* at 1. The recently released fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) uses the term "gender dysphoria" rather than the term "gender identity disorder" to recognize that an incongruence between people's natal sex and their gender self-identity do not indicate a disordered condition. The DSM-V and the American Psychiatric Association support medical transition for individuals with gender dysphoria. They recognize that some transgender individuals may feel distress from the incongruence between their experienced gender and their assigned gender. By adopting the term "gender dysphoria" the DSM-V clearly recognizes that transgender people do not have an identity problem that must be treated; rather if their gender identity causes them distress, it is the distress that must be addressed. AM. PSYCHIATRIC ASS'N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

90 *See, e.g.*, Case of I. v. United Kingdom [Eur. Ct of H.R. 2002] 36 E.H.R.R. 53; Goodwin v. United Kingdom [Eur. Ct. of H.R. 2002] 35 E.H.R.R. 18.

91 Case C-117/01, K.B. v. Nat'l Health Serv. Pensions Agency, 2004 E.C.R. I-541.

92 *See* Gender Recognition Act, 2004, Eliz. II, c. 7 (Eng.). Courts in other countries have also adopted this approach. *See, e.g.*, Attorney General v. Kevin, (2003) 172 F.L.R 300 (Australia) and Attorney General v. Otahuhu Family Court, [1991] SLR Lexis 184 (New Zealand).

93 *See, e.g.*, M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div 1976); Vecchione v. Vecchione, Civ. No 96D003769, reported in L.A. Daily J., Nov. 26, 1997, at 1 (California); *In re* Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001); *rev'd* 42 P.3d 120, 135 (Kan. 2002); *In re* Marriage of Kantaras v. Kantaras, No. 98–5375CA (Fla. Cir. Ct. Feb 21, 2003), *available at* http://www.transgenderlaw.org/cases/kantarasopinion.pdf, *rev'd* Kantaras v. Kantaras, 884 So.2d 155 (Fla. Dist. Ct. App. 2004); Radtke v. Misc. Drivers and Helpers Union Local 638, 2012 WL 1094452 (D. Minn. 2012); *In re* Lovo-Lara, 23 I. & N. Dec. 746, 752 (2005), 2005 WL 1181062. In *Radtke*, a federal district court determined that Minnesota would allow transgender people to marry in the role that comports with their gender self-identity. The court looked at the transgender spouse's anatomical and hormonal features as well as the sex designated on the birth certificate and other official documents, which had been amended. The court concluded that "[i]t would be wholly inappropriate for this Court to invent a narrow federal definition of 'sex' based on the sex assigned at birth and impose that construction on a Minnesota statute." *Id.* at *9. Similarly, in *Lovo-Lara*, an immigration court was asked to determine whether a marriage involving a transgender spouse was a legal marriage. The court ruled that North Carolina state law controlled and held that the marriage was a legal heterosexual marriage based on scientific studies regarding sex formation as well as North Carolina's statute that allowed sex amendments on birth certificates. *In re* Lovo-Lara, 23 I. & N. Dec. 746, 752 (2005), 2005 WL 1181062.