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Article

"IF I FOLLOW THE RULES, WILL YOU MAKE ME A MAN?": PATTERNS IN TRANSSEXUAL VALIDATION

Jamison Green, PhD [a1]

I. Introduction

Transsexual people are those who change or wish to change their birth-assigned sex and/or gender through medical means, such as hormone replacement therapy and/or surgery of the genitalia and/or secondary sex traits. [1] The status of transsexual people in the law has been dictated historically by a taxonomy of binary sex and gender which posits only male and female as valid and essential physical constructs, with specific social roles. This paradigm is reinforced by social inequality between women and men, and by an assumption of heterosexuality as a behavioral norm. With a few exceptions, marriage and family law has tended to view transsexual people as neither men nor women, [2] or as members of the originally assigned sex class ***24** regardless of their current appearance or social function, [3] which places them in social positions subject to challenge.

Section I defines transsexual people and outlines their problematic status in law. Section II discusses historical debates concerning personhood and social difficulties with unusual bodies, and describes a brief social history of transsexual people. Section III reviews the relevant case law that has had the most impact on the legal status of transsexual people. Section IV provides an overview of the current federal position on transsexual people. Section V quickly reviews the aforementioned cases for the patterns of judicial reasoning that were applied, and comments on those patterns. Section VI introduces the sex-gender debate which complicates the lives of transsexual people and makes legal interpretations inherently difficult, including a discussion of the evolution in judicial interpretation of Title VII, and a review of several major legal scholars' interpretations of the dilemmas transsexual people create for the law. Finally, Section VII outlines the new paradigm that is necessary to bring justice and equality for transsexual people, which must begin with general gender equality.

II. Which Human Beings Have Rights?

The human body historically has been conferred certain rights in law. For centuries, rights, privilege, and status could accrue only to male bodies (in some cases in British, European, and American societies, only to Caucasian, light-skinned, male bodies. [4]) Women and other non-white men were chattels, servants, or little more than beasts of burden, and were frequently regarded as lacking the capacity to reason, even lacking souls. [5] Particular qualities: autonomy, authenticity, authority, dignity--and rights: privacy, freedom, and equality--attach to, or conversely are denied, a corporeal presence. Yet the ways in which difference, particularly gender-variance, has been both objectified and exploited have presented trans people with immense barriers toward achieving equality under the law as the men and women they know themselves to be.

***25** The human body has been, and often still is, a site of contention regarding what is socially, spiritually, morally, and legally acceptable. Modern debates about women's rights (equal pay for equal work, job retention in the event of pregnancy, access

to child care, and access to abortion), the rights of disabled people (reasonable adjustment to ensure access to employment, housing, and social services), the rights of people of color (property ownership, voting rights, and inter-racial marriage), the rights of gay men and lesbian women (enjoyment of sexual contact, access to child adoption, and same-sex marriage), and the rights of trans people (participation in the workplace, founding a family, and personal privacy) all center around, and continue to employ, arguments about their fitness to enjoy the rights of full and equal participation in society because of the faulty constitution of their bodies or some disfavoured aspect of their corporeal selves. [6]

The social situation of transsexual people is frequently compared to that of intersex people. [7] "Disorders of sexual development" (DSD) is the new medical label for conditions which render bodies intersex, sexually ambiguous, or incompletely differentiated as either male or female. [8] "Gender Identity Disorder" (GID) is the current diagnostic nomenclature purporting to describe the affliction transsexual people experience, classified as a mental disorder when no explicitly physical sexual anomaly is present. [9] Were a physical anomaly to be discoverable on or within a given individual's body, the category of transsexual could not be applied, given the current taxonomy of the descriptive labels; instead, a DSD would be diagnosed, and any treatment would follow DSD protocols. Being rooted in the body as opposed to the mind, these protocols are perceived as less controversial and more socially helpful than transsexual treatment protocols, which are often ***26** judged as experimental, cosmetic, or "collaboration with psychosis." [10] Therefore, in deciding matters of legal status, it has been thought important to determine the cause of gender variance.

In scientific and popular literature of the seventeenth and eighteenth centuries in both Europe and America, sex--or gender--variant people, cross-dressers, and intersex people came to be seen as "inverts," [11] and as part of the homosexual milieu, affected by the intensity of their symptoms, which, if severe, caused them to appear or behave more like "the opposite sex." [12] In the twentieth century, science advanced ways to change bodies, establishing the transsexual person: one who claims the other sex without biological justification. [13] The transsexual, according to then-common understanding, both "deforms" his or her body with medical "experimentation," and employs the clothing and physical appearance of the other sex to claim the social, legal, and moral rights and obligations of a sex to which they have no obvious entitlement, but which they may be given through medical authority.

In the late twentieth century, science became an increasingly powerful cultural force, a force that since the Enlightenment had promised man's dominion over nature, or threatened to overtake nature, depending on prevalent beliefs. [14] When nature is equated with God, some find it logical to equate science with the devil, which has been done throughout history. [15] This is seen, for example, in the Roman ***27** Catholic Church's adjustment (or lack thereof) to the influence of science, from Galileo to stem cell research. [16]

Sumptuary laws, designed to control behavior, extending to the material, color, and design of clothing, jewellery, or weapons, that men and women could wear or carry, and even the food and beverages certain classes of people could consume, have been enacted in many different countries and cultures since the early Greek and Roman empires. [17] Laws of this type were intended to regulate commerce as much as to impose moral order. [18] The ubiquity of these kinds of laws made it easy for early legislatures to pass prescriptive statutes that deliberately or inadvertently criminalize or circumscribe certain people because of their attachment to certain materials or clothing, which then constitutes an inability to conform to the law. [19]

Shortly after the American Civil War, "ugly laws" began to appear in U.S. cities to regulate the movement and control the behavior of people who were "diseased, maimed, mutilated, or in any way deformed, so as to be an unsightly or disgusting object, or an improper person." [20] By the 1890's, when the enactment of "ugly laws" was at its zenith, and well into the twentieth

century, the concepts of disease and sexual deviance "went hand in hand." [21] In one tract, sociologist I. L. Nascher's Wretches of Povertyville, readers are warned of "creatures" posing a danger to society:

> There is still one class of wretches, male and female, we hardly dare mention lest we tread upon forbidden ground. This class is composed of those whose propensities, viler than animal since they have no counterparts in the animal kingdom, place them outside of any human category. They call themselves "fairies." Such a wretch, born of human parents, in the semblance of a man gives himself a female appelative, imitates a woman's voice and ways, and as far as he dares wears woman's attire. . . . This effeminate creature is in love with an equally despicable ***28** wretch of his own sex. There are women of the same class, masculine women who imitate the opposite sex as much as possible. . . . They assume a gruff voice, and in time lose their natural tone of voice, associate with the "fairies" and in their social intercourse with the latter take the part of a man in his relations to a woman. [22]

There is no doubt that gender-variant people would have been swept up in this construction of dehumanized social evil. Whether today these people would be regarded as gay, lesbian, or trans is a product of changing culture and evolving science, but moral and scientific horror of gender-variance is apparent in Nascher's description, and these beliefs are conveyed socially in many ways. [23]

Objectifying what we don't understand is common practice, elevated to an art form in the mid-nineteenth century by P.T. Barnum through his American Museum in New York City. There he exhibited, among various objects of curiosity, people whose physical characteristics were unusual to the point of stretching credibility about their age, size, and sexual characteristics. [24] In spite of the "ugly laws" that were erupting across the country to protect people from having to see things deemed offensive, various deformities and racial and ethnic differences made for a compelling spectacle, advertised as terrifying or astounding--yet safely restrained or distanced from the viewer-- that drew crowds willing to pay admission. [25] After his museum burned down, Barnum collaborated with James Bailey and took his show on the road. America provided paying customers hungry for "a conjunction between scientific investigation and mass entertainment." [26]

This aesthetic helped Barnum and Bailey Circus and Shows shape the delivery of scientific information to the general public in this largely rural country for over 100 years. They exhibited bearded ladies, "hermaphrodites" (half-man, half-woman), "savages" from other cultures or far-away lands whose appearance and behavior did not conform to that of the audience, and deformed bodies dressed up to ***29** invoke and disrupt class, race, and gender-based distinctions, frequently with undertones of erotic possibilities. [27] Supported by what Foucault called the "medicalization of the sexually peculiar," [28] science legitimized human interest in sexual and gender variance by encouraging objective scrutiny, while the circus sideshows, newspapers, magazines, and eventually television and the internet, fed society's curiosity about the monstrous and grotesque in human variation, which logically included trans people. Safely confined in these circus shows, gender-variant and other kinds of 'different' people, or their representations in exaggerated forms, could be freely gawked at. Audiences felt justified in expressing their fascination or disgust with the spectacles they witnessed.

The term "transphobia" is often used to describe intolerance and aversion toward transgender and/or transsexual people (in parallel to "homophobia"). [29] Transphobia is frequently characterized as a fear of difference, but it can be argued that transphobia is more rightly a fear of change. People fear the destabilization of gender and sex. They do not want to be "fooled or deceived into thinking a person is something--or someone--that they are not entitled to claim to be. [30] People want to be recognized as the gender they are; they do not like to be mistaken, and they do not want to make a mistake by attributing qualities to another person incorrectly. As sex distinctions come to matter less with respect to equality and civil rights, reactions to some

kinds of gender crossing (e.g., clothing restrictions, workplace equality, women and men in non-traditional jobs, variations in hairstyles, etc.) are diminishing in Western culture, but the areas of sexual relationships and physical intimacy remain spheres in which boundaries are very important to most people. [31]

Transphobia is apparent in the reactions of some trans people's friends and family members, co-workers, and neighbors when one announces that they plan to change their sex or gender expression, the change actually begins, or the change is obvious (as it often is in early ***30** stages). Transphobia can also arise in people when they become aware of someone's trans history. Transphobia often has nothing to do with the person toward whom it is directed; this is particularly apparent when just a moment prior that person was considered perfectly acceptable. When it is in response to someone whose appearance is visibly gender-variant, transphobia is a combination of the idea of difference and the idea of deviance from sexual norms. The idea, or the act, of changing one's body in a way associated with sex or gender, or of being deformed or mutilated with respect to expectations of sex and gender roles is what disturbs people. Most people cannot imagine changing their own physical sex, and for some the mere idea of having it done to them--or to another person--is so frightening they react with real physical disgust.

Bodies are what we believe tell other people the 'truth' about who we are. Even though we know we should not judge people based on their appearances or what we believe are their unalterable characteristics, we still do it--some of us more cavalierly than others. How we see, read, and interpret the human body is filtered through many forms of knowledge and belief such as education, personal experience, cultural standards, racial prejudice, sexism, religious edicts and moral principles. Scientific discoveries are interesting, even exciting for some people, but they are heresies for others, dismissible, irrelevant, mere theories until they are validated by whatever system has been allocated greater authority.

Gender-variant people embody cultural anxiety about sexuality. Bodies that are "in-between" male and female, or bodies that communicate either excessive or deficient masculinity or femininity, regardless of whether the body is male or female, can create confusion and "category crises" for observers that often set off their own emotional reactions. In some people, those reactions may be amusement or erotic attraction; others may react with distrust, disgust, anger, or violence.

Transsexual people are easy scapegoats for fears about violated boundaries. Institutionalized transphobia makes hatred, abuse, and inhumane treatment appear logical, natural, and even correct. Apparently "invented" by advances in biology (hormones) and medicine (psychology, psychiatry and surgery), transsexual people are regarded by some social critics--like Raymond (1979), Billings & Urban (1982), and Hausman (1995)--as dupes of a patriarchal medical establishment bent on maintaining women's oppression by enforcing ***31** gender stereotypes. [32] These critics imply an almost robotic conformity among transsexual people, and accuse them of being liars, desperate to mutilate their bodies, characterising their differences as clear signs of mental illness. [33] These critics pronounced the voices of transsexual people unworthy of being heard, and almost nothing trans people could say in their own defence was deemed rational. Medical treatments--hormones, genital reconstruction, psychiatric treatments including electroshock therapy [34] --have all been used to justify "correction" of homosexuality or extreme gender variance, as well as to assist people in finding comfort in the gendered self. [35]

By the mid-1990s, anthropological [36] and psychological texts [37] were becoming available to the academy and the general public that presented a more nuanced perspective and analysis than previous texts. [38] In 1994, Kate Bornstein was able to capture the imaginations of new readers whose predecessors had appreciated books like Jan Morris's Conundrum and Christine Jorgensen's A Personal Autobiography. [39] The history of transsexual people through medical literature is as mixed as the social criticism. [40] Still, for some transsexual people, the hope of medical treatment and legal validation in the gender ***32** or sex category they know themselves to fit in is worth almost any sacrifice, as transsexual autobiographers have tried to explain. [41]

Outside the academy or professional circles, response to gender-variance can be even more vicious, and far more physical. From the 1993 murder of Brandon Teena, memorialized in the Oscar-winning film Boys Don't Cry (released in 1999), [42] to the 2002 murder of Gwen Araujo (treated in a made-for-television film, A Girl Like Me in 2006) [43] and the all-too-frequent beatings and killings of transsexual people (some of whom are sex workers) in major cities around the world, [44] to the April 15 2010 assault of a 27-year-old trans man graduate student in a restroom at California State University Long Beach, [45] trans people are constantly on notice that they are hated and vulnerable.

Civil and human rights laws and policies in the European Union and at the Federal level in the United States now treat men and women as equal citizens, and wherever possible, Western governments are working to eliminate sex-based statutory differences (such as ineligibility for pensions and provisions of other benefits). [46] Yet, as is apparent in the case law evolution, there have been exceptional barriers to transsexual people who attempt to exercise their civil rights and responsibilities simply because their transsexual status renders them suspect, or outside the law to the extent that their altered or different bodies make them seem less than human. The evolution of scientific knowledge with respect to sex and gender-variance has combined with advances in anti-discrimination law to urge the legal system to be less ready to judge trans people who seek justice or resolution to problems through the courts. But the weight of misconception is heavy, and until ***33** judges and attorneys study the issues thoroughly, they may be tempted to perpetuate what they believe about the body and what legal precedent allows them to do with comfort and confidence in their pre-existing ideas.

The law looks to history and precedent to assure judges that their decisions are reasonable, certain, and true. Where there is no history or precedent, judges, depending upon the nature of the case, often require or are presented with "expert" witnesses who offer their perspective on the evidence at hand. When the subject is new or unusual, or when the experts do not fully agree, judges are called upon to exercise discretion. The principles upon which judges draw to guide their decision-making may be unique to each situation, and when transsexual people are involved, theoretical or moral biases often arise as they are intertwined with the logic in decisions. In reviewing the major cases in English-speaking law relevant to transsexual status to explore both the historical record and the logical trends these cases initiate or support, two distinct themes in reasoning are apparent: harmony and determinism. These themes lead to decisions that are either beneficent or harsh toward transsexual litigants.

III. Relevant Cases Worldwide

A. Forbes-Sempill (1967)

The unreported Scottish case, Forbes-Sempill, [47] seems to be the first in the U.K. involving sex determination for the purpose of inheriting a title and lands. Two cousins each sought the right to inherit title to the Baronetcy of Forbes of Craigievar, a title which admitted only males to the succession. They agreed that Ewan Forbes-Sempill, brother of the recently deceased Lord Sempill, the 19 th Baron Sempill and 10 th Baronet Forbes, was nearer in the line of succession than his cousin John Alexander Cumnock Forbes-Sempill, who also petitioned to receive the Forbes title (the Sempill title having legitimately descended to the eldest daughter of the deceased). [48] The issue at bar was not whether Ewan Forbes-Sempill was nearer in the line of succession, but whether he was male, and therefore eligible to inherit the Baronetcy. [49] This case is relevant to the historical and theoretical arguments concerning the determination of sex in law.

***34** The individual in question was born September 6, 1912, and the birth was registered on September 22, 1912 as female with the name Elizabeth Forbes-Sempill. Nearly 40 years later, in 1952, a gentleman farmer and physician named Dr. Ewan Forbes-Sempill, petitioned local authorities to correct the register, changing the Christian name "Elizabeth" to "Ewan" and the sex letter 'F' to 'M', explaining that while Mr. Forbes-Sempill had been brought up as female, he had been found on medical examination

to be male. The petition was accompanied by "Medical Certificates produced in support thereof from (1) Dr. John C. Reid, (2) Dr. William G. C. Manson, and (3) Dr. James F. Phillip." [50] On this basis, the local authorities granted the petition and the birth register for the district was changed. The matter went unnoticed and was apparently uncontested and unremarkable since there is no other record of it until the issue relative to inheritance arose. In 1965, a Scottish case before the Sheriff Court of Perth and Angus at Perth determined that "people treated for transsexualism were not able to have their birth certificates amended." [51] Ewan had accomplished his birth certificate change over a dozen years prior to that ruling, and since he was not claiming to be a transsexual person, his 1967 case escaped any additional scrutiny that a claim of transsexualism might have inspired.

John A. C. Forbes-Sempill maintained that Ewan Forbes-Sempill "is now and has all along been of the female sex in the physical, anatomical, physiological and genetic meaning of that term" [52] and was therefore ineligible to inherit the Forbes title. Ewan maintained that he "is now and has all along been of the male sex in respect that he is a hermaphrodite with predominant male characteristics." [53] The petition was brought before Lord Hunter, and the entire trial was held in Chambers at the Court of Session, a court of first instance.

Lord Hunter noted in his opinion the historical juridical precedent concerning the "hermaphrodite" that "its sex should be determined from that which predominates in it." [54] Lord Hunter also captured in his description the scope of conditions which were at that time "conveniently" interpreted as "true hermaphroditism," including ***35** "homosexuality" and "trans-sexualism." [55] This would imply that Lord Hunter viewed what we understand today as "sexual orientation" and "gender identity" to be part of the spectrum of intersex conditions and legitimate components of a person's sex that must be considered along with all other factors when a person's legal sex is in question. More broadly stated:

> [W]hile from a medical point of view sex is probably a spectrum, with the hermaphrodite in or near the centre and with gradations outwards in the direction of the typical male towards one end and the typical female towards the other, the law, which is concerned in a practical way with the sexual role of the individual in society, must in my opinion attempt to draw a firm line . . . according to the sexual characteristics which predominate in the person concerned. [56]

The charge before Lord Hunter, then, was to determine which sex predominated in Ewan Forbes-Sempill, a self-defined (and physician-corroborated) male, married to a woman. Numerous medical examinations and tests were conducted on Ewan's body, and he and his wife both gave testimony concerning his genital organ, its sexual function, and his wife's satisfaction. [57] In reviewing the evidence, Lord Hunter considered four criteria of sex: chromosomal, gonadal, apparent or phenotypical (visible characteristics of a particular type, in this case, specifically, the male or female type of genital configuration), and psychological. [58] He concluded that Ewan "is a true hermaphrodite in whom male sexual characteristics predominate, and that this has been the position throughout his life." [59] Lord Hunter gave particular weight to Ewan's wife's testimony, and her assurance that he was able to penetrate her vagina with his phallus and that both partners were satisfied. [60] He also believed that there was enough medical evidence produced to convince him that Ewan had a small undescended testis in the left groin area, and that this small amount of 'testicular tissue' was sufficient to support "the view, in [[his] opinion, that there is a constitutional [i.e., physical or biological] basis for the degree of masculine physical development and psychological orientation" [61] that Ewan possessed. In other words, it could be argued that Ewan was ***36** comfortable and confident in his self-expression as a man, and his appearance was not discomfiting to Lord Hunter, so Ewan's demeanour contributed to the overall impression of physical maleness.

Twelve medical experts were called to testify in the Forbes-Sempill case, one of whom was Professor Louis G. Gooren, a Dutch endocrinologist, who nearly thirty years later submitted a paper in evidence to the European Court of Human Rights in Sheffield & Horsham v. U.K. in which he concluded, with hindsight, that Ewan Forbes-Sempill was almost certainly a female-to-male

transsexual. [62] Dr. Gooren's research has been among the most influential in Europe and the U.S. regarding the efficacy and safety of cross-sex hormonal treatment. Lord Hunter rejected as arbitrary the notion that in cases where a person seemed equally male and female, the default, as a matter of law, should be male--especially since society was moving toward equality under the law for males and females--he was, however, also very clearly rejecting the idea that a person might seem to "choose" their sex:

> It is one thing to make life in society easier for those who exhibit the intersex conditions . . . and quite another to leave a possible loophole for those suffering from sexual aberrations or deviations such as certain trans-sexuals . . . who, in the event of success in achieving the social sex of their desire, might bring disastrous consequences not only upon themselves, but upon others in the society in which they live. [63]

To meet Lord Hunter's need for medical proof of "hermaphroditism" on which to base his decision, Sir Ewan Forbes (the name he used after the case was settled in his favor) used his medical knowledge to convince the court of his maleness, given the physiological ambiguities inherent in his body. [64] This successfully outweighed any "proof" that his cousin John was able to offer to support his contention that Ewan was, and always had been, female. John unsuccessfully appealed Lord Hunter's decision in 1968. [65] Ultimately, John succeeded his cousin Ewan to the baronetcy after Ewan's death in 1991. [66]

***37** The Forbes-Sempill case was prescient in that it clearly supported the weight of the psychological sex of the person as validated by others in both the social and professional spheres, but whether it would have helped transsexual people legally affirm their identities had it been available to cite as precedent is not certain, given Lord Hunter's preference for the "intersex model" of gender variance and his general wariness of transsexualism. [67]

The most commonly cited case whenever the gender-based claims of a transsexual person are in question (bearing particularly on marriage) is Corbett v Corbett. [68] Originally filing in December 1963, the husband, Mr. Arthur Cameron Corbett, asked the court to nullify his marriage to a transsexual woman, April Ashley, on the ground that at the time of the ceremony, in September 1963, Mrs. Corbett was a man, or alternatively on the ground of non-consummation. [69] Mrs. Corbett (Ms. Ashley) responded that she also sought nullification, but for the reason of Mr. Corbett's incapacity or wilful refusal to consummate the marriage, and she asserted that she was a woman at the time of the ceremony. [70] The primary issue became the validity of the marriage, which depended "on the true sex of the respondent," [71] and secondarily on "the issue of the incapacity of the parties, or their respective willingness or unwillingness, to consummate the marriage, if there was a marriage to consummate." [72]

The final decision on appeal was a decree of nullity based both on the incapacity of the wife to consummate intercourse--because, in the judge's opinion, "intercourse, using the completely artificial cavity . . . can [not] possibly be described . . . as 'ordinary and complete intercourse"' [73] -- and on the holding that Mrs. Corbett was a man. This was a clear rejection of April Ashley's lived gender, reinforced by the holding that she was a biological male from birth. [74] Ormrod J was professionally qualified in both medicine and law, lending weight to his opinion that "[t]he only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and ***38** subsequently revealed by further medical investigation . . . ." [75] His opinion has ever since served to concretize the belief in common law that sex depends on chromosomes and is fixed at the moment of birth. It also reinforces the concept that there are only two sexes, and they must be differentiated or law's project of "the regulation of relations between persons, and between persons and the State or community" [76] will somehow fail.

From the transsexual standpoint, the law that descends from these presumptions fails to recognize the humanity of those individuals who are forced by circumstances to manage the difference between their body and their gender. Legal scholar Professor Stephen Whittle noted: [77]

There is a need to re-theorize the law away from its current notional equivalency projects such as are embodied in the egalitarian definition of rape in s 142 of the Criminal Justice and Public Order Act 1994, wherein the courts had to ask whether a trans woman's vagina was a body orifice or not, or the interventionist approach of the Sex Discrimination Act 1975, in which if you fall outside the man/woman categories, you are not protected. These projects simply highlight the lack that is embodied in the law. [78]

These examples of dehumanizing treatment were justified by the deterministic standards established in Corbett. Testimony was solicited to describe the phenomenon of transsexualism, and Ormrod J compared April Ashley's history with the given descriptions and concluded that she belonged to the class of subjects labelled "male transsexual." [79] The language used in the Judge's opinion to describe both April Ashley and the phenomenon of transsexualism is very clear in its perspective, even when drawing on the testimony of the medical expert witnesses:

> Dr. Randell considered that the respondent [Ashley] is properly classified as a male homosexual transsexualist. Professor Dewhurst agreed with this diagnosis and said the description 'a castrated male' would be correct. Dr. Armstrong agreed that the evidence contained in the Walton Hospital records was typical of a male transsexual, but he considered that there was also evidence that the respondent was not physically a normal male. ***39** He said that the respondent was an example of a condition called inter-sex [sic], a medical concept meaning something between intermediate and indeterminate sex, and should be 'assigned' to the female sex, mainly on account of the psychological abnormality of transsexualism. Professor Roth thought that the respondent was a case of transsexualism with some physical contributory factor. He was prepared to regard the case as one of inter-sex, and thought that the respondent might be classified as a woman 'socially.' He would not recommend that the respondent should attempt to live in society as a male. . . . Insofar as there are any material differences in the evidence of Dr. Randell, Dr. Armstrong and Professor Roth, I was less impressed by Dr. Armstrong's evidence than by that of the other two doctors, both of whom were exceptionally good witnesses. Of the latter two, I am inclined to prefer the evidence of Dr. Randell because I do not think the facts of this case, when critically examined, support the assumptions which Professor Roth has been asked to make as the basis of his evidence. [80]

Ormrod J endeavoured to be as comprehensive as possible in his documentation of the expert witness testimony, and he was forthright about his own opinions in the matter, revealing both his reasoning and his biases. On the matter of causation of transsexualism, specifically the debate over whether transsexualism is a psychological disorder arising after birth or occurs organically in some individuals, especially the matter of the existence of a "male or female brain," he noted, "[i]n my judgment, these theories have nothing to contribute to the solution of the present case. On this part of the evidence my conclusion is that the respondent is correctly described as a male transsexual, possibly with some comparatively minor physical abnormality." [81]
In other words, he intended to focus only on the factors he believed carried weight. He wrote:
I must now deal with the anatomical and physiological anomalies of the sex organs, although I think that this part of the evidence is of marginal significance only in the present case. In other cases, it may be of cardinal importance. All of the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are --

(i) Chromosomal factors.

(ii) Gonadal factors (i.e. presence or absence of testes or ovaries).

***40** (iii) Genital factors (including internal sex organs).

(iv) Psychological factors.

Some of the witnesses would add --

(v) Hormonal factors or secondary sex 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). [82]

It is important to note that these criteria have been evolved by doctors for the purpose of systematizing medical knowledge, and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed, '[w]e do not determine sex--in medicine we determine the sex in which it is best for the individual to live.' These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination. [83]

This is followed by a long discussion of "inter-sex," heredity, and chromosomal abnormalities, such as these conditions were understood at that time, over 40 years ago, again highlighting the disagreement between the expert witnesses:

> Dr. Randell said that, in terms of sex determination, he would not give much weight to such psychological factors as transsexualism if the chromosomes, the gonads and the genitalia were all of one sex. Professor Dewhurst's views are similar. Dr. Armstrong and Professor Roth, on the other hand, would classify transsexuals as cases of inter-sex. Professor Mills, as an endocrinologist, takes a rather different view. In his opinion, patients in whom the balance of male and female hormones is abnormal should be regarded as cases of inter-sex, and he considers that there is sufficient evidence to justify a view that the respondent is an example of this condition. [84]

However, Ormrod J chose to completely ignore the factors of "psychological sex" and "hormonal sex," and viewed the evidence of an intersex condition to be insufficient in Ashley's case. He rather cavalierly concluded that all the medical witnesses agreed: "that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by natural development of organs of the opposite sex, or by medical or surgical means." [85] This desire to ***41** pin, cement, or stabilize sex, based on a narrow view of human experience has damaged the lives of countless transsexual and other sex and gender-variant people by denying them any possibility of personal development, self-discovery, or access to medical technologies that might permit them to live full lives. Further, the force of Ormrod's decision has most likely deterred sex and gender-variant people from bringing complaints forward into legal settings for fear that their status as "not male and not female" will disqualify them from receiving justice. The Littleton and Gardiner cases, discussed below, are examples of this fear coming to fruition some thirty years later, but it may help to consider the cases chronologically.

B. M.T. v J.T. (1976)

This U.S. (New Jersey) appellate case [86] is the first American decision to validate a trans woman's eligibility for marriage, based on her post-operative status. It is not, however, the first American opinion on the civil status of a transsexual person, and it is useful to briefly review first those few cases that preceded it. The earliest reported American case involving a transsexual person was Anonymous v. Weiner, [87] a 1966 New York case in which a transsexual woman sought--unsuccessfully--to change

her name and have a new birth certificate issued indicating her sex as female. That decision cited chromosomal sex and "the public interest for protection against fraud" as the primary reasons for denial. [88]

In the next related reported case, In re Anonymous, [89] a case of first impression, the Court granted the transsexual petitioner's request for a change of name (but did not issue the requested order to change the birth certificate) based on the importance of psychological sex and the fact that sex reassignment surgery removed her procreative ability. In this case, Pecora, J. provided the first judicial recognition of the transsexual person's effort to "harmonize" [90] her or his psychological and anatomical sex. [91] In Anonymous v Anonymous, [92] the Court ***42** determined that there was no marriage between a man and his transsexual female former partner because (although they had participated in a marriage ceremony) they had never lived together, had never had sex, and the transsexual woman had not had sex reassignment surgery prior to the marriage ceremony, so she could not be a woman for the purpose of marriage. [93]

In B. v. B., [94] a transsexual man's wife sued for annulment on the grounds that he had defrauded her by not informing her of his transsexualism (he had undergone only a mastectomy and hysterectomy, and was not capable of performing sexually as a male); her petition was granted. Each of these cases was cited in the decision of the Appellate Court in M.T. v. J.T., and it is this 1976 case that most closely relates to the facts in Corbett. In contrast to the Corbett decision, though, Carton J, Crahay J, and Handler J in the Appellate Division of the Superior Court of New Jersey (with the opinion delivered by Handler J) took the approach that psychological and anatomical harmony was crucial to individual integrity. [95] American law professor Taylor Flynn wrote: "The court relied on the predominant view within the medical establishment that, among the many components involved in determining sex, chief among them is gender identity. When birth anatomy and gender identity conflict, the court stated, the role of anatomy is merely 'secondary.'" [96]

As in both Corbett and Forbes-Sempill, M.T.'s genital appearance and function was the subject of lengthy discourse in testimony and in the court's opinion. Female form and function of the genital organs were deemed necessary for both April Ashley and M.T. (and male form and function for Sir Ewan Forbes). [97] Though the capacity for procreation was not a prerequisite for the M.T. court, sexual capacity was: the appearance --verisimilitude --of procreative capacity was much more important, along with the requirement of physical capacity to provide genital-to-genital sexual pleasure to an opposite-sex partner. [98] This latter requirement is always raised in cases seeking annulment for ***43** reasons of non-consummation, but it was not an issue in M.T.. M.T. brought her petition seeking support and maintenance from J.T. because J.T. abandoned her and ceased paying support after two years of marriage (and eight years of living together prior to the marriage, during which time J.T. paid for M.T.'s 1971 genital reconstruction procedure, and intercourse satisfactory to both parties had taken place.) [99] J.T.'s response was to claim the marriage "was a nullity because plaintiff was a male at the time of the ceremony." [100] The trial court disagreed and ordered J.T. to provide support for M.T., and the appellate court affirmed. [101]

J.T. apparently relied upon society's and judges' considerable antipathy toward the possibility of condoning same-sex marriage. British law professor Andrew Sharpe noted that the desire to avoid inadvertently legitimising same-sex marriage has been a serious concern for many courts considering cases involving transsexual marriage. [102] Concerning M.T., Professor Flynn wrote: "The court in M.T., for example, explicitly addressed the issue of whether the parties had to be of different sexes for the marriage to be valid and concluded that a 'legislative intent . . . which would sanction a marriage between persons of the same sex, cannot be fathomed.'" [103]

Nevertheless, by clearly affirming the "harmony principle," [104] the M.T. court swung open a door that Lord Hunter had unlocked in Forbes-Sempill, and Pecora, J. had explicated in In re Anonymous, allowing courts to recognize that the weight

of the various factors comprising sex may vary from person to person. Thus, in those cases where people were compelled to hormonally and surgically "harmonize" their psychological and anatomical sex-- as long as they are preserving the heterosexual imperative in their state-sanctioned relationships, and their "physiological orientation is complete" [105] --" the [legally recognized] social sex or gender of the individual should be made to conform to the harmonized status." [106]

***44 C. In re Ladrach (1987)**

This U.S. (Ohio) case [107] is notable because, while following the logic of Corbett in denying the application for a marriage license of a male-to-female transsexual person, the court stated its opinion that "the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals." [108] The frequency with which this refrain was taken up in other courts ultimately forced American transsexual people to join forces with other gender-variant people and seek statutory recognition and relief through various legislative bodies, an effort which only gained momentum in the 1990s. [109]

In re Ladrach was a case of first impression in the Ohio Probate Court. Elaine Ladrach sought a declaratory judgment concerning whether a male who became a post-operative female was permitted to marry a male. The surgeon who had performed her genital reconstruction testified that she now had "normal female external genitalia." [110] He also testified that a test of her chromosomes would be "highly unlikely" [111] to show her to be female. Clunk J's decision stated that a person's sex is determined at birth by an anatomical examination by the birth attendant, which was done at Elaine's birth, and no allegation was made that Elaine's birth attendant had erred. [112] Although he noted that fifteen U.S. states had allowed post-operative transsexual people to change their birth certificates, Clunk J cited the 1965 New York Academy of Medicine study relied upon in Anonymous v. Weiner [113] and Corbett as authority to support his contention that chromosomal sex (even when merely presumed) is dispositive as to an individual's permanent sex status. [114] The Ladrach Court forbade the couple from making a marriage application under Ohio statutes barring marriage between persons of the same sex. [115]

Ladrach has been cited frequently in other U.S. cases (including Littleton and Gardiner, below) as rationale for judicial resistance to recognizing the post-operative sex or gender status of transsexual ***45** people. It was unsuccessfully challenged in 2002 (judgment affirmed on appeal in 2003 [116]) when the courts denied an application for marriage license to Jacob B. Nash (a female-to-male transsexual person) and Erin A. Barr (a female) based on "clear Ohio public policy against same-sex marriages." [117] Because Mr. Nash had been born in Massachusetts, his attorney argued that under Article IV of the U.S. Constitution, full faith and credit should be extended to the recognition of Mr. Nash's valid, corrected birth certificate issued by the state of Massachusetts. [118] The majority opinion, written by Diane V. Grendell, J., reasoned that the fact that the original birth certificate was amended to declare him male was evidence of the fact that Mr. Nash's original birth sex was female. [119] "In addition," the opinion stated, "[e]ven if Ohio permitted changes to the sexual designation as noted on the original birth certificate, this would not affect the clear public policy authorizing and recognizing only marriages between members of the opposite sex." [120]

Echoing Ladrach, the court in Nash insisted that recognition of transsexual people's ability to participate in society's institutions, such as marriage, was a matter of social policy which the legislature should make clear. [121] Without such statutory clarity, the majority reasoned "it cannot be argued that the term 'male' . . . included a female-to-male post-operative transsexual," [122] even though the individual in question lives and is accepted socially (and legally by the state of his birth) as a male.

It is interesting to note that courts are more than willing to rule from the bench to dissolve, annul, or prohibit marriages involving transsexual people, while requests for permission to enter into a marriage or secure acknowledgement of civil status are often met with judicial avoidance as judges point to legislatures as the source of their authority. At the same time, legislators, in their own style of avoidance, postpone addressing the issue when brought to their attention, or simply refuse to consider the matter. [123]

***46** The weight of the Ladrach decision is still felt through a local practice in Clark County, Ohio. There, every applicant for a marriage license is required to take an oath swearing that they are "not a transsexual" before the license will be granted. [124]

D. Harris (1989)

This Australian case [125] concerned the determination of sex of two male-to-female transsexual women who were charged with solicitation under the New South Wales Crimes Act (1900), which prohibited the procuring or attempt to procure the commission by any male person an act of indecency with any other male person. Both of the women had made sexual advances to men on the vice squad. Harris, a post-operative transsexual woman, was exonerated, while the conviction of her friend, Phyllis McGuiness, a pre-operative transsexual woman, was upheld. [126] This court, like the New Jersey court in M.T. v. J.T. above, recognized specific logic in acknowledging a transsexual standpoint. Matthews J wrote:
[C]riminal law is concerned with the regulation of behavior. It is the relevant circumstances at the time of the behavior to which we must have regard. And I cannot see that the state of a person's chromosomes can or should be a relevant circumstance in the determination of his or her criminal liability. It is equally unrealistic, in my view, to treat as relevant the fact that the person has acquired his or her external attributes as a result of operative procedure. After all, sexual offences - with which we are particularly concerned here - frequently involve the use of the external genitalia. How can the law sensibly ignore the state of those genitalia at the time of the alleged offence, simply ***47** because they were artificially created or were not the same at birth? [127]

Matthews J's decision focuses on the behavior that the statute was designed to control, and implicitly acknowledges that Harris was not physically capable of committing the kind of indecent acts that males might commit together. [128] In spite of retaining her penis, McGuiness might not have been physically capable either, but the fact that she had a penis was used to convict her. [129] This, too, is problematic for transsexual people, whose sexed bodies contradict their gendered experience until they can access body-altering technologies, which are not always available.

Reinforcing the common assumption that our external genitalia defines who we are, cases like this one encourage transsexual people to rely on genital surgery as ultimate confirmation of their gender identity, hoping that once they have that surgery no one will look beneath the surface for evidence of the past and view them as something they are not. McGuiness might not want to have surgery, which should be her prerogative, since her body is hers. Her right to bodily integrity should not be sacrificed to her right to gender recognition, but in 1989 the law was not ready to consider this.

E. Lim Ying (1991)

This case in Singapore [130] involved a non-transsexual woman and a transsexual man. The petitioner, Ying, discovered after marriage that her husband was a female-to-male (FTM) transsexual man who had undergone surgical sex reassignment and was allegedly incapable of performing sexual intercourse. [131] Plaintiff claimed that her consent to marriage was not freely

obtained since, she asserted, she would not have married the respondent had she known he was not born male. [132] She claimed that because the respondent was biologically female, there could not be a valid marriage. [133] The respondent, Eric, did not defend against the petition. Interestingly, prior to the Singapore Women's Charter (Amendment) Act 1996, there was no express requirement in the Women's Charter that parties to a marriage must be of different ***48** sexes. Nevertheless, the High Court found that "this requirement existed implicitly in the statutory definition of monogamous marriage, which is referred to in the preamble to the Women's Charter. Since a monogamous marriage is a voluntary union of one man and one woman, [134] persons of the same sex could not marry."

Following Corbett, the Judicial Commissioner ruled that "A person biologically female with an artificial penis, after surgery and psychologically a male, must, for purposes of contracting a monogamous marriage of one man and one woman, under the Charter be as a 'woman'." [135]

Ying could have alleged that her reason for marrying Eric was to bear his children, and could have sought to annul the marriage due to non-consummation or impotency, thus preserving his male social status and enabling them both to end the relationship with their integrity intact. Her choice to expose her spouse as transsexual makes palpable her desire to damage him.

Subsequently, section 12 of Singapore's 1997 Women's Charter (as amended in 1996) provided that the sex of any party to a marriage shall be that stated on the identity card issued under the National Registration Act, and that "a person who has undergone a sex re-assignment procedure shall be identified as being of the sex to which the person has been reassigned." [136] However, Singapore retains the Corbett doctrine in law with respect to consummation of the marriage, and capacity for adultery by adopting the premise that transsexual people's genital organs are incapable of "ordinary and complete" [137] sexual intercourse. The female spouse of a transsexual man thus had the option to end what could be a valid marriage for reasons of incapacity to consummate; likewise for the male spouse of a transsexual woman. However, transsexual spouses would be exempt from charges of adultery. This places transsexual people in an unequal social position and could result in unfair or exploitative decisions against them.

***49 F. A-G v. Otahuhu Family Ct. (1995)**

This New Zealand case [138] arose from the 1991 decision in M v. M, [139] a divorce case (following a twelve year marriage) which required Justice Aubin to first validate the marriage between a post-operative male-to-female transsexual woman (the petitioner) and her non-transsexual male husband. Aubin J found the reasoning of Matthews J in R v. Harris and McGuiness persuasive, and focused on the woman's post-operative status at the time of the marriage and capacity for heterosexual intercourse to determine that her status was indeed valid for marriage to a man. [140]

In reaction to this ruling, the New Zealand Attorney General, on behalf of the Registrar of Marriages, sought:

> a declaration as to whether two persons of the same sex genetically determined may by the law of New Zealand enter into a valid marriage where one of the parties to the proposed marriage has adopted the sex opposite to that of the proposed marriage partner through sexual reassignment by means of surgery or hormone administration or both or by any other medical means. [141]

Ellis J declared in the affirmative, with the stipulation that the parties "must present themselves as having what appear to be the genitals of a man and a woman." [142] The court criticised Corbett's refusal to recognize social and psychological factors that help make one the sex he or she knows him or herself to be. [143]

This decision follows the M.T. "harmony" line of reasoning, though with respect to marriage, Ellis J ruled that New Zealand values conformance to gender and appearance norms over sexual functioning of surgically reconstructed anatomy. [144] The obligation remains of having to prove one's self in an invasive way, an obligation to which non-transsexual people are not subject.

***50 G. Littleton (1999)**

In this Texas case, [145] the plaintiff sued to resolve a dispute and the defendant countered by revealing plaintiff's transsexual status. Littleton concerned the statutory right of a surviving spouse, Christie Lee Littleton, a male-to-female transsexual woman, to file a wrongful death suit against the physician who treated her husband (of seven years) unsuccessfully: her husband died while in his care. In response, Dr. Prange filed a motion for summary judgment alleging Mrs. Littleton was a man and therefore ineligible to sue him because she cannot be the surviving spouse of another man. [146] The trial court granted summary judgment in favor of Dr. Prange, and Christie Littleton appealed.

Chief Justice Hardberger, who issued the Littleton opinion at the appellate level, relied heavily on Texas statutes that forbid same-sex marriage and the reasoning in Corbett. [147] He also cited M.T. v. J.T. without comment, and referred to Ladrach to support his conclusion that "it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals." [148]

Justice Lopez dissented, noting that the majority "concluded that Christie is a male as a matter of law. Despite this conclusion, there is no law to serve as the basis of this conclusion." [149] Justice Lopez wrote:

> Notably, neither federal nor state law defines how a person's gender is to be determined. . . . In the instant case, however, the majority relies on the absence of statutory law to conclude that this case presents a pure question of law that must be decided by this court rather than to allow this case to proceed to trial; that is, whether Christie is male or female. . . . To answer the question, the majority assumes that gender is accurately determined at birth. . . . Under the rules of civil procedure, a document that has been replaced by an amended document is considered a nullity. . . . How then can the majority conclude that Christie is a male? If Christie's evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not satisfactory enough to raise a genuine question of material fact on a motion for summary judgment? [150]

***51** Medical experts testified at trial that "true male-to-female transsexuals are psychologically and psychiatrically female before and after the sex reassignment surgery, and that Christie is a true male-to-female transsexual." [151] Chief Justice Hardberger concluded that "[t]he body that Christie inhabits is a male body in all aspects other than what the physicians have supplied." [152] The summary judgment granted by the trial court was affirmed. [153] Ignoring the psychological component of sex and relying on Corbett criteria, this court ruled that Christie's lived experience--either her transition from male to female or the loss of her spouse--had no bearing on the law. [154]

H. re Kevin (2001)

This Australian case [155] marks a major turning point in litigation concerning the civil status and rights of transsexual people. Earlier cases, such as M.T. and Otahuhu held that trans people should be treated as members of their new sex for purposes of marriage. The decision in this case is notable for its detailed refutation of the reasoning in Corbett. The medical testimony offered in this case was extensive, and went beyond the typical psychologists, endocrinologists (including Professor Louis Gooren, of Forbes-Sempill), and plastic surgeons who are experts in transsexualism according to the historical construct of the condition, to include Dr. Milton Diamond, Professor of Anatomy and Reproductive Biology at the School of Medicine, University of Hawaii. This case involved validation of a trans man's marriage and family status (Kevin and his wife, Jennifer, had a child through assisted reproductive technology).

This case did not involve divorce, or any change in the day-to-day family arrangements, but, like X, Y, and Z v United Kingdom, [156] the plaintiff sought to confirm the trans man's status as a man in law in order to secure his civil rights in relation to his wife and child, and their civil rights in relation to him. Chisholm J of the Australian Family Court held that "[t]here is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage is to be determined by reference to circumstances at the time of birth. Anything to the contrary in Corbett does not represent Australian ***52** law." [157] Chisholm J recognized that "the decision in Corbett is useful only to the degree of the persuasiveness of its reasoning." [158]

The concept of "true sex" advanced in Corbett is logically false, according to Chisholm J. [159] His reasoning proceeds first from the understanding that it is "a question of law what criteria should be applied in determining whether a person is a man or a woman for the purposes of the law of marriage, and a question of fact whether the criteria exist in a particular case." [160]

While Ormrod J stated that the biological sexual constitution of all individuals is fixed at birth and cannot be changed, Chisholm J responded:
[This] is a statement of fact, based on Ormrod J's understanding of the evidence. . . . [H]owever, where evidence is given on the general factual issue, in my view the Court must consider the evidence and determine the issue as one of fact. . . . [T]he asserted legal proposition, that "true sex" is the test for the validity of marriage, is true only if "true sex" is the sole criterion of determining whether a person is a man or a woman. The judgment thus again exploits a subtle shift in terminology which gives the impression that an argument has been made when in fact the proposition to be established is merely assumed. . . . [N]o relevant principle or policy is advanced. No authorities are cited to show, for example that it is consistent with other legal principles. This lack of any supporting argument has been obscured by a definitional sleight of hand, using the term "true sex" . The use of this language creates a false impression that social and psychological matters have been shown to be irrelevant. . . . [T]he legal criteria for determining whether a person is a man or a woman for the purpose of marriage is the person's "biological sexual constitution" is quite unsupported. [161]

Chisholm J declared that the Corbett approach, which ignores
The person's self-perception and role in society . . . is not a helpful approach . . . and distracts attention from the fundamental task of the law. That task, in a legal and social context that divides all human beings into male and female, is to assign individuals to one category or the other, including individuals whose characteristics are not uniformly those of one ***53** or other sex. [T]he law should treat post-operative transsexuals as members of their re-assigned sex. [162]

This conclusion takes the social reality of transsexual lives into account, and refutes the "[a]bsolute and unsupported assertions that a person's sex is fixed unalterably at birth." [163] It opposes the contention that only congruent, obvious, and presumed biological factors determine whether a person is a man or a woman.

It is relevant to note that the Australian Court did not find it necessary (as did the courts in Corbett and Kantaras which was being tried as this opinion was issued) to probe "[K]evin's sexual organs or his ability to perform sexual intercourse heterosexually in marriage. Or that his sexual propensities are heterosexual." [164] Chisholm J remarked that failing to recognize sex reassignment "would lead to the odd result that a person who appears to be a man . . . would be entitled to marry a man." [165] With this decision, a transsexual man has been legally granted membership in the category of men. The sex in harmony with his gender identity, his gender expression, and his social interactions is legally validated. Retaining dignity, the Court refrained from exposing Kevin in a verbal, genital, and sexual dissection, and from requiring his external genitalia to have specific dimensions, yet can still find its footing in the reassurance that Kevin's social maleness and heterosexual marriage maintain the expected hetero-normative social order.

Victorious attorney Rachael Wallbank, a transsexual woman who represented Kevin, takes well-earned pride in the dethroning of Corbett, and is a strong advocate for the framing of transsexualism as an intersex condition dependent upon "brain sex." [166] Separating this feature in transsexual people from the realm of "psychology" or mental illness, Wallbank was able to convince Chisholm J to confidently say "[t]hat the characteristics of transsexuals are as much 'biological' as those of people thought of as intersex." [167]

I. Gardiner (2001 and 2002)

In this Kansas case, [168] the basis of conflict was eligibility for inheritance. Marshall Gardiner died intestate 12 August 1999. He had ***54** one son, Joseph Gardiner, an adult, from whom he was estranged. His spouse of less than one year, J'Noel Gardiner, Ph.D., a college teacher, was a male-to-female transsexual person, who completed the surgical process in 1994 and received a corrected and re-issued birth certificate from her home state of Wisconsin that same year. Marshall was aware of her medical history prior to marriage. Joseph, however, petitioned for letters of administration naming himself as sole heir, claiming that the marriage between his father and J'Noel was void, that "despite surgery, a name change, and other steps taken by J'Noel to change sex, she remains a man [under Kansas law]," [169] where marriages between persons of the same sex are prohibited. The trial court granted Joseph summary judgment, voiding the marriage and holding that J'Noel was not Marshall's surviving spouse nor entitled to share in the estate under intestate succession. [170]

The final decision from the Kansas Supreme Court (2002) relies heavily on Littleton, and exacerbates the negative effects of that decision on the lives of transsexual people. However, in his 2003 opinion in Kantaras, O'Brien J calls the Appeals Court decision (2001) in Gardiner "unique" [171] in that the Court took advances in medical science into account, as well as a detailed review of case law pertaining to transsexual people up to that point and:

> Reject[ed] the reasoning of the majority in the Littleton case as a rigid and simplistic approach to issues that are far more complex than addressed in that opinion. We conclude that a trial court must consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth. [172]

The Appeals Court in Gardiner relied heavily on an article in the Arizona Law Review by American law professor Julie A. Greenberg, [173] which builds a case for gender determination as a subjective process influenced by biology, rather than something that can be objectively detected by observation at the moment of birth. [174] Greenberg presents ***55** well-substantiated medical information about the diversity of biological variations in sex and sex/gender combinations that exist in human beings, refuting the rigid binary of exclusive male and female categories easily read by external genital formation and the assumption that chromosomes always comport with genital configuration, both significant premises in the Corbett reasoning.

Gernon J, writing for the full Appeals Court, quoted from an article written by William Reiner, M.D., a researcher at The Johns Hopkins Hospital, published in the Archives of Pediatric and Adolescent Medicine:

> In the end it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the "correctness" of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical in psychosexual development and adaptation is not the external genitalia, but the brain. [175]

The Appeals Court reversed the trial court and remanded the matter for a full hearing and an

"opportunity for each side to present evidence on at least the factors enumerated in the Greenberg article and with directions to consider the conclusions of this court and the legal and scientific research we rely upon." [176]

However, "[n]o further medical evidence was allowed because [Joseph] petitioned for review to the Kansas Supreme Court [which] granted the appeal." [177] The Kansas Supreme Court rejected the Appeals Court decision, noting that Kansas statutes limit marriage to "two persons who are of the opposite sex," "all other marriages are declared contrary to the public policy of this state," and "it is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman," [178] and relying on Webster's New Twentieth Century Dictionary and Black's Law Dictionary to define the words "sex," "male," and "female," sources which limit these concepts to biological criteria only, and do not take ***56** psychological sex or gender identity into account. The force of this rejection is contained in the line of reasoning that gave rise to the following statements from the Court:

> The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. . . . We view the legislative silence to indicate that transsexuals are not included. [179]

This position ensures that new scientific and medical information is ignored, and, as Professor Flynn has noted, trans-people are simultaneously "de-sexed and hypersexualized. Given the centrality of sex and gender in our lives, both are dehumanizing moves." [180]

The Kansas Supreme Court took notice of In re Kevin, but did not analyze it deeply, most likely because the holding in that case was diametrically opposed to its own, and they may have expected - or at least hoped - it would be overturned on appeal to the Full Family Court of Australia (the case had been heard, but no opinion yet issued). Nevertheless, the Court described

its view of the philosophical difference between the determinism principle and the harmony principle, and demonstrated the judicial resistance to transsexual people's social reality and the justification employed in this line of reasoning:
Thus, the essential difference between the line of cases, including Corbett and Littleton, that would invalidate the Gardiner marriage and the line of cases including M.T. and In re Kevin, that would validate it is that the former treats a person's sex as a matter of law and the latter treats a person's sex as a matter of fact [emphasis added]. In Littleton, the thread running throughout the majority's opinion was that a person's gender was immutably fixed by our Creator at birth. Summing up its view of Christie's mission to be accepted as a [fe]male, [sic] the court stated: 'There are some things we cannot will into being. They just are.' Corbett was approvingly described by the Texas majority as holding, 'once a man, always a man.' The Texas court decided that there was nothing for a jury to decide, and [t]here are no significant facts that need to be decided.' Because ***57** 'Christie was created and born a male,' the Texas court 'h[e]ld, as a matter of law, that Christie Littleton is a male.' [181]

This appears to be circular reasoning. Facts can be discovered, while law is previously written and then interpreted. While the Corbett line of determinism is relying on law rather than fact, there appears to be a singular 'fact' (or assumption) supporting the judicial conclusion in Gardiner: that gender is "immutably fixed by our Creator at birth." [182] This is not a matter of written law, nor of discovered fact, but an attempt to extract logic from presumed shared belief in an ancient text that has nothing to do with the facts at hand.

J. Kantaras v Kantaras (2003)

This Florida case [183] resembles both Corbett and Littleton in that it hinges on the validation of a transsexual person's eligibility for marriage, and Corbett especially because there was an extensive inquiry into Mr. Kantaras's genital configuration and his ability to use his genitals for urination and coitus. Unlike these prior cases, however, O'Brien J was persuaded by the reasoning in M.T. v. J.T. and Re Kevin. This case is unique because it was conducted in the public eye, televised for three weeks on a national cable channel, CourtTV, complete with analysis and commentary by judicial pundits and transsexual activists, and audience polls inquiring about the litigants' believability. Michael Kantaras had petitioned to divorce Linda, his wife of nine years, and to retain custody of the two children, one born a few months before the marriage (Linda had rejected the child's father as unsuitably parental in favor of Michael, who adopted the child after the marriage), and the other born two years later, conceived using sperm donated by Michael's brother. [184] While this proceeding falls into the "harmony" line of reasoning, it was later overturned on appeal (like the Gardiner appeal and Kansas Supreme Court reversal). [185] Kantaras is a particularly rich case, not for its persuasive decisions, but for the unusual cultural setting imposed by the media presence and by the influence of fundamentalist religion in the appeal process, but that is a subject for another day. The case is important here because it laid the groundwork for progress by consolidating all the past arguments and focusing on contemporary medical opinion.

***58 K. Kevin and Jennifer (2003)**

Following Chisholm J's declaration in Re Kevin, the Attorney-General for the Commonwealth petitioned the full Family Court of Australia for final disposition of the matter. [186] Kevin and Jennifer were joined in their response by the Human Rights and Equal Opportunity Commission. The full Court reviewed Chisholm J's analysis of the facts and existing law, and reviewed the history of the institution of marriage in the Western world and Australian society, as well as the law with respect to the "contemporary and ordinary" meanings of the words man and woman, concurring with the trial Court. [187] The Justices also considered the Attorney-General's arguments with respect to the "Special Status of Marriage as a Social Institution having its Origins in Ancient Christian Law," [188] which led to the A-G's argument that procreation is one of the "essential purposes of marriage." [189] The Court disposed of these two arguments saying that "historical Christian origins are not relevant or helpful

in the determination of the present issue," [190] and noting that society has decoupled the practice of procreation from marriage; indeed, the availability of civil marriage and divorce to practitioners of any faith shows that the definition of marriage put forward by Lord Penzance in 1866 [191] has been superseded by social and legal evolution. The medical evidence developed since Corbett was found to be persuasive, and the Court wrote that ". . . an intersex person appears to be defined as someone with at least one sexual incongruity. If brain sex can give rise to such an incongruity then, legally, we think that there may be no difference between an intersex person and a transsexual person." [192]

Since the law has found that intersex people may choose and change their sex, and that they are eligible to marry in their post-operative, affirmed sex, [193] the court saw no reason not to grant the same rights to post-operative transsexual people. Therefore, the court's task, to determine as a question of law whether it was open to Chisholm J to find, as he did, that the terms man and woman include transsexual men and women within their ordinary meaning and that Kevin was a man at ***59** the time of his marriage, was decided in the affirmative, and the appeal was dismissed. [194]

IV. U.S. Federal Position

At the Federal level, there has been no definitive guidance on how to treat trans people under the law. A petition to argue the issues of the Littleton case before the U.S. Supreme Court was denied October 2, 2000. [195]

A U.S. Citizenship and Immigration Services (CIS) memo [196] was issued on April 16, 2004 which outlines federal immigration policy regarding transsexual people. This memo states that "CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claim to have [changed their sex]." [197]

The memo acknowledges that "[n]o federal statute or regulation addresses specifically the question of whether someone born a man or a woman can surgically change his or her sex." [198] "CIS policy disallows recognition of a change of sex so that a marriage between two persons born of the same sex can be considered bona fide for the purpose of spousal immigration petitions." [199]

The memo also acknowledges that at least half of the 50 United States authorize the issuance of corrected birth certificates for individuals who have undergone surgical sex reassignment (showing the person's new name and sex or gender), and also permit the issuance of marriage licenses for couples where one member presents a newly issued birth certificate. [200] However, this inconsistency complicates the situation for transsexual people, [201] and the federal Defense of Marriage ***60** Act (DOMA) only exacerbates the difficulties because its inherent homophobia is concerned only with preventing some people from entering into marriage contracts. [202] This raises Constitutional issues, particularly under Article IV, in which the Full Faith and Credit Clause specifies that states must honour the public acts, records and judicial proceedings of every other state, [203] and the Equal Protection Clause of Amendment XIV, specifying that no one shall be denied the equal protection of the laws: [204] trans (and gay and lesbian) people are simply not treated equally under the laws of the United States. A Petition for Writ of Certiorari was filed April 18, 2000 with the Texas Supreme Court and July 3, 2000 with the U.S. Supreme Court requesting a review of the Littleton case on these constitutional issues. [205] On October 2, 2000, the U.S. Supreme Court declined to review the case, [206] forcing trans campaigners and their allies to reform or establish local and state laws and policies that would offer rights and protections, hoping to build momentum to create trans-positive federal laws and policies in the future.

A decade elapsed before real progress was achieved at the federal level, which was made possible by a change of administration in 2008. The Obama Administration made a concerted effort to engage LGBT staff and federal employees.[207] Several transsexual people were hired or appointed to significant government posts,[208] and LGBT federal employees were able to be open about their lives. This evolution was made possible by longstanding educational efforts in the area of civil rights and workplace equality undertaken by individual LGBT activists and groups all across the country, and lobbying by activist organizations such as The Task Force, the Human Rights Campaign, the National Center for Transgender Equality, the National Center for Lesbian Rights, Out and Equal Workplace Advocates, and the International Foundation for Gender Education in Washington, D.C.

***61** Significantly, in 2010, the U.S. Department of State issued new guidelines permitting transsexual citizens to obtain a U.S. passport in their lived gender without having to produce a revised birth certificate (bypassing state procedures that may be onerous to applicants, or state laws that forbid acknowledgement of sex reassignment), and without having to prove that any particular surgery has been performed. A 2009 tax court ruling permitting O'Donnabhain[209] to claim her medical expenses associated with surgical transition as a federal tax deduction went uncontested by the IRS at the 2011 deadline.[210] And in 2012, the Equal Employment Opportunity Commission ruled that workplace discrimination against transgender people may be considered discrimination on account of sex under Title VII of the Civil Rights Act.[211] These victories have been long in coming, and are built upon many decades of effort to humanize and validate the rights and dignity of trans people.

We have seen that the law can recognize that "sex is probably a spectrum" ,[212] but a need for consistency, in conjunction with law's requirement to look to precedent and statutes for guidance, can compel judges to reduce complexity and even reject inconvenient new information. Concerning transsexual people, case law has developed in two strains: determinism and harmony. One strain privileges the opinions of observers and assumptions about biological 'normalcy'; the other privileges new scientific knowledge, individual liberty, and the capacity to know one's self, though this is sometimes guided by a need to meet with certain standards (such as hetero-normativity). Both strains seek evidence of physical proof of sex and gender, but one finds its proof in the past while the other finds it in the present. The table below provides a summary of these decisions.

Case	Argument Reasoning	Judicial Reasoning
Forbes-Sempill (1967) Scotland	Medical Condition (intersex)	Harmony ("the sex which predominates")
Corbett v. Corbett (1970) England	Birth Defect (intersex)	Determinism (chromosomes)
Anonymous v. Weiner (1966) NY	n/a - change of name & birth cert	Determinism
In re Anonymous (1968) NY	n/a - change of name & birth cert	Harmony (psychological sex)
Anon. v. Anon. (1971) NY	Rules - annulment: no surgery	Determinism
B. v. B. (1974) NY	n/a - annulment: fraud/incapacity	Determinism
M. T. v. J.T. (1976) NJ	Medical Condition	Harmony
In re Ladrach (1987) Ohio	Medical Condition	Determinism
R v. Harris & McGuiness (1989) Australia	n/a - criminal prosecution	Determinism (behavior/acts)
Lim Ying v. Hiok Kian Ming Eric (1991) Hong Kong	n/a - annulment: fraud/incapacity;no identity assertion by trans man	Determinism
Attorney General v. Otahuhu Family Court (1995) New Zealand	Rules	Harmony with heterosexual genitals required
X, Y, and Z v. U.K	Rules	Determinism
Littleton v. Prange (1999) Texas	Rules	Determinism
re Kevin (2001) Australia	Medical Condition (intersex)	Harmony
In re Estate of Gardiner (2001 & 2002) Kansas	Rules/medical condition/rules	Determinism/harmony/determinism
Goodwin v. United Kingdom (2002)	Medical Condition	Harmony/Autonomy

Bellinger v. Bellinger (2003) U.K.	Rules	Determinism
I v. United Kingdom (2003) ECHR	Medical Condition	Harmony/Autonomy
Kantaras v. Kantaras (2003) Florida	Medical Condition	Harmony
Kevin and Jennifer (2003) Australia	Medical Condition (intersex)	Harmony w/non-function
Schroer v. Billington (2008) W, D.C.	Medical Condition	Harmony/Autonomy
Robertson v. Scott (2011) Texas	Rules [legislative change]	n/a [Rules - vulnerable decision]

***63** Decisions in the 'determinism' vein are always against trans people; decisions in the 'harmony' vein are generally supportive of trans people's integrity in the gender with which the trans people feel most affinity. In the table above, "Medical Condition" means appealing to the established authority of medical experts and the existence and effectiveness of treatment offered, often without any direct testimony from medical experts. "Rules" means the trans person argues "I played by the rules," which may be rules established by medical guidelines or rules established by state law or regulation. "Intersex" or "Birth Defect" as an argument generally makes the statement "It's just how I am"; this differs from the "Medical Condition" argument in that the trans person disavows the transsexual paradigm, usually in an attempt to avoid the stigma of transsexualism. In the 23 cases shown, "determinism" prevailed in 12 (6 arguing "Rules," 1 arguing "Birth Defect", and 1 arguing "Medical Condition" (4 cases are labelled n/a, indicating the reasoning paradigm did not apply because the case was either criminal, uncontested, or a claim against a process or regulation). "Harmony" prevailed in 11 cases, 9 of which argued "Medical Condition," one argued "Rules," and one was a claim against a regulation. A trans person prevailed in the Robertson (2011) case (discussed below) because the Texas legislature had changed the rules permitting changes to birth certificates for trans people born in Texas, and the judge simply applied the rule given to him by the legislature. [213] Because the rules may be changed at any time, and there is no further reasoning or analysis behind the decision on the judge's part, decisions of this type are vulnerable, particularly in states where "traditional" or fundamentalist religious values are deeply entrenched. The table shows that "harmony" decisions are increasing in the 21 st century, and that the "Medical Condition" argument seems to have traction in securing ***64** affirmative recognition for trans people and their civil (in the U.S.) or human rights (in the U.K. and Europe).

Ormrod J's opinion in Corbett dominated legal thinking for over thirty years. Opinions like those in Forbes-Sempill, In re Anonymous, M.T., Otahuhu, and the Appeals Court in Gardiner chipped away at Corbett's hegemony, but it was not until In re Kevin in Australia (2001; affirmed 2003) and Goodwin and I in the European Court of Human Rights (2002) [214] that Corbett's logic and pre-eminence were soundly rejected.

In most of these cases, medical testimony was crucial in shedding light on the transsexual experience, and it is clear from the nature of that testimony that a growing understanding and acceptance of the 'naturalness' of gender variance (validated through neurophysiology, and through spouses, families, and friends of trans people who confirm litigants' gender identity and expression prior to medical treatment) contributed greatly to the capacity of judges to accept this new information. Remarkably, none of the British, Australian, or European Court of Human Rights transsexual marriage cases since Corbett have sought to expose the genitals, surgical status, or sexual capacity of any transsexual subjects the way American courts have done in Littleton, Gardiner, and Kantaras. This fascination with sexual organs is not uniquely American: contemporary media reports about transsexual people (or implying people might be transsexual) from many parts of the world frequently indicate anxiety about body parts associated with sex. [215] Some American courts do seem to be gaining in sophistication and respect in according dignity to transsexual litigants; however, in the U.S., without the benefit of inclusion in overarching statutes that protect their rights as gendered human beings, trans litigants remain at the mercy of individual judges who are free to exercise their personal biases ***65** as they interpret whatever laws they can find to apply to the facts at hand.

Since Corbett in the U.K., both British and European law have evolved somewhat with respect to transsexual people. The European Court of Human Rights issued several decisions instructing the U.K. to reform its treatment of transsexual citizens, most notably, Goodwin v. United Kingdom [216] and I v. United Kingdom. [217] Australian legal scholar Laura Grenfell has written succinctly about the impact of these decisions, [218] and professors Andrew Sharpe and Stephen Whittle have published

more extensively about this judicial and legislative history. [219] In Goodwin and I [220], the Court held that the United Kingdom's refusal to allow transsexuals the right to change their official birth certificates and to obtain valid marriages was in violation of Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, effectively overturning Corbett in July 2002. [221]

Real change did not easily follow. In Bellinger v. Bellinger [222] the House of Lords dismissed Mrs. Bellinger's appeal to have her 22-year marriage recognized under U.K. law, resolutely clinging to the precedent in Corbett. In his decision, Lord Hope "tries to persuade us that his decision is in line with European jurisprudence and with the E.C.H.R." by twisting the question from "is Mrs. Bellinger's marriage valid" to "what is Mrs. Bellinger's true sex?" [223] He insisted the Court in Goodwin was not trying to answer this latter question, and in so doing, Lord Hope cleverly drove his logic in the Corbett direction, implying that 'transsexual' is a category of persons outside the boundaries of the 'natural' categories of 'man' and 'woman'. [224] This proved to be Corbett's last gasp in Britain.

Britain's Gender Recognition Act (2005) was Parliament's response to the European Court of Human Rights' decisions. [225] This ***66** Act provides for full acknowledgement of transsexual people who are living in their affirmed gender, granting marriage rights and all other gender-based social rights, without a requirement for genital reconstructive surgery; however, it preserves marriage as a heterosexual institution, requiring any existing legal marriage to be dissolved before a gender recognition certificate may be granted (rather than affirming the validity of an existing marriage contract), allowing that the same-gender couple may recommit themselves in a civil partnership. [226] The Act privileges one's socially lived gender over one's assigned natal sex, the project that Ormrod J was loath to undertake, while providing reassurance that the assumed-to-be natural, bifurcated order prevails, placating the majority in Parliament. The Act was passed and assented to by the Queen in 2004.

Thus, by 2003 Corbett had lost much of its influence across Europe, Canada, and Australia, though the principles espoused in that decision remain almost unassailable in Ohio, Tennessee, Idaho (states that refuse to acknowledge sex reassignment by statute), and Kansas (where the state supreme court's decision in Gardiner takes precedent). The beliefs that Ormrod J expressed in Corbett still hold considerable sway in debates across the U.S., debates that are frequently conflated with fears of homosexual tyranny and man's misguided attempt to make a woman of himself (or a woman's effort to make herself a man), often reaching an almost hysterical pitch. [227] Even if Corbett has been proven no longer good law in the common law, it is also true that U.K. case [and statutory] law leaves intact not only the sex/gender distinction per se, but also the notion that marriage is based on sex (the natural fixed biological body), as opposed to gender (socially constructed masculinity/femininity), [228] although how gender could be superior to sex as a system of distinguishing status is another question for future inquiry. U.K. law also reifies the concept that sex cannot be changed, that transsexual people simply change their gender. These concepts do not alleviate the fears that fuel transphobia, nor do they address religious objections to transsexual humanity.

*67 VI. The Sex / Gender Debate

Does it matter whether we are talking about sex or gender--either changing or staying the same--when considering the legal status of transsexual people? In Corbett, Ormrod J wrote:

> I have dealt, by implication, with the submission that, because the respondent is treated by society for many purposes as a woman, it is illogical to refuse to treat her as a woman for the purpose of marriage. The illogicality would only arise if marriage was substantially similar in character to national insurance and other social institutions, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender. [229] (Emphasis added).

Ormrod J asserted that were medical doctors to change a person's body and assign sex to her or him, this action would not determine the individual's sex. He wrote that "The word 'assign', although it is used by doctors in this context, is apt to mislead since, in fact, it means no more than that the doctors decide the gender, rather than the sex, in which such patients can best be managed and advise accordingly." [230] (Emphasis added.). American legal scholar Mary Anne C. Case has written:

> The word "gender" has come to be used synonymously with the word "sex" in the law of discrimination. In women's studies and related disciplines, however, the two terms have long had distinct meanings, with gender being to sex what masculine and feminine are to male and female. Were that distinct meaning of gender to be recaptured in the law, great gains both in analytic clarity and in human liberty and equality might well result. For, as things now stand, the concept of gender has been imperfectly disaggregated in the law from sex on the one hand and sexual orientation on the other. [231]

It is well documented in U.S. legal history that Supreme Court Justice Ruth Bader Ginsburg is responsible for the verbal equivalence of 'gender' and 'sex' in U.S. legal contexts, and she credited a secretary who
once told her, "I'm typing all these briefs and articles for you and the word sex, sex, sex, is on every page. Don't you know ***68** those nine men [on the Supreme Court], they hear that word and their first association is not the way you want them to be thinking? Why don't you use the word 'gender'? It is a grammatical term and it will ward off distracting associations. [232]

The invocation of grammar to whitewash human sexuality was the result of a particular cultural moment and arguably predicated upon the intention of then-Professor Ginsburg to ensure that she would be taken seriously, so that those "nine men" would not be tempted to allow deliberations of matters pertaining to women's lives to degenerate to locker-room banter. Sex and gender do have specific - and different - meanings, though, to medical professionals who testify in these cases. Gender-variant people, and especially transsexual people, have struggled to define themselves and often to separate themselves from what Andrew Sharpe called the homophobia of the law, and Ginsburg's early-1970s desire for propriety and 'cleanliness' has exacerbated the public's confusion and resistance to comprehending the salient differences that might help trans people be less marginalised. It does matter whether we are talking about sex or gender, because the characteristics of sex and the qualities of gender have distinctly different (though often complementary) functions in every human organism, and it is precisely the difference between them that is the problem for trans people, whether the problem is within the trans person or in the eyes of their beholder. Unless we are prepared to say that neither sex nor gender matters in the law governing social situations, we cannot address any trans person's validation issues without acknowledging this discrepancy.

A. Discrimination and Title VII

With respect to Title VII of the 1964 Civil Rights Act (pertaining to employment discrimination "because of sex"), the word 'sex' is not defined, either in the Act or in its legislative history. [233] When transsexual people first brought employment discrimination claims, their petitions failed because Courts determined they were not being discriminated against based upon being a woman or a man, but because they had changed their sex, [234] and the word 'sex' was interpreted to exclude 'change of sex': 'sex' meant only men and women, not ***69** something in-between, or 'transsexual'. [235] Corbett reinforced those decisions; even though Ormrod J had ruled that sex could not be changed, his ruling might be interpreted to mean that April Ashley was neither a man nor a woman. "[T]he trial judge found that the respondent had been shown to be of male chromosomal sex, of male gonadal sex, of male genital sex and psychologically to be a transsexual." [236]

In 1989, in Price Waterhouse v Hopkins, [237] the U.S. Supreme Court expanded the application of the term 'sex' in Title VII beyond regarding a person's biological status as male or female, holding that it also includes stereotypical assumptions and preconceptions about how men and women are supposed to behave, dress, and appear. [238]

Nevertheless, it was not until 2000 that transsexual people began to win discrimination cases based on sex. [239] Due to legislative efforts begun in the 1990s to place the term 'gender identity and expression' into anti-discrimination laws on local and state levels, and the cumulative educational effort that trans people themselves made to support that change, advocates now have a rich literature upon which to draw for educating attorneys and the judiciary. [240] Recently, the U.S. District Court for the District of Columbia ruled that rescinding a job offer when a qualified candidate disclosed that she would be transitioning from male to female was discrimination because of sex under Title VII. [241] Although American society has long recognized that people have both the capacity and the freedom to change their religion, until 2008 no U.S. court had accepted the parallel argument regarding change of sex. Schroer v. Billington (2008) [242] was a case of sex discrimination in employment brought by a transsexual woman, who prevailed and retained the job she had been offered as a Specialist in Terrorism and International Crime with the Congressional Research Service at the Library of Congress. The job offer had been rescinded post acceptance, when Diane Schroer revealed her transsexual status and the hiring manager assumed the transition would be a barrier to ***70** Schroer's security clearance and ability to perform the functions of the job. Counsel for the Library of Congress argued "that a hiring decision based on transsexuality [sic] is not unlawful discrimination under Title VII [of the Civil Rights Act.]" [243] Robertson J. ruled that:

> In refusing to hire Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, and in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination. [244]

This decision overruled the judgment in Ulane. As of this writing a federal Employment Non-Discrimination Act (ENDA) that protects gender identity and expression from adverse discrimination in all 50 states has been introduced but has not yet been voted on by the Congress, the Obama Administration has taken steps to protect transsexual and transgender federal employees by administrative policy change as discussed above. [245]

Sex and gender have been conflated historically in culture and in the law. Culturally, in the English-speaking world, most people seem to comprehend their gender and their sex as equivalent, which is probably why it was so easy for Justice Ginsburg to make her verbal swap. Ormrod J was capable of discerning the difference between sex (biology) and gender (psychological and socio-cultural) [246], but to him only sex was important in the context of marriage. Ginsburg, as a feminist, knew the difference, too; perhaps her conflation project will one day prove effective in bringing about the legal admittance that gender is as important as sex. It is only when one is gender-variant, trans, intersex, or transsexual that the lack of correspondence of sex/gender characteristics of the body and/or body/psyche gives rise to a need for developing alternative language to explain the friction either within the individual or between the individual and certain social institutions. [247] The psyches of trans people live in bodies that carry them out into the social world. For trans people, sex and gender both matter, and the contention that sex is as socially constructed as ***71** gender, [248] and gender is as 'real,' 'natural,' or even 'God-given' as sex, is beginning to find comprehension in law.

One of the first modern legal scholars to write analytically about sexual issues in the law was U.S. Court of Appeals (Seventh Circuit) Judge Richard A. Posner. In his book Sex and Reason, [249] Posner J conjectured:

> The horror of transvestism--for that is the feeling it inspires in most Americans--is, on the constructionist view, related to the horror of hermaphroditism and to the persistent strong antipathy to homosexuality, especially when the (male) homosexual, by either effeminate or "hypermasculine" mannerisms, appears to be masquerading as something he is not. The sorting of all persons into male and female and the pairing of persons by opposite sex are fundamental elements of our construction or mediation of reality, and the violation of the pattern is felt as unnatural, transgressive. . . . [B]ut there is another possibility. It is that the shock value of transvestism and of effeminate or hypermasculine male homosexuality is related to our deep-seated anxiety about disguises. To maneuvre effectively in the world, we need to assume that people and things have stable identities. The idea that someone might change his identity by changing his clothes violates this assumption. . . . Most Americans do not consider, say, a male transsexual, even following conversion, to be a woman. The transsexual may fool them, as might a female impersonator or a transvestite. But if they were apprised of the facts, they would say, this is not really a woman; this is a man who has undergone surgical and hormonal therapy to make him look and feel like a woman. [250]

Yet, in Posner J's view, "transsexualism does not imply that we can change our sexual identity by changing our clothes" [251] because the 'conversion' requires medical intervention and therefore is not 'facile impersonation.' [252] The fact that the effort is "painful, time-consuming, expensive--and irreversible" mitigates transsexualism somehow, but does not fully redeem it, nor does it entitle the transsexual body to the status or privileges granted to either a female or a male body. [253] Posner ***72** J referred to the Ulane case (1984) [254] in which a transsexual woman was denied relief in a Title VII (of the Civil Rights Act of 1964) employment discrimination claim on the reasoning that she was not fired because she was (or had become) a woman, but "because she had what the airline regarded as a psychiatric disorder. Transsexuals are not a third sex protected by the laws against sex discrimination." [255] As mentioned previously, this opinion has been superseded by that in Schroer (2008), [256] in which 'change of sex' qualifies as discrimination against an individual 'because of sex'.

B. Categories, Distinctions, and Closure

American legal scholar Richard F. Storrow wrote of the conflict between the existence of transsexual people and "the traditional judicial emphasis on predictable outcomes", as complicated by "the Western classical tradition's emphasis on rationalism and closure" . [257]

The law, ever at the ready with its categories and distinctions, is prepared to recognize only two sexes, male and female, and rejects and finds jocular a body "in the act of becoming." Bifurcating sex into the exclusive categories of male and female, the law rejects recognition of any different sex, of any state of intersex, or of a sexual continuum that would call into question the legal system's insistence on mutually exclusive sexual categories. [258]

As discussed at the outset, the grotesque, unbound, disorderly image of the transsexual body is a threat to stability and closure in the realm of sexuality. This is compounded by "the presence of judicial horror at the thought of castration and [the appearance of] the image of a female father [[thrust] into social consciousness." [259] Medical experts have successfully convinced courts that the medical treatment for transsexualism is the most effective method of relieving the suffering of those gender-variant people who meet the diagnostic criteria. [260] Nevertheless, despite consensus among medical experts that sex is a continuum

and therefore more than two manifestations of sex exist, most courts have rejected medical authority on this point when it comes ***73** to including transsexual people as full members of society. It is acceptable to allow an individual to achieve personal, individual integration, but much more difficult to permit the grotesque to mingle with the orderly social body that the law attempts to preserve.

Storrow analyzed a series of relevant cases [261], many of which have been discussed in this article, in light of marriage and parental rights. He pointed out that by altering the body, particularly by castrating the male (and replicating homosexual sexuality, in the minds of some judges, at least, through the surgical use, in some cases, of rectal tissue to construct a vagina) and because of medical science's inability to create a naturally-functioning ('real') penis for the transsexual man, transsexual people are themselves responsible for taking themselves out of the social equation. [262] He postulated that because of their own actions transsexual people deserve whatever outlaw status befalls them, including the negative social consequences of breaking sexual taboos that enforce the social order. [263]
The courts' stance ultimately poses the larger question of whether the will to transgress sexual boundaries, embodied in the image of transsexualism, would not be tempting for more people if the curtailment of liberty resulting from its indulgence were removed. Such an outcome, demanding a fundamental reconceptualization of societal order, may be a major factor in the law's lack of compassion for transsexuals. [264]

Storrow went on to discuss issues for transsexual people in prison housing, employment discrimination, and name change cases, three areas outside the scope of this study; however, Storrow's analysis of the issues of the body through these particular problems of transsexualism supports his thesis that judges are selective in their acceptance of medical authority, ridicule and belittle transsexual people, and are reluctant to grant them legal status in their affirmed sex because they have the "ability to explode settled social expectations and to destabilize the very social framework within which the law moves." [265]

American law professor Marybeth Herald discussed the cognitive bias [266] that occurs when human beings--including judges--resist new ***74** information that counters long-held beliefs. Not only do we disregard new information that doesn't agree with our beliefs, we deliberately adopt denial strategies to avoid re-examining our beliefs. She reviewed the major court decisions that have taken place since the narrow, "ostrich-like approach" [267] of Corbett, "with the exception of prescient court decisions in New Jersey [268] and New Zealand, [269] which placed emphasis on both the psychological and social aspects of sex and marriage, a tidal shift in thinking did not occur until more than 30 years after Corbett." [270]

The breakthrough occurred with the European Court of Human Rights decision in Goodwin, [271] where the court took into account "at least two themes: (1) evolving knowledge and (2) personal autonomy." [272] Professor Herald stated that "the court reached this stage by incorporating the data [a more sophisticated understanding of the developing science] within a framework of human rights, rather than trying to force it within the existing binary sex structure." [273]

Ultimately, the Goodwin court found that acknowledging a change of sex "would not be a detriment to the public interest," and would be in accord with the principles of the Charter of Fundamental Human Rights, in which "protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings." [274]

C. Sex versus Sex Stereotyping

Herald further reviewed U.S. employment cases, in which the arguments once based on the concept of sex discrimination under Title VII were reframed as incidents of discrimination because of sex stereotyping. [275]

According to Herald, in the area of marriage in the U.S., progress has been less promising because broader principles such as sex stereotyping or human rights and personal autonomy have not been successfully incorporated into arguments for marriage and civil standing ***75** cases. [276] This is likely due to the "social, biblical, and emotional baggage" [277] with which the concept of marriage is burdened. She concluded that "there is a need to find a way to bypass the automated systems of our mind so we can actually comprehend the information, unobstructed by categorical barriers." [278]

With respect to the problems faced by Michael Kantaras, we see these observations played out again and again: the burden placed on Mr. Kantaras to explain and prove his validity as a man met with every form of resistance, and while he did prevail at trial, his victory was rebuffed on appeal with avoidant reasoning. Professor Taylor Flynn explored the "systematic obliteration of their personal identity, a legal shredding of self" [279] that trans men and women are likely to face should they venture into an American court to seek dispute resolution. She wrote:

> You can be a husband, a father, and even have male-pattern baldness, yet a court can declare, nonetheless, that you are female. When a court subordinates these realities to the orthodoxy of "sex-as-genitalia", it enforces as social and legal paradigm in which trans women and men have no place. . . . Based on their own experiences, judges may believe they "know" what sex is, just as they "know" what is best for children. . . . the resulting sex-system is incoherent and contrary to our conceptions of individual autonomy. Can the law make something as central to our notion of selfhood as our sex depend on the vagaries of where we reside? On an individual's desire for, or ability to afford, surgery? On the current state of medical knowledge? [280]

Flynn advocated for the legal recognition of gender identity as the central component in determining legal sex. Laura Grenfell similarly argued that "Given that the law operates on the basis of the notion of a stable subject, why can behavior and psychology not be understood as providing a sufficiently stable base?" [281] She used feminist critique, notably an analysis of Judith Butler's post-structuralist feminist thought, [282] as well a review of the pertinent cases, such as Corbett, [283] Rees, [284] Cossey, [285] M.T., [286] Littleton, [287] Gardiner, [288] Otahuhu, [289] and Re ***76** Kevin [290] to conclude that "an understanding of the fact that biology and sex are as socially constructed as gender could assist the courts in taking a more humane approach to the question of 'What is sex?'," leading to more equitable treatment for transsexual people and a "more socially relevant mode of determining gender and 'making' sex." [291] In other words, conceiving of sex as fixed is also a way of 'sex stereotyping'.

D. Affirming Social Sex

Perhaps the most thorough decision concerning the validity of marriage of a transsexual person is Re Kevin (2001), affirmed by the Full Court of the Family Court of Australia in February 2003. [292] An article by Australian attorney and former legal scholar James McConvill and legal scholar Eithne Mills in the International Journal of Law, Policy and the Family [293] reviewed the implications of the Kevin decisions. The three most important findings in Re Kevin were (1) that determination of a person's physical attributes at birth is not, and should not, be immutable; [294] (2) that "the words man and woman when used in legislation have their ordinary contemporary meaning according to Australian usage. That meaning includes post-operative transsexuals as men and/or women in accordance with their sexual reassignment;" [295] and (3) that the result of "irreversible" surgery that any

transsexual person has “must be at a stage in which it is no longer possible for one's body to function in its original biological sex, rather than having the result that one's body has the ability to function in its psychological sex.” [296]

These conclusions of law do not free transsexual people (or anyone, for that matter) from the form of the human body as classified by sex, but they clearly disconnect gender from genitals, and marriage from sexual functioning. In combination with Goodwin, I, and Schroer, Re Kevin provides the logical foundation for the most trans-positive ***77** decisions of the current era, in spite of what is now coming to be deemed an inhumane insistence on sterility. Whether these decisions will stand as a sufficient precedent for the equality and human rights needs of transsexual people around the world remains to be seen.

VII. Permeable Boundaries

O'Brien J's analysis of the cases prior to Kantaras reveals the conundrum he and every other judge confronted when presented with a transsexual party to a legal proceeding. In each case, how the judge approaches the first question-- does this individual have standing as a woman or man under the law to pursue or defend against the allegations presented in the issue at bar?-- telegraphs the outcome well in advance. Even in Corbett, although Ormrod J went through what was at the time comprehensive medical testimony [297], he simply ignored the evidence that he didn't want to hear. With centuries of cultural prejudice against gender variance working on the average person's mind, how are judges to respond to something they've never seen or considered seriously before?

Social and judicial analysts and commentators remain troubled by the current state of the law with respect to gender variance. Professors Sharpe and Herald both have searched the reasoning in existing cases to find and dismiss logical patterns that are rooted in bias against trans people. Sharpe concentrated on homophobia and the relationship of the heterosexist tendency to police sexual behavior and gender-normative bodies, finding fault even with decisions that are favorable to transsexual people because they preserve hetero-normative assumptions underlying acceptable behavior. Herald focused on the more recent courts' ability to incorporate evolving knowledge and the concept of personal autonomy within a framework of human rights that manages to affirm the lived experience of transsexual people.

Legal scholars Posner and Storrow, writing in the 1990s, considered the concepts of stability and predictability, rationalism and closure, upon which the law relies, to be concepts antithetical to the transformative characteristics inherent in transsexualism. Posner writes of the “horror of transvestism”, noting that the medical process renders a transsexual person just that much more ‘real’ or concrete, but because the condition can be considered a psychiatric disorder, the transsexual individual's credibility is reduced and their entitlement to legal protection is diminished. Storrow writes of law's capacity to find ***78** transsexual bodies jocular in an effort to insist on distinct categories of sex; ridicule is another way to diminish the humanity of transsexual people. In opposition to these prevailing attitudes, Stephen Whittle in the U.K. [298] and Phyllis Frye [299] along with Currah and Minter [300] in the U.S. separately asserted the transsexual standpoint and began a new trend in legal analysis.

More recently, professor Flynn and legal scholars Case and Grenfell each analyze the legal history in light of the cognitive bias that our language usage reinforces by both conflating and disaggregating ‘sex’ and ‘gender’. Each of these thinkers advocates in her own way for the law to recognize that gender is as real as sex, sex as constructed as gender, both terms have distinct meanings, and if the law could comprehend these meanings we might achieve a better understanding of the complexity of ‘sex’. Visible external genitalia, presumed chromosomal make-up, and presumed reproductive capacity are viewed as primal, objective, fixed, and ‘true’ only because the external genitalia is the first observable differentiator--or characteristic of social significance--that people see in an infant. However, to define ‘sex’ as the fixed point of a compass that always tells us the ‘truth’ about a person is both archaic and naive.

In Kantaras, Michael's attorneys' use of medical expert witnesses focused on establishing the following facts to support their case that he should be regarded as male for the purposes of marriage:

• That people do not choose their gender identity.

• That it is unethical to keep someone in therapy to change their gender identity.

• That severe gender identity disorder--transsexualism--is positively and effectively treated by sex reassignment according to established Standards of Care.

• That the most common surgical procedures for Female-to-Male transsexual people are chest reconstruction and total hysterectomy, and that these are irreversible.

• That the shape of one's genitalia does not determine one's sex, as supported by the fact that medical professionals experienced in treating this population concur that genital reconstruction is not necessary to render a female-to-male transsexual person male; further, that it would not be ***79** medically ethical to require specific surgical procedures to recognize male social status.

• That sexual orientation is not predicated by genital shape, but that it is defined by the sex of the person(s) to whom one is attracted.

• That the steps of legally changing one's name and birth certificate are indicative of the medical and social authenticity of a transsexual change which the Court should recognize as valid.

• That a penis is not required for 'male bonding' or to serve as an adequate male role model for a child, and that children can accept a transsexual parent if the information about the parent's transsexualism is delivered in an age-appropriate and reassuring way.

This line of evidentiary testimony differs from that in many of the previously examined cases in that there was no attempt to establish transsexualism as an intersex condition or as otherwise definitively rooted in biology. The existence of a well-established Standard of Care developed by an interdisciplinary group of medical and psychotherapeutic professionals is a distinct advantage for Michael Kantaras and other more recent cases such as those in the European Courts over many pre-1995 transsexual litigants who were compelled to prove their sex in court (see table). The fact that the medical experts testified in person and were available for cross-examination carried considerable weight with O'Brien J, as did Michael's masculine appearance and bearing. This is in contrast to Ormrod J's critique from the bench of the trans woman April Ashley's appearance in which he noted that the longer he observed her, "[t]he voice, manner, gestures and attitude became increasingly reminiscent of the accomplished female impersonator." [301]

O'Brien J considered Florida statutory language, which states (in part) that "Gender-specific language 'includes the other gender and neuter"', [302] and concluding that transsexual people are "strictly 'neuter"' in that (he assumes) they have been castrated, O'Brien J then noted that Michael is, from a medical standpoint, a neuter male, and observed that other males rendered 'neuter' through a variety of conditions (e.g., erectile dysfunction, low sperm count, prostate cancer) are permitted to marry. [303] He declared:

> ***80** There is no justification in the law to hold a transsexual to a higher standard than all heterosexuals in approaching marriage. Gender is only relevant, as male or female, at the time of application for a license to marry, not at birth. . . . All heterosexuals [of a certain age] are legally qualified to apply for a marriage

> license without having to prove they are capable of producing a family. . . . Michael . . . is a heterosexual and he is entitled to be treated at law as a heterosexual male. [304]

His discussion of 'neuter males' was likely intended to combat the Christian notion that procreation was the purpose of marriage, but he did seem to be reaching, since fertility was not an issue in the case, nor is it a requirement for marriage in Florida, nor is sterility a requirement for affirmation in the 'new' gender for transsexual people. He might have been trying to develop statutory support for his decision, but including this particular point may have actually weakened his position. In fact, his inclusion of this material in his judgment provided ammunition for Linda's counsel on appeal in their argument against Michael to critique O'Brien J's decision, calling his linguistic exercise "twisted logic" and "mind games." [305] English-speaking law provides no neutral or third category of gender; there is only 'man' and 'woman'. In P v S and Cornwall County Council, [306] the European Court of Justice Advocate General clearly stated "transsexuals certainly do not constitute a third sex" , [307] meaning they should not be treated as 'other', but as men or women in conformance with their gender identity. O'Brien J's invocation of the 'neuter male' contradicted his position that Michael should be treated in law as a heterosexual male.

In his conclusion, O'Brien J did not question the origin or possible causes of transsexualism, as Courts have done in many of the other cases. Instead, he held that medical science has seen fit to recognize the suffering of transsexual people and develop a diagnosis and treatment to relieve their distress and enable them to move on with their lives. [308] ***81** Invoking the principle of 'harmony' borrowed from M.T. v J.T., O'Brien J ignored the "chromosome barrier" of Corbett, Littleton, and Gardiner, and decreed that "Michael Kantaras should be considered a member of the male sex for marital purposes." [309]

Fortunately for transsexual people in Texas, Littleton has been challenged by Robertson v. Scott. [310] A transsexual man, Scott, has (in November 2011) preserved the validity of his heterosexual marriage to a woman in the face of her challenge that the marriage should be void because of her husband's transsexual status. [311] Scott was able to prevail because of legislative changes to the Family Code (§ 2.005(b)(8)) which added provisions for the recognition of a court order relating to an "applicant's name change or sex change" as legitimate proof of identity. [312] The legislative change was accomplished in 2009, and withstood an aggressive challenge in the spring of 2011 in the form of a bill intended to strike the words "or sex change" from the statute. That bill failed, but, ironically, it succeeded in affirming that the Texas Legislature had confirmed the right of trans people to marry an 'opposite sex' spouse, effectively nullifying Littleton, but Gardiner still stands in Kansas.

Most case law is undertaken within a contentious setting, with attorneys usually facing extremely busy schedules, and preoccupied with next cases to attend. Consequently, their arguments may be limited by tactical expediency. Whilst they will have a sense of a case's implications for their client, they rarely have the luxury of analysing what the case means from an historical and cultural perspective. The European Court of Human Rights maintained in 2002 that:

> In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. [313]

***82** Clearly, there have been huge social changes since the development of gender reassignment treatments in the 1940s and 50s. The question now is whether there is any good reason for not agreeing with the view of the ECHR. It is clear that where transsexual people are afforded recognition, whether as a consequence of legislation or case law, as members of their

preferred gender (sex) once they commence presenting in that gender in their daily life, the social stigma attached to gender variance is reduced considerably, and trans people are able to live safer, more productive lives. Evidence for this is found in those places where there has been trans-positive case law: most states in the U.S., Australia, many of the European Convention states, Singapore, South Africa, etc., and in the trans-inclusive policies and practices in over four hundred major American corporations, [314] over a hundred U.S. cities and counties, and thirteen U.S. states. [315]

As the European Court has held, considerable social changes have taken place in the last 30 years, and
It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identityFalse The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety. [316]

And the Court went on to say:

> No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals . . . society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost. [317]

***83** The legal status of trans people is confirmed by promoting and passing legislation, or, where possible, creating administrative procedures. As the experience of the U.K. has shown, creating a clear and unobstructed process of administrative name and gender change for identity documents, including for immigrants or people who wish to enter the state, does not cause crisis or social chaos. Litigators, legislators, and policy advocates should take every opportunity to demonstrate that the equation 'sex = chromosomes' is no longer true, and 'gender = chromosomes' is even less valid. Reification of these equations as a matter of law simply can no longer be justified. There is a clear move in many states to eliminate the legislative need for the category 'sex', instead acknowledging the fact that both men and women can commit the same offense and offences. [318] And in medicine, we see from the experts in Kantaras, and other cases, increased recognition that medicine does not have all the answers about various categories of the body. As Lord Winston, an internationally recognised fertility expert, said in the House of Lords Debate on the U.K.'s Gender Recognition Bill, we need to be very guarded before defining sex in terms of chromosomal, genital or any other simple definition. He stated, "It simply is not medically just, and I am sure that it would produce bad law." [319]

The next stage in law for transsexual people, indeed for all people, must be a move away from the concept of the sexed body as the definition of the person. Certainly, legal equality between women and men, and the eradication of sex-based barriers to marriage and other social institutions and benefits will help in this regard, but for trans people the issue is not that bodies need to be understood as similar, but they must be recognized as different. This difference must not be made qualitative such that trans bodies are valued as inferior to non-trans bodies. All bodies must be valued as intrinsically equal. Women and men will mostly continue to be physically different, and the "human race" will still perpetuate itself primarily through heterosexual procreation, but there is no logical reason to ground decisions in legal systems on the differences between male and female bodies.

It is also true that after a few years of hormonal treatment, many, if not most, trans bodies will not be visibly trans except in intimate or ***84** medical settings; the privacy and dignity of the body must be preserved for all people, not just those who are

trans. Models for this approach might be adapted from disability law, though considerable analysis will be necessary to avoid misappropriating or colonizing disability theory.

What we must not do, as a society, is condone the law's ignorance of trans people's legitimate complaints the way Michael Kantaras's assertions were ignored by most of the authority figures engaged in his case. The forces in motion throughout his case joined in a confluence that ultimately could not advance the legal interests of trans people, though not for want of trying on the part of Michael's legal counsel and O'Brien J. The entropy that engulfed their efforts was weighted in favor of history. There is still no agreement within the medical profession about the aetiology, or social (or psychological) utility of the drive to transition from male to female, or from female to male, and this clearly is still seen as problematic to the law and to social and governmental policy. It is simply easier to say 'we don't know' than it is to apply resources to verify a physical origin of transsexualism, especially when only a relative few people are affected. Efforts to understand transsexualism as an intersex condition wax and wane, and our collective knowledge of the human body is not yet deep enough to make such a conclusion inevitable and acceptable to all concerned. However, not knowing contributes to the ease with which trans people continue to be marginalized and treated as less than human. Not knowing also allows for religious opinion to be asserted as fact, and for the media to exercise its imagination in search of profits at trans people's expense.

The consequences of 'not knowing' can be seen even in the eastern European Community states, yet the European Court of Human Rights has clearly rejected the use of 'not knowing' in order to fail to acknowledge the human rights of transsexual people, having made it quite clear that:

> It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. . . . It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals. [320]

***85** And that "The Court is not persuaded . . . that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals." [321] In fact their determination was that "[t]he Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone." [322]

On the surface, it does not seem unreasonable that judges ask legislatures to provide for the social recognition of trans people. However, this attitude reveals a pattern of colonialism that unfortunately has shaped the history of English-speaking law, primarily through classism, racism and sexism. The result is that persons outside the dominant class require overt recognition, otherwise they do not matter. The law has no mechanism to critique its own culture-bound assumptions about sex and gender. By querying these subjects only through specific facts in specific cases, law's understanding of sex and gender remains tied to specific settings, and it has been left to litigators and legislators to find ways to reorganize these facts and use them constructively. By confronting the lack of human and civil rights that gender-variant people enjoy, "trans litigation holds the potential to defuse the power of gender as a mechanism for discrimination" [323] for everyone. Clearly, it is not enough to simply "follow the rules" and hope to be acknowledged. Acknowledgement must come from the recognition of individual gender integrity and gender-based equality.

To assist the efforts of litigators and legislators, based on the information gathered through this inquiry, there are eight key principles that should be addressed in the provision of public policy and applicable law:

• Medical treatment, surgery, or forced sterilisation must not be required to validate anyone's gender identity

• Identity documents must reflect the name and gender (sex) that an individual expresses in their daily life

• All people are entitled to express and actualise themselves; no person should be limited in the number of times they may make a gender change, whether that change applies to clothing, identity documents, or medically assisted change

***86** • All adults are entitled to form intimate relationships, to marry, and to found a family; gender-variant people also must be able to marry, to remain in existing marriages in the event of gender change, and to retain access to their children should their marriage be dissolved by either party, taking into account the best interests of the children, with no undue prejudice directed toward trans people

• All people, including trans people, must be afforded equal opportunities in education, housing, employment, healthcare, and public accommodations; enabling or protecting legislation must be enacted, and remedies for adverse discrimination must be readily available

• Access to health care for medically necessary treatments must be available to all people; exclusions denying medical treatments based on transgender or transsexual status must be eliminated from health insurance schemes

• All people are entitled to privacy concerning medical history; the history of any person's gender status change must be respected and their privacy preserved; the right to disclose a gender change belongs to the individual

• The human rights concerns of gender-variant people must be addressed openly and directly by all relevant institutions and governmental bodies; these bodies must act to promote equal opportunity and act to condemn discrimination toward gender-variant people; avoidance, negligence, and transphobia cannot be condoned

The U.K. is well on the way to achieving the above goals, with the exception of the marriage laws, which still enforce a hetero-normative model, and the limitation on gender change to a one-time event. Marriage laws are becoming more liberalised in many countries, and the U.K. should also take steps to remove these restrictions. There is no reason why people should not be able to change their lived gender more than once; paper trails would deter criminal misuse of the system, and the preservation of their integrity could be ensured with an administrative system that did not harass or penalize gender-variant people. In order to accomplish these goals in the U.S., however, the following must be done:

• The Federal Employment Non-Discrimination Act must be passed with protections for gender-variant people intact, and other administrative policies must be adopted throughout governments and other institutions

***87** • Health care systems must be reformed so that all people, including gender-variant people, have access to quality, medically-necessary care that is delivered respectfully

• Better research and education must be conducted throughout government and legal and medical professional training and service centers to ensure that gender-variant people are fairly integrated into all aspects of life, and so that prejudice and adverse discrimination is eliminated

Furthermore, judges, litigators, and legislators must also learn to recognise and disrupt racism, sexism, classism, able-ism, homophobia and transphobia in themselves and in their courtrooms, arguments, and legislation, statutes and regulations

Finally, the fundamental principles of human rights must be explicitly incorporated into American law so that the lives of gender-variant people can be accorded the respect, human dignity, and equality they deserve under the law. Along with all Americans, all other human beings, trans people should be entitled to subjective recognition of their shared experiences, practices, and conditions. Even if the practice of changing their sex or gender isn't widely shared, trans people are no less human because of it.

Determinism is the rationale for one set of beliefs about humanity; harmony is the rationale for another. It isn't following the rules that assures recognition for transsexual people, it's the willingness of others to recognize that neither sex nor gender is the whole of a person's destiny, and to recognize transsexual people as real human beings.

Footnotes

a1 Ph.D., Law (2011), Manchester Metropolitan University (England) School of Law. M.F.A., English (1972), B.A., English (1970), University of Oregon, College of Liberal Arts. Policy Analyst at the Center of Excellence for Transgender Health, Department of Family & Community Medicine, University of California, San Francisco; President-Elect of the World Professional Association for Transgender Health. Internationally-known accomplished legislative provocateur promoting the civil rights, health, and social safety of transsexual, transgender and gender-nonconforming people for over 25 years; friend and mentor to scores of transgender litigators. The author expresses gratitude to Professor Stephen Whittle, O.B.E., Ph.D. for his instruction, guidance, and friendship, to Shannon Price Minter, Esq., for his encouragement and wise counsel, and Heidi Bruins Green for her patience and steadfast support.

1 World Prof'l Ass'n for Transgender Health, Inc., Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 1-7 (7th Ver. 2011), available at http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf.

2 See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

3 See, e.g., In re Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001) aff'd in part, rev'd in part, 42 P.3d 120 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999); Corbett v. Corbett, [1970] 2 All E.R. 33.

4 The Eugenics movement in Britain and in the U.S., as well as American miscegenation laws, attest to this. See 4 The New Encyclopedia Britannica 593 (15th ed. 2003); see also 8 The New Encyclopedia Britannica 183 (15th ed. 2003).

5 Thomas Laqueur, Making Sex: Body and Gender from the Greeks to Freud 196 (1990).

6 Martha Nussbaum, Hiding from Humanity: Disgust, Shame, and the Law 92-93 (2006). Additional debates that attack or rely on physicality include "fat rights," age-based discrimination (including youth as well as people considered at "age of retirement"), and sometimes religious faith (e.g., religious requirements concerning hairstyles and clothing that conflict with other local laws or customs). For a very interesting discussion of the way American law frames personhood, see Anna Kirkland, Fat Rights: Dilemmas of Difference and Personhood (2008).

7 Julie A. Greenberg, The Roads Less Traveled: The Problem with Binary Sex Categories, in Transgender Rights 51-73 (Paisley Currah et al. eds. 2006).

8 Peter Lee et al., Consensus Statement on Management of Intersex Disorders, 118 Pediatrics e488 (2006), available at http:// pediatrics.aappublications.org/content/118/2/e488.full?sid=83963cdd-15c0-431b-8c93-2c596a24bc34.

9 Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 576-82 (4th ed. 2000).

10 Saul I. Meyerloo, Change of Sex and Collaboration with Psychosis, 124 Am. J. of Psychiatry 263, 263-64 (1967). This is the earliest reference to this concept in the medical literature. It is a refrain that is frequently reused by opponents of transsexual treatment; for example, Paul McHugh refers to "collaborating with madness" in his 2004 essay, Surgical Sex. Paul McHugh, Surgical Sex, 147 First Things 34, 38 (2004), available at http:// www.firstthings.com/article/2009/02/surgical-sex--35.

11 See, e.g., Michel Foucault, The History of Sexuality: Volume I: An Introduction (Robert Hurley trans., 1978); see also Alice D. Dreger, A History of Intersex: From the Age of Gonads to the Age of Consent, 9 J. Clinical Ethics 345, 354-55 (1998). For an analysis of the enduring popularity and economic success of transgender narratives as well as how they expose and manipulate spectators' fears and desires, see Sherry Velasco, The Lieutenant Nun: Transgenderism, Lesbian Desire, & Catalina de Erauso (2000).

12 See Richard von Krafft-Ebing, Psychopathia Sexualis (Brian King Trans. 1999).

13 See, e.g., Transexualism, Encyclopedia Britannica, http:// www.britannica.com/EBchecked/topic/603183/transsexualism (last visited July 22, 2012).

14 See, e.g., History of Science: The 20th Century Revolution, Encyclopedia Britannica, http:// www.britannica.com/EBchecked/topic/528771/history-of-science/29341/The-20th-century-revolution (last visited July 22, 2012).

15 See, e.g., Christopher Marlowe, Dr. Faustus (1604).

16 See, e.g., Vatican Admits Galileo Was Right, The New Scientist (Nov. 7, 1992), http://www.newscientist.com/article/mg13618460.600-vatican-admits-galileo-was-right-.html; see also Stem-Cell Research and the Catholic Church, AmericanCatholic.org, http://www.americancatholic.org/news/stemcell/ (last visited July 23, 2012).

17 See Sumptuary Law, Encyclopedia Britannica, http:// www.britannica.com/EBchecked/topic/573467/sumptuary-law (last visited July 22, 2012).

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19 See, e.g., Stanley Hollander, Sumptuary Legislation: Demarketing by Edict, 4 J. Macromarketing 4, 11 (1984) (noting the difficulties Sikhs have had with motorcyclist helmet laws).

20 Susan M. Schweik, The Ugly Laws: Disability in Public 85 (2009).

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22 I. L. Nascher, The Wretches of Povertyville: A Sociological Study of the Bowery 109-10 (1909).

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24 See P.T. Barnum, Encyclopedia Britannica, http:// www.britannica.com/EBchecked/topic/53706/PT-Barnum (last visited July 22, 2012).

25 See generally Rachel Adams, Sideshow U.S.A: Freaks and the American Cultural Imagination (2001).

26 Id. at 27.

27 Id. at 28.

28 Foucault, supra note 11, at 44.

29 Jillian Todd Weiss, GL vs. BT: The Archaeology of Biphobia and Transphobia within the U.S. Gay and Lesbian Community, 3 J. of Bisexuality 25, 27 (2004).

30 Id.

31 For an excellent summary of the effects of transphobia, the ways in which society is hostile to trans people, and recommendations for legislative action and social service reform, see Lewis Turner et al., Transphobic Hate Crime in the European Union, ILGA-Europe and Press for Change (2009), available at http://www.ucu.org.uk/media/pdf/r/6/transphobic_hate_crime_in_eu.pdf.

32 See generally Janice G. Raymond, The Transsexual Empire: The Making of the She-Male (1979); Bonnie Bullough & Vern Bullough, Transsexualism: Historical Perspectives, in Current Concepts in Transgender Identity 15 (Dallas Denny ed. 1998); Bernice L. Hausman, Changing Sex: Transsexualism, Technology, and the Idea of Gender (1995).

33 Id.

34 See Phyllis Burke, Gender Shock: Exploding the Myths of Male and Female (1996).

35 Id.

36 See, e.g., Anne Bolin, In Search of Eve: Transsexual Rites of Passage (1987); Mildred Brown & Chloe Ann Rounsley, True Selves: Understanding Transsexualism for Families, Friends, Coworkers, and Helping Professionals (1996).

37 Id.

38 Id.

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For example, compare the parallels of Sandy Stone versus Janice Raymond with Harry Benjamin versus Paul McHugh. See Sandy Stone, The Empire Strikes Back: A Postransexual Manifesto, in Body Guards: The Cultural Politics of Gender Ambiguity 280 (Julia Epstein & Kristina Straub eds. 1991); Raymond, supra note 32; See generally Harry Benjamin, The Transsexual Phenomenon (1996); McHugh, supra note 10.

40 Supra note 32.

41 See, e.g., Transgender Autobiography I, Trans Education (Nov. 1, 2009), http://transeducation.wordpress.com/2009/11/01/transgender-autobiography1/.

42 See Boys Don't Cry, IMDB.com, http://www.imdb.com/title/tt0171804/ (last visited July 22, 2012).

43 See A Girl Like Me: The Gwen Araujo Story, IMDB.com, http:// www.imdb.com/title/tt0787484/ (last visited July 22, 2012).

44 As a starting point, see 9th Annual Transgender Day of Remembrance November 20th, 2007, Gender.org, http://www.gender.org/remember/day/who.html (last visited July 22, 2012); see also International Transgender Day of Remembrance, Transgenderdor.org, http://www.transgenderdor.org/?page_id=58 (last visited July 22, 2012).

45 A young man called the student's name, shoved him into a toilet stall, lifted the student's t-shirt over his head to expose his chest and obscure his vision, carved “IT” into his chest, and fled. See Joseph Erbentraut, Man attacks transgender college student, carves ‘IT’ into his chest, Edge Boston (Apr. 28, 2010), http://www.edgeboston.com/index.php? ch=news&sc=&sc3=&id=105085&pf=1.

46 See, e.g., Social Security is Important to Women, Socialsecurity.gov (Jan. 2012), http:// www.socialsecurity.gov/pressoffice/factsheets/women.htm.

47 Forbes-Sempill v. Forbes-Sempill, (1967) Scot. Office Ref. CS 258/1991/P892 (Lord Hunter, Ct. Admin.).

48 Id.

49 Id.

50 Id. at 3. One of these was Ewan's former medical tutor, and one was his partner in medical practice. Stephen Whittle & Lewis Turner, ‘Sex Changes'? Paradigm Shifts in ‘Sex’ and ‘Gender’ Following the Gender Recognition Act, 12 Soc. Res. Online 1 (2007), available at http:// www.socresonline.org.uk/12/1/whittle.html.

51 Forbes-Sempill, supra note 47.

52 Id. at 5.

53 Id. at 6.

54 Id. at 14.

55 Id. at 7.

56 Id. at 15.

57 Forbes-Sempill, supra note 47.

58 Id.

59 Id. at 29.

60 Id.

61 Id. at 25.

62 See Lesley-Anne Barnes, Gender Identity and Scottish Law: The Legal Response to Transsexuality, 11 Edinburgh L. Rev.162, 171 (2007).

63 Forbes-Sempill, supra note 47, at 17.

64 Id.

65 Id.

66 Zoe Playdon, The Case of Ewan Forbes, Gendercentre.org.au, http:// www.gendercentre.org.au/57article5.htm (last visited Oct. 30, 2012) (citing the obituary of Sir Ewan Forbes published in The Daily Telegraph, October 1, 1991); see also Julius Hoenig, The Legal Position of the Transsexual: Mostly Unsatisfactory Outside Sweden, 116 Can. Med. Ass'n J. 319 (1977).

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68 Corbett, 2 All E.R. 33.

69 Id. at *3.

70 Id.

71 Id.

72 Id.

73 Id. at *15.

74 Corbett, 2 All E.R. at *13.

75 Id.

76 Id. at *14.

77 Stephen Whittle, Respect and Equality: Transsexual and Transgender Rights (2002).

78 Id. at 15.

79 Corbett, 2 All E.R. at *10.

80 Id.

81 Id. at *11.

82 Id.

83 Id.

84 Id. at *12 (emphasis added).

85 Corbett, 2 All E.R. at *13.

86 M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

87 Anonymous v. Weiner, 270 N.Y.S.2d 319 (N.Y. Sup. Ct. 1966).

88 Id. at 322. The Court relied on a 1965 report from a committee convened by the New York Academy of Medicine, entitled Change of Sex on Birth Certificates for Transsexuals. See also Samuel Bartos, Letting "Privates" be Private: Toward a Right of Gender Self-Determination, 15 Cardozo J. L. & Gend. 67, 82 (2008).

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

90 Id. at 837.

91 Id.

92 Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

93 Id. at 500.

94 B. v. B., 355 N.Y.S.2d 712 (N.Y. Sup. Ct. 1974).

95 M.T., 355 A.2d at 208.

96 Taylor Flynn, The Ties that [Don't] Bind: Transgender Family Law and the Unmaking of Families, in Transgender Rights 35 (Paisley Currah et al. eds. 2006). It should be noted that Prof. Flynn mistakenly cites J.T. as the transsexual party; the Appellate Court decision is clear: "M.T. testified that she was born a male." M.T., 355 A.2d. at 205. This does not diminish Prof. Flynn's analysis of the issues.

97 M.T., 355 A.2d at 207-11; Corbett, 2 All E.R. 33.

98 M.T., 355 A.2d at 209.

99 Id. at 205.

100 Id. at 207.

101 Id.

102 Andrew Sharpe, Transgender Jurisprudence: Dysphoric Bodies of Law 89-119 (2002).

103 Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392, 417 (2001).

104 M.T., 355 A.2d at 211.

105 Id. at 210 (citing In re Anonymous, 293 N.Y.S.2d at 837).

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107 In re Ladrach, 32 Ohio Misc. 2d 6 (1987).

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110 In re Ladrach, 32 Ohio Misc. 2d at 8.

111 Id.

112 Id. at 10.

113 Weiner, 270 N.Y.S.2d 319.

114 In re Ladrach, 32 Ohio Misc. 2d at 9-10.

115 Id. at 10.

116 In re Marriage License for Nash, 2003-Ohio-7221 (Ohio Ct. App. 2003).

117 Id. at P 46.

118 Id. at P 24.

119 Id. at P 28.

120 Id. at P 31.

121 Id. at P 46.

122 Nash, 2003-Ohio-7221 at P 32.

123 See generally, X, Y, & Z v. United Kingdom, 24 Eur. Ct. H.R. 143 (1997); Cossey v. United Kingdom, 13 Eur. Ct. H.R. 622 (1991); Rees v. United Kingdom, 9 Eur. Ct. H.R. 56 (1987). The legislative history in California: In 1996, Senator Milton Marks introduced Senate Bill 1964 to include gender identity within the unlawful bases for discrimination in employment and housing accommodations within the California Fair Employment and Housing Act (FEHA). When the bill was brought forward, rather than discuss it during committee hearings, legislators laughed and left the meeting room to demonstrate their contempt for the bill. SB 1964 failed to be passed out of committee. It was not until 2003 that Assembly member Mark Leno was able to move a similar bill, Assembly Bill 196 (the Gender Nondiscrimination Act of 2003), which did pass both houses of the legislature and was signed into law, effective January 1, 2004. Between 1996 and 2002, California trans activists had worked in legislator's offices, volunteered in their campaigns, educated them about trans issues, and empowered them to speak for trans people's humanity.

124 Eric Resnick, I swear I am not transsexual: Clark County requires marrying couples to take this oath, Gay People's Chronicle, Jan.12, 2007, available at http://www.gaypeopleschronicle.com/stories07/january/0112072.htm.

125 R v Harris & McGuiness (1989) 17 NSWLR 158 (Austl.).

126 Id. at 172.

127 Id. at 192.

128 Id. at 192-93.

129 Id. at 193.

130 Lim Ying v Hiok Kian Ming Eric, [1991] 2 SLR(R) 525 (Sing.).

131 Id. at P 7.

132 Id.

133 Id. at P 8.

134 Kantaras v. Kantaras, No. 98-5357CA, at 587 (Fla. 6th Cir. Ct. 2003), available at http://www.transgenderlaw.org/cases/kantarasopinion.pdf (citing Ying, 2 SLR(R) at P 59).

135 Id.

136 Debbie S. Ong, The Test of Sex for Marriage in Singapore, 12 Int'l J.L. Pol. & Fam. 161, 167-68 (1998).

137 Id. at 176.

138 Attorney Gen. v Otahuhu Family Court [1995] 1 NZLR 603 (1994, HC) (N.Z.).

139 M v M [1991] NZFLR 337 (1991, Fam. Ct.) (N.Z.).

140 Id.

141 Otahuhu Family Court, 1 NZLR at 603.

142 Id. at 612.

143 Id. at 605-06.

144 Id. at 603.

145 Littleton, 9 S.W.3d 223.

146 Id. at 225.

147 See id. at 226.

148 Id. at 230.

149 Id. at 232 (Lopez, J. dissenting).

150 Id. at 232-33 (Lopez, J. dissenting).

151 Littleton, 9 S.W.3d at 225.

152 Id. at 231.

153 Id.

154 Id.

155 Re Kevin: Validity of Marriage of Transsexual (2001) 28 Fam LR 158 (Austl.).

156 X, Y, & Z, 24 Eur. Ct. H.R. 143.

157 Re Kevin, 28 Fam LR 158 at *60.

158 Id. at *13.

159 Id. at *14.

160 Id. at *13.

161 Id. at *15.

162 Id. at *59.

163 Re Kevin, 28 Fam LR at *59.

164 Kantaras, supra note 134, at 681.

165 Re Kevin, 28 Fam LR at *59.

166 Rachael Wallbank, Re Kevin In Perspective, 9 Deakin L. Rev. 461 (2004), available at http://www.deakin.edu.au/buslaw/law/dlr/docs/vol9-iss2/vol9-2-9.pdf.

167 Re Kevin, 28 Fam LR at *51.

168 Gardiner, 22 P.3d 1086.

169 Id. at 1090.

170 Id.

171 Kantaras, supra note 134, at 627.

172 Gardiner, 22 P.3d at 1110; see also Kantaras, supra note 134, at 655 (discussing the holding in In re Estate of Gardiner).

173 Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265 (1999); Gardiner, 22 P.3d at 1094-100 (quoting substantial portions of Julie A. Greenberg's article).

174 Greenberg, supra note 173.

175 Gardiner, 22 P.3d at 1110.

176 Id.

177 Kantaras, supra note 134, at 656.

178 In re Estate of Gardiner, 42 P.3d 120, 136 (Kan. 2002) (citing Kan. Stat. Ann. § 23-101 (West 2001) and Kan. Stat. Ann. § 23-115 (West 1996)).

179 Id. at 135-36.

180 Flynn, supra note 96, at 37.

181 Gardiner, 42 P.3d at 132-33 (citations omitted).

182 Id. at 133.

183 Kantaras, supra note 134.

184 Kantaras v. Kantaras, 884 So.2d 155, 155-56 (Fla. Dist. Ct. App. 2004).

185 Kantaras, 884 So.2d 155.

186 Attorney-General v Kevin (2003) 30 Fam LR 1 (Austl.), available at http://www.transgenderlaw.org/cases/InReKevinAppealDecision.pdf.

187 Id. at PP 118-21.

188 Id. at P 139.

189 Id. at PP 139-55.

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191 Id. at P 77.

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193 W v. W, [2001] Fam. 110 (Eng.).

194 Kevin, 30 Fam. LR at PP 379-91.

195 Littleton v. Prange, 531 U.S. 872 (2000).

196 Cyrus Mehta, The Status of Transsexuals Under U.S. Immigration Law, Immigration Daily (April 18, 2010), http://www.ilw.com/articles/2004,0817-mehta.shtm; Interoffice Memorandum Dep. of Homeland Sec. from Assoc. Dir. William Yates, to Regional Dir., Serv. Ctr. Dir, Dist. Dir. and Dir. of Int'l. Affairs, (April 16, 2004), available at http://www.ilw.com/articles/2004,0817-mehta1.pdf [hereinafter Interoffice Memorandum].

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199 Interoffice Memorandum, supra note 196, at 2 (declaring whether a marriage qualifies for immigration purposes is a matter of federal, not state or foreign law).

200 Id.

201 See generally, Julie A. Greenberg & Marybeth Herald, You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings, 80 Wash. L. Rev. 819 (2005).

202 Defense of Marriage Act, 1 U.S.C.§ 7, 28 U.S.C. § 1738C (2006).

203 U.S. Const. art. IV, § 1.

204 U.S. Const. amend. XIV, § 1.

205 Petition for Writ of Certiorari, Prange, 9 S.W.3d 223 (No. 00-25).

206 Prange, 9 S.W.3d 223, cert. denied, 531 U.S. 872 (2000).

207 See The Victory Fund, http://www.victoryfund.org (last visited Oct. 12, 2012). Refer to the federal appointment efforts of The Victory Fund.

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209 O'Donnabhain v. Comm'r., 134 T.C. 34 (2010), recommendation regarding acq., AOD-2011-03 and acq., 2011-47 I.R.B. 789.

210 Action on Decision: O'Donnabhain v. Commissioner (2011), available at http://www.irs.gov/pub/irs-aod/aod201103.pdf.

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213 Robertson v. Scott, Case No. DF-10-16083 (Dallas Cnty. Dist. Ct. 2011); see Dallas Attorney Eric Gormly Wins Transgender Rights Decision, The Gormly Law Firm (Nov. 22, 2011), http://www.thegormlylawfirm.com/news_ robertson_v_scott1111.html.

214 Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18 (2002); I. v. United Kingdom, App. No. 25680/94, Eur. Ct. H.R. (2002). These cases were not mentioned in Kantaras, so they are not discussed in this Chapter. Their bearing on the demise of Corbett is looked at in the next chapter.

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217 I., App. No. 25680/94.

218 See Laura Grenfell, Making Sex: Law's Narratives of Sex, Gender and Identity, 23 Legal Stud. 66, 83 (2003).

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223 Sharon Cowan, “That Woman is a Woman!” The Case of Bellinger v. Bellinger and the Mysterious (Dis)appearance of Sex, 12 Feminist Legal Stud. 79, 84 (2004).

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245 See H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011).

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306 P v. S & Cornwall Cnty. Council, [1996] 2 CMLR 247. This was a historic and far-reaching decision involving a trans woman who was terminated from her employment upon giving notice that she would be transitioning from male-to-female. The ECJ ruling held that discrimination against transsexual people in the workplace was prohibited discrimination because of sex. Id. at *10-12.

307 Id. at *9; Whittle, supra note 77, 109-20. As Stephen Whittle explains, singling transsexual people out as transsexual (ostensibly to afford them protection), in fact creates a ‘third sex’, making ‘protective regulations' specific to transsexual people functionally equivalent to the ‘ugly laws.’ Id.

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