

The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA’s Box By Closing the Door on Transsexuals’ Right to Marry

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I. INTRODUCTION

We have been cock-sure of many things that were not so.

Oliver Wendell Holmes¹

A. Preface

Though not intended as such, there is no way around the fact that use of the above quote in an article involving anything sexual will be viewed by many as a pun, perhaps even a childish one.

And in an article about a case involving a post-operative male-to-female transsexual? Well, use your imagination in a pun-like manner if you must, but Justice Holmes’ short sentiment is, and always has been, at the core of all controversy regarding the legal gender status of transsexuals. It is now likewise at the core of the of the same-sex marriage issue. The *Baker v. Vermont* marriage rights litigation could ultimately result in a true separate-but-equal domestic partnership regime: so-called traditional marriage for opposite-sex couples and nonmarriage marriage for same-sex couples.² A different legal battle, one emerging in Texas, is poised to leave couples with a

1. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

2. 744 A.2d 864 (Vt. 1999).

gender-variant partner not knowing *which* of those two separate-but-equal paths is the proper legal road to travel down. This is because of the absurd lengths to which certain jurisdictions are going to prevent same-sex couples from enjoying the legal and social benefits of state-recognized marriage currently enjoyed by opposite-sex couples.³

B. Questions

What is “male”?

What is “female”?

Perhaps these questions have been in the minds of more people than one might initially think. After all, anyone who was old enough to read a newspaper in the early 1950s remembers Christine Jorgensen.⁴ Likewise, anyone old enough in the 1970s remembers Renee Richards.⁵

The 1990s quest for equality by homosexuals, and the awareness of “commitment ceremonies” and “holy unions” which occur because of state denial of legal recognition to marriages between persons of the same sex, caused many to wonder “What is marriage?”

Yet, almost no thought was given to two other questions:

What is opposite-sex marriage?

What is same-sex marriage?

The answers would seem to be obvious. The former is between a man and a woman. The latter is between either two males or two females. Right?

Unfortunately, the answers to both of those questions are dependent on how the two questions at the beginning of this section are answered. This is a point lost on almost all who have been at the forefront of the movement to limit the availability of legally-recognized marriages of opposite-sex couples.⁶ Some jurisdictions have declared that a transsexual’s right to marry emanates from her chromosomes: if she was designated male at birth and has XY chromosomes, then she may never marry a male and, in the eyes of

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

4. See *infra* Part II.C.

5. See *infra* Part II.F(2)(a)(i).

6. This is also lost on many who have sought equal access to marriage for same-sex couples, although the plaintiffs in Minnesota’s *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (not to be confused with *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)), one of the first court challenges to the special right of opposite sex couples to legally-recognized marriage, were cognizant of it and made arguments to that effect. See *infra* Part VI.

that jurisdiction's law, is still a male.⁷ Other jurisdictions, however, recognize the medical reality of transsexualism: that it is not an elaborate scheme by homosexuals to evade proscriptions against same-sex marriage.⁸ In those jurisdictions, even under a marriage regime which denies same-sex couples equal access to the benefits of legally-recognized marriage, a post-surgical male-to-female transsexual may marry a male and, in the eyes of the law, is female.⁹

So, then, what is a same-sex marriage?

Without definitions of "male" and "female," there is no clear answer. This definitional void, thanks to a transsexual from San Antonio, Texas, named Christie Lee Littleton, recently resulted in a decision which will likely be the most significant Texas family law development in the first part of the twenty-first century: *Littleton v. Prange*.¹⁰ I make that assertion about a decision which voided a marriage between a post-operative transsexual female and a male, because of two sweeping aspects of Texas Fourth Court of Appeals Chief Justice Phil Hardberger's majority opinion.¹¹ First, because of the court's reliance on a heavily-criticized British court opinion about the significance of chromosomes in determining gender, along with a total absence of guidance regarding the legal status of people who have unusual chromosome patterns, transsexuals will not be the only people who need to be concerned about their legal gender status.¹² Second, and most significantly, the court's use of the federal Defense of Marriage Act (DOMA) raises concerns not only for people in

7. See *Littleton*, 9 S.W.3d at 227.

8. This theory simply doesn't match up with actual case histories of transsexuals. As transgender rights activist Sarah DePalma remarked:

No one wakes up one morning and says, "Gee. I think that from now on I will willingly choose to become part of [one of] the most misunderstood minorities in America. I want to make my life more difficult by confusing and perhaps losing the love of my family and friends. I want to be subjected to hate crimes and employment discrimination. I want to go through the physical and financial pain of obtaining sex reassignment surgery."

Sarah DePalma, *Littleton Update*, TGAIN PRESS RELEASE E-MAIL (Jan. 14, 2000) (on file with author). Of course, this theory has been around for quite a while, even in popular culture. Billy Crystal's gay male character on the 1970s television series *Soap* considered undergoing sex reassignment surgery to be able to marry his lover, a quarterback. See generally KEITH HOWES, BROADCASTING IT 760, 858-59 (1993); *Soap Episode Guide* (visited Jan. 2, 2000) <<http://www.geocities.com/Hollywood/8163/soap.htm>>.

9. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

10. 9 S.W.3d at 223.

11. See *id.* at 230-31.

12. See *id.* at 226.

Texas, but also for anyone whose birth certificate was issued in Texas or who may have been married in Texas.¹³

In short, although it began as a seemingly simple wrongful death action, *Littleton v. Prange* may yield the first opportunity for the federal DOMA to be challenged in the context of a judicial non-recognition of an existing marriage.

Transsexualism and same-sex marriage are each complex in their own right. Portions of this article will appear to focus on one to the exclusion of the other. However, this is only to provide the reader with sufficient background on both. Part II of this article is a brief primer on transsexualism, intended both for those unfamiliar with the topic as well as those who have perused similar quick overviews in other law journal articles. It also includes some analysis of the *Littleton* decision itself, though the bulk of the analysis will be in Part IV.

Part III examines an issue which cannot be ignored in a complete analysis of *Littleton v. Prange*: politics. What will never be evident on the face of his majority opinion is that Chief Justice Hardberger's statement that transsexualism is not "a term . . . often heard on the streets of Texas" was, at the very least, a bit misleading in that the subject had bubbled to the top of the discussion cauldron in some rather significant Texas legal circles in the months leading up to the *Littleton* decision.¹⁴

Part IV is an examination of Chief Justice Hardberger's majority opinion, including the basic facts of Christie Lee Littleton's suit and why she never should have filed it. The examination concentrates on a comparison between decisional and statutory law which Hardberger chose to include and that which he chose not to include. Part V is a more extensive examination of one specific law which Hardberger referenced: DOMA. Part VI highlights a number of legal theories which were noticeably absent from the litigation, in addition to those which will be addressed in Parts II-V.

Part VII is a brief conclusion, followed by an epilogue, which in this instance should not be considered an afterthought. This particular epilogue centers not on law but on one tiny fact, seemingly missing from the entirety of the *Littleton* litigation thus far. Though it is not one which I feel should be wholly determinative of a transsexual's

13. See *infra* Part V.

14. *Littleton*, 9 S.W.3d at 225.

gender status, in light of the assertion by the Court of Appeals that no genuine issue of fact was left to be determined after summary judgment, it remains extremely significant by virtue of its absence.

C. *Caveat*

I cannot pretend to be a disinterested party with respect to the medical, social and legal issues addressed in *Littleton* and which I address in this article. I am a male-to-female transsexual. I was born in Texas. I possess an order from a Texas court directing that my gender identification information be changed from male to female on certain documentation. And, following the October 27, 1999, *Littleton* decision, I submitted an informal brief on behalf of myself urging the Court of Appeals to reconsider its decision.

Far from unduly skewing my objectivity, however, I view my being transsexual, as well as my having represented transsexuals in Texas courts, as giving me an insight not only into the precise nature of the flaws in the Court of Appeal's decision, but also into how inadequately transgender legal issues were presented during the litigation.

Years ago, a Neil Young song chronicled the needle and the damage done.¹⁵ *Littleton v. Prange* is a tale of the transsexual and the damage done. The goal of this article is to detail not only how much damage has already been done but also how much damage may result in the future—all in the name of protecting the special right of heterosexuals to legally marry.

II. A NOT-SO-BRIEF PRIMER ON TRANSSEXUALISM

A. *Basic Theories*

As geneticist Steve Jones noted regarding the pre-Nazi German research *then* thought to point to the existence of a “gay gene” and the ultimate crackdown by the Nazis against homosexuality, “[W]hatever genetic basis a character may have, preconceived views about its merits are unlikely to be changed by science.”¹⁶ Nevertheless, science backs the legitimacy of biological gender variance and on more bases than simply chromosomes.

15. See NEIL YOUNG, *The Needle and the Damage Done*, on Harvest (Reprise 1972).

16. STEVE JONES, *THE LANGUAGE OF GENES* 194 (1993) (frowning equally on those who would point to a purported gay gene as justification for legal equality).

Though they should not be wholly determinative of a person's sex, chromosomes are significant.

1. Chromosomes

Though interrelated, not only because of law such as that made in *Littleton v. Prange*, but also because, in the eyes of some, homosexuality is viewed as a form of gender nonconformity, sexual orientation and gender identity are separate issues. Of course, they do share another commonality: what causes them has yet to be definitively determined. Most legitimate research points to genetics as playing some role in homosexuality.¹⁷ Despite the popular and, far too often, legally conclusory “dualistic perception of the body as either male or female depending on the presence or the lack of a penis,” genes are unquestionably at issue with some transgendered people.¹⁸ The problem for transsexuals occurs when courts essentially declare that this is the end of the analysis.¹⁹ XX and XY are certainly the two most common chromosome patterns by far, but they are not the only two patterns that appear in humans.²⁰ Many of those with

17. See DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE—THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* 141 (1994) (describing Hamer's studies in genetics and biology regarding sexual expression); Joe Dolce, *And How Big Is Yours?*, *ADVOCATE*, June 1, 1993, at 38; Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, *SCIENCE*, Aug. 30, 1991, at 1034.

I deliberately use the word “legitimate” to contrast the above studies, the accuracy of which have been challenged, with the arguably fraudulent claims that homosexuality can be cured. One leading advocate of reparative therapy is Charles Socarides, who touts a .667 “batting average” in his attempts to “cure” homosexuals. Even on its face, this seems to acknowledge that one third of his subjects were not curable. However, he counts as “success” one third of his homosexual subjects who “still have same-sex sex” but simply not as part of “the gay scene,” whatever he may envision that to be. Viewed as objectively as possible, if, instead of homosexuality, Socarides was treating alcoholism, would anyone *not* laugh at a claim that his alcoholic patients were cured because they had stopped drinking at bars but were, instead, drinking at home? See Charles W. Socarides, *How America Went Gay*, *AMERICA*, Nov. 18, 1995, at 20-22. Perhaps not insignificantly, Socarides's son, Richard, is gay. See Adam Nagourney, *Father Doesn't Know Best*, *OUT*, Feb. 1995, at 75.

Socarides has also weighed in on transsexualism as an expert in one of the earlier transsexual employment cases. See *In re Grossman*, 316 A.2d 39, 44-45 (N.J. Super. Ct. App. Div. 1974) (stating that employment of a transsexual teacher could create “some anxieties among those [young children] already predisposed due to their own inter-emotional conflicts over their castration fears and so forth” and “would be very disruptive” if the transition “were known”).

18. Vivienne Muller, *“Trapped in the Body”—Transsexualism, the Law, Sexual Identity*, 3 *AUSTRALIAN FEMINIST L.J.* 103, 105 (1994).

19. See *Corbett v. Corbett*, 2 All E.R. 33, 35 (P. 1970).

20. See Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *ARIZ. L. REV.* 265, 281 n.27 (1999).

such uncommon patterns are, in some form, hermaphroditic or physically intersexed.²¹

Yet, invariably, the entire issue of gender nonbinariness is dismissed in terms similar to those used by Brian Fahling, an attorney with the conservative American Family Association: “An acorn doesn’t become a maple tree. You can try as you might but it will become an oak tree.”²² The problem with this sort of logic-leap, which permeates all arguments in favor of injecting religious absolutism into secular law, is that it assumes that everything which is created to look like an acorn, by whoever or whatever does the creating, really is an acorn.

When the news broke that the San Antonio Court of Appeals was addressing the validity of transsexual marriages, the Texas Lawyer asked me for a response to the religious conservatives’ view. My response was, “I have yet to hear a religious conservative address the fact that there are at least six or seven chromosomal patterns not just two.”²³ An article by Professor Julie Greenberg which came out shortly before the oral arguments in *Littleton* indicates that I was actually being a bit conservative in estimating the number of human chromosomal patterns, but this only buttresses my point.²⁴ In addition to the so-called normal XX and XY, “[d]octors have discovered people with a variety of combinations including: XXX, XXY, XXXY, XYY, XYYY, XYYYY and XO.”²⁵ And some of those who possess Ys look a lot like XXs even without hormonal or surgical intervention.²⁶

2. Hormones

In addition to chromosomal abnormalities, there are theories that transsexualism may be the result of either hormone imbalances occurring in the womb or of some other form of stimuli working to

21. *See id.* at 283.

22. Nathan Koppel, *4th Court of Appeals Confronts Transsexuals’ Marital Rights*, TEX. LAWYER, Sept. 13, 1999, at 6 (quoting Brian Fahling). This is not to say that a species-based analogy such as Fahling’s is never applicable in any argument. Remember that SRS means *sexual* reassignment surgery, not *species* reassignment surgery.

23. *Id.* (quoting Katrina Rose).

24. *See* Greenberg, *supra* note 20, at 281.

25. *Id.* at 281 (citing ROBERT POOL, *EVE’S RIB: THE BIOLOGICAL ROOTS OF SEX DIFFERENCES* 70-71 (1994)). Well-known transsexual model Caroline “Tula” Cossey possesses the XXXY pattern. *See* Gretchen Edgren, *The Transformation of Tula*, PLAYBOY, Sept. 1991 at 103, 105.

26. *See infra* Part II.D(2).

throw off the psychological development of the fetus. This stimuli alters what has been referred to as “gender neutrality” and ultimately determines the brain gender of a person in spite of what exists between the young person’s legs.²⁷ Prominent gender therapist Gianna Israel notes research suggesting “that variations in masculinization and defeminization of the brain—and possibly other parts of the body—are the underlying causes of gender transpositions.”²⁸ Coupled with clinical observations that environmental factors are not the sole cause of gender variant identities, she and Dr. Donald Tarver view hormones as influencing, to a large degree, the fetal brain development of their patients who are transsexual.²⁹

Though not connected with the studies of Israel and Tarver, some proof of this theory has come from experiments on sheep:

A pellet of testosterone was implanted in a pregnant ewe carrying a female fetus. It was inserted after the genital anatomy of the fetus had already differentiated as a female. The undifferentiated “sexual brain” of the fetus, however, masculinized. At the first mating season after its birth, the sheep displayed behavior that was typical of a ram, despite the presence of two ovaries that secreted female hormones. Its ritual mating behavior and urinary posture were male.³⁰

As Greenberg summarizes, “[A]lthough chromosomes generally control the hormones that are produced, it is actually the hormones that directly affect sexual development.”³¹ In other words, far from

27. See Tom Buckley, *The Transsexual Operation*, ESQUIRE, Apr. 1967, at 111, 115 (citing, among others, Dr. John Money).

28. E-mail from Gianna Israel, Gender Specializing Counselor, to Katrina Rose, Author (Dec. 4, 1999) (on file with author). Another gender specialist, Randi Ettner, shares this theory and offers an analogy:

[T]he brain may have become “feminized” early on in fetal development. Normally, the morphology of the body follows suit. In rare cases, however, the body develops in opposition to the brain, and the person may be born with a feminized brain in a male body, (or a masculinized brain in a female body).

A simple analogy is the individual who is born with two different eye colors. In most cases, the genetic information translates to produce two eyes that are identical in color. In some rare cases, however, eye color is not bilaterally symmetric.

RANDI ETTNER, CONFESSIONS OF A GENDER DEFENDER 25 (1996).

29. See Israel, *supra* note 28.

30. Greenberg, *supra* note 20, at 280 n.83 (citing John Money, *The Concept of Gender Identity Disorder in Childhood and Adolescence After 39 Years*, 20 J. SEX & MARITAL THERAPY 163, 170 (1994)).

31. *Id.* at 280.

being what should actually *be judged* in determining a person's sex, the chromosomes *help to create* what should be judged.³²

Acceptance of any of these theories does not cause a conflict with the concept of sex being an immutable characteristic.³³ Nor, does it, in and of itself, contradict any assertion, either Biblically or judicially based, that gender comes from "our Creator."³⁴ However, it severely hinders the absolutist belief adhered to by the *Littleton* majority that the determination made at birth by the attending physician is sufficient to be deemed accurate enough to force a person to live her life in deference thereto.

3. The Humanity Factor

If "male" and "female" are to be the only legally-recognized categories, then the decision in *Littleton* will prove to be as horribly inadequate for a substantial percentage of the population as it was for Christie Lee Littleton. Using the word "transgenderist," a word which has come to include all who fall outside of the strict "XX=female, XY=male" duality, Stephen Whittle, British law professor and female-to-male transsexual, notes, "The words 'man' and 'woman' are used to represent the whole of humanity. And since transgenderists fit neither keyword, they cannot be part of humanity."³⁵

The transsexual is simply a person who "is biologically affected by a trick of nature [which is] not detectable at birth and

32. Strangely enough, one of the most ardent opponents of same-sex marriage actually understands transsexualism based on this particular theory. In response to a letter written to the *700 Club* by a 40 year-old, post-operative male-to-female transsexual asking whether God had forgiven her for transitioning, Pat Robertson responded:

This is a very serious question and I appreciate it. There are people who are born with various types of hormonal activity in their bodies and they feel more male than female and more female than male. I know a plastic surgeon here, in this area who indeed does that sort of thing and uh, to accommodate what is going on in peoples lives.

700 Club (CBN television broadcast, Oct. 5, 1999) (video available online at <http://www.broadcast.com/lightsource/content/700_club_pat_robertson/archive.stm>). Terry Meeuwsen then commented, "This is a very legitimate hormonal thing happening," to which Robertson agreed, stating: "Exactly. So, it is not a sin. So you don't need to feel guilty." *Id.*

33. However, nature knows many species that do change, or at least mimic, gender during life—and without the help of surgery. See *It Takes All Kinds*, DISCOVER, July 1993, at 11 (specifically addressing *poecilia formosa*, a unisexual female species of fish, some of which have been documented as exhibiting male behavior patterns and physiological characteristics).

34. See *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999, pet. denied).

35. Stephen Whittle, *Choice and the Human Experience*, in PROCEEDINGS OF THE FOURTH INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 23, 25 (1995).

registration.”³⁶ There is, in fact, no “bizarre biological masquerade.”³⁷ The sex itself is not being changed, only the designation.³⁸ “I can’t understand why people don’t realize that my predicament had nothing to do with choice,” states transsexual model Caroline ‘Tula’ Cossey, who also has been on the short end of a court decision disallowing her ability to marry as a female.³⁹ Echoing the deep feeling of almost all male-to-female transsexuals, she states, “I never *was* a man. I always felt I was a woman. I just needed my body changed to fit my self-image.”⁴⁰

Certainly, accusations of “sexual fraud” or “gender misrepresentation” can materialize. Not even an edict from the U.S. Supreme Court can ease all of the tensions in a family whose only son has just announced that he will be undergoing gender reassignment. Likewise, a court cannot ease the tensions between lovers when one discovers that the other once had a genitalia configuration different than that which he or she now has. The “[m]atters of the heart” of which Hardberger spoke do exist, but they are separate and distinct from the concrete reality of what gender classification the law assigns to a person.⁴¹ Dismissing Ms. Littleton’s life, not to mention the lawsuit regarding the shortened life of Jonathon Littleton, as a matter of the heart, unjustifiably reduces her value as a human being in the precise manner of which Professor Whittle spoke: she “cannot be part of humanity.”⁴²

36. C.N. Armstrong & T. Walton, *Transsexual Metamorphoses*, 142 NEW L.J. 96, 97 (1992).

37. Greg L. Bahnsen, *The Ethical Issue of Transsexuality* (visited Feb. 27, 1998) <<http://jf.org/papers/bah695.html>>.

38. The language used in petitions for gender identification correction which I used in my Texas law practice, language developed by Phyllis Frye, reflects this position. Because the gender designation based on a genitalia inspection at birth has proven to be incorrect in light of the person’s later psychological development, a transsexual is actually a male-to-male or female-to-female transsexual rather than, respectively, male-to-female or female-to-male.

39. Edgren, *supra* note 25, at 103-05. *See also* Cossey v. United Kingdom, 13 Eur. H.R. Rep. 622, 627-28 (1991). Strangely, in *Littleton*, Chief Justice Hardberger did not cite Cossey’s litigation, even though, arguably, it would have bolstered his position.

40. Edgren, *supra* note 25, at 105.

41. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999, pet. denied).

42. Whittle, *supra* note 35, at 25. One might also wish to compare the plight of transsexuals seeking recognition of gender transition to the plight of Robin Williams’ character in the movie BICENTENNIAL MAN. He runs headlong into a judicial roadblock not unlike that experienced by transsexuals in nonrecognition jurisdictions on his “journey to become an ordinary man.” BICENTENNIAL MAN (Touchstone Pictures 1999), *quoted in bicentennial man* (visited Dec. 24, 1999) <http://movies.go.com/bicentennialman/home_fs.html>.

It is certainly possible for a transsexual to use the gender-transformation process to work a detriment upon others, be it financial⁴³ or purely emotional.⁴⁴ However, cases of this are so rare that they should not be at issue, either on the surface or beneath it, when dealing with transgendered peoples' quest to live a life unimpeded by legal constraints and societal nosiness.⁴⁵ If a transsexual, in fact, has worked a fraud upon someone, before attributing the fraud to the gender transition, examine the situation to see whether the person used the transition, or another device that a nontransgendered person could have used just as easily.⁴⁶

B. Definitions

1. Trans . . .

Despite transgender activist Kate Bornstein's legitimate admonition, "To attempt to divide us into rigid categories . . . is like trying to apply the laws of solids to the state of fluids," some keywords are necessary for a discussion of transgender issues and, obviously, the traditional pair, "man" and "woman" will not suffice.⁴⁷ For those with no connection to the issue, there are generally but two words for transgendered people: transsexual and transvestite.⁴⁸

43. See *infra* Part II.F.

44. See *Surprise—I'm a Transsexual*, in JERRY SPRINGER'S WILDEST SHOW'S EVER 116-19 (Richard Dominick, ed., 1999); *My Girlfriend's a Guy*, in JERRY SPRINGER'S WILDEST SHOW'S EVER 64-67 (Richard Dominick, ed., 1999). Or, for that matter, see almost any episode of Springer's show which features a transsexual.

45. See *infra* Part II.F.

46. In Texas, a male-to-female transsexual who happens to be a former death row inmate ran for the top position in the Harris County Democratic Party, making it into a runoff but ultimately losing. The transsexual, Leslie Perez, is anglo. Her name, prior to transition, was Leslie Douglas Ashley. According to one view, "Election analysts think her name misled voters who believed they were casting ballots for a Hispanic female." ROBERT L. BENTLEY, *DANGEROUS GAMES*, xv (1993). Obviously, one need not be transsexual to play such *race*-based name games.

However, playing name games to confuse voters is not limited to transsexuals. Sam Fayad, a native of West Africa, in different unsuccessful attempts to win a seat on Houston's City Council, declared his nickname to be "Texas" and ultimately changed his name to Sam Texas. See Wendy Benjaminson, *Election '97/The Race For City Hall*, HOUSTON CHRONICLE, Oct. 31, 1997, at 1; *Voters' Guide*, HOUSTON CHRONICLE, Jan. 12, 1997, at 33. Fayad also claimed to be endorsed by both Mother Teresa and Billy Graham. An attorney for Mother Teresa and a spokesman for Graham strongly denied the claimed endorsements. See R.A. Dyer, *Nun Wants to Keep Out of Local Race*, HOUSTON CHRONICLE, Jan. 11, 1997, at 30.

47. KATE BORNSTEIN, *GENDER OUTLAW—ON MEN, WOMEN AND THE REST OF US* 69 (vintage ed. 1994).

48. The difference between "transvestite" and "crossdresser" may, in reality, be the same as the difference between a violin and a fiddle; they effectively refer to the same thing. See

A “transsexual” (TS)⁴⁹ is an individual, either male or female, who is dissatisfied with his or her anatomic sex and desires to change it to better reflect the individual’s gender identity.⁵⁰ A “Post-operative transsexual” (post-op TS) is one who has “had genital surgery and live[s] fully in the role of another gender.”⁵¹ A “Pre-operative transsexual” (pre-op TS) is one who is “living full or part time in another gender,” but has not yet had “genital surgery.”⁵² Male-to-female transsexuals are often referred to as MTFs, and female-to-male transsexuals are referred to as FTMs.⁵³

The inherent gender conflict of the transsexual is typified by the experiences of “Theresa,” a pre-op TS who sought genital surgery from a Wisconsin welfare agency.⁵⁴ Although born into a male body, she “knew it wasn’t right.”⁵⁵ Prior to seeking surgery to resolve the gender identity issues, many transsexuals seek resolution via overindulgence in activities associated with the gender of birth.⁵⁶ Theresa was no different:

I made two very distinct attempts to be a male. Two days after I turned 18, I joined the Marine Corps, because ‘the Marine Corps builds men’ and I needed building and by the best.

....

I got married. It lasted about six months, but we were more like roommates, not lovers. We made a couple of attempts at making love, but I didn’t like it.

....

[O]nce I heard the word ‘transsexual,’ everything made sense.⁵⁷

DEBORAH HELLER FEINBLOOM, *TRANSVESTITES & TRANSEXUALS* 16-17 (1976) (defining a transvestite as “a person who cross-dresses”).

49. TS typically refers to “transsexual.” However, it can also refer to Turner’s Syndrome. This can be rather confusing as the latter is also a form of intersexuality, a subject often, as it will be in this article, discussed alongside transsexualism. In this article, TS will hereafter only refer to “transsexual.” See *The Turner’s Syndrome Society of the United States* (visited Dec. 13, 1999) <<http://www.turner-syndrome-us.org/>>.

50. See Collier M. Cole, *Transgendered Behavior and DSM IV*, in *PROCEEDINGS OF THE FOURTH INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY B-1* (1995).

51. BORNSTEIN, *supra* note 47, at 67.

52. *Id.*

53. See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 *UCLA WOMEN’S L.J.* 219, 243 (1998).

54. See *City of Madison v. Madison Human Serv. Comm.*, 361 N.W.2d 734, 737 n.3 (Wis. Ct. App. 1984).

55. *Id.*

56. See *Corbett v. Corbett*, 2 All E.R. 33, 35 (P. 1970).

57. *Madison Human Serv. Comm.*, 361 N.W.2d at 737.

Of course, this is not a universal characteristic; nothing related to gender truly is. Christie Lee Littleton did not go the overly-male route,⁵⁸ or as gender specialist Randi Ettner calls it, taking a “flight into hypermasculinity.”⁵⁹

Although gender identity and sexual orientation are two separate concepts, the blanket statement of John Holloway in 1968 is not always accurate.⁶⁰ He states, “The transsexual is *not* a homosexual, as he or she wishes to participate in a sexual relationship with a man or woman *as a member of the opposite sex*.”⁶¹

Holloway fails to acknowledge those transsexuals who are attracted to members of their own post-transition gender.⁶² Kate Bornstein brought the “transsexual lesbian” out of the shadows and into the forefront of gender identity activism.⁶³

2. Intersex

This is perhaps the least-addressed portion of the gender spectrum. It is rarely, if ever, mentioned despite, or perhaps because, intersexuality removes all foundation from such decisions as *Littleton*, which rigidly adhere to traditional notions of gender duality irrespective of their catastrophic effects on some people’s lives. As recently noted in *Discover Magazine*, one of the few instances of intersexuality being dealt with outside of dry medical literature, “Sex, in reality, is more than the simple blueprint learned in high-school biology—XX for female, XY for male.”⁶⁴

“Intersex”⁶⁵ is often used as a synonym for “hermaphrodite”⁶⁶ which refers to one with reproductive organs that are ambiguous enough that they are not clearly definable as completely male or

58. See Brief for Appellant at Appendix, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (affidavit of Christie Lee Littleton, dated Aug. 10, 1998).

59. ETTNER, *supra* note 28, at 25.

60. See John P. Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1968).

61. *Id.* at 282 (footnotes omitted).

62. See *id.* at 282-83. In fact, a small but influential group of conservative homosexuals believe that lesbian MTFs and gay FTMs are the only transsexuals who belong in the gay rights movement. See Mubarak Dahir, *Whose Movement Is It?* ADVOCATE, May 35, 1999, at 54.

63. BORNSTEIN, *supra* note 47, at 3.

64. Emily Nussbaum, *A Question of Gender*, DISCOVER, Jan. 2000, at 93.

65. See Greenberg, *supra* note 20, at 267.

66. See G.W. Bartholomew, “Hermaphrodites” and the Law, 2 U. MALAYA L. REV. 83, 83 n.3 (1960).

completely female.⁶⁷ However, a broader interpretation includes those with neither XX nor XY chromosome patterns.⁶⁸ Intersexuality will be discussed more fully in Part II.D(2).

3. TV vs. TS vs. Gay

The difference between “transvestite” and “transsexual” should be apparent. However, sometimes it is either overlooked or consciously ignored. Judgments regarding whether specific incidents of muddying the waters result from ignorance or from a *de facto* political or religious slap at the principle of transsexualism typically must be made by those reading the specific characterization. These judgments must take into account when or where the specific characterization was written.

After transsexual Dana International won the 1998 Eurovision song contest as the representative of Israel, an official Israeli news agency touted her victory, and referred to her as a transvestite.⁶⁹ Mistakes can happen, of course. However, this particular misnomer may have been more than a simple mistake as the government of Israel at the time was rather conservative. Moreover, some of Israel’s ultra-right religious political parties had unleashed virulent attacks against International prior to the contest, calling transsexualism “worse than sodomy” and saying that a transsexual representing Israel at Eurovision was “a message of darkness.”⁷⁰

Such mischaracterizations do not only occur in openly theocratic politics, though. Johnny Williams was profiled in two publications in South Africa in the mid-1950s.⁷¹ Neither article used the word “transsexual” to describe Johnny despite passages, in his own words, such as “I was not playing the fool when I disguised myself as a man.

67. See Douglas K. Smith, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 963 n.2 (1971).

68. See *id.*

69. See *Israel Line*, ISRAEL CONSULATE OFFICE, NEW YORK, PRESS RELEASE E-MAIL (May 11, 1998) (on file with author).

70. Claire Snegaroff, *Transsexual Singer to Represent Israel at Eurovision Contest*, AGENCE FRANCE-PRESSE, May 6, 1998, available in 1998 WL 2275381 (quoting Shlomo Beniz of the Shas Party). According to Ms. International, “To them, I am a symbol of Satan or something like that. I think they are capable of killing me.” *People in the News*, AGENCE FRANCE-PRESSE, May 6, 1998, available in 1998 WL 2275165.

71. See Dhianaraj Chetty, *Lesbian Gangster: The Gertie Williams Story—Excerpted From Golden City Post and Drum*, in *DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA* 128, 129 (Mark Geisser & Edwin Cameron eds., 1995)

I did it because I hate to be a woman,”⁷² and, “[m]y wish is that God must make me a man. It is the only thing I want most in the world. I hope He will grant me that wish, for I never want to go back to being a woman.”⁷³

Even more telling is this passage, “My earnest prayer each night is that God would be merciful to me and change me completely into a man. If it could be done by any operation, I would gladly risk it as no pain could be too severe if it meant the fulfilment of my desire.”⁷⁴ Still, the 1995 book which reprints these passages refers to Williams as “Gertie, a cross-dressing lesbian.”⁷⁵

In all fairness, a poor, “coloured”⁷⁶ person living in South Africa in 1956 was not likely ever to gain access to the type of medical treatment to which a white American such as Christine Jorgensen had access in Europe a few years prior. I pass no judgment as to whether the book’s editors were showing disrespect to transsexuals or whether they were simply following the lead of the two articles which were reprinted, neither of which apparently used either “transsexual” or “lesbian.”⁷⁷ However, the editor’s modern characterization of Williams as a cross-dressing lesbian is precisely the type of muddying of the water which causes those who insist on drawing unwise legal classifications to not be able to differentiate properly between homosexuality and transsexuality.⁷⁸ Chief Justice Hardberger did do a rather nice job of entering the proper terminology into the court’s majority opinion, though his ultimate legal conclusion, that Christie

72. *Id.* (from a September 1955 article in GOLDEN CITY POST, a Cape Town publication, which consisted primarily of a narrative in Williams’ own words).

73. *Id.* at 133.

74. *Id.* (quoting from the April 1956 issue of DRUM magazine, another South African publication).

75. *Id.* at 128 (Editor’s note).

76. *Id.* (from the GOLDEN CITY POST article).

77. *See id.* at 128-33.

78. I cannot emphasize enough that I am not intending to demean butch lesbians who are not transsexual. Such stereotyping is no different than an abject refusal to accept the validity of transsexualism. In a 1957 article, Barbara Stephens noted that wearing male attire may have been, to some lesbians, more of a statement to potential attackers than to society as a whole. She suggested these women felt more secure while walking alone at night while wearing pants than while wearing dresses. *See* Barbara Stephens, *Transvestism—A Cross-Cultural Survey*, THE LADDER, June 1957, at 10, 12-13. The words of Williams, however, cannot be rationally viewed as being anything other than the feelings of a transsexual, irrespective of what Williams may or may not have done about those feelings later in life.

Lee Littleton is still male, belies the respect which he purported to show.⁷⁹

C. History

1. Modern—More or Less

Christine Jorgensen is popularly believed to be the world's first transsexual.⁸⁰ More so than anything, this is because the media sensation surrounding her transition was the first instance of transsexualism getting widespread national press coverage.⁸¹ Beyond that, some believe that prior to this century there were no transsexuals.⁸² This view is correct *only* in terms of what we know *today* as sex reassignment surgery. Still, there were others prior to Jorgensen. The first modern, somewhat successful, genital surgeries were, until recently, thought to have been performed in Germany in the late 1920s.⁸³ However, research, some done by Jorgensen herself, indicates that some types of medical gender transition procedures were being performed at or before the turn of the last century.⁸⁴

79. See *Littleton v. Prange*, 9 S.W.3d 223, 225-26 (Tex. App. 1999, pet. denied) (delineating between TS and TV, both aside from homosexuals).

80. Even two recent auctions on eBay referred to Jorgensen as “the world’s first transsexual” and “the world’s first sex change person.” *eBay items 190052140 and 223823764* (visited Nov. 3, 1999 and Feb. 7, 2000) <<http://www.ebay.com>> (printouts on file with author) (auctioning one publicity photo from the movie adaptation of Jorgensen’s autobiography and one photo of Jorgensen as she appeared on a 1960s talk show).

81. See *Homecoming*, TIME, Feb. 23, 1953, at 28; *The Case of Christine*, TIME, Apr. 20, 1953, at 82-84.

However, at least one transsexual, Barbara Richards, was spotlighted in publications outside of medical academia as early as 1941. See Joanne Meyerowitz, *Sex Change and the Popular Press—Historical Notes on Transsexuality in the United States, 1930-1955*, 4 G.L.Q.: J. LESBIAN AND GAY STUD. 159, 167-68 (1998) (citing several sources including articles from various California newspapers and *Spot Magazine*). Meyerowitz notes that some non-academic mentions of transgender issues had occurred earlier via German researchers such as Magnus Hirschfeld. See *id.* at 162-63.

82. Sexuality commentator Pat Califia notes the paranoia of a small segment of lesbians who believe that the entire concept of transsexualism was actually created by the medical profession. See PAT CALIFIA, *SEX CHANGES* 92 (1997).

83. See Meyerowitz, *supra* note 81, at 162-63 (citing Felix Abraham, *Genitalumwandlung an zwei männlichen Transvestiten*, 18 ZEITSCHRIFT FÜR SEXUALWISSENSCHAFT UND SEXUALPOLITIK 223 (Sept. 10, 1931)). The most well-known of these was Lili Elbe who was a patient of Magnus Hirschfeld. However, according to Meyerowitz, the first published scientific report about surgery itself was by Felix Abraham, from around the same time period (1931), who detailed the operations performed on two people who he referred to as “homosexual transvestites.” *Id.*

84. See Gwendolyn Ann Smith, *Turn of the Century Transgenders*, TRANSGENDER TAPESTRY (forthcoming Summer 2000) (noting research by Meyerowitz and Susan Stryker into

2. Prior to 1900

Some genital operations may have been performed before the advent of modern medicine. The Roman emperor Nero had a male companion, Sporos, whose genitals, “whether by birth or surgery . . . more resembled a woman’s than a man’s.”⁸⁵ Historians differ as to whether Sporos was intersexed by birth or had some form of sexual reassignment surgery (SRS).⁸⁶ Forms of ritualistic gender transition were used by many Native American cultures throughout history and some Eastern cultures have gender rituals that do involve some form of genital mutilation.⁸⁷ The rigid duality of legal sex classification as male or female based exclusively on genitalia has only developed over the last 100-150 years.⁸⁸ And, during that time but prior to the advent of modern surgical intervention, many cross-living individuals

the Christine Jorgensen archives at the Royal Danish Library which uncovered an interview by Jorgensen of Charlotte von Curtis, who underwent some sort of genital surgical procedure in 1906).

85. Sarah Eris Horsley Caffee, *Sporos—Concubine of Nero, Emperor of the Roman Empire* (visited May 13, 1998) <<http://www.genderweb.org/~tats/sporos.phtml>>.

86. *See id.*

87. “Not-men and not-women are generally discovered to be different during childhood. These differences are usually encouraged and nurtured. During adolescence these children would experience an initiation ceremony . . .” Lester B. Brown, *Women and Men, Not-Men and Not-Women, Lesbians and Gays: American Indian Gender Style Alternatives*, in *TWO SPIRIT PEOPLE* 5, 9 (Lester B. Brown ed., 1997) (citations omitted); *see also infra*, note 93. Brown and others, though, seem overly-eager to distinguish between these cross-gendered people and transsexuals. *See* Little Crow et al., *Gender Selection in Two American Tribes*, in *TWO SPIRIT PEOPLE* 21 (Lester B. Brown ed., 1997). This distinction is somewhat suspicious due to their abject reliance on the DSM-IV’s ‘Gender Identity Disorders’—and its lack of cultural factors as diagnosis criteria—and ‘Transvetic Fetishism’. *Id.* at 26-27. Additionally, statements such as, “Often when an American Indian male has chosen the Not-Woman lifestyle, he has done so in response to an elemental spiritual revelation which is validated in his decision. He is in no way indulging in sexual fantasies, nor is his ultimate goal necessarily that of physiological transformation,” *id.* at 27, can legitimately be viewed as thinly-veiled hostility toward transsexuals, despite a one-sentence acknowledgment that “some” Indians “may truly desire sex reassignment surgery.” *Id.* at 28.

“In India, many transgender people have a choice between conforming to traditional gender stereotypes or becoming part of the Hijra caste. This is particularly so if they intend to live out their lives as members of the opposite gender. Within the caste, ritual castration without anesthesia is performed on new members by the caste.” Gianna E. Israel, *Transgenderists: When Self-Identification Challenges Transgender Stereotypes* (visited May 24, 2000) <<http://www.firelily.com/gender/gianna/transgenderists.html>>. “[T]he hijra have a 2,500-year-old history. Known contemporarily as a ‘third gender’ caste, hijra translates as herma-phrodite or eunuch or ‘sacred erotic female-man.’” Zachary I. Nataf, *Whatever I Feel . . .* (visited May 24, 2000) <<http://www.oneworld.org/ni/issue300/trans.html>>.

88. *See* Leane Renee, *Impossible Existence: The Clash of Transsexuals, Bi Polar Categories and Law*, 5 J. GENDER & L. 343, 351-52 (1997); Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, 850 (1995).

have been documented.⁸⁹ The female-to-males of this group, generally referred to as “passing women,”⁹⁰ may or may not have been transsexual in the sense that, had it been available to them, they would have sought out hormones and surgery. As Jonathan Katz noted, “academics act as if to name something is to know it; the order-loving mind may well be calmed by such pigeonholing, but the reality of these women’s lives will remain elusive.”⁹¹

One researcher has noted that several “alternative gender styles” existed in Native American culture.⁹² “Not-men” and “not-women” are those of one biological gender who “assume some aspects” of the other.⁹³ Some tribes used the word “berdache” to describe those who crossed gender lines in some fashion.⁹⁴ The Lakota/Dakota culture used the term “winkte,”⁹⁵ Over 130 tribes had some form of recognized male-to-female berdache role.⁹⁶ Fewer had female-to-male roles and some had no such concept.⁹⁷

3. Christian Demonization of Indigenous Transgenderism

Some post-Columbian anthropological studies attempted to portray berdaches as gay men rather than cross-gendered.⁹⁸ However,

89. See JONATHAN KATZ, *GAY AMERICAN HISTORY* 209-279 (1976).

90. See *id.* (documenting the lives of “passing women” from 1782 to 1920). Modern examples of “passing women” who may or may not have had any intention or desire to seek surgical intervention come to light occasionally, though usually only after the person’s death. See generally DIANE WOOD MIDDLEBROOK, *SUITS ME—THE DOUBLE LIFE OF BILLY TIPTON* (1998) (recounting the story of Billy Tipton, a jazz musician who lived as a man from the age of 19 until he was discovered to be a woman upon his death at age 74).

91. KATZ, *supra* note 89, at 211.

92. Brown, *supra* note 87, at 6.

93. *Id.*

94. See CALIFIA, *supra* note 82, at 123-24. However, it is not from the language of any North American tribe. It is believed to have come from Persia by way of Spain and then France. Arno Karlen referred to the word as “a corruption of a word that had passed into Arabic from Persian and variously meant slave, kept-boy or male prostitute.” ARNO KARLEN, *SEXUALITY AND HOMOSEXUALITY* 464 (1971). Although used in Native American culture despite its foreign origins, some Native American descendants today consider it to be a slur of the same magnitude as “redskin.” CALIFIA, *supra* note 82, at 123-24.

95. See Cheryl Long Feather, *Four Directions—Tribal Culture Loses the Element of Acceptance*, BISMARCK TRIB., Jan. 13, 1999, at 1B.

96. See CALIFIA, *supra* note 82, at 124.

97. See *id.*; KARLEN, *supra* note 94, at 465.

98. Speaking of the gender-variant among the Choctaw, Jean-Bernard Bossu declared: “They are morally quite perverted, and most of them are addicted to sodomy. These corrupt men, who have long hair and wear short skirts like women, are held in great contempt.” JEAN-BERNARD BOSSU’S *TRAVELS IN THE INTERIOR OF NORTH AMERICA 1751-1762* 169 (Seymour Feiler trans. and ed., 1962), quoted in KATZ, *supra* note 89, at 291. Of course, the religious slant on this

this characterization of Native American cross-gendered people is considered to be a remnant of a conservative period of pseudo-anthropology when “anything sexual that was not for procreation was being studied and dissected probably to determine how to be rid of it, as opposed to simply knowing about it.”⁹⁹ Ironically, this inherent suspicion of anything which validates the crossing of the dualistic gender boundary is remarkably similar to the theories of an extremely small group of virulently transphobic lesbians who believe that the concept of male-to-female transsexualism is part of a patriarchal conspiracy against women.¹⁰⁰

The lot of the Native-American alternatively-gendered may not have been a perfect one as accordation of a true “third-gender role” may have been rare.¹⁰¹ But, transition, in a sense quite similar to that done by transsexuals, was known and accepted in indigenous American culture.¹⁰² Leslie Spier, in a 1930 article on the Klamath tribe, exhibited open contempt for berdaches yet also acknowledged that “they are permitted to live as they desire despite the distaste of the normal Klamath for the practice. . . .”¹⁰³ The religions of many of the North American tribes utilized berdaches and winktes as “magicians, healers, priests and visionaries.”¹⁰⁴ This high regard for a nontraditional gender alternative was just one of many things viewed as “hedonistic” by the European Christians who came to North

characterization cannot be ignored. Bossu prefaced the above remark with general contempt of the Choctaw’s refusal to accept Christianity, stating, “The people of this nation are generally of a brutal and coarse nature. You can talk to them as much as you want about the mysteries of our religion; they always reply that all of that is beyond their comprehension.” *Id.*

99. Brown, *supra* note 87, at 8.

100. This view is epitomized by the writing of Janice Raymond. See *infra* Part II.F(2)(b).

101. CALIFIA, *supra* note 82, at 135. As Califa states, “The mere fact that a social role exists does not make it acceptable.” *Id.* at 131. Some have asserted that Berdache, while having the “status of the female, [were] still recognized as being males in female attire.” Janet Thompson, *Transvestism: An Empirical Study*, MATTACHINE REV., Dec. 1956, at 8, 45. By itself, though, this does not address the societal acceptance, specifically the legality or the illegality of the role.

102. See Long Feather, *supra* note 95, at 1B.

103. Leslie Spier, *Klamath Ethnography*, 27 U. CAL. PUBLICATIONS IN AM. ARCHEOLOGY & ETHNOLOGY 51, 51-53 (1930), *quoted in* KATZ, *supra* note 89, at 323. Spier said that he was “not sure” whether the Klamath berdache were “psychologically abnormal, homosexual” although he noted that another researcher felt as though that was indeed the case. *Id.* He also noted that there were at least seven berdache in a “population numbering upward of two thousand.” *Id.* Though he demeaned this as a “very minor fraction,” it is between one-half of one percent and one percent—significant in that one percent of the current population of the United States is approximately three million. *Id.*

104. Brown, *supra* note 87, at 7.

America in the years after Columbus.¹⁰⁵ As Lester B. Brown points out, “[M]ost decided that American Indian groups needed civilization to save them.”¹⁰⁶

Although Cheryl Long Feather asserts that the Lakota/Dakota culture accepted the *winkte* “without hesitation,”¹⁰⁷ a somewhat middle-ground view is put forth by Nick Metcalf and Yako Myers who, despite not exactly having a polar opposite view of the position of the gender-different in Native American society, do have harsh words for Pat Califia.¹⁰⁸ They refer to her as just “another arrogant white anthropologist.”¹⁰⁹ Metcalf, who is Lakota, and Myers, who is Mohawk and Ojibwe, claim that while Native Americans of nontraditional gender deal with teasing, it is specifically not the type of teasing which such people endure in white culture – that designed to put such people “in their place.”¹¹⁰ Moreover, the issue of whether a *winkte* is homosexual or transsexual is really not an issue in their culture as neither sex nor gender is as significant as it is in white culture.¹¹¹ The same is true to some extent regarding Hawaiian indigenous transgenderism, which is still extant on some of the islands. As one Mahu said, “On our island, the males don’t tease the mahus, because they know one another, they were brought up together. You can tell the boys that were raised here, because their parents taught them to respect the mahus.”¹¹²

“Mahu,” the word generally used to refer to the cross-gendered population in Hawaii, originally referred to “men who are soft, feminine. It wasn’t a bad word, but people made it bad.”¹¹³

Irrespective of how the roles of cross-gendered Native Americans are quantified by modern anthropologists and historians, the acceptance that they enjoyed was almost certainly “an

105. *Id.*

106. *Id.*

107. Long Feather, *supra* note 95, at 1B.

108. See Aaron Lichtov, *From Us to They*, LAVENDER MAG., Oct. 10, 1997, (visited May 19, 2000) <<http://www.lavendermagazine.com/62/62.culture.50.html>>.

109. *Id.* (interviewing Metcalf and Myers as part of a review of CALIFIA, SEX CHANGES (1997)).

110. *Id.*

111. *See id.*

112. Nancy Nangeroni, *In Search of Mahu*, TRANSGENDER TAPESTRY, Winter 1998, at 24, 28 (quoting a Mahu named Moana).

113. *Id.* at 27.

improvement over twentieth century homophobia.”¹¹⁴ Moreover, their mere existence is a ferocious blow to the alleged self-evidentness that a two-gendered, heterosexual society is the only acceptable standard and the only one ever to have existed. Their mere existence bolsters, theoretically at least, potential constitutional claims when “Judeo-Christian” morals are asserted as a defense to a marriage of a post-transition transsexual, as happened in *Littleton v. Prange*, or even in the broader context of same-sex marriage in any form.¹¹⁵

D. Other Medical & Psychological Concerns

1. The Ups and Downs of Gender Identity Disorders

The chromosomal and hormonal bases for recognition of transsexuality were discussed in Part II.A. Equally significant, though, are mental diagnostics. Homosexuality has disappeared from the American Psychiatric Association’s (APA) list of mental disorders.¹¹⁶ The classification of Gender Identity Disorders (GIDs), though, is still listed.¹¹⁷ Although official existence of GID lends credence to an assertion that transsexualism is not a form of sexual fraud, a downside exists: a diagnosis can be made *against* a person’s will, giving medical and psychological practitioners license to attempt to “cure” the person.¹¹⁸ “For some, the APA’s diagnostic criteria are

114. CALIFIA, *supra* note 82, at 134. As stated by Duane Cunningham, “The multiple forms of oppression found in present-day society find their roots in the established sacredness of heterosexuality and gender relations.” Duane Cunningham, *Preface: Sharing the Gift of Sacred Being*, in TWO SPIRIT PEOPLE xxi (Lester B. Brown ed. 1997).

115. See Koppel, *supra*, note 22, at 6.

116. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 279-96 (4th ed. 1994) (listing sexual disorders).

117. See *id.* at 535.

118. And not always of transsexualism. A recent episode of the television series *E.R.* dramatized how it can be used against a person whose parents want to “cure” her of being gay. See *E.R.: Family Matters* (NBC television broadcast, Jan. 6, 2000).

One well-known real-life victim of an involuntary GID diagnosis, Daphne Scholinski, spent three years in mental institutions for not being “feminine enough” for some people’s liking. *Dateline NBC* (NBC television broadcast, Oct. 20, 1997), *transcript available in 1997 WL 7755489*; see also DAPHNE SCHOLINSKI WITH JANE MEREDITH ADAMS, *THE LAST TIME I WORE A DRESS* (1997). “Barbie just didn’t appeal to me,” she has said. Though Scholinski admits that there were several reasons that her parents committed her, chief among them was, “[she] was constantly being mistaken for a boy.” *Today* (NBC television broadcast, Oct. 21, 1997), *transcript available in 1997 WL 15116434* (broadcasting Scholinski as interviewed by Katie Couric). She admits to being a bit unruly, perhaps even out of control. See Marty Berry, *Survivor Bares Soul to ‘Dress’ Down Mental Health System*, USA TODAY, Dec 22, 1997, at 6D. Noteworthy is the fact that Scholinski does not hold a grudge against her parents. She feels that they truly believed that they were helping her. She does find fault with those who treated her as

too limiting and do not take into account variations that exist which do not fit into the specified categories.”¹¹⁹

The view of some transgender activists is that professionals who brand youths with a diagnosis of GID make no differentiation between those who are “gender questioning”¹²⁰ and those who are “gender leaking”.¹²¹ The late Shoshanna Gillick, a physician and male-to-female transsexual who dealt with a GID diagnosis as a child, felt that this is primarily due to transphobia and homophobia in the psychiatric community.¹²² She did not go as far as to advocate a genderless society, though, “[g]ender is a large part of our persona, our ability to be a person. Standing on a mountain and saying you don’t need a gender is cruel. The truth is, we’re not all gumbo of gender soup. We’re Campbell’s 350 varieties.”¹²³

The GID diagnosis actually is beneficial in one context: genital surgery. Irrespective of how the transsexual views herself in terms of having a “disorder,” most surgeons require a diagnosis of GID before performing genital surgery on a transsexual.¹²⁴ Yet, as long as it is listed in the DSM-IV, it can be used *against* people as well as simply the permission slip for desired genital surgery.

she feels that the doctors did not accurately inform her parents about her treatment. *See Dateline, supra*. Although there were other factors influencing her behavior at the time, among them sexual abuse, those who were designated to “help” her focused exclusively on her appearance. She said, “I just needed to learn how to be more feminine and then everything would go away. All of a sudden, my whole life would just be perfect.” *Id.* She continued, “[M]y goals—you know, like a quote from my—from my chart would be, ‘Patient to spend 15 minutes,’ you know, ‘with female peer, learning to curl and style hair, learning how to apply makeup.’” *Id.* Her confinement ended when her father’s medical insurance ran out. *See Berry, supra*, at 6D.

119. Cole, *supra* note 50, at B-2.

120. Gender questioning is those for whom gender cross-identification is actually positive in spite of societal scorn. *See* Athena Douris, *The Well of Genderlessness—Who Decides if We’re Lesbian or Transsexual?*, GIRLFRIENDS, April 1998, at 18 (commenting on theories of Shoshanna Gillick).

121. Gender leaking is those whose gender confusion is so severe that it may lead to self-mutilation or suicide. *See id.*

122. *See id.*

123. *Id.* at 44.

124. For purposes of this article I will not address the dispute over specific guidelines used in approval for surgery. A discussion of and comparison between the Harry Benjamin Standards and the Health Law Standards can be found in James L. Nelson, *The Silence of the Bioethicists—Ethical and Political Aspects of Managing Gender Dysphoria*, 4 G.L.Q.: J. LESBIAN AND GAY STUD. 213, 219-24 (1998).

2. More on Intersexuality

*My intersexuality and change of sex were the family's dirty little secrets.*¹²⁵

In reality, the way in which intersexuality is handled is a dirty little secret of both the medical and legal professions. The abject refusal of the San Antonio Court of Appeals even to offer guidance as to how their extremely broad decision in *Littleton* should be applied to an intersexed person is typical of judicial unwillingness to address something that is seemingly less concrete than transsexualism. Sex reassignment surgery is thought of as a choice,¹²⁶ but the matter of a child's gender being changed without his or her permission early in life, which is the fate of many intersexed people,¹²⁷ is not. Yet, the same inflexible laws which are used to constrain the gender identity of transsexuals must also be applied to the intersexed. And if exceptions are made, then the door opens to equal application to transsexuals.

Justice Angelini's concurrence in *Littleton* specifically expressed "no opinion as to how the law would view [intersexed] individuals with regard to marriage."¹²⁸ Chief Justice Hardberger's majority opinion did not mention the intersexed at all, leaving the intersexed not simply at the mercy of whatever creator deals out X and Y chromosome cards,¹²⁹ but also at the mercy of the medical view toward intersexed children.¹³⁰ A person with the following life history may or may not be able to marry a male in Texas:

125. Cheryl Chase, *Hermaphrodites With Attitude—Mapping the Emergence of Intersex Political Activism*, 4 GL.Q.: J. LESBIAN AND GAY STUD. 189, 193 (1998)

126. And, to be fair, some transsexuals also view the entire process in this light. Says a young transsexual named Elizabeth, "I decided I'd rather be a woman than an effeminate man." Maria Russo, *Teen Transsexuals—When Do Children Have a Right to Decide their Gender?*, SALON, Aug. 28, 1999, at 3 (visited May 22, 2000) <<http://www.salon.com/health/sex/urge/1999/08/28/transsexualteens/index2.html>>.

127. *See id.*

128. *Littleton v. Prange*, 9 S.W.3d 223, 232 (Tex. App. 1999, pet. denied) (Angelini, J., concurring).

129. In the French film *Ma Vie en Rose*, perhaps the most accurate portrayal ever of the mental agony endured by a person who realizes early in childhood that his mental and physical genders do not properly align, a male gender variant child is told that getting one's chromosomes is "like playing poker." *MA VIE EN ROSE* (Sony Pictures Classics 1997). The comment prompts the child to vividly imagine Xs and Ys literally being dealt from the sky and that he simply received a Y instead of a second X. *See id.*

130. As Emily Nussbaum stated, "To some degree, intersexuality is in the eye of the medical beholder: A large clitoris may be considered normal by one doctor, ambiguous by another." Nussbaum, *supra* note 64, at 93.

I was born with ambiguous genitals. A doctor specializing in intersexuality deliberated for three days—sedating my mother each time she asked what was wrong with her baby—before concluding that I was male, with a micropenis, complete hypospadias, undescended testes, and a strange extra opening behind the urethra. A male birth certificate was completed for me, and my parents began raising me as a boy. When I was a year and a half old my parents consulted a different set of experts, who admitted me to a hospital for “sex determination.” . . . They judged my genital appendage to be inadequate as a penis, too short to mark masculine status effectively or to penetrate females. As a female, however, I would be penetrable and potentially fertile. My anatomy having been relabeled as vagina, urethra, labia, and oversized clitoris, my sex was determined . . . by amputating my genital appendage. Following doctors’ orders, my parents then changed my name, combed their house to eliminate all traces of my existence as a boy (photographs, birthday cards, etc.), changed my birth certificate, moved to a different town, instructed extended family members no longer to refer to me as a boy, and never told anyone else—including me—just what had happened.¹³¹

That person, Intersex Society of North America founder Cheryl Chase, is intersexed, but would more likely be viewed with judicial sympathy than one former client of mine, a male-to-female transsexual who, after beginning the transition process, learned that she was a true hermaphrodite who had been designated male at birth following a gender-clarification procedure and, perhaps most significantly for post-*Littleton* Texas, actually has the XX chromosome pattern—all because Chase’s “change” occurred at age 1 1/2 rather than later in life.

As Chase notes, many intersexed children are subjected to numerous surgeries to reinforce whichever gender designation that a certain group of physicians make, often ending “only when the child grows old enough to resist.”¹³²

131. Chase, *supra* note 125, at 193.

132. *Id.* at 192. According to Chase, 90% of babies with ambiguous genitals are designated female and surgically conformed to that designation because, as she quotes Johns Hopkins intersex specialists as saying, “You can make a hole, but you can’t build a pole.” *Id.* (citing Melissa Hendricks, *Is it a Boy or a Girl?*, *JOHNS HOPKINS MAG.*, Nov. 1993, at 10-16).

Ostensibly aimed at ritual mutilation committed against those too young to resist, the federal Female Genital Mutilation Act criminalizes the “circumcis[ion], excis[ion], or infibulat[ion of] the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years,” but exempts such action when done by a physician and the procedure is deemed to be “necessary to the health of the person on whom it is performed.” 18 U.S.C. § 116 (1996). According to Chase, the Act’s principal author, Congresswoman Pat

One of many post-*Littleton* “dirty little secrets” consists not of an answer, but rather of a series of questions.¹³³ Is my XX-chromosomed client male? Or, is she female?¹³⁴ Can she marry a male? Or, can she marry a female? Or, can she marry either? Or, as one Australian case would dictate for an intersexed person, can she marry neither?¹³⁵ Or, will exceptions to the absolutism of the “chromosomes = sex” rule be made based on when the transition occurs,¹³⁶ leaving happiness available only to those people who have parents who are enlightened enough, not to mention financially well-off enough, to allow gender transition at an early age?¹³⁷ This last question is important because nowhere in *Littleton*, or in the briefs of the parties for that matter, was there any mention of an evisceration-by-exception of the “chromosomes = sex” standard in England, where that standard was first judicially created. A chromosomally male child, being raised as a female, recently overcame *Corbett v. Corbett*, the decision from which the medico-legal theory behind the *Littleton* majority opinion stems, and had her birth certificate changed.¹³⁸ The child had what was termed an “embryological abnormality” called “cloacal

Schroeder, ignored pleas from intersexed advocates to provide greater protection to young children from unwise sex correction procedures. See Chase, *supra* note 125, at 204.

Of course, the question that remains is whether resisting further treatment would constitute prevailing in the sense of Lord Coke’s declaration that hermaphrodites be classified as male or female depending upon which sex “doth prevaile.” Greenberg, *supra* note 20, at 277-78 (quoting the first part of the INSTITUTES OF THE LAWS OF ENGLAND, 1 E. COKE, INSTITUTES 8.a. (1st Am. ed. 1812)).

133. Chase, *supra* note 125, at 193.

134. This makes her situation not on all fours with that of Tula Cossey, who has been prevented from marrying under the auspices of “chromosomes = sex” because she has a Y chromosome, albeit as part of the XXXY pattern. See Edgren, *supra* note 25, at 105.

135. See *Marriage of C and D (Falsely Called C)* (1979) 28 A.L.R. 524, 528 (Fam. Ct. Austl.).

136. This is an argument of which Ms. Littleton’s attorneys were sufficiently aware to at least mention in their oral argument to the Court of Appeals. See Adolfo Pesquera, *Court to Decide What’s Changed in Sex Operations*, SAN ANTONIO EXPRESS NEWS, Sept. 3, 1999, at 1A (quoting one of Ms. Littleton’s attorneys, Dale Hicks, as asking if only those designated to be female at birth are to be given legal standing in marriages to males, “[W]hat do we do with a hermaphrodite, what do we do with persons who wait 10, 20 years before deciding which way they’re going to go?”).

137. See Florence Dillon, *Tell Grandma I’m a Boy*, in TRANS FORMING FAMILIES: REAL STORIES ABOUT TRANSGENDERED LOVED ONES 3 (Mary Boenke ed., 1999) (telling a mother’s first-person story of coming to terms with and being willing to help her adolescent female-to-male son); *c.f.* Suzan Cooke, *Not My Child—Disowning and Other Abuses of Transchildren*, ANYTHING THAT MOVES, Spring 1999, at 14; Russo, *supra* note 126, at 1-2 (noting that even teenagers who are able to seek out proper medical help for gender variance encounter an unwillingness on the part of doctors to assist anyone under 18).

138. See *infra* Part IV.B.

exstrophy.”¹³⁹ Those connected with the matter took great pains to sully transsexuals and to distance the child from transsexualism, but the fact remains that the child was, and is, “chromosomally a boy.”¹⁴⁰ Nothing about her situation falls within the ironclad edict of *Corbett*:

[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. [A transsexual’s] operation . . . cannot affect her true sex. The only cases where the term ‘change of sex’ is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.¹⁴¹

There was no chromosomal mistake regarding the child in question, Joella Holliday. Her genitals were malformed, but she was registered at birth as a male based on her chromosomes.¹⁴² According to one article, “[O]n his first birthday, Joel became Joella after doctors advised that as he lacked male sex organs, he would have a *better* life if raised as a girl. Five months later, Joella underwent the first of a series of operations to become female.”¹⁴³

Her physical abnormality simply would have made a functional life as a male painfully inconvenient, perhaps even impossible. But why should an exception be made for her and not someone who suffers from nongenital physical abnormalities brought on by hormone imbalances, either pre-natal or post-natal?¹⁴⁴ And will another exception be made should Joella ever decide to follow her chromosomes and decide to live as a male?

139. Celia Hall, *Girl Born a Boy Wins New Birth Certificate*, DAILY TELEGRAPH (London), Dec. 2, 1998, at 3.

140. *Id.* Worth noting here, the Americans With Disabilities Act purposely excluded transsexuals, but would, perhaps, give some relief to a person with such a birth abnormality. The word “disability,” as used in the ADA, does not include “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders *not resulting from physical impairments*, or other sexual behavior disorders.” 42 U.S.C. § 12211(b) (1990). This exclusion was almost entirely the work of Senator Jesse Helms. As one law review article pointed out: The law codifies the notion that these conditions are, in the words of Senator Helms, “moral problems, not mental handicaps;” that they are “addictions” with “moral content” whose presence might render an individual unfit for working life. Adrienne L. Hiegel, *Sexual Exclusions: The Americans With Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1476-77 (1994) (quoting 134 Cong. Rec. S2401 (daily ed. Mar. 17, 1988) (statement of Sen. Helms) (footnotes omitted)).

141. *Corbett v. Corbett*, 2 All E.R. 33, 47 (P. 1970).

142. See Stuart Millar, *Official: Joel, 10, Becomes Joella After Lifelong Fight For New Birth Certificate*, THE GUARDIAN (LONDON), Dec. 2, 1998, at E2.

143. *Id.* (emphasis added).

144. See *infra* Part VII.B.

Joella “look[s] forward to getting married.”¹⁴⁵ Yet, as with a marriage involving Cheryl Chase, a marriage that Joella enters into with a male likely would at least be subject to a challenge for voidness if the marriage’s validity was ever at issue in Texas.

E. Some Legal Essentials

1. Change of Name

a. Transsexuals Are Not the Only Disfavored Group Ever to Have Had Problems With Name Changes

Littleton v. Prange addressed the question of legal recognition of an ostensibly opposite-sex marriage involving a post-transition male-to-female transsexual and a male.¹⁴⁶ And, of course, at a more fundamental level, it addressed the question of whether a post-transition male-to-female transsexual is legally male or female.¹⁴⁷ A legal hurdle that some transsexuals, as well as others who certain majoritarian elements of society frown upon, have faced was not at issue in *Littleton*: a change of name.

The Texas adult change of name statute has rarely resulted in reported case law.¹⁴⁸ In *In re Erickson* a married woman had petitioned to change her last name from that of her husband to her maiden name but the request was denied by the trial court for “fail[ing] to state sufficient legal or equitable grounds” for the change of name and because there was “no statutory or case law authorizing” such a change of name for a married woman.¹⁴⁹ In reversing and rendering, the Fourteenth Court of Appeals noted that, “A follower of traditional social propriety may not understand appellant’s motives in this case; however, her motives are legitimate to her, and she believes it in her ‘interest’ and to her ‘benefit’ to use her maiden name.”¹⁵⁰

To say that the words “may not understand” apply to many, perhaps even to the majority, of people where transsexualism is concerned would be a vast understatement.¹⁵¹ Yet, in *Littleton*, no

145. Millar, *supra* note 142, at E2.

146. See *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999, pet. denied).

147. See *id.*

148. See TEX. FAM. CODE ANN. § 45.101 (West 1996).

149. *In re Erickson*, 547 S.W.2d 357, 359 (Tex. App. 1977, no writ) (quoting the trial court’s conclusions of law).

150. *Id.* at 360.

151. See, e.g., *M.T. v. J.T.*, 355 A.2d 204, 207 (N.J. Super. Ct. App. Div. 1976) (quoting and upholding trial court’s statement, that “The entire area of transsexualism is repugnant to the

attempt was made to draw an analogy between the departure from the so-called traditional morality used by the *Erickson* trial court to disallow that married woman's name change and the departure from traditional notions of what is male and what is female.¹⁵²

b. Transsexual Name Changes and the Fraud Factor

The prospect that any petitioner is using a name change for potential fraud is typically considered by those called upon to pass judgment on such requests.¹⁵³ Failure to provide evidence regarding the reason for a change can lead to a petition being denied even in a state that has very liberal standards for allowing name changes.

i. New York

In New York, one such denial was handed to a thirty-nine-year-old man named William who sought to change his name to Veronica "to avoid embarrassing situations" due to his sexual orientation and to protect his "physical well being."¹⁵⁴ Noting that the court should consider "whether the proposed change will lead to fraud, misrepresentation, confusion, deception or otherwise interfere with the rights of the public," Judge Berke denied William's petition because the claims in it were not corroborated by "competent medical and psychiatric evaluation, including whether he is a transvestite or a transsexual and, if a transsexual, whether he has undergone a sex change operation and is now anatomically and psychologically a woman."¹⁵⁵

A New York court had, as early as 1968, allowed such a change for a post-operative transsexual.¹⁵⁶ In the 1968 *In re Anonymous*,

nature of many persons within our society," but noting that "this should not govern the legal acceptance of a fact").

152. I am not attempting to depict this as an apples-to-apples comparison. Rather, I mention it to point out that equitable interpretations of the Texas Family Code are not unknown. *See infra* Part VI.A.

153. One of the requirements of a petition which must be verified for a change of name for an adult is "the reason the change in name is requested." TEX. FAM. CODE ANN. § 45.102(a)(3) (West 1996). One of the few instances of a denial of a change of name being upheld came in *In re Dickey*, 919 S.W.2d 790 (Tex. App. 1996, no writ) (construing section 45.103, which restricts name changes for felons, to include felonies committed within and without the state of Texas and denying a name change for a federal prisoner).

154. *In re Anonymous*, 587 N.Y.S.2d 548 (N.Y. Civ. Ct. 1992) (quoting from William's petition).

155. *Id.*

156. *See In re Anonymous*, 293 N.Y.S.2d 834 (N.Y. Civ. Ct. 1968).

Judge Pecora felt that any potential for fraud in the case of a transsexual seeking a name change would be in continuing to classify a post-op male-to-female transsexual as male.¹⁵⁷ Strangely, in *Littleton v. Prange*, Chief Justice Hardberger did not cite Pecora's extensive policy-based analysis of gender transition recognition, even to disagree with it.¹⁵⁸

ii. Pennsylvania

Lisa Harris, a Pennsylvania pre-op MTF, was told by a trial court that "absent reassignment surgery it would not comport with common sense, common decency and fairness to all concerned, especially the public, to allow a change of name," prior to SRS, and disallowed her desired change from Brian to Lisa.¹⁵⁹ On appeal, Judge Olszewski, in reversing the trial court, directly addressed the fraud issue: "[R]ather than perpetrating a fraud upon the public, the name change would eliminate what many presently believe to be a fraud; that is, that petitioner is a man."¹⁶⁰

However, dissenting Judge Saylor was unswayed: "To judicially sanction a pre-operative male transsexual's adoption of an obviously female name would grant legal recognition to a physiological fiction."¹⁶¹

As evidence of how divisive any aspect of transsexualism can be, the decision was, in fact, a 1-1-1 split, although in favor of granting the name change. Judge Popovich's concurring opinion was actually the most up-front in terms of dealing with Pennsylvania's name-change law¹⁶² as applied to this specific petitioner.¹⁶³ According to

157. *See id.* at 838. Similarly, most, perhaps all, transsexuals express the view that any "faking . . . of individual identity," as the *National Review* derisively referred to transsexualism during the Renee Richards media frenzy, was done *prior* to gender transition. *The New, Improved Self*, NATIONAL REVIEW, Oct. 1, 1976, at 1048-49 (generally decrying the "epidemic of self-redefinition" in which "Cassius Clay becomes Muhammad Ali; Richard Raskin is 'reborn' as Renee; Negroes become blacks; homosexuals become gays.") "Before, I was a facade . . ." Dale Bryant, *Boy Morphs Girl*, METRO, Jan. 30-Feb. 5, 1997, at 16, 20 (quoting California transsexual attorney and law enforcement officer Melinda Whiteway).

158. *See infra* Part IV.B.

159. *In re Harris*, 707 A.2d 225, 227 (Pa. Super. Ct. 1997); *see also In re McIntyre*, 715 A.2d 400, 402-03 (Pa. 1998) (noting trial court's denial of petitioner's request to assume female name where he had not yet obtained sex reassignment surgery).

160. *In re Harris*, 707 A.2d at 228.

161. *Id.* at 230 (Saylor, J., dissenting).

162. *See* PA. STAT. ANN. tit. 54, § 701 (West 1998). The statute requires court approval for a change of name:

Popovich “the inquiry ends” when the statute is satisfied as to ensuring no fraudulent intent.¹⁶⁴ Judge Popovich stated, “I believe that appellant’s petition should be granted without probing into appellant’s sex or his desire to express himself in the manner of his choosing.”¹⁶⁵ Perhaps in opposition to the absolutism of Saylor’s dissent, Popovich added:

[I]f parents have an absolute right to choose to name their male child an obvious “female” name at birth, it is illogical that an adult does not have the same right to change his name in the future if he so desires, whatever the name shall be, provided that the person does not seek the change for fraudulent purposes.¹⁶⁶

Popovich emphasized that there was no evidence to suggest that Harris was attempting the name change to avoid any financial obligation.¹⁶⁷ Beyond the issue addressed, the name only, Popovich’s analysis gets at the deeper dilemma of the transsexual: having to live with a determination of gender made immediately after birth, irrespective of how accurate it actually is.

2. Crossdressing

a. History

In theory, legal prohibitions against crossdressing can be traced to the same extra-legal source as prohibitions against sexual contact between members of the same sex: the Bible.¹⁶⁸ However, many of the American anticrossdressing laws apparently began with a different intention. It was once the original need disappeared that they were

(a) General rule.—It shall be unlawful for any person to assume a name different from the name by which such person is and has been known, unless such change in name is made pursuant to proceedings in court as provided by this chapter

(b) Informal change of name.—Notwithstanding subsection (a), a person may at any time adopt and use any name if such name is used consistently, nonfraudulently and exclusively.

Id.

163. See *In re Harris*, 707 A.2d at 229 (Popovich, J., concurring).

164. *Id.* (Popovich, J., concurring).

165. *Id.* (Popovich, J., concurring).

166. *Id.* (Popovich, J., concurring).

167. See *id.* (Popovich, J., concurring).

168. “The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman’s garment: for all that do so are abomination unto the LORD thy God.” *Deuteronomy* 22:5 (King James). This apparent direct Biblical authority, of course, makes Pat Robertson’s declaration that transsexualism is not a sin even more extraordinary. See *700 Club*, *supra* note 32.

used against sexual minorities.¹⁶⁹ One of the earlier works dealing with transgender issues, Magnus Hirschfeld's *Transvestites*, chronicles many German prosecutions of the late nineteenth and early twentieth centuries.¹⁷⁰ Some of those prosecuted were, indeed, what would be considered cross-dressers.¹⁷¹ However, some were people who were dressed according to their legal gender but who were thought, by virtue of being too masculine or too feminine, to be members of the opposite sex crossdressing as that sex.¹⁷²

Of course, crossdressing, and alleged crossdressing, was still targeted by those wishing to enforce moral order under the general rubric of "gross indecency."¹⁷³ However, such a malleable phrase gave rise to inconsistent results. One decision noted by Hirschfeld held: "[T]he wearing of women's clothing by men is grossly indecent when it easily comes to the attention of passers-by that a man is hidden in woman's clothing."¹⁷⁴

A 1904 conviction of an actor who had "tak[en] a walk as a woman down the streets of Berlin in the company of a gentleman" was overturned because, as the only person who was aware of the actor's gender was the policeman who had arrested him, "it was to be assumed that the [actor] did not act with the intention of committing gross indecency."¹⁷⁵ Hirschfeld observed, doubtlessly with a bit of a jab intended by the phraseology, that at that time, "Cross-dressing in 'free' England and America, too, even if it does not disturb the peace,

169. One state law that was still in existence in the early 1970s had originally been enacted as a response to farmers who disguised themselves as Native Americans to attack officers who were enforcing rent-control laws. See Smith, *supra* note 84, at 990.

170. See MAGNUS HIRSCHFELD, M.D., *TRANSVESTITES* 265-78 (Michael A. Lombardi-Nash, M.D., trans., Prometheus ed. 1991). In May, 1933, Hirschfeld's Institute for Sexology (Institut für Sexualwissenschaft) was one of the first targets of Hitler's quest to rid Germany of that which he viewed to be "un-German." Jim Steakley, *Anniversary of a Book Burning*, *ADVOCATE*, June 9, 1983, at 18.

171. See Steakley, *supra* note 170, at 18.

172. See HIRSCHFELD, *supra* note 170, at 269. Hirschfeld quoted from a 1906 Berlin newspaper report of a woman who had been arrested seven times because police assumed her to be a man dressing as a woman:

Mrs. K. has the external appearance of being more like a man than a woman. She looked like a man wearing even the prettiest wig or woman's hat. Her appearance would not attract attention if only she would wear men's clothing. But then she would be going against the law. . . .

What should she do?

Id.

173. *Id.* at 265-78.

174. *Id.* at 272 (quoting a report from *Forwards (Vorwaerts)*).

175. *Id.* (quoting from a Berlin court case of Feb. 9, 1904).

[was] considered as disturbing the peace.”¹⁷⁶ And, the situation remained as such long after sex reassignment surgery became well-known.¹⁷⁷ Although the Supreme Court has never taken a stand on crossdressing laws, some courts have held that they are constitutionally inapplicable to transsexuals.¹⁷⁸

b. Illinois

In 1974 two preoperative male-to-female transsexuals were arrested for violating the portion of the “public morals” chapter of the Chicago Municipal Code which states, “Any person who shall appear in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex . . . shall be fined not less than \$20.00 nor more than \$500.00 for each offense.”¹⁷⁹

Obviously, if a male-to-female transsexual is viewed as being legally male, she will be in violation of any such law, which is typically found to exist at the local level, should she appear in public in female attire.

With a closing declaration that the state has “an interest in maintaining the integrity of the sexes,” an Illinois appellate court rejected a long list of challenges to the ordinances, and upheld the two’s convictions and \$100 fines.¹⁸⁰ Acknowledging that the “existence of unspecified constitutionally protected freedoms cannot

176. *Id.* at 277 (citing, among others, a July 7, 1907 newspaper account of the case of John Becht, who had been “sentenced to nine months in jail because of endangering public morality by his masquerading as a woman”).

177. *See, e.g.*, CHICAGO, ILL., CODE § 192-8.

178. And, strangely, the *Littleton* litigation is totally devoid of reference to them. *See infra* Part VI.

179. *City of Chicago v. Wilson*, 357 N.E.2d 1337, 1339 (Ill. App. Ct. 1976) (quoting CHICAGO, ILL., CODE § 192-8)).

180. *Id.* at 1342. Justice Dieringer had no use for the fact that preparing for sex reassignment surgery requires living as the intended gender, deferring to the medical and psychological wisdom of the City Council:

The defendants testified they are transsexuals who are required to adopt female dress in preparation for sex-change operations, but their appearance in public dressed as females in an attempt to hide their true sex has, nevertheless, the same negative effect on the public morality and safety which has been prohibited by the Chicago City Council. Should the Council wish to create an exception in the ordinance based on the hardship alleged by the defendants, it may do so but it is not within our authority to judicially create such an exception.

Id. at 1341.

be doubted,” the Illinois Supreme Court reversed.¹⁸¹ Justice Moran elaborated:

If we assume that the ordinance is, in part, directed toward curbing criminal activity, the city has failed to demonstrate any justification for infringing upon the defendants’ choice of public dress under the circumstances of this case.

....
Neither of the defendants was engaged in deviate sexual conduct or any other criminal activity. Absent evidence to the contrary, we cannot assume that individuals who cross-dress for purposes of therapy are prone to commit crimes.¹⁸²

....
In this case, the aesthetic preference of society must be balanced against the individual’s well-being.¹⁸³

Additionally, Moran effectively told the City of Chicago that it could not overrule the State of Illinois regarding societal acceptance of crossdressing under at least some circumstances.¹⁸⁴ As he said, “It would be inconsistent to permit sex-reassignment surgery yet, at the same time, impede the necessary therapy in preparation for such surgery.”¹⁸⁵

Chief Justice Ward’s dissent was an attempt to discredit one of the two defendants as being, perhaps, not a transsexual. He focused on the lack of psychiatric testimony at the trial, even noting that one

181. *City of Chicago v. Wilson*, 389 N.E.2d 522, 523 (Ill. 1978).

182. *Id.* at 524-25. A federal challenge to a Toledo crossdressing ordinance which applied its prohibition only to “homosexual[s], lesbian[s], or other perverted person[s],” resulted in a similar analysis by Judge Walinski, who, in an apparently unpublished opinion, stated that if the city’s contention that the ordinance discouraged criminals from gaining some sort of advantage by appearing in female attire was the real reason for the ordinance, “it is difficult to understand how that purpose could be served by limiting its application to this one affected group.” *Toledo’s ‘Pervert Drag’ Law Voided*, *ADVOCATE*, Nov. 7, 1973, at 16.

183. *Wilson*, 389 N.E.2d at 525. A bit of “balancing” that is rarely done is society’s disdain for the transgendered versus the income generated by them. Based on personal conversations with some rural crossdressers, it could be that many mail-order clothing outlets owe a significant percentage of their business to crossdressers who are too closeted to buy female clothing in person, even if they live in a town large enough to have a mall. Additionally, Trinidad, Colorado’s Mount San Rafael Hospital, the town’s only hospital, is probably still in existence primarily because of the income generated by the “gender alchemy” business of Dr. Stanley Biber. See Elizabeth Cohen, *Biberpeople*, *OUT*, May 1995, at 86, 90. One mayor of Trinidad held Biber’s work in complete disdain, wanting Trinidad to become known for gambling rather than transsexual surgery, to which Biber responded “You tell me: What’s worse, gambling or transsexuals?” John Tayman, *Meet John, er, Jane Doe*, *GQ*, Dec. 1991, at 221, 226.

184. See *Wilson*, 389 N.E.2d at 525.

185. *Id.*

of the defendants “didn’t know what sex-reassignment surgery would involve and said he did not know the doctor who would perform it.”¹⁸⁶

At least two problems exist with Justice Ward’s line of reasoning. First, the Court of Appeals had essentially viewed violation of the ordinance as a strict liability crime.¹⁸⁷ Under that view, what would be the point of a psychiatrist’s testimony? Second, Ward focused on the defendant’s lack of knowledge concerning both the genital surgery procedure itself as well as who would perform it. Many otherwise intelligent adults would likely flunk tests on genital physiology as well as the specifics of any particular type of surgery. Why should a transsexual be any different regarding SRS?¹⁸⁸ After all, as a prerequisite for surgery, a transsexual is required to be diagnosed with GID, not licensed to make such a diagnosis.

Of course, that particular ordinance had a history of provoking odd judicial pronouncements.¹⁸⁹ The *Wilson* litigation was not the first challenge to the Chicago ordinance to result in a court ruling that it was unconstitutional.¹⁹⁰ Apparently, no reported decision resulted from a 1973 challenge, and the law was reinstated prior to the *Wilson* arrests.¹⁹¹ According to a report on the 1973 case in *The Advocate*, Chicago officials were then doing some procedural maneuvering to dodge the unconstitutionality portion of the ruling by claiming that the charges had properly been dismissed due to a lack of intent. Specifically, they argued that “no man can legally intend what is legally impossible,” and that, therefore, the constitutional issue had needlessly been reached.¹⁹² Judge Jack Sperling had ruled that the four defendants “did not succeed in any way whatsoever in making anyone believe that they were women instead of males.”¹⁹³ However, “[t]he judge’s view was in fact disputed by some observers of their

186. *Id.* (Ward, C.J., dissenting).

187. *See id.* at 522.

188. Likewise, it is not a given that a transsexual knows all of the surgeons who do SRS even now with easy access to such information on the internet. In the early 1970s the situation was undoubtedly worse. A transsexual may have heard that there was such a thing as SRS, via stories of Christine Jorgensen, but may have been at a loss as to where to actually seek similar treatment. *See In Christine’s Footsteps*, TIME, Mar. 8, 1954, at 63 (describing Charles, now Charlotte, McLeod’s efforts to obtain surgery in Copenhagen). Even today, many transsexuals do not begin serious consideration of a particular surgeon until some money has been put aside for the eventual operation. And, yes, I do speak from personal experience on that last point.

189. *See Chicago Officials Move to Restore Drag Law*, ADVOCATE, Nov. 7, 1973, at 20.

190. *See id.*

191. *See id.*

192. *Id.*

193. *Id.*

actual appearance and by the remarks of the city prosecutor at their trial, who stated at the time that he had . . . looked around for the defendants and didn't see any men."¹⁹⁴

c. Texas

In 1980, eight transsexuals brought a federal civil rights action against the City of Houston, Texas, to invalidate the following ordinance: "It shall be unlawful for any person to appear on any public street, sidewalk, alley, or other public thoroughfare dressed with the designed intent to disguise his or her true sex as that of the opposite sex."¹⁹⁵

The city replied to a constitutional challenge to the ordinance by claiming, "The Constitutional infringements, if any exist, are so insignificant as to be outweighed by the public's desire and the police department's need to know someone's true sexual identity."¹⁹⁶

Citing the Illinois Supreme Court's reasoning as well as acknowledging the medical and psychological necessity of a transition period, Judge Norman Black issued an injunction against enforcing the ordinance against pre-op transsexuals.¹⁹⁷

While these victories are significant to transsexuals who can prove that they are in therapy in anticipation of surgery, they do little for those who cannot do so or for crossdressers who venture out of their closets on the weekend.¹⁹⁸ Although the City of Houston ultimately repealed its crossdressing ordinance in its entirety,¹⁹⁹ pre-op transsexuals, as well as crossdressers, are still subject to arrest in many jurisdictions because how they are dressed is viewed by the locality as "disguis[ing] his or her *true* sex."²⁰⁰

194. *Id.*

195. *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (quoting HOUSTON, TEX., CODE § 28-42.4 (repealed Aug. 12, 1980)).

196. *Id.* at 80.

197. *See id.* at 81.

198. And not all who are crossdressers know that they are such. According to Phyllis Frye, prior to the emergence of some noncloseted transsexuals, the Houston ordinance had primarily been used to harass lesbians who wore fly-front pants. *See* PHYLLIS FRYE, THE WAR STORIES (unpublished manuscript on file with author).

199. *See* HOUSTON, TEX., CODE § 28-42.4 (repealed Aug. 12, 1980).

200. *McConn*, 489 F. Supp. at 79 (quoting HOUSTON, TEX., CODE § 28-42.4 (repealed Aug. 12, 1980)) (emphasis added).

3. Criminal Deviance

An involuntary GID diagnosis, though horrific, does not necessarily involve the machinations of the *criminal* justice system. Prior to GID and, indeed, prior to significant public awareness of transsexualism, gender variance of any type was considered criminal deviance.²⁰¹ Anti-crossdressing laws were certainly part of this regime.²⁰² However, the extent to which gender variance was regarded as something which needed to be addressed by the criminal justice system is frightening.

In a 1971 Minnesota report on sex offenders, Dr. Carl P. Malmquist addressed transvestism and transsexualism alongside pedophilia and incest in an analysis of “handling . . . those with alleged antisocial sexual tendencies”²⁰³ in concert with Minnesota’s “psychopathic personality law”²⁰⁴ and “sex offenders statute.”²⁰⁵ I highlight this report because Minnesota traditionally has been the most enlightened state with respect to the basic rights of transgendered people, being, since 1993, the only state to prohibit employment discrimination based on gender variance.²⁰⁶

Of transvestism, Malmquist spoke in an unbelievably negative way, stating, “By dressing in the clothing of the opposite sex, an illusion is created analogous to appraising and testing reality by way of playing an imposter. The difference is that this imposter is restricted to fooling others about the nature of one’s sex.”²⁰⁷

Yet, even after this, he seemed to acknowledge that there is inherent gender variance in some people.²⁰⁸ But, he also went on to allege “covert collusion” in some families in which femininity in a boy is rewarded.²⁰⁹

201. See Carl P. Malmquist, *Sex Offenders: Psychiatric Aspects*, in A REVIEW OF THE SOCIAL, LEGAL AND PSYCHIATRIC ASPECTS OF SEX OFFENSES AND SEX OFFENDERS CM-1, CM-21-23 (1971).

202. See, e.g., HOUSTON, TEX., CODE § 28-42.4 (repealed Aug. 12, 1980).

203. Malmquist, *supra* note 201, at CM-1.

204. *Id.* (citing MINN. STAT. §§ 526.09-526.11 (1939) (repealed 1994)).

205. *Id.* at CM-2 (citing MINN. STAT. § 246.43 (1953) (repealed 1979)).

206. See MINN. STAT. §§ 363.01(45), 363.03 (1993) (defining sexual orientation as including “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness”).

207. Malmquist, *supra* note 201, at CM-21.

208. See *id.* (stating that, “Being able to predict which personality traits, family interactions, and *genetic factors*, predispose toward transvestite solidification is extremely difficult.” (emphasis added)).

209. *Id.*

He viewed transsexualism as “a deviation where an individual *feels* himself to be a member of the opposite sex[.]”²¹⁰ adding that an actual belief that one is a member of the opposite sex would be a “delusion.”²¹¹ He was so preoccupied with preparing a place in the criminal sexual conduct spectrum for everything which may even remotely be some form of deviance, be it harmful or not, that he did not bother to address intersexed people.²¹² Even though that particular term had yet to be popularized, intersexuality had already been the subject of at least one noted law review article.²¹³

4. Employment

A full discussion of transgender employment law concerns is far beyond the scope of this article. Generally, though, little has changed in the legal landscape that gave rise to the statement of gender specialist Dr. Leo Wollman in the apparently well-intentioned, though badly executed, 1978 documentary on transsexualism, *Let Me Die a Woman*:

I’m sorry to say employers will not hire transsexuals. Now, just the other day one of my patients came to the office. She was very upset and despondent. It seems that her employer had somehow found out that she was a transsexual, and fired her, in spite of the fact that she was an excellent secretary, was in his employ for two years and he was extremely pleased with her work.²¹⁴

Title VII’s proscription against employment discrimination “because of sex” has dumbfoundingly been held not to encompass discrimination because of a change of sex.²¹⁵ All state laws

210. *Id.* at CM-22.

211. *Id.* at CM-22-23.

212. *See id.* at CM-23.

213. *See* Bartholomew, *supra* note 66, at 83.

214. LET ME DIE A WOMAN (Something Weird Video 1978).

215. *See* *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984) (holding transsexual whose employer discharged her from her position as a pilot was not entitled to protection under Title VII).

Phyllis Frye had an interesting take on what a decision disallowing legal recognition of gender transition might hold for employment law. Though it would be a logical application of employment in a post-*Littleton* Texas, it would be difficult to see the same court system which produced the *Littleton* decision ruling in favor of a transsexual on any issue. “Employment law in Texas will change,” she said, noting *Ulane* and similar Title VII holdings. Phyllis Frye, *Opinion: “Chromosomes = Sex” Court Case in Texas*, GAIN NEWS E-MAIL (Sept. 26, 1999) (on file with author), available at <<http://www.gender.org/gain/g99/g092699.htm#3>>. She goes on to say:

addressing sexual orientation discrimination have been worded to exclude transgender-based discrimination²¹⁶ except that of Minnesota, which defines “sexual orientation” in its Human Rights Act as

having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.²¹⁷

Although this doesn’t overtly say that transgendered people are covered, the basic language was first introduced in 1975 on behalf of transsexuals as an amendment to one of the early unsuccessful efforts at gay rights legislation in Minnesota by State Representative, later Governor, Arne Carlson.²¹⁸

5. Sex Reassignment Surgery (SRS)

“Does everyone owe society a duty of procreation?”²¹⁹ This question was posed in a 1967 law review article addressing various

As the circuits reasoned, transsexuals do not face sex discrimination which is illegal, but instead face change-of-sex discrimination which is not illegal. If the Texas 4th Court of Appeals applies the chromosome test for legal determination of sex, then all the transsexuals in Texas can get federal employment discrimination protection. They will no longer have legally changed sex.

Id.

The constrained definition of “sex” adhered to by the *Ulane* court is not universally accepted. A Québec Human Rights Tribunal has specifically held that “transsexualism or the process of unification of disparate sexual criteria is included in the scope of the term ‘sex’ in section 10 of the Québec Charter of human rights and freedoms.” *Commission Des Droits De La Personne et Des Droits De La Jeunesse v. Maison Des Jeunes*, (Québec Human Rights Tribunal, July 2, 1998), *English translation available at* <http://www2.lexum.umontreal.ca/qctdp/en/decisions/1998/a_ma_baie_en.html>.

216. As has the proposed federal Employment Non-Discrimination Act, in which, “‘sexual orientation’ means homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.” H.R. 2355, 106th Cong. (1999) (deliberately not including issues of self-image or identity).

217. MINN. STAT. § 363.01(45) (1993).

218. See MINNESOTA JOURNAL OF THE HOUSE 2460, 64th Legis. Sess. 2 (MINN. 1975); *Midwest TS’s and TV’s Fight for Civil Rights*, 6 DRAG No. 23, at 25, 26 (1976). In fact, it was Gov. Carlson who signed the 1993 amendment to the Minnesota Human Rights Act, which ultimately enacted protection based on sexual orientation. The definition included the language that he had proposed as a State Representative in 1975. See 1993 Minn. Laws. Ch. 22.

219. Robert N. Harris, Jr., *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 597 (1967).

The question of whether society owes transsexuals SRS has come up in various jurisdictions with answers ranging from ‘no’ to ‘maybe.’ Compare *Rush v. Parham*, 625 F.2d 1150, 1157-58 (5th Cir. 1980) (answering no because the state may exclude “experimental treatment”); with

justifications for enforcement of certain moral standards via laws which criminalize consensual adult conduct.²²⁰ That basic premise is one of the allegedly logical justifications behind the current wave of legislation to deny recognition of same-sex marriages. In light of *Littleton v. Prange*, it is a live issue with respect to the very lives of transsexuals, not to mention their marriages.

A little over a decade after the aforementioned article, Stan Twardy essentially answered that question in the affirmative with an article titled the *Medicolegal Aspects of Transsexualism*.²²¹ Billed as “the most comprehensive exposition on the medicolegal aspects of transsexualism ever written,”²²² the article was everything but an objective treatment of the topic. Twardy focused on ways to construe SRS as contravening various laws.

As part of his discussion of castration as a criminal offense, he mentioned the pre-1975 Texas castration law and one particular prosecution under that statute.²²³ The statute read: “Whoever willfully and maliciously deprives any person of either or both or any part of either or both of the testicles shall be confined in the penitentiary not less than five nor more than fifteen years.”²²⁴

Twardy cited *Crocker v. State*²²⁵ as proof that “[p]rosecution for castration and disfigurement has been upheld under assault and battery and mayhem statutes.”²²⁶ While that statement is accurate in a compartmentalized sense, *Crocker* had absolutely nothing to do with transsexualism. His inclusion of it as part of a discussion of possible criminal prosecutions for surgeons who perform sex reassignment surgery is absolutely disingenuous.²²⁷

Pinneke v. Preisser, 623 F.2d 546, 550 (8th Cir 1980) (answering yes, where “medically necessary”); *Doe v. Dep’t of Pub. Welfare*, 257 N.W.2d 816, 821 (Minn. 1977); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 772 (N.D. Iowa 1999) (answering yes, where “medically necessary and patient is “ready”).

220. See Harris, *supra* note 219, at 597 (specifically, while addressing homosexuality).

221. See Stan Twardy, *Medicolegal Aspects of Transsexualism*, 26 MEDICAL TRIAL TECHNIQUE QUARTERLY 249, 309-310 (1980).

222. *Id.*

223. See *id.* at 297.

224. 1925 Tex. Crim. Stat. art. 1168 (Vernon 1925).

225. 573 S.W.2d 190 (Tex. Crim. App. 1978).

226. Twardy, *supra* note 221, at 297.

227. Twardy neglected to delve into the facts of the case. The defendant Crocker was convicted of castrating his son. However, the castration did not occur as part of a sex-reassignment procedure, either back-alley or clinically-supervised. The elder Crocker simply castrated his son, though in a gruesomely creative manner: by allowing the son’s testicles to be

His recount of *Crocker*, though, did lead into a discussion of the application of mayhem statutes to SRS:

Castration is undeniably mayhem, yet effective surgical sex change from male to female cannot be performed without castration. Similarly, it can be argued that mastectomies performed on female to male transsexuals also constitute mayhem.

It would be no defense to the physician's crime of removing a healthy organ to say that the patient consented, even though such consent may have been seemingly informed and understanding.²²⁸

These statements seem to be mere analysis of the law at that time.²²⁹ However, when coupled with some of Twardy's "suggested approaches" to the "problems of transsexualism," they begin to assume the posture of disinformation.²³⁰ Moreover, Twardy's view of the application of mayhem statutes to SRS was not unanimous.²³¹ Robert Veit Sherwin, writing in the *American Journal of Psychotherapy* in 1954, acknowledged that prosecutors "would point to the Mayhem Statute," but noted that such laws had rarely been used "in such a ridiculous and unscientific fashion."²³² His view was that "[i]t was a king's device in the days of yore to prevent his men from becoming useless as fighters in his army," going on to assert that "[t]here seems to be little doubt that cutting off of the male genitalia would not be mayhem."²³³

Twardy advocated requiring court or administrative approval of all sex reassignment operations, including veto power for a transsexual's relatives, stating, "Members of the patient's family,

exposed to cylinders of radioactive cesium 137 as the son slept. See *Crocker*, 573 S.W.2d at 194-97.

At the time, the castration-by-radiation was as sensational a news story as any of the early, well-publicized news stories of transsexuals. See *id.*

228. Twardy, *supra* note 221, at 299.

229. In 1949, Edmund G. Brown, who would eventually be governor of California but was then a district attorney, was among those who advised Harry Benjamin that what would now be referred to as sex reassignment surgery was illegal. See Meyerowitz, *supra* note 81, at 170-71 (citing from Harry Benjamin archival materials).

230. Twardy, *supra* note 221, at 307-08.

231. See Meyerowitz, *supra* note 81, at 184 n.69 (quoting Robert Veit Sherwin, *The Legal Problem in Transvestism*, 8 AM. J. PSYCHOTHERAPY 243-44 (1954)).

232. *Id.*

233. *Id.* One female-to-male transsexual has pondered why the "mutilation of the body" slur aimed at SRS was not applied across the board: "Breast enlargement and reduction are socially acceptable, so long as the person is female, and she's doing it to be more comfortable with herself as female. But what about an MTF who has electrolysis or receives a breast implant?" David Harrison, *Becoming a Man—the Transition From Female to Male*, in ASSAULTS ON CONVENTION—ESSAYS ON LESBIAN TRANSGRESSORS 24, 35 (Nicola Godwin et al. eds., 1996).

especially the wife or husband and minor children, would have standing to challenge the request for sex change surgery, or under appropriate conditions, the court would appoint a guardian to do so.”²³⁴

According to Twardy, this would not be an invasion of the patient’s right to privacy, but rather, “a legitimate exercise of the doctrine of *parens patriae* and the police powers of the state, in a matter where the state has considerable interest, analogous to mental health and/or incompetency proceedings.”²³⁵

His obsession with outside interference all but ignores the reality that individuals will find a physician who will perform the procedure, either legitimately or illegitimately,²³⁶ and that other individuals, if desperate enough, will attempt self-surgery.²³⁷

234. Twardy, *supra* note 221, at 309-10.

235. *Id.*

236. See Randy Dotinga, ‘Butcher Brown’ Sentenced in Amputation Murder, APBNEWS.COM, Dec. 17, 1999, (visited Jan. 2, 2000) <http://www.apbnews.com/newscenter/breakingnews/1999/12/17/amputate1217_01.html> (reporting that Brown was known for performing various surgical procedures illicitly, including SRS, though he was convicted for the death of a man whose leg he amputated unnecessarily).

237. See Daniel P. van Kammen, M.D., & John Money, Ph.D., *Erotic Imagery and Self-castration in Transvestism/Transsexualism: A Case Report*, Vol. 2 No. 4 J. HOMOSEXUALITY 359, 360-61 (1977). They reported an account of one man’s attempt:

I went into a farm store. They had this castration tool which, with pliers, opens up a rubber band. I read it was bloodless, so I bought it. Then I put a rubber band on [above the testicles to clamp off the blood supply], and in 15 minutes went shopping to tend to get my mind away. In 15 minutes the pain was so great on there, so I had to rush to a gas station and try to get it off. I opened it up again and got it off. I put it on the two testicles and got it off. The second time—I tried it again—the second time I could not get it off, so I rushed to a drugstore and got a razor blade and cut it off. And then—that was in the morning—so in the afternoon I called up my company and found out where my next job was, and they told me I had to go to Vermont for two weeks. So that meant I had to be out of town for two weeks. So I got myself a motel, and got myself some ice and attempted it again. I put a ring on and then I put another ring on, just in case to make sure I didn’t take it off again. Then I put the ice around it, so with the ice the pain wasn’t that great. The first thing you know it started to get black from the blood. So I said “That is it, there is no turning back now.” I figured that if I cut the rubber or took the rubber off I would get poison through my system. So I went around for about two or three days, and the whole thing was just solid black. And there was quite an odor to it. I read in the instructions that after three or four days or a week that you could cut it off. So I bought some scissors. And I sterilized them in real hot water. They were stainless steel scissors. They were actual surgical scissors. So I cut them off and flushed them through the toilet. Then for two weeks I was in pain. I didn’t sleep for a good five or six days at all.

Id. But, he did survive. He was 51 when he did this. Attempted self-castration among younger gender-confused males is also not unknown. See *id.*

F. Other Legalities

1. Is It All Just Fraud?

In the legal sense, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. But in its general or generic sense, fraud comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another, or the taking of undue or unconscientious advantage of another.²³⁸

Science fiction author Fred Pohl wrote of a transgendered dancer in a short story entitled *Day Million*. He wrote:

About this business of her being a boy. It didn't matter to her audiences that genetically she was male. It wouldn't matter to you, if you were among them, because you wouldn't know it—not unless you took a biopsy cutting of her flesh and put it under an electron-microscope to find the XY chromosome—and it didn't matter to them because they didn't care.²³⁹

Some members of some club audiences differ from Pohl's fictional audience, though, in that, typically, they do care or at least claim to publicly.²⁴⁰

2. Conflicts Over Recognition of Gender Transition

a. By the Ostensibly Straight World

i. Sports

*Raskind-Richards is a fake—that is, male—woman. He-she is no more a woman than a bogus Renoir is a Renoir. He-she may look like a woman, act like a woman, claim to be a woman, but he-she is, in fact, a man who pretends to be a woman.*²⁴¹

238. See 37 C.J.S. *Fraud* § 2 (1997).

239. Frederik Pohl, *Day Million*, in *BIO-FUTURES* 305, 308 (Pamela Sargent ed. 1976).

240. Though the reasons can vary—and can include scorn and revulsion—when the audience features non-transgendered women who profess to be heterosexual, the reaction can be a semi-envious, “It’s not fair,” as was that of an audience member at a performance by Eileen Dover (not a transsexual but a male drag artist) at a St. Paul area club, “You’re prettier than we are!” Michael Dahl, *My Son, The Showgirl—Eileen Dover’s Cinderella Story*, *LAVENDER MAGAZINE*, May 19, 2000, available online at <http://www.lavendermagazine.com/130/130_out_57.html>.

241. Thomas Szasz, *Male Women, Female Men*, *THE NEW REPUBLIC*, Oct. 9, 1976, at 8-9. However, Richards did commit one unquestioned act of dishonesty during her emergence into women’s tennis: she lied about her age, “[p]assing herself off as 31 instead of 41.” Marcia Seligson, *The Packaging of Renee Richards*, *Ms.*, Feb. 1977, at 75.

Although Renee Richards' height, 6'-2," did not change because of her gender transition, her weight did—going from 180 down to 147.²⁴² Still, the tennis establishment was not sure to what extent her game was diminished by the decreased testosterone and increased estrogen.²⁴³

Richards was, and is, indeed larger in stature than most women tennis professionals. But, should simple lack of seeming normality be a disqualifying criterion? More importantly, what would be the standard? In a recent interview, Richards commented, "Venus Williams is umpteen times stronger than I was on tour."²⁴⁴ While Richards is larger than, say, Chris Evert, one of her contemporaries on the women's pro tour, she is smaller than most female professional basketball players.

How is this relevant?

If exceeding size normalcy is the standard for exclusion, gender arbiters would be faced with tough calls in the following scenarios as well:

a male-to-female transsexual who is smaller than the normal female professional basketball player wanting to play in the WNBA; and

a taller-than-average non-transsexual female basketball player attempting a second career in women's professional tennis.²⁴⁵

While the bone structure that was aided in growth by male hormonal development may remain in place following a male-to-female gender transition, years of female hormones significantly alter musculature. Would hormones alter male musculature to the point of being equivalent to normal female musculature?

All of the above questions are problematic. So, to avoid all of the above genderbabble and to alleviate any possibility of any problems, just do as the *Littleton* court did and stick to the chromosomal standard, right?

Wrong.

Although speculation abounded in the 1960s and 70s regarding the true gender of many of the Eastern bloc women athletes, the chromosome tests which were put into place as a result netted an

242. See Szasz, *supra* note 241, at 17-18.

243. See *id.* at 18.

244. Cindy Shmerler, *Regrets, She's Had a Few*, TENNIS, Mar. 1999, at 31, 32.

245. Far-fetched? Perhaps. However, in an era of two-sport athletes, Bo Jackson and Deion Sanders being the two most well-known, perhaps not.

innocent victim.²⁴⁶ Maria Patino, a Spanish hurdler, had planned to compete in the 1985 World University Games and knew that a sex verification test would be required beforehand.²⁴⁷ She had no reason to believe that the test would show her chromosomes to be anything other than XX.²⁴⁸ However, unbeknownst to her, she had Androgen Insensitivity Syndrome (AIS).²⁴⁹ Her chromosomes were XY in spite of a gender identity and external anatomy of a female.²⁵⁰ She was banned from the 1985 competition and was later banned from competition by her nation's team.²⁵¹ Professor Greenberg notes that, in addition to being a miscarriage of justice, this was also terribly ironic, because:

Although a person with AIS may have a height advantage over the average woman, in other aspects the condition does not provide any competitive advantage. In addition, a woman with AIS may be at a disadvantage because her body cannot respond to any male hormones, including the normal levels of testosterone in XX women that help develop muscle tone.²⁵²

Though banned from that international track and field competition, under the case law that resulted from Renee Richards' fight to play tennis as a female, Patino would not have been barred from women's professional tennis.²⁵³ An unanswered question, though, is whether, under a "chromosomes = sex" standard she could begin to live as a male and marry a female.

ii. Securities, et al.

The accusation that someone will attempt gender reassignment for no other reason than a small financial gain is often made, often when the possibility of publicly-funded SRS is discussed.²⁵⁴

246. See Greenberg, *supra* note 20, at 273 (citing Alison Carlson, *When is a Woman Not a Woman*, WOMEN'S SPORTS & FITNESS, Mar. 1991, at 24-29).

247. See *id.*

248. See *id.*

249. See *id.*

250. See *id.*

251. See *id.*

252. *Id.* at n.37 (citing ROBERT POOL, *EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES* 80 (1994)).

253. See generally *Richards v. United States Tennis Ass'n*, 400 N.Y.S.2d 267 (N.Y. Sup. Ct. 1977) (holding that use of a sex chromatin test as the sole prerequisite was discriminatory).

254. Compare Brad Cain, *Oregon Considers Taxpayer-Financed Sex-Change Surgery*, THE COLUMBIAN, April 20, 1998, available in 1998 WL 7185272; with Alice Barnes, *Sex Change Not Always What It's Cut Out to Be*, PORTLAND OREGONIAN, Apr. 17, 1998, at D11.

Likewise, the direct contention that transsexuals have no goal in mind other than an end run around same-sex marriage proscriptions has been asserted.²⁵⁵

One of the few instances where it appears that a transsexual may have directly used his or her new identity to achieve a fraudulent gain involves Eleanor Schuler, an MTF who was born John Huminik.²⁵⁶ The story of Huminik's transformation into Eleanor Shuler appeared in *People* magazine in 1978.²⁵⁷ Following that article, little was heard of Schuler until an article in *Business Week* in 1994.²⁵⁸ The 1994 article mentioned that, as a male, she had, after involvement in the management of a corporation that had run afoul of the Securities and Exchange Commission, "agreed to a permanent injunction barring him from making untrue statements, and otherwise defrauding investors, in the future."²⁵⁹ The *Business Week* article prompted a defamation action by Schuler, which was unsuccessful.²⁶⁰

iii. Actual Matters of the Heart

The words "deceit"²⁶¹ and "charade"²⁶² were in headlines introducing stories about Brandon Teena.²⁶³ Unfortunately, Brandon

255. See Tim Fleck, *What's in a Name (and Sex) Change?*, HOUSTON PRESS ONLINE, June 17-23, 1999, at 3 (visited Dec. 27, 1999) <<http://houstonpress.com/1998/061799/insider1-1.html>>.

To Hardberger's credit, he did not cast Christie Lee Littleton's marriage to Jonathon Littleton in this light. Ironically, though, had he done so, historians would have a much more accurate picture of the anti-transsexual influence on at least some portions of the Texas judiciary which was developing at the time of the *Littleton* litigation. See *infra*, Part III.

256. See Gary Weiss and Michael Schroeder, *Did the AMEX Turn a Blind Eye to a 'Showcase' Stock?*, BUSINESS WEEK, Sept. 12, 1994, at 80, 81.

257. See *id.*

258. See *id.* at 80.

259. *Id.* at 82. The article shows a portion of a New York securities document, apparently filed by Shuler, claiming that she both had never been "enjoined or restrained" by any court or agency regarding dealing in securities as well as had never been known by any other name. *Id.* at 81.

260. See *Shuler v. McGraw-Hill Companies, Inc.*, 989 F. Supp. 1377 (D.N.M. 1997), *aff'd*, 145 F.3d 1346, *cert. denied*, 119 S. Ct. 548 (1998) (saying that at issue were not only the truthfulness of the *Business Week* article but whether or not Schuler had managed to undo "public figure" status that effectively attached when the PEOPLE article was published).

261. Chris Burbach & Henry J. Cordes, *Romance, Deceit, Rage Surround Three Slayings*, OMAHA WORLD-HERALD, Jan. 9, 1994, at 1-A.

262. Larry Fruhling, *Charade Revealed Prior to Killing*, DES MOINES REGISTER, Jan. 9, 1994, at 1B.

263. See C. Jacob Hale, *Brandon* (visited Dec. 1, 1999) <<http://www.gender.org/remember/people/brandon.html>>.

was a murder victim and those words were not in reference to any scheme of her murderers.²⁶⁴ Rather, they were directed at Brandon for having dared to live as a gender other than that assigned to him at birth.²⁶⁵ According to several accounts, though, Brandon was no perfect angel: he had been known to steal from friends.²⁶⁶ A corollary to this, which, sadly, must remain speculation, is whether she stole solely because her legal identity did not match her appearance. This is of course a problem for many transsexuals.²⁶⁷

Brandon was, by almost all accounts, killed primarily because he had, for lack of a better word, fooled the small Nebraska town where he lived. The murderers, even though none of them had been fooled into a physical relationship with Teena, in two separate incidents, decided that an appropriate penalty for such fraud would be humiliation and then death.²⁶⁸

b. By the Non-Straight World

*Nothing upsets the underpinnings of feminist fundamentalism more than the existence of transsexuals. A being with male chromosomes, a female appearance, a feminist consciousness, and a lesbian identity explodes all of their assumptions about the villainy of men. And someone with female chromosomes who lives as a man strikes at the heart of the notion that all women are sisters, potential feminists, natural allies against the aforementioned villainy.*²⁶⁹

That there is resistance to transgendered people in society as a whole is a given. However, that is not the extent of the resistance. An

Brandon was a female-bodied twenty-year-old who passed, to some extent, as a man, without hormonal or surgical intervention. Given the name "Teena Renae Brandon" at birth, Brandon used a number of different gender-neutral and masculine names. Upon first arriving in Richardson County, Tenna Ray Brandon said it would be easier to be called "Brandon". Although "Brandon Teena" has become codified as the name with which to refer to Brandon, there is little evidence for Brandon's own use of this name.

Id.

264. *See id.*

265. This is nothing new in murder cases where the victim is transgendered. The mother of a man who was accused of murdering three prostitutes, two of whom were transgendered, in Toronto in 1996 called the victims "garbage." *See* Michele Mandel, *God Heard Our Prayers Today*, TORONTO SUN, June 2, 1996, at 5.

266. *See* Burbach and Cordes, *supra* note 261, at 1A.

267. *See* LET ME DIE A WOMAN, *supra* note 214.

268. Brandon's brutal murder has already inspired numerous books and movies, both documentary and dramatic. *See* APHRODITE JONES, ALL SHE WANTED (1996); THE BRANDON TEENA STORY (Zeitgeist 1998); and BOYS DON'T CRY (Fox Searchlight 1999).

269. CALIFIA, *supra* note 82, at 91-92.

additional layer of resistance comes from within certain gay and lesbian circles.²⁷⁰ Some refuse to acknowledge the rights of the transgendered as being worthy of a fight,²⁷¹ while others profess support for transgender rights but are of a “separate but equal” mindset.²⁷² Ann Ogborn, a transgender activist who identifies as bisexual, goes even further, calling the attitude of some in the gay community towards transgendered people “genocidal.”²⁷³

In making a rather weak, and ultimately illogical, argument, Janice Raymond compares a hypothetical “white [person] trapped in a Black body” to the transsexual and says that “most Blacks recognize that it is their society, not their skin, that needs changing.”²⁷⁴ This suffers from a similar “either/or” false dichotomy as does the larger gender issue: it can’t be both? I point this out primarily because of her abject brush-off of the plight of intersexed people. She said, “It

270. Some gay conservatives have attempted to marginalize “transgender issues” as being nothing more than “the latest obsession of the politically correct crowd” and one of the “ancillary pet causes of the liberal reformers.” Dale Carpenter, *LGRL and the Coming Republican Majority in Austin*, OUTSMART, May 1998, at 21.

271. At least not worthy of a combined effort with gay rights. *See id.*

272. Lesbian singer Alix Dobkin said, “Every lesbian I know supports transsexuals’ rights to live their lives. But I support our right to define our own space.” CALIFIA, *supra* note 82, at 229.

273. *See* Steve Greenberg, *The Next Wave*, ADVOCATE, July 13, 1993, at 51, 52. Ogborn added, “We were at one time very much a part of the gay community. Then the radical feminists, the PC lesbians, and the assimilationist gay men threw us out of our own movement.” *Id.* at 52; *see also* Mubarak Dahir, *Whose Movement Is It?*, ADVOCATE, May 25, 1999, at 50, 54 (quoting Log Cabin Republicans executive director Rich Tafel as stating, “I’d say if a transgendered person doesn’t have a gay orientation, he or she is not part of the gay movement.”).

274. JANICE RAYMOND, *THE TRANSSEXUAL EMPIRE* xvi (1994). Raymond’s sentiment that transsexualism is nothing but a creation of the medical profession is actually one of the least offensive sentiments attributed to her. Of *EMPIRE*, transgender activist Candice Brown has observed, “[Raymond’s] quoting out of context a letter written by [Angela Keyes] Douglas was tantamount to intellectual dishonesty. The letter originally written as political satire of misplaced lesbian separatist hysteria over Sandy Stone’s employment at Olivia Records was misquoted” to imply that transsexual women hate non-transsexual women. Candice Brown, *Janice G. Raymond Ph.D.* (visited Nov. 22, 1999) <http://www.transhistory.org/TH_Janice_Raymond.html>. According to Brown, “[t]he book, while it did not create the transphobic attitude in the lesbian community, did tap into and ‘validated’, at least for the transphobes themselves, the discrimination they practiced.” *Id.* Additionally, Brown cites Raymond as being the primary author of a Reagan-era study which resulted in the elimination of federal and much state aid for indigent transsexuals as well as the following suit of private insurers in denying treatment for anything that might possibly be related to the transsexual health regimen, including treatment for breast cancer. *See id.*

Not just transsexuals inspire scorn from certain members of the lesbian separatist fringe. According to the aforementioned Douglas, lesbian leader Jean O’Leary “demanded that transvestites should be barred from all kinds of employment.” Angela K. Douglas, *Transsexuals, Transvestites ‘Getting it Together,’* ADVOCATE, Nov. 7, 1973, at 14.

must be noted that practically all of them are altered shortly after birth to become anatomically male or female and are reared in accordance with the societal gender identity and role that accompanies their bodies.”²⁷⁵

As a mere footnote, she criticizes the entire notion that there even is such a question as “when does life begin?” because it is “posed in men’s terms and on their turf, and is essentially unanswerable.”²⁷⁶

Yet, she does create an answer by declaring that it begins whenever socialization begins, and her entire theory rests on outside forces. In her view, we are what we are treated as.²⁷⁷ It begins with being treated by the delivering physician as whatever that physician thinks the child is based on the child’s genitals.²⁷⁸ This view, one which would force a non-intersexed XX-chromosomed woman to live as a man if her parents had declared her to be such at birth because they did not want a daughter, is ironic coming from someone who purports to be concerned about women having control over their own bodies.²⁷⁹

Applying Raymond’s societal model, an African-American baby raised from birth by a white couple in an all-white area should be considered to be white even if he subsequently begins interacting predominantly with African-Americans, irrespective of how those African-Americans may treat him. It would also necessitate the view that sexual orientation is based entirely on what society throws at a person during rearing, and that a person is inextricably bound to that societally-encouraged orientation. If you are raised to be heterosexual, then you cannot be lesbian – ever. I can only assume

275. RAYMOND, *supra* note 274, at 114-15. I can only assume that Raymond dismissed intersex issues for the same reason that Chief Justice Hardberger likely refused even to mention them: intersexuality blows holes in their respective gender theories, Raymond’s academically-refined man-hating (which I refuse to dignify by referring to it as feminism in any way shape or form) and Hardberger’s overly-heterosexist view of marriage.

Still, coming from Raymond it is truly bizarre considering the number of women who have been subjected, unknowingly, to clitorectomies to save their parents the embarrassment of having a female child with a clitoris large enough to be mistaken for a small penis. “All the things my body might have grown to do, all the possibilities, went down the hall with my amputated clitoris to the pathology department. The rest of me went to the recovery room—I’m still recovering.” Chase, *supra* note 125, at 197 (quoting Morgan Holmes, one of the intersexuals who responded to Chase’s Intersex Society of North America, a support network).

276. RAYMOND, *supra* note 274, at 114 fn. *.

277. *See id.*

278. *See id.*

279. *See id.*

that Raymond would find a way to craft an exception to that rule for herself.

Speaking to the Raymond-esque belief that transsexuals are not “real women,” transgender activist Riki Wilchins reminds all involved that there was a time in the not too distant past that lesbians were viewed as being not real women due to having either no interest or little interest in men.²⁸⁰

Everything is relative.

III. THE POLITICS OF TRANSSEXUALISM IN TEXAS: 1999

A. *She Is My Father*²⁸¹

Those four words, written by the daughter of a male-to-female transsexual, may rankle those who approve of Chief Justice Hardberger’s holding in *Littleton v. Prange*. Obviously, to them, either “she” or “father” is a mistake, or a flat-out lie designed, at best, to confuse and, at worst, to deceive.

But, those words were none of that.

They simply represented a daughter’s recognition of the reality that the person who fathered her had come to terms with a lifelong gender incongruence. If, as gender specialist Dr. Collier Cole has asserted, “transgenderism is a variation on the human condition,” then politics is a mutation of it, and the Texas version of that mutation attacked transsexuals in the summer of 1999.²⁸²

B. *We Are Hot Potatoes*

Perhaps if one is inclined to dig deep enough, some arguably political motive might be discovered underlying all court decisions. Rarely would politics directly render a court decision invalid. Perhaps the closest that this has come to occurring recently involved an Illinois lesbian couple’s attempt to adopt a child in which a judge,

280. See Andrea L.T. Peterson, *United We Stand, Divided We Fall: Riki Ann Wilchins’ Post-Identity Politics*, TEXAS TRIANGLE, Dec. 4, 1997, at 14.

281. Debbie McKellar Donaldson, *Dealing With Change—From the Daughter of a Transgender Father*, TEXAS ASS’N FOR TRANSSEXUAL SUPPORT NEWSLETTER (TATS, Houston, Tex.), Oct. 1997, at 2.

282. Cole, *supra* note 50, at B-6.

sua sponte, named the Family Research Council as a party to the case.²⁸³

The full opinion of the Illinois Appeals Court details the extent of the abuse of power by Judge Susan McDunn.²⁸⁴ Now, granted, I do not assert that the politics detailed below rise to the level of what occurred in Illinois and should operate, on their own, to invalidate the court's decision in *Littleton v. Prange*. However, a survey of the political landscape of Texas, as it related to transsexuals in the summer of 1999, is an important prelude to the San Antonio Court's decision. In light of the politics then afoot, Chief Justice Hardberger's statement that "transsexual" is "a term not often heard on the streets of Texas, nor its courtrooms"²⁸⁵ seems to be, at best, misleading.

Transgender politics began early in the year with two lobbying efforts at the Texas Legislature.²⁸⁶ In the spring, however, THE ADVOCATE featured a cover story on transgender issues.²⁸⁷ In conjunction with that issue, the magazine's website featured links to several transgender-related sites, including that of Texas transsexual attorney Phyllis Frye.²⁸⁸ Soon thereafter, Rick Scarborough, of Pearland Texas's First Baptist Church, ascertained that Frye was securing court ordered recognition of gender transition for transsexuals in Harris County district courts.²⁸⁹ The issue of gender-change court orders almost immediately hit the pages not only of Houston's free tabloid paper²⁹⁰ but also those of the *Texas Lawyer*.²⁹¹

Regarding the potential conflict between gender change court orders and the marriage licensure provisions of the Texas Family Code, Harris County Civil Administrative Judge Scott Brister stated

283. See *In re C.M.A.*, 715 N.E.2d 674, 678 (Ill. App. Ct. 1999) (stating, "It is undisputed from this record that no one opposed these adoptions, except the judge, who obviously had a predetermined bias against lesbians.").

284. See *id.*

285. *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999, pet. denied).

286. See Vanessa Edwards Foster, *Texas Lobby Event a Success!!!*, TEXAS ASS'N FOR TRANSEXUAL SUPPORT NEWSLETTER (TATS, Houston, Tex.), Feb. 1999, at 1; Vanessa Edwards Foster, *Equality Begins Away From Home—At the Capitol*, TEXAS ASSOCIATION FOR TRANSEXUAL SUPPORT NEWSLETTER (TATS, Houston, Tex.), April 1999, at 7.

287. See Dahir, *supra* note 273, at 50. The issue, whose cover featured gay male Greg Louganis and transsexual female Alexandra Billings, asked the question, "What is Transgender?"

288. Based on conversations I've had with Phyllis Frye.

289. See *id.*

290. See Fleck, *supra* note 255, at 1.

291. See Susan Borreson, *Transsexual Name Changes Cause Furor*, TEXAS LAWYER, June 21, 1999, at 1.

that fraud is the “main concern.”²⁹² The position not only of most of the Harris County civil judges but also of local Republican activist Dr. Steven Hotze was that “[i]f somebody has been using us to avoid the same-sex marriage ban, everybody’s upset about it. But it appears that’s not the case.”²⁹³ Of course, the disturbing part involves that last name mentioned. One reporter pondered why “the civil administrative judge of Harris County felt it necessary to meet with a political figure such as Hotze to discuss judicial operations.”²⁹⁴ And, yet, the meeting with Hotze was not unique. Several judges also “huddled” with “conservative political consultant” Allen Blakemore soon after Scarborough began making waves.²⁹⁵ Blakemore said, “The judges are kinda exercised about it. . . . [t]he judges look at Scarborough and think, ‘Does this mean he’s going to be drumming up campaign opposition for people?’”²⁹⁶

Perhaps a better question should be: Why were judges letting politics even appear to play *any* direct role whatsoever in the application of the law?

IV. CHRISTIE LEE LITTLETON AND HER WRONGFUL DEATH SUIT AGAINST DR. MARK PRANGE

A. *The Basic Facts*

Christie Lee Littleton married Jonathon Littleton in Kentucky in 1989. They lived together as a married couple until his death in 1996.²⁹⁷ Christie alleged that Jonathon’s death was the result of medical malpractice by Dr. Mark Prange and, based on her being Jonathon’s surviving spouse, filed suit under the Texas Wrongful Death and Survival Statute²⁹⁸ in Bexar County District Court.²⁹⁹ The

292. *Id.*

293. Fleck, *supra* note 255, at 2.

294. *Id.* No explanation was offered by Brister, but Fleck opined:

The answer may be that Hotze’s endorsement is considered crucial in contested primary races. In recent years incumbent judges who earned his wrath have been defeated by challengers backed by the westside allergist. In the current judicial atmosphere, having God on your side is nice, but having Hotze as your co-pilot when flying through political turbulence is better.

Id.

295. *Id.*

296. *Id.*

297. *See Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999, pet. denied).

298. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.004, 71.021 (West 1977).

299. *See Littleton*, 9 S.W.3d at 225.

district court never reached the merits of whether Dr. Prange committed medical malpractice.³⁰⁰

B. The Details

1. The Beginning of the Trouble

During a pretrial deposition, one of Dr. Prange's attorneys sensed something unusual about Christie³⁰¹ and asked her whether she had been born male.³⁰² She replied that she had been.³⁰³ Soon thereafter, Dr. Prange moved for summary judgment, alleging that Christie is a man and, therefore, could not be the surviving spouse of another man.³⁰⁴

2. Christie Lee Littleton's Life Prior to the Suit

Christie was born in San Antonio, Texas, in 1952.³⁰⁵ Her name at birth was Lee Cavazos, Jr.³⁰⁶ Due to her having been born with a penis, scrotum, and testicles, she was designated male and was raised to be male, though ultimately unsuccessfully.³⁰⁷ As she stated:

From a very early age, despite the fact that I had male sexual organs, I felt that I was female. By the time I was three to four years old, I had discovered that there was a great discrepancy between the physical genital anatomy that I was born with, and my sense of self identity as a female. My gender identity as a woman was established very early in life, and was

300. Neither I, nor any advocate of transgender rights of whom I am aware, has taken any position regarding the issue of whether Dr. Prange was, in fact, in any way at fault in the death of Jonathon Littleton.

301. See Mary Flood, *Court Is Asked to Develop a Gender Test*, WALL ST. J.-TEX. J., Sept. 15, 1999, available at 1999 WL-WSJ 24913819.

302. Q. Were you born a woman?

A. No, ma'am.

Q. Is that the surgery you were having in Kentucky when you met your husband?

A. No, ma'am.

Q. When did you have your surgery?

A. Ten years prior to my husband's meeting.

Brief of Appellant at Appendix, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (excerpt from deposition of Christie Lee Littleton).

303. See *id.*

304. See *Littleton*, 9 S.W.3d at 225.

305. See *id.* at 224.

306. See *id.*

307. A logical and usually-correct decision based solely upon this genital evidence, though, not always the right decision. See Phyllis Frye, *Freedom From the Scalpel*, TRANSGENDER TAPESTRY, Spring 1999, at 32-33.

certainly complete by the time I was five to six years old. In every sense of the word, I considered myself as being a female.³⁰⁸

In her late teens, she began searching for a physician who would perform sex reassignment surgery.³⁰⁹ Her name was legally changed to Christie Lee Cavazos in 1977.³¹⁰ In late 1979, and early 1980, she underwent a three-stage surgical procedure conducted by physicians with the gender treatment program at the University of Texas Health Science Center (UTHSC) in San Antonio.³¹¹ According to surgeon Dr. Donald Greer's and psychiatrist Dr. Paul Mohl's affidavits, the guidelines used by the UTHSC program to diagnose Christie as being a transsexual were those established by the Johns Hopkins gender program.³¹² According to Dr. Mohl:

It is my opinion based on a reasonable degree of medical probability that transsexuals such as Christie Lee Littleton are psychologically and psychiatrically female before the sex reassignment operation, and are certainly psychologically and psychiatrically female after the sex reassignment operation.

In my medical opinion, based on a reasonable degree of medical probability, if an individual has a female psychic gender and undergoes a sex reassignment operation that person would be considered female.³¹³

However, Dr. Prange asserted that none of the foregoing was of any legal consequence and, accordingly, Christie was still male. The trial court granted Prange's summary judgment motion and Littleton appealed.³¹⁴

C. *Ormrod's Monster*

In a rendition of caselaw addressing legal recognition of gender transition, Chief Justice Hardberger, writing for a 2-1 majority of the San Antonio Court of Appeals, cited six cases: four from the United

308. Brief for Appellant, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (affidavit of Christie Lee Littleton at 1).

309. See *Littleton*, 9 S.W.3d at 224.

310. No details appear regarding the specifics of this court action. Consequently, there is no indication as to whether it contained any gender transition language similar to the pre-operative petitions used by myself and Phyllis Frye.

311. See *Littleton*, 9 S.W.3d at 225.

312. See *id.* at 224.

313. Brief for Appellant, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (affidavit of Dr. Paul Mohl at 3).

314. See *Littleton*, 9 S.W.3d at 225.

States³¹⁵ and one each from England³¹⁶ and New Zealand.³¹⁷ He acknowledged that one of the anti-recognition American cases had since been overturned by statute.³¹⁸ However, despite transsexual marital rights indeed being not the most frequently-addressed issue in courts of law, the half-dozen cases are not the only ones to have ever addressed it either directly, in a marriage context or an applications for a marriage license, or indirectly, through some other form of petition for a change of legal status.³¹⁹ Hardberger began his discussion with *Corbett v. Corbett*, a 1970 British decision authored by Judge Roger Ormrod, cited as the first case to address the validity of a post-transition transsexual marriage.³²⁰ For all of the importance placed on it, though, Hardberger devoted but a few paragraphs to the rather lengthy opinion, a portent of things to come in his treatment of transsexualism in what was the creation of an anti-transsexual gender-recognition standard for Texas.³²¹

Of course, Hardberger did mention, as Ormrod designated them, the “four criteria for assessing the sexual condition of an individual[:]”³²²

- (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.³²³

However, Hardberger refused even to mention that some of the experts who had testified at the *Corbett* trial felt that a fifth factor also merited consideration: “Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc. which are thought to reflect the balance between the male and female sex hormones in the body).”³²⁴

315. See *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div. 1976); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987); *K. v. Health Div. of Human Resources*, 560 P.2d 1070 (Or. 1977).

316. See *Corbett v. Corbett*, 2 All E.R. 33 (P. 1970).

317. See Coombs, *supra* note 53, at 250 n.137 (1998) (discussing *M. v. M.* (S. Ct. of NZ May 30, 1991) (unreported)).

318. See *Littleton*, 9 S.W.3d at 229.

319. See, e.g., *Attorney-General v. Otahuhu Family Court*, [1995] 1 N.Z.L.R. 603 (H.C.).

320. See *Littleton*, 9 S.W.3d at 226.

321. See *id.* at 226-27.

322. *Corbett v. Corbett*, 2 All E.R. 33, 44 (P. 1970).

323. *Littleton*, 9 S.W.3d at 227 (citing *Corbett*, 2 All E.R. at 44) (illustrating that Ormrod, of course, and Hardberger view chromosomes as the most significant factor).

324. *Corbett*, 2 All E.R. at 44.

This is frustrating in light of the recent research, noted in Part II.A(2), which strongly suggests that hormones, at least at the embryo stage, may play more of a role than thought even by those experts who testified in *Corbett*.

Rather telling with respect to the *Littleton* court's inability, or unwillingness, to deal with intersex issues is the source of the information which was included in the majority opinion regarding individuals normally having twenty-three pairs of chromosomes.³²⁵ It came from a rather lengthy discussion of intersex issues and how such issues could factor in for April Ashley, the transsexual wife who was the victim of Arthur Corbett's annulment.³²⁶ As I discuss in Part VII.B, the absence of any discussion of intersex issues, in addition to being an abject insult to intersexed people, who will be as much at the mercy of *Littleton* as transsexuals, may well be the single biggest flaw in the court's determination that there was no issue of fact for the trial court to determine.

D. *How America Dealt with Corbett*

1. New York

Hardberger then noted New York's *Anonymous v. Anonymous*, which nullified a purported marriage involving a transsexual who had never undergone surgery.³²⁷ Quite rightly, that relationship was viewed as being "between persons of the same sex."³²⁸ However, no mention was made of another *Anonymous* New York trial court level decision which held that "[a] male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact" and allowed the birth certificate of a post-operative transsexual to be amended to reflect her gender transition.³²⁹ The court permitted an attachment denoting her new female name, but not to physically alter the certificate to change the gender.³³⁰ Although it predated *Corbett*, the following statement could have, in fact, should have been made in opposition to *Corbett*'s further application:

325. See *Littleton*, 9 S.W.3d at 227 (citing *Corbett*, 2 All E.R. at 44-48).

326. I will discuss Arthur and April as individuals, along with more of *Corbett* in Part IV.E(2).

327. See *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 501 (N.Y. Sup. Ct. 1971).

328. *Id.* at 500.

329. *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968).

330. See *id.*

It has further been stated that ‘male to female transsexuals are still chromosomally males while ostensibly females’. Nevertheless, should the question of a person’s identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.³³¹

This 1968 decision specifically disagreed with a 1966 decision, also not mentioned in *Littleton*, though it arguably would have supported Hardberger’s view, which had adopted the view of a medical panel that “the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud.”³³²

2. New Jersey

Hardberger examined the New Jersey Superior Court, Appellate Division’s decision in *M.T. v. J.T.*, laying out the facts and including two paragraphs from the decision, one of which was from the trial court opinion which was being appealed.³³³ While the following passage from the appellate court is significant, it does little to provide insight into the degree to which Judge Handler disagreed with the reasoning of *Corbett*:

If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person’s identification at least for purposes of marriage to the sex finally indicated.³³⁴

Noting the criticism of *Corbett* that was already evident at that time from commentators, Handler stated that:

331. *Id.* (adding “there is a serious question in the court’s mind whether the denial of the relief requested by the petitioner herein would not be a violation of his civil rights”).

332. *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966) (quoting the Committee on Public Health of the New York Academy of Medicine).

The Law Division of the American Medical Association responded to *Weiner* with strong criticism, stating that “the law cannot accept classifications of sex that are inconsistent with the practical considerations of everyday life.” Louis Swartz, *Updated Look at Legal Responses to Transsexualism: Especially Three Marriage Cases in U.K., U.S. and New Zealand*, INT’L J. OF TRANSGENDERISM, Vol. 1 No. 2, Dec. 1997, (visited May 19, 2000) <<http://www.symposium.com/ijt/jtc0201.htm>>.

333. See *Littleton v. Prange*, 9 S.W.3d 223, 227-28 (Tex. App. 1999, pet. denied) (citing *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).

334. *M.T.*, 355 A.2d at 210-11.

Against the backdrop of the evidence in the present record we must disagree with the conclusion reached in *Corbett* that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard.³³⁵

Handler emphasized that his “departure from the *Corbett* thesis is not a matter of semantics.”³³⁶ Rather, he stated:

It stems from a fundamentally different understanding of what is meant by “sex” for marital purposes. [Ormrod] apparently felt that sex and gender were disparate phenomena. In a given case there may, of course, be such a difference. A pre-operative transsexual is an example of that kind of disharmony, and most experts would be satisfied that the individual should be classified according to biological criteria. The evidence and authority which we have examined, however, show that a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character. Indeed, it has been observed that the “psychological sex of an individual,” while not serviceable for all purposes, is “practical, realistic and humane.”³³⁷

Significant in light of Hardberger’s refusal to accept the medical determination of Christie Lee Littleton as being female, Handler was willing to accept the view of the experts who were involved in *M.T.* He stated that “it is the sexual capacity of the individual which must be scrutinized” and that “in this frame of reference” that “requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.”³³⁸

Handler also specifically refused to follow the New York non-recognition authority of the *Anonymous* marriage decision, *Anonymous v. Weiner*³³⁹ and one other post-*Corbett* decision, *Hartin v. Director of the Bureau of Records* which had focused on “the body cells governing sexuality.”³⁴⁰ He felt this last reason to be “unsound and inadequate.”³⁴¹

335. *M.T.*, 355 A.2d at 209 (1976); cf. Note, *Transsexuals in Limbo*, 31 MD. L. REV. 236, 244 (1971).

336. *M.T.*, 355 A.2d at 209.

337. *Id.* (quoting Douglas K. Smith, *Transsexualism, Sex Reassignment Surgery, and The Law*, 56 CORNELL L. REV. 963, 969-970 (1971)).

338. *Id.*

339. 270 N.Y.S.2d 319, 321-22 (N.Y. Sup. Ct. 1966).

340. 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct. 1973) (relying on the medical panel’s position adhered to in *Anonymous v. Weiner* and having no inclination to challenge the assertion of the

3. Ohio

I quoted rather heavily from *M.T.* not only because it supports recognition of gender transition, but also because of the all-but-total disregard for it by *In re Ladrach*,³⁴² an Ohio trial level decision which Hardberger asserted was the last U.S. case to deal with gender transition recognition.³⁴³ In *Ladrach*, Judge Clunk quoted one paragraph from *M.T.*, which contained none of the details of the New Jersey court's disagreement with the *Corbett* analysis, and then concluded:

The New Jersey Court takes a very liberal posture and concludes that the plaintiff at the time of her marriage was a female and the defendant, a male, became her lawful husband, obligated to support her as his wife. There is no indication in the opinion as to whether the court would have ordered a marriage license to issue if the issue of transsexualism had been raised at the time of the marriage application.³⁴⁴

That last sentence is perhaps the most strained rationalization for holding against recognition of gender transition in the history of transgender jurisprudence.³⁴⁵ However, it is in step with the utter contempt which Clunk showed for Elaine Ladrach throughout his opinion.³⁴⁶ Ormrod's posture was similar in *Corbett*, stating that transsexuals "are said to be 'selective historians,' tending to stress events which fit in with their ideas and to suppress those which do not."³⁴⁷ This statement blissfully ignores the reality that, because of moral stigma and legal proscriptions, some, perhaps many, transsexuals are forced to strictly adhere to their assigned gender in order to survive long enough to transition.³⁴⁸ Failure on the part of Ormrod to understand why a male to female transsexual would want to forget about a hypermasculine phase, undertaken in a vain attempt to conform to the societal and legal expectations of members of the

New York City Board of Health's view that SRS is an "experimental form of psychotherapy" consisting of "mutilating surgery").

341. *M.T.*, 355 A.2d at 210 (citing Edward S. David, Note, *Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288 (1975)).

342. 513 N.E.2d 828 (Ohio Prob. Ct. 1987).

343. See *Littleton v. Prange*, 9 S.W.3d 223, 228 (Tex. App. 1999, pet. denied).

344. *Ladrach*, 513 N.E.2d at 832.

345. See *id.*

346. See *id.* at 829 (stating, "for purposes of clarity and notwithstanding the fact that the applicant contends to be a biological female, the court will refer to the applicant with masculine pronouns").

347. *Corbett v. Corbett*, 2 All E.R. 33, 42 (P. 1970).

348. See *Cooke*, *supra* note 137, at 15.

gender to which she was assigned at birth, shows either a complete failure to grasp the concept of transsexualism or an abject predisposition against it.³⁴⁹

Clunk's ultimate decision was similar to Hardberger's in *Littleton* insofar as holding that the Ohio birth certificate statute³⁵⁰ is a "correction type."³⁵¹ However, the general tenor of the language in the decision should cause it to be viewed as little more than the product of horrific preconceptions of transsexualism.³⁵² To Clunk's credit, though, he at least hinted that his decision, even under his unnecessarily-harsh "correction only" regime, might have been different if at least some evidence had been introduced that Ms. Ladrach had "other than male chromosomes."³⁵³ This is an issue which Hardberger refused even to ponder in an opinion that was predominantly advisory in nature.³⁵⁴

E. *The Weight of Authority; The Taint of the Authority*

1. The Courts

Hardberger put great stock in his conclusion that *M.T.* "is the only United States case to uphold the validity of a transsexual marriage"³⁵⁵ and that the most recent decision, Ohio's 1987 *In re Ladrach*, held to the contrary.³⁵⁶ *Ladrach*, as has just been noted, did so hold.³⁵⁷ However, the citation of *M.T.* in *Littleton*, although arguably correct, is misleading.³⁵⁸ The pro-recognition *M.T.* was decided by the Appellate Division of the New Jersey Superior Court,

349. April Ashley tried being a merchant seaman before beginning her transition. *See Corbett*, 2 All E.R. at 35.

350. *See* OHIO REV. CODE ANN. § 3705.15 (West 1998) (previously § 3705.20).

351. *Ladrach*, 513 N.E.2d at 831.

352. Clunk made the blanket statement, "There was no error in the designation of Edward Franklin Ladrach as a 'Boy' in the category of 'sex' on his birth certificate." *Id.* Yet, the only discussion of transsexuals' psychological sex came not from the limited quotation from *Corbett*, but from his citation from *M.T.*, a case which he refused to follow. *See id.* at 831-32. The only other mention of the psychological aspect of transsexualism came from a quotation from *Weiner*, which referred to transsexuals as "psychologically ill persons." *Id.* at 831 (quoting *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (N.Y. Sup. Ct. 1966)). Use of that particular quotation from that particular New York decision, without any of the pro-transsexual language which was contained in the New York cases that followed *Weiner*, is telling indeed.

353. *Id.* at 832.

354. *See infra* Part IV.H.

355. *Littleton v. Prange*, 9 S.W.3d 223, 227 (Tex. App. 1999, pet. denied).

356. *See id.* at 228-29.

357. *See id.*

358. *See id.* at 227.

not at the trial level.³⁵⁹ The anti-recognition *Ladrach*, on the other hand, was authored by a single trial court level probate judge, as was, for that matter, *Corbett*.³⁶⁰ Similarly, *Anonymous v. Anonymous* was a New York trial court opinion.³⁶¹ These same decisions, had they come from Texas state courts, all would have been unreported, and of no precedential value.³⁶² A much more valid statement by Hardberger would have been one to the effect that the only state appellate court in the United States ever to address a marriage involving a post-transition, post-operative transsexual upheld it.³⁶³

Moreover, and quite disturbing in view of the 1999 political climate in Texas regarding transgender rights noted in Part III, Hardberger chose not to cite the passage from *Ladrach* in which Judge Clunk openly derided the New Jersey court for taking “a very liberal posture” in *M.T.*³⁶⁴ I realize that mere usage of the word “liberal” in *Ladrach* does not automatically mean that the decision was based on politics more so than on law. However, it is not a word whose usage should be ignored. Likewise, the possibility that politics, and politics of a variety much more ingrained than the American varieties of *Democrat v. Republican* or *liberal v. conservative*, was a prime motivating factor in the outcome of *Corbett*, should not be ignored either.

359. See *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. App. Div. 1976).

360. See *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987); *Corbett v. Corbett*, 2 All E.R. 33 (P. 1970) (originating in the Probate, Divorce and Admiralty division of the British trial courts, the decision was not appealed).

361. 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). To note the obvious, there are many New York opinions involving transsexuals that have ‘Anonymous’ in the case name.

362. See TEX. R. APP. PROC. 47.7 and 77.3 (referring specifically to unpublished decisions of Texas appellate courts); *Walker v. Packer*, 827 S.W.2d 833, 848 (Tex. 1992) (Doggett, J., dissenting) (reemphasizing that unpublished decisions in general are regarded as having no precedential value in Texas courts). Yet, Hardberger *did* acknowledge the unreported New Zealand decision, *M. v. M.*, though basically disregarding the question raised by it: whether the prospect of seemingly legal same-sex marriages that would be allowed by permitting post-transition male-to-female transsexuals, still classified legally as males, to marry females would indeed be too “disturbing” for an anti-same-sex marriage regime. *Littleton*, 9 S.W.3d at 229.

363. One federal appellate decision, *Von Hoffburg v. Alexander*, also not noted in *Littleton*, weighed in on the issue but did so with painfully little analysis of transsexual marriages or of transsexualism in general. 615 F.2d 633, 635 (5th Cir. 1980). The decision, however, is extremely significant, but in another context. See *infra*, Part V(C).

364. *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987).

2. The People

The names of the *Corbett* parties, Arthur Corbett and April Ashley, are generally known and discussed along with the case's holding.³⁶⁵ What is less frequently mentioned, though, is that Arthur was the offspring of British aristocracy and that April was a Liverpudlian of the same general commoner background from which the Beatles came.³⁶⁶ Had her marriage to Arthur been upheld, though, April Ashley would have been the daughter-in-law of Lord Rowallan.³⁶⁷

Ashley and her counsel initially believed that the selection of Roger Ormrod to hear the case would benefit her position, which was replete with detailed medical arguments, as he had once been a physician.³⁶⁸ A few days into the presentation of the case, though, it seemed as though he had already made his decision, openly pondering whether it was necessary to continue to spend tax money to hear the case and “grumpily” agreeing to go on only because both sides wanted the evidence to be heard in full.³⁶⁹ April Ashley's account goes on to say:

Professor Mills [an endocrinology expert involved in the case] said, “There is a great deal of snobbery in this case, April.” By this I assumed he meant not only the obvious prejudices against transsexuals and the usual gestures of male chauvinism but also a more subtle association between Arthur, Arthur's counsel and the bench, the subconscious intransigence and *hauteur* of educated gentlemen who had no intention of being made to revise, or even examine, their notions of what a man, a woman, a marriage might be, especially not at the behest of a parvenue such as myself who, having been born into a Liverpool slum, not only refused to stay there but had the damn nerve to change her sex into the bargain, and not only that,

365. See *Corbett v. Corbett*, 2 All E.R. 33, 34 (P. 1970).

366. See generally DUNCAN FALLOWELL & APRIL ASHLEY, *APRIL ASHLEY'S ODYSSEY* (1982) (documenting the tale).

367. See *id.*

368. See *id.* at 210.

369. See *id.* at 215-16 (“In the face of his alarming lack of interest in the debate, my counsel began to look very worried indeed.”).

In Ormrod's words, from *Corbett*:

My only regret is that it did not prove possible to save a great deal of [the experts'] time by exchanging reports and making available to all of them all the known facts about [Ashley's] physical condition both before and after the operation, including facilities for a joint medical examination, before the hearing began. Had such steps been taken a great deal of time and expense might have been saved.

Corbett, 2 All E.R. at 35.

but more, much more, cheek of all cheek, had the impertinence to marry into the peerage as well! . . . One thing you have to admire about these castes—they sure know how to protect themselves, from without and from within.³⁷⁰

Also absent from *Littleton* was any discussion of the non-chromosomal specifics of the Ashley-Corbett relationship which may have influenced Ormrod's decision. Described by Ormrod as "an unusually good witness" in discussing such, Arthur was a bisexual transvestite who, by the time he met April in 1960, had become "more and more involved in the society of sexual deviants, and interested in sexual deviation of all kinds."³⁷¹ And, at that time, April was working at a club called the Carousel, described by Arthur as "the Mecca of every female impersonator in the world."³⁷²

Of Arthur's sex life and his presentation of it to the court, Ashley noted in her biography:

When questioned he was very frank about his personal life. In this he had been cleverly advised. He explained that he had had sexual relations with many woman before, during and after his marriage to Eleanor. He also described his deviations, the male brothels, what happened there, his need to dress as a woman, which he did about four or five times a year. About being so dressed he remarked, "I didn't like what I saw. You want the fantasy to appear right. It utterly failed to appear right in my eyes." From the first meeting he said he had been mesmerised by me. "This was so much more than I could ever hope to be. The reality was far greater than any fantasy." And later: "It far outstripped any fantasy for myself. I could never have contemplated it for myself."

Suddenly I realised what he was doing. So did my medical and legal advisers. Arthur was emphatically presenting himself as a deviate, in vivid detail, some of which was new even to me. For example, I had not realised the extent of his homosexual experiences. By adopting this confessional approach, by posing as the pervert since struck by contrition, by casting a pall of sulphurous depravity and transgression over our entire relationship, he was able to convey the impression that our marriage was no more than a squalid prank, some deliberate mockery of moral society perpetrated by a couple of queers for their own twisted amusement. By implication, I too was a deviate, and no more than a deviate.³⁷³

370. FALLOWELL & ASHLEY, *supra* note 366, at 216.

371. *Corbett*, 2 All E.R. at 37.

372. *Id.*

373. FALLOWELL & ASHLEY, *supra* note 366, at 215.

This contention of Ashley's seems to have some validity simply from a read of *Corbett*. Ormrod observed that April's and Arthur's relationship was "affectionate, yet quite passionless" which was "not at all the sort of relationship which one would expect to satisfy a man of such extensive and varied sexual experience as [Arthur] claims to be."³⁷⁴

F. *Much More to the Legal Picture Than Meets the Eye*

Despite Hardberger's claim regarding *Ladrach*, actually, the most recent case in the United States to result in a specific ruling on the validity of a transsexual marriage came from an Orange County, California trial court in 1997, and it did uphold the marriage.³⁷⁵ Of course, California trial courts happen not to publish their decisions.

374. *Corbett*, 2 All E.R. at 38. Ormrod also stated that he accepted Arthur's account of his sex life "from a qualitative point of view" but was "sceptical about the quantity of it." *Id.*

During the preparation of this article, I included in one of my weekly *Texas Triangle* columns a discussion of the important early Swiss gender transition decisions. See *infra* Part IV.H(1)(a)(i). The article included a mention of my analysis of the possible pro-aristocracy slant of *Corbett*. See Katrina C. Rose, *Desperately Seeking Arlette (And the Precedent That She Set)*, TEXAS TRIANGLE, Feb. 18, 2000 (on file with author), available online at <<http://www.txtriangle.com/819/vpkatrose.htm>>. A reader's criticism of my view of *Corbett* included information on two transsexuals, both female-to-male, who were themselves members of the aristocracy. See e-mail from Peter Flagg Maxon to Katrina Rose, Author (Feb. 22, 2000) (on file with author). Though I disagree with Maxon's contention that their existence in the aristocracy negates my theory of *Corbett* (specifically, to me it seems almost self-evident that aristocrats tolerating one of their own as being transsexual would be one thing but allowing a transsexual to marry into their circle would be quite another, much like the toleration of "open secret" homosexuality in certain rich conservative circles in America but vilification of it by those same rich conservatives when the homosexuality is truly open and among non-rich, non-conservatives), one of the two men, Sir Ewan Forbes, is significant because, almost twenty years prior to *Corbett*, he apparently was allowed to change his birth certificate and not only enter into a valid marriage with a woman but also succeeded to the title of Lord Sempill. Forbes died in 1991 and the records surrounding the gender transition and the title succession are unusually unavailable. As Zoe J. Playdon said, "It is as if the case had been deliberately removed from the public domain." Zoe J. Playdon, *The Case of Ewan Forbes* (visited Feb. 23, 2000) <<http://www.pfc.org.uk/legal/forbes.htm>>; BURKE'S PEERAGE & BARONETAGE 1082 (Charles Mosley ed., 106th ed. 1999).

375. See *Vecchione v. Vecchione*, Civ. No. 96D003769 (Cal. App. Dep't Super. Ct. 1997), available in L.A. DAILY J., Nov. 26, 1997, at 1. Essentially, this is the result forecast over a decade ago. See Catherine Kunkel Wilson, *Transsexual Marriages: Are They Valid Under California Law?*, 16 SW. U. L. REV. 505, 531 (1986).

Though not a reported decision, the case was of some note at the time. Moreover, the *Littleton* court was aware of at least one law review article mentioning this decision. Justice Angelini's concurrence mentions Professor Greenberg's *Intersexuality* article, but, strangely, Chief Justice Hardberger's lead opinion makes no mention of it or the decisions detailed in it which speak favorably to legal recognition of transsexuals' post-transition gender. See *Littleton v. Prange*, 9 S.W.3d 223, 232 (Tex. App. 1999, pet. denied) (Angelini, J., concurring).

Beyond that, though, if state trial court rulings, such as the anti-recognition New York and Ohio decisions cited, are to be given equal standing with appellate decisions when evaluating their persuasiveness, then the court should have made some effort to ascertain the number of rulings from Texas trial courts regarding changes of gender designation as well as marriages involving transsexuals.³⁷⁶ Following the summer 1999 controversy in Harris County, a good place to start, at least for court recognition of gender transition, would have been the Harris County district courts.³⁷⁷ However, I am not suggesting stopping with Texas courts.

Although Chief Justice Hardberger did mention New Zealand's *M. v. M.*, an unreported decision which was favorable to transsexuals, absent from his discussion were several other Pacific cases which addressed the issue of recognition of transsexuals' post-transition gender.³⁷⁸ Some favored transition recognition. Others did not. The distinction between the conflicting groups of cases seems to have

376. Harberger dismissed out of hand another Bexar County district court order, from a different court than that in which *Littleton v. Prange* originated, to amend Christie's birth certificate to reflect the female gender. See *Littleton*, 9 S.W.3d at 231. His decision leaves the validity of that amended birth certificate in limbo, and unnecessarily so. That proceeding and the amended birth certificate, for the reasons I note in part IV.G, should be regarded as being potentially dispositive of the summary judgment in the wrongful death action, though simply because they happened when they happened—not because of any legal infirmity in the proceeding.

377. This is not to imply that Harris and the other large counties in Texas were the only ones in which judges granted name and gender change orders. It is, however, where Texas's two openly transgendered attorneys, myself and Phyllis Frye, practiced primarily. For one specific account of a rural gender change, see Phyllis Frye, *In Bubbaville With Dignity*, 1 S. TEX. CIV. LIB. J. 17 (1997).

378. And the court was at least aware of another apparent pro-recognition New Zealand decision, *Attorney-General v. Otahuhu Family Court*, [1995] 1 N.Z.L.R. 603 (H.C.), as it was mentioned in Louis Swartz's article, which was included as part of Littleton's brief to the Court of Appeals. See Brief for Appellant, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

This was an application for a declaration of rights regarding the ability of someone who has undergone sex reassignment by "surgery or hormone administration or both or by any other medical means" to marry a member of that sex. *Otahuhu*, 1 N.Z.L.R. at 604. The court held that there was "no lawful impediment." *Id.* at 608. Swartz questioned the weight of the decision, feeling as though it was unclear whether it specifically addressed transsexualism. See Swartz, *supra* note 332, at 9. Though the decision speaks several times of transsexuals, Swartz argues that "the test laid down in the Court's Declaration does not do this. It speaks solely in terms of drastic body modification." *Id.* The author further argues that when reassignment is separated from a sound medical rationale, which legitimates and requires such drastic somatic changes, self-injury and mutilation result. See *id.*

It is unclear why the Court of Appeals refused to mention *Otahuhu* even perhaps to seize upon this possible flaw.

been a willingness by the pro-recognition panels to look at not only the medical evidence but also the sheer reality of transsexualism with a substantially less-jaundiced eye than did Ormrod in *Corbett*.³⁷⁹

1. Australia

In 1993, the Federal Court of Australia denied a female old-age pension to a *pre-operative* transsexual but made the following observation regarding those who have had surgery:

Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and the external genitalia of which, as a result of irreversible surgery, they no longer have. Where through medical intervention a person born with the external genital features of a male has lost those features and has assumed, speaking generally, the external genital features of a woman and has the psychological sex of a woman, so that the genital features and the psychological sex are in harmony, that person may be said, according to ordinary English usage today, to have undergone a sex change. The operation that brought about the change in external genital features would be referred to as a sex change operation.³⁸⁰

This was not a marriage decision. However, while the court explicitly disapproved of an administrative tribunal's use of psychological factors to the exclusion of all else in ruling for the pre-operative transsexual, it also stated that Australian jurisprudence after *Corbett* provided "convincing reasons for rejecting the concept that when the law speaks of male or female persons it necessarily speaks on the footing that sex is unchangeable."³⁸¹ The court emphatically stated: "Sex is *not* merely a matter of chromosomes, although chromosomes are a very relevant consideration. Sex is also partly a psychological question (a question of self perception) and partly a social question (how society perceives the individual)."³⁸²

379. See *Corbett*, 2 All E.R. at 34-51.

380. Secretary, Dept. of Social Security v. S.R.A. (1993) 118 A.L.R. 467, 472 (Fed. Ct. Gen. Div. Austl.).

381. *Id.* The court also "consider[ed] that whilst a pre-operative male-to-female transsexual cannot come within the category of eligibility for a wife's pension under the [Social Security] Act, the respondent in this case would have come within that category had she successfully undergone the surgery that has been recommended for her." *Id.* at 473.

382. *Id.* at 493 (emphasis added).

The court also made several further statements, well-supported by a far more extensive examination of the history of court decisions throughout the world than that listed in *Littleton*:³⁸³

After surgery, a male-to-female transsexual is no longer a functional male. Indeed, her psychological sex accords with her new anatomical sex. Her male biological sex characteristics can be discerned usually only by medical examination.

....

Post-operative transsexuals should not be denied by society the inner peace of life which is their right.

....

Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society. . . . But where the psychological sex and the anatomical sex of a person do not conform to each other it seems to me that the sex of a person must be determined by the anatomical sex.³⁸⁴

The last sentence was specifically directed at the pre-operative respondent in that litigation. Significantly, in light of the punt to the legislature by Chief Justice Hardberger, the Australian court stated that it felt that the *only* step so monumental that it would have to be taken by a legislature would be gender transition recognition for *pre-operative* transsexuals.³⁸⁵

The administrative tribunal being appealed from had taken a step beyond one of its own previous decisions in which it refused to follow Ormrod's *Corbett* strictures and held in favor of a post-operative transsexual—again, for a female old-age pension.³⁸⁶ The panel in that previous decision stated clearly that it had no intention of abandoning the principle that there are two sexes, but it was equally uncomfortable with the tests from other decisions which were used to determine how a post-operative transsexual should be classified.³⁸⁷

383. See *id.* at 485-93 (including the extremely significant, though all-but-forgotten, *In re Leber.*) See *infra*, Part IV.H(1)(a)(i).

384. Secretary, Dept. of Social Security v. S.R.A. (1993) 118 A.L.R. 467, 493-94 (Fed. Ct. Gen. Div. Austl.).

385. See *id.* at 494. Even this possibility was not completely foreclosed, as the court refrained from passing judgment on “the case where a person may achieve the anatomy of the other sex through chemical treatment if that ever becomes possible.” *Id.*; see also Frye, *Freedom From the Scalpel*, *supra* note 307, at 33 (arguing that this is, in effect, the case for long-term hormonally-altered transsexuals who have not yet had genital surgery).

386. See *In re* Secretary, Dept. of Social Security and H.H., No. Q90/118 (1991) 23 A.L.D. 58 (Admin. App. Trib., Gen. Admin. Div.).

387. See *id.* at para. 13.

Based on evidence presented by Professor A.W. Steinbeck, an endocrinologist, and Professor W.A.W. Walters, a reproductive medicine specialist, the panel viewed eight factors as being of significance in sex determination:

- (a) sex chromosome constitution;
- (b) gonadal sex;
- (c) sex hormone pattern;
- (d) internal sex organs (uterus, sperm ducts);
- (e) genitalia;
- (f) secondary sex characteristics (facial hair, body shape);
- (g) sex of rearing; and
- (h) psychological sex.³⁸⁸

The panel's analysis based on these categories, while not perfect, exhibited far more insight than did the *Littleton* court into the ramifications of any precedent that might be set by a judicial ruling on a person's gender.

Chromosomes were not viewed as being the decisive factor because, although there are varying chromosome patterns, "conventional analysis does not reveal where a genetic problem may lie."³⁸⁹ The gonadal standard was deemed inadequate because of the potential to leave a true hermaphrodite in the position of being viewed legally as neither sex.³⁹⁰ Far from being theoretical, a decision holding just that had been handed down by an Australian court in *Marriage of C and D (falsely called C)*, which left the physically intersexed unable to marry anyone of any gender.³⁹¹

In fact, the administrative panel viewed "chromosome constitution and psychological sex" as being the only two of significance for a post-operative transsexual.³⁹² However, it placed greater weight on the psychological factor:

The law is concerned with people's relations with other people and with society as a whole. Because society considers them crucial, factors other than a person's psychological sex cannot be ignored. In fact, they must be held to be controlling if overwhelmingly contrary to the assumed sex role. . . . The psychological test is appealing because it is at once practical, realistic, and humane. . . . For post-operative transsexuals a psychological

388. *Id.*

389. *Id.* at para. 15.

390. *See id.* at para. 16.

391. (1979) 28 A.L.R. 524, 528 (Fam. Ct. Austl.).

392. *H.H.*, 23 A.L.D. at 58, para. 21.

test recognises what the individual has thought themselves to be all along, a conception to which the person's anatomy now conforms.³⁹³

Australian society had allowed sex reassignment surgery to occur. The law, in turn, in the panel's view, "must acknowledge this fact and accept the medical decisions which have been made."³⁹⁴ Apparently, no American jurisdiction now prohibits sex reassignment surgery. Moreover, some states actually play a role in the procedure itself, as did Texas in *Christie Lee Littleton's*.³⁹⁵

In fairness to Hardberger, not all recent decisions outside the U.S. have been favorable to transsexuals. British courts still officially refuse to back down from *Corbett*, although the recent exception made for Joella Holliday seems to indicate that the true meaning of *Corbett* is no longer "chromosomes = sex," but rather "transsexuals = bad," and European Union courts have yet to go against them.³⁹⁶ The Australian decisions were based on a re-examination of Ormrod's medico-legal conclusions, but made with the aid of more medical evidence.³⁹⁷ A decision from Singapore followed the *Corbett* rule but magnified why any decision based on a classification such as sex from a jurisdiction which is not bound by written constitutional principles of equal protection should not be viewed as authoritative in America.³⁹⁸

2. Singapore

The High Court of Singapore, in *Lim Ying v. Hiok Ming Eric* nullified the marriage of a female-to-male transsexual.³⁹⁹ The *Lim Ying* court relied only on the facts of the case and a recitation of much of the decisional law on transsexual marriages up to that time. However, "[n]o medical evidence was adduced."⁴⁰⁰ Still, it highlights the problem of using the one man—one woman marriage standard as a faith-based bedrock. The court, in addition to the analysis of

393. *Id.* at para. 20.

394. *Id.* at para. 23.

395. Littleton's surgery was performed under the auspices of a program at the University of Texas Health Science Center. See Brief for Appellant at Appendix, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (affidavits of Donald Greer and Paul Mohl).

396. See *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622, 627-30 (1991).

397. See *H.H.*, 23 A.L.D. at 58.

398. See *Lim Ying V. Hiok Ming Eric* [1992] 1 S.L.R. 184, 187-88 (H.C. Sing.).

399. See *id.* at 196.

400. *Id.* at 187.

transsexual law, also addressed Singapore marriage law in general.⁴⁰¹ Prior to a 1951 statute mandating monogamous marriage, Singapore had recognized many forms of marriage—all catering to the niceties of various faiths.⁴⁰² Not all were monogamous, though all, at least all that were known to have ever come before a court, were heterosexual.⁴⁰³ Following a 1961 statute, monogamous heterosexual marriage was the official norm, yet there was an exception for Muslims.⁴⁰⁴

Now, had Hardberger accepted as guidance the great weight not only of statutory law from other states, but also decisional law, both reported and unreported, Christie Lee Littleton should have prevailed on her summary judgment motion, right?

Wrong.

G. *My Criticism of the Littleton Litigation*

*Appellant has presented conclusive summary judgment evidence that she was a woman at the time her marriage took place. In her Affidavit, she establishes that she has no male sexual organs; that she has functional sexual organs; and that she was legally married in Kentucky, to Jonathon Mark Littleton after her sex reassignment surgery.*⁴⁰⁵

Not so fast.

As has been noted, Lee Cavazos, Jr.'s name was legally changed to Christie Cavazos in 1977.⁴⁰⁶ She underwent genital surgery procedures in 1979-1980 and went through a marriage ceremony with Jonathon Littleton in 1989.⁴⁰⁷ He died in 1996.⁴⁰⁸ However, along that road, she never changed the gender designation on her birth certificate from male to female, nor did she seek any other specific court recognition of her gender reassignment.⁴⁰⁹ By virtue of her surgery she was unquestionably *eligible* for such recognition under

401. *See id.* at 194.

402. *See id.*

403. *See id.*

404. *See id.*

405. Brief for Appellant at 10, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

406. *See Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999, pet. denied).

407. *See id.* at 224-25.

408. *See id.* at 225.

409. A birth certificate is not required to get a marriage license, only “some certificate, license, or document issued by this state or another state, the United States, or a foreign government.” TEX. FAM. CODE ANN. § 2.005(b) (West 1969).

any legal framework designed to recognize gender transition.⁴¹⁰ And, ultimately, she petitioned for and received such recognition from a Texas court, though not until after the issue of her gender reassignment arose in a deposition in her wrongful death action.⁴¹¹ The recognition came in a *separate* Bexar County District Court proceeding in which she petitioned for an amendment of her birth certificate, to change the gender designation on it from male to female.⁴¹² The order was signed on August 7, 1998,⁴¹³ over two years *after* the death of Jonathon Littleton.⁴¹⁴

Chief Justice Hardberger dismissed her 1998 birth certificate amendment as inconsequential, stating “the words contained in the amended certificate are not binding on this court.”⁴¹⁵ Dr. Prange’s brief on appeal contained the following statement: “The correctness of the trial court’s order directing the amendment of the birth certificate is irrelevant *to this appeal*. Appellee has no standing in this case to challenge the propriety of either the request for the amendment or the lower court’s order amending the record.”⁴¹⁶

I fully agree with that specific contention of Dr. Prange, but not for the overall reason behind his appeal.

Ms. Littleton could have made the issue of the gender listed on her birth certificate relevant by properly amending her birth certificate prior to Mr. Littleton’s death and engaging in a ceremonial marriage as a person whose birth certificate read “female.” She never did this.⁴¹⁷

410. At least any such framework applicable to someone born in Texas.

411. See *In re Littleton*, No. 98CI-11602 (Tex. Dist. Ct. Bexar County 37th Dist, Aug. 7, 1998).

412. See *id.*

413. See *id.*

414. Jonathon Littleton died on July 29, 1996. See Brief for Appellant at 6, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

415. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999, pet. denied).

416. Brief for Appellee at 14, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (emphasis added). Indeed, at the trial court, Dr. Prange’s counsel seemed to be willing to accept, and perhaps even were making, the argument that I make in this article, namely that all would have been okay had Ms. Littleton changed her birth certificate prior to her marriage. The following verbiage appeared following a paragraph addressing the invalidity of same-sex marriages: “Further, Plaintiff Christie Lee Littleton took no legal steps to have her Birth Certificate changed, to request any Court order for such a change, or to have any Court determine or declare that she is legally a female.” Defendant, Dr. Mark A. Prange, Partial Motion for Summary Judgment at 3, *Littleton v. Bexar County Hosp. Dist.* (Texas Dist. Ct. Dec. 22, 1998) (No. 97-CI-15491).

417. And it is unclear whether the transsexual spouse in *M.T.* did so. According to Judge Handler, after her surgery, M.T., though living in New Jersey but born in New York, “applied to

I assert that, because of the timing of her birth certificate amendment, Christie Lee Littleton deserved to lose her wrongful death action. Chief Justice Hardberger's opinion that all marriages between post-transition male-to-female transsexuals and males are invalid same-sex marriages was wrong. However, his holding that the marriage between Christie Lee and Jonathon Littleton was a same-sex marriage was correct. She simply waited too long to make her relationship with Jonathon Littleton an opposite-gendered marriage in the eyes of what transsexuals have long asserted to be Texas law.⁴¹⁸ This could easily have been done during Jonathon Littleton's lifetime with a ceremonial marriage after the same type of birth certificate amendment that she petitioned for, and was granted, *after* his death.

This would not have validated the portion of their marriage that occurred until then, from the time of the Kentucky ceremony, but it would have made the case for the marriage being valid at the time of Jonathon Littleton's death. However, the argument on appeal was based almost entirely on her *being* a transsexual female and that fact's effect on the summary judgment proof standards. Nothing, except the 1998 birth certificate amendment, was done to address the likelihood that any court in any state, much less an officially homophobic state such as Texas, would require some sort of state sanction to avoid classifying the Littleton's relationship as same-sex.

On appeal, Littleton's attorneys stated that "for Appellee to prevail on summary judgment, he must establish beyond cavil that she was a man at the time of her marriage."⁴¹⁹ Justice Lopez's dissent contended that, procedurally, the amended birth certificate should take the place of the original for evidentiary purposes.⁴²⁰ However, the mere fact that an amendment was petitioned for after the litigation was underway all but concedes that, irrespective of what gender

the State of New York to have her birth certificate changed." *M.T. v. J.T.*, 355 A.2d 204, 205 (N.J. Super. Ct. App. Div. 1976). Nothing was noted regarding whether the application was for a change of name only or also for a recognition of her gender transition. Additionally, the opinion does not note whether the application was approved.

418. In my last case in a Texas court prior to moving to Minnesota, a judge all but took it for granted that a *post*-operative gender change was permissible under Texas law. His opposition was to granting a *pre*-operative gender transition recognition order.

419. Brief for Appellant at 11, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

420. See *Littleton*, 9 S.W.3d at 232-34 (Tex. App. 1999, pet. denied) (Lopez, J., dissenting). This evidentiary issue is the whole of Lopez's dissent. It properly addresses that bare procedural point but misses the broader issues of transsexualism and same-sex marriage which the majority was far more interested in addressing at length.

Christie Lee Littleton is *now*, it is doubtful that she was legally female at the time of her marriage to Jonathon Littleton.

My position, though harsh, actually is not at odds with the belief of the typical transsexual that, in reality, she has always been her post-transition gender. As a legal professional, however, I realize, as do most transsexuals who have any knowledge whatsoever of the legal requirements of gender transition, that record-keeping and documentation are legitimate interests of the state. Forcing a person, despite mountains of medical evidence to the contrary, to live the entirety of her natural life saddled with the ironclad gender declaration of the obstetrician that happened to deliver her is neither rational nor legitimate.⁴²¹

Again, I acknowledge that my position is harsh. However, it is only harsh with respect to one particular person, not an entire class of people. I provide the following example to illustrate why this position is legitimate. I am a male-to-female transsexual. I was designated male at birth by virtue of my having a penis and testicles, *not* as the result of an examination of my chromosomes. I have never had a chromosome test. I contend, and it is my brain that makes such contentions rather than my genitalia, that I was female from day one because of my brain.⁴²² However, the Texas Department of Public Safety (DPS) was under no *obligation* to issue a driver's license to me with an "F" in place of the "M" until I presented them with *something* directing them to alter that "M" to an "F."⁴²³ In my case, it was an order from a Texas District Court.

421. Moreover, such a regime operates to encourage male-to-female transsexuals as well as certain intersexed females to marry females, defeating the stated objective of the state in banning same-sex marriages. See Greenberg, *supra* note 20, at 268-69. As Greenberg notes, there are numerous reported instances of male-to-female transsexuals marrying females in such jurisdictions as Ohio and England, specifically because of the refusal to recognize gender transition. See *id.* "Despite the laws in these jurisdictions that prohibit same-sex marriages, these marriages are considered legal. . . ." *Id.* at 268.

422. In this sense, Jan Morris's words, "I was three or perhaps four years old when I realized that I had been born into the wrong body, and should really be a girl," apply to me as well. JAN MORRIS, CONUNDRUM 15 (1974).

423. The DPS has a policy of issuing driver's licenses with transsexuals' new gender information. When I represented transsexuals in court, I relied on a letter from a DPS attorney stating:

The Department's Drivers License Service Manual addresses the issue of handling a change of gender request. The Department requires a licensee to submit court records or an amended birth certificate, which specifically grant the change of gender. Upon receipt of this documentation, the Department will change the gender marker on the driver license or identification card.

Yes, I would contend that I had a female gender identity with or without a court order. Moreover, I contend that medical science backs me on this. However, I could not have walked up to a driver's license office the day *before* my court order was signed, said, "My name is really Katrina Rose and I'm really female," and legitimately have expected the Department of Public Safety to change my driver's license's name and gender information based solely on that statement.

Yet, this is the equivalent of what Ms. Littleton did when she got married in Kentucky in 1989 without court recognition of her post-transition gender. This is harsh with respect to Ms. Littleton's wrongful death cause of action, but the court should simply view it no differently than it would view her had she let the statute of limitations run.

H. More Criticism for the Court

*[A]t the time of the "marriage" between Christie Lee Littleton and Jonathon Mark Littleton, Christie Lee Littleton was a male as reflected by the birth certificate issued by the State of Texas in 1952. No amended birth certificate had issued at the time of the purported marriage.*⁴²⁴

Though this passage from Dr. Prange's brief was likely not aiming for such a ruling, the court could have, and should have, taken it as a cue to refrain from addressing the issue of what gender Ms. Littleton *is*, in turn throwing the gender status of all transsexuals and intersexed people in Texas into doubt. The court should consider more carefully the following lines from Chief Justice Hardberger's opinion:

In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals.

....

We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature.⁴²⁵

Letter from Rebecca Blewett, Driver License Division Attorney with DPS, to Katrina Rose, Author (March 11, 1999) (on file with author).

424. Brief for Appellee at 7, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

425. *Littleton*, 9 S.W.3d at 230.

1. What Hardberger Did Versus What He Claims to Have Done

The stark reality of *Littleton v. Prange* is that Chief Justice Hardberger *did* make law where none existed. In essence, he made one of the flawed contentions of Lon Mabon's "Family Act," a proposed citizen initiative which has never received enough support even to make it onto the ballot in Oregon, the law of Texas.⁴²⁶ The Family Act sought, as part of a broad prohibition of same-sex marriage, to declare that "gender is determined at the moment of conception."⁴²⁷ It is the essence of a Tennessee statute which specifically forbids the amendment of birth certificates to reflect gender reassignment.⁴²⁸ The Texas Legislature could have passed such legislation any time after transsexualism became known outside of European sexology circles, but it has never done so.

In fact, the Texas Legislature has known since at least as early as 1995 that transsexuals have been getting gender documentation changes pursuant to Texas statutes that do not explicitly prohibit such changes. It was during that 1995 session that transsexuals began actively lobbying for statutory clarification to prevent an unjust decision as occurred in *Littleton v. Prange*.⁴²⁹ The bill proposed the creation of Section 45.105 in the Texas Family Code, whose provisions would have included:

- (a) A court shall order a change of name for a petitioner under this subchapter if the petition is accompanied by a sworn affidavit of a licensed physician that the petitioner is a gender other than the gender indicated on his or her driver's license, birth certificate, or other official documents.
- (b) A court that orders a change of name for a petitioner under this section shall simultaneously order:

426. See *Text of 1998 OCA Anti-Family Act* (visited Nov. 30, 1999) <<http://www.aclu-or.org/~aclu/fam-act.html>>.

427. *Id.* Further evidence that non-recognition of gender nonduality is an infliction of a religious view comes from the intended placement of the Family Act in the Oregon Constitution. It would have amended Article 1, Section 3, Freedom of Religious Opinion. See *id.* The proposal, primarily aimed at same-sex marriage, also contained the statement: "These concepts are consistent and compatible with natural law, millennia of moral teaching, self-evident truth, conscience and Almighty God." *Id.* Of course, they are not consistent with the scientific reality of chromosomal, gonadal and hormonal abnormalities which force humans to make decisions as to which gender, in fact, was created at conception.

428. See TENN. CODE ANN. § 68-3-203(d) (1977) ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.").

429. See Tex. H.B. 358, 74th Leg., R.S. (1995).

1. that the Department of Public Safety, as soon as practicable, change the petitioner's gender on the petitioner's driver's license and other identification documents under the department's control; and

2. that the Texas Department of Health, on receipt of a physician's sworn affidavit that the petitioner is in fact a person of a different gender than the gender indicated on the petitioner's birth certificate, amend the petitioner's birth certificate as provided by Section 192.011, Health and Safety Code, to reflect the petitioner's true gender.⁴³⁰

After positive and neutral, but no negative, testimony, during which it was made clear that such changes were taking place though simply at the mercy of judges who may or may not be willing to accept the transsexuals' interpretation of existing law, the proposal received approval from the Juvenile Justice and Family Issues Committee. But it was never considered by the full House.⁴³¹

A similar bill also failed in the 1999 session.⁴³² More importantly, though, the legislature again did not see fit to pass any legislation to *stop* the documentation changes that were already taking place. Legislative inaction regarding repeal of laws—for example, laws criminalizing certain consensual sexual behavior, is accepted as constituting “majority sentiments about the morality” of such activity.⁴³³ In 1973, the legislature specifically amended the marriage license statutory framework to state that “[a] license may not be issued for the marriage of persons of the same sex.”⁴³⁴ Gender transition recognition, sought and received in courts throughout Texas, should be regarded as legitimate, in light of the legislature's implicit knowledge that transsexuals had long been getting such gender documentation via well-researched petitions and well-presented arguments, to ensure legitimate equitable interpretation of Texas law. There has, in fact, been an “underlying study and analysis,” albeit one of omission.⁴³⁵ And while the legislature did not feel that positive law was necessary, it also did not feel compelled to enact a statutory prohibition.

430. *Id.*

431. *See id.* (providing the bill history and analysis of the bill).

432. *See* TEX. H.B. 1579, 76th Leg., R.S. (1999).

433. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

434. TEX. FAM. CODE ANN. § 2.001 (West 1996); *see also* JOHN J. SAMPSON & HARRY L. TINDALL, TEXAS FAMILY CODE ANNOTATED at 7 (8th ed. 1998) (commenting on § 2.001).

435. Pesquera, *supra* note 136, at 1A (quoting Prange attorney George Brin as arguing that such was needed before recognition of transsexual marital rights).

Despite the manner in which the question of Ms. Littleton's gender status was presented to the court, the only issue which *needed* to be addressed to dispose of her claim against Dr. Prange was her legal gender at the time of her marriage to Jonathon Littleton. Unquestionably, that was "male." Any declaration of her current gender status such as the blunt "Christie Littleton is a male"⁴³⁶ as well as any holding affecting the legal rights as related to gender status of any or all transsexuals and intersexed people under Texas law were not real cases or controversies for the court to address. The portion of the court's opinion purporting to decide the broad question of all transsexuals' rights was far beyond dicta. It was an unconstitutional advisory opinion.⁴³⁷

a. More on Birth Certificates

Perhaps the greatest flaw in the entire discussion, not simply in *Littleton* but in general, of transsexuals' post-transition gender recognition, is the use of April Ashley as, for lack of a better term, patient zero, because her legal gender was allegedly decided in the context of a challenge to the validity of a marriage. *Corbett*, however, did not declare that April Ashley was male for all purposes, a point which, if the *Littleton* majority had not had a general anti-transsexual policy motive in mind, either Chief Justice Hardberger or Justice Angelini would have mentioned.⁴³⁸ It is a point which will undoubtedly be overlooked when *Littleton* is cited against transsexuals' legal rights in the future.⁴³⁹

436. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999, pet. denied).

437. See *Patterson v. Planned Parenthood of Houston and Southeast Texas, Inc.*, 971 S.W.2d 439, 442-43 (Tex. 1998); *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 628 (Tex. 1987) (regarding the prohibition on advisory opinions as infringements on the separation of powers).

438. See Mary Beth Walz, *Transsexuals and the Law*, 5 J. CONTEMP. L. 181, 200 (1979). "The question then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large." *Corbett v. Corbett* 2 All E.R. 33, 48 (P. 1970) (emphasis added).

439. And, according to transgender activists in Kentucky, *Littleton* already is being used as the prime weapon to repeal recently-enacted local legislation prohibiting employment discrimination against transsexuals. See Dawn Wilson, *A Call to Arms: TRANSGENDERED Lobbying Effort in KY Feb 2-3*, GAIN NEWS EMAIL (visited Feb. 4, 2000), <<http://www.gender.org/gain/g99/g122299.htm#8>> (specifically noting the efforts of Dr. Frank Simon, Rev. Jerry Stephenson and Kentucky State Representative Tom Kerr). I have also found one trial court decision in Minnesota which has used *Littleton v. Prange* as a justification for denying a claim by a transsexual under that state's Human Rights Act. See *Goins v. West Group*, No. 98-18222 (Minn. Dist. Ct., Hennepin Co., Jan. 14, 2000).

An assumption that *Corbett* did completely declare Ashley to be male, in addition to being inaccurate, puts the starting point at neither end of the recognition spectrum. In *Littleton*, Chief Justice Hardberger, perhaps prompted by the manner in which the issue was presented by Littleton's attorneys, seemingly wanted to focus only on the decisions which specifically recognized transsexuals' right to marry.⁴⁴⁰ Yet, in an apparent attempt to bolster his decision to throw the issue of transsexual marriage to the legislature, he included the Oregon Supreme Court's decision in *K. v. Health Div. of Human Resources*,⁴⁴¹ cited by Prange, which, according to Hardberger, held that "alter[ing the] birth certificate to change the designated gender" must be authorized by the legislature.⁴⁴² Likewise, he noted the statute subsequently enacted effectively overturning *K.*⁴⁴³

By itself, this tends to erode his contention that only one state has ever recognized a transsexual marriage.⁴⁴⁴ After all, in the states that have such statutes,⁴⁴⁵ could a challenge such as that in *Littleton* have any real chance of succeeding?⁴⁴⁶ Consequently, decisions explicitly recognizing transsexual marital rights are unlikely in such jurisdictions, and a more accurate starting point would be law which itself specifically and fully recognizes gender transition, either via birth certificate amendment or some other means. Any following analysis would need to overcome the logical and legal precedents therein. I can only assume that Littleton's attorneys did not want to emphasize this theory because their client had not amended her birth certificate prior to her marriage. I can only assume that Chief Justice Hardberger did not want to examine this because it would have forced him to look at something other than *Corbett* and its progeny.

440. See Brief for Appellant at 11, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

441. 560 P.2d 1070, 1072 (Or. 1977) (in banc).

442. *Littleton v. Prange*, 9 S.W.3d 223, 229 (Tex. App. 1999, pet. denied).

443. See *id.*; Or. Rev. Stat. § 432.235(4) (1997).

444. And, as I noted earlier, the language of the New Jersey *M.T.* opinion does not fully detail whether that transsexual managed to get her birth certificate amended to reflect her post-transition gender, or simply her name change (or neither).

445. According to one list, 21 states, the District of Columbia and the territory of Guam have such specific statutes. See Stephanie Belser, *Don't Make a Federal Case of It: Gender Outlaws and Employment Discrimination*, 2 S. TEX. CIV. LIB. J. 17, 33 (1998).

446. The only publicized challenge in California, a state which specifically authorizes such birth certificate changes, has been the 1997 *Vecchione* trial court decision. See *Vecchione v. Vecchione*, Civ. No. 96D003769 (Cal. App. Dep't Super. Ct. 1997), available in L.A. DAILY J., Nov. 26, 1997, at 1.

i. Switzerland

Though *Corbett* was predated by a case which Judge Ormrod strained to distinguish, no case which could be regarded as on point and controlling with regard to the situation presented by the marriage of April Ashley and Arthur Corbett existed in British law in 1970.⁴⁴⁷ However, two cases were decided in Switzerland several decades prior to *Corbett*. Both cases, one from 1931 and another from 1945, are mentioned in a 1958 book by Eugene de Savitsch.⁴⁴⁸ Douglas K. Smith's 1971 law review article⁴⁴⁹ and the Australian *S.R.A.* decision⁴⁵⁰ both mention the 1945 case, *In re Leber*,⁴⁵¹ but de Savitsch's book seems to be the only reference to the 1931 case.⁴⁵²

Both Swiss cases were petitions for a "change of civic status" from male to female.⁴⁵³ The Cantonal Court in *Leber* and Hardberger in *Littleton* framed the issue in similar ways: "The fate of Leber's petition depends on whether or not the alleged discrepancy really

447. See *S. v. S. Otherwise W.* (No. 2), 3 All E.R. 55, 57 (C.A. 1962) (holding that a woman who had been born with a malformed vagina, necessitating surgery to allow her to engage in intercourse, was not legally incapable of consummation).

448. See EUGENE DE SAVITSCH, *HOMOSEXUALITY, TRANSVESTISM AND CHANGE OF SEX* 96, 101-02 (1958).

449. See Smith, *supra* note 67, at 971-72.

450. See *Secretary, Dept. of Social Security v. S.R.A.* (1993) 118 A.L.R. 467, 485 (Fed. Ct. Gen. Div. Austl.).

451. See *In re Leber*, (SWISS CANTONAL CT. 1945), available in DE SAVITSCH, *supra* note 448, at 96-107.

452. See DE SAVITSCH, *supra* note 448, at 101-02. *Leber* references this decision, apparently the earliest such in Western law, as does de Savitsch elsewhere in his book, though each without the formality of a case citation. That petitioner's name was Margrith (nee Niklaus) Businger and the petition was granted by the Council of State of the Canton of Nidwald on October 19, 1931. See *id.* The *Leber* court noted that Businger

suffered from a feminine psyche, which influenced his entire behaviour. He had a predilection for female activities and, obeying irresistible impulses, dressed himself as a woman whenever possible: he was ill at ease in masculine garments and considered the obligation to wear them both disagreeable and coercive. From the physical point of view there was nothing feminine about Businger. He had normal masculine genital organs, but he held them in such abhorrence that he attempted self-mutilation. It was to prevent this that the surgeon deemed it necessary to castrate him. Here we are dealing with a human being who, while possessing male genitalia, had in his psychological constitution cells which functioned in two ways, some in a masculine way and others in a feminine. Psychically he was more woman than man, but physically he was a combination of man and woman. His desire to change his civic status and name was so strong that he threatened to commit suicide unless his wish was granted.

Id. at 101 (summarizing the facts of the Businger case).

453. See *id.* at 96, 101.

exists and whether Leber is really a woman entered in the register as a man. In other words, is the petitioner a man or a woman?”⁴⁵⁴

Of course, the two courts came to markedly different conclusions.

According to the *Leber* court, Swiss law at that time allowed for consideration of a petition for a “rectification of civic status” in any of three instances “where an entry made in the Register of Births is at variance with reality[.]”⁴⁵⁵ As the court stated: “In the case in question, the petitioner maintains that there is a discrepancy between the entry and the facts inasmuch as the entry describes him as a man, whereas in fact he is a woman.”⁴⁵⁶

The court felt that Leber’s petition qualified for consideration under the law. However, it did not specifically state under which of the three categories listed Leber’s petition was considered:

- (a) When the official in charge has committed an error or been led into error when examining the relevant documents.
- (b) When these documents, correct in form, were factually inexact, and
- (c) When, since the entry was made, a modification has been introduced in the provisions of the law in question. . . .⁴⁵⁷

Provisions (a) and (b) seem to be in line with the provisions of the Texas Health and Safety Code, at issue in Christie Lee Littleton’s 1998 court order, which post-transition transsexuals in Texas have long used to amend their birth certificates.⁴⁵⁸ Provision (c) seems to exist in anticipation of some future legislation, which could include laws specifically aimed at gender transition. However, the Cantonal Court’s analysis appears to be a hybrid focusing only on one key issue: namely, is Leber male or female? “[I]s it a question of rectifying an error made at the moment of registration of his birth, or of adapting a correct original entry to a change of status? The question comes back to that of deciding whether an individual can change sex.”⁴⁵⁹

Though it answered this question in the affirmative, the *Leber* court had a peculiar view in this regard: a transsexual could change

454. *Id.* at 102-03.

455. *Id.* at 102.

456. *Id.*

457. *Id.* (citations omitted).

458. *See infra* Part IV.H(1)(a)(iii).

459. *Id.* at 105-06.

sex in law, though not in fact.⁴⁶⁰ Though possibly viewable as bigoted, it is the attitude that many transsexuals face in certain situations. Realistically, not everyone will, in their own minds, approve of a transsexual's change of gender status irrespective of any legislative action. In no way did either *Brown v. Board of Education*⁴⁶¹ or the Civil Rights Act of 1964⁴⁶² convince embittered racists that African-Americans and other non-whites were, *in fact*, equal to whites and, in turn, deserving of treatment equal to whites. Yet *Brown* and the Civil Rights Act are both the law and operate against certain traditional notions that whites are inherently superior.

Even though there was no actual or purported marriage at issue in *Leber*, the ability of a transsexual to marry as a member of her post-transition gender was a live issue, having been put before the court by one of the experts who testified on Ms. Leber's behalf. The expert, though in favor of the change of civic status, felt that Ms. Leber was too unstable otherwise to marry.⁴⁶³ The court, in noting that it was without jurisdiction to consider the issue as part of an application for a change of civic status, specifically refused even to ponder the issue in dicta.⁴⁶⁴

I cannot emphasize enough that I do not endorse all aspects of either the *Leber* court's view of transsexualism or, despite owing a debt of gratitude to him for his inclusion of the *Leber* decision in his book, de Savitsch's view. While uncharacteristically civilized for their time insofar as recognizing the reality of transsexualism and the approach that the law should take, they were plagued with an undertone that considered transsexualism to be a sickness. Specifically, they viewed transsexualism as an extreme form of sexual inversion, the phraseology for homosexuality which was still in favor

460. And, most importantly if *Leber* is ever applied to Christie Lee Littleton's relationship with Jonathon Littleton, the Cantonal Court stated that "the present decision *does not have retroactive effect* and that in Law Leber is a woman only from today." *Id.* at 106 (emphasis added).

461. 347 U.S. 483 (1954).

462. 42 U.S.C. § 2000e, *et seq.* (1964).

463. I cannot assert that no transsexual is, or has ever been, truly mentally unstable. However, although the history of Ms. Leber noted in de Savitsch's book seems to indicate that she may not have been the perfect candidate for gender reassignment surgery, much of the scorn directed at her mental character seems to be based on her not being "modest" about her body and her willingness to show it.

464. See *In re Leber* (Swiss Cantonal Ct. 1945), available in DE SAVITCH, *supra* note 448, at 106.

with some professionals at the time. Still, de Savitsch was quite modern in his assertions:

In genuine homosexuality the physical acts are the outcome of an inherent condition, a condition which, it cannot be too strongly stressed, is unalterable. Those who are so ready to censure homosexuals for their behaviour should realise, too, that while they may be able to control their urge to a certain extent, it can no more be permanently repressed than can the normal sexual impulse.

In other words, the true homosexual or “invert” (who should not be confused with the “pervert”) can in no way be held responsible for his condition, and the acts by which his sexual impulse finds expression are no more and no less immoral—depending on the point of view—than are those which take place between man and woman.⁴⁶⁵

Though I frown on the use of “normal” in this context⁴⁶⁶ as well as the designation of the transsexual as a constitutional “invert,”⁴⁶⁷ de Savitsch’s book as a whole and the two Swiss cases that it mentions show clearly that the first approach to transsexualism taken by modern western law was, in stark contrast to the unreasonably harsh edict of *Corbett*, one of accommodation of reality, of recognition of gender transition.

ii. Oregon

Of course, *Leber* was not discussed in *Littleton*, which brings the discussion of birth certificates back to the Oregon decision cited by Hardberger. An analysis more detailed than the single paragraph contained in *Littleton* shows that any reliance on *K* to support the outcome in *Littleton* is in error. The statutes which the Oregon Supreme Court were interpreting in *K* were far more constraining than the Texas Health & Safety Code provisions governing birth certificates. According to Justice Tongue, three statutes were pertinent. I include them here to the extent that Tongue felt it necessary to include them in *K* to show that a comparison between the Oregon statutory framework, as it existed in 1977, and that which

465. DE SAVITCH, *supra* note 448, at 16.

466. *See id.* Which, of course, would necessitate homosexuality being deemed abnormal irrespective of any legal stigma.

467. *Id.* Although de Savitsch’s explanation of this phrase could be the origin of the characterization of transsexualism as being ‘a woman trapped in a man’s body,’ the uncomfortableness with the entire issue seems evident when de Savitsch refers to a constitutional invert as “a sort of congenital monstrosity having the nervous system of a female in the body of a male.” *Id.* at 73.

exists in Texas, is not of the apples-to-apples variety. Then-existing Oregon Statute Section 33.430 provided:

- (1) In the case of a change, by court order, of the name of the parents of any minor child, if the child's birth certificate is on file in this state, the State Registrar of Vital Statistics, upon receipt of a certified copy of the court order changing the name, together with the information required to locate the original birth certificate of the child, shall prepare a new birth certificate for the child in the new name of his parents. The name of the parents as so changed shall be set forth in the new certificate, in place of their original name.
- (2) The evidence upon which the new certificate was made, and the original certificate, shall be sealed and filed by the State Registrar of Vital Statistics, and may be opened only upon demand of the person whose name was changed, if of legal age, or by an order of a court of competent jurisdiction.⁴⁶⁸

Section 432.415 provided:

- (1) Upon receipt of the adoption report, the State Registrar shall, if the original birth certificate is of record in his office, prepare and file a supplementary certificate in accord with the adoption report in the new name of the adopted person without reference therein to such adoption or to the names of such person's natural parents, and with reference therein to the adoptive parents as the parents of such person.
- (2) If the original birth certificate is of record with any local registrar, the State Registrar shall procure the same and shall prepare and file such supplementary certificate.
- (3) If no certificate of the birth of such person is of record with the State Registrar or any local registrar, the State Registrar may nevertheless prepare and file such supplementary certificate.
- (4) The State Registrar shall then inclose the original birth certificate and the adoption report in a sealed envelope and file the same in his office.
- (5) Upon receipt of a certified copy of a court order of annulment of adoption, the State Registrar shall restore the original certificate of birth to its original place in the files.⁴⁶⁹

And, Section 432.425 provided:

- (1) In case of the marriage of the parents of any child after the birth of the child, the State Registrar, upon receipt of a certified copy of the marriage certificate of the parents, together with a statement of the husband

468. *K. v. Health Div. of Human Res.*, 560 P.2d 1070, 1071 n.2 (Or. 1977) (quoting OR. REV. STAT. § 33.430 (amended by 1983 c. 369 § 7)).

469. *Id.* at 1071 n.3 (quoting OR. REV. STAT. § 432.415 (amended by 1997 c. 783 § 38)).

acknowledging paternity, shall prepare a new certificate of birth in the new name of the child.

(2) The evidence upon which the new certificate was made, and the original certificate, shall be sealed and filed and may be opened only upon order of a court of competent jurisdiction.⁴⁷⁰

With these guidelines to work with, Tongue held that the “intent of the legislature of Oregon [was] that a ‘birth certificate’ is an historical record of the facts as they existed at the time of birth, *subject to the specific exceptions* provided by statute.”⁴⁷¹ Perhaps more significantly, though, he seemed to view an amended birth certificate as being different from a “new” one.

Apparently, the court was not passing judgment as to whether an altered original could issue for a transsexual: “No issue has been raised in this case whether a birth certificate may be “altered” or “corrected” by interlineation under the circumstances of this case, as distinguished from the issuance of a “new” birth certificate.”⁴⁷²

Transsexuals typically prefer that the post-transition birth certificate have no reference to the pre-transition gender. Of course, something is better than nothing.

iii. Texas

Now, compare the 1977 Oregon statutes to the specific wording of the pertinent present-day Texas statutes. Texas Health & Safety Code Section 192.011, titled “Amending Birth Certificate” provides:

(a) This section applies to an amending birth certificate that is filed under Section 191.028 and that completes or corrects information relating to the person’s *sex*, color, or race.

(b) On the request of the person or the person’s legal representative, the state registrar, local registrar, or other person who issues birth certificates shall issue a birth certificate that incorporates the completed or corrected information instead of issuing a copy of the original or supplementary certificate with an amending certificate attached.

(c) The department shall prescribe the form for certificates issued under this section.⁴⁷³

The referenced Section 191.028, entitled “Amendment of Certificate,” provides:

470. *Id.* at 1071 n.4 (quoting OR. REV. STAT. § 432.425 (repealed 1983)).

471. *Id.* at 1072 (emphasis added).

472. *Id.* at 1072 n.6.

473. TEX. HEALTH & SAFETY CODE ANN. § 192.011 (West 1992) (emphasis added).

- (a) A record of a birth, death, or fetal death accepted by a local registrar for registration may not be changed except as provided by Subsection (b).
- (b) An amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence *to be* inaccurate. The amendment must be in a form prescribed by the department. The amendment shall be attached to and become a part of the legal record of the birth, death, or fetal death if the amendment is accepted for filing, except as provided by Section 192.011(b).⁴⁷⁴

The Texas Legislature could have, but did not, use the words “to have been” in place of the italicized words “to be” in Section 191.028(b). And, in general, there was no specific limitation as to the operation of these two Texas statutes and any benefit to transsexuals until Chief Justice Hardberger created one in his *Littleton* opinion.

Hardberger chose to decide, and he decided incorrectly. He did not interpret. He altered.

b. Back to Marriages (But Still Not Forgetting Birth Certificates)

Hardberger accurately noted that in Kentucky “[m]arriage is prohibited and void . . . [b]etween members of the same sex.”⁴⁷⁵ However, he failed to note that Kentucky has the precise type of statute which he apparently felt that Texas needed for him to be able to acknowledge Christie Lee Littleton’s gender transition:

Upon receipt of a sworn statement by a licensed physician indicating that the gender of an individual born in the Commonwealth has been changed by surgical procedure and a certified copy of an order of a court of competent jurisdiction changing that individual’s name, the certificate of birth of the individual shall be amended as prescribed by regulation to reflect the change.⁴⁷⁶

Obviously, though, this specific language would not have benefited Ms. Littleton because she was born in Texas.

So, Hardberger need not have mentioned it then, right?

Wrong—at least it should have been included in an advisory opinion such as *Littleton*.

Even if she had been born in Kentucky rather than Texas and had taken advantage of the Kentucky birth certificate statute, all other things being equal in Christie Lee Littleton’s life, Dr. Prange’s

474. TEX. HEALTH & SAFETY CODE ANN. § 192.028 (West 1992) (emphasis added).

475. KY. REV. STAT. ANN. § 402.020(1)(d) (1998).

476. KY. REV. STAT. ANN. § 213.121(5) (1990).

attorneys still would have begun to suspect that she is transsexual and the challenge to the validity of her marriage would likely still have been made. All other things being equal, Chief Justice Harderger's analysis of Texas law and transgender marriage jurisprudence would likely have been the same.

What, then, does *Littleton* do to the marriage of an opposite-sex couple, one spouse of which is transsexual, whose gender has been legally recognized in a state which specifically authorizes such recognition, *when that couple is in Texas*? If such a couple is still a same-sex couple in Texas, keep in mind the following hypothetical that was posed by Sondrea Joy King in a 1996 article suggesting how Texas might address the validity of Hawaii same-sex marriages which were then thought to be looming on the horizon:

[S]uppose two Texas men travel to Hawaii and marry pursuant to the laws of that state. They return to Texas to live, and one dies intestate after six months. The decedent's "spouse" sues to inherit under Texas laws of descent and distribution. To determine whether the survivor will inherit, the court must first resolve whether the couple was validly married. If they were not married, the laws of descent and distribution dictate the decedent's next of kin inherit and the survivor take nothing. If, however, a valid marriage is recognized, the same-sex spouse will inherit all or a portion of the decedent's real and personal property, just as any other surviving spouse. Thus, it is critical for the survivor to demonstrate that he is a surviving spouse.⁴⁷⁷

Obviously, Christie Lee Littleton discovered just how critical this is, though in the context of a wrongful death suit.⁴⁷⁸ King theorized that, in a Texas suit to recognize a valid same-sex marriage from another state, the following conflict of laws factors from the Restatement (Second) would be determinative:

the relevant policies of Texas, the forum state;
the relevant policies of the state in which the same-sex couple validly married and the relevant interests of that state in determining whether the marriage is recognized in Texas;

477. Sondrea Joy King, *Y'all Can't Do That Here: Will Texas Recognize Same-Sex Marriages Validly Contracted in Other States?*, 2 TEX. WESLEYAN L. REV. 515, 530 (1996) (footnotes omitted, though King did refer to TEX. PROB. CODE ANN. § 38(b)(2) (West 1980) in her discussion of intestacy).

478. A reference was, however, made to Jonathon Littleton's estate. The parties stipulated that "[t]here is no administration pending on the estate of Jonathon Mark Littleton and that none is necessary; that Jonathon Mark Littleton died intestate." *Littleton v. Bexar County Hosp. Dist.*, No. 98-CI-15220 (Bexar Co. Dist. Ct. Dec. 22, 1998), *aff'd sub nom*, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (modified partial summary judgment and order).

protection of justified expectations;
the basic policies relevant to marriage; and
the certainty, predictability, and uniformity of the outcome.⁴⁷⁹

Although the Restatement was not adopted by the Supreme Court in a marriage case, King noted that two Court of Appeals decisions did apply them to marriages.⁴⁸⁰

In analyzing how such a “significant relationship” analysis would operate on a Hawaii same-sex marriage, King stated:

[I]t is likely that at the time of the marriage, Hawaii is the state with the most significant relationship. In this case, the local law of Hawaii should determine the validity of the marriage. Since the marriage is in accord with Hawaii law, it will be upheld. However, after the couple moves to Texas, Hawaii’s interest in the couple’s marriage presumably lessens. Consequently, at the time of the suit, arguably Texas has the most significant relationship. In this case, the local law of Texas will determine the validity of the marriage. Depending on whether Texas law prohibits same-sex unions, the marriage may be declared invalid.⁴⁸¹

The last sentence is problematic for a critical statement by Chief Justice Hardberger. “Texas,” according to him, “does not permit marriages between persons of the same sex.”⁴⁸² If, by that, he means that Texas does not permit licenses to be issued to same-sex couples for the performance of ceremonial marriages, then Hardberger is accurate. However, if he means that the plain language of Texas statutory law does not permit recognition of same-sex marriages that are validly contracted elsewhere, then he is absolutely wrong. If the absence of a specific statutory enactment is to be used against certain

479. See King, *supra* note 477, at 531-32 (interpreting the Texas Supreme Court’s adoption of portions of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984)).

480. See *Seth v. Seth*, 694 S.W.2d 459, 463 (Tex. Ct. App. 1985) (denying claim of a woman, the purported second wife of a Moslem man, that the man’s Islamic divorce of his ‘first’ wife, which consisted solely of repeating a short phrase three times, was valid). In King’s view, though, the pitting of each factor individually against, and subsequently concluding that none of the other factors outweighs consideration of, the interests of the policies of the forum state was an improper application of the factors as they are meant to be applied in a balancing test, rather than individually comparing one factor against another. See King, *supra* note 477, at 534 (quoting *Seth*, 694 S.W.2d at 463).

A few months after *Seth*, the San Antonio Court of Appeals held that Texas interests were not at issue in a dispute over whether a deceased husband had made a valid gift to his spouse of a sum of money on deposit in a Laredo bank and yielded to Mexican law. See *Ossorio v. Leon*, 705 S.W.2d 219, 223 (Tex. App. 1985, no writ).

481. King, *supra* note 477, at 537 (emphasis omitted).

482. *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999, pet. denied).

couples to declare them to be same-sex in law, despite the reality of gender transition, then a similar absence should work to the benefit of such couples where applicable.⁴⁸³ The State of Texas did not have at any pertinent time with respect to the Littleton's marriage, and still does not have, a state version of the federal Defense of Marriage Act. One was introduced in the 1999 session of the Legislature, by Rep. Warren Chisum, which would have added a Section 1.109, entitled "Recognition of Same-Sex Marriage" to the Texas Family Code:

The state may not give effect to a:

1. public act, record, or judicial proceeding that recognizes or validates a marriage between persons of the same sex; or
2. right or claim asserted as a result of the purported marriage.⁴⁸⁴

However, it never emerged from the State Affairs Committee.⁴⁸⁵ Moreover, neither the plain text of the bill nor the bill's analysis evidenced any express desire to include post-transition transsexuals or intersexed people within the ambit of its proposed same-sex marriage ban.⁴⁸⁶ Neither, for that matter, did the federal DOMA, a law which Hardberger did see fit to reference in *Littleton*.

In so, doing, he may have opened the PanDOMA's Box that remained closed after the demise of Hawaii's same-sex marriage litigation and might still not be opened by Vermont depending on post-*Baker v. Vermont* legislative action.

483. In fact, *all* same-sex couples.

484. TEX. H.B. 383, 76th Leg., R.S. (1999).

485. *See id.* (noting bill history).

486. The bill's stated purpose consisted of but a single paragraph:

Current Texas law prohibits issuing a marriage license for persons of the same sex, but Texas may in the future be asked to recognize a same-sex marriage that was performed in another state because the Full Faith and Credit Clause of the United States Constitution requires states to recognize the public acts, records, and judicial proceedings of other states. However, constitutional law dictates that one state may refuse to recognize legal contracts executed in another state if the contract is repugnant to the public policy of the forum state. H.B. 383 prohibits the recognition of same-sex marriages.

Id. (bill analysis). The analysis also was devoid of references to transsexuals, stating simply that the bill, if enacted, would prohibit

the state from giving effect to a public act, record, or judicial proceeding that recognizes or validates a marriage between persons of the same sex, or to a right or claim asserted as a result of the purported marriage.

Id.

V. WHAT WAS IN CHIEF JUSTICE HARBERGER'S OPINION BUT SHOULD NOT HAVE BEEN, WHERE IT CAME FROM, AND WHERE IT MIGHT GO FROM *LITTLETON*

A. *DOMA*

On the road to needlessly reaching, and wrongly answering, the question of Christie Lee Littleton's current gender status, Chief Justice Harberger mentioned the federal DOMA, albeit almost in passing.⁴⁸⁷ Yet, in declaring Christie Lee Littleton to be male, he made the court's holding apparently the first to use DOMA even as a mere reference point, to invalidate what was thought to be a valid, existing marriage. In doing so, he beat to the punch any court that might be seething to apply DOMA to same-sex marriages that may result from the *Baker v. Vermont* litigation and the legislation which may ensue.

Because of the staggering degree to which the San Antonio Court truly did *not* answer the questions "What is male?" and "What is female?," a federal law which came into existence as a piece of election year gay-baiting, and which was generally believed to be only an exercise in pro-heterosexuality theory, suddenly has been brought to practical life. Because of the potential for DOMA now to invalidate existing marriages which were believed to be opposite-sex, an analysis of DOMA and its underpinnings is necessary to appreciate fully the impact that *Littleton v. Prange* may have on family law in Texas and elsewhere.

B. *Majoritarian Politics of the 1990s, Federalism and Same-Sex Marriage*

*The concept of federalism, it appears, certainly has staying power once it gets into your system. We Americans love federalism or, as the Court has called it, "Our Federalism." It conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard.*⁴⁸⁸

Of course, that Rockwellian image contains neither homosexuals, transsexuals, intersexed people nor, for that matter, any

487. See *Littleton*, 9 S.W.3d at 226.

488. Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906 (1994) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

allusions to what heterosexuals do behind closed doors after those parades are over.

Why?

At some point a purported majority deigned that it should be so. When a movement mounts to make a change in that picture, the response from the purported majority is, typically, that they are not bigots but that they are simply not ready for the particular change.⁴⁸⁹ This may sound nice, but it does not help those who happen not to be in the majority.

Laws of various states currently proscribe certain consensual adult-to-adult sexual activity, including consensual same-sex sexual contact.⁴⁹⁰ Such activity may be legal in one state while classified as a felony in a neighboring state. In states where that activity is a criminal offense, the general policy of the state may be not to enforce the proscription. Yet, if the local prosecutor suddenly goes on a morality crusade⁴⁹¹ there is little recourse based solely on the infrequency of the law's enforcement.⁴⁹² All are at the mercy of that local prosecutor's whim.

People travel from one state to another to engage in various indulgences such as gambling and even prostitution. Marriage, however, is not simply an activity. While, undoubtedly, the marriage

489. For example, Rep. Bono was quoted as saying, "I simply can't handle it yet, Barney" (speaking of same-gender marriage to Rep. Barney Frank) in the Judiciary Committee hearing on the Defense of Marriage Act, June 12, 1996; *reprinted in* ANDREW SULLIVAN, *SAME SEX MARRIAGE: PRO AND CON* 223 (1996).

Florida Governor Lawton Chiles expressed a similar sentiment in connection with his state's Defense of Marriage Act. "I believe that, by and large, most Floridians are tolerant and will one day come to view a broader range of domestic partnerships as an acceptable part of life. But, that is not the case today." Michael J. Kanotz, *For Better or For Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 FLA. ST. U. L. REV. 439, 445 (1998).

490. *See generally* RICHARD A. POSNER & KATHERINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 56-71, 98-110 (1996) (surveying state statutes proscribing sodomy, fornication and adultery). Though still a nice resource, the book quickly became out of date. Since its publication, the Supreme Courts of Montana and Georgia have overturned their respective states' sodomy laws. *See Gryczan v. State*, 942 P.2d 112, 115 (Mont. 1997); *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998) (declaring the same sodomy law unsuccessfully challenged on federal grounds in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to be violative of Georgia's constitution).

491. *See* Art Lawler, *Pregnant Girl Gets Three Years Probation*, IDAHO STATESMAN, May 16, 1996, at 1A. When informed that a local prosecutor had decided to start enforcing Idaho's fornication law, a representative of the Idaho Attorney General's office said, "If it's being used, I'm unaware of it." Art Lawler, *Gem County Teens Charged for Having Sex*, IDAHO STATESMAN, May 15, 1996, at 1A.

492. *See, e.g.*, MINN. STAT. § 645.41 (1998) (stating, "A law shall not be deemed repealed by the failure to use such law.").

ceremony may be legitimately viewed as an activity, the aftermath of that activity is a new status, being married.⁴⁹³ This status is the ticket to countless societal benefits and, currently, these benefits are only attainable by opposite-sex married couples.⁴⁹⁴

Litigation during the 1990s in Hawaii, Alaska and Vermont caused much pondering about what the result will be of a state actually legalizing same-sex marriages.⁴⁹⁵ Although the Alaska and Hawaii challenges failed, same-sex marriages could soon become legal in Vermont depending upon the legislative solution to the *Baker v. Vermont* mandate.⁴⁹⁶ The federal government and most states have asserted a pre-emptive public policy-based denial of recognition to such marriages. Other states may not.⁴⁹⁷ Legally married same-gender couples will be at the mercy of the political whim of the state they happen to be in at any given time. The debate, including that surrounding the passage of the federal DOMA, has almost always assumed that there are no legal same-sex marriages in the United States currently. *Littleton v. Prange* has resulted in the answer to the question “Are there legal same-sex marriages in the United States?” being: “There are, and there aren’t.”

Chief Justice Hardberger’s punt to the legislature acknowledged that other states do recognize marital rights of post-transition transsexuals. However, what he did not bother to address was whether such marriages, valid in those states, would be valid in Texas.

There are—and there aren’t.

A question remaining in the aftermath of *Littleton v. Prange* is: What is an opposite-sex couple?

Chief Justice Hardberger purported to answer that question but in no way did so. Rather, by mentioning DOMA, he opened a Pandora’s

493. This touches upon one of the many flaws, both factual and logical, in the Judiciary Committee’s report on the Defense of Marriage Act. The report implies that supporters of same-gender marriage expect to be able to take a marriage *license* from Hawaii to another state and perform a marriage in that other state. The flaw here is that this is not allowed with opposite-gender marriage licenses. See H.R. REP. NO. 104-664, at 8 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2912.

494. See WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 66-67 (1996).

495. North American litigation was not limited to the United States. Although also not likely to result in legislative action to specifically open marriage to same-sex couples, the Supreme Court of Canada held that a heterosexual definition of “spouse” in an Ontario law violated the Canadian Charter of Rights and Freedoms. See *M. v. H.*, [1999] 2 S.C.R. 3 (Can.) (stating, “The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships.”).

496. 744 A.2d 864, 887 (Vt. 1999).

497. And Texas is one of those which has not. See *supra* Part IV.H(1)(b).

Box that lacks a critical definitional constraint. Although a federal law, DOMA rolled through Congress on the crest of a states' rights tidal wave.⁴⁹⁸ The purported authority for DOMA is the Constitution's "full faith and credit" language.⁴⁹⁹ As a foundation for DOMA, though, it is weak at best.

C. *One of Many Non-Exhaustive Surveys of the Pre-Littleton Same-Sex Marriage Landscape*

1. Off on the Road to Hawaii

Polls that are not spiked with the red herring of "special rights" tend to show that a clear majority of Americans favor equal rights for homosexuals in areas where civil rights protections exist for other minorities.⁵⁰⁰ However, "[T]hen you get to gay marriage. And that's when all this talk of equality stops dead cold."⁵⁰¹ Arguments against recognition of same-gender marriage abound. Most, if not all, are based either upon faulty facts, faulty logic, or purely religious considerations. One argument frequently made to mask the purely religious argument is tradition: the perceived notion that same-gender marriages have never been recognized *anywhere*.⁵⁰²

The first U.S. cases to seek same-sex marriage rights, noted by Hardberger in *Littleton*, were brought in the early 1970s, and were not

498. 1996 Republican Presidential candidate Robert Dole incessantly made reference to a copy of the 10th Amendment that he kept in his pocket. See Robert Scheer, *Dole Backs the Big Lie in Drug War*, LOS ANGELES TIMES, Oct. 22, 1996, at B7 (noting that Dole, who "brags about carrying a copy of the 10th Amendment . . . in his pocket [seems] blissfully unaware that the drug war represents a most irrational federal intrusion into our lives.")

499. U.S. CONST. art. IV, § 1.

500. In response to far-right, religious propaganda against the proposed federal Employment Non-Discrimination Act (ENDA), the Human Rights Campaign conducted polls whose results show that 63% of Christians favor "a bill which would extend current civil rights protections in the workplace to cover gays and lesbians." Dr. Herbert D. Valentine, *Faithful Friends*, HUMAN RIGHTS CAMPAIGN QUARTERLY, Fall 1997, at 8.

501. Scott Bidstrup, *Gay Marriage: The Arguments and the Motives* (visited July 17, 1997) <<http://www.pe.net/%/Ebidstrup/marriage.htm>>. One can also look to the position of Vice-President Al Gore, supporting the rights of gay couples for equality of benefits typically associated with marriage while being adamantly opposed to simply allowing same-sex couples to marry exactly as opposite sex couples are currently allowed to do. See Mark Sandalow, *On Campaign Trail, Gays Still Viewed as Liabilities*, SAN FRANCISCO CHRONICLE, Dec. 20, 1999, at A1 (quoting Gore spokesman Chris Lehane as saying that Gore "supports domestic partnerships" but does not "think they should be put in the same category as traditional marriages").

502. This generalization did not impress the Alaska court that addressed the issue. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *2 (Alaska Super. 1998) (stating, "In some parts of our nation mere acceptance of the familiar would have left segregation in place."); *ESKRIDGE, supra* note 494, at 15-50.

successful.⁵⁰³ In a later challenge in 1993 the Hawaii Supreme Court directed the state to show a compelling interest for denying marriage rights to such couples.⁵⁰⁴ At the subsequent trial, the state trotted out many alarmist fears of what might happen if same-gender marriage is permitted, namely legalization of incest and polygamy.⁵⁰⁵ The trial court noted that, while the state had compelling reasons to prohibit some marriages, such as incestuous ones, it did not have an interest in prohibiting same-gender marriages sufficient to overcome the Hawaii Constitution's guarantee of equal protection:

[The state] has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has [the state] demonstrated how same-sex marriage would adversely affect . . . the institution of traditional marriage, or any other important public or governmental interest.⁵⁰⁶

Of course, this was not the last word either in Hawaii or Washington, D.C.⁵⁰⁷

2. The Federal Reaction to Hawaii

The Republican-led 104th Congress apparently wanted it both ways⁵⁰⁸ on the issue of same-sex marriage.⁵⁰⁹ In an attempt to bolster a federalist notion, Congress made a full-strength legislative assault into an area that the States jealously guard as their own. The pre-1967 antimiscegenation law decisions, most of which upheld such race-based marriage laws, were most adamant in asserting that marriage is a state issue.⁵¹⁰ However, relying on the “full, faith and credit”

503. See David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 7-10 (1997) (summarizing the arguments made in several such cases from the 1970s and 80s).

504. See *id.* at 10-11 (summarizing the 1990-93 *Baehr* litigation).

505. See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), at *20. See also ESKRIDGE, *supra* note 494, at 144-52 (commenting on the “slippery slope” argument).

506. *Baehr*, 1996 WL 694235, at *21.

507. Or, ultimately, in San Antonio, Texas.

508. No bisexuality pun intended.

509. See *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 199-200 (1996) (statement of Elizabeth Birch) (noting the irony of a pro-10th Amendment Congress getting involved in a state matter).

510. See *Frasher v. State*, 3 Tex. Ct. App. 263, 272-3 (1877).

language of Article IV, Congress passed DOMA in 1996 in response to potential legal same-gender marriages from Hawaii.⁵¹¹

a. DOMA and Federal Law

DOMA has two provisions. The ostensibly federal section defines “marriage” and “spouse” for the federal government:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.⁵¹²

While this may not *directly* invalidate same-gender marriages,⁵¹³ it makes them effectively worthless regarding any federal benefit or obligation.⁵¹⁴

In re Allen and *Von Hoffburg v. Alexander* are prime examples of *how* worthless. In *Allen*, a same-sex couple⁵¹⁵ was not allowed to file a joint bankruptcy petition because their marriage was not recognized as such despite acknowledgment by the court that the marriage had “many of the same characteristics of a typical marriage between a man and a woman,” and that ninety-two percent of the debts in question were joint debts.⁵¹⁶ Even if state law recognized their marriage, the Bankruptcy Court would almost assuredly have to ignore its existence pursuant to DOMA.

Von Hoffburg should be viewed as precisely how the federal DOMA will likely now affect marriages involving transsexuals and intersexed people, as well as non-transsexual same-sex marriages

511. Congress did not bother to wait for Judge Chang’s ruling. After the 1993 decisions, Congress apparently realized the inevitable and decided to launch a preemptive strike. In fact, the State of Hawaii asked Judge Chang to take judicial notice of the newly-enacted DOMA. See *Baehr*, 1996 WL 694235, at *20.

512. 1 U.S.C.A. § 7 (West 1997). Significantly, in light of *Littleton*, Congress did not see fit to define “man” or “woman.” If neither is defined, how can the “opposite” of either be ascertained?

513. Abuse by state governments, including the invalidation of marriages, was not unknown to the framers of the Constitution. See Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 472-73 (1986) (referring to a 1784 report on abuses by the Pennsylvania Legislature). DOMA is apparently the first act of Congress to potentially have such an effect.

514. See Coolidge, *supra* note 503, at 4-5 n.8 (quoting sources noting that over 1,000 federal laws are based, at least in part, on marital status).

515. Apparently neither half of this couple was transsexual.

516. *In re Allen*, 186 B.R. 769, 771 (N.D. Ga. 1995).

should Vermont ultimately sanction them.⁵¹⁷ Although this case predated DOMA by over a decade, it presented the Fifth Circuit with a situation that is surely to arise in post-*Littleton* family, criminal and military law. In light of how it operated to federally invalidate a facially-valid marriage involving a transsexual by deeming the marriage to be a same-sex relationship, I find it shocking that *Von Hoffburg* was not mentioned by the *Littleton* court, if even to bolster its position by noting it as a decision which held against transsexual marital rights.

Marie Von Hoffburg was honorably discharged from the army “because of her alleged homosexual tendencies.”⁵¹⁸ She enlisted in the army in 1975 and established “a good military record.”⁵¹⁹ In 1976, she married Kristian Von Hoffburg, a female-to-male transsexual, in Alabama.⁵²⁰ Kristian’s pre-transition name was Linda Louise Bowers, under which he, as a female, had served in the army from 1974 to 1975.⁵²¹ Apparently, it was his stint in the military that caused him to come to the attention of Fort Rucker authorities after the couple received a Basic Allowance for Quarters. Specifically, personnel in the Office of the Adjutant General reported to the Criminal Investigation Division that “an individual previously known as Linda Bowers had obtained a dependent military identification card as the dependent husband” of Marie.⁵²²

Much of the Fifth Circuit’s opinion deals with whether Marie went through proper administrative channels prior to filing her action in federal court. Frightening, though, is the court’s total disregard for whether the State of Alabama would recognize the Von Hoffburgs’ marriage⁵²³ and whether Kristian Von Hoffburg was “a biological female, or a biological male, or both.”⁵²⁴ There can be little doubt that *Von Hoffburg* is a preview of DOMA in action on several levels:

Family law: The court paid no attention to the state’s opinion of the marriage;

517. See *Van Hoffburg v. Alexander*, 615 F.2d 633, 634 (5th Cir. 1980).

518. *Id.* at 634.

519. *Id.* at 635.

520. See *id.*

521. See *id.*

522. *Id.*

523. See *id.* at 635 n.2. “To the best of our knowledge, the validity of the marriage has not been challenged in any state court.” *Id.*

524. *Id.* at 635 n.4. This, of course, is one more example of intersexuality being a dirty little secret of the human condition with which pro-heterosexual courts cannot deal.

Military law: Homosexuals are still not allowed to serve openly in the military;⁵²⁵ and

Criminal law: Same-sex sexual behavior is still illegal in many jurisdictions, including Texas.

The House Judiciary Committee which considered DOMA refused to include language that would suspend federal non-recognition of same-gender marriages from states which may one day choose to define marriage to include same-gender marriage, even if such definition comes via “citizen initiative or referendum.”⁵²⁶ The assumption that no state would ever do so was not only arrogant but also incompetent considering that by 1996 there had long been conflicting U.S. court decisions regarding the validity of transsexual marriages.⁵²⁷

The implications of this refusal is mindboggling, even when only considering the ramifications if more states recognize transsexual marriages, much less same-sex marriage in general. It would not be inconceivable for all, or a majority of, the state legislatures to be controlled by one party while both houses of Congress are controlled by the other. Considering the increasingly polarized relationship between the two major parties, theoretically, though certainly not likely, *all* of the states could legislatively recognize transsexual marriages and same-sex marriages while a less-enlightened Congress could refuse to recognize them by refusing to repeal the federal DOMA.

525. Of course, the “Don’t Ask, Don’t Tell” policy is a controversy unto itself. See Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1274 (1996).

After military service is a different issue. The Veterans Administration has issued at least one ruling regarding the validity of marriages entered into by transsexual veterans. See *Benefit Determination Involving Validity of Marriage of Transsexual Veterans*, 55 Fed. Reg. 26,810 (1990). In an opinion requested by an agency branch in Texas, the VA held that:

Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran’s spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse.

Id.

526. H.R. REP. NO. 104-664, at 21 (1996), *reprinted in* U.S.C.C.A.N. 2925.

527. Compare *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), and *Anonymous v. Weiner*, 270 N.Y.S.2d 834 (N.Y. Civ. Ct. 1966), *supra* Part IV.D.

b. DOMA and the States

DOMA also purports to give all American jurisdictions the right to ignore same-sex marriages performed in other jurisdictions:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁵²⁸

Professor Larry Kramer critiqued this portion in four words: “This is radical stuff.”⁵²⁹ As at the federal level, numerous rights and privileges are conferred by states based on marital status.⁵³⁰ A couple with a valid same-gender marriage who lives in a state that recognizes such marriages would lose all rights of married couples if the couple moves to a non-recognition state. A point lost on the *Littleton* majority, as well as at least one commentator who approves of DOMA’s constitutionality, is that DOMA would have the same effect on a couple, one spouse of which is transsexual, which one state recognizes as being validly-married and opposite-sex, but is held by another state to be not married and same-sex.⁵³¹

528. 28 U.S.C. § 1738C (1997).

529. Larry Kramer, *Same-Sex Marriage, Conflict of Laws and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 2000 (1997).

530. The inevitable one, of course, is probate. Marriage, or lack thereof, affects inheritance via either intestacy or required spousal shares—and, as Christie Lee Littleton found out, it affects the right to sue as a surviving spouse.

A less obvious one is simply being able to claim to be married in any given situation—including political battles. In a 1997 Houston City Council election race, heterosexual businessman Don Fitch listed himself on a campaign flyer as “Married” and his opponent, Annise Parker, a lesbian with a life partner, as “Single” in a comparison of personal qualifications. See *Don Fitch Campaign Flyer* (1997) (copy on file with author); but cf. *Christian Coalition Legislative Action Center* (visited Jan. 1, 2000) <<http://christian-coalition.org/>> (showing the congressional directory of the virulently anti-gay Christian Coalition listing lesbian Wisconsin Representative Tammy Baldwin’s partner under the category of “Spouse”).

531. See Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 421-22, 456 (feeling that the concept of marriage being “but (truly) a ‘ministerial’ act” is all but dispositive of the entire controversy if such ministerial acts are not ‘judgments’ in an Article IV sense, yet not addressing the change of gender of transsexuals, documentation of which typically takes the form of a court judgment).

Texas case law holds that a ministerial act is one “where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994) (quoting *Rains v. Simpson*, 50 Tex. 495, 501 (1878)). If, however, “the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.” *Id.* I speak

When same-sex marriage seemed on the verge of becoming a reality in Hawaii, one fear was that same-sex couples from the mainland would flock to Hawaii to get married. DOMA, however, was not crafted to distinguish between couples from other states who might have gone to Hawaii to take advantage of its transsexual or same-sex marriage policy via vacation and longtime residents of Hawaii who might have sought a friendly forum in the islands.⁵³²

DOMA would essentially operate to invalidate such marriages while precluding any realistic laboratory test for same-sex marriages, those with a transsexual spouse as well as those without.⁵³³ If one does view the fifty separate bodies of state law as a laboratory where novel legal concepts can take root, this preclusion should be viewed as a major flaw. In fact, such preclusion seems to have been overlooked by Judge Posner, who, though he encouragingly does not take an absolutist view against same-gender marriage, is not in favor of intervention by the U.S. Supreme Court to resolve the issue:

[P]ublic opinion is not irrelevant to the task of deciding whether a constitutional right exists.

....

Let a state legislature or activist (but elected, and hence democratically responsive) state court adopt homosexual marriage as a policy in one state and let the rest of the country learn from the results of the experiment.⁵³⁴

Posner's logic would work for couples who never leave the state where they have married *and* have no rights or obligations contingent on any machination of any other state government or of the federal government. And, if an amended birth certificate is a criteria in recognition of the transsexual's post-transition gender, then couples with a transsexual spouse would be further restricted, likely being forced to remain in the transsexual's state of birth. Perhaps even as recently as the early part of this century, such isolation within the boundaries of a single state was possible. Such couples, same-sex or opposite-sex, quite probably do not exist today, even among the isolationist populace of survivalist and militia groups.

from experience on this point not only as an attorney but as one who has petitioned for such relief: in an action on a petition for recognition of gender transition, the judge is an adversarial party until sufficient evidence is presented to convince him to sign the order recognizing the transition.

532. See Kramer, *supra* note 529, at 1968.

533. See *supra* note 513.

534. Richard A. Posner, *Should There Be Homosexual Marriage? And if so, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585-86 (1997).

On the other hand, if marriages involving transsexuals are same-sex marriages, then precisely the experiment that Judge Posner proposed has been ongoing for several decades. One study has indicated that only one out of every seventeen male-to-female transsexuals gets married following transition.⁵³⁵ If this is even close to being accurate, then the only cost to society has been the resources wasted by those who have contested the validity of transsexual marriages. Indirectly, of course, these costs have resulted from legislative bodies failing to adequately define “man” and “woman,” allowing the issue of whether a marriage is a same-sex marriage to spark litigation, such as that in *Littleton v. Prange*.

c. Profiles in Federalism: DOMA Was Not the First Encroachment on Federalism in Family Law

As Professor Kramer observed, “[N]ote how extraordinary DOMA is in this light: Congress was content to let the states slug it out on issues like slavery, miscegenation, divorce, and abortion—but [same-sex marriage], it seems, goes too far.”⁵³⁶ Also worth noting here is another example of Congress deciding *not* to get involved in marriage:

Indeed, [DOMA] is not the first time when Congress has been pressured to federalize marriage. For example, not so long ago, there was national furor over the notion that one could go to Reno, Nevada to obtain a quick divorce. Congress exercised legislative restraint because it understood that it lacked the constitutional authority to alter the substantive definition of marriage for any purpose or for any state in the union.⁵³⁷

While governors of many states were quick to jump on the DOMA bandwagon, William Weld of Massachusetts was a bit more pragmatic than most. He stated, “If the Hawaii ruling is approved by the Hawaii Supreme Court, then Hawaii’s definition of marriage has

535. See Nick Napolitano, *We Are Considered Disposable People*, WASHINGTON BLADE, Dec. 10, 1999, available online at <<http://www.washblade.com/national/991210d.htm>> (noting statistics according to transgender historian Candice Brown Elliot). Rather disturbing is that this is cited as being *less* than a male-to-female transsexual’s chances of being murdered.

536. Kramer, *supra* note 529, at 2001.

537. *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 197 (1996) (statement of Elizabeth Birch).

to be respected,” adding that “[a] Reno divorce is a lot quicker than a divorce in other states and we recognize Reno divorces.”⁵³⁸

Federal and state law governing consensual sexual relations have already directly intersected in at least one federal statute: the Mann Act,⁵³⁹ described by Michael Conant as “the product of an era of moral panic in the early twentieth century that has long since passed.”⁵⁴⁰ Conant observes that not only the act itself but also Supreme Court decisions construing it are blatant encroachments on state sovereignty.⁵⁴¹ His argument is that the topics of “debauchery” and “any other immoral purpose” dealt with in the 1910 version of the Mann Act, when noncommercial in nature, are of no more federal concern than probate law or general tort law.⁵⁴² Perhaps most disturbing, though, is the reality that, in recent years, Congress has not only decreased the scope of the Mann Act, but actually has substantially *broadened* it, replacing the aforementioned archaic phrases with “*any sexual activity* for which any person *can* be charged with a criminal offense.”⁵⁴³ This effectively gives authority to the federal government to prosecute, at least on a derivative basis, where a state may expressly decline to do so, a rather blatant transgression of the states’ police powers.⁵⁴⁴

3. Congress Was Not Alone—The States Reacted Also

Within six months of the 1996 *Baehr v. Miike* decision, forty-eight states either proposed or actually passed preemptive anti-recognition statutes.⁵⁴⁵ Hawaii passed two statutes. The first was a proposal to amend the state constitution with the language “[t]he legislature shall have the power to reserve marriage to opposite-sex couples”⁵⁴⁶ which went before the voters in 1998 and was approved.⁵⁴⁷

538. Joe Battenfeld, *Gov Would Not Nix Same-Sex Marriages*, BOSTON HERALD, Dec. 5, 1996, at 4; *see also* Williams v. North Carolina, 317 U.S. 287, 303 (1942).

539. 18 U.S.C. § 2421 (1997).

540. Michael Conant, *Federalism, the Mann Act, and the Imperative to Decriminalize Prostitution*, 2 CORNELL J. L. & PUB. POL’Y 99, 99 (1996).

541. *See id.* at 100-01.

542. *Id.* at 101.

543. Child Sexual Abuse and Pornography Act of 1986, Pub. L. 99-628, 100 Stat. 3511 (emphasis added). Elizabeth Birch’s 10th Amendment political irony observation is applicable here as well. In 1986, the President was Republican, as was the Senate.

544. This is the reality of the “offending two sovereigns” principle—allowing both a state and federal prosecution for the same offense without triggering double jeopardy.

545. *See* Coolidge, *supra* note 503, at 97-119.

546. 1997 Haw. Sess. Laws H.B. 117 § 2 (codified at HAW. CONST. art. I, § 23 (1999)).

The other is viewed as an appeasement to homosexuals, extending “certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.”⁵⁴⁸ Of course, such an appeasement reeks of “separate but equal,” and could easily be repeated in Vermont in the wake of *Baker v. Vermont*. More distressing, though, is the general hue and cry of “special rights” when non-heterosexuals seek to remove the words “separate but” from that equation, as occurred in Colorado and Oregon prior to those states’ 1992 anti-equality referenda.⁵⁴⁹

Referring to Justice Scalia’s dissent in *Romer v. Evans* and the assertion that homosexuals are seeking “preferential treatment,”⁵⁵⁰ Professor Marcossion makes the following observation:

In a nation whose commerce was dominated by common law freedom of contract principles, Justice Scalia would have a point; protection against others’ exercise of this freedom in order to discriminate would, indeed, be “special.” But, ours is not such a nation, and has not been (when it comes to discrimination) since at least 1964. Seen in the context of a nation that has deemed fundamental the rights provided by antidiscrimination laws,

547. See *Gay Rights Voted Down*, GRAND RAPIDS PRESS, Nov. 4, 1998, at A6. The adoption of the state constitutional amendment was recently held to have validated the already-in-existence statute which denied marriage to same-sex couples. See *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

548. HAW. REV. STAT. § 572C-1 (1997).

549. Candace Gingrich, Human Rights Campaign spokesperson and sister of former Speaker of the House Newt Gingrich, remarked that, while there is doubtlessly animus in the hearts of some—perhaps even a majority—of those who claim that homosexuals are seeking “special rights,” others may indeed simply be ignorant on one key point: they are under the impression that homosexuals already have equal rights and, therefore, anything further that they seek must be “special.” See Candace Gingrich, Speech Given in Houston, Texas, to the November 1997 meeting of Lesbians in Business (Nov. 21, 1997), in 2 S. TEX. CIV. LIB. J. 45, 51 (1998). I am no fan of the HRC, primarily due to its dumbfounding persistence in opposing the inclusion of transgendered people in the proposed federal Employment Non-Discrimination Act. However, her observation on the ‘special rights’ issue is compelling. Two nights prior to her Houston speech, ABC’s *Drew Carey Show* almost assuredly reinforced in the minds of some the mistaken belief alluded to by her when, in a conversation with his brother who came out as being a crossdresser, Carey states that federal employment law currently protects gays. Of course, as it does not now it did not then. See Katrina C. Rose, *Television’s Mixed-up Portrayal of Transgendered Characters*, BALTIMORE GAY PAPER, Dec. 19, 1997, at 18; FOX’s *King of the Hill* *Misinforms Viewers Concerning Employment Discrimination Laws*, TEXAS TRIANGLE, April 30, 1998, at 7 (noting that an episode of *King of the Hill* casually misstated that sexual orientation is protected under both Title VII and the ADA).

550. 517 U.S. 620, 638 (1996) (Scalia, J., dissenting). The rallying cry of the pro-Amendment 2 forces was ‘no special rights’ and Scalia, in his *Romer* dissent, saw “special treatment of homosexuals” as precisely what homosexuals were seeking in challenging the measure. *Id.*

the depth of the deprivation worked by [Colorado's] Amendment 2 is, as Justice Kennedy saw and Justice Scalia failed or refused to, astonishing.⁵⁵¹

Amazingly, even Justice Thomas, another standard-bearer in the revival of the 10th Amendment, may have blinked on the concept of taking change, or, as I call it, reality, into account when looking at constitutional issues.⁵⁵² Speaking in general of the Supreme Court's 20th Century Commerce Clause jurisprudence in his concurrence in *United States v. Lopez*, Thomas noted:

Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.⁵⁵³

The use of the term "reliance interests" begs a serious question: Who would Thomas permit to exercise this footnote to federalism? In light of his having sided with Scalia in *Romer*, it is difficult to conceive of Thomas, much less Scalia, siding *against* a state should DOMA arrive at the Supreme Court for scrutiny, either in an appeal of *Littleton* or in a challenge to DOMA that results from Vermont's legislation to come.

4. "Shall" vs. "Ought" and the Purported Public Policy Exception

*Full faith and credit . . . looks toward integration of the judicial systems of the states on the matter of the respect due to judgments.*⁵⁵⁴

Federalism, of course, is not simply the relationship between the federal government and the several states. It also involves the relationship between the states themselves. The Constitution addresses this latter relationship in Article IV: "Full Faith and Credit

551. Samuel A. Marcossan, *Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense"* in THE SAME-SEX MARRIAGE FIGHT, summary at 2, presented at the *Equal Protection Arguments* panel, 1997 NATIONAL LESBIAN/GAY LAW ASSOCIATION CONFERENCE, Oct. 25, 1997 (footnotes omitted).

552. See *id.* (Marcossan refers to it as "context" rather than reality).

553. 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring). The comment on the Commerce Clause is worthwhile to note because Congress's Article IV, § 1 power has been analogized to its Commerce Clause power for purposes of possible conflict with the 10th Amendment. With the lack of decisional law on the issue, such observations are as competent guidance as any. See Dianne M. Guillerman, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 456-57 (1997).

554. Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last in Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 831 (1969).

shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.”⁵⁵⁵

In addition to being a command to the states, this clause also gives Congress legislative authority. However, Congress has seldom used this authority. Indeed, when analyzing DOMA, the inquiry should not be whether Congress should act, but whether it even has the power to do so. An article by Scott Ruskay-Kidd points to what may be a fatal legal flaw in Congress’s attempt to tell states that they are free not to recognize marriages performed in sister states.⁵⁵⁶ The Constitution went through several drafts before it attained its final form. The commanding word “shall” was *not* initially part of the “full faith and credit” language. Prior versions contained the suggestive “ought”.⁵⁵⁷ Interpreting “shall” as “shall” leaves little room to come to any conclusion other than: “There is no plain meaning of the first sentence of the Full Faith and Credit clause that would allow Congress to conclude it has the authority to limit full faith and credit or provide definitional, substantive guidance to the states.”⁵⁵⁸

Interpreting “shall” as “ought,” however, would leave states to act on a whim regarding recognition of marriages performed in other states. As such, I find quite interesting a comparison of several South Carolina Attorney General opinions: a pair from 1943 and one from 1996. In 1943, A.G. John Daniel proudly quoted South Carolina’s then-existing absolute ban on divorce.⁵⁵⁹ In defense of this ban, he stated, “The law makes it unlawful for an able-bodied man to desert and fail to support without just cause or excuse his wife and minor children. A man cannot make a woman live in just any kind of place

555. U.S. CONST. art. IV, § 1 (emphasis added).

556. See Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1482 (1997).

557. See *id.* at 1450. The Federalist exhibits a dearth of commentary on this section of the Constitution, the only comment coming from Madison asserting that the effects clause is superior to its counterpart in the Articles of Confederation. See THE FEDERALIST NO. 42, at 303 (James Madison) (Benjamin Fletcher Wright ed., 1961). Speaking to Madison’s views on the clause, Professor Kramer notes “[N]othing in the history affirmatively suggests that Congress may relieve states of the obligation to recognize the laws and judgments of sister states.” Kramer, *supra* note 529, at 2005.

558. *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 198-99 (1996) (statement of Elizabeth Birch).

559. See Op. S.C. Att’y Gen. 116 (1943).

or amid humiliating surroundings.”⁵⁶⁰ I interpret this as some type of statement about the public policy of the state of South Carolina at that time. Three weeks after he issued that opinion, however, Daniel stated that South Carolina *would* honor divorces granted in other states.⁵⁶¹ Public policy certainly yielded to “full faith and credit” in that conflict. Decades later, however, with the possibility of Hawaii same-sex marriages looming, A.G. Charles Condon stated, “Even if another state . . . validates a same-sex marriage performed in that state, South Carolina still has the constitutional authority to say “no” to it. Such marriages are against the public policy of South Carolina and are void from their inception.”⁵⁶²

Even if a source for the public policy exception can be found in the Constitution, the use of it to deny recognition of same-sex marriages would still have to be predicated on some legitimate state interest.⁵⁶³ Not surprisingly, many of the state interests proffered in support of non-recognition of same-gender marriages parallel those in support of laws against homosexual activity itself. Increasingly, though, the logic of these interests is being scrutinized and found to be not logical enough to support laws which criminally sanction consensual sexual activity.⁵⁶⁴ Almost half of the states still have some law criminalizing same-gender sexual activity and those states will almost certainly continue to use the existence of such laws to bolster a “public policy” argument against recognition of same-gender marriages from other states.⁵⁶⁵

560. *Id.*

561. *See* Op. S.C. Att’y Gen. 121-22 (1943).

562. Op. S.C. Att’y Gen. (1996), *available in* 1996 WL 265499, at *10 (S.C.A.G.).

563. And the public policy question is certainly *not* in the plain text of Article IV. *See* U.S. CONST. art. IV.

564. In rejecting a fear-of-AIDS argument, the Montana Supreme Court noted that the law in question had been passed long before an AIDS case ever occurred in Montana. *See* Gryczan v. State, 942 P.2d 112, 123-24 (Mont. 1997).

Similarly, the Vermont Supreme Court bluntly stated that the State’s arguments, including one of encouragement of procreation, for limiting marriage to opposite-sex couples while not prohibiting such couples who were either unwilling or unable to procreate, suffered from a “failure of logic.” *Baker v. Vermont*, 744 A.2d 864, 885 n.14 (Vt. 1999).

565. Of course, non-recognition of same-gender marriage from other states is not the only derivative use of sodomy laws in a family law context. The continued existence of the Texas homosexual conduct statute was used in a dispute over a potential adoption by a lesbian couple. *See* Polly Ross Hughes, *CPS Worker on Crusade to Bar Adoptions by Gays*, HOUSTON CHRONICLE, Nov. 20, 1997, at 1A.

5. The Other Congressional Writing on the “Full Faith and Credit” Wall Before DOMA

Congress rarely has used the authority available to it via “full faith and credit.” In fact, if the research of one vehement opponent of gay rights can be relied upon, DOMA is only the fourth such exercise of this authority.⁵⁶⁶ The Supreme Court has had little opportunity to deal with Congress’s use of this authority. Many proponents of DOMA point to *Thompson v. Thompson*,⁵⁶⁷ a 1988 Supreme Court decision involving the Parental Kidnapping Prevention Act (PKPA).⁵⁶⁸ I specifically use the word “involving” because using “upholding” would be misleading to the reader. The constitutionality of the PKPA was not at issue, only whether the PKPA conferred a private right of action in federal court.⁵⁶⁹ Even so, a decision specifically finding PKPA constitutional would not necessitate a similar holding regarding DOMA. Although phrased in the negative, PKPA required states to give full faith and credit to child custody determinations from sister states.⁵⁷⁰ This was merely a procedural clarification of “shall,” a legitimate exercise of power in the view of Justice Marshall, due to the “peculiar status” of custody orders with regard to their finality and their attendant enforceability in other states.⁵⁷¹ Unlike DOMA and its rigid classification, based on sexual orientation (or, perhaps, sex), PKPA drew no classifications regarding who could or could not enforce a custody order. More importantly, for constitutional analysis, PKPA *reinforced* “shall” while DOMA effectively *erases*

566. See *Defense of Marriage Act: Hearings on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 227 (1996) (statement of Jay Alan Sekulow). According to Sekulow, Chief Counsel for the Pat Robertson-aligned American Center for Law and Justice (ACLJ), after the 1790 codification of the Constitution’s language the other two statutes were enacted in 1980 and 1994. See 28 U.S.C. § 1738A (1997) (Parental Kidnapping Prevention Act); 28 U.S.C. § 1738B (1997) (Full Faith and Credit Child Support Orders Act). Although Dianne Guillerman’s research indicates a few other enactments, the legislative slate is, indeed, still rather bare. See Guillerman, *supra* note 553, at 456-57.

567. 484 U.S. 174 (1988); see also Leonard G. Brown, III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 166-67 (1996).

568. 28 U.S.C. § 1738A (1998).

569. See *Thompson*, 484 U.S. at 178-79.

570. See 28 U.S.C. § 1738A(a) (1998) (stating, “The appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.”).

571. See *Thompson*, 484 U.S. at 180 (noting that some states did not consider a custody order “final” enough to warrant affording it full faith and credit).

“shall” and replaces it not even with “ought,” but with “may,” essentially permitting “each State on an ad hoc basis to determine whether or not it wants to extend full faith and credit to a same-sex marriage.”⁵⁷²

6. Again—Action by Congress vs. Inaction by Congress

As highlighted above, *the* key difference between DOMA and other Congressional forays into the domestic arena via “full faith and credit” is that DOMA purports to give states the power *not* to give “full faith and credit” to acts of other states. This action by Congress is in stark contrast to numerous actions that could have been taken, yet were not, regarding interracial marriages prior to *Loving v. Virginia*.⁵⁷³ Then, many states refused to allow performance of such marriages and, likewise, refused to recognize such marriages that had been performed in other states.

In the *Plessy v. Ferguson*⁵⁷⁴ era of Court-consecrated “separate but equal,” Congress never saw the need to pass a “Defense of Marriage Act” to ensure only same-race marriages. Likewise, when attitudes regarding race began to change, Congress never saw fit to pass legislation *requiring* states to recognize interracial marriages performed in other states.⁵⁷⁵ The issue existed though, and the intransigence of certain states regarding anti-miscegenation laws ultimately led to the Supreme Court having to pass judgment against allowing such laws to be enforced in any state.⁵⁷⁶

Pro-federalism, “pro-states’ rights” forces likely would not have supported the concept of a federal DOMA, replete with a legislative history which contained a stated intent of “defending” the institution of marriage by ensuring the equal access of gay couples *to it*, proposed by a liberal Congress. Once Congress is able to walk through the wall of federalism on this issue in one direction, there will be no argument, other than mere whining, if a future Congress decides to get rid of the current anti-same-sex marriage DOMA in favor of the one which I have sketched out. Additionally, that future Congress

572. Cynthia M. Reed, *When Love, Comity and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 130 (1996).

573. 388 U.S. 1, 9 (1967).

574. 163 U.S. 537 (1896).

575. Even President Lyndon Johnson’s impassioned ‘We Shall Overcome’ speech of March 15, 1965, failed to mention the subject of anti-miscegenation laws.

576. Unanimously, in fact.

could prescribe other requirements, such as age, and whether common-law marriage should be recognized. And, naturally, it could mandate recognition of transsexual marriages. This is not an academic absurdity, but merely an acknowledgement of what may happen in the future with the issue of marriage in the hands of a highly partisan national legislative body.⁵⁷⁷

7. Adventures in Comparison

a. Anti-Miscegenation Laws and Same-Sex Marriage Proscriptions, If Not Identical Twins, Then Certainly Fraternal Ones

*It has always been the policy of this state to maintain separate marital relations between the whites and the blacks.*⁵⁷⁸

*No State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.*⁵⁷⁹

*Isn't it strange how little we change.*⁵⁸⁰

No discussion on same-sex marriage can be either accurate or complete without highlighting the parallels between current restrictions against same-sex marriage and the antimiscegenation laws of the past, the *past* being as recent as 1967. Far from simply playing the race card, this is the most direct parallel to the issue of same-sex marriage, one that was resolved in favor of personal liberty yet without the ensuing destruction of the human race that was feared by some.

Prior to *Loving*, states had varied widely on both the allowance and the recognition of interracial marriages. Ultimately, the Supreme Court recognized that, although the institution of marriage was a state issue, the U.S. Constitution's guarantee of equal protection is supreme regarding the manner in which the state's regulate marriage. Feathers

577. Of course, the prospect of facing highly-partisan legislative bodies in most states bodes no better for homosexuals and transsexuals as does the prospect of making progress with the current Congress. See Rick Casey, *Sex-Change Ruling May Cause Scandal*, SAN ANTONIO EXPRESS-NEWS, Oct. 28, 1999, at 3A.

578. *Frasher v. State*, 3 Tex. Ct. App. 263, 278 (1877).

579. H.R. REP. NO. 104-664, at 3 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2907.

580. PINK FLOYD, *Point Me At the Sky*, on THE EARLY SINGLES (EMI 1992).

were, and still are, ruffled, but federalism survived, as did the institution of marriage.

The states that had laws prohibiting interracial marriage considered such laws to be constitutional and logical uses of power “reserved to the States”⁵⁸¹ under the 10th Amendment to justify anti-miscegenation statutes. Even more disturbingly, courts upholding such laws frequently, and overtly, used Christianity as authority. This last point is worth keeping in mind in light of Prange attorney George Brin’s direct assertion that the overriding concern in *Littleton v. Prange* should be the continued primacy of Judeo-Christian norms.⁵⁸²

The Indiana Supreme Court, in declaring that the Fourteenth Amendment had no effect on that state’s antimiscegenation law, stated:

The right, in the states, to regulate and control, to guard, protect, and preserve this God-given, civilizing, and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the states suffer or permit any interference therewith.

. . . .
The people of this State have declared that they are opposed to the intermixture of races and all amalgamation. If the people of other states desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy.⁵⁸³

The Missouri Supreme Court, in *State v. Jackson*, went further, espousing a theory, bizarre at best, concerning the ability of whites and blacks to actually produce offspring together⁵⁸⁴ and an analogy which left no doubt that the court was upholding a Christian law for a

581. U.S. CONST. amend. X. In decisions upholding such laws, the state courts did not always use the word “federalism,” though they frequently cited the 10th Amendment.

582. See Koppel, *supra* note 22, at 6.

583. *State v. Gibson*, 36 Ind. 389, 402-04 (1871).

584. 80 Mo. 175, 179 (1883). This so-called theory is noteworthy in light of the oft-used justification of nonrecognition of same-gender marriage on grounds that same-gender marriages will not produce children. Justice Henry noted:

It is stated as a well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites. . . .

Id.; see also ESKRIDGE, *supra* note 494, at 96-98, 138-40 (addressing procreation-based objections to same-gender marriage).

Christian state.⁵⁸⁵ Similar mixtures of Christianity and federalism permeated decisions from Georgia⁵⁸⁶ and Texas.⁵⁸⁷

b. Littleton Meets Loving?

*Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.*⁵⁸⁸

*Christie was created and born a male.*⁵⁸⁹

The former quote is what Richard and Mildred Loving heard from a trial court judge in Virginia in 1959 after they were convicted of racially intermarrying and having left the state of Virginia to obtain such a marriage.⁵⁹⁰ The latter came from Chief Justice Hardberger in *Littleton v. Prange* and was directed, of course, at Christie Lee Littleton.⁵⁹¹

Although the only overt reference to any religious tenet in *Littleton* was an oblique mention of “our Creator,”⁵⁹² the disregard for reality in the two opinions is strikingly similar. Of course, Christie Lee Littleton was not put directly in criminal jeopardy.⁵⁹³ The Lovings, however, were sentenced to one year in jail, though the trial judge suspended it for 25 years on the condition that the Lovings banish themselves from the state of Virginia for that period of time.⁵⁹⁴ They initially complied, but sought to return to Virginia and

585. See *Jackson*, 80 Mo. at 179 (stating, “Under the Jewish dispensation persons nearly related by ties of blood intermarried, but in no Christian land are such marriages tolerated.”).

586. See *Scott v. State*, 39 Ga. 321, 324-27 (1869). After declaring that there is no “moral or social equality” between the races, Chief Justice Brown added “The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it.”

587. See *Frasher v. State*, 3 Tex. Ct. App. 263, 273-8 (1877) (invoking both the 10th Amendment as well as Justice Buskirk’s opinion in *State v. Gibson*, 36 Ind. 389 (1871); further observing “the people of Texas are now, and have ever been, opposed to the intermixture of these races. Under the police power possessed by the states they undoubtedly, in our judgment, have the power to pass such laws.”)

588. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting the Virginia trial court opinion).

589. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999, pet. denied).

590. See *Loving*, 388 U.S. at 2 (noting they had traveled to Washington, D.C.).

591. 9 S.W.3d at 231.

592. *Id.* at 224.

593. Even though, as I have noted previously and expand on below, holding her to be male puts her in such jeopardy in the future with respect to any sexual relationship that she might have with a male.

594. See *Loving*, 388 U.S. at 3.

eventually brought an action to vacate the sentence. The Virginia courts refused to vacate, and the Lovings appealed to the U.S. Supreme Court.⁵⁹⁵

Chief Justice Warren decided to resettle what Virginia had declared to be a “well settled” point on the constitutionality of miscegenation statutes.⁵⁹⁶ He found in these laws “no legitimate overriding purpose independent of invidious racial discrimination.”⁵⁹⁷

i. Similarity in Effect

Due solely to their marriage, the Lovings could be a legally married couple or heinous felons. It simply depended upon which of two neighboring jurisdictions they happened to be in at any given time. Non-married homosexual couples currently face a similar duality based on state sexual activity laws. After *Littleton v. Prange*, legally-married heterosexual couples with a transsexual or intersexed spouse face it as well.

One of many ramifications not considered either by the *Littleton* parties or the San Antonio court was the effect declaring a male-to-female transsexual to be male would have on criminal law. By holding that marriages involving transsexuals are same-sex marriages, the court, by implication, declared that sex between the partners of such marriages is same-sex conduct, and created the very real possibility of a married couple, one spouse of which is transsexual, upon entering Texas, not only ceasing to be married, but also becoming subject to prosecution pursuant to the state’s homosexual conduct statute. According to the Texas Penal Code, “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”⁵⁹⁸ Also under the Code, “deviate sexual intercourse” includes “the penetration of the genitals or the

595. *See id.* at 3-4.

596. Brief of Appellee at 36, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (quoting Am. Jur. in support of its position).

597. *Loving*, 388 U.S. at 11. Perhaps most importantly, in terms of the federalism issue, Warren was careful to note that marriage is a state matter, though the states simply do not have unlimited power in the area. Virginia did not actually make the claim of plenary authority, though it did maintain that the only hurdle to overcome was equal treatment for black and white violators of the statute, a test which, arguably, the statute did pass. The prohibition, and related punishment, was equal for both blacks and whites. However, this “mere fact of equal application” did not, according to Warren, satisfy the Equal Protection Clause. *Id.* at 8. The statute was, in fact, based on invidious discrimination which the Fourteenth Amendment was designed to address. *See id.* at 10-11.

598. TEX. PEN. CODE ANN. § 21.06(a) (West 1966).

anus of another person with an object.”⁵⁹⁹ Any court that is willing to deny a male-to-female transsexual’s sex designation is rather likely to approve of the penis of a husband of a transsexual being viewed as an “object” should an arrest of what is now, in the eyes of the law, a same-sex couple, be made and a prosecution commenced.⁶⁰⁰

What I term *Loving-Littleton* scenarios will become common if Vermont does allow same-sex marriages and if other states not only refuse to recognize the marriage but continue to regard either homosexual sexual conduct or fornication⁶⁰¹ as criminal offenses, either misdemeanor or felony.⁶⁰² Virginia vigorously defended its policy in the same manner as states, including Texas, today defend bans on both homosexual conduct and same-sex marriage.

ii. Equal Protection and Sexual Orientation

A) The “will of the majority”?

*The U.S. Constitution quite simply provides no mechanism for determining the will of 50-percent-plus-one of us.*⁶⁰³

Arguably, had the issue of interracial marriage been put to a nationwide popular vote in the late 1950s or 1960s it would have lost,

599. TEX. PEN. CODE ANN. § 21.01(b) (West 1966).

600. And Section 21.06 is still used against consenting adults. A constitutional challenge to the statute stemming from a 1998 prosecution is pending in Houston’s Fourteenth Court of Appeals. See *State v. Lawrence*, No. 14-99-00109-CR (Tex. App. filed Feb. 8, 1999); *State v. Garner*, No. 14-99-00109-CR (Tex. App. filed Feb. 8, 1999).

601. For example, Minnesota’s fornication statute prohibits sexual intercourse between “any man and single woman.” MINN. STAT. § 609.34 (1998). This likely would not be implicated in a regime in which a post-operative male-to-female transsexual is classified as male for all purposes but could be if that same transsexual is classified as male only with respect to whether she has the right to marry a male.

Of course, an entirely different group of permutations would arise regarding a lesbian male-to-female transsexual’s relations with women. Such a lesbian would be subject to the law if she is classified as male for all purposes, but likely would not be if the male classification existed only for marriage purposes.

602. Georgia’s non-recognition of same-sex marriage, as well as the then-continued existence of its sodomy law were used as ammunition by Georgia Attorney General Mike Bowers in withdrawing an offer of employment to Robin Shaha, a lesbian who went through a commitment ceremony with her lover. Even if homosexual *conduct* was legal, Shaha would still be in the same position: out of a job. According to Bowers and his staff, “Shaha’s same-sex ‘marriage’ would create the appearance of conflicting interpretations of Georgia law and affect public credibility about the [Department of Law’s] interpretations.” *Shaha v. Bowers*, 114 F.3d 1097, 1101 (11th Cir. 1997).

603. Lynn A. Baker, “*They the People*”: *A Comment on U.S. Term Limits, Inc. v. Thornton*. 38 ARIZ. L. REV. 859, 865 (1996) (approvingly referring to Justice Thomas’s words in his *Term Limits* dissent, 115 S.Ct. 1842, 1882 (1995)).

perhaps soundly.⁶⁰⁴ Likewise, during his tenure as Chief Justice of the U.S. Supreme Court, had a referendum been held to impeach Earl Warren, it may well have *passed*, again perhaps even by a wide margin.⁶⁰⁵

Time may well have changed some minds on the subject of interracial marriage, but societal approval of it is still far from unanimous. Polling data suggests that, unlike in 1967, interracial marriage might survive a national popular vote.⁶⁰⁶ However, in noting the demographics of one poll taken, such passage would not be certain, and a majority in numbers equivalent to the 3/4 requirement of states needed for passage of a constitutional amendment would be even less likely.⁶⁰⁷ Additionally, with typical apathy among some segments of the population and other intangibles, like bad weather in areas that support it and good weather in places that do not, the proposition could conceivably even fail by a slight margin.⁶⁰⁸

States' rights activists typically paint a picture showing the federal government (portrayed, naturally, as the bad-guy) attacking the states (portrayed as the collective good-guy).⁶⁰⁹ Yet, this picture leaves out one important component: people. James Madison wisely observed two other important juxtapositions: those of "society" versus "the oppression of its rulers"⁶¹⁰ as well as "a number of citizens, whether amounting to a majority or minority of the whole,

604. As would have many, or even most, decisions of the Warren Court.

605. See L. Brent Bozell, *Should We Impeach Earl Warren?*, NATIONAL REVIEW, Sept. 9, 1961, at 155; Charles W. Morton, *Impeach Earl Warren*, ATLANTIC MONTHLY, Apr. 1967, at 118.

606. See Joe Maxwell, *'Til Race Do Us Part?*, (visited Feb. 8, 2000) <<http://www.strang.com/nm/stories/nf197101.htm>>. Of course, South Carolina voters did recently repeal the anti-miscegenation language in its constitution which, though unenforceable, remained even after *Loving*. The measure which was presented to the voters, Amendment No.4, read:

Shall Section 33, Article III of the Constitution of this State be amended by deleting the following sentence from the Constitution:

'The marriage of a white person with a Negro or mulatto, or person who shall have one-eighth or more of Negro blood, shall be unlawful and void'.

Proposed Amendments to the Constitution of South Carolina—November 3, 1998, (visited Dec. 4, 1999) <<http://www.state.sc.us/scsec/98/98ammend.html>>. Although it passed, almost 40% of the electorate favored keeping the language. In fact, six counties actually had a *majority* vote in favor of keeping it. *November 3, 1998 South Carolina Statewide General Election Results—Amendment #4*, (visited Dec. 4, 1999) <<http://www.state.sc.us/cgi-bin/scsec/r1.html>>.

607. See Maxwell, *supra* note 606.

608. See *id.*

609. Perhaps the most oft-lamented vehicle of Congress in this power struggle is the unfunded mandate.

610. THE FEDERALIST NO. 51 at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).

who are united . . . adverse to the rights of other citizens.”⁶¹¹ “Faction” was what he called it, and the concept is alive and well.⁶¹² Further it is typified by the debate over the rights of non-heterosexuals, specifically marital rights.⁶¹³

In light of the possibility that the federal statutory status of same-gender marriage could change with the party in control of Congress (assuming no successful challenge to the constitutionality of DOMA) as well as the equally-wobbly, piecemeal, state-by-state approach to gay and transgender rights in general, the only satisfactory solution to the same-gender marriage issue will be recognition that sexual orientation is a constitutionally suspect classification.⁶¹⁴

611. THE FEDERALIST NO. 10 at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961); Madison echoed these sentiments during the 1st Congress:

The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority.

1 Annals of Congress 437 (Joseph Gales ed., 1789).

612. See THE FEDERALIST NO. 10 at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961); SAMUEL H. BEER, TO MAKE A NATION—THE REDISCOVERY OF AMERICAN FEDERALISM at 256-58 (1993) (stating, “The heart of Madison’s case against the Confederation was the failure of justice in the small republic: its tendency to tyranny of the majority.”).

613. One commentator has pointed out that Madison failed “to appreciate the disproportionate influence that can be wielded on a national level by certain groups that may be relatively small in numbers but that are cohesive.” DAVID L. SHAPIRO, FEDERALISM—A DIALOGUE 79. Indeed, few people believe that the radical religious right are a “majority” (Moral or otherwise) but likewise, few will argue that their status as a political bloc-creature with financially secure, media-savvy tentacles that extend into every state is not scary to anyone running for political office. “Even scrupulous politicians are reluctant to oppose gay bashing because they reasonably fear a backlash because of their association with a disliked group.” ESKRIDGE, *supra* note 494, at 181.

Madison’s America did not have TV evangelists, political disinformercials or the internet. If it did, he may have formulated his thoughts on factionalism differently.

614. In light of how intertwined same-sex marriage and transsexualism have become following *Littleton*, the only rational legal definition of “sexual orientation” is that used in the Minnesota Human Rights Act, defining it as:

having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, *or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.*

MINN. STAT. § 363.01, Subd. 45 (1996) (emphasis added). The emphasized language specifically covers transgendered people. See *supra* Part II.E(4); Governor’s Task Force on Gay and Lesbian Minnesotans, REPORT at 49 (1995).

B) A New Suspect? Not Even in Vermont, Yet

A full discussion of sexual orientation as a suspect classification is beyond the scope of this article. However, I do feel compelled to address it to some extent simply for contextual purposes as the issue of equal protection was completely absent from *Littleton*.⁶¹⁵

The Fourteenth Amendment came into existence long after the Founding Fathers had passed from the scene.⁶¹⁶ But, the position of the courts “to guard the Constitution and the rights of individuals from the effects of those ill humors, which . . . sometimes disseminate among the people themselves, and which” materialize as “serious oppressions of the minor party in the community” was recognized by the framers.⁶¹⁷ The Fourteenth Amendment is, and was understood by both its supporters and opponents in the 1860s to be, a limitation on states’ rights.⁶¹⁸

A prime element of Chief Justice Warren’s opinion in *Loving* was the suspect classification which anti-miscegenation statutes drew upon: race. As Warren intoned, “At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the ‘most rigid scrutiny.’”⁶¹⁹ However, even the most gay-friendly opinion to date from the U.S. Supreme Court, *Romer v. Evans*, did not recognize sexual orientation as a “suspect class” worthy of such “rigid scrutiny.”⁶²⁰ Likewise, gender has never been deemed to be a suspect class, either by the Supreme Court or by constitutional amendment.⁶²¹

615. Though obviously not binding on Texas courts, shortly after the *Littleton* opinion was issued, the Supreme Court of Colombia recognized intersexed people as a specifically-protected minority. See Katie Szymanski, *Victory for Intersex People*, BAY AREA REPORTER, Nov. 5, 1999 (visited Nov. 5, 1999) <<http://www.ebar.com/barnnews.htm>>.

616. Even so, Madison recognized the potential for “abuse . . . to an indefinite extent” by the state governments. 1 Annals of Congress 438 (Joseph Gales ed., 1789). In the debates in the 1st Congress on the resolutions that would eventually be submitted to the states for ratification as the federal Bill of Rights, he expressed concern that some states had no bills of rights and others had bills that were either “defective” or “absolutely improper” in that they “limit [rights] too much to agree with the common ideas of liberty.” *Id.* at 439.

617. THE FEDERALIST NO. 78 at 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

618. See CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 377-87, 394-98 (1997).

619. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

620. 517 U.S. 620, 641 n.1 (1996) (Scalia, J., dissenting). A suspect class is a discrete class exhibiting immutable characteristics that is “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” Those so protected are race, ancestry and alienage. *Mass. Bd. of Retirement v. Murgia*, 427 U.S.

The Supreme Court observed, in *City of Boerne v. Flores*,⁶²² that there has not been invidious discrimination against religion⁶²³ over the last forty years that would legitimately warrant sweeping congressional intervention into state and local sovereignty via the Religious Freedom Restoration Act, an attempt to legislatively define the scope of the right of free exercise of religion.⁶²⁴ Similarly, there has been all but no discrimination *against* either heterosexuals as a group or heterosexual marriage.⁶²⁵ Still, the Judiciary Committee report on DOMA repeatedly referred to the prospect of legally recognized same-gender marriages as an “assault against traditional

307, 313 n.3 (1976) (citations omitted); *see also* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441-46 (1985) (using various forms of the word ‘immutable’).

621. This is significant because the Hawaii decisions were predicated, not on sexual orientation, but on sex—which does have higher protection under the Hawaii Constitution, though lessened somewhat by the amendment which nullified the *Baehr* litigation outcome. An effort to add an Equal Rights Amendment to the U.S. Constitution, of course, failed. However, the Texas Constitution does contain an equal rights amendment. *See infra*, Part VI.B(1).

The Vermont Supreme Court, in *Baker*, also refused to take the step of recognizing sexual orientation as a suspect classification. *See Baker v. Vermont*, 744 A.2d 864, 873, 878 (Vt. 1999). However, the reaction of some opponents of same-sex marriage, such as Gary Bauer, who declared the court’s decision to be “in some ways worse than terrorism” should, perhaps, give pause to those who have been unwilling to take the suspect classification step, as Bauer’s words shed some light on just how deep the irrational hatred of homosexuality runs in many, perhaps even most, political opponents of equality for sexual minorities. ADVOCATE HEADLINES, (visited Dec. 31, 1999) <<http://www.advocate.com/html/news/122899/122899news04.html>>.

622. 117 S. Ct. 2157, 2169 (1997) (quoting from hearings on RFRA: “deliberate persecution is not the usual problem in this country”).

623. Though the right to worship is protected in the First Amendment, religion is not a suspect class. However, it does receive statutory protection via Title VII. *See* U.S. CONST. amend. I; 42 U.S.C. § 2000e-2(a)(1) (1964) (providing employment protection based on “race, color, religion, sex, or national origin”).

624. While DOMA, 28 U.S.C. § 1738C (1996) and 1 U.S.C. § 7 (1996), is predicated on Article IV, § 1, and RFRA, 42 U.S.C. § 2000bb (1983), was predicated on § 5 of the 14th Amendment, a mention of *Boerne*, 117 S. Ct. at 2157, is warranted here because it is a recent analysis by the Supreme Court of the alleged pervasiveness of discrimination based on a particular classification—religion. This is doubly important because, not only must the case still be made that there is invidious discrimination based on sexual orientation, but also increasingly claims by conservative Christians that recognition of gay and transgender rights is de facto persecution of those who have religious views which frown on homosexuality and transsexualism must be countered.

625. Extremely rare, though not unheard of, is some form of discrimination by non-heterosexuals against heterosexuals. *See* Jan Glidewell, *Rights Safe For One Are Safe for All Series*, ST. PETERSBURG TIMES, Dec. 18, 1993 at 1 (straight waitresses fired when bar shifts to a gay clientele); *see also* THE FEDERALIST NO. 78, at 495 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (“[N]o man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day.”).

heterosexual marriage.”⁶²⁶ However, there was no evidence to show how recognizing an excluded group’s right to participate in the legal institution of marriage would restrict the rights of heterosexuals to do as they are currently allowed to do.⁶²⁷ That there has been, and is still, serious discrimination, not just in actions but in attitudes, against homosexuals and transsexuals, not just in the quest for marriage legitimization⁶²⁸ but overall, cannot legitimately be questioned.⁶²⁹ The aforementioned Committee report even overtly asserted that heterosexual marriage enjoys “preferential status.”⁶³⁰

Recognition of sexual orientation as a suspect classification may well be the vehicle to overturn DOMA as well as state laws against consensual same-gender sexual activity. As noted above, homosexuals have been, and continue to be, the subject of both public and private discrimination.⁶³¹ However, whether sexual orientation is

626. H.R. REP. NO. 104-664, at 4 (1996), *reprinted in* U.S.C.C.A.N. 2908; same gender marriage is a threat “to marriage and families.” *Id.* at 14, *reprinted in* U.S.C.C.A.N. 2918; “marriage is embattled.” *Id.* at 15, *reprinted in* U.S.C.C.A.N. 2919.

The logic of statements such as

The result of cutting off our cultural understanding of and commitment to heterosexual marriage may well be to make marriage a less realistic option, *and perhaps even practically unavailable*, to many in our society.

which was contained in the ACLJ’s amicus brief in the ongoing Vermont same-sex marriage litigation simply is never analyzed. Precisely how *does* one lead to the other? Jay Alan Sekulow, et al., *Same-Sex Marriage—ACLJ Amicus Brief in Baker v. Vermont* (visited Dec. 4, 1999) <http://www.aclj.org/issues_samesex_brief.html> (emphasis added).

627. See H.R. REP. NO. 104-664, at 1-45 (1996), *reprinted in* U.S.C.C.A.N. 2905-47. The report also repeatedly makes use of the state sovereignty argument. Logic does not provide a link from one to the other, however.

628. And the ramifications affect not simply non-heterosexuals. California Gov. Pete Wilson vetoed a bill providing funding authority to the California State Bar. One stated reason was a resolution favoring same-sex marriages adopted at a California Bar convention. See Zachary Coile, *Governor Cripples Operations of State Bar*, S.F. EXAMINER, Oct. 14, 1997 at A3.

629. One of the State of Colorado’s stated interests in justifying Amendment 2 linked homosexuality to “a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass.” Evans v. Romer, 63 F.E.P. Cases 753, 759 (Colo Dist. Ct. 1993) (quoting from the State’s brief); *Thomas Road Baptist Church* (visited July, 19, 1997) <www.inmind.com/people/trbc/stand.html> (showing that the web site of Jerry Fallwell’s church intones “[t]he homosexual lifestyle destroys lives (broken marriages, families torn apart, sexually transmitted diseases, loneliness)”).

630. H.R. REP. NO. 104-664, at 15 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2919.

631. And there can be little doubt that the claim that homosexuals are better off financially than heterosexuals is one of the most illegitimate justifications imaginable for disputing the existence of such discrimination. See *Nazi Anti-Jewish Speech v. Religious Right Anti-Gay Speech: Are They Similar?*, (visited Dec. 4, 1999) <<http://www.wiredstrategies.com/hitler.html>> (quoting Family Research Council representative Robert Knight, in testimony before the Senate Labor Committee in 1994 as stating, “Homosexuals are among the most economically advantaged people in our country.”); *Stills and Images from Der ewige Jude*, (visited Dec. 4,

an immutable characteristic⁶³² and whether nonheterosexuals are sufficiently politically powerless to warrant “suspect class” protection are both the subject of debate in the judicial arena.⁶³³ Until the Supreme Court recognizes sexual orientation as a suspect class, we are left with the eloquent words of academics such as William Eskridge:

Classifications according to sexual orientation have no legitimate role in neutral governance. In the past, such classifications have only served invidious goals. The equal protection clause has in the past been a politically necessary means of cleansing American law of classifications based on race, sex, and ethnicity and is just as needed against sexual orientation classifications today.⁶³⁴

Such classifications should indeed “follow the dodo bird’s path to extinction.”⁶³⁵

VI. MORE OF WHAT WAS NOT ARGUED BUT SHOULD HAVE BEEN

As the recent vintage of the federal and state DOMAs and the use of the federal DOMA in *Littleton* indicate, the dodo bird alluded to by Eskridge, unfortunately, still has viability. What aids its continued existence, sadly, are lost opportunities to put significant issues into play in the judicial arena. The *Littleton* litigation is rife with lost opportunities. Christie Lee Littleton’s attorneys relied on procedural arguments almost to the exclusion of others, many of which could have prevented the decision of October 27, 1999, from

1999) < <http://www.holocaust-history.org/der-ewige-jude/stills.shtml> > (noting that the 1940 Nazi propaganda film *The Eternal Jew* stated, “The average wealth of Germans was 810 marks; the average wealth of Jews 10,000 marks.”).

632. See Paisley Currah, *Searching for Immutability, in A SIMPLE MATTER OF JUSTICE?* 51-90 (Angelia R. Wilson ed., 1995); ESKRIDGE, *supra* note 494, at 178.

633. Progress cannot be ignored. However, those opposed to gay rights suggest that facts such as the 46.6% that voted against Colorado’s Amendment 2 are justifications for leaving gays out in the cold. See *Amendment 2 Goes on Trial*, COLO. SPRINGS GAZETTE TELEGRAPH, Jan. 12, 1993, at A6. Even the Colorado court that declared Amendment 2 to be unconstitutional noted: “Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness.” *Evans v. Romer*, 63 F.E.P. at 761. If a statewide referendum which passed by the same 53.4%-46.6% margin negatively affected, to the same extent that Amendment 2 would have negatively affected homosexuals, a specific racial or ethnic group comprising only four percent of the population, would courts suddenly withdraw suspect class status due to a lack of powerlessness? I think not.

634. ESKRIDGE, *supra* note 494, at 181.

635. *Id.*

being as disastrous as it was for all of those who fall outside of the false “XX = female, XY = male” duality.⁶³⁶

A. *Equity*

Texas courts sit in both law and equity.⁶³⁷ A court applying principles of equity is “not bound by cast-iron rules” but, rather, “[is] governed by rules which are flexible and adapt themselves” to particular, indeed unique, circumstances.⁶³⁸ Equitable principles “are designed to alleviate harsh results caused by rigid application of legal principles.”⁶³⁹ There are few results in law harsher than the one elucidated in *Corbett*.

Texas courts have taken pains to note that equity jurisdiction should not be exercised whimsically or arbitrarily. Indeed, equity should not be used unless the court can base its “decree upon some rule that is equally applicable to all circumstances of the kind.”⁶⁴⁰ The relief sought by a transsexual when she goes before a judge seeking state recognition of her gender transition via legitimately equitable interpretations of pertinent provisions of the Texas Health & Safety and Family Codes is not any type of special right or whimsical request. It is simply a reasonable interpretation of Texas law which is, and, if not extinguished by the ultimate outcome of Ms. Littleton’s litigation, will continue to be generally applicable to anyone in Ms. Littleton’s situation.

The absolute limit of the equity jurisdiction of Texas courts was stated rather succinctly in *Edinburg Irr. Co. v. Ledbetter*: equity simply “may not enforce” what is “forbidden.”⁶⁴¹ Texas courts have never specifically contradicted this basic assertion. Even operating

636. Again, this is not to say that they totally ignored issues such as the effect of adopting the *Corbett* rule on intersexed people and the potential for voiding all Texas marriages involving transsexuals. See *Pesquera*, *supra* note 136, at 1A. However, the lack of inclusion of these issues in any detail as well as the absence of a constitutional attack on the trial court ruling is dumbfounding.

637. See TEX. GOV’T CODE ANN. § 24.008 (West 1998) (stating that District courts “may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity”).

638. *Warren v. Osborne*, 154 S.W.2d 944, 946 (Tex. App. 1941, writ ref’d w.o.m.).

639. *Slaughter v. Cities Service Oil Co.*, 660 S.W.2d 860, 862 n.* (Tex. App., 1983, no writ).

640. *Morales v. State*, 869 S.W.2d 941, 944 (Tex. 1994) (quoting HENRY HOME, PRINCIPLES OF EQUITY 46 (2d ed. 1767), specifically to refute a claim that Texas civil courts have unlimited jurisdiction to declare a criminal statute to be unconstitutional).

641. 286 S.W. 185, 187 (Tex. Comm’n. App. 1926, judgment adopted in part, rev’d in part).

under the arguably incorrect assumption that same-sex marriages are absolutely forbidden under Texas law, prior to *Littleton v. Prange*, there was nothing in Texas statutory or decisional law forbidding either the recognition of a transsexual's post-transition gender or marriages that transsexuals may enter into post-transition.

Although the above argument could also be made with regard to Ms. Littleton's marriage, for my reasons noted in Part IV.G, the wiser move would have been to use an equitable argument to support the validity of the ill-advised gender-transition court order of August 7, 1998, perhaps using the *In re Erickson* reasoning, noted in Part II.E(1)(a).⁶⁴²

However, this was not done.

B. *The Constitution, et al.*

1. State

I have focused thus far almost exclusively on laws which deal with marriage and birth certificates. However, Ms. Littleton's actual lawsuit was brought pursuant to the Texas wrongful death and survival statutes.⁶⁴³ It was the statutory limitation upon who can bring such an action which gave Dr. Prange the opportunity to make Ms. Littleton's past an issue.

Just a few weeks after the *Littleton* decision was issued, the Fort Worth Court of Appeals held that those same statutes are unconstitutional as applied on the basis of gender discrimination. In that instance, they had been applied to prevent the father of a viable fetus, whose viability was destroyed by negligence, from recovering damages for mental anguish while the mother of the same fetus was permitted to recover.⁶⁴⁴ This fetal case is not directly analogous to *Littleton* at all. However, it does give one pause to wonder why no effort was made to go after the wrongful death and survival statutes themselves, using the Texas Constitution as a weapon.

The challenge in the Fort Worth case, *Parvin v. Dean*, was based on the equal rights amendment of the Texas Constitution, which reads, "Equality under the law shall not be denied or abridged because of

642. 547 S.W.2d 357, 359-60 (Tex. App. 1977, no writ).

643. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.004(a) (West 1977) (limiting those who can bring an action to the "spouse, children, and parents" of a decedent); TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (West 1977).

644. See *Parvin v. Dean*, 7 S.W.3d 264, 267-68 (Tex. App. 1999, no pet. h.).

sex, race, color, creed, or national origin,”⁶⁴⁵ language which has been held to be “more extensive” and to provide “more specific protection” than both the due process and equal protection guarantees of both the Texas and United States Constitutions.⁶⁴⁶ In light of the almost complete reliance on Ms. Littleton’s being transsexual as the basis for her appeal, an argument that she was treated differently than the spouse of a male who was designated female at birth certainly could not have hurt.

2. Federal

As noted in Part V.C(7), sexual orientation is not a constitutionally suspect classification, yet even under a rational basis analysis, Colorado’s Amendment 2 was held to deny equal protection.⁶⁴⁷ Moreover, even if the federal Equal Rights Amendment had been ratified, federal court interpretation of Title VII’s “because of sex” language as not providing protection because of a change of sex indicates that the ERA might not have been held to protect transsexuals anyway.⁶⁴⁸ The Texas ERA’s effect on transsexuals’ rights still is an unanswered, and, as yet unasked, question.

Still, as noted in Part II.E(2), transsexuals have won significant favorable rulings in constitutional challenges in both state and federal courts, and one of those rulings was in Texas. Both *City of Chicago v. Wilson*⁶⁴⁹ and *Doe v. McConn*⁶⁵⁰ held crossdressing ordinances to be inapplicable to transsexuals. Yet, these decisions are absent from the *Littleton* litigation.⁶⁵¹

In *Darnell v. Lloyd*, a federal district court held that absolute denial by the state of Connecticut of a post-operative male-to-female transsexual’s request for an amended birth certificate stated a claim for a federal civil rights violation.⁶⁵² Although Judge Blumenfeld

645. TEX. CONST. art. I, § 3a.

646. *In re Unnamed Baby McLean*, 725 S.W.2d 696, 698 (Tex. 1987).

647. *See Romer v. Evans*, 517 U.S. 620, 625 (1996).

648. *See Ulane v. Eastern Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984).

649. 389 N.E.2d 522 (Ill. 1978).

650. 489 F. Supp. 76 (S.D. Tex. 1980).

651. *See* Brief for Appellant at v-vii, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

652. 395 F. Supp. 1210, 1212 (D. Conn. 1975). This particular opinion’s escaping the view of all concerned with the *Littleton* litigation is almost understandable as the word ‘transsexual’ appears nowhere in it, though “‘sex change’ operation” does. *Id.* at 1213. Of course, it has been mentioned in several articles on transgender issues, including Kristine W.

somewhat chided the nonextensiveness of the exploration of the transsexual's "exact anatomical condition at birth and all of the details of her operation and present circumstances" at the state administrative hearing, he refused to accept a two-page response to the transsexual's court petition which did little more than call her claims frivolous.⁶⁵³ Blumenfeld stated rather bluntly the aspects of life for which a birth certificate which accurately reflects a person's sex is necessary, including obtaining a passport and the ability to marry, "suggests that the Commissioner must show some substantial state interest in his policy of refusing to change birth certificates to reflect current sexual status unless that status also obtained at birth. So far the defendant has shown *no state interest in this policy whatsoever*."⁶⁵⁴ Apparently, the Commissioner, despite a statute arguably more restrictive than that of Texas⁶⁵⁵ would grant some requests for birth certificate changes not specifically authorized by the statute (in her particular case, her certificate had been amended to reflect her female name), but would not approve of a post-operative transsexual's request to change her gender status.⁶⁵⁶ Of course, the downside of this arguably positive ruling is that, ultimately, it was to be contingent on "the record as more fully developed establish[ing] that she is presently 'female.'"⁶⁵⁷ Sadly, such a record development would allow the decision-maker to be bombarded with *Corbett*, *Ladrach* and, now, *Littleton*.

As a transsexual and as a legal practitioner, I find fault with both the court and Littleton's attorneys for not addressing, even in passing, the possibility that, even under the type of anti-same-sex marriage regime that the court was all-too-eager to uphold, a ban on same-sex marriages might simply be constitutionally inapplicable to a transsexual. Recall the bold statement from *Wilson* that "the aesthetic preference of society must be balanced against the individual's well-being."⁶⁵⁸ The failure to use this in an effort to craft an argument that proscriptions against same-sex marriage might be inapplicable to transsexuals is absolutely unconscionable.

Holt, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMPLE L. REV. 283, 292 n.54 (1997).

653. *Darnell*, 395 F. Supp. at 1213.

654. *Id.* at 1214 (emphasis added).

655. *See id.* at 1213 n.5; *see* CONN. GEN. STAT. ANN. § 19-16 (West 1969) (repealed 1978).

656. *See Darnell*, 395 F. Supp. at 1213 n.6, 1214.

657. *Id.* at 1214.

658. *City of Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978).

Blame-gaming aside, an inapplicability ruling could have easily been harmonized by any court insistent on maintaining the special rights of opposite-sex couples to marry with the anti-same-sex marriage rulings that the court cited.⁶⁵⁹ I specifically point out the Minnesota decision, *Baker v. Nelson*.⁶⁶⁰ The court cited that *Baker* decision, not to be confused with the current Vermont case, as one of the cases which “soundly” rejected same-sex marriage.⁶⁶¹

That characterization is accurate.

However, in deciding that case, the Minnesota Supreme Court had the opportunity to cast aspersions on the rights of transsexuals and intersexed people to marry, but it did not do so. Among numerous other arguments in support of their attempted application for a marriage license, the gay male couple in *Baker* threw in transgender theories to support their claim that they should be issued a marriage license.⁶⁶² Those theories were not addressed in the court’s opinion, though. That court’s refusal to do so should be viewed as at least some indication that it did not see gender variant people marrying while post-transition as a threat to the special marital rights and equal benefits of opposite-sex couples.

The couple argued that a prohibition against same-sex marriage:

[L]acks a rational basis because it assumes that all who are permitted to marry fall either into the category of “male” or “female,” and that the sex of marriage partners can thus be regulated by the State. In fact, the assumption is defective. Considerable research has shown that many

659. This should not be read as approval of those special rights. In a hastily prepared informal letter brief to the Fourth Court of Appeals urging reconsideration of the *Littleton* decision, I made the following statement:

The marital interests of transsexuals are simply not the same as those of homosexual males and females and, under a steadfastly anti-same-sex marriage regime, should not be treated the same.

Amicus Brief of Katrina Rose at 13, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (Request for Rehearing).

This will doubtlessly be seized upon by those who seek to exclude transgendered people from the quest for equality by sexual minorities as ‘proof’ that we do not belong. Far to the contrary. This argument was made *after* the court’s ruling—a ruling which proves that, in the eyes of a legal system that not only will not make any effort to interpret existing law in favor of *homosexuals* but also will judicially create a standard which will arguably suck tens of thousands more Texans (transsexuals and intersexuals alike) into the state’s anti-same-sex marriage morass, a queer is a queer.

660. 191 N.W.2d 185 (Minn. 1971).

661. See *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999, pet. denied).

662. See Brief for Appellant at 66-68, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (No. 43009).

individuals who marry are not in fact members of the sex class in which they are presupposed to be grouped, but rather are a cross between the “two” classes.⁶⁶³

Indeed, the aforementioned hermaphrodite client of mine had been married to a woman prior to beginning her transition.⁶⁶⁴ The *Baker v. Nelson* couple’s argument proceeded to detail some chromosomal specifics of intersexual issues:

“[Two percent of] newborn males have an XXY sex chromosome constitution or some other sex chromosome anomaly compatible with male phenotype,” rather than the “normal” male constitution of XY or “normal” female constitution of XX. . . . [Data indicates] that the determination of one’s gender involves a lot more than looking at the shape of one’s genitals as the State would have the Court believe.

. . . .
Even the concept of assigning male and female roles to individuals will not withstand nature’s way of ignoring theory; for an individual with, say, male outsides and female insides who is assigned the role of a male, might just decide that “he” wants to be a “she” and would have all the legal credentials to do so, at least as defined by the legislature and the lower court here. That might, of course, be of no particular concern to this Court unless “she” already happens to be married to another “she.”⁶⁶⁵

Obviously, the theoretical “she” described in that excerpt would be medically classified as intersexed yet could be prohibited from marrying a male under *Littleton* even though she is chromosomally female. Both *Littleton*’s attorneys and the San Antonio Court should have made some effort to go behind the cases which were cited. But, even more so, they should have been willing to think about the ramifications of “chromosomes = sex” on family law at large.

663. *Id.* at 66.

664. And, no legal mechanism exists in Texas or, apparently, any of the states which specifically recognize gender transition via statute that would have forced her and her wife to divorce after transition had they chosen to stay together. In fact, a number of other clients of mine have remained married to their respective spouses after transition, arguably ‘creating’ same-sex marriages from opposite-sex ones. Another question entirely will arise should any of them move to a state that might somehow recognize the Texas court order which, though now of questionable validity, recognizes the transsexuals spouse’s gender transition yet does have a state Defense of Marriage Act.

665. Brief for Appellant at 66-68, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (No. 43009) (quoting F. Gianelli, *Human Cytogenetics*, J. MED. WOMEN’S FEDERATION 27 (issue unknown, 1965)).

C. *Fear of the Reality of a Knee-Jerk Adoption of Corbett in Texas*

As noted above, my true hermaphrodite client had been married while legally classified as a male. Her divorce from her wife was, though not devoid of stress, amicable. However, it was a marriage between two people with XX chromosomes. Was that marriage valid?

Certainly, I do not feel that chromosomes should be the determining factor. The tale of XY female Maria Patino, detailed in Part II.F(2)(a)(i), should convince even those who are uncomfortable with transsexualism that “chromosomes = sex” is a horrifically faulty standard.⁶⁶⁶ Yet, no one should be surprised if, in post-*Littleton* Texas family law, an attorney who is desperate to find an edge while representing a husband in a nasty, high-dollar divorce action, will ask the question of the wife that was asked of Christie Lee Littleton: “Were you born a woman?”⁶⁶⁷ Even if she says that she was not born male, and, in so answering, is being truthful to the best of her knowledge, *Littleton* stands for the proposition that a demand could be made for a chromosome test. If that desperate attorney is trying to protect a six or seven figure community estate from being subject to a “just and right” division, then expending a few hundred dollars on a chromosome test will be a worthwhile gamble.⁶⁶⁸ And, if, like Maria Patino, that wife turns out to have a Y chromosome, the husband’s attorney would move to have the marriage declared void.

I would. It would hurt, but I would feel an ethical duty to do so. I may be a transsexual, but I also am an attorney who vigorously represents my clients to the best of my ability.⁶⁶⁹

This type of “‘chromosomal’ defense” to the validity of marriages *will* become commonplace if *Littleton v. Prange* is allowed to stand.⁶⁷⁰ It will only be a matter of time before either an unsuspecting XY wife submits to a chromosome test being *oh so sure* that she’s XX or a judge, being asked to compel a wife to take a chromosome test, looks at that wife and has some doubts as to

666. ‘Uncomfortable’ as contrasted with those who are arguably irrationally paranoid such as Janice Raymond. *See supra*, Part II.F(2)(b).

667. Brief of Appellant at Appendix, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV).

668. *See* TEX. FAM. CODE ANN. § 7.001 (West 1997).

669. And, in my short career as a sole practitioner in Texas, prior to accepting a job in Minnesota, I have, in addition to representing transsexuals in gender transition recognition proceedings, represented a non-transgendered person *against* a transgendered person as well as one transgendered person against another.

670. *See* Pesquera, *supra* note 136, at 1A.

whether the wife “is” or “isn’t,” and subsequently grants such a request over her objection.

Now, envision the gender-converse of the above scenario. Suppose that the wealthier of the two spouses is the wife and that she is trying to avoid any division of what she thinks is all hers. Suppose further that she demands a chromosome test of her husband. And, suppose further still, that the husband is like the aforementioned client of mine insofar as, unbeknownst to him, he possesses the XX chromosome pattern. I assert that the first time that a Texas male finds out, in the context of a nasty divorce, that he is chromosomally female, violence will result.

And, it will all be directly traceable to Chief Justice Phil Hardberger’s unnecessarily reaching the issue of Christie Lee Littleton’s *current* legal gender in *Littleton v. Prange*, and, beyond that, the shoddy manner in which the entire issue of gender variance was presented by Ms. Littleton’s attorneys, allowing him to do so.

VII. CONCLUSION

A. *Summation*

As Justice Holmes stated, “It is revolting to have no better reason for a rule of law than that so it was laid down in the reign of Henry IV,” when “the grounds upon which it was laid down have vanished long since.”⁶⁷¹ If this is so, then it should be repugnant to the American notion of liberty to follow a non-American rule of law laid down even as recently as 1971 whose basis for continued viability stems from possible political posturing by a single probate judge in Ohio and whose original basis for existence in the United Kingdom has been so eroded that continued application approaches an affront to equal protection.⁶⁷² It is noteworthy that equal protection is an American constitutional principle that British courts are not obligated to address except where mandated by statute. The magnitude of the repugnance is even greater if there is even a marginal amount of validity in April Ashley’s allegation that Judge Ormrod’s opinion in *Corbett* was geared, not toward protecting the institution of

671. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

672. See Hall, *supra* note 139, at 3 (the XY-chromosomed Joella Holliday being permitted to amend her birth certificate); Fitzpatrick v. Sterling Housing Association Ltd., 4 All E.R. 705, 707 (H.L. 1989) (allowing the same-sex partner of a deceased man to be considered a “surviving spouse” for purposes of succession of tenancy).

heterosexual marriage, but rather the insularity of British aristocracy.⁶⁷³

It has been noted among those who deal with transgender legal issues that United States federal courts have “gone out of their way to find that existing federal non discrimination laws do not apply to transgendered individuals.”⁶⁷⁴ The same sentiment is becoming applicable regarding the application of family law that does not specifically address non-XX females and non-XY males. As Littleton’s attorney Dale Hicks rightly noted, transsexuals exist as a segment of society, and “[t]hey are going to marry.”⁶⁷⁵ Decisions such as *Littleton v. Prange* indeed condemn people like Christie Lee Littleton “to live outside the bounds and norms of society.”⁶⁷⁶ Hicks, irrespective of whether he consciously desired to be saddled with such a responsibility when he took on what likely appeared to be nothing but an ordinary tort claim, seems to have been aware that he was representing the rights of all people in Texas whose chromosomal patterns are neither XX nor XY, when he represented Ms. Littleton.

Perhaps he and Ms. Littleton’s legal team had the best of professional intentions when they began this litigation. However, I reiterate my contention that, because she had no government recognition of her gender transition during the course of her marriage to Jonathon Littleton, this was a case that never should have been filed. From personal experience with representing transsexuals, I can assure the reader that no such litigation is easy; nor is it ever likely to be. However, under the pertinent law of Texas and Kentucky as it existed during her relationship with Jonathon Littleton, Christie Lee Littleton’s suit against Dr. Mark Prange was all but unwinnable.

Gay couples who have been litigating for recognition of same-sex marital equality essentially have had nothing to lose in those battles. Legal recognition of gender transition, where it exists, has been achieved with much hard work by transgender activists and their supporters, both gay and straight, democrat and, yes, even republican. Had *Baker v. Vermont* resulted in a judicial boot to the head, the Vermont plaintiffs would be in no worse of a legal position than they

673. See FALLOWELL AND ASHLEY, *supra* note 366, at 216.

674. Stephen Whittle, *Gemeinschaftsfremden—Or How to Be Shafted By Your Friends: Sterilization Requirements and Legal Status Recognition for the Transsexual*, in LEGAL QUERIES 42, 47 (Leslie J. Moran, et al., eds.) (1998) (quoting from the *Proceedings from the Second Conference on Transgender Law and Employment Policy* (1993)).

675. Pesquera, *supra* note 136, at 1A.

676. *Id.*

were when the litigation began. *Littleton v. Prange* did not simply result in no gain for Christie Lee Littleton in her wrongful death action. It took everything away, not only from her but also from thousands of people who knew nothing of her litigation until an article about it appeared in the San Antonio Express-News *after* oral arguments had taken place at the Fourth Court of Appeals.⁶⁷⁷

My fundamental interests, and the similar interests of every transsexual and every person whose chromosomal patterns are neither XX nor XY, were before the Court of Appeals in 1999, and those interests were not adequately represented by the overall manner in which the entire issue of gender variance was put before the court. Moreover, justice was not served by the court's holding. It was truncated not only by what was said in the majority and the concurrence, but also by what was *not* said.

B. Epilogue

"I'm a woman. Must my life be ruined," asked a male-to-female transsexual named Viki thirty years ago, "because nature gave me a male's organs?"⁶⁷⁸ A concurrence in a personal jurisdiction dispute decided by the Beaumont Court of Appeals shortly before the *Littleton* decision was issued adopted the standard of "Tain't fair" in holding that subjecting out of state insurance guaranty funds to jurisdiction in Texas courts did not comport with due process.⁶⁷⁹ "Tain't fair" is a rather accurate characterization of what happened to the rights of all transsexuals, not simply Christie Lee Littleton, as a result of *Littleton v. Prange*.

And, I cannot stop by saying that it was simply not fair to transsexuals and the intersexed. It was not fair to the fact-finding function of the courts. Perhaps the greatest tragedy is that the Court of Appeals made the wrong decision even within the construct of its willingness to deny the medical reality of an XY-chromosomed person's transition from male to female.

Keep in mind critical words from the *Corbett* decision:

Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most

677. See *id.*

678. Roland H. Berg, *The Transsexuals—Male or Female?*, LOOK, Jan. 27, 1970 at 29, 30.

679. See *G.E. v. California Ins. Guaranty Co.*, 997 S.W.2d 923, 931 (Tex. App. 1999, pet. requested) (Stover, J., concurring).

severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision.⁶⁸⁰

Justice Angelini acknowledged this difficulty in her concurrence.⁶⁸¹ However, she blithely assumed that the court was "not presented with such a case at this time."⁶⁸²

And therein lies the problem.

Hardberger relied on the general principle of "no genuine issue of material facts" standard as the backbone for determining whether a movant is entitled to judgment as a matter of law.⁶⁸³ In determining whether a fact exists that is sufficiently material so as to preclude summary judgment, evidence which favors the nonmovant is taken as true and "all reasonable inferences are indulged in favor of the nonmovant."⁶⁸⁴

However, instead of attempting to analyze the trial court record for a factual issue that might be in need of determination, Hardberger smothered the facts, most significantly, the lack of one specific fact, in condescending rhetoric, speaking of the "many fine metaphysical arguments lurking about" and the "misty fields of sociological philosophy."⁶⁸⁵ In so doing he either ignored or failed to consider that there is something missing between his supposition and his conclusion. He supposed, "The male chromosomes do not change with either hormonal treatment or sex reassignment surgery.

680. *Corbett v. Corbett*, 2 All E.R. 33, 48-49 (P. 1970).

681. *See Littleton v. Prange*, 9 S.W.3d 223, 231-32 (Tex. App. 1999, pet. denied) (Angelini, J., concurring).

682. *Id.* at 232 (Angelini, J., concurring).

683. *Id.* at 229 (citing *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985)).

684. *Id.* at 230 (citing *Nixon*, 690 S.W.2d at 548-49).

685. *Id.* at 231.

Biologically a post-operative transsexual is still a male.”⁶⁸⁶ On the basis of that, he concluded, “Christie was created and born a male.”⁶⁸⁷ He obviously assumed that Christie Lee Littleton has the XY chromosome pattern. However, *nowhere* in the Court of Appeals’ opinions, the parties’ briefs, or the trial court stipulations is there any mention of what chromosome pattern *actually* is contained in her genes.⁶⁸⁸ Christie stated, “When I was ten years old, I was taken to a physician by my mother. He prescribed male hormones for me in an effort to overcome my feminine tendencies. That was unsuccessful. . . . I never functioned as a male before or after my surgery in 1979.”⁶⁸⁹ That statement, with no evidence to the contrary in the record, presents a fact question as to whether there is some form of intersexual condition involved.⁶⁹⁰

However, the court, perhaps having a premonition of the upcoming *Baker v. Vermont* decision, felt such a need to maintain an anti-same-sex marriage posture in Texas that it issued a decision which will allow a war of challenges to the federal Defense of Marriage Act to be fought in Texas courts, even before the Vermont Legislature, as directed by *Baker*, decides whether to create separate-but-equal status for same-sex couples or to make marriage a truly “common benefit” for all people in that state.⁶⁹¹

686. *Id.* at 230.

687. *Id.* at 231.

688. During most of the time that I spent preparing this article, I wondered if I had simply missed something in all of the *Littleton* documents. However, on Jan. 5, 2000, Sarah DePalma of TGAIN notified me via e-mail that she had spoken with Ms. Littleton. In that e-mail, DePalma stated the following:

She verified to me that at no time was she ever asked to take a chromosome test. She has not had a test done since her trial either. I asked her if that issue was ever raised by Dale Hicks and her answer was a definite no. In fact, she even asked me if that was an important issue.

E-Mail from Sarah DePalma, Director, TGAIN, to Katrina Rose, Author (Jan. 5, 2000) (on file with author); Sarah DePalma, *Littleton Update from TGAIN*, TGAIN E-MAIL PRESS RELEASE (Jan. 14, 2000) (on file with author).

689. Brief of Appellant at Appendix, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999, pet. denied) (No. 04-99-00010-CV) (Affidavit of Christie Lee Littleton, dated Aug. 10, 1998).

690. Even the arguably transphobic rubric of *Corbett* allowed that the question of whether a transsexual has some sort of intersexual condition was a fact issue, though Ormrod felt, possibly rightly considering that April Ashley’s chromosome pattern had been established to be XY, that she had not established “the factual basis for the Klinefelter Syndrome or any other hormonal disorder.” *Corbett v. Corbett*, 2 All E.R. 33, 44 (P. 1970).

691. See *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999) (quoting from VT. CONST., Ch. I, art. 7).

While the *Baker* court actually deferred to the legislature, deciding that there was an equal protection issue afoot, but leaving to the legislature which of two paths to take, the *Littleton* court actually usurped legislative power even though it claimed not to be doing so. Although Chief Justice Hardberger's opinion could be viewed as being politely respectful of Ms. Littleton's gender identity,⁶⁹² the legal effect was no more respectful of her, other transsexuals, or intersexed people than the matter-of-fact refusal to acknowledge gender transition exhibited by ultra-right-wing extremists.⁶⁹³ It was not deference to the legislature. It was a specific judicial adoption of a "chromosomes = sex" standard which the Texas legislature long has had the opportunity to apply to transsexuals via language that would specifically limit the application of the Texas Health and Safety Code⁶⁹⁴ and the Texas Family Code.⁶⁹⁵

Opponents of equality for non-heterosexuals should equate the foregoing to "shame on the legislature." However, Chief Justice Hardberger, in bypassing the obvious narrow issue which would have operated to bar Christie Lee Littleton's wrongful death claim, opted for "shame on transsexuals."

As Mario Martino stated, "Unless you have actually experienced transsexualism, you cannot conceive of the trauma of being cast in the wrong body. It is the imprisonment of body and soul, and for some transsexuals life is largely a succession of disapprovals, disappointments, rejections."⁶⁹⁶ "Transgendered individuals," as Professor Greenberg notes, "do not fit conveniently into binary systems."⁶⁹⁷ Transsexuals in Texas had thought that they had found statutory language which, though not perfect, at least accommodated their existence, even if it did not guarantee their equal treatment with respect to employment and other issues which tyrannically majoritarian heterosexuals in Texas take for granted.

However, a lawsuit filed by a transsexual woman who, despite being born in Texas, having had her sex reassignment surgery in Texas, and having spent a substantial amount of her post-transition

692. See *Littleton*, 9 S.W.3d at 224.

693. See DALE O'LEARY, *THE GENDER AGENDA* 211 (1997) (referring to Kate Bornstein as "a man who had his genitals amputated and dresses up like a woman").

694. See TEX. HEALTH & SAFETY CODE ANN. § 191.028 (West 1992).

695. See TEX. FAM. CODE ANN. § 45.102 & 45.103 (West 1996).

696. MARIO MARTINO WITH HARRIET, *EMERGENCE—A TRANSSEXUAL AUTOBIOGRAPHY* xii (1977).

697. Greenberg, *supra* note 20, at 326.

life in Texas, never bothered to amend her Texas birth certificate to reflect her change of legal status *until* that gender status was challenged, has apparently thrown not only transsexuals, but all who are not simplistically classifiable by a binary gender regime, to the legislative lions.

C. *2001: A Legislative Odyssey*

Unlike Harlan Ellison's grotesque post-apocalyptic monstrosity who bemoans that he has no mouth but must scream, transsexuals are not monstrosities nor are we lacking mouths.⁶⁹⁸ We continually "cry for help and understanding" from the government.⁶⁹⁹ However, because of decisions such as *Littleton v. Prange*, we are forced to scream louder and louder to seek vindication of the legal status of our existence. What is lacking, however, are ears which will listen to the realities of transsexualism. Some states have listened. Others have not.

I quoted a Neil Young song in this article's introduction and bastardized it in this article's title. After looking at the San Antonio Court of Appeal's selective application of law and medical information as well as its apparent willingness to avoid addressing a critical factual issue, and knowing that the Texas Legislature is as unlikely to enact positive law respecting transsexuals' existence as it is to pass legislation prohibiting employment discrimination against homosexuals and transsexuals, the words of another Neil Young song come to mind:

*And once you're gone, you can't come back*⁷⁰⁰

The ability of a transsexual to marry in her post-transition gender may come back in Texas.⁷⁰¹ But, it will not come from an increasingly polarized elected legislative body which, by the next time it is scheduled to meet in 2001, likely will contain even more religious conservatives than it does now, all of whom doubtlessly will

698. See Harlan Ellison, *I Have No Mouth and I Must Scream*, in *I HAVE NO MOUTH AND I MUST SCREAM* 22, 41-42 (1967).

699. CHRISTINE JORGENSEN, *A PERSONAL AUTOBIOGRAPHY* 150 (1967) (quoting Dr. Christian Hamburger's summation of the plight of transsexuals).

700. Neil Young, *Hey Hey, My My (Into The Black)*, on *RUST NEVER SLEEPS* (Reprise 1979).

701. Of course, other courts of appeals as well as trial courts in other districts are not obligated to follow *Littleton*. See *Harrison v. Bass Enterprises Prod. Co.*, 888 S.W.2d 532, 538 (Tex. App. 1994, no writ) ("cases from other courts of appeals . . . are not binding authority on this court").

be dying to send an anti-same-sex marriage message to Vermont. And that message will likely be sent at the expense of transsexuals.

Immediately after the *Littleton* decision, San Antonio Express-News columnist Rick Casey asked, “Can anyone seriously imagine a majority of elected politicians choosing to take this issue on?”⁷⁰² I can, though likely it will be to codify *Littleton* rather than to overrule it.⁷⁰³

The damage has been done, not only to transsexuals but also to anyone whose chromosomes might involuntarily come under scrutiny.

I close with a thought for readers of this article, particularly married Texas readers.

You survived Y2K. It’s now the year 2000.

Do you know what *your* chromosome pattern is?

702. Casey, *supra* note 577, at 3A. The list compiled by Stephanie Belser contains some states that would seem to be out of place in a group of states enlightened enough to pass legislation designed specifically to validate transsexuals’ existence. See Belser, *supra* note 445, at 33. One might begin to wonder then, if states such as Alabama, Georgia, Louisiana and North Carolina can pass such statutes, then why can’t Texas? Well, Texas, as some fairly well-known commercials say, is like a whole other country—and becoming more so every day.

703. Republican State Rep. Robert Talton’s comment on Littleton’s case was “People have had enough of even don’t-ask-don’t-tell,” adding, “People are ready to go back to traditional values again,” an attitude which, if legislatively implemented, likely will not even attempt to address the issue of intersexuality. Flood, *supra* note 301.