In 1843 Levi Suydam, a 23-year-old resident of Salisbury, Connecticut, asked the town's board of selectmen to allow him to vote as a Whig in a hotly contested local election. The request raised a flurry of objections from the opposition party, for a reason that must be rare in the annals of American democracy: It was said that Suydam was "more female than male," and thus (since only men had the right to vote) should not be allowed to cast a ballot. The selectmen brought in a physician, one Dr. William Barry, to examine Suydam and settle the matter. Presumably, upon encountering a phallus and testicles, the good doctor declared the prospective voter male. With Suydam safely in their column, the Whigs won the election by a majority of one.

A few days later, however, Barry discovered that Suydam menstruated regularly and had a vaginal opening. Suydam had the narrow shoulders and broad hips characteristic of a female build, but occasionally "he" felt physical attractions to the "opposite" sex (by which "he" meant women). Furthermore, "his feminine propensities, such as fondness for gay colors, for pieces of calico, comparing and placing them together, and an aversion for bodily labor and an inability to perform the same, were remarked by many." (Note that this 19th-century doctor did not distinguish between "sex" and "gender." Thus he considered a fondness for piecing together swatches of calico just as telling as anatomy and physiology.) No one has yet discovered whether Suydam lost the right to vote. Whatever the outcome, the story conveys both the political weight our culture places on ascertaining a person's correct "sex" and the deep confusion that arises when it can't be easily determined.

European and American culture is deeply devoted to the idea that there are only two sexes. Even our language refuses other possibilities; thus to write about Levi Suydam I have had to invent conventions -- s/he and h/er to denote individuals who are clearly neither/both male and female or who are, perhaps, both at once. Nor is the linguistic convenience an idle fancy. Whether one falls into the category of man or woman matters in concrete ways. For Suydam -- and still today for women in some parts of the world -- it meant the right to vote. It might mean being subject to the military draft and to various laws concerning the family and marriage. In many parts of the United States, for example, two individuals legally registered as men cannot have sexual relations without breaking antisodomy laws.

But if the state and legal system has an interest in maintaining only two sexes, our collective biological bodies do not. While male and female stand on the extreme ends of a biological continuum, there are many other bodies, bodies such as Suydam's, that evidently mix together anatomical components
conventionally attributed to both males and females. The implications of my argument for a sexual continuum are profound. If nature really offers us more than two sexes, then it follows that our current notions of masculinity and femininity are cultural conceits. Reconceptualizing the category of "sex" challenges cherished aspects of European and American social organization.

Indeed, we have begun to insist on the male-female dichotomy at increasingly early stages, making the two-sex system more deeply a part of how we imagine human life and giving it the appearance of being both inborn and natural. Nowadays, months before the child leaves the comfort of the womb, amniocentesis and ultrasound identify a fetus’s sex. Parents can decorate the baby's room in gender-appropriate style, sports wallpaper -- in blue -- for the little boy, flowered designs -- in pink -- for the little girl. Researchers have nearly completed development of technology that can choose the sex of a child at the moment of fertilization. Moreover, modern surgical techniques help maintain the two-sex system. Today children who are born "either/or -- neither/both" -- a fairly common phenomenon -- usually disappear from view because doctors "correct" them right away with surgery. In the past, however, intersexuals (or hermaphrodites, as they were called until recently), were culturally acknowledged.

Hermaphroditic heresies

In 1993 I published a modest proposal suggesting that we replace our two-sex system with a five-sex one. In addition to males and females, I argued, we should also accept the categories herms (named after "true" hermaphrodites), merms (named after male "pseudohermaphrodites"), and ferms (named after female "pseudohermaphrodites"). [Editor's note: A "true" hermaphrodite bears an ovary and a testis, or a combined gonad called an ovo-testis. A "pseudohermaphrodite" has either an ovary or a testis, along with genitals from the "opposite" sex.] I'd intended to be provocative, but I had also been writing tongue in cheek and so was surprised by the extent of the controversy the article unleashed. Right-wing Christians somehow connected my idea of five sexes to the United Nations-sponsored Fourth World Conference on Women, to be held in Beijing two years later, apparently seeing some sort of global conspiracy at work. "It is maddening," says the text of a New York Times advertisement paid for by the Catholic League for Religious and Civil Rights, "to listen to discussions of 'five genders' when every sane person knows there are but two sexes, both of which are rooted in nature."

[Sexologist] John Money was also horrified by my article, although for different reasons. In a new edition of his guide for those who counsel intersexual children and their families, he wrote: "In the 1970's nurturists ... became ... 'social constructionists.' They align themselves against biology and medicine ... They consider all sex differences as artifacts of social construction. In cases of birth defects of the sex organs, they attack all medical and surgical interventions as
unjustified meddling designed to force babies into fixed social molds of male and female ... One writer has gone even to the extreme of proposing that there are five sexes ... (Fausto-Sterling)."

Meanwhile, those battling against the constraints of our sex/gender system were delighted by the article. The science fiction writer Melissa Scott wrote a novel entitled *Shadow Man*, which includes nine types of sexual preference and several genders, including fems (people with testes, XY chromosomes, and some aspects of female genitalia), herms (people with ovaries and testes), and mems (people with XX chromosomes and some aspects of male genitalia). Others used the idea of five sexes as a starting point for their own multi-gendered theories.

Clearly I had struck a nerve. The fact that so many people could get riled up by my proposal to revamp our sex/gender system suggested that change (and resistance to it) might be in the offing. Indeed, a lot has changed since 1993, and I like to think that my article was one important stimulus. Intersexuals have materialized before our very eyes, like beings beamed up onto the Starship Enterprise. They have become political organizers lobbying physicians and politicians to change treatment practices. More generally, the debate over our cultural conceptions of gender has escalated, and the boundaries separating masculine and feminine seem harder than ever to define. Some find the changes under way deeply disturbing; others find them liberating.

I, of course, am committed to challenging ideas about the male/female divide. In chorus with a growing organization of adult intersexuals, a small group of scholars, and a small but growing cadre of medical practitioners, I argue that medical management of intersexual births needs to change. First, let there be no unnecessary infant surgery (by necessary I mean to save the infant's life or significantly improve h/er physical well-being). Second, let physicians assign a provisional sex (male or female) to the infant (based on existing knowledge of the probability of a particular gender identity formation -- penis size be damned!). Third, let the medical care team provide full information and long-term counseling to the parents and to the child. However well-intentioned, the methods for managing intersexuality, so entrenched since the 1950s, have done serious harm.
In a Decision Rejecting a Transsexual’s Marital Union, Kansas Embraces Traditional Marriage -- Or Does It?
by Joanna Grossman
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Just after its decision to discourage the teaching of evolution in public schools (later reversed), Kansas has once again embraced the laws of the Creator--only this time, the topic is marriage.

Twice citing a prior Texas opinion referring to sex as something "fixed by our Creator at birth," the Kansas Supreme Court overturned the decision of an intermediate appellate court that had recognized that, for purposes of marriage, a sex-reassignment operation could change one's legal sex. For the Kansas Supreme Court, sex is a function of what you're born with, not what a surgeon creates.

What's fascinating about the Kansas Supreme Court's decision, *In re Gardiner*, is not necessarily the holding - which will affect a relatively small group of individuals, those who are, or are contemplating becoming, post-operative transsexuals. It is the holding's logical consequences.

The Early Stages of the *Gardiner* Case

This case, which I described in detail in an earlier column, arises out of the May-December wedding of J'Noel Ball, a post-operative male-to-female transsexual, and her much older millionaire paramour, Marshall Gardiner.

When Gardiner died intestate (that is, without a will), J'Noel claimed her law-given spousal share ($1.25 million). (An earlier column on Anna Nicole Smith's marriage explains in detail the consequences of dying intestate, and the concept of the spousal share). However, his son, Joe, challenge J'Noel's claim. Joe asserted that J'Noel's marriage to his father was invalid because, he argued, it violated Kansas's ban on same-sex marriage.

Joe won round one, convincing a district court that an individual who is born male, but becomes anatomically female, remains a male. But J'Noel won round two.

That is, J'Noel convinced the appellate court that chromosomes (which determine birth sex) are only one factor in determining someone's sex at the time of marriage, and that subsequent treatments to harmonize one's psychological and physical self can change one's sex.

Joe's Two Contradictory Arguments
Now Joe has won round three. The Kansas Supreme Court decided to hear the case last fall, and finally issued its opinion this week. The legal task for the court was one of statutory interpretation. Kansas, like many states, has a statute (Section 23-101 of the Kansas Code) defining marriage "as a civil contract between two parties who are of the opposite sex." The question is, What is "sex"?

Joe, seeking to invalidate his father's marriage, made two arguments that seem odd when juxtaposed. First, he argued that "sex," as used in the statute, means "birth sex," and thus that a male-to-female transsexual (such as J'Noel) could not legally marry a man (such as his father) because both shared the same birth sex. On Joe's theory, as Joe, through his attorney, admitted, a transsexual (such as J'Noel) could, however marry a woman, because they would have different birth sexes - even though the result would be a marriage between two individuals sharing both the outward appearance and sexual apparatus of females.

Second, without skipping a beat, Joe argued that the reason the statute must be construed in this way is because the legislature intended to "uphold traditional marriage." One would think, however, that Joe's second argument contradicts his first. Joe admits his theory would allow marriage between two persons who appear female and, sexually, are female. Yet certainly that would not be a traditional marriage in Joe's or Kansas's view.

The Kansas Court Accepts Both of Joe's Two Contradictory Arguments

That a litigant makes inconsistent arguments is no surprise, but when a court blindly adopts them it is noteworthy. And that is exactly what happened here.

The Kansas Supreme Court agreed with Joe's arguments - relying on an assortment of dictionary definitions and the reasoning of a recent Texas case it found persuasive, Littleton v. Prange.

Based on these sources, the court held that 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 transsexual does not fit the definition of a female." Thus, the court concluded, J'Noel "remains . . . a male for purposes of marriage" under Kansas law. The upshot was that J'Noel, since her marriage was void, was not entitled to a spousal share, and lost the $1.25 million - which then went to Joe.

The court found the conclusion that J'Noel was "male for purposes of marriage" to be consistent with the underlying purpose of the Kansas marriage statute. The statute had been amended in 1975 to clarify that marriage could only legally occur between members of the opposite sex. And the legislature, the court noted, viewed "opposite sex" in the "narrow traditional sense" - defined by reference to the role played in marriage and the ability to reproduce. Accordingly, this
approach that considered biological sex alone in determining sex for purposes of marriage was, the court thought, in step with the statute's overall purpose to recognize only "traditional marriage."

Ironically, however, the logical consequence of the Kansas Supreme Court's ruling does anything but preserve "traditional marriage." The clear implication of this ruling is that J'Noel would be free under Kansas law to marry a woman.

Indeed, similar relationships have been the practical result in other states with a ruling like this one on the books--with male-to-female transsexuals carrying on lesbian relationships with women, under the sanctity of civil marriage.

Bizarrely, then, under Kansas law and the laws of the other states that have reached similar conclusions, a lesbian relationship that involves a man-to-woman transsexual is deemed more "traditional" than a lesbian relationship between two lesbian women.

**A Victory for Traditional Marriage?**

Which outcome - the one J'Noel argued for, or the one Joe argued for - truly "upholds traditional marriage?" The one that sanctioned marriage between a man and an individual who is psychologically, anatomically, hormonally, and in all other decipherable respects a woman? Or the one that sanctioned marriage between two individuals, both of whom are anatomically female?

The average American who does not have $1.25 million dollars at stake would almost certainly be less offended by the former outcome. In reality, neither marriage can be fairly defined as "traditional" - since neither permits conventional forms of reproduction. And yet both should be recognized.

The kinds of family forms and structures continue to multiply, and the need for legal recognition follows each. Inheritance rights, like those at stake in the *Gardiner* case, are just one of the rights that non-traditional couples desire when they attempt to have their marriages legally recognized.

One irony of this ruling is that it licenses a form of same-sex marriage for a group that doesn't want them, while withholding it from groups that do. Most male-to-female transsexuals are not homosexual, and, given the choice, would enter intimate relationships with men. Yet they are only allowed to marry women. And many lesbian women would like to marry other women, but are told by courts and legislatures nationwide that they must marry men if they marry at all.

**Why Transsexuals Must Constitutionally Be Allowed To Marry Someone**

What if the Court had suggested that J'Noel could not marry Marshall because both were born male, but also could not marry a woman because both would be
anatomically female? Wouldn't that be, from Kansas's perspective, the easiest answer, since it would rule out both types of non-traditional marriages - and indeed, would deem any marriage involving a transsexual nontraditional? From Kansas's perspective, perhaps.

But such a ruling would be constitutionally suspect. A statute that, as interpreted by the relevant state court, prevents an entire class of persons from marrying anyone of either sex would be subject to serious constitutional challenge.

There is significant protection in the Constitution for the right of marriage, stemming from the Due Process Clause of the Fourteenth Amendment and the "substantive due process" doctrine, which I discussed in an earlier column on the right of prisoners to procreate. The right to marriage is one of a panoply of privacy rights protected by the Constitution - including the right to bear and beget children, the right to use contraception, and the right of access to abortion without undue burden.

The right to marry has been construed to permit states to impose reasonable procedural regulations on how marriage is obtained (e.g., requiring a blood test or marriage license), but not to significantly interfere with the ability to marry. Thus, the Supreme Court struck down a Wisconsin statute in Zablocki v. Redhail that made it difficult if not impossible for a deadbeat dad to remarry without first paying up all back-owed child support.

Yet outside of the race context, most courts have upheld statutes limiting the class of persons one can marry. Thus incest statutes, which prevent one from marrying close relatives, and general marriage statutes, which prevent women from marrying men and men from marrying women, have withstood most scrutiny. But they survive because while they remove a class of potential marriage partners from the ring, they leave some there.

In short, limiting the class of persons one can marry is very different, in the Court's eyes, from telling a class of persons they can never marry at all. (Of course, this may in some cases be a false distinction; if one is a homosexual man or lesbian, the right to a heterosexual marriage only can be tantamount to a complete bar on marriage to anyone.)

Thus, pursuant to the Supreme Court's rulings, it may be that the state legislature can tell transsexuals whom they can marry - by defining their sex as either male or female, and letting them marry the opposite sex. But it may also be that under the Court's rulings, the state legislature cannot effectively forbid transsexuals from marrying at all.

A Controversial Case, But An Unfortunately Predictable Outcome
The Gardiner case has garnered significant media attention because it purports to resolve such grand questions as the meaning of sex and gender. But, in the end, it is predictable in its outcome and reasoning.

"Once a man, always a man," is the court's mantra. It comes from the judges' gut instincts rather than any complicated legal analysis. But its logical consequences, as described above, probably defy those same instincts. It is unlikely that the same judges who instinctually believe a man is always a man, also instinctually believe that a male-to-female transsexual's marriage to a woman is a traditional marriage. Yet that is, nonetheless, what they ruled.

One can only hope that perhaps the court, in its transparent effort to preserve "tradition," has unwittingly opened the door to same-sex marriage generally. Kansas soon will be forced to welcome what are in effect lesbian unions, as long as one of the partners is biologically male; perhaps the state will learn to accept them.

If so, it will be ironic, for same-sex marriage is an idea that poses a much more significant challenge to the tradition the court seeks to protect than the rare and apparently heterosexual marriage between a male-to-female transsexual and a man ever has.

The Kansas Supreme Court will not have the last word. J'Noel's lawyer has said they may seek review by the United States Supreme Court. Meanwhile, a Florida court is poised to rule on this precise issue under Florida law in the near future, and other states will eventually no doubt resolve the same issue for themselves. The law of transsexual marriage, and of the mutability of one's sex, is just beginning to develop.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Wills, Trusts and Estates and Sex Discrimination, among other subjects.
Let's face it, the subject of same-sex marriage tends to unhinge rational debate. Otherwise sensible people scramble for arguments to defend exclusionary marriage laws that barely stand up to even modest scrutiny. The two state supreme courts that have tried to sort through the mess and directly address the question -- Hawaii's and Vermont's -- failed to find any reasoned case to defend opposite-sex-only marriage. But when the issue was bounced back to the legislative process, common sense again got short shrift. Hawaii's voters took the extraordinary step of amending their state constitution to require inequality. Vermont's legislature created a parallel institution called "civil unions" to confer the rights and responsibilities of marriage on same-sex couples, but refused to call what walks, looks and swims like a duck a duck.

But when it comes to dysfunctional reasoning, the citizens of Vermont and Hawaii have to take a backseat to the Kansas Supreme Court, which has weighed in with what qualifies as a genuine first: a decision meant to enforce a ban on same-sex marriage that actually clears the way for same-sex marriage, as long as the union involves a gay transsexual. In dealing with the case of a male-to-female transsexual who married the man she loved, the court attempted to figure out whether the transsexual was a male or a female. In the process, the justices tripped over the state's ban on same-sex marriage and stumbled into the dilemma that's at the heart of current marriage laws.

Best to begin at the beginning. The basic facts of "In re Estate of Gardiner" are conventional enough to be almost archetypal: A young woman meets an older, wealthier man, and four months later they get married. The following year, the man dies, and his estranged son, who's out of the will, challenges the marriage. It all winds up in court.

The twist, and it's a good one, is that the son challenged the marriage as illegal because it was between members of the same sex, which is not permitted under Kansas law. It turns out that the wife, J'Noel, had been born a male, and four years prior to the marriage had undergone a complete sex change operation. It had taken her three years of surgical, psychological and pharmaceutical procedures to change her gender.

The final step in J'Noel's sex change odyssey had been to formally and legally have her birth certificate, passport and related health documents changed to reflect that she was a woman. Her husband, a former state legislator and
chairman of the Kansas Democratic party, was aware of all of this. Indeed, there was no question in the case that he was capable of making his own decisions. In its ruling, the Kansas Supreme Court agreed with the son, holding that anyone who is born a man is always a man, and nothing can ever change that. Under Kansas law, which prohibits same-sex marriages, J'Noel had been born a man, and thus her marriage to a man was illegal.

But by focusing so doggedly on preventing same-sex marriage, the Kansas court has created a situation that may make Kansans feel like they aren't in Kansas anymore. After Gardiner, a woman in Kansas can have surgery to make herself a man, and then marry a man -- legally. Which isn't even the weird part. The weird part is that Kansas, a state which has no ambiguity in its law prohibiting same-sex marriages, is now one of the few places on Earth that requires transsexuals to be homosexual as a condition of marriage. Because if a transsexual is heterosexual after surgery (i.e., a chromosomal woman who has the body of a man and has sexual desires for women), he can't get married to anyone he has a sexual desire for. It's only if he's attracted to other men that he can rely on Kansas law to provide him with a legally binding marriage.

This rule certainly has the virtue of being easy to administer: To determine whether a marriage is legal in Kansas, a couple will need to show up at the clerk's office with a documented chromosome check and the clerk will issue a marriage license. But it's hard to square this rule with any of the arguments against same-sex marriage that we're used to. Assume, for example, that J'Noel decides she is a lesbian and finds a nice girl to settle down with in Wichita or Topeka. They decide to have a child, and like heterosexual couples who have biological problems procreating, use a little medical science to intervene. Or maybe they adopt. Their child (or children) will have legally married homosexual parents of the same (apparent) sex -- a configuration that many Kansans find intolerable -- because the court has tried to enforce state law against same-sex marriage.

J'Noel and her new wife could drop by the supermarket and shop arm in arm, with all the world, and the world's kids, watching. If they kissed, and anyone tried to make a big stink about it, J'Noel and her wife could simply brandish the Supreme Court decision, demonstrating the legality of their marriage. They would apparently be entitled to all the federal tax benefits married couples get, not to mention all the rights and responsibilities married couples have under Kansas law. In fact, they might fit the profile of a model "normal" marriage in Kansas, though one would have to see evidence of their chromosomal makeup to understand that.

In its decision, the Kansas court is up-front about the fact that the legislature is ultimately responsible for what the law says, and that the court is simply interpreting the law as best it can. But it's hard to see how the legislature could make a better job of it than the court did. It is difficult, if not impossible, to
compulsively distinguish between same-sex and opposite-sex marriages without facing the profound question of what sex is and why it matters.

If the legislature does nothing, it permits homosexual transsexuals to marry people of what appears to be the same sex, leaving heterosexual post-op transsexuals out in the cold, along with all the non-transsexual homosexuals in the state. If the legislature sees a problem in legalizing apparent same-sex marriage, it could overrule the court and permit transsexuals to marry someone who is the opposite of their post-op gender, thus acknowledging that it is the appearance of opposite sex that is ultimately the guiding force in creating public policy. But, in order to apply that policy with any consistency, the legislature would then be obliged to prohibit heterosexual cross-dressers from (a) marrying, or (b) appearing in public with their spouses and expressing affection. Option (b) would certainly present some interesting First Amendment issues, and no one anywhere has proposed anything like option (a).

But that isn't the end of it. Most people, it's true, have either an XX or an XY chromosome set to determine their gender. But some people have more. What about those people who have three chromosomes? Who do they get to marry? How would that be decided? And what about children like the infamous John/Joan, who was born a male but whose parents approved an operation to have his penis removed after a botched circumcision and then raised him as a girl -- with very poor results. Unlike J'Noel, he/she never had a choice about the sex change. Who should someone like John/Joan be allowed to marry? And why should the state have any role in that decision?

The Gardiner ruling, in all its stunning complexity, should illustrate, better even than the cases dealing directly with same-sex marriage, how extraordinary it is for the state to be inserting itself into the relative gender of marital partners. Lesbians and gay men know, and Gardiner may help some heterosexuals to realize, that it isn't the relative sex of the partners that makes marriage valuable to both society and individuals, and it certainly isn't the appearance of opposite sex; it's the intimacy and satisfaction of the two partners. We all benefit from couples who support one another, emotionally, financially, spiritually and in all the other ways couples lean on one another.

The question at the heart of Gardiner is not whether J'Noel is a man or a woman, it's whether she is worth treating as a human being. As long as Kansans focus on the first question, it will be necessary for them to answer the second with a humiliating no.