Strangers to the Law:

The Legal Treatment of People Who Are

Intersex, Intergender, or In-between

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# TABLE OF CONTENTS

INTRODUCTION ................................................................................................................. 1
ARGUMENT .......................................................................................................................... 5

I. **Background: Sexual Minorities and the Myth of Duality** ................................. 5
   A. What are Sex, Gender, and Legal Sex? ................................................................. 6
   B. What’s Sex(ual Orientation) got to do with it? .................................................. 8

II. **Problem: How Classification and Law Affects Sexual Minorities** ................. 9
   A. Sex and Gender Assignment at Birth ................................................................. 9
   B. Affect of Duality on Intersex Athletes ............................................................... 12
   C. Terms of Sex or Gender in Statutory Language .............................................. 14
   D. Sex Reassignment State by State Requirements ............................................ 18
   E. Cases Addressing Transgender and Intergender Issues ................................. 20
   F. Intersex: The Hypothetical Case of Four Brave Humans ................................. 29

III. **Solution: Visibility and Equality** ....................................................................... 31
   A. The Historical, Cultural, and Scientific Myth of Duality ................................. 31
   B. Sex and Gender Equality Under the Law Today .............................................. 32
   C. Why Not Add a Third Sex/Gender Classification? .......................................... 33
   D. Doing away with Sex/Gender Classification .................................................... 34

CONCLUSION ....................................................................................................................... 35
“A State cannot so deem a class of persons a stranger to its laws.”

INTRODUCTION

Throughout history there have been laws and regulations that required the identification of a person’s sex or gender to determine rights and responsibilities in society. The current social, political, and legal uproar over the right of same-sex couples to marry is just the latest of many. The right to vote in the United States required a person to be male prior to the passage of the 19th Amendment in 1920. But what if, prior to 1920, you wanted to vote and couldn’t prove you were male? In 1843, twenty-three-year-old Levi Suydam of Salisbury, Connecticut, attempted to vote “as a Whig in a hotly contested local election.” Suydam was thought to be “more female than male” so the town selectmen brought in a physician who, finding a phallus and testicles, declared him male and allowed him to vote. The Whigs won by a single vote. Later the same physician discovered that Suydam, whose gender expression and narrow shoulders and broad hips were very feminine, also had a vagina and regular menstrual cycle. Levi was intersex.

Today, David Cameron wants to marry the male partner he has been with for years. David is not entirely male, so his relationship is not really a “same-sex marriage,” but David is not entirely female either. David’s chromosomes are XXY. He has a penis and very small testes. The rest of his body was of a feminine shape, hairless with wide hips and full breasts, until

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2 U.S. Const. amend. XIX prohibits any U.S. citizen from being denied the right to vote based on sex.
3 Anne Fausto-Sterling, Sexing the Body: Gender Politics and the Construction of Sexuality, pg. 30 (2000).
4 “An estimated one in 2,000 babies is born with a reproductive or sexual anatomy and/or chromosome pattern that doesn’t seem to fit typical definitions of male or female. The conditions that cause these variations are sometimes grouped under the terms ‘intersex’ or ‘DSD’ (Differences of Sex Development). These conditions include androgen insensitivity syndrome, some forms of congenital adrenal hyperplasia, Klinefelter’s syndrome, Turner’s syndrome, hypospadias, and many others.” Anne Tamar-Mattis, FAQ: What is intersex/DSD?, Advocates for Informed Choice (AIC), http://aiclegal.org/faq/#whatisintersex.
5 “Most men inherit a single X chromosome from their mother, and a single Y chromosome from their father. Men with Klinefelter syndrome inherit an extra X chromosome from either father or mother; their karyotype is 47 XXY. Klinefelter is quite common, occurring (sic.) in 1/500 to 1/1,000 male births.” Klinefelter Syndrome, Intersex Society of North America (ISNA) http://www.isna.org/faq/conditions/klinefelter.
doctors told him he had to take testosterone to be a “normal” man. His California state birth certificate and driver’s license list him as “male.” But David doesn’t feel male, nor does he feel female. David is intersex, and wishes to change his legal identification to match his true birth sex. So do three other California citizens: Thomas, Galen, and Hida. Thomas and Galen are also XXY “males” like David, with a condition called Klinefelter’s Syndrome. Hida has an unknown intersex condition resulting in “clitoromegaly” and a legally assigned sex of “female”. These “four brave humans” are attempting to challenge the pervasive myth of duality by insisting the law recognize the existence of their true sex. If they succeed in getting their legal sex changed to "I" they will be left out by all of the statutes that mention sex, because they are neither male nor female. They can marry no one in most states. They are to be incarcerated nowhere. David Cameron “My Intersex Journey: From Awkward Teenager to Human Rights Activist” in 21st Century Sexualities: Contemporary Issues in Health, Education, and Rights, edited by Gilbert H Herdt & Cymene Howe, at 163-164 (2007). See also D. Cameron “Caught Between: An Essay on Intersexuality” in Intersex in the Age of Ethics, edited by Alice Dreger, at 92-93 (1999).

7 Id.
8 Klinefelter Syndrome, ISNA, see FN 5 supra.
9 “Clitoromegaly means that the clitoris is larger than expected. This is a description, rather than a diagnosis. The most common cause of clitoromegaly is probably CAH.” Clitoromegaly, ISNA, http://www.isna.org/faq/conditions/clitoromegaly. “Congenital Adrenal Hyperplasia (CAH) is the most prevalent cause of intersex among people with XX chromosomes. … [T]he prevalence of CAH-related intersex is about 1 in 20,000 to 1 in 36,000. … CAH occurs when there is a broken genetic “recipe” for making cortisone in the adrenal glands. … [which] may make an unusually high level of other hormones that are “virilizing”. That is, they can make XX embryos have larger than average clitorises, or even a clitoris that looks rather like a penis, or labia that look like a scrotum. Congenital Adrenal Hyperplasia (CAH), ISNA, http://www.isna.org/faq/conditions/cah.
10 The status of their case is that they have not yet filed any paperwork and are in discussions with LGBT and Intersex advocacy groups about how best to proceed.
are not covered by affirmative action hiring of women\textsuperscript{13} or military drafting of men.\textsuperscript{14} They do not exist. They are “strangers to the law.”\textsuperscript{15}

In spite of society’s obsession with the duality of male and female the law has mostly failed to legally define sex. The law ignores those whose sex may be ambiguous. In keeping with the myth of duality, the law makes no provision for people who are intersex because it assumes that exceptions to the rule of two are extremely rare, when in fact they are anything but.

Recent medical literature indicates that approximately one to four percent of the world's population may be intersexed and have either ambiguous or noncongruent sex features. Thus, the manner in which the law defines ‘male,’ ‘female,’ and ‘sex’ will have a profound impact on at least 2.7 million persons in the United States. If, as some experts believe, the number of intersexed people is four percent, approximately ten million people in the United States will be affected.\textsuperscript{16}

David and others like him are not nearly as rare as people think. Add to this the untold numbers of people who are intergender (identify as neither male nor female) or in-between (transgender people in the process of transitioning) and the need to uncover and correct the myth of duality becomes all too clear. “[L]abeling someone a man or a woman is a social decision.”\textsuperscript{17} The duality of male and female is not a scientific fact, unbending like a concrete foundation. It is a social construct, flexible and changing over time. Basing law upon the myth of duality is like building a house upon sand.

This paper will delve into the large and very important issues of the falsity of the gender-binary social construct - the “myth of duality” - and how statutes such as those governing marriage and ability to update sex markers on identification affect intersex, intergender, and those transgender persons who are in the process of transition. The goal of this paper is to argue

\textsuperscript{13} See, e.g., Cal Ed Code § 89515 (2010).
\textsuperscript{15} Romer, 517 U.S. at 635.
\textsuperscript{16} Julie A. Greenberg, Therapeutic Jurisprudence: Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265, 267-268 (Summer, 1999).
\textsuperscript{17} Fausto-Sterling, Sexing the Body, at 3.
for gender-neutrality in laws in order to be inclusive of all sexes, genders, and sexual orientations across the spectrum in the long run. In the short run the "solution" to this problem is to impart knowledge of the legal problem of sex/gender classification based on a false duality and discrimination based on that classification.

In order to cover this topic this paper will often need to discuss persons who conform to neither male nor female pronouns. The gender non-specific pronouns “zie” in place of he/she and “zir” in place of him/her may be used. Transgender persons who are either transitioning or transitioned from male-to-female (MtF) or female-to-male (FtM) will be identified as such. In discussing transgender persons it is necessary to differentiate a non-transgender person: a “cisgender” person is someone whose sex/gender at birth matches zir sex/gender in adulthood. The law in most instances has not caught up to understanding the differences between sex and gender, and often uses terms of sex and terms of gender (such as male, female, man, woman, sex, or gender) interchangeably or contradictorily when referring to legal sex.

For that reason this paper will occasionally have to use “sex/gender” when referring to legal concepts.

This paper will focus on persons who do not fit into the myth of duality as a way to put the spotlight on the need for sex/gender neutral laws. People who are intersex, intergender, or in-between during a transition from MtF or FtM are done violence by the myth of duality as they are forced into boxes which they do not fit, like a square peg in a round hole. Existing statutes

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18 Zie and zir are words I learned in the bisexual community that have become a normal part of my vocabulary. They are discussed in the Gender Neutral Pronoun FAQ, http://aetherlumina.com/gnp/ which in turn references Dennis E. Baron, Grammar and Gender, Yale University Press (1986). Some organizations working with transgender clients use “ze” and “hir” instead of “zie” and “zir”. See Tips for Communicating with Trans Clients in Prisoners’ Rights Cases, Sylvia Rivera Law Project, www.srlp.org.


20 Cisgender is a label for "individuals who have a match between the gender they were assigned at birth, their bodies, and their personal identity", complementing "transgender". Kristen Schilt, Doing Gender, Doing Heteronormativity: ‘Gender Normals,’ Transgender People, and the Social Maintenance of Heterosexuality. Gender & Society 23 (4): 440–464 (August 2009). (The prefix cis- is pronounced like 'sis'.)

21 For instance Okla. Const. Art. II, § 35 limits marriage to "[o]ne man and one woman" using terms of sex, but then specifically disallows recognition of "same gender" relationships using terms of gender.
that differentiate by sex/gender are all, of course, about man and woman, male and female. So although the laws discriminate against M (male), F (female), or both on the basis of sex, the invisible third sex/gender "I" (intersex/intergender/in-between) is completely left out of the picture. The invisibility of millions of intersex people highlights the absurdity of the gender specific laws.

In part I this paper will define “The Myth of Duality,” touching upon what makes up sex and gender, who are the people left out of a dual system, and the historical and cultural background of the myth of duality. Part II will address three problems with how the law affects people who don’t fit into the myth of duality: first that people are classified by sex at birth, second that this is done according to a dual system of male and female which does not correspond to reality, and finally that laws discriminate against people on the basis of sex using this dual system based on classifications that have been set at birth and may be inaccurate. Lastly in part III arguments will be made for some possible solutions, including inclusion of a third sex/gender, doing away with sex/gender classifications entirely, or at least creating sex/gender neutrality under the law, but most importantly the initial “solution” of informing the legal community that the problem exists.

**ARGUMENT**

I. **Background: Sexual Minorities and the Myth of Duality**

There are not just two genders - male and female - but a range of genders, gender identities, and gender expressions as well as a range of sexual orientations. Biological sex, gender identity, gender expression, and sexual orientation are different parts of each person’s
identity that exist side by side. The popular notion that there are two distinct categories for each area (male/female, man/woman, masculine/feminine, gay/straight) with everyone falling neatly into one or the other is a social construct. Even the term “bisexual” is a misnomer: “bi” meaning “two” or “both” assumes only two sexes. People who are intersex, genderqueer, androgyous, or pansexual do exist, along a continuum. We do not live in a black and white world. We live in a rainbow of colors.

A. What are Sex, Gender, and Legal Sex?

Where do Intersex and Transgender people fit in a Land of Duality? There are three concepts of sex and gender which will need to be referred to in this paper. The first is a person’s sex as defined by physical traits such as chromosomes, hormones and other chemicals, internal and external sex organs, and secondary sex characteristics. Sex is traditionally classified using the terms man or woman. This paper will use an additional term, intersex, to refer to anyone born physically different from entirely man or woman. For instance, when it comes to chromosomes XX usually means a person is a woman and XY means they are a man. However, people with Androgyn Insensitivity Syndrome (AIS) and 5-Alpha Reductase Deficiency (5ARD) have XY chromosomes yet are born looking for all outward appearances as girls (albeit with internal

23 “Genderqueer: Someone who rejects the traditional gender binary and identifies as a) neither male nor female, b) as both, or c) as a combination thereof.” Stewart Wachs, Questioning Gender: An interview with Japan-based psychotherapist Kim Oswalt, Kyoto Journal #64, Nov-Dec 2006, http://www.kyotojournal.org/kjselections/oswalt.html.
24 “Most people labeled male have one penis each, a scrotum, two descended testicles, a prostate, no vagina, penile erections and ejaculations, and so on. Most labeled female have one clitoris each, a vagina, two ovaries in the abdomen, no testicles, erections (in this case of the clitoris), a period of life in which they menstruate, and so on.” Alice Dreger, Doctors Containing Hermaphrodites: The Victorian Legacy, ISNA http://www.isna.org/books/chrysalis/dreger. Retrieved on 8/28/2011.
testes rather than ovaries). Other combinations beyond XX and XY exist. For instance people with 47,XXY, also called Klinefelter’s Syndrome, are classified at birth as male yet develop female secondary sex characteristics and often feel both male and female. Hormones and other chemicals play a huge role in sex determination. Congenital Adrenal Hyperplasia (CAH) causes enzyme and hormonal differences resulting in atypical genitals. These are just a few of the physical manifestations of sex beyond the typical man/woman duality. To mention more than a few examples would take an entire volume.

The second concept is a person’s gender as defined by identity and expression. Gender identity and gender expression are not always the same and are often classified on a sliding scale using the terms male and female on the far ends of the line for gender identity, and the terms masculine and feminine for gender expression. This paper will focus on identity, combine references to identity and expression for simplicity's sake using the term “gender,” and will introduce an additional term, “intergender,” to refer to anyone whose identity is neither male nor female. A common term used in queer culture by people who identify this way is “genderqueer.”

The third concept is a person’s legal sex. Legal sex is defined differently in different jurisdictions, or not at all. The need for transgender persons to change legal sex from one they were classified with at birth has brought this lack of conformity to light. For those persons in the

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28 XX babies with CAH are regularly subjected to unnecessary “feminizing” surgery and questionable follow-up testing. http://aiclegal.org/aic-in-the-news/statement-on-recent-controversy-about-genital-surgery-and-dexamethasone/. Pregnant women at risk for a CAH child are sometimes given dexamethasone “prevent female fetuses from developing genitals that are atypical, [and] from being psychologically ‘masculinized,” i.e., tomboyish, more aggressive than average girls, and ultimately lesbian or bisexual…” http://www.fetaldex.org/home.html.


30 "The law typically has operated under the assumption that the terms ‘male’ and ‘female’ are fixed and unambiguous despite medical literature demonstrating that these assumptions are not true.” Greenberg, supra note 16, at 267.
middle of a transition from MtF or FtM the term “in-between”\(^{31}\) applies. While most legal forms contain two checkboxes, M or F, some activists encourage addition of a third box labeled “I” to identify person who are intersex, intergender, or in-between.

“The intersex movement in the past two decades has challenged social, medical, and academic conceptions of sex and gender. In the same period, genetic studies of sex determination, largely derived from research on intersex conditions, has revolutionized long-standing theories of sex determination… [G]enetics research is upending ancient sexist prejudices in biology. It also elucidates the dizzying complexity of biological sex that is well beyond simplistic sex binarism and involves multiple interactions between genes and environment.”\(^{32}\)

**B. What’s Sex(ual Orientation) got to do with it?**

What, if anything, does sexual orientation have to do with the Myth of Duality? Language, for one thing: the word “heterosexual” for opposite-sex assumes only two sexes, man and woman. Gay men and lesbian women assume they are partnered with someone of the exact same sex as themselves. The word “bisexual” assumes only two genders, however many in the bisexual community recognize that this is a myth, and keep the label only because it is well understood. The Williams Institute of the UCLA School of Law, in creating the “Best Practices for Asking Questions about Sexual Orientation on Surveys”\(^{33}\) provided for only three orientations (heterosexual, bisexual, or gay/lesbian) and only two possible sexes of partners.

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\(^{31}\) “In-between” is a term that was given to me by the “four brave humans” in their discussion of the need for the availability of “I” in addition to “M” or “F” as a gender marker. The “I” marker could easily include persons who are intersex, intergender, or in-between.


\(^{33}\) Thanks to Lindasusan Ulrich for posting this on academic_bi@yahoogroups.com, Jun 11, 2011. Lindasusan Ulrich is a former member of the San Francisco Human Rights Commission’s LGBT Advisory Committee and the author of the committee’s report *Bisexual Invisibility: Impacts and Recommendations.*
(male or female). The response of some members of the bisexual academic community was a testament to the need to break the myth of duality:

Giving only three sexual orientation options and asking about attraction to only two genders can hardly be said to be inclusive… [P]eople also identify as pansexual, omnisexual, queer, fluid, bi-curious, heteroflexible, homoflexible, polysexual… Many people… are attracted to genders and sexes beyond men or women… such as transgenders, genderqueers, cross dressers, femmes, butches, bigenders, [or] intersex… Given those limited survey options, research is sure to miss out on many factors concerning sexual orientation and desire and to produce highly partial information.  

In addition to the language and research issues, the fact is that - irrespective of their sexual orientations - intersex and transgender people have been rolled in to the ever lengthening acronym LGBTQQIA (hereafter “queer”), and to a greater or lesser extent included in the queer community.

II. Problem: How Classification and Law Affects Sexual Minorities

The issue with how classification and law affects sexual minorities can be divided into three discrete problems: 1) That people are classified by sex at all, and especially that they are classified at birth; 2) That people are classified by sex according to a dual system of male and female which does not correspond to reality; 3) That laws discriminate against people on the basis of sex, and especially that it does so using a dual system which does not correspond to reality based on classifications that have been set at birth and may be inaccurate

A. Sex and Gender Assignment at Birth

It is a problem that people are classified by sex at all and especially that they are classified at birth, because they are being classified by others, because their bodies and psyches

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34 Shiri Eisner, quoted from post on academic_bi@yahoogroups.com, Jun 13, 2011. Shiri Eisner is a feminist bisexual and genderqueer activist, writer and researcher. She resides in Tel Aviv, Israel, where she runs the bisexual organization Panorama – Bi and Pansexual Feminist Community. Shiri is the founder and manager of the Academic_bi mailing list.

35 Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, and Allies
are unformed, because secondary sex characteristics come later, and because the child’s gender identity is still unknown.

The Myth of Duality begins at birth, or before.\(^{36}\) The myth of duality is so strong in our society that the minute a pregnant person\(^ {37}\) is far enough along for a sonogram to see the existence or absence of a penis the first question everyone asks is “what are you having?”\(^ {38}\)

Intersex children, however, are born into a world full of things much worse than just nosy questions and color-coded clothing. Children forced into a sex classification of boy or girl who are in fact intersex face unnecessary surgeries and even sterilization\(^ {39}\) in infancy and early childhood, before the child is old enough to consent and before anyone is able to tell what sex the child would prefer or identify with. The child is often lied to and zir health history kept a complete secret. This strategy for treating intersex infants began in the 1970’s based on the results of a single test case of a non-intersex child who was transformed from boy to girl.\(^ {40}\)

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\(^{36}\) The first words when my daughter came into the world were not “it’s a healthy baby!” or “congratulations, you are done pushing!” The first words were “it’s a girl!”


\(^{38}\) I liked to answer “a baby.” I knew what they meant; I just found the obsession with the sex of my child to be bizarre. Apparently my daughter did too, for she’d hidden that part of her body in the sonogram. My wife, on the other hand, had fooled her mother’s doctor in her sonogram, and came in to a world fully stocked with blue onesies.

\(^{39}\) When a child is born with a DSD doctors often perform surgery that can result in sterilization. “[T]he birth of an intersex baby has generally been treated as a medical emergency. Although the vast majority of these babies have no medical condition that will result in physical harm, doctors act quickly to assign a gender, and often pressure parents to consent to immediate surgery to conform the genitals to this assigned gender.” Anne Tamar-Matis, Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants, 21 Berkeley J. Gender L. & Just. 59, 65 (2006).

\(^{40}\) The child, whose penis had been mutilated in a circumcision accident, was raised as a girl. The horror of this story is that the single test case used to decide the future of thousands of intersex infants, as well as the
“Doctors began to recommend immediate genital-normalizing surgery for many intersex infants, along with hormonal reinforcement of the assigned gender, strictly gendered upbringing, and—above all—secrecy.”⁴¹ A generation of lies, secrecy, and forced sex classification created the situation which now exists: thousands or millions of intersex persons who are not only invisible to the rest of society, but invisible to themselves. In a world that accepted intersex as a valid sex classification these children could be seen as perfect just the way they are, and allowed to choose whether or not to have elective surgeries or hormone treatments later in life if their bodies did not match their true gender identity. These changes are only recently beginning to happen.

As a result of the discrediting of the foundational study of genital normalizing surgery on infants, mounting evidence of the resultant harm, and the unanimous voice of the adult intersex community denouncing infant surgeries as harmful, the standard of care is slowly beginning to move away from the concealment model. The legal community is also gradually awakening to the important questions raised when parents and doctors confront the reality of an intersex baby. For legal scholars, there are interesting academic issues about the meaning of autonomy and liberty, family privacy and children’s rights, judicial deference and the role of gender in the law.⁴²

On the gender side of the sex/gender coin, children who are forced into a gender role of male or female who are in fact intergender or transgender face diagnosis of GIDC⁴³ and possibly recommended treatment of other boys with injuries to the penis, was based on lies. The boy in the John/Joan case, in spite of all the lies and secrecy, fought back and grew up to be a man. The “experiment” had been a failure, and no one found out for 25 years. See John Colapinto, The True Story of John/Joan, ROLLING STONE, Dec. 11, 1997


⁴² Anne Tamar-Mattis, Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants, 21 Berkeley Journal of Gender, Law & Justice 59 (2006). FN23: “National intersex leaders claim to be unaware of any intersex person who is satisfied with surgical intervention, and no intersex person has stepped forward publicly to advocate for surgery. …Some advocates of surgery do claim to know of satisfied patients, but none of these has spoken or been identified in a public forum. See MARCUS DE MARÍA ARANA, SAN FRANCISCO HUMAN RIGHTS COMM’N, A HUMAN RIGHTS INVESTIGATION INTO THE MEDICAL “NORMALIZATION” OF INTERSEX PEOPLE (2005), available at http://sfhrc.org/site/uploadedfiles/sfhumanrights/Committee_Meetings/Lesbian_Gay_Bisexual_Transgender/HRC%20Intersex%20Report.pdf (reporting Commission’s inability to find intersex person to testify in support of surgery); see also Barron H. Lerner, If Biology Is Destiny, When Shouldn’t It Be?, N.Y. TIMES, May 27, 2003.

⁴³ Gender Identity Disorder of Childhood (GIDC) appeared in the DSM-III as a solution to the “need” to treat nonconforming children when “Homosexuality” was eliminated as a mental disorder and children could no longer be treated for gender deviance as a means of preventing homosexuality. The current trend is to justify
unnecessary psychiatric treatment.\textsuperscript{44} A world that accepted them in whatever gender identity or expression was natural for them would not treat their natural tendencies as a mental disorder. The need for a diagnosis of GID in adult transgender persons is an ongoing controversy in the transgender community.\textsuperscript{45} On the one hand, without a diagnosis there is no insurance coverage for medical procedures to transition FtM or MtF persons to allow their bodies to match their identity and counseling to support them in the process. On the other hand, the diagnosis continues to stigmatize these persons and, especially in childhood, makes the process of growing into the identity that fits that much more painful. Furthermore, the diagnosis implies that there can only be two genders, and that it is unacceptable to be somewhere in between.

\textbf{B. Affect of Duality on Intersex Athletes}

Most people have never have met an intersex person \textit{that they know of}, but anyone who has followed sports news has probably heard of one or two women athletes who found out they were intersex after failing femininity testing required to allow them to compete.\textsuperscript{46} Until 1968 female Olympic athletes would be required to parade nude in front of examiners to prove they had the requisite breasts and vagina to compete as women.\textsuperscript{47} The move to modern DNA testing stopped this degrading tradition but created new problems. The Intersex Society of North America reports that testing at the 1996 Summer Olympics revealed eight of 3,387 women tested

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\textsuperscript{44}See the story of Kit, a young girl placed in a locked psychiatric ward as treatment for GIDC. Burke, \textit{Gender Shock} at 69-71.
\textsuperscript{45}There are issues with the “Disability Model” and the “Medical Model” which are complicated and involve differing priorities in the Intersex, Transgender, and GLB communities related to medical abuse, availability of healthcare, keeping homosexuality out of the DSM, need to work with the medical community, Title VII and ADA protections from employment discrimination, and legal precedent. See “Disability” workshop at Lavender Law 2009 and “Revisiting Disability Frameworks” workshop at Lavender Law 2011.
\textsuperscript{46}When a sporting event is limited to a single sex the associations running the event may verify the eligibility of an athlete to compete. Note that proof of masculinity has never been required of male athletes, the assumption being that women have no competitive edge against men, but men would have a competitive edge in a women’s sporting event.
\textsuperscript{47}Fausto-Sterling, \textit{Sexing the Body}, at 3.
had XY chromosomes (due to either AIS\textsuperscript{48} or 5-alpha reductase deficiency\textsuperscript{49}). These women were often instructed to feign injury or were even fitted with casts in order to hide their intersex condition from the media.\textsuperscript{50} Famous cases include 1988 Olympic vaulter Maria Patino and the more recent case of South African gold medal runner Caster Semenya.

Following her dramatic gold medal victory as the fastest 800-meter runner in the world at the 2009 World Championships, Caster Semenya was required by the International Association of Athletics Federations (IAAF) to undergo a gender test because there were questions as to whether she was actually a woman, given how fast she ran. The test revealed that she was intersex, much to her surprise, and she was withdrawn from international competition amid media frenzy. Eventually the IAAF agreed to let her keep the medal and the prize money and finally cleared her to return to competition in July 2010. Semenya stated, "God made me the way I am and I accept myself."\textsuperscript{51}

Maria Patino did not fare as well in 1986. Spain’s best female hurdler, she competed at the 1983 World Track and Field Championships in Helsinki, where she had passed the testing and been given a “Certificate of Femininity.”\textsuperscript{52} In 1985, at the Kobe World University Games, she had forgotten her Certificate and was retested. This time she failed the test\textsuperscript{54} and, told to fake

\begin{footnotes}
\footnotetext{48}{Androgen Insensitivity Syndrome (AIS), supra note 25.}
\footnotetext{49}{5-alpha reductase deficiency, supra note 26.}
\footnotetext{50}{Maria's Story, Androgen Insensitivity Syndrome Support Group (AISSG) at http://www.aissg.org/articles/MARIA.HTM, quoting Robert Peel, Eve’s Rib - Searching for the Biological Roots of Sex Differences (1994).}
\footnotetext{51}{Oren Yaniv, Caster Semenya, forced to take gender test, is a woman ... and a man, NY Daily News, Thursday, September 10, 2009}
\footnotetext{52}{In 1968 the International Olympic Committee switched from the "nude parade" to using the buccal smear in which skin cells from the inside of a woman's cheek are examined under a high-powered microscope. If the cells have two X chromosomes a dark spot inside the cell's nucleus called a Barr body appears. In this way the “jurisdiction” of athletics settled on chromosomes as the determining factor in sex/gender. Buccal Smear, Medline Plus at http://www.nlm.nih.gov/medlineplus/ency/imagepages/9140.htm (updated 12/15/2010 by: Frank A. Greco, M.D., Ph.D., Director, Biophysical Laboratory, The Lahey Clinic, Burlington, MA.)}
\footnotetext{53}{Maria's Story, supra note 50.}
\footnotetext{54}{Greenberg, supra note 16, citing Albert de la Chapelle, The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes, 256 JAMA 1920, 1921-22 (1986). In reality, the test used does not test}
\end{footnotes}
an injury, was prevented from competing. A complete karotype analysis took two months to complete and showed that she was 46,XY with AIS.\textsuperscript{55} She insisted on competing in the January 1986 Spanish National Games, and came first in the 60m hurdles. Her test result was revealed; she lost her medals, her scholarship, her fiancé, and was kicked off her team.\textsuperscript{56} Fighting this unfair result led to reinstatement of her license in 1988 and eventually to the end of chromosome based testing unless there is a question as to the specific athlete’s sex.

Gender verification in the Olympics was officially stopped by the International Olympic Committee (IOC) in 1999 following a resolution passed in 1996, but in individual cases the IOC retains the right to test gender.\textsuperscript{57} The International Association of Athletics Federations (IAAF) ceased sex screening for all athletes in 1992,\textsuperscript{58} but retains the option should suspicions arise, as was the case with Caster Semenya.

\textbf{C. Terms of Sex or Gender in Statutory Language}

Discrimination on the basis of sex by amateur and professional sporting associations is just one way in which people who don’t fit into the myth of duality are damaged. In the statutory arena Title IX\textsuperscript{59} has required that women and girls have equal access to athletic opportunities for the past 30 years, but only recently is work is underway to improve access to high school and

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\textsuperscript{55} Androgen Insensitivity Syndrome (AIS), \textit{supra} note 25.


\textsuperscript{59} 20 U.S.C.A. § 1681.
college sports for transgender and intersex athletes. There is federal protection against discrimination on the basis of sex in Title VII and the Equal Protection Clause of the Fourteenth Amendment of the US Constitution but there are still many laws on the books which discriminate on the basis of sex. Because these laws are based on a system of duality they exclude people who are neither man/male nor woman/female completely. “The currently accepted binary model …does not reflect reality and it often does not accomplish the legislative intent of the laws that seek to regulate behavior based upon a person's sex.”

The standard of review for sex discrimination in Federal Court is intermediate scrutiny. Under equal protection analysis if a law treats persons in similar situations differently on the basis of sex, that law cannot pass constitutional muster unless it passes intermediate scrutiny, because sex is a quasi-suspect classification. Intermediate scrutiny requires the government to show that the law is substantially related to an important government interest in order to allow statutes to discriminate based on sex. All states follow at least this intermediate level of scrutiny, while some such as California and Hawaii apply the higher standard of strict scrutiny requiring the classification by sex to be narrowly tailored to a compelling government interest. Unfortunately in a society which accepts the myth of duality as fact, statutes that discriminate based on sex all too often pass intermediate or even strict scrutiny.

An exhaustive search of all implications of sex/gender in US law would be impractical because the impact of legal sex in our society is so pervasive. A brief review of two sample states (California and Mississippi) as well as federal law identified at least ten major areas in

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61 Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employment discrimination based on race, color, religion, sex, or national origin. Title VII (Pub. L. 88-352), as amended, 42 USC § 2000e, et seq.
62 USCS Const. Amend. 14, § 1. “No State shall … deny to any person within its jurisdiction the equal protection of the laws.”
63 Greenberg, supra note 16, at 278.
which the words gender, sex, man, woman, male, or female occur in statutes in the jurisdictions. These areas were education, labor/business, public assistance, genital mutilation, prisoners, evidentiary/legal, enforced service/military, parenting/pregnancy, marriage/married name, and morals. Although a few of these require equal treatment, some engage in affirmative action in support of women but not men, or engage in sex discrimination of both men and women, and many require unequal treatment dependant on the sex or gender of the citizen.

In California genital mutilation (circumcision) of females is a crime, while genital mutilation (circumcision) of males is allowed. An unrelated adult male living with a family on welfare is required to provide financial contribution, while an unrelated adult female is not. Marriage is denied to some on the basis of the potential spouse’s sex. In Mississippi some quite archaic laws remain on the books such as those related to “morals”. Furthermore, each state’s laws use different language and follow different rules.

Not only are men and women discriminated against on the basis of some of these statutes, but intersex, intergender, and in-between persons are completely cut out of the laws and thereby discriminated against by the existence of all of these statutes. “A State cannot so deem a class of

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67 Cal Wel & Inst Code § 11351.5 (2011). Requirement of financial contribution by unrelated adult male residing with family that applies for or receives aid (held constitutional in Russell v. Carleson, 36 Cal App 3d 334 (1973)).
68 Cal Const, Art. I § 7.5
persons a stranger to its laws.” Similar to the way in which Colorado’s Amendment 2 prohibited all state or local protection of lesbian, gay, or bisexual persons, whether legislative, executive, or judicial, the laws which define all persons as either male/man or female/woman exclude people who are intersex, intergender, or in-between from protection of the laws. Romer overturned Amendment 2, reminding us that the Constitution “neither knows nor tolerates classes among citizens.” A complete overhaul of the statutes removing all unnecessary references to sex or gender is needed in order to do the same for people who are intersex, intergender, and in-between.

Currently, states have differing laws about whether they will change a birth certificate for a person born in the state, and whether they will respect a changed birth certificate from another state for the purposes of recognizing a marriage as being “opposite sex” and therefore valid. Of course there are the differences between states in whether they allow same-sex marriage, and because of DOMA no state is required to recognize same-sex marriages, nor is the Federal Government. The treatment of marriages involving transgender persons varies from state to state, and the legal status of marriages involving intersex persons is unclear since they must, according to the law of most states, be either male or female, not both, and not some third gender.

The issue of the validity of a marriage can have a huge impact on the life of an intersex or intergender person. “[I]n contested issues such as payment of insurance proceeds, parental rights, or tort claims, one party always stands to benefit by challenging the validity of a same-sex, or

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71 Romer, 517 U.S. at 635.  
73 Romer, 517 U.S. 620.  
74 Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissenting opinion).  
75 The understanding of what is “unnecessary” needs to be revised based on an understanding that duality is a myth.  
76 Sec. 2 of DOMA, 28 USCS § 1738C.  
77 Sec. 3 of DOMA, 1 U.S.C. § 7.
any other marriage." A transgender person might think she has a valid legal marriage based on an amended birth certificate, and find out otherwise when she tries to inherit. An intersex person might not even know of her status until she is tested as condition precedent to a settlement for a claim as a surviving spouse, and the next thing she knows her marriage is deemed invalid and she has no claim for wrongful death, no pension, no life insurance proceeds, and her children are taken away.

D. **Sex Reassignment State by State Requirements**

Statutes which differentiate the rights of men and women are one way in which the myth of duality is perpetuated. The denial of marriage to same sex couples is another. The inconsistent state and federal laws regarding the ability to change one’s legal sex is an additional way in which persons who do not fit into the “male-born-man” and “female-born-woman” dichotomy are made strangers to the law. While one would think that Full Faith and Credit and Comity should apply, it often doesn’t.

Each state follows different rules regarding changing records which contain classification on the basis of sex or gender. In California statutes allowing for legal change of sex on a

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80 Requested to undergo genetic testing as a condition precedent to settlement [as a surviving spouse in a wrongful death action], Rae was informed that she has ‘a fairly common hormonal disorder called Androgen Insensitivity Disorder (AIS), which means that although she appeared female in all respects, her chromosomal pattern is one typical of males (XY) and not that of females (XX).’ …[T]he company retracted its offer of settlement and moved for summary judgment on the basis that the marriage between Rae and Tom is void because Rae is not a ‘spouse’ of the opposite sex under the state statute. Summary judgment was granted, and Rae’s marriage was declared void. Despondent, Rae also learned that neither Tom’s life insurance company nor his employer’s pension plan would issue the proceeds to her. Rae lives in a community property state. However, since she is not a surviving ‘spouse,’ she has no right to occupy [her] home. Further, she lost custody of the two children she has helped raise.” Michalek, *supra* note 78, at 727-728.

81 28 USCS § 1738.

82 “[C]ourts follow the general rule that a marriage that is valid in the jurisdiction where it is contracted is valid in [another state] ‘unless it is contrary to […] public policy …’ This rule is based on the principle of comity, by which one state accommodates its own law to the law of another jurisdiction that is pertinent to a particular transaction or event.” 2010 Md. AG LEXIS 1, 51-52 (Md. AG 2010) quoting Henderson, 199 Md. At 458. n33.
person’s birth certificate require that “the sex of the registrant… has been surgically altered.”

There is no specification as to how much alteration is required. The Transgender Law Center provides instructions for persons changing their gender marker on their ID. “In order to get a [California] court order for gender change, the law requires that you provide proof that you have had some kind of surgery that changes sex characteristics as a part of your transition.” (Emphasis added). In addition, when dealing with questions by a judge of whether the person has had genital surgery, TLC clarifies that “the law says [the person changing legal gender] must have had surgery that changes sex characteristics. It does not proscribe any particular kind of treatment.”

In comparison, to change gender marker on a California driver’s license it is only required to have an examination by a licensed U.S. physician or psychologist who must certify that “gender identification” and “demeanor” are male or female and whether gender identification is “complete” or “transitional.” Only a physician can certify that gender identification is complete, but there is no requirement for hormone therapy, mental health services, or surgery to change sex on a driver’s license.

As for Federal identification such as Social Security records, Passports, and Immigration documents, most federal agencies require “an original surgeon’s letter to change the gender marker.” However, their policies are vague. It is unclear how much or what types of surgery are considered sufficient to change gender. For instance the Social Security Administration requires a surgeon or doctor’s affidavit verifying that “sex change surgery has been completed”

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83 Cal Health & Safety Code § 103430(d); also ID PLEASE, . . . A Guide to Changing California & Federal Identity Documents to Match Your Gender Identity, Transgender Law Center (TLC), at 16. (Hereafter ID PLEASE, TLC)

84 ID PLEASE, TLC, supra note 83, at 18

85 This reference to “transitional” gender in the Department of Motor Vehicles (DMV) Form DL 329 is the only recognition of Intersex, Intergender, or In-between persons that I was able to find in any law or regulation. Id. at 27.

86 Id. at 25.

87 Id. at 36.
but does not specify what is meant by “completed.” The Federal Government, in spite of allowing change of gender markers, does not recognize this change for selective service registration (the draft). People age 18 to 25 assigned male at birth are required to register for the draft. This means that FtM transgender persons are exempt, but must show they are exempt in order to apply for federal student loans, government aid, and employment once their current documentation identifies them as male. However FtM people who transitioned prior to their 18th birthday and have changed their birth certificate may register for the draft. MtF persons are all required to register regardless of age of transition or likelihood that they will be deemed ineligible for military service.

Because David, Thomas, Galen, and Hida have not had surgery to become intersex, but rather were born intersex and misclassified as male or female, they are not addressed at all by laws that allow legal change of sex/gender. Those persons who are in the process of changing gender or who identify as intergender are also left without recourse under these laws.

E. Cases Addressing Transgender and Intergender Issues

Although this paper does not focus on marriage, many of the cases addressing the legal impact of sex classifications do relate to marriage because of the plethora of legal rights involved in marriage and the rash of litigation in recent years over marriage equality. In 1987 Ohio denied an MtF person’s request for declaratory relief in the denial of her application for a

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88 Id. at 22.
89 Id. at 43.
90 The exception being the California driver’s license option for “transitional” status for those who are in-between during their transition. Id. at 27.
marriage license to marry a male in the Ladrach case. To this day Ohio is one of the few states that still does not allow legal sex change. The only US case prior to 2000 to uphold marital rights of a transgender person was M.T. v. J.T., a 1976 New Jersey case involving the spousal support claim of an MtF ex-wife who had undergone the surgery at her ex-husband’s request and expense prior to their wedding, only to have him divorce her two years into the marriage and refuse to pay alimony on the basis of her being transgender. Marriage and the incidents of marriage is one of the primary ways in which cases of gender duality end up in the courts.

Transgender: In re Estate of Gardiner (2002)

The seminal case on legal implications of classification by sex is In re Estate of Gardiner, a 2002 Kansas supreme court case in which an MtF widow lost her entire intestate share of her husband’s estate due to her being classified by the court as male, therefore deeming her marriage invalid, therefore deeming her a legal stranger to her husband who, like most Americans, had not bothered to write a will. The court states in the syllabus of the case that “[t]he stated purpose of [the Kansas marriage statute] is to recognize that only traditional marriages are valid in this state. A post-operative male-to-female transsexual is not a woman within the meaning of the statutes and cannot validly marry another man.” Kansas now allows legal change of sex so if this case were tried today the outcome would likely be different. This area of law is rapidly changing for transgender people, although it still requires someone to choose classification as either male or female, and in most states to marry someone of the opposite sex.

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93 Id. at 831.
95 Gardiner, 273 Kan. 191.
97 Sex may be amended on birth certificate if there is “a medical certificate substantiating that a physiological or anatomical change occurred.” Administrative Code: K.A.R. § 28-17-20 (b)(1)(A)(i) (2006).
98 See supra note 11.
Although it is possible to change a person’s birth certificate to match a new sex/gender changed by surgery in most states, in Idaho, Ohio, Tennessee, and possibly Texas it is not. In Tennessee, for example, statutory language concludes that "[t]he sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery." Over the years amendments have attempted to address this problem, first in 2009 for intersex persons only, and most recently in February, 2011 for transgender persons as well. So far none of these amendments has become law.

In Texas it is not entirely clear where the law stands. The Texas supreme court in *Littleton v. Prange* held in 1999 that an MtF transgender person born in Texas, with an amended birth certificate stating her sex as female, married to a man in Kentucky did not have a valid marriage and therefore did not have standing as a surviving spouse to sue for the wrongful death of her husband. The *Littleton* court cited cases from Ohio, New York and England that

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100 Tenn. Code Ann. § 68-3-203 (d).

101 2009 Tenn. HB 931; 2009 TN SB 1070, AN ACT to amend TENN. CODE ANN. § 68-3-203 "(2) Notwithstanding subdivision (d)(1), upon receipt of a sworn statement by a licensed physician indicating that an individual was born with intersex or as a hermaphrodite and that a surgical procedure altered the sex of the individual, and upon request of such individual reaching the age of sixteen (16) or older, the certificate of birth shall be amended to indicate the choice of sex of the individual. For the purposes of this subsection (d), a person with intersex means an individual whose sex chromosomes or genitalia are determined to be neither exclusively male nor female."

102 2011 TN SB 0313, 2011 TN H.B. 187 (NS), Vital Records - As introduced, provides for amendment of birth certificate to reflect a change in gender. - Amends TCA Section 68-3-203. Feb. 7, 2011"deleting subsection (d) in its entirety and by substituting instead the following: (d) Upon receipt of a sworn statement by a physician, surgeon, endocrinologist, gynecologist, internist, neurologist, psychiatrist, psychologist or social worker indicating that the gender of a person has been changed, the certificate of birth of the individual shall be amended to reflect the change."

103 *Littleton*, 9 S.W.3d 223.

104 “During the pendency of this suit, Christie amended the original birth certificate to change the sex… [S]he was entitled to seek such an amendment if the record was ‘incomplete or proved by satisfactory evidence to be inaccurate.’” Texas Health and Safety Code § 191.029; *Littleton*, 9 S.W.3d at 231.

105 Ladrach, 513 N.E.2d 828.
had each held a marriage involving a transgender person to be invalid. Littleton found the amended birth certificate not binding on the court.\textsuperscript{108} Texas \textit{does} have a statute that allows “amending [a] birth certificate [to] correct[] information relating to the person's sex…”\textsuperscript{109} under which Christie Littleton amended her original birth certificate to change her sex and name.

According to Lambda Legal “[p]rior to Littleton \textit{v.} Prange, Texas issued new birth certificates. Anecdotal reports now indicate that some officials refuse to correct the sex designation on transgender people's birth certificates, although judges may order such a change.”\textsuperscript{110} The law is in flux in Texas, with an appeal pending in the Araguz case in which the District Court ruled a marriage invalid where an MtF woman who had changed her birth certificate in California married a man in Texas.\textsuperscript{111} The Texas State Attorney General has declined to issue an opinion on the question requested by the judge as to “[w]hether a county clerk may issue a marriage license when one of the parties is a female and the other was born a male but subsequently underwent sexual reassignment surgery.”\textsuperscript{112} Appellants argue Littleton has been overruled by subsequent state law\textsuperscript{113} and no longer governs. The Littleton court itself

\textsuperscript{107} Corbett \textit{v.} Corbett, 2 All E.R. 33, 44 (P.1970). English case analyzing 4 factors in determining sex: “(1) Chromosomal factors; (2) Gonadal factors (i.e., presence or absence of testes or ovaries); (3) Genital factors (including internal sex organs); and (4) Psychological factors.”
\textsuperscript{108} “We believe the legislature intended the term ‘inaccurate’ in section 191.028 to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth.” Littleton, 9 S.W.3d at 231.
\textsuperscript{110} LambdaLegal, supra note 99.
\textsuperscript{111} In the Estate of Thomas Trevino Araguz III, Deceased, Cause No. 44575 (245th District Court of Wharton County, Texas, May 36, 2011).
\textsuperscript{112} Attorney General Opinion No. RQ-0882-GA, 2010 Tex. AG LEXIS 37 (August 6, 2010).
\textsuperscript{113} Texas Acts 2009, 81st Leg., ch. 978 (H.B. 3666), § 2, effective September 1, 2009 added the allowance of an out of state drivers license or certified birth certificate among a long list of documents that could be used as proof of identity to receive a marriage license under Tex. Fam. Code § 2.005, at least implying that the legislature intended to overrule Littleton and allow people whose ID had been changed in states that allowed such a change to have a valid marriage in Texas.
stated in 1999 that “it is for the legislature, should it choose to do so, to determine what
guidelines should govern” and it appears that in 2009 they may have done just that.

Ironically, in each of these cases essentially “[t]he court stated that a person's sex is
determined at birth by an anatomical examination by the birth attendant.” If this logic is
carried over to an intersex person, then the examination at birth declaring the child to be intersex
(not entirely male or entirely female) should be binding in law. The law should, to be consistent,
hold all intersex persons to be legally of the sex/gender classification “intersex” rather than
“male” or “female,” irrespective of whatever surgeries or hormonal treatments have been utilized
to force them into one of the boxes of duality. It follows logically that legally these persons in
most states cannot marry either a man or a woman, can neither be drafted nor required to
contribute to a welfare household, do not have the right to an abortion or protection from
genital mutilation, and can be housed in no prison nor barracks. Under all laws based on
sex classification they do not exist.

_In-between: Glenn v. Brumby (2010)_

Most of the case law available on this issue is based on marriage of a transgender person.
However, the focus of this paper is neither transgender nor marriage, rather the focus is on legal
implications of dual classification on intersex, intergender, and in-between persons: those who
are neither entirely male nor entirely female. Case law on this point is sparse.

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114 Littleton, 9 S.W.3d at 230.
115 Ladrach, 513 N.E.2d at 832.
116 See supra note 11.
118 See, e.g., Cal Wel & Inst Code § 11351.5.
119 See, e.g., Cal Health & Saf Code § 123466.
120 See, e.g., 8 USCS § 1374, 18 USCS § 116, 22 USCS § 262k-2.
121 See, e.g., Cal Pen Code, Part 3, Titles 1 (Male Prisoners) and 2 (Female Prisoners).
122 See, e.g., 10 USCS §§ 4319, 6931, 9319.
One such case is the Georgia employment discrimination case of Glenn v. Brumby.\textsuperscript{123} Vandiver Elizabeth Glenn, at all times relevant to the case, had male sex organs and a male chromosomal makeup\textsuperscript{124} and a female gender identity. Zie was truly “in-between.” In 2005 Glenn was diagnosed with and began treatment for Gender Identity Disorder (GID). The treatment for GID consists of three major steps which take place over many years: 1) hormone therapy; 2) living full-time as the new gender for at least a year; and 3) sex reassignment surgeries.\textsuperscript{125} In 2005 Glenn was hired (presenting as a man) to work for the Georgia General Assembly's Office of Legislative Counsel (OLC), and also began hormone therapy and living as a woman outside of work. In 2006 zie underwent electrolysis and facial feminizing surgeries, and notified zir direct supervisor that zie was transgender and in the process of becoming a woman.\textsuperscript{126} In 2006 Glenn presented as a woman at work just one day, on Halloween, and was sent home by the head of the OLC.\textsuperscript{127} In late 2007 Glenn informed zir direct supervisor that zie would begin presenting at work as a woman. At that point Glenn was fired by the head of the OLC.

Glenn is a classic case of a person who is “in-between” male and female: with male chromosomes and genitals, female hormones and gender identity, and gender expression that is in some times and places male and in some female. Because the process of transition takes so long, a transgender person may spend years in this in-between place. To be expected not to work or marry or interact with the world during these years is to be made a stranger to the law. It is to impose the myth of duality on someone who does not fit within its walls. Glenn brought suit and won a case for sex discrimination under the equal protection clause of the fourteenth

\textsuperscript{124} Id. at 1289 fn.1.
\textsuperscript{125} Id. at 1289.
\textsuperscript{126} Id. at 1290.
\textsuperscript{127} Id. at 1290-1291.
amendment. Because Glenn was not being discriminated against for being a woman or a man, but for dressing like a woman while classified by zir employer as a man, the court analyzed zir discrimination on the basis of sex stereotyping, as in Price Waterhouse (discussed below).


In another employment case, Schroer v. Billington, the court held that a person hired who was in transition during the hiring process had been discriminated on the basis of sex, providing a case for Title VII protection on the basis of sex for intersex, intergender, or in-between persons. Diane Schroer applied for the position of Specialist in Terrorism and International Crime with the Congressional Research Service (CRS) at the Library of Congress, a position requiring security clearance. Schroer was extremely qualified for the position, and was offered and accepted the job. Because zie was “in-between,” during the long process of transitioning from male to female, zie applied for the position as "David J. Schroer," zir legal name at the time. While the paperwork was underway to finalize the hire, Schroer asked the selecting official for the position out to lunch in order to disclose the fact that zie was an MtF transgender person. Zie was about to begin presenting as a woman on a full-time basis, and believed that starting work at CRS as a woman would be less disruptive than if zie started as a man and later began

128 Glenn, 724 F. Supp. 2d at 1293.
131 It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).
132 See also the case of Barnes v. City of Cincinnati in which a Cincinnati police sergeant who was MtF and working as a male but known to be living outside of work as a female was demoted for “alleged lack of command presence,” winning a Title VII claim for sex discrimination. Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005). Darrell R. VanDeusen, VanDeusen on Gender Identity Discrimination, 2008 Emerging Issues 793, Matthew Bender.
133 Schroer is a graduate of the National War College and the Army Command and General Staff College, holds masters degrees in history and international relations, has 25 years of service in the U.S. Armed Forces, held command and staff positions in the Armored Calvary, Airborne, Special Forces and Special Operations Units, and combat operations in Haiti and Rwanda, was a Colonel assigned to the U.S. Special Operations Command that tracked and targeted high-threat international terrorist organizations, and held a Top Secret, Sensitive Compartmented Information security clearance. Schroer, 577 F. Supp. 2d at 295.
presenting as a woman. After learning of Schroer’s transgender status, the job offer was rescinded, mainly on the basis of the belief that “David's security clearance was not relevant to Diane, and that Diane would need a separate clearance.” Additional concerns of the hiring officer were that “the past contacts I had counted on you to bring to the position may not now be as fruitful as they were in the past [and] the transition that you are in the process of might divert your full attention away from the mission of CRS.” It was specifically the fact that Schroer was in-between male and female that zie lost the job offer. The assumption that the person with the legal name “David” who had security clearance did not guarantee that the person with the legal name “Diane” would have the same security clearance automatically was a large part of the problem. This was a clear instance of the impact of the myth of duality, wherein the hiring manager thought of Schroer as two different people -- one male, one female -- rather than accepting the in-transition person as a single person who had the security clearance and qualifications for the job zie had been offered and had accepted. The court found that the concerns about security clearance, maintaining contacts, and the distraction of transition were “pretext[s] for discrimination” and that CRC’s conduct, “whether viewed as sex stereotyping or as discrimination literally ‘because of . . . sex,’ violated Title VII.” This holding shows just how fuzzy the line is between sex stereotyping based on gender expression and sex discrimination based on physical sex.

*Intergender: Price Waterhouse (1989)*

Gender involves identity and expression, as opposed to sex, which involves physical characteristics. One case that appears to be about intergender discrimination is *Price*.

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134 Id. at 296-297.
135 Id. at 298.
136 Id. at 299.
138 Schroer, 577 F. Supp. 2d at 300.
The Price Waterhouse court held that “Title VII barred not just discrimination because of biological sex, but also sex stereotyping” in the case of a female employee denied partnership because she was considered “macho” and didn’t fulfill expectations to walk, talk and, dress “femininely.”

Gender bending, especially by women who feel more free to dress and act masculinely in our society than men do to dress and act femininely, is often litigated in cases of employment discrimination. “Androgyyny involves the scrambling of gender markers - clothes, gestures, speech patterns, and so on - in a way that both undermines the stability of a sex-gender system premised on a male-female dichotomy and retains that dichotomy by either juxtaposing or blending it’s elements...”

The idea of transgender is transitioning towards something, having an endpoint in mind: for example, female, or at least female-ish. Whereas genderqueer folks are saying “neither/nor, both/and, I don’t even want to talk about gender because I don’t believe in it, and don’t genderize me. I don't want to be called female or male. I just want to be myself.” It’s as if to say the whole idea of gender is oppressive... For many, genderqueer is a revolutionary term implying anarchy and overturning established binary structure. They are about not assimilating, not trying to pass, or look like anything that makes another person feel comfortable.

It is a brave person indeed who is willing to refuse to participate in the overwhelming societal rule of a dual gendered culture and to go so far as take on the legal structures set up around that culture. David, Thomas, Galen, and Hida are four very brave people.

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139 Price Waterhouse, 490 U.S. 228.
140 Id.
141 In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. See e.g. Costa v. Desert Palace, Inc., 299 F.3d 838, 861 (9th Cir. Nev. 2002) where employee was told “you got more balls than the guys.” See also Margolis v. Tektronix, Inc., 44 Fed. Appx. 138, 141 (9th Cir. Or. 2002) where employee was told that others considered her "pushy" and "aggressive" (for a woman).
F. Intersex: The Hypothetical Case of Four Brave Humans

“The legal anomaly … intersexuals face when they leave their states of birth is that their legal sex may change, and with it, their legal rights.” At this time there are no US cases on intersex employment discrimination, marriage, or legal sex classification that I know of. Although there are millions of intersex people in the world, they are for the most part invisible, often even to themselves. This is because the treatment of infants with intersex conditions or differences of sex development (DSD) has involved doctors picking a sex (male or female), convincing the parents to consent to treatments to make the child conform to that sex as much as possible, and telling the parents to lie to the children and keep their condition a secret. Recent work of the intersex movement has involved advocating for the rights of intersex children to informed consent prior to “normalizing” surgery and freedom from unnecessary treatment.

Consider this hypothetical case. Imagine the Four Brave Humans are successful in either judicially or legislatively being allowed to change the sex marker on their birth certificates to “I”. What law applies to them? Looking back at J’Noel in the Gardiner case:

[After 1994, while J’Noel Ball was in Wisconsin, she was, for all legal purposes, a woman. However, while J’Noel was in Kansas, according to a Kansas probate court, she was, for all legal purposes, a man. Therefore, while in Wisconsin, if J’Noel wanted to enter a golf tournament, for example, she could only play in the women’s division; if convicted of a crime, she could only be sent to a women’s prison; and if she wanted to marry, she could only marry a man. But while in Kansas, she could only enter the men’s division, only be sent to a men’s prison,

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145 Beh & Diamond, supra note 41, at 2. Discussing intersex adults who learn of “secret surgical procedures performed on them when they were too young to remember or consent.”
146 Advocates for Informed Choice (AIC) is an organization committed to legal advocacy for the rights of these children. The majority of AIC’s work involves children’s right to informed consent prior to “normalizing” surgery and freedom from unnecessary treatment, although they are also involved in issues related to identity documents. Recent changes to US policy making it clear that intersex people can correct the sex marker on their passports was drafted with input from AIC, and they are involved in an advisory capacity with the case of the four brave humans attempting to change their legal sex to Intersex. See generally http://aiclegal.org/.
and only marry a woman. An anomaly of this nature is exactly what the Full Faith and Credit Clause was intended to resolve.\textsuperscript{147}

While J’Noel and other people to whom the laws concerning change of legal sex from MtF or FtM are subject to having their sex classification change from state to state and their “marital status blink on and off like a strobe light”\textsuperscript{148} the problem for David and his friends could be even more confusing. The IAAF and IOC determine the sex of athletes based on chromosomes.\textsuperscript{149} With XXY chromosomes, David would qualify as neither male nor female, and so could be blocked from competition, considered to be no sex at all. To change his birth certificate in California he must have some kind of surgery, but to change his driver’s license he need only have a doctor’s certification. So potentially he could be classified as intersex on one form of ID if a doctor certifies that is his gender identity and a court allows it, but could still be listed as male on his birth certificate.

In different states an intersex person could be legally a different sex. In Ohio, no change of sex/gender marker is allowed or recognized, so whatever is on the birth certificate is forever zir legal sex. In Texas, the state of the law is unclear. In a jurisdiction that requires only “some surgery” it’s ok if genitals don’t match legal sex which can be defined by the presence or absence of breasts. Another jurisdiction may require “genital surgery” so legal sex is defined by presence or absence of a penis. Another allows legal sex to be defined by gender identity as confirmed by a licensed doctor or psychologist. Another allows no change of legal sex from whatever happens to be on the original birth certificate (which may or may not be accurate). No jurisdiction recognizes any option other than F and M. Sex can only be changed on a person’s birth certificate (if at all) in the state in which the person was born.

\textsuperscript{147} Missing citation.
\textsuperscript{148} Koppelman, supra note 91, at 2155.
\textsuperscript{149} See part II B above “Affect of Duality on Intersex Athletes”.
The only real solution I can offer at this time is knowledge. The more people are aware that intersex, intergender, and in-transition people exist, and that they are currently unprotected by all laws that classify on the basis of a dual system of sex, the sooner we will be able to get to a long term legal solution. This long term solution could be to have no discrimination based on sex/gender, better classification which includes a third sex/gender for those who are neither male nor female, or (eventually) no classification of humans at all.

III. Solution: Visibility and Equality

The primary goal of this paper is also the first and most important solution to the problem of the legal erasure of people who are intersex, intergender, or in-between: to communicate to the legal community that these people exist and they are currently strangers to the law. There are three additional solutions to the problem which will probably happen in the following order: 1) creating sex/gender equality under the law, 2) availability of a third sex/gender for identification purposes, and finally 3) doing away with sex/gender classifications entirely.

A. The Historical, Cultural, and Scientific Myth of Duality

Visibility requires an understanding that people are classified by sex according to a dual system of male and female which does not correspond to reality. The “myth of duality” referred to throughout the paper is largely a 19th and 20th century Western phenomenon. “Some anthropologists assert that many societies have recognized more than two sex and gender categories.”

Throughout history and even today in many cultures there have been more than two sexes recognized. One more well known example is the two-spirit people of native North American culture. Widely misunderstood to refer to gays and lesbians, two-spirit actually refers

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to a third or fourth sex/gender which includes the spirit of both male and female, encompassing intersex, intergender, and transgender persons.\textsuperscript{152} Other examples include the \textit{mahu} of Hawaii,\textsuperscript{153} the \textit{calabai}, \textit{calalai}, and \textit{bissu} of Indonesia,\textsuperscript{154} and the truly intersex \textit{guevedoche} of the Dominican Republic.\textsuperscript{155}

In addition to the historical and cultural proofs that duality is a myth, there is the scientific fact of the existence of millions of intersex people\textsuperscript{156} as well as all the self identified intergender people and those in-between people in the process of transition from one end of the sex/gender spectrum to the other end. Now that you have been convinced that there are more than just two genders/sexes in our world, what can be done to include these people within the nation’s laws?

\textbf{B. Sex and Gender Equality Under the Law Today}

The advantage of creating sex/gender neutrality under the law by passing laws protecting against sex discrimination in general, such as the inclusion of “sex” in Title VII,\textsuperscript{157} and the

\begin{footnotesize}
\begin{enumerate}
\item The Navajo term \textit{nadleehi} refers to that culture’s traditional third gender, in which a biologically male-born person embodies both the masculine and feminine spirit. \textit{Dilbaa} refers to a female-born person with a more masculine spirit. Both are considered to encompass both genders in one person. Fred Martinez, the subject of the documentary \textit{Two Spirits} (supra, note 151), was \textit{nadleehi}. Navajo tradition places \textit{nadleehi} and \textit{dilbaa} in high esteem and they often assume roles as healers in their tribes.” Other two-spirit genders of Native North American tribes were the Mohave \textit{hwame} (male-identified females) and \textit{alyha} (female-identified males), the Zuni \textit{lhamana}, and the Lakota \textit{Winkte}. Map of Gender Diversity, supra, note 151.
\item The \textit{mahu} of the Kanaka Maoli indigenous people of Hawaii, who could be biological males or females inhabiting a gender role somewhere between or encompassing both the masculine and feminine. \textit{Id.}
\item The Bugi people of southern Sulawesi in Indonesia recognize three sexes (male, female, intersex) and five genders: men, women, \textit{calabai}, \textit{calalai}, and \textit{bissu}. \textit{Calabai} are biological males who embody a feminine gender identity. \textit{Calalai} are biological females who embody a male gender identity. \textit{Bissu} are considered a “transcendent gender,” either encompassing all genders or none at all. The \textit{bissu} serve ritual roles in Bugi culture and are sometimes equated with priests. \textit{Id.}
\item In an exceptional case, genetics seems to have created a third sex in Dominican Republic. A heritable pseudo-hermaphroditic trait was discovered by ethnographers in the 1970s, who followed the children over generations. With undifferentiated genitalia, they generally were raised as girls, but began developing male traits at puberty. Instead of changing their gender identities to male, most chose to live as a third gender called \textit{guevedoche} (roughly meaning “testicles at 12”) or \textit{machi-embra} (man-woman). The society has accommodated the \textit{guevedoche} and constructed a third gender with distinct roles for them. \textit{Id.}
\item See Greenberg, supra note 16, at 267-268.
\item Title VII of the Civil Rights Act of 1964 (“Title VII”) (42 USC § 2000e et seq.).
\end{enumerate}
\end{footnotesize}
application of heightened scrutiny to sex discrimination under the Equal Protection Clause,\textsuperscript{158} is that it is a quick fix allowing men, women, and others to sue for discrimination on the basis of sex. Other improvements have been made at the state level to equalize treatment of the sexes.\textsuperscript{159} Likewise the improvements in the seven jurisdictions\textsuperscript{160} that allow people to marry without regard to sex/gender includes, without even trying to, the ability of intersex, intergender, and in-between people to marry without regard to their sex or gender. This solution can be accomplished bit-by-bit rather than all at once, as legal advances often are.

One disadvantage of this solution is that it retains a system of classifications, and any classification based on male and female marginalizes people who don’t fit into this dual system. The other problem is the question of whether the US Constitution really protects against discrimination on the basis of sex for all sexes; or does it only protect against discrimination of cisgendered women, and possibly cisgendered men? The answer seems to be that statutes purporting to provide neutrality are the first step, but not the final step, in obtaining legal protection for persons who are intergender, intersex, and in-between.

\textbf{C. Why Not Add a Third Sex/Gender Classification?}

The solution sought by David, Thomas, Galen, and Hida is one which has not been successfully tried by the United States legal system before: inclusion of a third sex/gender.\textsuperscript{161} This solution requires education of the legal community and the public about the existence of

\textsuperscript{158} U.S. Const. amend. XIV, § 1.


\textsuperscript{160} See supra note 11.

\textsuperscript{161} I have heard of at least one case in another country where someone was able to have zir gender marker changed to something other than male or female, but have been unable to locate a source.
other genders beyond male and female. It also could have a similar impact to the Y2k\textsuperscript{162} crisis in terms of the need to update computerized systems which only have two choices for legal sex. It has the advantage of respecting the existence and right to accurate identification of people who don’t fit into the Myth of Duality, while respecting the need for some type of identification.\textsuperscript{163}

**D. Doing away with Sex/Gender Classification**

The possibility of completely doing away with legal classification based on sex or gender is remote; not just decades but generations away. One disadvantage to arguing this policy currently is the government’s need to use sex markers for identification purposes. In these times, with the Patriot Act in full force and the “war on terror” an ongoing concern of politicians, removing a simple means of classifying most (if not all) people is not only unlikely but a completely impossible argument to win. In spite of this, I will propose an advantage to this solution: the reduction of sex and gender stereotyping in our culture. Although many people think society must change before laws, it is often true that laws change before society.\textsuperscript{164} Breaking the Myth of Duality and removing the sexism of our culture would be greatly quickened by removing the strictly gendered system of classification on legal and other identification systems.

There are topics that haven’t even been touched on in this paper, such as the application of Full Faith and Credit to sex marker changes in one state being respected in other states, the

\textsuperscript{162} At 11:59 pm on December 31\textsuperscript{\textsuperscript{st}}, 1999 the world watched to see whether the computer systems that are so pervasive in our lives had been successfully updated to handle the change from a 2-digit year (12/31/99) to a 4-digit year (1/1/2000). The work required to prepare for this was massive, but the outcome was anticlimactic. Similarly, a binary sex setting (M/F) would need to be changed to a trinary system (M/I/F) to allow for the 3\textsuperscript{rd} gender to be tracked in computer systems.


right to move from state to state, immigration issues for intersex and transgender persons,\textsuperscript{165} and parenting issues such as the legal ramification to being a male “mom” or a female “dad.” To address every topic would require not a paper but a book or series of books.

**CONCLUSION**

In conclusion, the strict gender-binary social construct is based on a myth. Many people can and do exist somewhere in the spectrum between male and female, neither man nor woman. These people are made strangers to the law by our strictly dual gendered system of classification and the discriminatory laws based on that system. Classification at birth is particularly onerous to intersex and transgender persons, whose proper gender cannot be known until they are old enough to speak for themselves, and whose sex often will not correspond to either of the two choices given. The use of terms of sex/gender in statutory language and inconsistent state and federal laws and regulations on changing one’s classification create additional barriers for people who are intersex, intergender, or in-between during transition. While it is unlikely that the entire system of sex and gender classification will be defeated any time soon, it is imperative that we do away with all discrimination based on sex and gender, and begin to think of ways to accurately classify and include those of a third sex/gender that is neither male/man nor female/woman. The intersex/intergender/in-between people of our society are part of our society, and cannot continue to be made strangers to its laws.

\textsuperscript{165} See, e.g., ORAM Lecture Series: Hidden Topics in LGBTI Asylum and Refugee Law, Hastings College of Law (June 24, 2011) information at http://us2.campaign-archive1.com/?u=f9c95273ad99bfa19e9e1c974&id=74b6d70ebc&c=2f96e22e4f.