REMOVAL OF THE IMPEDIMENT: THE STATE OF TRANSGENDER MARRIAGE IN MONTANA

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I. Introduction

Montana has not addressed whether a marriage involving a transgender person is legal, although the presence of the transgender community in recent Montana news should signal this issue is on the horizon.[1] The term "transgender" is defined as "those [people] whose psychological self ("gender identity") differs from the social expectations for the physical sex."[2] The National Center for Transgender Equality estimates between 0.25 to 1.0 percent of the United States population identifies as transgender.[3] Applying these nationwide estimates to the Montana population suggests approximately 2,500 to 10,000 transgender persons live in Montana.[4] Montana will eventually have to address the issue of marriage among the trans-

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1. *See e.g.* Keila Szpaller, *Citing Restroom Safety, NotMyBathroom.com Opposes Missoula Anti-Discrimination Ordinance*, Missoulian, http://missoulian.com/news/local/citing-restroom-safety-notmybathroom-com-opposes-missoula-anti-discrimination-ordinance/article_2fd30e58-37ba-11df-abb6-001cc4c002e0.html (May 25, 2010) (This article discusses the Missoula non-discrimination ordinance that protects transgender persons from discrimination based on gender identity. Opponents argued that women and children would be subject to increased sexual assaults as a result of allowing transgender people into public restrooms that did not conform with their genitalia.). *See also* Gwen Florio, *Transgender UM Student Wins Restraining Order against Sexual Assault Suspect*, Missoulian, http://missoulian.com/news/state-and-regional/transgender-um-student-wins-restraining-order-against-sexual-assault-suspect/article_89aeefea-091e-11e2-843e-0019bb2963f4.html (Sept. 27, 2012).

2. Gender Equity Resource Center, *Definition of Terms*, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#transgender (accessed Mar. 21, 2012).

3. National Center for Transgender Equality, *Understanding Transgender*, http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf (May 2009). Other groups have estimated the population to be between 2.0 to 5.0 percent. Transgender Law & Policy Institute, *Transgender Issues: A Fact Sheet*, http://www.transgenderlaw.org/resources/transfactsheet.pdf (accessed Mar. 21, 2013). A precise number of persons who identify as transgender is unknown because the U.S. Census Bureau does not track the population and many transgender persons are secretive about their identity.

4. This is only an estimate. A definitive number of transgender persons in Montana has never been confirmed.

gender population. Because current Montana matrimonial laws do not address the transgender population, the Montana courts will likely determine the validity of transgender marriage.

Transgender people in Montana face the situation where they could be legally recognized as one sex for some purposes and another sex for others. For instance, Montana permits transgender persons to legally change drivers' license sex designations even if surgery has not been performed;[5] on the other hand, Montana only permits *postoperative* transgender persons to legally change birth-assigned sex on birth certificates.[6] Interestingly, in order to obtain a marriage license in Montana, applicants can present *either* a driver's license *or* a birth certificate as identification.[7] The question of whether a transgender person is required to have surgery for his or her sexual identity to be recognized for marriage purposes still remains.

Transgender persons struggling to have their self-identified sexes legally recognized view amending birth certificates as fundamentally necessary in order to ensure legal congruity with their self-identified sexes.[8] However, most transgender persons do not undergo sex reassignment surgery[9] and are thus barred from changing birth certificate sex designations in Montana. A state employee in charge of amending sex designations on Montana birth certificates has recently indicated that, to her knowledge in the last two decades, approximately a dozen transgender persons in Montana have amended their birth certificates after undergoing sex reassignment surgery.[10] Consistent with nationwide findings, this evidence suggests the vast majority of transgender persons living in Montana have not undergone sex reassignment surgery.

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5. Email from Patrick McJannet, Montana DOJ/MVD, CDL & Audit Section Supervisor (Jan. 10, 2013, 10:05 MST) (copy on file with author); *see also* State of Montana Motor Vehicle Division, *Driver Licensing Bureau Procedures Manual* 300.6.1 ("Any individual who presents a letter from their physician stating that they are in the process of a gender change may have a driver license issued with the proposed gender change (it will not be necessary for the individual to present a statement showing the process is completed).").

6. Admin. R. Mont. 37.8.311(5) (2012). Montana requires "a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of an individual born in Montana has been changed by surgical procedure." *Id.* Montana statutory and case law have not addressed whether amended sex designations on birth certificates are valid for marriage purposes.

7. Mont. Code Ann. § 40–1–203(1) (2011).

8. Jody Lynee Madeira, *Law As a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. Pa. J. Const. L. 128, 145 (2002).

9. Deborah J. Anthony, *Caught in the Middle: Transsexual Marriage and the Disconnect between Sex and Legal Sex*, 21 Tex. J. Women & L. 153, 186 (2012).

10. Telephone Interview with Anonymous Employee, Office of Vital Statistics, Helena, Montana (Apr. 18, 2012). The employee indicated that this is only an estimate from work experience and that the exact number is not tracked.

Montana's constitutional and statutory laws prohibiting same-sex marriage present barriers transgender people must overcome before their marriages are legally recognized.[11] Montana Code Annotated § 40–1–401 prohibits specific types of marriages: marriages between already married persons; marriages between certain blood relatives; and marriages between persons of the same sex.[12] The statute also provides that prohibited marriages can be cured through "the removal of the impediment."[13] Although marriages between blood relatives are incurable, marriages between already married persons and between persons of the same sex can be cured. An already married person who marries another spouse can divorce one spouse. Additionally, if traditional definitions of "sex" are used in the interpretation of § 40–1–401, transgender persons can likely avoid Montana's ban on same-sex marriage through sex reassignment surgery or "the removal of the impediment."[14] To illustrate, under current Montana law, a transgender-identified female classified as male at birth who marries another male could have this otherwise legally prohibited marriage recognized through sex reassignment surgery. In this scenario, a transgender person in Montana who has undergone sex reassignment surgery could argue that the legal barrier or "impediment" prohibiting same-sex marriage has been removed.

Transgender persons who have not undergone sex reassignment surgery should also be able to avoid Montana's same-sex marriage ban because requiring a transgender person to undergo surgery in order to obtain a legally recognized status violates both equal protection and privacy as guaranteed by the Montana Constitution.[15] This article advocates for the adoption of a principled, subjective definition of sex that respects the sexual identity of transgender persons. Montana should recognize a transgender person's self-identified sex rather than relying upon the flawed objective model used by other states, which forces transgender persons to conform to traditional notions of sex and gender.[16] A legal definition of "sex" should

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11. Mont. Const. art. XIII, § 7; Mont. Code Ann. § 40–1–401.

12. Mont. Code Ann. § 40–1–401.

13. *Id.*

14. Currently, no Montana cases have been reported where a same-sex couple has attempted to gain legal recognition of their marriage through this route. Montana legislators vehemently against same-sex marriage would likely want to tighten the current statute to foreclose this potential avenue.

15. *See* Anthony, *supra* n. 9, at 179–186. Anthony argues that denying transgender persons the right to marry violates the Equal Protection Clause of the United States Constitution's Fourteenth Amendment because it discriminates on the basis of sex. Further, Anthony argues that federal due process privacy protections are also violated when the government requires that genitalia match sexual identity for marriage purposes.

16. The current DSM-IV uses the term "Gender Identity Disorder" when referring to transgender persons. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576 (4th ed., rev. 2000). The term "Gender Identity Disorder" is currently being reevaluated by the American Psychiatric Association. Gender Identity Disorder will likely be replaced in the DSM-V because the term falls short of capturing the whole spectrum of gender variance. Peggy Cohen-Kettenis &

protect privacy, guarantee equal protection of the laws, and include all transgender people within its meaning.[17] Subjectively defining "sex" respects an individual's self-identified sexual identity and aligns the plurality of gender expressions with the individual rights and freedoms protected by the Montana Constitution.

As of the date of this article, no Montana court has explicitly addressed transgender marriage. Of the numerous state courts outside Montana that have addressed transgender marriage, traditional, objective definitions of sex were used that fail to protect the privacy of transgender people and fail to apply laws equally throughout the entire transgender community. This article surveys in depth those out-of-state cases to illustrate the inconsistent reasoning courts have applied when addressing transgender marriage. Then, this article examines contemporary Montana cases regarding gay and lesbian privacy and equal protection. Synthesizing these sources, this article suggests that Montana pioneer transgender marriage recognition through the use of a subjective definition of sex and offers solutions for achieving both legal marriage rights for the entire transgender community and social acceptance of transgender persons. Specifically, transgender persons must be included in the struggle for gay and lesbian marriage equality, Montana should adopt gender-neutral marriage legislation, and Montana should define sex subjectively.

II. A Plurality of Gender Expressions

Montana case law problematically uses the terms "sex" and "gender" interchangeably;[18] however, this article takes the position that these terms should remain distinct from one another. Using the terms "sex" and "gender" interchangeably supports the incorrect assumption that biological and gender expression always align. The term "sex" refers to an individual's biological sexual expression, while the term "gender" is much broader and

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Friedemann Pfäfflin, *The DSM Diagnostic Criteria for Gender Identity Disorder in Adolescents and Adults*, 39 Archives of Sexual Behavior 499 (2010).

17. *See e.g.* Anthony, *supra* n. 9, at 186.

18. *See Donaldson v. State*, 292 P.3d 364, 368 (Mont. 2012) ("sex" and "gender" used interchangeably to refer to same-sex marriage); *Baldridge v. Bd. of Trustees, Rosebud Co. Sch. Dist. No. 19, Colstrip, Mont.*, 951 P.2d 1343, 1348 (Mont. 1997) (teacher's comments about students' testes and menstrual cycles were inappropriate remarks based on "sex or gender"); *Stringer-Altmaier v. Haffner*, 138 P.3d 419, 423 (Mont. 2006) (sexual harassment does not occur when remarks are made regardless of "gender" or "sex"); *Williams v. Joe Lowther Ins. Agency, Inc.*, 177 P.3d 1018, 1023 (Mont. 2008) (employer retaliatory threats because of refused sexual favors is harassment based on "gender or sex"); *Snetsinger v. Mont. U. Sys.*, 104 P.3d 445, 466 (Mont. 2004) (Nelson, J., specially concurring) (laws or policies "based on gender or sexual orientation are suspect classifications in their own right"); *Stone v. Belgrade Sch. Dist. No. 44*, 703 P.2d 136, 141 (Mont. 1984) (employer can discriminate on basis of gender when position requirements demand specific sex to perform job); *Gryczan v. State*, 942 P.2d 112, 122 (1997) (homosexual activity referred to as "same-gender sexual conduct").

refers to the social and psychological expression of a person's sexual identity.[19] The terms "male" and "female" are typically used to describe a person's sex, while the terms "masculine" and "feminine" are typically used to describe one's gender.[20] However, male/female and masculine/feminine are binary opposites that do not encompass the multitude of sex and gender expressions that fall somewhere within the spectrum of sex and gender expressions.[21]

A definition of sex inclusive of all transgender people should encompass the sex and gender diversity that constitutes the entire transgender community. Gender expression within the transgender population is extremely varied, and "there is no prototypical transgender experience."[22] For instance, some transgender individuals identify as the opposite biological sex and are willing and able to undergo surgical procedures in order to achieve that goal. On the other hand, many transgender persons do not want to surgically alter their bodies to change their physical appearance, even though their biological sexes do not match their gender expressions. Sexual orientation within the transgender community varies as much as it does within the general population. Transgender people identify as straight, gay, bisexual, and queer.[23] Some transgender persons are attracted to biological men, some are attracted to biological women, and some are attracted to other transgender people.[24] An objective, linear continuum from masculine to feminine does not fully encompass the three-dimensional "gender galaxy"[25] comprised of countless combinations of gender expressions, identities, biological sexes, and orientations of varying degrees. Defining sex subjectively acknowledges individual sexual identity, encompasses the gender diversity of the transgender community, and would assist transgender people in gaining legal recognition of their marriages.

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19. Amy Ballard, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 Cardozo J.L. & Gender 775, 779–780 (2012).

20. *Id.* at 779–780.

21. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 Mich. J. Gender & L. 253, 260 (2005).

22. *Id.* at 271.

23. A straight identification refers to being attracted to the opposite sex; a gay identification refers to being attracted to the same sex; and a bisexual identification refers to being attracted to persons of the same and opposite sex. *See id.* at 270–271. The term "queer" is defined as a person who rejects heterosexual social constructs. "Queer" is often used to unite non-normative sexual communities against the heterosexual majority for political purposes. Frederick D. King, *Queer Spaces and Strategic Social Constructions in Rao's* The Boyfriend, 1 The Word Hoard 35, available at http://ir.lib.uwo.ca/wordhoard/vol1/iss1/5 (July 5, 2012).

24. Vade, *supra* n. 21, at 271.

25. *Id.* at 278. Dylan Vade coined the term "gender galaxy." According to Vade, we need to "work toward a world in which all people and all gender locations [in the gender galaxy] are supported, recognized, and protected by the law." *Id.*

III. The Current State of Transgender Marriage in Montana

Montana clearly bans marriage between two persons of the same sex. The Montana Constitution, as amended in 2004, provides that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state."[26] The corresponding legislation appears as part of § 40–1–401, which provides that "a marriage between persons of the same sex [is prohibited]." Neither the Montana Constitution nor the legislation defines the terms "man," "woman," or "sex," apparently assuming that every Montanan fits into an obvious category. This assumption defies reality and ignores the estimated 2,500 to 10,000 transgender persons currently living within Montana.[27] The Montana Supreme Court has addressed the issue of same-sex marriage on three occasions, and none of those cases involved transgender persons.[28] Thus, the legality of transgender marriage in Montana is unknown.

Montana law provides that same-sex marriages are illegal without giving any indication how same-sex marriage should apply to the transgender community. The absence of legislative and/or judicial definitions of what constitutes a person's "sex" for marriage purposes has left the transgender community in Montana in legal limbo. "Sex" for marriage purposes has been defined in other jurisdictions in one of the following four ways: (1) presence and functional ability of genitals; (2) birth certificate designation; (3) physician designation given at birth; and (4) physical sex at the time of marriage solemnization.[29] All of these standards for defining sex for marriage purposes have presented problems for the transgender community and have been used inconsistently to invalidate the marriages of transgender individuals.[30] Although Montana law gives no guidance on how sex should be defined in transgender marriage, § 40–1–401 provides a potential avenue for transgender persons seeking to gain legal acceptance of prohibited same-sex marriages.

Section 40–1–401 prohibits numerous types of marriages, such as those entered between already married persons, blood relatives, and persons of the same sex. The most interesting aspect of § 40–1–401 is its second subsection that legislatively approves a proscribed marriage once the basis of the proscription—the so-called impediment—is eliminated. Section 40–1–401 provides:

Prohibited marriages—contracts.

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26. Mont. Const. art. XIII, § 7.

27. National Center for Transgender Equality, *supra* n. 3.

28. *See Donaldson*, 292 P.3d 364; *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009); *Snetsinger*, 104 P.3d 445.

29. Anthony, *supra* n. 9, at 174.

30. *See* Section IV *infra.*

> (1) The following marriages are prohibited:
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> (a) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties;
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> (b) a marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood, or between first cousins;
>
> (c) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood;
>
> (d) a marriage *between persons of the same sex*.
>
> (2) Parties to a marriage prohibited under this section who cohabit *after removal of the impediment are lawfully married as of the date of the removal of the impediment*.
>
> (3) Children born of a prohibited marriage are legitimate.
>
> (4) A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy.[31]

If a marriage is prohibited because both individuals are male and one of them undergoes sex reassignment surgery and amends his birth certificate to become legally female, then the second subsection of the statute would be satisfied, and the marriage arguably would be legally valid. However, not all transgender people are willing or able to undergo sex reassignment surgery. A person born male recognized in the community as female who lives her life as a female, but does not undergo surgery, would not likely be able to gain legal recognition of her marriage to another male under § 40–1–401. Although this scenario has not presented itself in Montana courts, it appears that Montana law would require sex reassignment surgery to avoid the same-sex marriage ban.[32]

Only recognizing a transgender person's postoperative sex raises both privacy and equal protection issues. The state would infringe upon a transgender person's privacy rights by examining a person's genitals, and the state would violate equal protection by only recognizing a postoperative transgender person's sex while not recognizing the sex of a transgender person who has not undergone surgery. Sections 10 and 4 of Article II of the Montana Constitution provide, respectively:

> Right of privacy.
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> The right of individual privacy is essential to the well-being of a free society and *shall not be infringed without the showing of a compelling state interest*.[33]

> Individual dignity.
>
> The dignity of the human being is inviolable. *No person shall be denied the equal protection of the laws*. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his

31. Mont. Code Ann. § 40–1–401 (emphasis added).
32. *See* Admin. R. Mont. 37.8.311(5) (discussed *supra* n. 6).
33. Mont. Const. art. II, § 10 (emphasis added).

> civil or political rights on account of race, color, *sex*, culture, social origin or condition, or political or religious ideas.[34]

"Sex" is a complex concept, and Montana law does not acknowledge this complexity. A person's sex is not composed of mere external biological features. The following eight factors have been shown to determine an individual's sex: (1) chromosomal sex; (2) gonadal sex; (3) internal morphologic sex; (4) external morphologic sex; (5) hormonal sex; (6) phenotypic sex; (7) assigned sex and gender rearing; and (8) sexual identity.[35] Sexual identity should be the dispositive factor in determining one's legal sex because state inquiries into the other factors infringe upon constitutional rights.[36] Defining "sex" subjectively would make sexual identity the dispositive factor.

IV. Transgender Marriage Outside Montana

Because Montana courts have not yet addressed transgender marriage, they are likely to look at precedent from other jurisdictions, but other jurisdictions provide little useful guidance. Marriage laws recognizing a transgender person's right to self-identify are virtually non-existent.[37] Typically, courts apply existing laws not created with transgender people in mind to transgender marriage issues.[38] Courts that have adjudicated transgender marriage have failed to recognize the complexity of sex and gender by imposing a binary construct of sex—masculine/male and feminine/female—upon transgender persons. If all transgender persons are to be included within the meaning of sex, Montana will have to define sex differently from other jurisdictions.

Few states have adjudicated transgender marriage, and the courts that have had the opportunity have applied shifting logic and reasoning. Of the following seven jurisdictions examined in this article, only one found trans-

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34. Mont. Const. art. II, § 4 (emphasis added).

35. Rachel Duffy Lorenz, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. Rev. 553 (2005) (arguing that birth sex should not be dispositive but only one of the eight factors in determining an individual's sex for legislative purposes).

36. *See e.g.* Ballard, *supra* n. 19, at 799.

37. The word "virtually" is used here because nearly all gender-neutral statutory language drafted for the benefit of same-sex couples is inclusive of transgender populations by default, except in New York. *See* N.Y. Dom. Rel. § 10–a discussed *infra* Part IV, Section C. New York marriage laws recognize a transgender person's right to self-identify through mandates requiring gender-neutral legislation and recognition of individuals who have been a "different sex." Thus, the New York statute contemplates the existence of the transgender community. *See also* Vt. Stat. Ann. tit. 15, § 8; Conn. Gen. Stat. Ann. § 46b-20; Md. Fam. Law Code Ann. § 2-201(b); D.C. Code § 46-401(a); N.H. Rev. Stat. § 457:1-a; Wash. Rev. Code Ann. § 26.04.020(3). These statutes merely define marriage as between two people, persons, or individuals. They do not specifically address the transgender community.

38. Vade, *supra* n. 21, at 297.

gender marriage legally valid.[39] The other six jurisdictions have inconsistently-reasoned decisions, but have all precluded transgender persons from obtaining legally recognized marriages.[40] This section first explores transgender marriage cases from jurisdictions that currently have same-sex marriage bans, followed by a discussion illustrating the problems applying the logic of these jurisdictions to Montana. Then, transgender marriage cases from jurisdictions in which same-sex marriage or civil unions are currently recognized are discussed, followed by a brief analysis of those jurisdictions.

A. Transgender Marriage in States with Same-Sex Marriage Bans

1. Kansas

Like Montana, the Kansas Constitution and statutes define marriage as between one man and one woman.[41] In *In re Estate of Gardiner*,[42] J'Noel Gardiner transitioned from male to female and amended her birth certificate in the state of Wisconsin following the surgery.[43] J'Noel had her driver's license, passport, and other official documents changed to reflect her sex as female while living in Wisconsin.[44] J'Noel later married Marshall Gardiner, a biological male, in Kansas. At the time of their marriage, Marshall was aware that J'Noel had changed her sex. The following year, Marshall suddenly passed away intestate. Joe Gardiner, Marshall's son, opposed J'Noel's interest in Marshall's estate, claiming the marriage was a fraud because J'Noel and Marshall were both men.[45] The Kansas trial court declined "to give full faith and credit to J'Noel's Wisconsin birth certificate" holding that Kansas did not have to recognize an amended birth certificate from another state.[46] The district court found in favor of Joe Gardiner. J'Noel and Marshall's marriage was ruled void as a matter of law because

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39. *See M. T. v. J. T.*, 355 A.2d 204 (N.J. Super. App. Div. 1976) (discussed *infra* Part IV, Section C).

40. *See In re Est. of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App., San Antonio 1999); *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. 2d Dist. App. 2004); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. 1987); *In re Marriage License for Nash*, 2003-Ohio-7221, 2003 WL 23097095 (Ohio App. 11th Dist. Dec. 31, 2003); *B v. B*, 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (discussed *infra* Part IV, Sections A and C).

41. Kan. Const. art. XV, § 16 ("Marriage shall be constituted by one man and one woman only."); Kan. Stat. Ann. § 23–2508 (2012) ("It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman."); Kan. Stat. Ann. § 23–2501 (Marriage is "between two parties who are of opposite sex . . . [and] . . . [a]ll other marriages are declared to be contrary to the public policy of this state and are void.").

42. *In re Est. of Gardiner*, 42 P.3d 120.

43. *Id.* at 122–123.

44. *Id.* at 124.

45. *Id.* at 123.

46. *Id.*

J'Noel was legally male. Hence, J'Noel had no legal claims to her husband's estate.[47]

On appeal, the Kansas Supreme Court determined that the Kansas Legislature did not intend to include transgender persons when drafting statutes recognizing marriage as only between one male and one female. The Court interpreted "the legislative silence [in regards to transgender marriage] to indicate that transsexuals are not included."[48] As such, if prohibitions against same-sex marriage are ever lifted in Kansas, transgender persons may nonetheless continue to be barred from marriage because they possess no legal sex status for marriage purposes.

The Court held "the words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."[49] It stated, "'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria."[50] The Court defined male as "the sex that fertilizes the ovum and begets offspring" and female as "the sex that produces ova and bears offspring."[51] The Court further held that the male-to-female transgender individual is not female as a matter of law because she lacks a "womb, cervix, [and] ovaries."[52] The Court concluded, "J'Noel remains a transsexual, and a male for marriage purposes" and upheld the lower court ruling voiding her marriage to Marshall on the grounds that it was a same-sex marriage.[53] In dicta, the Court essentially barred postoperative transgender persons from marriage because they lack a legal sex status and stripped them of a sexual identity for marriage purposes.[54]

2. *Texas*

Texas, like Kansas and Montana, prohibits marriage between members of the same sex in both its constitution and statutes.[55] Texas courts, using traditional definitions of sex, have determined that a person's birth sex can never be changed. In *Littleton v. Prange*,[56] Christie Cavazos, a male-to-

47. *Id.*
48. *In re Est. of Gardiner*, 42 P.3d at 136.
49. *Id.* at 135.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 137.
54. *In re Est. of Gardiner*, 42 P.3d at 136.
55. Tex. Const. art. I, § 32 ("Marriage in this state shall consist only of the union of one man and one woman."); Tex. Fam. Code Ann. § 6.204 (2011) (This statute also bans the recognition of any other state's legally recognized same-sex marriages and domestic partnerships.); Tex. Fam. Code Ann. § 2.001 (This statute prohibits marriage licenses to be issued to persons of the same sex.).
56. *Littleton*, 9 S.W.3d 223.

female transgender person, met and married Jonathon Littleton, a biological male, in Kentucky in 1989.[57] The couple moved to Texas, and in 1996, Jonathon died while in the care of a physician. Christie filed a medical malpractice suit against the physician in Texas. The trial court dismissed Christie's case on summary judgment because as a male, Christie could not be the surviving spouse of another male and was not entitled to sue on behalf of her dead husband.[58] During the proceedings, Texas allowed Christie to officially change the sex designation on her Texas birth certificate to female.[59] The trial court that permitted the birth certificate change considered the original birth certificate inaccurate as a result of the sex reassignment and permitted the change. Yet, the Texas Court of Appeals invalidated the birth certificate sex change, finding that Christie's original birth certificate was not inaccurate at the time it was originally recorded. According to the appellate court, the court that permitted the change was merely performing ministerial duties and failed to consider "the deeper public policy concerns presented" by permitting such a change.[60] Thus, Christie's marriage was found invalid, and her amended Texas birth certificate was not binding on the appellate court for marriage purposes. The court reasoned, "There are some things we cannot will into being. They just are."[61]

A person will always be his or her birth sex for marriage purposes under the constraints of Texas law; sex is an immutable characteristic legally unchangeable.[62] The Texas Court of Appeals determined that a physician cannot change the "gender of a person with a scalpel, drugs and counseling."[63] The court stated, "as a matter of law . . . Christie Littleton is a male. As a male, Christie cannot be married to another male."[64] If birth sex is unchangeable as the Texas court proclaimed, a postoperative male-to-female transgender person could argue that her marriage to a biological woman is valid even though same-sex marriage is prohibited in Texas. Hence, the rule developed in *Littleton* arguably permits same-sex marriages in such cases. The court never considered that a postoperative transgender person may identify as gay or lesbian and that its holding may lead to same-

57. *Id.* at 225.

58. *Id.*

59. *Id.* at 226.

60. *Id.* at 231.

61. *Id.*

62. *Littleton*, 9 S.W.3d at 231.

63. *Id.* at 224. In its opinion the court uses the terms "sex" and "gender" interchangeably. The court also makes a point of noting that in referring to Christie as she, rather than he, they were only respecting the wishes of Christie, and that there was no legal bearing on its use of the feminine pronoun.

64. *Id.* at 231. The Texas court did not prohibit Christie from marrying a biological female.

sex marriages between postoperative transgender persons and people of the same biological sex.

3. Florida

Same-sex marriages and same-sex domestic partnerships are prohibited in Florida statutes and the Florida Constitution.[65] In *Kantaras v. Kantaras*,[66] Michael Kantaras, a female-to-male transgender person, married Linda Kantaras after Michael underwent transition surgery.[67] Michael's transition-related medical procedures "included hormonal treatments, a total hysterectomy, and a double mastectomy."[68] At the time of their marriage, Linda was pregnant by a former boyfriend. Michael adopted Linda's son. In 1992, the couple had a daughter through artificial insemination, and Michael was named the father.[69]

In 1998, Michael filed for marriage dissolution and sought to obtain custody of both children. Linda argued that the marriage was void as a matter of law because Florida prohibits same-sex marriage and also banned same-sex adoption at that time.[70] Although Michael technically still had a vagina, a physician testified that medicine had enlarged and elongated Michael's clitoris and, as a result, Michael's clitoris resembled a penis.[71] During the dissolution proceeding, the trial court weighed the following factors when determining Michael's sex: (1) birth sex; (2) chromosomal sex; (3) self-identity; (4) transition-related medical treatments; (5) spousal knowledge of sex reassignment; (6) social holding out as self-identified sex; and (7) legal modification of identification documents such as driver's licenses, passports, and birth certificates.[72] After weighing these factors, the trial court concluded that Michael was legally male and entitled to primary custody of the children.[73]

Despite the trial court's careful consideration of a multitude of factors in determining Michael's sex for marriage purposes, the Florida District Court of Appeals reversed. The court held that a postoperative female-to-male transgender person cannot marry a biologically-born female and any such marriage is void as a matter of law.[74] The court further noted that it

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65. Fla. Stat. Ann. § 741.212 (2012); Fla. Const. art. I, § 27.

66. *Kantaras*, 884 So. 2d 155.

67. *Id.* at 155–156.

68. *Id.* at 155.

69. *Id.* at 156.

70. *Id.*; *see also* Fla. Stat. Ann. § 63.042 (held unconstitutional by *Fla. Dept. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. 3d Dist. App. 2010)).

71. *Kantaras*, 884 So. 2d at 157.

72. *Id.* at 156.

73. *Id.*

74. *Id.* at 155.

"must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth."[75] After declaring the marriage between Michael and Linda void, the court did not address the primary custody issue and remanded the case to the trial court for that determination.[76] The Florida Supreme Court upheld the appellate court and declared the marriage void.[77] Michael and Linda eventually settled their custody dispute in 2005, with Michael obtaining joint custody of the children.[78]

4. Ohio

Same-sex marriages are not recognized in Ohio and have "no legal force or effect."[79] Two lower Ohio courts have dealt with transgender marriage issues, but the Ohio Supreme Court has yet to address transgender marriage. In *In re Ladrach*,[80] Elaine Ladrach, a male-to-female transgender person, married and divorced two women while a biological man, prior to undergoing transition surgery.[81] After undergoing her sex change, Elaine attempted to marry a man and was denied a marriage license. Elaine disclosed that she previously married two women on her marriage license application. She submitted a physician's letter to the court confirming that a sex change had been performed but to no avail.[82] Elaine later attempted to amend her birth certificate to show she was female, and the court denied her petition, reasoning that the birth certificate was an historical record of birth.[83] The Ohio Probate Court, in a manner similar to the Texas Court of Appeals, stated that Elaine was "correctly designated 'Boy' on his birth certificate" and therefore could not "obtain a marriage license as a female person."[84] The birth certificate, which could not be changed in Ohio, provided conclusive evidence that Elaine was a man.[85]

In a more recent case, an Ohio appellate court also addressed transgender marriage. In *In re Marriage License for Nash*,[86] Jacob Benjamin Nash was born Pamela Ann Nash.[87] In 1999 while in Massachusetts,

75. *Id.* at 161.
76. *Id.*
77. *Kantaras v. Kantaras*, 898 So. 2d 80 (Fla. 2005).
78. Chris Tisch, *Transsexual, Ex-Wife Settle Custody Fight*, St. Petersburg Times, http://www.sptimes.com/2005/06/11/Tampabay/Transsexual__ex_wife_.shtml (June 11, 2005).
79. Ohio Rev. Code Ann. § 3101.01(C)(1) (2012); Ohio Const. art. XV, § 11.
80. *In re Ladrach*, 513 N.E.2d 828.
81. *Id.* at 829.
82. *Id.*
83. *Id.* at 831.
84. *Id.* at 832.
85. *Id.*
86. *In re Marriage License for Nash*, 2003 WL 23097095.
87. *Id.* at *1.

Pamela married and divorced a biological man before transitioning into Jacob. In 2002, while still living in Massachusetts, Jacob changed his birth certificate to reflect his postoperative sex.[88] Jacob moved to Ohio and obtained an Ohio driver's license designating Jacob as a male.[89] Jacob then met Erin Barr, a biological female, and applied for a marriage license.[90] Jacob and Erin were denied their marriage license because "the court noticed the previous court entry granting Nash's name change from Pamela Ann Nash to Jacob Nash."[91] The Ohio Court of Appeals held that the trial court did not have to give full faith and credit to the out-of-state birth certificate because "to do so would violate clear Ohio public policy."[92] Ohio only permits the change of a sex designation on a birth certificate to correct errors or mistakes made in the production of the original birth record.[93] The court further noted, "Even if Ohio permitted changes to the sexual designation as noted on the original birth certificate, this would not affect the clear public policy authorizing and recognizing only marriages between members of the opposite sex."[94] Unlike the court in *In re Ladrach*, the court here determined a birth certificate was not conclusive evidence of one's sex.[95] Rather, in an effort to uphold public policy against same-sex marriage, the *In re Nash* court would essentially permit same-sex marriage between a postoperative transgender person and a person of the same biological sex.

5. *Illinois*

Montana Code Annotated § 40–1–401 and Illinois Compiled Statutes Annotated 750 § 5/212 are strikingly similar.[96] Like Montana, the Illinois statute prohibits marriages between persons of the same sex.[97] Further, just like the Montana statute, the Illinois statute provides that "[p]arties to a marriage prohibited . . . who cohabit *after removal of the impediment are lawfully married as of the date of the removal of the impediment*."[98] Also

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *In re Marriage License for Nash*, 2003 WL 23097095 at *9.

93. *Id.* at *6.

94. *Id.*

95. *Id.*; *see also Ladrach*, 513 N.E.2d at 832.

96. *Compare* Mont. Code Ann. § 40–1–401 *with* Ill. Comp. Stat. Ann. 750 § 5/212 (2013).

97. Ill. Comp. Stat. Ann. 750 § 5/212(a)(5).

98. Ill. Comp. Stat. Ann. 750 § 5/212(b) (emphasis added). Unlike Montana, Illinois does not have a constitutional ban on same-sex marriages.

similar to Montana, Illinois allows a transgender person to change his or her birth certificate after sex reassignment surgery.[99]

In 2005, a transgender man in Illinois unsuccessfully argued the Illinois "removal of the impediment" statute as the basis for the legal recognition of his marriage. In *In re Marriage of Simmons*,[100] Robert (born "Bessie Cornelius Lewis") and Jennifer Sterling were married in 1985.[101] During their marriage, Robert and Jennifer had a child through artificial insemination. Robert had an outward appearance of a man, had lived as a man for most of his life, and had taken testosterone for many years. In 1991, Robert "underwent a total abdominal hysterectomy and a bilateral salpingo-oophorectomy, which removed his uterus, fallopian tubes and ovaries."[102] In 1994, Robert changed his Illinois birth certificate to reflect his postoperative sex using an affidavit signed by his surgeon stating a sex reassignment surgery was performed.[103]

In 1998, Robert filed for dissolution of his marriage and for sole custody of his minor child.[104] The trial court denied the petition for dissolution finding the marriage was an invalid same-sex marriage. Jennifer was given sole custody of the child; Robert was deemed to lack parental standing to pursue custody, although the court granted Robert visitation.[105] Robert argued his marriage to Jennifer was valid since they "cohabited after removal of the impediment."[106] Robert also contended his birth certificate was proof that Illinois recognized his status as a male. The appellate court, however, determined his " 'impediment' [had] never been removed because while he [had] undergone surgeries to remove his internal female organs, he still possesses all of his external female genitalia and requires additional surgeries before sex reassignment can be *considered completed*."[107] The court further held that "the mere issuance of a new birth certificate cannot, legally speaking, make petitioner a male."[108] The court noted the State Registrar would not have issued the new birth certificate if it knew that Robert still had female genitalia.[109] Robert's marriage was invalidated, and

99. Ill. Comp. Stat. Ann. 410 § 535/17(d) ("An affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed. The State Registrar of Vital Records may make any investigation or require any further information he deems necessary.").

100. *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. 1st Dist. 2005).

101. *Id.* at 307.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *In re Marriage of Simmons*, 825 N.E.2d at 309.

107. *Id.* at 309 (emphasis added).

108. *Id.* at 310.

109. *Id.*

he lost standing as a parent because he was "not a man within the meaning of the statute."[110]

Robert failed to completely remove his impediment. Although Robert lost his case, the appellate court implicitly confirmed that the "removal of the impediment" in a same-sex marriage can be achieved when a sex reassignment surgery is "considered completed."[111] The appellate court intimated that a completed sex reassignment involves the surgical removal of external genitalia.

B. Analysis of Jurisdictions with Same-Sex Marriage Bans and Application to Montana

In jurisdictions where same-sex marriage is prohibited, "common sense" or status quo definitions of sex have led to absurd court rulings that make same-sex marriage a possibility when a transgender person is involved.[112] As the previous discussion displays, courts often use "common sense" notions of sex and gender when adjudicating transgender marriage issues, asserting that sex is immutable at birth and unchangeable.[113] If a state refuses to acknowledge a person's sex transformation and binds both parties to their birth sexes, the state may end up inadvertently allowing same-sex marriages. To illustrate, a person identified at birth as male who self-identifies as female and lives as female could marry another female. This marriage would remain legally valid in some states banning same-sex marriage even if the person born male changed his sex to female via surgical means.

Although this author does not support same-sex marriage bans, Montana's current ban on gay marriage could prove to be meaningless to postoperative transgender persons if sex is not defined differently. In the presence of similar statutory and constitutional constructs, Montana is poised for a similar, nonsensical result as in Kansas, Texas, Ohio, and Florida. Moreover, if Montana defines sex as immutable at birth, instead of defining it subjectively, a postoperative transgender person could enter into a same-sex marriage with a person possessing the same type of genitals, as long as

110. *Id.* at 312.

111. *Id.* at 309.

112. *See Gardiner*, 42 P.3d at 137; *Littleton*, 9 S.W.3d at 231; *Kantaras*, 884 So. 2d at 155–156; *Ladrach*, 513 N.E.2d at 832; *Nash*, 2003 WL 23097095 at *6, discussed *supra*. In these cases, the courts ruled that sex is immutable at birth. An argument could be made that a transgender person who has undergone a sex change can marry a person of the same sex because legally the couple would still be the opposite sex, even though they have matching genitalia—one created surgically, the other created biologically.

113. Jonathan L. Koenig, *Distributive Consequences of the Medical Model*, 46 Harv. Civ. Rights-Civ. Liberties L. Rev. 619, 638 (2011).

those genitals were not physician-created, while two persons with naturally occurring matching genitals could not.

Defining sex as immutable at birth would conflict with Montana administrative regulations and statutes that allow sex designations to be amended. Ohio and Texas do not permit an individual to change the sex designation on his or her birth certificate after undergoing transition surgery,[114] but Montana does permit postoperative sex designation amendments.[115] The Montana Legislature gave the Montana Department of Public Health and Human Services and the Office of Vital Statistics the administrative authority to amend birth certificates.[116] However, the same statute granting the administrative authority to amend birth certificates also gives the judicial or administrative body "before whom the certificate is offered as evidence" the authority to determine whether or not such amendment is valid.[117] Indeed, a Montana court could invalidate a birth certificate amended after reassignment surgery and determine that sex is immutable at birth for marriage purposes, while another court or administrative agency could determine the amended birth certificate is valid for other uses, such as for a driver's license.[118]

Transgender people face the unique situation where they could be legally recognized as one sex for some purposes and another sex for others. For instance, not only does the Montana Department of Justice Motor Vehicle Division acknowledge the sex designation on an amended birth certificate when issuing a driver's license,[119] the Division will also change a person's sex designation on a driver's license if the applicant presents a physician's letter with a *proposed* sex designation.[120] In other words, sex reassignment *does not have to be complete* for a driver's license to reflect the sexual identity of a transgender person.[121] However, proof of a sex

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114. Ohio Rev. Code Ann. § 3705.15 (Only a name change is permitted for postoperative transgender persons on Ohio birth certificates.); *see also* Tex. Health & Safety Code Ann. § 191.028 (2011) (A birth certificate can only be changed in Texas "to correct a record that is incomplete or proved by satisfactory evidence to be inaccurate.").

115. *See* Admin. R. Mont. 37.8.311(5).

116. Mont. Code Ann. § 50–15–204(2).

117. Mont. Code Ann. § 50–15–204(5).

118. Mont. Code Ann. § 61–5–111(2)(a)(iii) (requiring "the full legal name, date of birth, Montana residence address unless the licensee requests use of the mailing address, and a brief description of the licensee").

119. Email from Patrick McJannet, Montana DOJ/MVD, CDL & Audit Section Supervisor (Jan. 10, 2013, 10:05 MST) (copy on file with the author).

120. *Id.*

121. *Id.*; *see also Motor Vehicle Division, Driver Licensing Bureau Procedures Manual* 300.6.1 ("Any individual who presents a letter from their physician stating that they are in the process of a gender change may have a driver license issued with the proposed gender change (it will not be necessary for the individual to present a statement showing the process is completed).").

reassignment is needed for a birth certificate amendment in Montana.[122] Notably, however, in order to obtain a marriage license in Montana, applicants can present *either* a driver's license *or* a birth certificate to the clerk of court.[123] Thus, transgender persons can obtain a marriage license if a driver's license is shown as proof of identification regardless of sex reassignment surgery status. Montana should not legally recognize a person's sexual identity for some reasons while refusing to recognize it for others. Yet Montana would be doing just that if Montana determined sex is immutable at birth for marriage purposes. Sex, in Montana, should be defined subjectively to avoid these confusing and inconsistent results.

A rule recognizing only completed sex reassignment surgeries fails to consider possible equal protection infringements. Mandating genital removal before validating a person's legal marriage status unfairly targets members of the transgender community who may not have the financial means or desire to undergo the physician's scalpel. Recognizing a postoperative transgender person's marriage while denying access to similarly situated transgender persons who have not had genital surgery denies equal protection of the laws on the basis of sex, or the removal thereof.

The dicta in *Gardiner* essentially barred postoperative transsexuals from marriage for lacking the required bodily organs.[124] If Montana followed the logic of the Kansas Supreme Court in *Gardiner*, the equal protection guarantees of the Montana Constitution would arguably be violated on this basis.[125] Using the logic applied by the Kansas Supreme Court, transgender persons, sterile persons, and women who have had total hysterectomies and oophorectomies (ovary removal) would all fail to meet the criteria for sex necessary to enter into legally valid marriages. Biological females often have their ovaries, wombs, and cervixes surgically removed for a multitude of medical reasons.[126] Since the lack of legal sex status would seem-

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122. Admin. R. Mont. 37.8.311(5).

123. Mont. Code Ann. § 40–1–203.

124. *In re Est. of Gardiner*, 42 P.3d at 135. The Kansas Supreme Court stated, "The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes." *Id.*

125. Mont. Const. art. II, § 4. *See also* Kan. Const. Bill of Rts. §§ 1, 2. The Kansas Constitution also provides equal protection in its Bill of Rights; however, equal protection was not one of the issues raised in *Gardiner*.

126. *See* Jon I. Einarsson & Yoko Suzuki, *Total Laparoscopic Hysterectomy: 10 Steps toward a Successful Procedure*, 2 Reviews in Obstetrics & Gynecology 57, 57–58 (No. 1, 2009) (The authors report that the removal of the cervix during a total hysterectomy is common.). *See also* Jerry L. Lowder et al., *Prophylactic Bilateral Oophorectomy or Removal of Remaining Ovary at the Time of Hysterectomy in the United States, 1979–2004*, 202 Am. J. of Obstetrics and Gynecology 538.e1 (Issue 6, June

ingly apply only to transgender persons who have had their sex organs removed, people who have had their sex organs removed for non-transition purposes would still possess a legal sex status. Using a subjective definition of sex would avoid this type of equal protection violation in Montana because a subjective definition of sex recognizes an individual's sexual identity as valid, regardless of the presence, absence, or type of genitals the person possesses.

Even though the Illinois and Montana statutes banning same-sex marriage are similar,[127] Montana should not follow *Simmons* because such an approach would violate Montana's constitutional right to privacy. The Illinois Constitution provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, *privacy*, property or reputation."[128] Illinois privacy protections are remedy-based, whereas, in Montana, privacy infringements must withstand a strict scrutiny analysis. The Montana Constitution specifically states, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed *without the showing of a compelling state interest*."[129] Montana's privacy protections should require the state to show a compelling state interest in order to examine the postoperative condition of a transgender person's genitals to ascertain completeness. A subjective definition of sex would avoid privacy infringements by respecting a transgender person's sexual identity. A subjective definition of sex would not require transgender persons to undergo invasive surgical procedures or subject them to state genital inspections.

C. Transgender Marriage in States Allowing Same-Sex Marriages or Civil Unions

1. New York

In 2011, the New York Legislature lifted the ban on same-sex marriage and simultaneously opened the door to transgender marriage by drafting gender-neutral legislation inclusive of the transgender community. The New York marriage statute construing marriage relations in a gender-neutral manner should be used as a model for Montana. The current New York statute provides:

Parties to a marriage

2010) (This article reports that approximately 3,686,000 hysterectomies with ovary removal were performed in the United States from 1979 to 2004.).

127. *Compare* Mont. Code Ann. § 40–1–401 *with* Ill. Comp. Stat. Ann. 750 § 5/212.

128. Ill. Const. art. I, § 12 (emphasis added).

129. Mont. Const. art. II, § 10 (emphasis added); *see also Gryczan*, 942 P.2d 112, discussed in detail *infra* Part V, Section B.

> 1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
> 2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, *shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex*. When necessary to implement the rights and responsibilities of spouses under the law, *all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law*.[130]

The above statute followed two New York cases in the 1970s that determined transgender marriage to be void as a matter of law. The following two New York cases examined in this article are important because they illustrate how these courts wrongly focused on genitals in order to void the marriages at issue when the courts could have easily based their decisions on the well-established contract principles of fraud, mistake, deceit, and non-disclosure.

In *Anonymous v. Anonymous*,[131] a lower New York court voided a marriage between a transgender woman and a biological male. A non-commissioned Army officer met a woman on the streets in Augusta, Georgia, in 1968, and followed her into "a house of prostitution where they spent a short time together."[132] In 1969, the two were married in Texas. On the night of the marriage, the husband "awoke at 2 o'clock in the morning, reached for the defendant and upon touching the defendant, discovered that the defendant had male sexual organs."[133] Upon the husband's revelation, the wife informed him that she planned on undergoing sex reassignment surgery. Soon thereafter, the Army sent the husband overseas, and while he was gone the wife had the sex change as promised and sent her newlywed husband the medical bills. Upon his return from deployment, the husband filed for a declaratory judgment in New York regarding the legal status of his marriage after having to bail his wife out of jail on prostitution charges.[134] The New York court declared that marriages between two persons of the same sex are invalid and that the "mere removal of the male organs would not, in and of itself, change a person into a true female."[135] In *Anonymous*, the New York court, like Texas, Florida, and Ohio, determined that sex was immutable at birth to void the marriage, rather than focusing on the fraud or misrepresentation that also made the marriage *voidable*.

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130. N.Y. Dom. Rel. § 10–a (2013) (emphasis added).
131. *Anonymous*, 325 N.Y.S.2d 499.
132. *Id.* at 499.
133. *Id.*
134. *Id.* at 499–500.
135. *Id.* at 500.

Similarly in *B v. B*,[136] another New York court focused on the functionality of sex organs rather than fraud or misrepresentation. Mark B. (formerly "Marsha B."), after having undergone a mastectomy and hysterectomy as part of transition-related therapy in 1972, met and married Frances B., a biological female.[137] Two years later, Frances filed an annulment action claiming that Mark was legally a woman and the marriage was a fraud.[138] Frances was unaware that Mark had previously been a woman prior to the marriage, and she further claimed Mark was unable to have "normal sexual intercourse" with her.[139] Frances moved the court for a physical examination of Mark.[140] The court stated that "the marriage relationship exists with the result and for the purpose of begetting offspring."[141] Further, the court found Mark's transition-related treatments did not make him capable of taking on the male duties in the marriage relationship because medical science could not give him a penis capable of penetration.[142] The court then denied the motion for a physical examination and annulled the marriage between Mark and Frances.[143] The court reasoned that "marriage is and always has been a contract between a man and a woman" and medical science could not change a woman into a man.[144] This New York court held that a physician could not change a person's birth sex, voiding the marriage on the grounds that one's sex is immutable at birth.[145]

2. *New Jersey*

New Jersey recognizes same-sex civil unions and grants same-sex couples the same rights as married couples.[146] In 1976, prior to the recognition of same-sex civil unions in the state, a New Jersey court recognized the marriage rights of a postoperative transgender person. In *M. T. v. J. T.*,[147] M. T., a male-to-female transgender person, married J. T., a biological male.[148] M. T. and J. T. met when they were both physically men. M. T. went through years of psychological and medical treatment and transitioned prior to marrying J. T. J. T. supported M. T. through her transition

136. *B*, 355 N.Y.S.2d 712.
137. *Id.* at 715–716.
138. *Id.* at 713.
139. *Id.*
140. *Id.* at 714.
141. *Id.* at 717.
142. *B*, 355 N.Y.S.2d at 717.
143. *Id.*
144. *Id.* at 716–717.
145. *Id.*
146. N.J. Stat. Ann. § 37:1–28 (West 2013); N.J. Admin. Code 18:26–2.6 (West 2013).
147. *M. T.*, 355 A.2d 204.
148. *Id.* at 205.

process and even financed the treatment.[149] Two years after M. T.'s surgery, the couple ended their relationship. M. T. petitioned the court for maintenance, and J. T. claimed that the marriage was void because M. T. had gone through sex reassignment.[150] At the divorce proceeding, M. T.'s doctor testified that the sex change aligned "[M. T.'s] sense of psyche gender identity."[151] The court, like the doctor, reasoned that the transition surgery harmonized M. T.'s gender with her genitalia. This New Jersey court held, "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."[152]

D. Analysis of Jurisdictions Allowing Same-Sex Marriages or Civil Unions and Application to Montana

Although New York currently allows both same-sex and transgender marriage by statute, the marriages in *Anonymous* and *B* would still be *voidable*[153] in New York today under well-established contract principles. To focus on genitals and the evaluation of whether a person can perform sexually arguably violates individual privacy, especially under Montana's constitutional privacy mandate. If Montana adopted a subjective definition of sex, it would avoid this constitutional problem, and existing contract law would serve to protect individuals who unintentionally enter into marriages as a result of fraud or mistake.[154] *When* same-sex marriage is legalized in Montana, Montana should consider using the New York marriage statute as a model for drafting gender-neutral marriage laws. Until then, defining sex subjectively will permit transgender persons to enter into legally valid marriages under current Montana law, which bars same-sex marriage.[155]

Like New York, New Jersey has embraced same-sex marriage, and the court in *M. T.* should be commended for recognizing a transgender person's postoperative sex and right to a valid marriage. However, the court's holding reinforces perceptions that transgender people suffer from a disorder[156] that should be treated surgically. The court stated, "In this case the

149. *Id.*

150. *Id.* M. T. was able to change her birth certificate in New York to reflect her post-surgical sex.

151. *Id.* at 206.

152. *Id.* at 211.

153. *See Restatement (Second) of Contracts* § 7 (1981) (Contracts are voidable that are entered into under fraud or mistake.).

154. *See Beebe v. James*, 8 P.2d 803, 806 (Mont. 1932) (In Montana, like in New York, contracts "induced by fraud, false representations, deceit, [or] mistake" are voidable.).

155. Mont. Const. art. XIII, § 7; Mont. Code Ann. § 40–1–401.

156. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576 (4th ed., rev. 2000) (In the DSM-IV, the pathological factors that lead to a diagnosis of GID include:

transsexual's gender and genitalia are no longer discordant; they have been harmonized through medical treatment."[157] This supports the misguided opinion that transgender persons who undergo surgery deserve legal protection because they have the desire to conform to status quo definitions of sex and gender. As one author predicted, "Once it is in record that a person is female because she has had genital surgery, it will be difficult for those transgender people who have not had or cannot afford or never intend to have genital surgery to have their genders recognized."[158] The holding in *M. T.* perpetuates the perception that transgender persons who choose not to undergo surgery are nonconforming gender fetishists undeserving of legal protection. The court did not consider that not every transgender person can afford, or desires, to undergo an invasive sex reassignment surgery.

V. Equal Protection and Privacy in Montana

The Montana Constitution provides, "No person shall be denied the equal protection of the laws . . . on account of . . . *sex*."[159] The Montana Constitution also provides that "individual privacy . . . shall not be infringed without the showing of a compelling state interest."[160] Montana courts have considered the privacy and equal protection rights of the gay and lesbian community in two recent cases, neither of which involved transgender parties but may apply by analogy when arguing for transgender marriage recognition.

A. *Montana Equal Protection:* Snetsinger v. Montana University System

In 2004, the Montana Supreme Court adjudicated equal protection guarantees for gays and lesbians as it pertains to employer-provided access to health insurance benefits. In *Snetsinger v. Montana University System*,[161] the Montana University System ("University System") denied health insurance benefits to same-sex partners of employees but offered health insurance benefits to opposite-sex partners of employees.[162] Upon signing a common law marriage verification form supplied by the University System, opposite-sex unmarried couples were able to purchase health coverage for themselves and their children. The University System policy

(1) a persistent cross-gender identification, (2) discomfort about one's assigned sex, (3) a lack of a physical intersex condition, and (4) significant impairment in social functioning.).

157. *M. T.*, 355 A.2d at 211.

158. Vade, *supra* n. 21, at 313.

159. Mont. Const. art. II, § 4 (emphasis added).

160. Mont. Const. art. II, § 10.

161. *Snetsinger*, 104 P.3d 445.

162. *Id.* at 448.

did not allow same-sex couples to use the common law marriage form to qualify for health benefits.[163] The University System denied two of its employees, Carol Snetsinger and Carla Grayson, health care benefits for their same-sex partners. Snetsinger and Grayson sued, claiming that the denial of health care benefits to their same-sex domestic partners violated the equal protection rights guaranteed by Article II, section 4 of the Montana Constitution.[164]

The Montana Supreme Court held that any employer "that adopts an administrative procedure" to provide benefits to opposite-sex couples must also offer those benefits to same-sex counterparts.[165] The University System claimed that marriage was the determining factor in qualifying for health benefits, even though the common law marriage affidavit form did not fulfill common law marriage requirements.[166] The Court held that denying same-sex couples health care benefits while offering benefits to similarly situated opposite-sex counterparts was discrimination based on sexual orientation and violated the equal protection guarantees of the Montana Constitution.[167]

Based on *Snetsinger*, Montana Code Annotated § 40–1–401 will likely lead to equal protection violations if applied to transgender persons seeking legal recognition of marriage. In order to cure a prohibited marriage under section 1 of § 40–1–401, section 2 requires the "removal of the impediment." For transgendered persons, this may require one person to undergo transition surgery. Requiring the "removal of the impediment" via genital surgery prior to the legal recognition of marriage provides benefits to those who can afford and want to undergo transition surgery while denying the same benefits to similarly situated transgender persons who do not. Montana law must treat similarly situated individuals in the same manner.[168] Prohibiting transgender persons who have not had sex reassignment surgery

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163. *Id.*

164. *Id.* at 448–449. Snetsinger and Grayson also claimed violations in the right to privacy and the right to pursue life's basic needs guaranteed by Article II, sections 3 and 10 of the Montana Constitution.

165. *Id.* at 453.

166. *Id.*

167. *Id.* at 452.

168. *Snetsinger*, 104 P.3d at 449 (citing *McDermott v. Mont. Dept. of Corrections*, 29 P.3d 992 (Mont. 2001)). *See also Donaldson*, 292 P.3d at 395 (Nelson, J., dissenting). Justice Nelson noted the following steps in determining whether a group is similarly situated: (1) identification of a State classification of a group and identification of a group "roughly equivalent in all relevant respects *besides* the classifying trait adopted by the State" to act as the control group in order to isolate the potential source of discrimination; and (2) a comparison between the group classified by the State and the control group to determine if there has been different treatment. If the State-classified group is treated differently, the court must determine whether the different treatment is justified under the specific level of constitutional scrutiny. *Id.*

from enjoying the benefits of marriage "denies, impairs, and disparages"[169] the same rights enjoyed by opposite-sex married couples, whether or not the opposite sex is achieved through surgical interventions.

So long as the law continues to classify individuals according to traditional definitions of sex, which "is just as invidious as maintaining registries of racial composition,"[170] the transgender population is left in legal limbo with no choice but to either conform to binary definitions of sex or risk the possibility of not being legally recognized.[171] However, transgender individuals transcend traditional notions of sex and gender. They have been excluded from civil rights protections under the false belief that "sex reassignment surgery renders a person neither male [n]or female."[172]

Transgender persons deserve suspect class status that parallels the heightened scrutiny analysis applied to laws that discriminate on the basis of race because it is well-established that people who have endured a history of discrimination are deemed suspect classes, and laws affecting suspect classes should receive heightened/strict scrutiny analysis. Transgender persons have historically been forced to conform to dominant, majority binary definitions of sex.[173] Sex differences have traditionally passed equal protection under intermediate scrutiny because courts have interpreted sex and sex differences as inherent, natural, and either male or female.[174] When intermediate scrutiny was created for discrimination based on sex, transgender people were not contemplated.[175] Montana should apply strict scrutiny analysis when addressing equal protection claims involving discriminatory practices against transgender people because of the history of discrimination that the community has endured.[176]

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169. Mont. Const. art. II, § 34 ("The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.").

170. Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination-The Need for Strict Scrutiny*, 20 Colum. J. Gender & L. 141, 144 (2011).

171. *See U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938). Footnote 4 states that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." This quote could not be more applicable in regards to the increased protections that the transgender community deserves when adjudicating their rights.

172. Ezie, *supra* n. 170, at 165; *see also In re Est. of Gardiner*, 42 P.3d at 121, discussed *supra* Part IV, Section A.

173. Ezie, *supra* n. 170, at 144.

174. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing that equal protection analysis involving sex and gender differences must withstand intermediate scrutiny and "must serve important governmental objectives and must be substantially related to achievement of those objectives").

175. *Id.* at 198–199. The *Craig* Court contemplated "the difference between males and females with respect to the purchase of 3.2% beer" when adopting the intermediate standard of scrutiny. *Id.*

176. *See Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (transgender person terminated for not conforming to sex and gender norms found to have been discriminated against on the basis of sex); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 576 (6th Cir. 2004) (firefighter terminated for being trans-

Transgender discrimination has placed many members of the community in the lower levels of the socioeconomic strata. The disproportionate poverty among the members of the transgender community directly affects their access to health care and their ability to undergo transition-related treatment, including hormone therapy, psychotherapy, electrolysis, voice treatment, tracheal shaves, breast reduction or augmentation, and sex reassignment.[177] In 2001, the average cost for genital sex reassignment alone was estimated to be $15,000 or approximately $19,500 in 2012 (adjusted for inflation using the Consumer Price Index increases between 2001 and 2012).[178] Considering the average transgender person has an income below the poverty line,[179] limiting access to marriage to postoperative transgender people benefits only the minority who have sufficient resources and unjustly excludes the majority of transgender persons who lack the means to obtain the surgery.

Montana should not use sex reassignment surgery as the litmus test for determining transgender marriage rights. Financially disadvantaged transgender persons in Montana are already prohibited from using Medicaid funds for sex-reassignment-related health care.[180] Recognizing the marriages of postoperative transgender persons while simultaneously denying similarly situated transgender persons the same recognition violates Mon-

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gender was discriminated against based on sex in violation of Title VII of the Civil Rights Act of 1964); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (pre-operative transgender male-to-female prisoner who was sexually assaulted was found to have been a victim of a gender motivated act of violence); *Macy v. Holder*, Appeal No. 0120120821 (E.E.O.C., Apr. 20, 2012), available at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (discrimination against a transgender person in the workplace is discrimination based on sex and violates Title VII of the Civil Rights Act of 1964).

177. *See* Pooja Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 J. Natl. Sexuality Resource Ctr. 7, 7–8 (No. 4 Dec. 2010).

178. Mary Ann Horton, *The Cost of Transgender Health Benefits*, Out & Equal Workplace Summit Conference, 2–4, available at http://www.tgender.net/taw/thb/THBCost-OE2008.pdf (Sept. 2008). In 2001, the cost varied from doctor to doctor and could range from $4,500 to $26,000 for male-to-female surgeries and from $4,000 to $60,000 for female-to-male surgeries. *Id.*

179. Gehi & Arkles, *supra* n. 177, at 10. Gehi and Arkles reviewed studies conducted in Washington D.C., San Francisco, and New York. In 2000, a Washington D.C. study revealed that a shocking 29% of transgender survey participants had no source of income and 31% had an annual income of less than $10,000, putting a staggering 60% of participants well below the poverty line. In 2003, a study conducted in San Francisco revealed that 64% of the population reported incomes under $25,000 per year in a city where the average cost of living is nearly 85% higher than the national average. In 2005, the Sylvia Rivera Law Project, a New York non-profit organization that serves transgender people of color regardless of income, found that 85% of its clients—who mostly reside in New York City—made less than $9,570 per year. *See also* Emilia Lombardi, *Varieties of Transgender/Transsexual Lives and Their Relationship with Transphobia*, 56(8) Journal of Homosexuality 977 (Oct. 2009). Lombardi notes a 2009 study conducted in Pittsburgh of 90 transgender-identified individuals between the ages of 17 and 71 that found the majority earned less than $12,000 per year. *Id.* at 983.

180. Mont. Admin. R. 37.79.303(1)(q). Included in this list of banned services in Montana are cosmetic surgery, abortions, unnecessary medical treatments, and experimental treatments.

tana's express equal protection guarantees against discrimination on the basis of social class or condition.[181] A subjective definition of sex that respects a transgender person's self-identified sex and gender avoids this constitutional problem and would allow all transgender persons, regardless of their financial means, the right to gain legal recognition of marriage.

B. Montana Privacy: Gryczan v. State *and* Armstrong v. State

Gryczan v. State[182] addressed the right to privacy regarding same-sex sexual relations in the home. In *Gryczan*, three lesbian women and three gay men filed a declaratory judgment action against the State, alleging that Montana Code Annotated § 45–5–505,[183] which criminalized same-sex sexual conduct, was unconstitutional. The plaintiffs claimed the statute violated both equal protection guaranteed by Article II, section 4 and the right to privacy guaranteed by Article II, section 10 of the Montana Constitution.[184]

The Montana Supreme Court focused primarily on the privacy violations implicated by § 45–5–505. In the Bill of Rights of the Montana Constitution, privacy is considered a fundamental right. As such, the Court applied a strict scrutiny analysis stating that any infringement of privacy "must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest."[185] The Court found no compelling state interest justifying the infringement of privacy rights in criminalizing same-sex sexual relations and deemed the statute unconstitutional.[186] The Court held, "[The] right of privacy under Article II, Section 10 of Montana's Constitution includes the right to engage in consensual, non-commercial, private, same-gender sexual conduct with other adults free

181. *See* Mont. Const. art. II, § 4 (The Montana Constitution specifically prohibits discrimination based on "social origin or condition."). *See also McClanathan v. Smith*, 606 P.2d 507, 514 (Mont. 1980) (social condition includes discrimination on the basis of economic status or rank).

182. *Gryczan*, 942 P.2d 112.

183. Mont. Code Ann. § 45–5–505(1) ("A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct."); *see also* Mont. Code Ann. § 45–2–101(21) ("'Deviate sexual relations' means sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal."). Although the Montana Supreme Court decriminalized consensual same-sex sexual conduct in 1997, statutes that define deviate sex in this manner remained on the books until 2013. On April 10, 2013, the Montana Legislature finally passed Senate Bill 107, which revised the deviate sexual conduct laws to strike the unconstitutional language regarding same-sex sexual conduct. Mont. Sen. 107, 63d Reg. Sess. (2013), available at http://data.opi.mt.gov/bills/2013/billpdf/SB0107.pdf. In 2011, a similar bill died in standing committee. *See* Mont. Sen. 276, 62d Reg. Sess. (2011), available at http://data.opi.mt.gov/bills/2011/billhtml/SB0276.htm.

184. *Gryczan*, 942 P.2d at 115–116. The plaintiffs also asserted that the statute violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

185. *Id.* at 122.

186. *Id.* at 126.

of governmental interference or regulation."[187] The Court further determined that every adult, regardless of sexual orientation, has a "reasonable expectation that [his/her] sexual activities will remain personal and private."[188]

Montana privacy protections should also extend to the privacy of a person's genitalia. Montana courts should not enter the business of examining a person's genitals to see if gonads and gender expression synchronize. Rather, sexual identity should be the only source of court inquiry in cases where one's sex is placed into issue.[189] Once people accept that one's anatomy is not necessarily dispositive of one's sex, the significance of physical sex is exposed as the "socially constructed and arbitrary classification" that it really is.[190] As such, defining sex by assessing genitalia ignores the fact that people give significance to the objective and so-called immutable biological traits.[191]

If Montana courts interpret § 40–1–401 so that the "removal of the impediment" incentivizes surgical procedures for transgender persons, Montana should have to show a compelling state interest in order to infringe upon the constitutionally protected privacy rights of transgender persons. The most typical "state interests" set forth in defense of legislation that infringes upon the rights of transgender persons are: (1) prevention of crime and fraud; (2) promotion of heterosexuality; and (3) enforcement of gender norms.[192] These arguments should fail to pass any compelling state interest standard because they are based on unfounded biases and stereotypes and are overbroad. By defining sex subjectively, Montana would likely adopt transgender-affirmative jurisprudence that moves toward the deconstruction of laws that promote the dominant binary social norms and embraces and acknowledges the plurality of gender expressions.[193]

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187. *Id.* at 123.

188. *Id.* at 122.

189. Ezie, *supra* n. 170, at 180.

190. *Id.* at 198.

191. *Id.*

192. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (preoperative transgender male-to-female bus driver fired for good cause because of legitimate concern over potential criminal liability that may result from permitting a biological male to use women's public restrooms); *City of Columbus v. Zanders*, 266 N.E.2d 602, 604 (Ohio Mun. 1970) (Columbus ordinance prohibiting cross-dressing in public determined to be substantially related to the "the health, safety, morals or general welfare of the public" and assisted in crime prevention); *City of Chic. v. Wilson*, 389 N.E.2d 522, 524 (Ill. 1978) (Chicago asserted four reasons for cross-dressing ban: "(1) to protect citizens from being misled or defrauded; (2) to aid in the description and detection of criminals; (3) to prevent crimes in washrooms; and (4) to prevent inherently antisocial conduct which is contrary to the accepted norms of our society.").

193. Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 Berkeley J. Gender L. & Just. 83, 86 (2008). Gilden argues that legal advocates for the

After *Gryczan*, the Montana Supreme Court, in *Armstrong v. State*,[194] further defined and expanded personal privacy and autonomy protections guaranteed by the Montana Constitution. The Court held the autonomy component of Montana's right to privacy protects an individual when making medical decisions affecting one's body.[195] In *Armstrong*, a case that dealt with the privacy rights of women choosing their own abortion provider, the Court expounded upon Montana's heightened privacy protections:

> Attempts to define this right notwithstanding, we conclude that, while it may not be absolute, no final boundaries can be drawn around the personal autonomy component of the right of individual privacy. It is, at one and the same time, *as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy* by the government—as in *Gryczan*—and *as broad as are the State's ever innovative attempts to dictate in matters of conscience*, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.[196]

As the above quote illustrates, *Armstrong* broadens the scope of Montana privacy protections. Under *Armstrong*, denying marriage to transgender persons is in itself an invasion of privacy, regardless of whether the State forces a person to undergo surgery. The invasion of personal autonomy through attempts to dictate matters of conscience is—in and of itself—an invasion of privacy. Thus, pathologizing a transgender person's sexual identity and requiring surgery infringes upon a transgender person's privacy throughout the entire continuum of privacy protection—from narrow State genital invasions to broad matters of personal conscience. Denying transgender people access to marriage because they fail to conform to status quo definitions of sex further denies them privacy protections on the basis of being "socially repugnant or politically unpopular."[197]

C. Solutions Promoting Transgender Marriage Equality

Legal transgender victories tend to "perpetuate the underlying stigmatization of non-conformity to gender norms" rather than generate equality in all forms of gender expression.[198] However, a recent EEOC ruling indi-

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transgender community should focus on the long term goal of liberating the transgender community from the social confines of the binary social-sexual construct. *Id.*

194. *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

195. *Id.* at 384.

196. *Id.* at 375 (emphasis added).

197. *Id.*

198. Gilden, *supra* n. 193, at 85. Gilden argues the transgender community deserves *sui generis* protections that acknowledge that transgender "discrimination stems precisely from a challenge to dominate binary norms." *Id.* Other cultures have embraced sex-gender expressions that fall outside the definitions of male/female and masculine/feminine. For example, the adoption of gender fluidity and acceptance of gender non-conforming individuals was observed in some Native American populations

cates that the attitudes toward transgender persons may be beginning to shift in the right direction. In *Macy v. Holder*,[199] the EEOC recently held that discrimination against transgender persons in employment violates Title VII of the Civil Rights Act of 1964. The EEOC clarified that sex discrimination under Title VII includes discrimination based on transgender status. "[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination violated Title VII."[200] Although *Macy* dealt with transgender employment discrimination, the EEOC ruling could serve as an example to support an argument for access to marriage for all transgender people.

Montana transgender legal advocates should challenge birth-assigned sex rather than validating gender norms by attempting to assimilate transgender individuals into the status quo.[201] Anchoring transgender sex-stereotyping discrimination claims in mainstream gender behavioral characteristics neutralizes the goal of "uproot[ing] sex and gender categories."[202] The legal system should protect individuals who do not have the desire to conform to social-sexual expressive norms because as citizens, transgender people deserve all legal protections afforded by the law.[203] The following solutions promote transgender marriage equality and should be considered: (1) the inclusion of transgender persons in the struggle for gay and lesbian marriage equality; (2) the adoption of gender-neutral marriage legislation; and (3) the adoption of a subjective definition of sex.

1. Including Transgender Persons in the Struggle for Gay and Lesbian Marriage Equality

There are no guarantees that the transgender community will have access to gay and lesbian marriage, even if secured for the gay and lesbian communities, because recent advances in gay and lesbian marriage equality have been silent regarding transgender marriage rights.[204] Considering

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prior to colonialism. Navajo society allowed children the autonomy to determine their own gender identity. Andrew Gilden, *Preserving the Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 Mich. J. Gender & L. 237, 237–240 (2007). Contemporary American society, including Montana, should adopt a similar social framework that expands gender norms to be inclusive of all forms of gender expression.

199. *Macy v. Holder*, Appeal No. 0120120821 (E.E.O.C., Apr. 20, 2012), available at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

200. *Id.*

201. *See* Gilden, *supra* n. 193, at 92.

202. *Id.* at 95–96.

203. *See id.* at 98.

204. *See Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub. nom Hollingsworth v. Perry*, 133 S. Ct. 786 (2012); *see also Donaldson v. State*, 292 P.3d 364.

states like Kansas that have contemplated that postoperative transgender persons do not possess a legal sex status for marriage purposes, same-sex marriage mandates would still be meaningless to those who possess no legal sex. As such, transgender persons must be included in cases seeking gay and lesbian marriage equality.

Very recently in *Perry v. Brown*,[205] the Ninth Circuit overturned as unconstitutional a voter initiative amending the California Constitution declaring that only a marriage between a man and a woman is valid.[206] The California Supreme Court held the initiative unconstitutional because it targeted a minority group and deprived its members of a fundamental right.[207] *Perry* fails to mention transgender marriage rights at all and explicitly names gays and lesbians as the targeted minority group,[208] neglecting to include transgender persons despite the commonalities that can be drawn between the gay, lesbian, and transgender communities. If cases like *Perry* ever result in federal same-sex marriage recognition, transgender persons may still not be afforded recognition of their marriages. Although the United States Supreme Court granted certiorari and heard oral arguments in *Perry* in March of 2013,[209] transgender people will likely not be included in the Court's final ruling because the transgender community was not included in any of the lower court rulings.

Montana has also failed to address transgender marriage in gay and lesbian marriage equality court rulings. *Donaldson v. State*,[210] a recent Montana Supreme Court case addressing gay and lesbian rights, like *Perry*, did not specifically address transgender marriage rights. In *Donaldson*, six same-sex couples challenged the statutory structure of Montana laws that deny same-sex couples the rights and privileges afforded to opposite-sex, married couples.[211] The couples complained that Montana's statutory structure violates their equal protection rights, privacy rights, dignity, pursuit of life's basic necessities, and due process.[212] The couples—none of whom were transgender—sought declaratory and injunctive relief.[213] The Montana Supreme Court held that the plaintiffs were precluded from relief because they failed to specifically identify the statutes that violated their constitutional rights.[214]

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205. *Perry*, 671 F.3d 1052.
206. *Id.* at 1064.
207. *Id.* at 1066.
208. *Id.* at 1082.
209. The United States Supreme Court is expected to rule on this case in June of 2013.
210. *Donaldson*, 292 P.3d 364.
211. *Id.* at 365.
212. *Id.*
213. *Id.* at 366.
214. *Id.* at 367.

The Court remanded the case, giving the plaintiffs an opportunity to amend the complaint and identify specific statutes and the constitutional scrutiny that should be applied to each challenged statute.[215] Even though transgender persons were not included as plaintiffs in *Donaldson*, Montana Code Annotated § 40–1–401 is a specific statute that gays, lesbians, *and transgender* persons should challenge *together*. Hopefully, transgender persons will be included as plaintiffs in future challenges to the constitutional validity of § 40–1–401. Although the majority opinion in *Donaldson* failed to mention the transgender community, Justice Nelson, in his insightfully written dissent, did not:

> The committed couples here—and lesbian, gay, bisexual, *and transgender* Montanans everywhere—must never lose sight of the fact that although today's battle has been lost, the war has not been. *They must remain united* in defeat because, in the end, they *will* overcome; they *will* prevail. Of that, I am absolutely certain.[216]

Lesbian, gay, bisexual, and transgender persons should remain united; let's not forget transgender people in the fight for marriage equality.

2. *Gender-Neutral Marriage Legislation*

Montana should adopt gender-neutral marriage language when the marriage statutes are eventually rewritten. The New York marriage statute construing marriage relations in a gender-neutral manner should be used as a model for Montana when the prohibitions against same-sex marriage are lifted and new legislation is drafted to replace the archaic marriage laws in Montana recognizing only those marriages between opposite sexes. Today in New York, two individuals can marry regardless of "*being or having been* of the same sex rather than a different sex."[217] The New York statute further states that "all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law."[218] The language in this New York legislation clearly recognizes the existence of transgender persons and legally validates any marriage entered into by a transgender person in New York. New York provides an ideal model for Montana when current constitutional and statutory laws banning same-sex marriage are overturned.

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215. *Id.*

216. *Donaldson*, 292 P.3d at 423 (Nelson, J., dissenting) (first and second emphases added, third and fourth emphases as in original).

217. N.Y. Dom. Rel. § 10–a(2) (emphasis added).

218. *Id.*

3. A Subjective Definition of Sex

Although lifting Montana's constitutional same-sex marriage ban and adopting gender-neutral marriage legislation is the most ideal solution, defining sex subjectively would be a step in the right direction for transgender persons. Defining sex subjectively would not implicate a necessity for transition-related surgery in the interpretation of Montana Code Annotated § 40–1–401. Defining sex subjectively would avoid violations of privacy and violations of equal protection. Section 40–1–401 could be redrafted to resemble the following:

> Prohibited marriages—contracts.
> (1) The following marriages are prohibited:
> . . .
> (d) a marriage between persons of the same sex*.
> (2) Parties to a marriage prohibited under this section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.
>
> * 'Sex' as defined in this statute refers to a person's subjective, self-identified sex. Sex shall not be determined by the sex of the individual assigned at birth, gender rearing, or objective gender manifestations.

A subjective definition of sex respects an individual's self-identified sex and gender identity. A subjective definition of sex would not require Montana to amend its constitution or completely rewrite its marriage statutes. Defining sex subjectively would continue to protect transgender persons even when same-sex marriage prohibitions are lifted in Montana. Further, a subjective definition of sex would align gender expression with the individual rights and freedoms protected in the Montana Constitution. If sex were defined subjectively, the "removal of the impediment" would not be interpreted as requiring transgender persons to surgically alter their bodies. Most importantly, a subjective definition of sex would assist in paving the way to the social acceptance of the transgender community.

VI. Conclusion

Prohibitions against same-sex marriage present the greatest legal barrier for transgender people attempting to enter into marriage because sex has not been legally defined to be inclusive of the transgender population. Montana Code Annotated § 40–1–401 suggests that a same-sex marriage can be legalized through the "removal of the impediment." Using traditional, objective definitions of sex, the "removal of the impediment" can arguably be interpreted as incentivizing surgical procedures for transgender persons in relationships with persons who have matching genitals and different sexual identities. Requiring sex reassignment surgery in order for transgender people to gain legal recognition of marriage would violate the

privacy and equal protection guarantees of the Montana Constitution. Accessing the fundamental right of marriage should not require anyone to undergo surgery. A subjective definition of sex recognizes the plurality of gender expressions, provides privacy protections, guarantees equal protection of the laws, and includes all transgender people within its meaning regardless of whether sex reassignment surgery has been performed.