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## Beyond the Binary: What Can Feminists Learn from Intersex Transgender Jurisprudence

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BEYOND THE BINARY: WHAT CAN FEMINISTS  
LEARN FROM INTERSEX AND TRANSGENDER  
JURISPRUDENCE?

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**JULIE GREENBERG:** Our panel will be discussing recent developments in the intersex and transsexual communities. The transsexual community began to organize in the 1970s, but did not fully develop into a vibrant movement until the 1990s. The intersex movement was born in the mid-1990s and has rapidly developed a strong and influential voice. Recently, both movements have undergone profound changes and each has provided new and unique theoretical perspectives that can potentially benefit other social justice groups. The purpose of our dialogue today is to describe these developments and explore how feminists could potentially benefit from the theoretical frameworks that are being advanced by the intersex and transsexual communities.

Before we begin our discussion, I want to provide a brief summary of the terminology we will be using. When we refer to a person with an intersex condition or a disorder of sex development (DSD), we will be discussing a person whose reproductive or sexual anatomy is not all clearly male or clearly female. When we use the word transsexual, we are referring to a person whose reproductive system and sexual anatomy do not match the person's self-identified gender.

It is impossible to cover all the recent developments in both movements. In our limited time, we will focus primarily on developments in the transsexual community, but I will start by summarizing recent developments in the intersex movement. Although the intersex movement is in its infancy, during the past few years, the movement has accomplished some of its primary goals and has undergone some dramatic shifts in its focus.

When the intersex movement began, it followed the model of many other social justice identity movements. For example, just as other social justice movements chose to reclaim and recharacterize pejorative terms, such as the word "queer," that had been used against them, the Intersex Society of North America (ISNA) published a newsletter, titled

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“Hermaphrodites with Attitude.”<sup>1</sup> The group sought to end the shame and secrecy surrounding the birth of a child with an intersex condition and develop a support network for these children and their families. The intersex movement approached other organizations that it believed would share common concerns and goals. It associated closely with gay and AIDS activist groups and adopted some of their tactics, including staging protests at medical gatherings. It also viewed itself as a logical progression in the evolution of civil rights struggles by feminists, gays and lesbians, and transsexuals, and acknowledged the beneficial paths that had been forged by the transsexual movement.<sup>2</sup>

Recently, many in the intersex movement have shifted away from an identity politics model. Although the early movement closely allied itself with the LGBT community, many intersex activists have distanced themselves from LGBT politics and have started utilizing a disability-rights framework. Transsexuals, on the other hand, are closely allied with gays, lesbians, and bisexuals; most major gay and lesbian organizations have added “T” to their acronym and are including transsexual concerns on their agendas.

Some of you may be questioning the relevance of including this topic at a feminist legal theory conference. I believe that feminists can benefit from examining the development of the different movements and the alliances and rifts that have occurred among the various organizations. One would think that close alliances and working relationships would have developed among people who have focused their energies on ending discrimination based on sex, gender, sexual orientation, and gender identity. Unfortunately, dissention has developed among the various groups. Some disagreements are a part of our history and have been effectively resolved, but many of these disputes have not been successfully addressed and new divisions are developing.

One current concern is that the various communities do not share common goals and some fear that forming alliances among the various groups may be counterproductive. Some activists believe that although sex, gender, sexual orientation, and gender identity concerns overlap, the different movements have distinct and sometimes incompatible goals. I believe that these diverse movements, including feminists, can learn about more effective ways to frame their issues and agendas by examin-

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1. *Welcome*, 1 *Hermaphrodites with Attitude* 6 (Intersex Society of North America, Rohnert Park, Cal.), (Winter 1994), available at <http://www.isna.org/files/hwa/winter1995.pdf>.
  2. Eli Nevada & Cheryl Chase, *Natural Allies*, 1 *Hermaphrodites with Attitude* 11, (Intersex Society of North America, Rohnert Park, Cal.), (Summer 1995), available at <http://www.isna.org/files/hwa/summer1995.pdf>.

ing our history and learning about the risks associated with not forming mutually beneficial alliances.

Feminists and lesbians, especially if you were in college as I was during the growth of second-wave feminism, are aware of our not-so-pretty history. The feminist movement was a white, upper-class, heterosexual movement. Lesbians were referred to as the purple menace and leading feminists distanced themselves from lesbians and their issues. These feminists were concerned that incorporating lesbians into the movement would lead to societal rejection of all feminist concerns because of the homophobia that was prevalent at this time. Eventually, lesbian activists were able to successfully reframe the vision of a feminist to put lesbian concerns front and center. Women who loved other women were seen as more female than women who desired sex with men. Currently, many key positions in feminist organizations are held by lesbians and the lesbian agenda is a critical part of the feminist movement.<sup>3</sup>

Many second-wave feminists were even more opposed to the inclusion of transsexuals than they were to incorporating lesbians into the women's movement. This aversion to including transsexuals in some female spaces still exists. Three justifications for excluding transsexuals and their concerns have been raised. First, some feminists have asserted that male-to-female transsexuals should be excluded from feminist groups because they are not true women and they continue to exercise the power associated with their male privileged upbringing. Second, some feminists have argued that female-to-male transsexuals should be excluded because they have rejected their womanhood to gain the advantages awarded to men in our patriarchal system. Finally, and probably most important, some feminists have maintained that transsexuals buy into essentialist notions of sex and gender and inappropriately seek to cross the gender divide rather than deconstruct it.<sup>4</sup>

One prominent example of this rejection occurred at the Michigan Womyn's Music Festival (MWMF), one of the largest annual social gatherings of women. Women forcefully ejected a male-to-female transsexual attendee when she identified herself in a workshop as a transgender woman. MWMF then adopted a "womyn-born-womyn" policy. Although MWMF has deleted this reference in its current

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3. LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS* 212 (Columbia University Press 1991); KARLA JAY, *TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION* 137–138 (Basic Books 2000).

4. Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 *LAW & SOC. INQUIRY* 1 (2003).

materials and no longer evicts transsexual women from the festival, it still has failed to embrace transsexuals or fully include them in their celebration of the “diversity” of women.<sup>5</sup>

Later feminists, many of whom were born during the 1960s and 1970s, who identify as third-wave feminists, are more ambivalent towards trans rights. Daughters of second-wave feminists were typically taught that gender would not play a role in determining their future success. Therefore, some younger women find it difficult to relate to someone who would want to transition to the opposite sex. They question how anyone could assign gender such critical importance that it would become the defining feature of the person’s identity.

Many feminist activists have moved away from the original outright rejection of transsexuals. Some feminists, however, still fail to understand transsexual concerns and transsexuals are far from fully incorporated into the feminist movement.

Divisions have also arisen between lesbians and transsexuals. Although transsexuals were on the front lines at Stonewall in 1969, as the gay and lesbian movement developed, transsexuals and their issues were marginalized or completely rejected. During the 1970s and 1980s, transsexual concerns rarely appeared in LGB organizations’ mission statements. Many gays and lesbians viewed transsexuals’ claims as valid, but unconnected to the gay and lesbian movement. They did not understand the connection between gay and transsexual rights and believed that trying to combine the two diverse issues would lead to a loss of focus and effectiveness.<sup>6</sup>

In contrast, most transsexuals believe that the movements are inseparable. First, a large number of transsexuals also identify as lesbian, gay or bisexual. More importantly, they recognize that homophobia and transphobia are closely linked and that bias and violence against both groups is motivated by animosity towards those who transgress gender norms.<sup>7</sup>

This issue came to a head in 2007 when Congress was considering passing the Employment Nondiscrimination Act (ENDA), a law that would prohibit discrimination based upon sexual orientation. The original version of the bill also prohibited discrimination based upon gender identity and expression. When it appeared that a transgender

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5. See Nan Alamilla Boyd, *Bodies in Motion: Lesbian and Transsexual Histories*, in *A QUEER WORLD: THE CENTER FOR LESBIAN AND GAY STUDIES READER* 134, 143–145 (New York University Press 1997).

6. Shannon Minter, *Do Transsexuals Dream of Gay Rights?*, in *TRANSGENDER RIGHTS* 141–42 (University of Minnesota Press 2006).

7. *Id.*

inclusive ENDA would not pass, Barney Frank proposed a bill that deleted the “gender identity and expression” language. All the major LGBT organizations, except the Human Rights Campaign, joined forces to oppose the new version. They united together to oppose the passage of any bill that protected gays and lesbians, but not transsexuals. This united stand was a watershed moment in the incorporation of transsexual concerns in the gay and lesbian agenda.<sup>8</sup>

The intersex and feminist movements have also been at loggerheads. During the early years of the intersex movement, feminist viewpoints about the social construction of gender resonated with many intersex persons. Feminist theory provided a supportive framework for people whose gender identity did not conform to the sex assigned to them at birth, as well as those who had developed an intersex identity. It also helped many intersex persons understand how their medical treatment had been based on societal assumptions about appropriate genitalia and gender roles.

The intersex movement met rejection from feminists who worked to oppose female genital cutting (FGC) as it is practiced in non-western countries. Although the reasons for opposing genital surgery on intersex infants are similar to the arguments made by feminists opposed to FGC, anti-FGC feminists have failed to include surgeries on intersex infants on their agendas. Surgeries on intersex infants and FGC often result in almost identical physical harms. In addition, they are both medically unnecessary and are performed without the informed consent of the patient. Most important, just as FGC is used to reinforce gender norms, one of the goals of intersex surgeries is to reinforce heterosexism and cultural norms of appropriate gender roles.

Intersex activists believe that anti-FGC feminists should recognize the parallels between the harmful practices of FGC and genital surgery performed on intersex infants. They have asked anti-FGC feminist groups to help them convince legislatures to include infant intersex genital surgeries within the ban on FGC. Despite the similarities between the surgeries, their negative physical and psychological effects, and the patriarchal heterosexist norms that support both practices, anti-FGC feminists have excluded intersex concerns from their agenda. Thus far, western feminist organizations that oppose FGC have refused to criticize western doctors who perform surgery on intersex infants. Although intersex activist organizations have attempted to form an alliance with anti-FGC feminists, these overtures have been rejected.<sup>9</sup>

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8. Emily Douglas, *An Uneasy Alliance*, AM. PROSPECT, Nov. 1, 2008, at 30.

9. Cheryl Chase, “Cultural Practice” or “Reconstructive Surgery”? *Genital Cutting, the Intersex Movement, and Medical Double Standards*, in GENITAL CUTTING & TRANSNATIONAL

Currently, conflicts are developing between the intersex and transsexual communities. Some in the intersex movement believe that the primary goal should be to end surgeries on intersex infants. They believe that this goal is too far removed from the major goals of LGBT organizations. In addition, many intersex activists are moving away from an identity politics model and instead are framing their issues in terms of disability rights.

As a final introductory comment, I believe one of the major lessons that feminists can learn from the intersex and transsexual movements relates to the advantages and disadvantages of working within a binary sex model. An important question that feminists need to address is whether gender rights are more effectively advanced by working within the binary or instead trying to dismantle our binary sex and gender system.

**MARYBETH HERALD:** Government and private discrimination against transsexuals falls into at least two major areas: sex determination and sex discrimination.

**Sex Determination:** The government's determination of a person's legal sex carries broad implications in our society and affects, among other matters, marriage, child custody, and identity documents. For example, most states currently prohibit same-sex marriage. The label "male" prohibits a person from marrying another man and the female marker bars marriage to another woman. To determine whether a marriage is between a male and a female, however, requires the government to determine each person's sex. The issue of who is a male or a female seems self-evident to a lot of people—the "I know it when I see it" approach. But appearances are deceiving. The scientific literature reveals a more complex model than outward physical characteristics disclose, or venturing below the surface, chromosomes indicate.<sup>10</sup> Rather, many different factors play a role in determining male or female status. Most of the population has congruent factors that all point in the direction of either male or female, but a significant minority do not conform to the majority model.

When the courts began addressing the question of a person's legal sex, they seemed confounded by the challenge. In the early cases considering these issues, courts sometimes acknowledged the complexity but then retreated to a simplistic solution: whatever it says on your birth certificate, whatever the doctor decided at that time of birth, is one's sex

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SISTERHOOD 126, 140–42 (Stanlie M. James & Claire C. Robertson eds., University of Illinois Press 2002).

10. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

for life.<sup>11</sup> The court effectively ruled that when the ink dried on the birth certificate, nothing could change it – not even if a person had gender reassignment surgery. Focusing on birth, even when subsequent history rendered that event a questionable marker, provided a convenient tool to avoid defining male and female. After a time for reflection and thought, however, a more modern approach developed in Australia, New Zealand, and Europe that permitted documents to reflect a change in sex under some circumstances.<sup>12</sup> But the theories allowing these changes leave the binary sex structure and heterosexual marriage undisturbed.

Marriage is not the only area where one's legally determined sex will affect important life events. Given our increasingly security conscious society, documents that verify your identity and carry personal information such as your age, sex, and even height and weight are increasingly required. Whether your driver's license or passport identifies you as male or female makes a difference if you are stopped for security at the airport or at a traffic light. Finally, one's sex determination will have implications for housing, bathroom, and locker room use.

In addition to sex determination issues, transsexuals face sex discrimination issues. Discrimination issues arise in employment, schools, housing, insurance, medical coverage, and hate crimes. We obviously, with our time limits, will be able to touch on only a few points. This topic

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11. In the early influential case of *Corbett v. Corbett*, the English court considered a challenge to the validity of a marriage between a postoperative male-to-female transsexual and a male. (1970) 2 All E.R. 33 (P.). The transsexual wife had male chromosomes (XY) and at birth, genitals (a penis) and male gonads (testicles). The chromosomes remained unchanged at the time of trial, but the genitals and gonads had been altered. The court voided the marriage as an illegal same-sex marriage between two males. The court decided that the sex assigned at birth was unchangeable, no matter the current state of a person's genitalia or self-identity. *Corbett*, 2 All E.R. at 44–45. In Canada and Singapore, judges cited *Corbett*, denying any legal effect to medical alterations of sex. *C. (L.) v. C. (C.)*, [1992] 10 O.R.3d 254 (Can.); *Lim Ying v. Hiok Kian Ming Eric*, [1992] 1 S.L.R. 184 (ruling that a person's legal sex is established at birth and does not change based upon medical intervention). Moreover, the European Court of Human Rights (ECHR) rejected challenges under the European Convention on Human Rights (European Convention), which found in its early cases no rights violation when a country refused to allow post-operative transsexuals to marry in their self-identified gender role. *See, e.g., Sheffield & Horsham v. United Kingdom*, 1998-V Eur. Ct. H.R. 2011; *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (1987), *overruled by Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1; *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (1990).
  12. *See In re Kevin* (2001) 28 Fam. L.R. 158 (Austl.) available at [http://www.austlii.edu.au/au/cases/cth/family\\_ct/2001/1074.html](http://www.austlii.edu.au/au/cases/cth/family_ct/2001/1074.html), *aff'd* (2003) 30 Fam. L.R. 1 (Austl.) available at [http://www.austlii.edu.au/au/cases/cth/family\\_ct/2003/94.html](http://www.austlii.edu.au/au/cases/cth/family_ct/2003/94.html). *Attorney-General v. Otahuhu Family Court*, [1991] 1 N.Z.L.R. 603 (H.C.); *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1.



is relevant to feminists because of the way that courts are interpreting the word "sex" in statutes that prohibit discrimination because of sex.

**MARK STRASSER:** My focus will be on family issues. To illustrate some of the difficulties that might arise for families where one of the adults is transsexual, we might consider the family of Thomas Beatie.

Thomas Beatie, who has written a book<sup>13</sup> and appeared on Oprah, is a female-to-male transsexual who has given birth to two children since transitioning. At some point in time, it may be important to determine whether he, his wife, and their two children are considered a family in the eyes of the law. That may depend on whether he is viewed legally as male or female.

His amended birth certificate from Hawaii states that he is male. Further, the state where he and his family now live, Oregon, permits birth certificates to be amended, so it might seem that he of course would be viewed as male by Oregon law. However, it should be noted that those states permitting birth certificates to be modified differ about the requirements that must be met before such a modification will be permitted. An individual who meets the criteria for having his or her birth certificate amended in one state might not have met the relevant criteria in a different state, and that latter state might refuse to give credit to the birth certificate amendment authorized by the former state.

Even if a judge is tempted as a general matter to give credit to a birth certificate amendment from another state, she might be less tempted in a case involving someone like Beatie. Basically, the court would have to decide whether to recognize the modification and treat as male someone who had given birth to two children *after* having undergone the relevant procedures.

A judge with an essentialist view of the sexes might hesitate before declaring that a man can give birth to a child. Indeed, historically, courts would sometimes justify their refusal to permit a birth certificate modification precisely because permitting such a change might create the possibility that a man would be able to give birth to a child. On their view, using a chromosome test was preferable. Chromosomes do not change and the judge would not be in the position of declaring someone a man who had XX chromosomes and who had delivered a child. (Let us bracket for the moment that not all individuals have either XX or XY chromosomes.)

It might be noted, however, that one can have an essentialist understanding of the sexes without focusing on giving birth as a defining

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13. THOMAS BEATIE, *LABOR OF LOVE: THE STORY OF ONE MAN'S EXTRAORDINARY PREGNANCY* 161 (Seal Press 2008).

characteristic. Beatie, for example, seems to have a binary view of the sexes and believes that one is either male or female, but he defines the sexes differently so that there is no contradiction in saying that a man can give birth.

It might be tempting to think that once a state permits a change to the sex marker on a birth certificate, that change would be applicable for all purposes. However, that has not been the view embraced by the states. Rather, states have taken the position that an individual can be viewed as female for certain purposes and male for other purposes. Even more confusing, it may not be clear whether a person will be considered male or female for a particular purpose until the matter goes through the courts.

Consider the case of J'Noel Ball and Marshall Gardiner.<sup>14</sup> J'Noel transitioned from male to female in Wisconsin and her Wisconsin birth certificate was amended to reflect that change. J'Noel met Marshall. They began dating and eventually married. He had been informed about her history prior to the marriage, so there could be no claim that he had been defrauded into marrying her.

The question before the Kansas Supreme Court was whether J'Noel was a woman for purposes of the state marriage statute. If so, then her marriage would be valid and she would be entitled to all of the benefits due to a widow whose husband had died intestate. However, if J'Noel was viewed by the state as a man for purposes of marriage, then J'Noel's marriage to Marshall would be viewed as void and of no legal effect. J'Noel would be a legal stranger to Marshall. She would not be entitled to receive any of his estate and the sole heir would be Marshall's estranged son. The Kansas Supreme Court held that J'Noel was a man for purposes of the state's marriage law, amended birth certificate notwithstanding, and that therefore she was not Marshall's widow.

An analogous issue arose in Texas.<sup>15</sup> Christie Littleton, a post-operative, male-to-female transsexual, had met and eventually married Jonathan Littleton after having informed him about her history. Again, there was no claim of fraud or misrepresentation. Christie's husband, Jonathan, had died, allegedly because of medical malpractice, and she was suing his doctor for wrongful death.

In this case, Christie had undergone sex reassignment surgery in Texas and, during the litigation, had had her birth certificate amended in accord with Texas law. Here, the issue was whether Christie was a female for purposes of the Texas marriage statute. If so, then her marriage to Jonathan was valid and she could pursue the wrongful death action.

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14. See *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

15. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

If not, then her marriage to Jonathan would be void and of no legal effect and she would be precluded from pursuing this cause of action because in the eyes of the law she would be a legal stranger to her husband of several years.

*Gardiner* and *Littleton* involved scenarios where a post-operative transsexual married someone who was not of her self-identified sex. But an individual might marry someone of a different chromosomal sex and only later realize that he or she is transgendered. Louisiana has a statute that speaks to the conditions under which one's birth certificate can be amended. That law includes a provision regarding notification of the current spouse, so Louisiana law recognizes that an individual might be married and then seek to have the sex marker of his or her birth certificate amended.<sup>16</sup> Surprisingly, Louisiana law does not address the *Littleton/Gardiner* scenario where a post-operative transsexual seeks to marry someone not of his or her self-identified sex. The failure to address this possibility means that it will have to be litigated, e.g., in the context of a wrongful death case. Or, it may come up in the context of a divorce—one of the parties who, perhaps, has all of the property in his or her name seeks to avoid a property division or being forced to pay spousal support by claiming that the marriage was void *ab initio* because both of the parties are of the same chromosomal sex. The marriage might then be viewed as if it had never existed and the parties would be legal strangers to one another.

Let us again consider Thomas Beatie and his family. Suppose for whatever reason his marriage to his current spouse does not work out and one or the other files for divorce. One of the parties might challenge the validity of the marriage because they are of the same chromosomal sex. Were the court to find that the marriage was void and of no legal effect, there would be a variety of questions that would have to be answered. Not only might property or spousal support be at issue but a separate question would be whether each adult would be recognized as having a legal relationship to the children of the marriage. For example, as a general matter, a child born into a marriage is presumed to be the child of each spouse. But if the marriage is viewed as a nullity, then Beatie's partner might not be afforded that presumption.

Certainly, some states have equitable doctrines whereby an individual who has a *de facto* parental relationship will be recognized in law as having a relationship with those children. Further, there are other possibilities as well. In some states, a non-marital partner is permitted to establish a parental relationship with his or her partner's child via a sec-

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16. See LA. REV. STAT. ANN. §40:62(B)(2001).

ond parent adoption. However, part of the difficulty here is that it would not be clear prospectively whether an adoption was necessary.

Let us add an additional wrinkle. Suppose that Beatie's wife does not want to rely on the presumption of parenthood afforded to a spouse when a child is born into a marriage. Because she has no biological connection to the children, she decides to adopt as a way of legally cementing her parental status. She avails herself of the stepparent adoption option. Here, there is no other adult (in addition to Beatie) who has parental rights, Beatie consents, and the adoption is in the best interests of the child. But a separate question to be resolved in light of state law would be whether a stepparent adoption can be considered valid if the individual attempting to make use of that provision was not in fact a stepparent of the child. Thus, were the marriage declared void *ab initio*, then Beatie's wife would not have been a stepparent and a court would have to decide whether the adoption would be recognized by the state.

Needless to say, having courts decide whether a couple is married or whether a parent-child relationship exists at the time of divorce or after one of the parties has died is simply unacceptable. Such a system jeopardizes the reasonable expectations of all of the parties and creates unfair incentives. Consider how much it might be worth to an individual not to have the validity of his or her marriage or parent-child relationship contested. It would not be surprising if individuals would be quite willing to sacrifice spousal support or property to avoid rolling the dice to see whether a court would recognize the validity of the marriage.

**JULIE GREENBERG:** Mark's comments also relate back to my initial remarks about shifting alliances. I still remember in the late 1990s when our local LGB bar association was one of the bar associations that engaged in extraordinarily heated debates about whether to become an LGBT organization and include transsexual people and concerns in its mission. Some gay and lesbian members spoke out vociferously against inclusion, arguing that the issues that affect transsexuals, as opposed to gays and lesbians, are different and they should not be included under the same umbrella.

Interestingly, it was at about this same time that the validity of marriages in which one of the spouses was a transsexual started to be litigated. In some of these cases, the transsexual spouse experienced some success, as opposed to the same-sex marriage cases, which at this time met with universal failure. Suddenly, LGB organizations that were choosing to distance themselves from transsexuals realized the marriage cases involving a transsexual spouse had the potential to advance the same-sex marriage movement. If courts could understand that determining a person's legal

sex for purposes of marriage was not a simple straightforward proposition, then the state justification for limiting marriage to one man and one woman is weakened. How can a state legally ban same-sex marriage if experts, courts, and society are unable to agree on the factors that determine whether someone is a male or a female? I think that these developments may have played a role in building the LGBT alliance. It may be a coincidence, but it is significant that the alliances grew at the point when the successful arguments being advanced by transsexual litigants could also be used by gays and lesbians challenging the mixed sex marriage requirement.

**MARK STRASSER:** Well, just one more thing on this. Texas is one of the states that relies on chromosomes to determine the sex of an individual, which is how we get the result in *Littleton*. But such a holding does not permit Texas to restrict marriage to those who appear to be the traditional different-sex couple. It turns out that some transsexuals are physically attracted to individuals of their self-identified sex. According to Texas law, an individual with XX chromosomes can only marry someone with XY chromosomes, and an individual with XY chromosomes can only marry someone with XX chromosomes. Suppose, then, that a transsexual with XY chromosomes undergoes gender reassignment surgery and so is indistinguishable from any other woman that one might meet on the street. The only type of person that she could legally marry in Texas would be another woman, i.e., someone with XX chromosomes. So, in Texas, we have individuals marrying who appear to be same-sex couples, because one of them has XX chromosomes and the other has XY chromosomes. However, the marriage of the Littletons could not be recognized because both of them had XY chromosomes.

**MARYBETH HERALD:** A thread going through all the decisions is a fear of same-sex marriage. In considering these cases, the courts seem concerned about the effect of their decisions regarding transsexuals and implications for the same-sex marriage debate generally. But the ironic consequence for post-surgical transsexuals stuck with the label of their sex assigned at birth is that the marriage partners that remain legally available to them are persons of the same gender. Some courts, in their willingness to engage in cognitive distortions such as ignoring surgical alterations, reach an anomalous result—condoning same-sex marriages when they are committed to a heterosexual norm. In *Gardiner*, the Kansas Supreme Court seemed to go even further by implying that the Kansas statute precluded marriage for 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.”<sup>17</sup>

Obviously if same-sex marriage were lawful, these issues would disappear for transsexuals. As it remains a contentious social issue, it unites lesbian and gay organizations with the transgender movement. The intersex movement is less sanguine about an alliance on the same-sex marriage issue, however.

**JULIE GREENBERG:** At this point, I think it would be helpful to discuss what has happened in the marriage cases in which one of the spouses had an intersex condition. One of the reasons that I think that some intersex activists have concluded that it is better not to join forces with the LGBT movement is the belief that persons with an intersex condition can fly below the radar. In other words, they can marry whomever they please and their marriages are unlikely to be successfully challenged. Unfortunately, based on what has happened in the marriage cases involving a transsexual spouse and the two reported cases in which one of the spouses had an intersex condition, I believe that this assumption may be proven wrong.

When I first started writing in this area, approximately 10 years ago, I firmly believed that courts would treat marriages involving an intersex spouse differently from the way that they would treat marriages in which one of the spouses is a transsexual. I did not believe that they would subject intersex persons to the same scrutiny as transsexuals. At that time, only one reported case on this issue existed, *In re C and D*, a 1979 case from Australia.<sup>18</sup> In that decision, the Australian Family Court annulled a 12-year marriage between a woman and a man with an intersex condition. In its astounding conclusion, the court held that a true marriage could not have occurred because “the husband was neither a man nor a woman, but was a combination of both.”<sup>19</sup> In other words, as a non-man/non-woman, he did not have the legal right to marry at all. This case has been severely criticized and it is clear that courts in Australia, or elsewhere, would be unlikely to conclude that a person with an intersex condition is not allowed to marry at all.

If the one recent reported case involving a spouse with an intersex condition is a typical judicial reaction, it appears that courts may follow the same approach that they do in cases involving a transsexual spouse. In 2001, a court in England was asked to determine whether a marriage was valid or whether the wife (who was referred to as “W”) was actually

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17. See *In re Estate of Gardiner*, 42 P.3d 120, 135 (Kan. 2002).

18. In *Marriage of C and D (falsely called C)* (1979) 35 F.L.R. 340 (Austl.).

19. In *Marriage of C and D (falsely called C)* (1979) 35 F.L.R. 340, 345 (Austl.).

legally a man for purposes of marriage.<sup>20</sup> At her birth, W's doctors were unsure whether to assign her to the male or female sex. They left the decision up to the parents, who decided to raise W as a boy. It was clear at a very young age that W identified as a girl and wanted to live her life as a female. When W turned 15, W's body began to feminize. Eventually, she underwent medical procedures to further feminize her body. She lived her entire adult life as a woman.

W married a man who sought an annulment of the marriage alleging that W should not be considered a female. Although the court eventually validated the marriage and ruled that she was a female, it did so only after subjecting her to an intensive and invasive examination. The experts testified that they believed that W had an intersex condition, Partial Androgen Insensitivity Syndrome (PAIS). Women with PAIS have male chromosomes and testicles. Often, their genitalia do not appear to be clearly male or female. The court asked W to provide detailed evidence about the appearance of her genitalia before the surgery was performed. She was questioned about the size of her phallus, the existence of testicles and scrotal sac, whether she had a vagina, the location of the opening of her urethra, and whether she ever urinated in a standing position. The court acknowledged that she likely suffered embarrassment and discomfort about being asked to provide this evidence. Despite her reticence to provide detailed information about the appearance of her genitalia, the court found this information critical to its determination. In its findings, the court felt the need to provide an extensive description of her genitalia and specifically located her urethral opening, "at, or near, the end or tip of the flap of skin," that would have been considered her phallus.<sup>21</sup>

The judge eventually determined that she was legally a woman for purposes of marriage and based his decision on the three criteria: her sex factors, her history and the medical evidence, and her ability to consummate the marriage. Based upon her history of self-identifying as a female at a young age and choosing to live as a female before her surgery and the diagnosis of PAIS, the court determined that assigning her to the male sex on her birth record was an error.

The English court's determination that the wife was a female and her marriage to a man was a legal heterosexual marriage is far superior to the Australian judge's declaration that the husband with an intersex condition was neither a man nor a woman. The decision, however, should not be hailed as a model for future courts to follow. To attain the legal status of female and the right to marry a man, W was required to

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20. *W v. W*, [2001] Fam. 111 (Eng.).

21. *W v. W*, [2001] Fam. 111 (Eng.).

provide embarrassing intimate information about the appearance of her genitalia, her ability to engage in intercourse, and her preferred position for urinating. In other words, the court treated her to the same type of scrutiny that has been applied in the cases involving a transsexual spouse.

The second reason that I believe that the intersex community may need to be concerned relates to Mark's discussion about who has been allowed to challenge the validity of a marriage. Before the *Littleton* and *Gardiner* decisions, I thought that a court would not allow a third party to challenge the validity of someone else's marriage. I had assumed that the cases would have to be brought by one of the spouses or potentially the state. As Mark mentioned, however, courts have given standing to strangers to challenge another person's sex and the validity of a marriage in which they were not a party. The courts never discussed standing in either the *Littleton* or *Gardiner* decisions. In *Gardiner*, a relative challenged the marriage, but in *Littleton*, it was a doctor who was defending a wrongful death action. The court allowed him to litigate Christie Littleton's legal sex and marital status so that he could avoid paying loss of consortium damages in a wrongful death action.

Therefore, the intersex community has to recognize that an intersex person's legal sex could be challenged not only by the state, but also by a total stranger.

**MARK STRASSER:** One additional point about divisions within or across communities. Beatie himself is somewhat controversial within the transgender community. Some members of the community have particular understandings of what it means to be a male or female and believe, for example, that men do not deliver babies. On their view, some individuals were simply born with the wrong parts, which can be corrected to some extent by gender reassignment surgery. Transitioning from one sex to another is fine—that is simply correcting a mistake. But transitioning from female to male and then delivering a child is to cross boundaries that should not be crossed. Others, of course, do not believe that Beatie broke any “rules.”

**MARYBETH HERALD:** Julie's discussion about the court's examination emphasizes the courts' adherence to the binary system. In these decisions, there is an emphasis on the physical attributes of male and female, as well as social and cultural ones. For example, in the New Jersey decision, *M.T. v. J.T.*, the court considered the situation of a post-operative male-to-female transsexual married to a male. Although the court rejected the rule of birth sex as determinative, the court in *M.T.* also focused on the adequacy of M.T.'s reconstructed body for “traditional



penile/vaginal intercourse.”<sup>22</sup> The concern was whether the person’s sexual machinery looks and could operate as a traditional female in performing heterosexual intercourse. In the New Zealand case, *Attorney-General v. Otahuhu Family Court*, the court required that the marriage partners have genitals of a male and female respectively. The court dispensed with the requirement that the person’s genitalia were sexually functional, however. The step forward in *Otahuhu* was that as long as one of each sex was represented in the marriage, heterosexual appearances were served and no further information was required. One could cross over and become a member of the opposite sex, but one could not disturb the binary sex or heterosexual marriage scripts.

Reinforcing the binary theme, some courts find it important that the crossover be complete. For example, in *In re Marriage of Simmons*, the court recognized a transsexual’s surgical changes, but required a complete crossover. Although the transsexual husband had some surgical procedures, there were several remaining to complete the transition. The court found this failure to totally cross over dispositive because although the petitioner did not have a uterus, fallopian tubes, and ovaries, female genitalia were still in place.<sup>23</sup> The appellate court affirmed the trial court’s holding that petitioner’s marriage was an invalid same-sex marriage because the petitioner was still a female. Similarly, in *In re Heilig*, the court was willing to endorse a change in birth certificate as long as the petitioner provided sufficient medical evidence that the surgery was irreversible.<sup>24</sup>

Although some courts have not required a complete physical crossover to the opposite sex, the permanency of the changes have impressed the courts. The female-to-male transsexual in the Australian case of *In re Kevin* had undergone only partial reassignment surgery—a mastectomy and a total hysterectomy—but still had a vagina.<sup>25</sup> Nevertheless, the court noted the irreversible nature of the surgery as the important point. The Australian court also placed emphasis on evidence that Kevin had always been perceived to be male through the testimony of 39 witnesses. It is the ability of Kevin to act stereotypically male—hogging the television channel changer?—that gives him the freedom to cross over from

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22. *M.T. v. J.T.*, 355 A.2d 204, 206 (N.J. 1976).

23. See *In re Marriage of Simmons*, 825 N.E.2d 303, 309 (Ill. App. Ct. 2005).

24. *In re Heilig*, 816 A.2d 68 (Md. 2003). But see *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971)(invalidating a marriage between a male and a male-to-female transsexual, stating that “mere removal of the male organs would not, in and of itself, change a person into a true female.”).

25. *In re Kevin* (2001) 28 Fam. L.R. 158 (Austl.) available at [http://www.austlii.edu.au/au/cases/cth/family\\_ct/2001/1074.html](http://www.austlii.edu.au/au/cases/cth/family_ct/2001/1074.html), *aff’d*, (2003) 30 Fam. L.R. 1 (Austl.) available at [http://www.austlii.edu.au/au/cases/cth/family\\_ct/2003/194.html](http://www.austlii.edu.au/au/cases/cth/family_ct/2003/194.html).

one sex to the other. Any drift away from stereotypical male behavior may have proven fatal to the claim. The irony for feminists is that while there have been efforts to root out and destroy gender stereotyping, in this case, the more stereotyping, the more successful the claim.

**JULIE GREENBERG:** Mark has discussed the family law issues relating to marriage and parentage that arise in sex determination actions. I will briefly examine two other areas related to sex determination: identity documents and housing, bathroom, and locker room use.

As Mark mentioned, states vary widely in the “sex” test that they use in the family law cases. Similarly, states have adopted a variety of “sex” tests to determine the appropriate marker that should appear on someone’s identity documents. Some states have statutes that allow transsexuals to change the sex marker on their birth certificate. Others have general name change statutes. Some have no controlling legislation. And, at least one state has a statute prohibiting a change of sex. In addition, the Social Security Administration and the State Department have their own tests for sex determination that control the sex listed on social security records and on passports. In other words, a person’s sex can vary depending upon which state or government agency is making the determination.<sup>26</sup>

Let’s return to J’Noel Gardiner’s case. J’Noel was born in Wisconsin and she was identified as a male at birth, but she had successfully changed all of her Wisconsin records so that they indicated that she was a female. If J’Noel had married in Wisconsin and the status of her marriage had been litigated in Wisconsin, she would have been determined to be a female and her marriage to Marshall Gardiner would have been considered a valid heterosexual marriage. But J’Noel traveled to Kansas, married there, and had her marriage challenged in the Kansas court system. When J’Noel crossed into Kansas, she was transformed back into a legal male and her marriage to a man was determined to be an invalid same-sex union.

To avoid this ludicrous situation, some might advocate for a universal sex test. England has taken this approach and has adopted a national law that many believe is a desirable model. In 2004, England adopted the Gender Recognition Act.<sup>27</sup> This legislation allows transsexuals to transition for all legal purposes so that no conflict exists among marriage, social security, and identity document laws. The law is advantageous for many reasons, including the fact that transition is allowed even without surgical alteration. England’s rejection of a surgical

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26. For a comprehensive list of these various rules *see* <http://www.drbecky.com/birthcert.html> (last visited Nov. 8, 2009).

27. Gender Recognition Act, 2004, c. 7 (Eng.).

requirement is critical because not all transsexuals want surgery, and even for those who would choose to have a surgical procedure, it may be inaccessible because these surgeries are extremely expensive and for the most part, they are not covered by insurance policies or Medicare. Recognizing this problem, England only requires an affidavit from a doctor or psychologist confirming the person's gender identity.

England's approach, however, is potentially problematic for two reasons. First, under the a conservative administration, the "sex test" would not be beneficial because they would make it very difficult to transition. Even with the Obama administration, I have my doubts that a universal sex test is desirable. I believe that the United States is not ready to allow a legal sex transition without significant surgical alteration. Therefore, I believe that it would probably be better at this point to allow the states to experiment until society is more open to allowing a person's sex to be determined by his/her gender identity.

England's law is problematic for a second reason. Married people who want to transition in England must first divorce their current spouse because England's laws still limit marriage to heterosexual couples. Let's consider a couple in which one of the spouses is a male and one is a female. They have been married for years and the male decides to transition to female. Although the couple is in love and wants to remain married, England presents them with a Hobson's choice. The transsexual spouse can live as a woman and be legally recognized as a woman only if she first obtains a divorce. If she wants to stay married, she is not allowed to be legally recognized as a woman. In other words, England has adopted a law that promotes the divorce of a happily married couple who may have children.

The other alternative to a national approach is to continue the state-by-state, agency-by-agency approach. If we allow states to continue to adopt contradictory tests for determining a person's legal sex, then we are confronted with the problem that people's legal sex, marital status, and parenting status may change as they cross state borders, which raises a number of constitutional issues, including full faith and credit, the right to travel, substantive due process, and equal protection. We do not have time to examine all of these issues in detail, but I want to spend a few moments just mentioning some of the current full faith and credit issues that have been raised.<sup>28</sup>

Full faith and credit issues are becoming more important recently because a number of transsexuals are seeking court orders that recognize

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28. For an in-depth discussion of these issues see 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).

their transition. Even in states that do not require a court order, attorneys are seeking court orders because an argument exists that court orders should be given full faith and credit, while a sex change granted by an administrative agency could be ignored under conflicts of law principles. In addition to the full faith and credit issues raised by all of these orders, a problem is arising because some of the judges who are issuing them are not thinking through all of the ramifications. For example, I have recently seen court orders issued by judges in Texas for current residents of Texas who were born in a different state. These court orders are directing the registrar of birth records in a sister state, for example, Ohio, to modify the birth certificate. These judges are not addressing the issue of whether a judge in Texas has jurisdiction over the actions of an administrative agency in Ohio.

In addition to identity documents, a person's legal sex has also been raised in other scenarios. For example, who can participate as a female in athletic events? Where should transsexuals and persons with an intersex condition be allowed to live in sex-segregated facilities like dormitories, homeless shelters, and prisons? What bathroom and locker room should they be allowed to use?

As far as athletics are concerned, different athletic organizations have utilized a variety of "sex tests" and the tests used have varied dramatically over the years. The most recent tragedy involving athletic gender testing is the case of Caster Semenya. After Ms. Semenya won the 800-meter race in the World Championship, other teams challenged her ability to compete in the games as a female. They alleged that she was not a woman. Ms. Semenya was forced to undergo extensive testing. The results of these tests were not released, but Ms. Semenya may have some type of intersex condition. It also appears that Ms. Semenya, an 18 year old, learned this news at the same time that it was exposed to the world in sensational international headlines. She is not the first female athlete to have her sex challenged or to have the world learn the intimate details about her reproductive system and the appearance of her genitalia.<sup>29</sup>

Housing issues have arisen primarily in the prison context and have typically involved transsexuals, although one reported appellate court decision addressed appropriate housing for a person with an intersex condition. Most prisons do not have separate safe facilities for transsexuals so male-to-female transsexuals are often housed in the male population, where they are subjected to severe sexual abuse or isolated in solitary confinement, a placement usually reserved for dangerous

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29. IAAF Urges Caution of Semenya Intersex Claims (Sept. 11, 2009), <http://www.cnn.com/2009/SPORT/09/11/athletics.semenya.gender.iaaf/index.html>.

prisoners who pose a risk to others and prisoners who have misbehaved. For example, Miki Ann DiMarco, a female who was born with an intersex condition, was convicted for check fraud and was placed on probation. When she violated the terms of the probation, she was imprisoned. Despite a security-threat rating that indicated that she posed no risk to herself or others, she spent 438 days in solitary confinement in a maximum-security prison. She was not allowed to interact with other inmates and she had limited access to the day room, commissary, educational opportunities, haircuts, religious items, a radio, a lamp, or playing cards. She was forced to eat her meals alone in her cell, while sitting either on her bed or toilet. Miki was placed in solitary confinement because she was born with an intersex condition. Despite the fact that she had lived as a female since puberty and was not sexually functional as a male, she remained in isolation throughout her incarceration.<sup>30</sup>

Homeless shelters and college dormitories present similar problems. This issue has not been litigated, but it appears that significant progress is being made in this area. A number of sex-segregated homeless shelters allow persons to live in facilities that comport with their gender identity. Similarly, a number of colleges are also adopting more flexible approaches. I have two sons, one who just graduated from college and one who is a junior in college. Both their schools changed their housing policies recently and their housing form asks: Do you smoke? What time do you wake up? What is your personal gender identity: woman, man, other, prefer not to state? What is your biological sex: female, male, intersex, or prefer not to state? What do you prefer your roommate is: male, female, transgender, intersex, or does not matter? The schools leave all the options open. I think this is excellent progress.

Finally, bathrooms and lockers rooms seem the most resistant to change. Some public restroom facilities are now unisex, but most bathrooms remain sex segregated and the male/female division is carefully policed. We even have cases in jurisdictions that prohibit discrimination based on gender identity that have found that it is not sex discrimination to bar a male-to-female transsexual from using the female restroom.<sup>31</sup>

**MARK STRASSER:** One of the interesting facets of the *Gardiner* case was that J'Noel's birth certificate was amended in light of Wisconsin law, and one of the questions before the Kansas Supreme Court was whether to give credit to the Wisconsin record designating J'Noel as female. While the state's policy on this was not entirely clear, there was already a regulation specifying the conditions under which Kansas

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30. *DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334 (10th Cir. 2007).

31. *Goins v. W. Group*, 635 N.W.2d 717 (Minn. 2001).

would permit birth certificate modifications. So, it could hardly have been said that recognizing a modification to a birth certificate would have violated an important Kansas public policy; on the contrary, permitting such modifications was in accord with Kansas policy. Given that other states' records should be given some deference and that no Kansas public policy would have been violated by recognizing a birth certificate amendment, one might have expected the Kansas Supreme Court to regard the Wisconsin amended birth certificate as establishing that J'Noel was female.

The Kansas court was fearful, however, that recognizing J'Noel's marriage would somehow open the door to same-sex marriage. That same fear may motivate courts in Texas to refuse to recognize marriages involving a post-operative transsexual and someone not of her or his self-identified sex, although as a practical matter this means that Texas only permits post-operative transsexuals to marry individuals of their self-identified sex.

**MARYBETH HERALD:** The Gender Recognition Act in England<sup>32</sup> is considered progressive and it does not require sex reassignment surgery. If you do not have the sex reassignment surgery, however, you do have to have a certificate of gender identity disorder. Both options reinforce the binary system. The first requires surgical alteration to look like the reassigned sex and the second requires one to assert that not fitting into the established binary pattern constitutes a medical issue.

Early feminists also had the bathroom issue. Bathrooms, in fact, may have sunk the Equal Rights Amendment. When the Equal Rights Amendment was being considered, opponents emphasized the specter of same-sex bathrooms. Instead of voters favoring equal rights, they came to fear same-sex bathrooms. It is interesting but disheartening to see it being raised again in this context.

On a broader level, discussion and education on issues affecting transsexual and intersex persons will be necessary to spur legislative change. More groundwork has to be laid at the local and state level. Although interesting constitutional questions are raised by the treatment of transsexuals as they cross state lines, it is probably not an opportune moment to raise these issues in the court system until society moves forward in its understanding. It is possible, however, that some of these questions will arise when persons are denied their right to marry or are treated differently when they move to another state. For example, does treating post-operative male-to-female transsexuals differently from females identified as females at birth violate equal protection? Do

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32. Gender Recognition Act, 2004, c. 7 (Eng.).

contradictory sex determination rulings infringe on the right to travel under the dormant commerce clause and the privileges and immunities clauses? The question of whether litigation can affect social change is much debated.<sup>33</sup> In the area of gay rights, the Supreme Court's infamous decision in *Bowers v. Hardwick* inspired activism that accomplished the political change that enabled the Supreme Court's reversal of that decision in *Lawrence v. Texas*<sup>34</sup> almost twenty years later. But having bad decisions on the books can set a movement back, and litigation too early in a movement's life may cost valuable time and resources.

**MARK STRASSER:** One more point to consider involves the Defense of Marriage Act (DOMA).<sup>35</sup> The federal government did not include within that act any definition of sex. Perhaps this means that the federal government will defer to the states, although that means that there is yet another layer of confusion, because states are defining sex differently—an individual might be female in New Jersey but male in Texas.

**MARYBETH HERALD:** We have discussed the sex determination issues in terms of family law, identity documents, housing, and bathroom use. We will now move to the topic of sex discrimination and discuss the meaning of the term "sex" in the statutes that prohibit discrimination "because of sex."

A number of states and municipalities now explicitly prohibit discrimination based on gender identity or expression. The question remains whether transsexuals and persons with an intersex condition are protected under state laws that do not explicitly include these statuses or under federal laws.

Consider Title VII, which covers discrimination in employment. Title VII's language prohibits discrimination "because of sex." In early cases, transsexuals might sue under Title VII claiming, "Well, if you're firing me from my job because I'm transsexual, you're discriminating because of sex." The courts responded, "No, they are discriminating against you because you are a transsexual and that does not violate Title

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33. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (The University of Chicago Press 1993).

34. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

35. See 28 U.S.C.A. § 1738C ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

VII.”<sup>36</sup> In the view of these courts, Title VII discrimination based on sex included cases where the employer fired a woman or refused to hire a woman to be a bartender, because the employer only hired men. If the employer refused to hire or fired a transsexual, that was not based on sex, but on transsexual status, and not covered under Title VII. Although the courts voiced concerns about stereotyping in sex discrimination cases, the early courts’ underlying conception of male and female reflected rigid conceptions of male and female. Females have XX chromosomes, look like women, want to have sex with men, and have a female gender identity. Males have XY chromosomes, look and act stereotypically like men, and want to have sex with women. Although some males and females conform to the model, many do not. If you deny a job to a male or female and they are the prototypical male or female, that is covered under Title VII. But if you deny a job to someone who does not conform to the model, early courts glossed over the complexity of gender identity and often held that the discrimination was not “because of sex” but rather because the plaintiff was gay, lesbian, or transsexual, categories apparently disconnected from sex.

The case of *Price Waterhouse v. Hopkins*<sup>37</sup> represented a leap forward in understanding. Ann Hopkins did not make partner in the firm. Rather than take what has become the well-worn path of stating pretextual reasons or remaining silent, luckily for her, the partners went on the record with remarkable candor as to why they refused to admit her to partnership. Their reasoning was: “You’re just too macho. You should walk more femininely, talk more femininely, and wear some jewelry and makeup.” The partners were not, in their opinion, opposed to having a female in their ranks, but they wanted a stereotypical one. The Supreme Court’s opinion recognized that the partners took their action because Ann Hopkins did not conform to female stereotypes and that was discrimination because of sex. Almost casually they stated, “Really we’re beyond the day when an employer could evaluate employees by assuming that they match the stereotype associated with their group.” With that, the theory of sex stereotyping was born. That they discriminated against Ann Hopkins because she did not engage in feminine behavior was, in fact, discrimination based on sex.

Probably no member of the Supreme Court at that time knew that the *Hopkins* case would be so influential in cases of gay, lesbian, and transsexual plaintiffs. But it turned out that what worked for feminists

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36. See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

37. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).



trying to put forth a more sophisticated view of sex discrimination was opening the door to other groups. Gays and lesbians were generally dismissed out of Title VII because the discrimination was sexual orientation discrimination, not sex discrimination. But now the claim is framed as one based on failure to meet the gender stereotype that a male is always sexually attracted to females, or females to males. The Price Waterhouse partners discriminated against Ann Hopkins because she did not conform to stereotypes about her sex and sexual orientation; claims come under Title VII's "because of sex" language because one is not conforming to sex stereotypes. Similarly, in the 1970s, when transsexuals would bring Title VII actions, their claims were uniformly rejected. Now, after *Hopkins*, a transsexual plaintiff will frame the claim that the defendant took the adverse employment action because the plaintiff did not conform to sex stereotypes, that is, not all females conform to a female gender identity and not all males conform to a male gender identity. There are significant victories in the circuit courts of appeals using this theory.

For example, in one case a firefighter was living as a male but was transitioning to female and he was harassed for his feminine appearance. He spoke to the supervisor and then was suspended. The court considered the earlier cases rejecting the claims of transsexual plaintiffs but dismissed their reasoning in light of *Price Waterhouse* and its sex stereotyping theory.<sup>38</sup> The court held that discrimination against transsexuals is, in fact, covered under Title VII even without amendments to include that specific type of discrimination.

The most recent case where the court applied a theory of gender stereotyping is *Schroer v. Billington*.<sup>39</sup> Diane Schroer was offered a job as a terrorism analyst at the Library of Congress. She interviewed as Dave because she had not formally transitioned from male-to-female. After getting the job offer, she asked her new boss if she could start work as a woman to make a clean transition. The Library revoked the job offer saying she was not a "good fit." Schroer sued under Title VII and the D.C. District Court denied the Library's motion to dismiss, finding that Schroer could bring a Title VII claim based on gender stereotyping and discrimination because of sex. As to the latter claim, the court used religion to explain its reasoning in finding that discrimination based on transsexual status was discrimination because of sex. If an employer discriminated against Christians or Jews, the employer would be discriminating based on religion. Similarly, it would be discrimination

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38. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). *See also Barnes v. Cincinnati*, 401 F.3d 729, 737-38 (6th Cir. 2005).

39. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008).

based on religion if the employer discriminated against persons who converted to Judaism or Christianity. In Diane Schroer's case, discriminating against her because of her transition from male to female was "because of sex" under Title VII.

*Price Waterhouse* provided one theory that united a variety of groups. By changing the focus from discrimination against a male or a female, and recognizing the bundle of stereotypes that have become a part of those terms, each group is able to target the stereotypes that plague their group. As the court in the *Schroer* case recognized, however, there is no need to resort to a gender nonconformity theory because discrimination based on transsexual status is discrimination because of sex.

**MARK STRASSER:** In sum, families where one of the parents or spouses is transgendered face a number of uncertainties. Even states permitting sex markers on birth certificates to be changed may not treat such changes as valid for all purposes. Further, individuals born in one state but living in another face additional uncertainties, because the latter state may have different criteria for the conditions, if any, under which birth markers can be changed or the purposes for which such changes will be recognized. The current law both within and across states imposes unnecessary and unjustifiable burdens on the transgendered and must be changed.

**JULIE GREENBERG:** In addition to thinking about the effect of these laws and rulings on the transsexual community, lesbian, gay, bisexual, transsexual, intersex, and feminist activists and scholars need to carefully consider how they frame their claims and the alliances that they may want to form. These different groups share common goals, but they also have unique concerns and issues that they seek to advance. I believe all these communities could benefit from studying the history of other social justice movements. Many approaches have led to progress for a number of disenfranchised groups, while other tactics have resulted in marginalized groups being pitted against each other. As these communities develop their strategies, they must be careful to consider the effects of their approaches on other groups. ♣

