SEX REQUIRED: THE IMPACT OF MASSACHUSETTS' SAME-SEX MARRIAGE CASES ON MARRIAGES WITH INTERSEX AND TRANSSEXUAL PARTNERS

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INTRODUCTION

"Lesbian wedding allowed in Texas by gender loophole."[1] Such a headline is proof that in determining someone's sex for the purpose of marriage, a court's decisions have unintended consequences. Nearly a year before the headline appeared, the Court of Appeals of Texas voided a marriage of a male-to-female transsexual named Christie Lee Littleton to a biological male named Jonathon Mark Littleton. The case was *Littleton v. Prange*,[2] and the court declared that the sex that someone is assigned at birth is the sex that they are deemed to be for the purposes of marriage.[3] The result was that the Texas court banned heterosexual marriages if one of the parties was transsexual, but it inadvertently opened the marriage door to couples who appeared to be of the same sex.[4]

The heterosexual marriage is generally thought to consist of one male, who has all the biological and psychological characteristics of a male, and one female, who has all the biological and psychological characteristics of a female. Similarly, when same-sex marriage is contemplated, the couple is assumed to be either two females who both have all the biological and psychological characteristics of a female, or two males who both have all the biological and psychological characteristics of a male. As society fights over which of these people have the right to marry, the laws that are created and how they are interpreted inadvertently

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[1] Michele Kurtz, *Lesbian wedding allowed in Texas by gender loophole: Same-sex union allowed because one was born a man*, SEATTLE POST-INTELLIGENCER, Sept. 7, 2000, *available at* http://seattlepi.nwsource.com/national/marr07.shtml.

[2] Littleton v. Prange, 9 S.W.3d 223, 223-25 (Tex. App. 1999).

[3] *Id.* at 231& 229. Although the court did briefly discuss an unreported 1999 case from New Zealand in connection with the outward appearance of a couple as same or opposite-sexed, the Texas court seems to give no more thought to the consequences of its own decision on the issue.

[4] *Id* at 229.

affects people who do not neatly fit into the average perceptions of male and female.

Making matters even more complicated are traditional notions of sex and gender. Just as with sex, a person's gender can be male, female, a combination of the two, or neither. Traditional marriage is tinged with expectations of not only sex designations but also gender roles. These gender roles are also tied into notions of sexuality.

Sex and gender play a prominent role in the current discussion on marriage. But despite sex and marriage being openly debated in public, few people have considered marriages involving intersex or transsexual persons. Because this segment of the population has been cut out of the deliberations, the marriage laws that exist are not easily applied to them, resulting in unreasonable outcomes.[5]

In part, because these issues have been ignored for so long, they have gotten to the point where there are no simple solutions. One scholar commented that:

> As the Bush administration puts its weight behind the proposed Federal Marriage Amendment that states "marriage in the United States shall consist only of the union of a man and a woman," many states are rushing to enact similar amendments with even more speed. However, very few have noticed that any such amendment (or statute) immediately raises the questions of "Who is a woman?" and "Who is a man?"[6]

In the Massachusetts same-sex marriage case *Goodridge v. Dep't. of Pub. Health*,[7] the court noted that the analysis was in terms of sex rather than sexuality, because "nothing in [Massachusetts marriage] law precludes people who identify themselves... as gay, lesbian, or bisexual from marrying persons of the opposite sex."[8] In the end, this analysis based on sex led to the recognition of marriage rights for same-sex couples. The court seems to strive for not discriminating based on sex;[9] however, the court does not seem to contemplate its impact on those who may be outside of the sex binary.

After *Goodridge* was decided, Massachusetts reinstated a 1913 law to prevent same-sex out-of state couples from marrying. The law was challenged but upheld in *Cote-Whitacre v. Dep't of Pub. Health*.[10] As a result, transsexual and intersex persons may have more obstacles to marriage now than before Massachusetts allowed same-sex marriage.

This note will analyze the possible impact of the court's decisions on intersex and transsexual persons. In the "Overview" section of Part I, the note provides a general overview of transsexual and intersex issues and marriage. Part I-a will

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[5] *See, e.g.*, Littleton, 9 S.W.3d 223.

[6] Michael L. Rosin, *Intersexuality and Universal Marriage*, 14 LAW & SEX 51, 53 (2005).

[7] Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 320 (2003).

[8] *Id* at n.11.

[9] *See id.* at 313.

[10] *See generally* Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350 (2006).

focus on the medical criteria of sex determination and discuss its legal implications. The note will then continue, in Part I-b, with an outline of recent key marriage cases in Massachusetts.

Part II contains the main analysis of the impact of the recent litigation. This section will focus on the marriages in which one or both of the parties are intersex or transsexual. These issues are further broken down between two geographic groups: Part II-a discusses issues involving Massachusetts residents, while Part II-b considers non-residents. Part III proposes solutions for the problems encountered.

I. OVERVIEW

The use of sex as the determining factor in marriage cases may be a matter of law, but the courts are drawn to the use of sex for independent reasons. It may be that many courts see sex as a more tangible thing than it is, and therefore attribute properties of clarity and rigidity to it that simply do not match the reality lived by transsexual and intersex persons throughout the United States. By focusing on sex rather than other factors—such as gender identity—the court may be trying to base its reasoning on something concrete. However, when sex turns out to be less clear than expected, problems ensue. The courts may assign a sex based on factors of their choice,[11] simply throw their hands up and announce that someone simply has no sex, or may be both sexes at once.[12] Despite such frustrations, resulting from false assumptions on which vast bodies of law rest, there has been no sweeping attempt by the courts to reconsider the wisdom of continuing on the current course.

Courts across the United States struggle with determining sex and often do not reach a satisfactory conclusion. For instance, assume that hypothetical Bob has lived his whole life as a man. Bob may be put in a better legal position if a court were to decide that he is female. In the realm of marriage law, the determination of any sex, whether right or wrong, is still better than a determination that a person is of neither or both sexes. When Bob has his marriage to Jane challenged, he could in some courts be deemed neither male nor female. Then regardless of the court's determination as to Jane's sex, there is no way—short of changing their state or country of residence—that Bob and Jane may marry.

The law in most states requires that marriage be between people of opposite sexes.[13] When there is no sex determined, there can be no one to be the opposite sex from and hence no possibility of marriage.[14] For example, if Bob were

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[11] For an overview of factors used in determining sex, *see infra* note 23.

[12] *See, e.g.*, In Re Estate of Gardiner, 273 Kan. 191, 213 (2002) (the court goes so far as to say that "[t]he words . . . 'male,' and 'female' in everyday understanding do not encompass transsexuals"); *see also* Marriage of C and D (1979) 28 A.L.R. 524 (Austl.) (Court held that an intersex man was of neither sex).

[13] *Map: Gay marriage across the US*, BBC NEWS, http://news.bbc.co.uk/2/hi/americas/3516551.stm (last visited Oct. 26, 2006).

[14] *See generally* Loving v. Virginia, 388 U.S. 1 (1967). A complete disallowance of marriage is unconstitutional under even the Federal Constitution, because marriage is a fundamental right.

adjudicated to be neither male nor female, he could not marry a man or a woman. This is because neither of the two sexes are the "opposite sex," of "no sex," or some third sex.

In cases where the sex is determined based on birth rather than a person's current state of being, the only hope for a marriage that fits the person's sexuality would be to another transsexual or intersex person whom the court may consider to be of opposite sex. So if the court were to find that Bob was female for the purposes of marriage—perhaps because his circumcision involved an unfortunate accident—then he could marry Jane, whom the court could deem to be male—possibly based on a hormone analysis.

This kind of pigeonholing by judges has a more disparate effect on intersex persons than those who are transsexual. Although at birth, an intersex person is assigned a sex and many do identify as one sex or the other, unlike someone who is transsexual, they may identify with neither sex, and self-identify as simply intersex.[15] In the latter case, they will have no court where their current sex can be determined to be the opposite of someone else's. In Massachusetts, however, they may be deemed the same sex as another intersex person, and thus be able to marry another intersex individual; but if they were a non-resident, then they would then still be ineligible for marriage under Massachusetts law.

These problems do not arise in most cases until after a challenge to the marriage is brought. Therefore, intersex and transsexual people do in fact end up getting married. Although intersex couples may enter into a void marriage, when no one—sometimes not even themselves—are aware of an intersex condition, such marriage will likely never be challenged. Generally, marriage statutes do not require the parties to prove their sex. Questions of someone's sex come to light only after one of the parties tries to invalidate the marriage.[16] A case in Massachusetts, however, upheld a law that may have the effect of preventing such marriages from ever forming in the first place among non-residents.[17]

I-a. Intersex and Transsexual Issues

Up to four percent of the world population is intersex.[18] Among the U.S. male population, at least one in 2500 males has had sexual reassignment surgery and is now a post-operative woman, with the prevalence of untreated transsexual males at around one in 500.[19] Though the figures may seem small, these are not

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[15] Intersex Society of North America, *Frequently Asked Questions: Why Doesn't ISNA Want to Eradicate Gender?*, *available at* http://www.isna.org/faq/not_eradicating_gender (last visited Feb. 17, 2006).

[16] Julie A. Greenberg, *Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 307 n.336 (1999) [hereinafter Greenberg, *Intersexuality*].

[17] *See generally* Cote-Whitacre, 446 Mass. 350.

[18] Greenberg, *Intersexuality*, *supra* note 16, at 267.

[19] Lynn Conway, *How Frequently Does Transsexualism Occur?*, Dec. 17, 2002,

insignificant numbers in terms of social impact. Although intersex conditions may be relatively rare, the legal implications are so vast, entrenched and expansive that issues surrounding sex determination cannot be tossed aside lightly.

The legal implications of sex determination follow a person throughout life. The sex that is assigned at birth, and the medical procedures rendered as a result, affect a person's legal status. There are many aspects of life, in and out of the legal system, which require a sex to be designated, such as official documents, sports teams, and housing in correctional facilities. Such designations restrict many legal rights: for example, eliminating a cause of action in an anti-discrimination suit, or the right to pension and insurance payments. However, the greatest impact is in the area of marriage.[20]

Everyone is designated as either male or female at birth or shortly thereafter on a birth certificate. If the infant has ambiguous genitals, then a sex is assigned based on a combination of chromosomes and genitalia. These decisions have brutal implications. XY infants are judged on the length of their penis; if it is too short, they are declared female and surgery is performed to make the genitals match the female standard. If the infant is XX and capable of reproduction, any masculine genitalia is surgically removed and reshaped to be more pleasing to some future penetrating male. In females, reproduction is favored, while in males, it is the ability to penetrate a female, whether they can produce sperm or not. Infants with chromosomal patterns that are neither XY or XX are defaulted to female, and surgery is performed to make the genitals match that designation.[21]

As these children grow up they do not simply take on the gender that they are brought up in.[22] Although some do self-identify as their assigned sex, others do not because sexual identity is not formed simply based on possession of surgically-reconstructed genitalia followed by a steady stream of gender reinforcement, with strong adhesion to gender stereotypes.[23]

There are many medically recognized factors that determine sex.[24] Eight of the factors that would, in combination or separately, determine someone's sex are

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http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html.

[20] Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 THE ENDOCRINOLOGIST 277, 280 (2003) [hereinafter, Greenberg, *Gender Assignment*].

[21] *Id.* at 277.

[22] *Id.* at 278. (These types of surgeries are the current standard, supported by the American Academy of Pediatrics. The parents of intersex infants have limited information provided to them by their child's pediatrician, who is also creating time pressure, and any consent given is often not based on a full disclosure of information by the physician. These practices are being challenged, but they rest on more than fifty years of entrenched misinformation in the medical community.). *Id.* at 279, 283. (To make matters worse, some parents are not even told of the intersex condition of their child and instead are told "that their child is a girl or boy with 'unfinished' genitals that the doctor will repair with surgery."). *See also* Kate Haas, *Who Will Make Way for the Intersexed?*, 30 AM. J. L. & MED. 41 (2004).(The legal problems created by the actions of surgeons in the past, present and unfortunately the future, will need to be addressed with changes in the law.).

[23] Intersex Society of North America, *supra* note 15.

[24] *See* Greenberg, *Intersexuality, supra* note 16.

genetic or chromosomal sex, gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.[25] For most people, all of these factors line up to make him or her unquestionably male or female. When just one of these factors is misaligned from the others, or if a factor is itself ambiguous, gender and sex can come into question.[26] When such a misalignment happens, there can be physical signs that are apparent at birth, or the person may not find out until puberty when their body does not conform to the normal development expectations for their assumed sex. With some of these conditions people may not figure out that there is something different about their body until much later in life, or never at all.

For intersex individuals, issues of sex are quite different from those who are transsexual. Someone who is classified as intersex may very well identify as one, both, or neither of the two legally-recognized sexes. A transsexual person however, by definition, identifies with a particular sex, just not the one that he or she was assigned at birth.

The legal issues that arise from these non-conformities to traditional notions of sex are similar. For purposes of deciding marriage cases, the courts do not always consider what sex someone lives as. As such, even the sex of a transsexual, who for the most part lives within and in terms of the sex binary, does not neatly fit into the sex binary as construed, interpreted and applied by the courts.[27] For a marriage between partners of the opposite sex, the threshold question, by definition, is the sex of the partners. For such a marriage to be valid, one must be found to be male and one to be female, so that they can be said to be "opposite" of one another.

Sex determination, by courts, for purposes of marriage has ranged from procreation concerns to focusing on the person's ability to engage in intercourse, and from chromosome analysis to gender—psychological sex—as well as just endorsing and maintaining whatever sex a person was labeled with at birth, in spite of any other evidence to the contrary.[28]

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[25] *Id.* at 278. (Chromosomal sex is sex determined by the different combinations of X and Y chromosomes, such as the common XX and XY, or more varied combinations including: XXX, XXY, XXXY, XYY, XYYY, XYYYY, and XO. Gonadal sex refers to the kind of gonads a person may have, people can have ovaries, testes, both, or neither, or one of each. Internal morphologic sex is identified by appearance of internal genitalia, while external morphologic sex relies on a person's external sex organs. Organs can be clearly those of a typical male, female or a combination of any such organs. Hormonal sex is based on the levels and balance of "male" androgens, "female" estrogen and progesterone. Phenotypic sex refers to other characteristics typically associated with sex, such as breast development and amount of facial hair that a person has. The assigned sex and gender of rearing are the sex as prescribed at birth and the gender that the person was brought up as. Finally, sexual identity is simply the sex that the person identifies themselves to be, which may be completely independent of any of the aforementioned factors.). *Id.* at 281-83.

[26] *See* Greenberg, *Intersexuality*, *supra* note 16, at 278.

[27] *See* Greenberg, *Gender Assignment*, *supra* note 20, at 281-82.

[28] *See* Greenberg, *Intersexuality*, *supra* note 16

I-b. Marriage

Marriage in the United States carries with it a plethora of benefits through various entitlements and rights and social constructions. When the New York courts were recently deciding same-sex marriage cases the Court of Appeals acknowledged marriage's many benefits, stating:

> It is undisputed that the benefits of marriage are many. The diligence of counsel has identified 316 such benefits in New York law, of which it is enough to summarize some of the most important: Married people receive significant tax advantages, rights in probate and intestacy proceedings, rights to support from their spouses both during the marriage and after it is dissolved, and rights to be treated as family members in obtaining insurance coverage and making health care decisions. Beyond this, they receive the symbolic benefit, or moral satisfaction, of seeing their relationships recognized by the State.[29]

In the United States, same-sex marriage is allowed only in Massachusetts,[30] while forty-three states restrict marriage to individuals who couple with those of the opposite sex. In the remaining six states, the law is either silent on the matter, is being actively challenged and hence in limbo, or allows for some but not all rights—such as states providing only civil unions or domestic partnerships.[31] The marriage debate in the Unites States is focused on the rights of same-sex couples, but there is little to no non-academic discussion on the rights of intersex and transsexual individuals to marry.

It has been said that the issues surrounding marriage by intersex and transsexual people would strengthen the argument for same-sex marriage.[32] There are several arguments that can be made for such an approach. The main argument is that the legal system should recognize that some people do not fall into the sex binary.[33] Once that realization is cemented, then marriage laws should be among those laws that are going to be changed to allow for intersex and transsexual people to marry. Then it will become clear that the sexes of the couple do not need to be the basis of recognizing a marriage. Finally, once sex is no longer a consideration in the validity of marriage, same-sex couples will be allowed to marry. Professor of Law, Terry Kogan, expresses this argument, writing that:

> The irony of [the transsexual and intersexed marriage cases] is this: In every case the judge is committed to upholding the statutory principle that

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29 Hernandez v. Robles, 7 N.Y.3d 338, 358 (2006).

30 Although a Massachusetts court has held that, additionally, Rhode Island does not prohibit same-sex marriages. *See* Cote-Whitacre v. Dep't of Pub. Health, No.95367, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006).

31 *See Map, supra* note 13.

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

33 An "all or nothing" categorization of sex into either male or femal.

> marriage is the union of one man and one woman. Yet, in the struggle to apply this principle, these cases illustrate the difficulty and even foolishness in looking to a person's sex as a criterion for marriage. Accordingly, the cases offer insights into why society should extend marriage rights to same-sex couples.[34]

Although, as it turns out, same-sex marriage rights have been secured to some extent before the same rights have been guaranteed for transsexual and intersex people, there are still forty-nine other states and a federal government to persuade.

In 2003, with the *Goodridge* decision, Massachusetts extended marriage to same-sex couples. The decision was unpopular among certain segments of the Massachusetts population.[35] The court and the state were subject to the great disapproval from non-state residents and of various states' politicians as well as from the federal branches of government. Shortly after the decision, the Massachusetts government began implementing the enforcement of a marriage law dating from 1913.[36] There are several sections of that marriage law that were passed together. Section eleven—which prohibits marriage of a non-resident where the law of their own state would not allow the same marriage[37]—is the part of the law that is commonly referred to as simply "the 1913 law." The 1913 law originated in the inter-racial marriage context and had long ago fallen into disuse before being revived due to political pressure[38] and was eventually upheld by the *Cote-Whitacre* decision.

Three years after the *Goodridge* decision and renewed use of the marriage code sections eleven and twelve, the court decided *Cote-Whitacre*, where it upheld the 1913 law, limiting marriage in Massachusetts based on residency.[39] The court held that those who would not be able to marry in the states in which they reside would not be allowed to marry in Massachusetts.

The renewed enforcement of the 1913 law was not enough to appease some. Two legislators in the Massachusetts House of Representatives tried to pass an amendment to the state constitution in an attempt to limit marriage.[40] The proposed amendment would have defined marriage in Massachusetts as between

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[34] *Id.*

[35] *See e.g.*, Pam Belluck, *Same-Sex Marriage: The Overview; Marriage by Gays Gains Big Victory in Massachusetts*, N.Y.Times, Mov. 19, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9402E4DC163BF93AA25752C1A9659C8B63

[36] The last time the law was cited was more than thirty years ago, with a break of almost forty years before that.

[37] MASS. GEN. LAWS ch. 207, § 11 (1913).

[38] Scott S. Greenberger, *The 1913 Law: History Suggests Race was the Basis*, THE BOSTON GLOBE, May 21, 2004, *available at* http://www.boston.com/news/specials/gay_marriage/articles/2004/05/21/history_suggests_race_was_the_basis/ (explaining that no legislative history exists for the bill, so there is no direct evidence of legislative intent).

[39] *Id.*

[40] H.R. 653 184th Gen. Ct. (Mass. 2005).

"one man and one woman." [41] The text of the proposed amendment is as follows:

> It being the public policy of this Commonwealth to protect the unique relationship of marriage, in order to promote, among other goals, the stability and welfare of society and the best interests of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent, nor shall it receive the benefits or incidents exclusive to marriage from the Commonwealth, its agencies, departments, authorities, commissions, offices, officials and political subdivisions.[42]

Although billed as an anti-gay-marriage amendment, the language seems clear that it will even eliminate any possibility of civil unions or domestic partnerships of the kind that have sprung up in other states.

However, what support there was for the amendment waned before the final vote by the Legislature, and the proposed amendment was defeated in June 2007.[43] The amendment effort also lost the political support of the Governor, as Deval Patrick took office in January 2007, replacing Mitt Romney.[44] Furthermore, after considering the substantive content of the proposed amendment, two out of seven justices on the Massachusetts Supreme Judicial Court already opined on the topic, suggesting that, if passed, the amendment may be found to be so incongruent with the Massachusetts and Federal Constitutions that it may very well not survive any subsequent legal challenges.[45] Despite these setbacks, there is no guarantee that a new proposal will not be introduced.

II. ANALYSIS

Two pertinent cases for the analysis of Massachusetts same-sex marriage laws are *Goodridge* and *Cote-Whitacre*. In *Goodridge*, the court declared that barring marriage based on the fact that both parties are of the same sex is inconsistent with the state constitution, which is "more protective of individual

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[41] *Id.*

[42] *Id.*

[43] Frank Phillips, *Legislators Vote to Defeat Same-Sex Marriage Ban*, THE BOSTON GLOBE, June 14, 2007, *available at* http://www.boston.com/news/globe/city_region/breaking_news/2007/06/reaction_to_the.html.

[44] *See, e.g.*, Stephanie Ebbert, *Healey Backs Proposed Constitutional Ban on Gay Marriage: But Opposes Change in GOP Platform*, THE BOSTON GLOBE, Nov. 19, 2005, *available at* http://www.boston.com/news/local/articles/2005/11/19/healey_backs_proposed_constitutional_ban_on_gay_marriage/.

[45] *See* Schulman v. AG, 447 Mass. 189, 198-99, 199 n.3 (2006) (Greaney, J., concurring, joined by Ireland, J.). (The issue in the case was whether the amendment proposal could pass muster as an initiative petition under Massachusetts constitutional standards prohibiting such a petition if it would result in a "reversal of judicial decision."); *see id.* at 191 n.3. (The majority opinion did not deviate from the core issue; the concurrence is therefore the only available judicial expression on the substantive merits of the proposed amendment.).

liberty and equality than the Federal Constitution...."[46] This case was celebrated as a victory for same-sex marriage; however, this victory was limited, because Massachusetts has a 1913 statute on the books that prohibits couples marrying in the state if that same couple could not be married in the state of residence of the non-Massachusetts resident partner.[47] The constitutionality of the 1913 law was challenged and upheld in *Cote-Whitacre*.

The *Cote-Whitacre* decision resulted in the continuance of the renewed enforcement of the 1913 law. There was a procedure set up for town clerks to check for any impediments to marriage in a couple's home state.[48] For most states this includes a ban on same-sex marriage, or a requirement that the parties be of opposite sex.[49]

The analysis of the impact of the recent Massachusetts litigation is dependent on the function of the 1913 statute. The 1913 law provides for unequal treatment of Massachusetts residents and non-residents. Therefore, the discussion of the impact of *Goodridge* and where applicable, *Cote-Whitacre,* is broken up between the following two sections.

II-a. Marriage for Massachusetts Residents

Under *Goodridge*, Massachusetts residents may, by default, marry based on their self-identified sex. Because both same-sex and opposite-sex marriages are allowed, the question of sex is no longer assumed to be an issue for residents. This means that, for practical purposes, no marriage should be denied on the grounds of sex. The clerks, who must authorize the marriage, will presumably not turn people away based on sex. Furthermore, if questioned on sex, it is unlikely that any person who is old enough to marry will lack some sort of documentation designating their sex, regardless of the standards on which that sex was based. For example, a hypothetical intersex person named Bob, trying to marry a female Massachusetts resident named Jane, could for some reason be questioned as to his sex. His birth certificate will designate Bob's sex as either female or male; either way, his sex will not be an impediment to marrying Jane. If something goes wrong and Jane later wants to void the marriage, she could argue that Bob is neither male nor female, and therefore the marriage was invalid. Bob may have an argument that the *Goodridge* decision allowed him to marry Jane regardless.

Goodridge contains language that could extend the right to marry to persons without concern for coupling certain sexes. In the opening paragraph the Court states:

> The question before us is whether, consistent with the Massachusetts

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[46] Goodridge, 440 Mass. at 313.

[47] MASS. GEN. LAWS ch. 207, §§ 11–13 (1913).

[48] *See* Cote-Whitacre 446 Mass.at 353-55.

[49] *See Map, supra* note 13.

> Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity of all individuals. It forbids the creation of second-class citizens.[50]

The case includes language of "commitment to another human being"[51] and also further espouses virtues of the Massachusetts Constitution.[52] Additionally, the court places great emphasis on "individual autonomy."[53]

> Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.[54]

Although the court refers to same-sex couples specifically, the analysis is done on an individual level. The focus is on the person who is entering the marriage. Although it is the entry into marriage which provides the benefits and protections, and two people are necessary to enter into such a relationship, it is the individual person, not the couple, in whom the right lies.

When these marriage rights are linked to the individual, it is likely that they would be extended to intersex and transsexual persons. *Goodridge* was decided partly on state constitutional rights, so although the federal government has not extended marriage rights very far based on the individual right-holder, Massachusetts, based on its own constitutional values, might. The court is even more likely to allow intersex and transsexual people to marry because it has already cleared the hurdle of same-sex marriage.

At some point there may have been concerns about expanding the way sex is determined for the purpose of marriage. Some of these fears were based on the argument that transsexual and intersex marriage will mean that same-sex marriage would not be far behind. Now that Massachusetts has allowed same-sex marriage, there should be no argument left for the exclusion of intersex or transsexual people from the institution—at least in Massachusetts, but also elsewhere if and when other states follow Massachusetts' example.

An analysis of the court's language must consider the fact that this was a case brought by same-sex couples. Gender-neutral language should not be expected throughout the opinion, because the question before the court is whether same-sex

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[50] Goodridge, 440 Mass. at 312.

[51] *Id.* at 322. ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.").

[52] *Id.* at 322, 328.

[53] *Id.* at 313.

[54] *Id.*

couples can get married. In order to talk about same-sex couples, gender-specific language is needed. The court also likely wanted to focus on same-sex couples because of the pervasive view in society and government that marriage should be limited in some ways. The focus on the couple, rather than the individual, might have dissuade the unfounded fears of the door being opened to polygamy and of course, the right to marry one's pet.

Concluding the discussion, the court stated "[w]e construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."[55] Although in the next—and final—paragraph of the opinion the court reverts to same-sex language, this may be a symptom of simply sticking to the facts of the case.

The Massachusetts Supreme Judicial Court, in deciding *Goodridge*, used the U.S. Supreme Court case of *Lawrence v. Texas*[56] as gateway to the recognition of same-sex marriage. *Lawrence* had left the question of civil marriage open. The Massachusetts court aimed to protect the more expansive rights provided for in the Massachusetts constitution, rather than to limit those rights to those protected by the Federal Constitution as recognized in *Lawrence*.[57] Because the case was about the rights of same-sex couples, *Lawrence v. Texas* was an obvious starting place. However, it was definitely not to be the end-point. The court's use of gender-neutral language shows that the court may be open to a definition of marriage that is truly blind to sex. In light of the court's language and apparent attitude throughout the opinion, it is hard to conclude that under its watch Massachusetts would deny marriage to couples where one or both partners are either intersex or transsexual persons. On the other hand, Massachusetts has no precedent for determining sex for the purposes of Massachusetts marriage. This lack of precedent means that the court could take any route. This would lead to problems for transsexuals and intersexuals, if for purposes of determining what the opposite or same sex would be, Massachusetts followed the Fifth circuit or the older Australian approach. Those courts have held that a person could be determined to be of both or neither sexes.[58] Such an outcome is problematic in a legal setting that requires conformity to the sex binary, but if the language in *Goodridge* is to be taken to its logical conclusion, then there would be no such requirement in

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[55] Goodridge, 440 Mass. at 343.

[56] Lawrence v. Texas, 539 U.S. 558 (2003) (holding that because of privacy rights, a state could not ban homosexual conduct between consenting adults).

[57] Goodridge, 440 Mass. at 312-13.

[58] Von Hoffburg v Alexander, 615 F.2d 633, 635 n.4 (5th Cir. 1980) (relating to recognition of marriage by the United States Army and related benefits) and In Marriage of C and D (1979) 28 A.L.R. 524 (Austl.). (In the Australian decision, the court held that one of the parties to a marriage—an intersex person—was neither male nor female. The Fifth Circuit decision also allowed for this categorization as relating to the plaintiff's alleged husband, who was a female-to-male transsexual. Australia may have now rejected this approach. In the case of In re Kevin (2003) 31 Fam. L. R. 1 (Austl.), involving a female-to-male transsexual, the court held that a person's sex should be determined at the time of marriage rather than at the time of birth. However, this does not seem to completely rule out all possibility of complications for intersex persons.).

Massachusetts. This means that regardless of the way in which sex could be determined in Massachusetts, the decision would not impede marriage.

II-b. Marriage for Non-Massachusetts Residents

For the analysis on non-resident couples, it is best first to understand the procedural aspects of getting married in Massachusetts. In a concurring opinion in *Cote-Whitacre*, Judge Spina set out the procedure as follows:

> To marry in Massachusetts, all applicants for a certificate of intention of marriage, commonly known as a marriage license, must complete a written notice of intention of marriage (notice) on forms provided by theregistrar of vital records and statistics (registrar), and submit it to the clerk or registrar of any city or town in the Commonwealth, along with the appropriate fee. The notice shall include "a statement of absence of any legal impediment to the marriage, to be given before such town clerk under oath by both of the parties to the intended marriage.[59]

A marriage license should not be issued if any of the legal impediments are found.[60] There is a possibility that like in other states, the sex put down on paper will not be questioned. However, because the law was drudged out from obscurity to be enforced against same-sex couples, sex is naturally a central concern for the clerks, who are instructed to look for possible reasons for an invalid marriage.[61] What is troubling about the *Cote-Whitacre* decision is that it mandates increased scrutiny of couples by the clerks, especially when this could result in the unreasonable burden on the couple in being required to prove their state's legal

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[59] Cote-Whitacre, 446 Mass. at 353-54.

> The applicants also shall provide the clerk with the residence address of both parties. On or after the third day from the filing of the notice (or sooner if the time period has been waived by a judge), the clerk shall deliver the marriage license to the parties. Then, an authorized officiant may solemnize the marriage. After solemnization, the officiant completes the portion of the license setting forth the time and place of the ceremony, signs it, and returns it to the clerk who issued it. The clerk records the marriage in the appropriate registry, transmits the original record of the marriage and all documentary evidence to the registrar, and retains a certified copy of the license. The Commissioner of Public Health (commissioner) binds the marriage records with indexes thereto and retains their custody.
>
> To provide guidance to applicants as to what constitutes a "legal impediment" to marriage, clerks must display, in a conspicuous location, a printed notice of the prohibitions to marriage in Massachusetts, provided to them by the commissioner and the registrar. The notice specifically incorporates the language of G. L. c. 207, § 11. The registrar has also issued to clerks a guide setting forth legal impediments to marriage in the fifty States, the District of Columbia, and various territories of the United States. *Id.* at 354-55 (citations omitted).

[60] Cote-Whitacre, 446 Mass. at 352-55.

[61] *See generally* Cote-Whitacre, 446 Mass. 350 (2006); Cote-Whitacre v. Dep't of Pub. Health, 2006 WL 3208758 (Mass. Super. Sept. 29, 2006); and Cote-Whitacre v. Dep't of Pub. Health, 18 Mass. L. Rep. 190 (2004).

position on the often-undecided issue of sex for the purposes of marriage.[62] If for some reason a person's sex comes into question she will have to show that her state would indeed allow her to marry the person she is seeking to marry in Massachusetts. This type of hyper-sensitivity toward sex opens the door to the kind of scrutiny that does not exist in many out-of-state couples' home states. The close scrutiny of couples creates a possibility of denial of marriage to couples whose marriages would never be questioned in their home states.[63]

Cote-Whitacre upheld the constitutionality of the 1913 law. In doing so, the court denied a preliminary injunction for eight same-sex non-resident couples from various states.[64] The court was not unaware that the decision would have a disproportionate impact on some types of couples. The concurrence by Justice Spina, with which Justices Cowin and Sosman joined, read in part:

> I recognize that the brunt of §§ 11 and 12 has inevitably fallen disproportionately on nonresident same-sex couples, rather than on nonresident opposite-sex couples, because, in the aftermath of *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), Massachusetts became the only State where same-sex couples could obtain a marriage license. However, the fact that this court concluded in the *Goodridge* case that there was no rational basis under the Massachusetts Constitution for denying Massachusetts same-sex couples the right to enter into civil marriages does not now compel a conclusion that nonresident same-sex couples, who have no intention of living in Massachusetts, have an identical right to secure a marriage license that they could not otherwise obtain in their home States.[65]

It is evident that *Cote-Whitacre* was decided in full awareness of the continuing concerns by other states as to their control over their own resident's rights.[66]

The reasoning given in that concurrence shows that the court may have had

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[62] *See generally* Greenberg, *Gender Assignment, supra* note 20. (Most states simply have not yet considered or decided the issue of how to determine sex for the purpose of marriage.).

[63] The question then becomes, "Why try to marry in Massachusetts then?" However, the point is not that the couple would be able to get married somewhere else. Opposite-sex couples enjoy the luxury of not having to worry about where they will marry. If it so happens that an Alaskan couple has all its family in Boston, it need not worry about flying there for its wedding. It is somewhat ironic that in trying to open marriage to a larger population of its residents, the Commonwealth would have created the possibility of becoming a state where certain couples would be denied marriage when they could have gotten married in their home state, even though had they been Massachusetts residents, the marriage would have been allowed.

[64] Cote-Whitacre, 446 Mass. 350 (2006), for a summary of the decision *see*, Cote-Whitacre v. Dep't of Pub. Health, 2006 WL 3208758, at *1.

[65] Cote-Whitacre 446 Mass. at 370 (Spina, J., concurring).

[66] The court is treading on eggshells, unfortunately, and it seems that the court must strike a balance. The reasoning is that if they were to allow too many people to marry, they would lose any hope of those marriages being recognized, due to the possible backlash from other states of a great number of same-sex couples leaving Massachusetts with a marriage license, and seeking its recognition in their home states. However the solution of denying marriages seems like a poor one when the goal is to have more marriages recognized.

noble intentions in refusing to marry out-of-state residents. Justice Spina explains:

> Before it creates a marital relationship, the Commonwealth rationally wants to be certain that the marriage will be properly recognized, regulated, and supported, either by serving as the couple's home State or by knowing that the integrity of the marriage will be protected in another State. Once same-sex couples leave Massachusetts, the Commonwealth's ability to protect and enforce marital benefits and responsibilities, including obligations to children, is significantly compromised. Therefore, a means for achieving the Commonwealth's goal of protecting the marital relationship has been set forth in §§ 11 and 12, through which the Legislature has determined that marriage licenses should not be issued to residents of jurisdictions in which same-sex marriages are prohibited. Simply put, given the enormity of the rights and responsibilities that accompany marriage, Massachusetts has a rational and substantial interest in ensuring that the marriages it creates will be recognized as valid outside its borders.[67]

Understandably the court would not want a couple to rely on its Massachusetts marriage when outside of the court's jurisdiction. The court is concerned that a couple may leave the state unaware that its marriage is void when it crosses the border, undermining the social purposes of marriage, which is to protect the interests of the spouses, children, and the public in general. The Commonwealth wants to protect its own interests, such as financial obligations, in the marital relationship it creates. However, this view seems to have dissipated by the next paragraph where Justice Spina announces:

> Further... it is rational, and hopeful, for the Commonwealth to believe that if it adheres to principles of comity and respects the laws of other jurisdictions, then other jurisdictions will correspondingly respect the laws of Massachusetts and recognize same-sex marriages of Massachusetts couples lawfully celebrated in this Commonwealth.[68]

This seems to be a reply to the ongoing fear that has been voiced regarding Massachusetts "exporting" same-sex marriage to other states as couples moved around the country.[69]

The decision in this case has far-reaching consequences; this is evident in the careful parsing of the issues. In a one-paragraph majority opinion—with three concurrences spanning more than fifty pages—the Massachusetts Supreme Judicial Court decided that for most of the plaintiffs, living in Connecticut, Maine, New Hampshire and Vermont, the law of their home state was not on their side.[70] A

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[67] Cote-Whitacre, 446 Mass. at 372 (Spina, J. concurring).

[68] Cote-Whitacre,446 Mass. at 373 (Spina, J., concurring).

[69] *E.g., Reaction to the Defeat of the Proposed Same-Sex Marriage Ban*, THE BOSTON GLOBE, June 14, 2007, *available at* http://www.boston.com/news/globe/city_region/breaking_news/2007/06/reaction_to_the.html.

[70] Cote-Whitacre, 446 Mass. at 352.

judgment was ordered for the defendants, and the couples were denied marriage.[71] For the two other couples—those from New York and Rhode Island—the court sent the cases back to the Superior Court to determine whether same-sex marriage was prohibited in those states.[72] The Superior Court ordered a declaratory judgment "that same-sex marriage is prohibited in New York and is not prohibited in Rhode Island."[73]

The residents of the other forty-eight states will have far bigger hurdles to overcome in order to get married. If the individuals in the couple are non-residents then the 1913 law will be applied. If the clerk fails to be satisfied that the couple would be allowed to marry under its own state's laws, then a Certificate of Intention of Marriage[74]—colloquially, a marriage license—will not be issued.

If a question of one of the parties' sex arises, then the couple would have to provide the clerk with proof—through "affidavits or otherwise"—that the marriage would not be contrary to their own state's laws.[75] In the case of transsexual or intersex persons, such proof would logically mean that they would have to show how their own state would interpret their sex for the purpose of its laws. This determination could then be applied by the Massachusetts licensing officer in issuing or denying a marriage license. This seems like an unreasonable burden on both the prospective spouses and the clerks.

States and countries differ on how to determine sex for the purpose of marriage laws.[76] There are two main lines of cases on sex-determination for the purpose of marriage:[77] sex determination based on the sex assigned at birth, or sex determination based on the sex of the person at the time of marriage. The latter approach does not preclude the sex at the time of marriage to be the same sex as was assigned at birth. Usually the court will decide that the person in question is male or female and therefore does or does not fill the "opposite sex" requirement for marriage.[78] However some courts have acknowledged that some people do not fit neatly into these categories. The Fifth Circuit—in a case of military discharge

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[71] *Id.*

[72] *Id.*

[73] Cote-Whitacre, 2006 WL 3208758, at *1. Therefore, couples residing in either Rhode Island or Massachusetts would be treated the same, in Massachusetts, on the issue of sex for the purpose of marriage, and should be permitted to marry. In light of these developments in *Cote-Whitacre*, any further mention of "non-residents" does not include residents of Rhode Island. Just as there will be no concern over the sex of Massachusetts residents trying to marry in Massachusetts, Rhode Island residents will too benefit from the assumption that if same-sex marriage is allowed, and opposite-sex marriage is also allowed then sex is not an issue. Although Rhode Island residents will benefit from the Goodridge decision, they may still have some of the residual problems that Massachusetts residents may encounter, as discussed in Part II-A. Neither state, for example, has precedent for determining sex for the purpose of marriage, so it is possible that one of these states may deem someone to be of neither sex, and thus unable to marry under either marriage allowance of same or opposite sex.

[74] *Id.* at *1-2.

[75] MASS. GEN. LAWS ch. 207, § 12 (1913).

[76] *See* Greenberg, *Gender Assignment*, *supra* note 20, at 281-82.

[77] Gardiner, 273 Kan. at 195-96.

[78] Greenberg, *Gender Assignment*, *supra* note 20, at 281-82.

for "alleged homosexual tendencies"—suggested that a female-to-male transsexual could be both female and male.[79] Other courts have either stated or alluded that by process of elimination, one could also be neither male nor female.[80] Unfortunately, when courts have realized that life does not conform to the legal binary system, they did nothing to alleviate the effects of its arbitrariness.

The courts that have determined sex for the purpose of marriage based on the sex assignment at birth include those in England, Ohio, Texas, while those that make the determination based on mental state and medical procedures include New Jersey, California, Australia and New Zealand.[81] The United States Supreme Court has yet to weigh in on the issue and has denied certiorari in both cases using reassigned sex—sex at time of marriage—and those relying on sex at birth as the sex for determination of marriage.[82]

Regardless of which line of cases a court falls within, it takes into account various factors in getting to its conclusion.[83] A court that has decided that sex for the purposes of marriage is whatever sex was assigned at birth does not do so in a vacuum of choices, but rather, after disregarding a great deal of factors. Some of the factors that have been considered by the courts in both lines of cases include:

> self-identity, gender perception of others, hormonal and surgical intervention, acceptance of this legal status as [that sex] for other purposes... plain meaning and dictionary definitions... chromosomes... genitalia, gonads, internal and external morphologic sex,... phenotypic sex, assigned sex and gender of rearing, sexual identity... sex provided by 'our Creator'... 'man-made' sex attributes.[84]

Any number of these factors may be considered and weighed before the court makes a determination based any combination of those factors.

Analysis of sex based on the sex at birth tends to be a lot simpler. In *Estate of Gardiner*, a 2002 Kansas decision where the party's sex was determined to be that assigned at birth,[85] the court's decision was partly based on a "Texas court's statement of the issue... 'Can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth?'"[86]

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[79] Von Hoffburg, 615 F.2d at 635 n.4.

[80] *See, e.g.*,Gardiner, 273 Kan. at 195-96.

[81] *Id.* at 196; *see also* Greenberg, *Intersexuality*, *supra* note 16, at 307.

[82] Gardiner, 273 Kan. at 196. (Among the cases brought to the court's attention not recognizing a mental component or the efficacy of medical and surgical procedures are Corbett v. Corbett, 2 All E.R. 33 (1970); In re Ladrach, 32 Ohio Misc. 2d 6, 513 N.E.2d 828 (1987); and Littleton v. Prange, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied* 531 U.S. 872, 148 L.Ed.2d 119, 121 S. Ct. 174 (2000). Recognizing them are M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204, *cert. denied* 71 N.J. 345 (1976); and In re Kevin, (2003) 31 Fam LR 1 (Austl)).

[83] *See* Greenberg, *Gender Assignment*, *supra* note 20, at 281-82.

[84] *Id.*

[85] Gardiner, 273 Kan. 191.

[86] *Id.* at 196. (Note that the court here uses the terms "sex" and "gender" interchangeably, a

A New Jersey court took a different approach in *M.T v. J.T.*,[87] weighing various factors. The New Jersey court's approach to these issues presents an exceptional level of analysis, and would serve well as a model starting point for other courts to follow. The court's decision references *Corbett*, a 1970 case from England where in determining sex for marriage purposes, the English court looked to nothing more than the sex at birth.[88] The New Jersey court's reasoning follows.

> We cannot join the reasoning of the Corbett case. The evidence before this court teaches that there are several criteria or standards which may be relevant in determining the sex of an individual. It is true that the anatomical test, the genitalia of an individual, is unquestionably significant and probably in most instances indispensable. For example, sex classification of an individual at birth may as a practical matter rely upon this test. For other purposes, however, where sex differentiation is required or accepted, such as for public records, service in the branches of the armed forces, participation in certain regulated sports activities, eligibility for types of employment and the like, other tests in addition to genitalia may also be important.[89]

Note that the court makes no attempt to reconcile all of these possible sex determinations. It would seem more desirable that a person could acquire and retain a satisfactory sex assignment that they could count on throughout their life, whatever they decide to do, be it ice skating, using a restroom or getting married.

The court continues by rejecting the *Corbett* analysis.

> Against the backdrop of the evidence in the present record we must disagree with the conclusion reached in Corbett that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard. On this score the case has not escaped critical review.
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> Our departure from the Corbett thesis is not a matter of semantics. It stems from a fundamentally different understanding of what is meant by "sex" for marital purposes. The English court apparently felt that sex and gender were disparate phenomena. In a given case there may, of course, be such a difference. A preoperative transsexual is an example of that kind of disharmony, and most experts would be satisfied that the individual should be classified according to biological criteria. The evidence and authority which we have examined, however, show that a person's sex or sexuality

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rampant practice in the courts.).

87 M.T. v. J.T., 140 N.J. Super. 77 (App. Div. 1976).

88 *See* Greenberg, *Gender Assignment, supra* note 20, at 281.

89 M.T. v. J.T., 140 N.J. Super at 89-90.

> embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the "psychological sex of an individual," while not serviceable for all purposes, is "practical, realistic and humane."[90]

This approach, with a focus on being "practical, realistic and humane," can be contrasted with the inquiry into God's intentions that the Kansas Supreme Court will be engaged in over 25 years later. The New Jersey court summed up their finding by stating that:

> [i]n this case the transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment. Plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy. Consequently, plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did do so here. In so ruling we do no more than give legal effect to a fait accompli, based upon medical judgment and action which are irreversible. Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.[91]

The court aimed not only to take a look at the person as a whole but to also look at the social policy behind the medicine. Not only was the person as a whole harmonized, but also medical judgment and the person's actions upon that medical judgment were given legal effect, harmonizing medical reality with the legal reality.[92]

As noted earlier, neither of the two lines of analysis necessarily leads to a conclusive determination of sex. However, the courts do not always need to reach such a conclusion. Allowing for same-sex marriage alleviates some of the barriers to marriage that couples comprised of intersex or transsexual persons encounter.

For example, in *Gardiner* the court concluded that neither definition, male nor female, fit a male-to-female transsexual.[93] The court concluded that because a male-to-female transsexual was not clearly "female," she could not be considered "the opposite sex" of her alleged husband.[94] This same issue would come up if the court were trying to decide if the couple were of the "same sex" where same-sex marriage is allowed. The court in this case tries to match the definitions of "male" and "female" to best satisfy the legislative policy of "one man, one woman."

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[90] *See id.* at 89.

[91] *Id.* at 89-90.

[92] *See id.* at 89.

[93] Gardiner, 273 Kan. at 213.

[94] *Id.* at 215.

Where both same-sex and opposite-sex marriages are allowed it would be harder to ban transsexuals from marriage based on policy concerns since marriage would no longer be limited to a very distinct set of couples. A legislative policy argument would then be less likely to hold up against a couple where one or both partners were transsexual, since many of these couples would classify themselves as "opposite-sex."[95]

Other courts have faced similar quandaries, for example, the court in *Von Hoffburg* pondered whether a female-to-male transsexual could be both male and female, and an Australian court ruled that an intersex person was neither male nor female.[96] Determinations like these are problematic when law would specifically require marriage to be between "one man and one woman," but they are also problematic when the limitation of "opposite sex" is required, for what is the opposite sex of a person with no sex?

The problems remain, although minimally alleviated, when same-sex marriage is allowed. If the court were to determine that a person is neither male nor female, it still has not made a determination as to that person's sex. It is uncertain what the courts would do if faced with a marriage between two intersex individuals. The sex requirement would presumably vary based on the factors used for sex determination. For example, if the court focused on a specific genetic condition as precluding the finding of male or female, then the court could find two people with the same genetic characteristics to be of the "same sex." But the possibility of this occurring is slim: intersex conditions are rather rare, forming a small pool of potential spouses.

However sex is eventually determined, there is another layer to the problem in Massachusetts that can be found in chapter 207, sections eleven through thirteen of the Massachusetts General Laws.[97] One main problem with the enforcement of the statute is that it front-loads the validity of marriage. Although the clerks may never in fact know if the parties before them are intersexed or transsexuals, the fact that the door has been opened for this type of inquiry is troubling.[98] Where otherwise intersex persons and transsexuals are able to marry and—if the marriage is never contested—benefit from the institution for life, now there is cause to engage in a sex determination before ever issuing a license.

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[95] Such couples would also most often consider themselves heterosexual. Notions of sexuality seem to have been merged into the definitions of sex and gender in the law. But someone can be transsexual and at the same time very much heterosexual. When a male-to-female person has a male partner, the couple generally self-identifies as heterosexual and holds itself out as such. The gender expressions of these couples are not rooted in the appearance of partners' genitalia at birth. The outward presentation of these couples would be that of a heterosexual couple. These couples, it seems, should be even more openly accepted than same-sex couples because of their conformation to the heteronormative ideals of typical legislatures.

[96] In Marriage of C and D (1979) 28 A.L.R. 524 (Austl.).

[97] MASS. GEN. LAWS ch. 207, §§ 11–13 (1913).

[98] The greatest variable of the impact of this approach, if any, will most likely be the gender-conformity of each individual who seeks a marriage license.

This may be seen by those who do not believe that intersex couples should be allowed to marry as simply closing a loophole. But the problem is that this issue has not been identified or considered in a vast majority of the states.[99] Putting the burden on the couple to prove that their state would allow them to marry is a rather harsh burden when there is only a handful of states that have approached this question in any way, and even fewer that have taken a reasonable approach.[100]

While significant obstacles may remain for out-of-state couples, in-state couples in which one or more person is transsexual or intersex may benefit greatly from the *Goodridge* decision. The court rejected interpreting marriage to be a union between one man and one woman, to the exclusion of all others, and substituted that wording with "the voluntary union of two persons as spouses, to the exclusion of all others."[101] This case allows for a greater variety of people to marry. While allowing for same- and opposite-sex couples to marry, it opens the door of marriage to those whose sex may be legally questionable. For example, an inquiry into transsexuals' legal sex is no longer necessary, for be they legally male or female, they may still marry anyone of the same or opposite sex. Under the *Cote-Whitacre* case, however, a great emphasis has been placed on investigating inter-state couples who may not be eligible for marriage in their own state.

Cote-Whitacre also has implications for the point in time at which the validity of marriage is challenged. When an inquiry into the nature of a person's sex is made before they are allowed a license, an out-of-state couple in which one of the parties is transsexual or intersex may end up with fewer benefits if they try to marry in Massachusetts than in any other state. In Massachusetts they may be prohibited from getting a marriage license at all, whereas in other states, they might receive a license and marriage benefits until the marriage is challenged.

If a female-to-male transsexual were to marry a biological and psychological female in a state other than Massachusetts, there would be no questions asked. The interaction of *Goodridge* with *Cote-Whitacre* and the 1913 law seems to frustrate the purpose of the court in cementing equality under the Massachusetts legal system.[102]

This new development undermines the spirit of both the *Goodridge* principles of equality, and marriage designed to benefit only those who are heterosexual. In these cases, the couple would be treated better in their home state than under Massachusetts law. The *Cote-Whitacre* decision goes far beyond treating the couple as they would be in their home state. Instead of limiting rights, the *Cote-*

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[99] *See* Greenberg, *Gender Assignment*, supra note 20, at 281-82; *see also* Gardiner, 273 Kan. at 196.

[100] *See* Greenberg, *Gender Assignment, supra* note 20, at 281-82; *see also Gardiner,* 273 Kan. at 196

[101] Goodridge, 440 Mass. at 343.

[102] In practice, the clerks in Massachusetts may not probe the couples as to their gender to any greater degree than clerks in other states.

Whitacre court goes even farther, depriving people of what they could have had if they had not tried to marry in Massachusetts.

The front-loading of the validity question would prohibit many couples from marrying where such a marriage may have never been questioned in their home state. In extending the right to marriage to same-sex couples, the court may have inadvertently triggered a constriction of marriage opportunities for intersex and transsexual people. The *Cote-Whitacre* opinion lists some barriers to marriage in other states—including the fact that a couple is of the same sex—but the court does not appear to specifically contemplate the effects of sex determination by home states.

In Massachusetts, the burden is on the couple to satisfy the clerk that their marriage would be valid in their home state.[103] However, many states have no decisive position on the issue. So whereas before *Cote-Whitacre,* couples with one or more transsexual or intersex partners could marry freely in Massachusetts, the liberalization of marriage to include same-sex marriages created the possibility of a backlash that could prevent some non-resident heterosexual couples from marrying.

The courts stop their sex analysis at the point where they cannot easily peg a person into one category or the other. Under the current "one man, one woman" laws, that is as far as the analysis needs to go, because if the person is not a "man" or a "woman," they cannot enter into a marriage. Allowing for same-sex couples to get married, then, does not alleviate the problem for those people whom the court determines to be outside of the binary.

III. SOLUTIONS

Many of the problems discussed above are systemic. Most stem from a deeply flawed legal system that rests on a sex binary. Some of the problems require reevaluating assumptions at the core of the long tradition of marriage, but they may not necessitate wholesale systemic changes to the law.

Getting away from a binary legal system of sex and gender would be the most comprehensive solution to all of these problems. Law should reflect the realities of the world. If the reasoning behind granting same-sex marriage is that marriage should not be restricted on the basis of sex, then there is no reason why there should be only two sexes eligible for such marriage. Given the political climate in the legislature, there is probably little hope that such a basic change is possible. If that is the case, the solution lies in directing current case law away from such draconian and disparate outcomes.

As long as the 1913 law is enforced and upheld by the Massachusetts courts, it will be up to the other states to change definitions of sex in the marriage context so that their transsexual and intersex residents will be able to marry across state lines, like everyone else. If the legislatures are not ready to abandon the gender

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[103] MASS. GEN. LAWS ch. 207, § 12 (1913).

binary in the marriage laws, self-identification by those who are intersex would be best for all involved. Under such a scheme, the legislature could still limit marriages to two people of the opposite sex, while intersex and transsexual people could self-identify their own sex for the purpose of marriage. The likelihood of sex fraud would be low[104] or at least no higher than it is currently, because as it stands, these cases do not come to light except when the marriage is challenged at a later date. Although sex-identification would force some people to pick a sex that is not in line with their identity, it may be no worse than having the court make a decision years later, when the person has no choice at all.

Different states have different standards for determining the sex of the parties for purposes of marriage. Some states look to the sex of the person at birth, others go by the sex at marriage, and some rely on chromosome testing. Massachusetts itself has no cases involving sex assessment for marriage purposes, but because of the 1913 law[105] the state may have to determine the sex of persons applying for a marriage license if their state of residence has a "one man, one woman" policy.

A proposed constitutional amendment that would limit Massachusetts marriage to "one man and one woman"[106] failed in the legislature in June of 2007.[107] Although supporters of the amendment continue their fight, it is not clear when a new proposal will be presented.[108] Such an amendment would have detrimental effects on a transsexual or intersex person's right to marriage. By denying some transsexual people the right to marry, such an amendment would in some cases ban heterosexual marriages, depending on the method of sex-determination used.

Ideally, marriage would be free of sex—and gender—restrictions.[109] The states that choose to allow same-sex marriage in addition to opposite-sex marriage have not solved the legal marriage problems that transsexual and intersex people face. The issue may, at the core, be one of legislative interpretation and statutory construction. The court in *Gardiner* said that "[i]f the legislature intended to include transsexuals, it could have been a simple matter to do so."[110]

However, in reality such issues are probably not even contemplated by individual legislators and legislatures. In a state like Massachusetts, where the marriage statute does not specify sex and the extension of marriage rights to same-sex couples occurs through the courts, that argument is poorer still. Where the legislature actively chooses to extend marriage rights to same-sex couples, the issue

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104 Greenberg, *Intersexuality, supra* note 16, at 307-08.

105 MASS. GEN. LAWS ch. 207, §§ 11–13 (1913).

106 H.R. 653, 184th Gen. Ct. (Ma. 2005).

107 Phillips, *supra* note 41, at http://www.boston.com/news/globe/city_region/breaking_news/2007/06/reaction_to_the.html.

108 *Id.*

109 *See generally* Randi Frankle, Comment, *Does a Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage*, 30 FORDHAM URB. L.J. 2007 (2003).

110 Gardiner, 273 Kan. at 214.

of transsexuals might very well not be considered. The approach, then, should be to ask what the legislature would have done had it considered the issue, rather than assume that because nothing was said about transsexuals, the legislature chose to exclude them from the marriage statute.

Because no record remains of the motivations behind the passage of the 1913 law, it may just be a matter of Massachusetts giving its neighbors time to adjust before the law is put out of use once again.

CONCLUSION

Some designations in biology—being a member of the human species, for example—are acceptable standards for marriage, but the requirement that one should have certain physical characteristics makes little sense. Consider the following example:

> Imagine the public furor that would erupt if Jake, a young, wounded veteran of the Iraq conflict returned home after an arduous rehabilitation, intending to marry his high school sweetheart Ashley and was denied a marriage license because of his wounds: the loss of his penis and testicles thanks to a land mine.[111]

Few people would dare question whether Jake was still male. Why, then, when a surgeon causes the same type of mutilation, is someone's sex challenged?

The Massachusetts courts have confirmed that the right to marry a person of one's choosing extends to gay, lesbian and bisexual persons. However, intersex and transsexual Massachusetts residents are left in limbo, and non-residents may be worse off than before, depending on the certainty of their sex and their sexual orientation.

Having to reconcile the inflexible legal binary system with the true diversity of human life, the courts have been forced to make ill-fitting judgments. The legal system, especially marriage laws, are based on false assumptions about basic human biology. Additionally, to some extent, the fact that marriage is based on human biology is itself problematic. Generally, when medical advances are made, the law adjusts accordingly. There is no reason why it should not do the same in light of a better understanding of human sexuality. The law should not be so inflexible as to frustrate its own purpose of equality and justice.

Further actions by the various states will determine what groups of people, if any, will benefit from the rights recognized by Massachusetts.

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[111] Michael L. Rosin, *Intersexuality and Universal Marriage*, 14 LAW & SEX. 51, 52-53 (2005).