LETTING "PRIVATES" *BE* PRIVATE: TOWARD A RIGHT OF GENDER SELF-DETERMINATION

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INTRODUCTION

The history of constitutional law sometimes spotlights a short phrase that—like a trumpet call announcing the theme of a great symphony—rings through the decades and centuries, encapsulating an entire judicial philosophy. Justice Felix Frankfurter called John Marshall's famous admonition that "it is a *constitution* we are expounding"[1] the "single most important utterance in the literature of constitutional law."[2] This Note celebrates and finds hope for transgendered people in a prescient phrase, written by Justice Harlan Fiske Stone more than a century later in a famous footnote, that allowed—predicted, really—that "prejudice against discrete and insular minorities may be a special condition . . . which may call for . . . more searching judicial inquiry."[3]

A. The Problem of Transgender Autonomy

If ever the problems of a "discrete and insular minority" needed help from a "more searching judicial inquiry," those of transgendered people do.[4] In contrast to the federal protections gays and lesbians have received, transgendered people remain one of the most marginalized—and therefore insecure—groups in America.[5] The purpose of this Note is not to survey a history of abuses of the transgendered or to add to the copious literature on discrimination against them, but rather to help lay a theoretical groundwork for their rescue from the legal limbo in which they still find themselves. Little if any such theoretical groundwork exists as yet. Part I takes note of some of the glaringly contradictory ways transgendered people are treated by the courts, and the dire consequences in terms of the legal

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1 McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

2 Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955).

3 United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

4 *Id.*

5 Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. GENDER, 213 (2005).

confusion and suffering this causes. Part II notes contrasting positive recent developments in New York and California, tracing the interesting stops and starts experienced by certain New York courts on their way to arriving at their present somewhat progressive posture. Finally, Part III envisions steps in reasoning that may be capable of basing a newly delineated freedom to be a transsexual, intersexed or transgendered person—a "right to self-determination of sexual identity"[6]—in the long line of cases that have taken root in Justice Stone's short, inspired phrase. Note is also taken of approaches by various contemporary groups—in particular the jurists, government and U.N. figures and academics who met in Indonesia in 2006 and signed the "Yogyakarta Principles"—that may ultimately impinge on that process and urge it on to its ultimate fulfillment.

II. ANATOMY IS DESTINY

A. Jurisprudential Contradictions

According to the Kansas Supreme Court, transsexuals cannot marry;[7] according to the Court of Appeals of Texas, they are not part of God's creation.[8]

> We live in a highly gendered society where sex distinctions have significant legal consequences . . . [affecting] whom you can marry, whether you can inherit your spouse's estate, or whether you provide an "appropriate" role model for your children . . . . [C]ourts replace substantive analysis (whether Michael is a good parent) with a relentless focus on sexual anatomy (whether Michael has a penis).[9]

Most jurisdictions take the "essentialist" position that sex is fixed at birth—i.e., by anatomy—and cannot be changed; only a small number of courts have recognized the complexity of the question and look to a person's *gender identity* as a "primary determinant of legal sex," and recognize a person who has transitioned into a different sex as having established herself in that new condition.[10] Thus, today a person's legal sex could change by simply crossing from one state into another, and an incoherent collection of statutes and legal rulings determines "one of the most intimate and defining aspects of our lives—gender identity . . . our sense of ourselves as male or female."[11] Each judge may think he "knows" what sex is; the result is a system that—quite aside from the horrendous personal losses

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[6] Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families, in* TRANSGENDER RIGHTS 32, 34 (Paisley Currah, Richard M. Juang, and Shannon Price Minter eds., 2006) [hereinafter TRANSGENDER RIGHTS]; *see also generally* Phyllis Randolph Frye, *Preface to Appendix: The International Bill of Gender Rights*, and *The International Bill of Gender Rights, in* TRANSGENDER RIGHTS 327-331.

[7] *See* In the Matter of the Estate of Marshall G. Gardiner, 42 P.3d 120 (Kan. 2002).

[8] Littleton v. Prange, 9 S.W. 3d 223 (Tex. Civ. App. 1999).

[9] Flynn, *supra* note 6, at 33.

[10] *Id.*

[11] *Id.*

imposed on transgendered people—is contrary to our conceptions of individual autonomy. "Can the law make something as central to our notion of selfhood as our sex depend on . . . where we reside . . . or [our] ability to afford surgery?"[12] Such attitudes are related to an essentially ahistorical view that there exist only two very fixed sexes. Though the long history of hermaphroditism and the laws dealing with it attest otherwise, twentieth-century courts and statutes all tend to reflect this view.

Even when courts have "recognized" a person's new condition, far too often their obsession with anatomy leads them to require that in every case extensive, invasive surgical interventions must have been undergone. For many, this project of achieving a perfect and acceptable appearance of the "other sex" is an ordeal that not only takes years and is prohibitively expensive, but may involve "procedures that for some individuals are not only unnecessary but may cause permanent physical damage."[13] Relying on one's gender identity rather than one's sex would avoid this.[14] The way to that goal, envisioned by more and more people today, is explored here.

B. Kansas Rules out Marriage for Transsexuals

The Kansas Supreme Court affords the reader of *In the Matter of the Estate of Marshall G. Gardiner* an instructive mini-tour through the contradictory landscape of transgender jurisprudence.[15] At the time of J'Noel Gardiner's birth in Wisconsin, her birth certificate described her as male; after extensive and complex reassignment surgery, her birth certificate had been changed, as permitted by Wisconsin statute, to indicate that she was female.[16] In the case, J'Noel challenged the Kansas courts to tell her why the Wisconsin court order permitting her to receive a new birth certificate should not be honored in Kansas.[17]

What J'Noel had not counted on was the determination of the judges on the Kansas Supreme Court to make transsexuals non-existent as far as family law is concerned, despite the Full Faith and Credit Clause of the Constitution. J'Noel had a Ph.D., was a college professor, and had married an important donor to her school who understood her past.[18] When her husband died, his estranged son, Joe, whose mother had died prior to his father's marriage to J'Noel, wished to inherit his father's 2.5 million dollar fortune.[19]

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[12] *Id.* at 47.

[13] *Id.* at 35.

[14] Flynn, *supra* note 6, at 35.

[15] *Gardiner*, 42 P.3d at 124-35.

[16] *Id.* at 122.

[17] U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.)."

[18] *Id.*

[19] Matambanadzo, *supra* note 5, at 229.

Joe petitioned the court to name him the sole heir and declare his father's marriage void, on the grounds that J'Noel had been born male. The lower court agreed and ruled Joe's father's marriage void under Kansas law. The Court of Appeals reversed, rejecting the district court's "sex-at-birth-answers-the-question" rationale and sending the case back to the lower court for a more nuanced and complex determination of J'Noel's legal sex, directing it to "consider a number of factors in addition to chromosomes."[20] It was this decision that was reviewed by the Kansas Supreme Court.[21] The court ended the case with a second reversal, agreeing with the district court and declaring J'Noel's marriage void as against public policy. This left her with no right to inherit whatsoever.

C. The Gardiner Court Flirts With the Other Side

Gardiner is often identified—and reviled—as the most recent leading "anti-recognition" decision in this field.[22] However, this Note proposes to examine its reasoning not so much as a ringing endorsement of prejudice, but as a case constrained *almost reluctantly* by Kansas precedent regarding statutory interpretation.[23] Before reaching its conservative conclusion, the court, with a certain generosity of spirit, considered in detail which way to go; this included reviewing some of the best-known "pro-recognition" cases, among them *M.T. v. J.T.*[24] and *In re Kevin*,[25] as well as setting forth the Court of Appeals' reasoning in its *Gardiner* decision. The Court of Appeals had "opined that there are a number of factors that make sexual identification at birth less than certain."[26] It had referred with approval to a well-known seminal law review article[27] advocating the relevance of an array of criteria in the evaluation of legal sex, including disorders at birth, in which "the chromosomal pattern does not fit into the XX and XY binary system," as well as "gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity . . . ."[28]

In *J.T.*, a New Jersey Supreme Court opinion that the Kansas Court of Appeals drew on in deciding in J'Noel's favor, the court decided whether, after a husband and wife divorced, the husband could argue that he did not owe his former

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[20] *Gardiner*, 42 P.3d at 133.

[21] *Id.* at 123.

[22] Matambanadzo, *supra* note 5, at 229.

[23] *Gardiner*, 42 P.3d at 136.

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

[25] In re Kevin, FamCA 1074 (File No. SY8136 OF 1999, Family Court of Australia, at Sydney, 2001).

[26] *Gardiner*, 42 P.3d at 133.

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

[28] *Gardiner*, 42 P.3d at 133.

wife any support because she had actually been male all along, and that the marriage had therefore not been lawful.[29]

Finding that "the wife's gender and genitalia were no longer 'discordant' and had been harmonized by medical treatment," the court held that the wife was "a female at the time of her marriage" and that therefore he must support her.[30] The Kansas appellate court appreciated that the New Jersey decision had thus replaced a "biological sex test" with "dual tests of anatomy and gender," having ruled that "identity by sex must be governed by the congruence of these standards" and claiming that it was only giving "legal effect to a *fait accompli* based upon medical judgment and action that were irreversible."[31] The New Jersey court believed that such recognition would "promote the individual's quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality."[32]

Typical of many courts is the use of an anatomical "checklist," whereby a court "meticulously scrutinizes" a party's anatomy, comparing it to a "presumed norm"; because of J.T.'s many surgeries, she passed the anatomical test, being found to have a vagina with a "good cosmetic appearance" that was "adequate" for "traditional penile/vaginal intercourse."[33]

Not referred to in the Kansas opinions was another very interesting pro-recognition court decision worth mentioning here. The 1996 holding of the California court in *Vecchione v. Vecchione* formally recognized the full results of reassignment surgery and the legal effect of a new birth certificate.[34] In this case, the court upheld the marriage of a woman, Kristie, to a transgendered man, Joshua. The court based its decision on its acceptance of the state statute[35] that allowed for

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[29] *J.T.*, 355 A.2d at 207.

[30] *Gardiner*, 42 P.3d at 128.

[31] *Id.* at 125.

[32] *Id.* Of course in some ways the surrounding *moral* situation in *J.T.* could hardly have been more different from that in *Gardiner*. In *J.T.* the husband had lived with the wife since 1964 and paid for her reassignment surgery, had then deserted her two years after marrying her—and was now trying to get out of paying any support by arguing that since she was "really" a man there had never been a marriage. *J.T.*, 355 A.2d 204. In *Gardiner*, J'Noel, a successful Ph.D., had married a wealthy order man who died intestate less than a year after the marriage; his son, regardless of the estrangement, may perhaps be forgiven for wanting to be declared his legal heir. *Gardiner*, 42 P.3d at 123.

[33] Flynn, *supra* note 6, at 37-38.

[34] Case Studies: Vecchione v. Vecchione, http://ismsandsuch.com/TM/cases.html.

[35] The provisions of the two pertinent sections of the California Health & Safety Code are so meaningful to the developments discussed in this paper as to warrant reproduction here:

> § 103425. *New birth certificates; petition for issuance.* Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for the person reflecting the change of gender and any change of name accomplished by an order of a court of this state, another state, the District of Columbia, or any territory of the United States. A petition for the issuance of a new birth certificate in those cases shall be filed with the superior court of the county where the petitioner resides.

a new sex designation on the birth certificate, and declared that the law showed that "California recognizes the post-operative gender of a transgendered person."[36] Above all, the decision is important because of its recognition that even though anatomy was still to be considered paramount, it need not be the anatomy at birth.[37]

Vecchione is somewhat like *Gardiner* in that the plaintiff, Kristie, was attempting to have her marriage invalidated on the ground that Joshua was legally female. Because of its finding that the statute permitting change of sex on birth certificate meant that Joshua was legally male, the court was able to uphold the validity of the marriage and award him fifty-percent custody of the couple's child.[38] Media coverage of the case emphasized the normal day-to-day nature of the relationship between father and daughter.[39] Taylor Flynn comments that "by recognizing that sex [could] be decoupled from anatomy, and given that 'gender' had therefore come to be viewed as a surrogate for 'sex,'" such an opinion provides "a means of disentangling gender from anatomy."[40] She maintains that "if the man before the court was (or is) anatomically indistinguishable from a woman, this undermines the assertion that . . . children require one male and one female parent for optimal gender role development."[41] Such cases may therefore be used to "chip away at the system itself;" in *Vecchione*, therefore, "access to heterosexual entitlement . . . facilitates the process of slowly dismantling the law's enforcement of gender norms."[42]

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§ 103430. *Affidavit accompanying petition; Hearing; Order; Indications of sex in new birth certificate.*

(a) The petition shall be accompanied by an affidavit of a physician documenting the sex change, and a certified copy of the court order changing the applicant's name (if applicable).

(b) The petition shall be heard at the time appointed by the court and objections may be filed by any person who can, in those objections, show to the court good reason against the change of birth certificate. At the hearing, the court may examine on oath the petitioner, and any other person having knowledge of facts relevant to the application. At the conclusion of the hearing the court shall make an order to issue a new certificate, or dismissing the petition, as to the court may seem right and proper.

(c) A certified copy of the decree of the court ordering the new birth certificate, shall within 30 days from the date of the decree, be filed with the State Registrar. Upon receipt thereof together with the fee prescribed by Section 103725, the State Registrar shall establish a new birth certificate for the applicant.

(d) The new birth certificate shall indicate the sex of the registrant as it has been surgically altered and shall reflect any change of name specified in the application if accompanied by a court order, as prescribed by Section 103425. No reference shall be made in the new birth certificate, nor shall its form in any way indicate, that it is not the original birth certificate of the registrant.

36 Flynn, *supra* note 6, at 36.

37 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, 416 (2001).

38 *Id.*

39 *Id.* at 419.

40 *Id.* at 416.

41 *Id.* at 416.

42 Flynn, *supra* note 37, at 417.

D. "Psychologically Male" is Enough in Australia

The Kansas appellate court in *Gardiner* also considered another relatively recent case, *In re Kevin*, in which the Australian Family Court had similarly upheld the validity of a marriage to a transgendered person.[43] The court based its opinion that the husband, Kevin, was legally male on expert testimony that "brain . . . or mental sex . . . [is thought to] explain the persistence of a gender identity in the face of . . . external influences," and that therefore Kevin had always been "psychologically male."[44] The Australian court found this to be grounds enough to render him legally male.[45]

E. In Texas, the Creator is the Obstacle

Finally, the appellate court had also considered and rejected one of the more bizarre anti-recognition decisions, a famous case decided by the Texas Court of Appeals.[46] There, a transsexual, Christie Littleton, had brought a medical malpractice/wrongful death suit against a physician as the surviving spouse of the doctor's male patient; the doctor argued that the transsexual could not have been the spouse of "another man."[47] Christie had undergone reassignment surgery and her birth certificate had been changed; doctors testified that she was a female capable of fully functioning sexually—that she was "a woman."[48] But the court declared that it had "no authority to fashion a new law on transsexuals, or anything else."[49] It explained: "We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature," and opined that "biologically" Christie was "still a male."[50] The court further offered the illuminating reflection that a person's gender is "immutably fixed by our Creator at birth,"[51] adding that "[t]here are some things we cannot will into being. They just are."[52]

One cannot help wondering about the motivations behind such pronouncements—aside from a sheer hatred of transsexuals, which of course exists. Certainly they are reminiscent of fundamentalist, Biblical approaches to other policy questions, but also of the strange interplay between Puritan doctrine and turning a blind eye to reality that seems to operate when fundamentalist voting blocs fall in line behind "conservative" candidates whose adulteries and divorces have been well publicized. Yet it may be worth remembering that the Senator who

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43 *Gardiner*, 42 P.3d at 131-32.
44 *Id.* at 132.
45 Flynn, *supra* note 6, at 37.
46 *Gardiner*, 42 P.3d at 130.
47 *Littleton*, 9 S.W. at 231.
48 *Id.* at 225.
49 *Id.* at 230.
50 *Id.* at 230.
51 *Littleton*, 9 S.W.3d at 224.
52 *Id.* at 231.

compared homosexuality with bestiality has been voted out of office,[53] and that as much as jurists similar to those sitting on the Texas Supreme Court may try to keep government out of matters like sexual or gender identity, the Supreme Court, as we shall see below, has not always been quite as shy.

F. Kansas Rules by the Book

After reviewing the Court of Appeals' reasoning, the Kansas Supreme Court put an end to all path-breaking possibilities by explaining its deference to the Kansas legislature's "public policy of recognizing only marriages between a man and a woman" and of recognizing as valid only "marriages from other states that are between a man and a woman."[54]

> The fundamental rule of statutory construction is that the intent of the legislature governs . . . . [C]ourts . . . may look to the historical background of the enactment, the purpose to be accomplished . . . . Words in common usage are to be given their natural and ordinary meaning. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be . . . . The words "sex," "male," and "female" are words in common usage and understood by the general population . . . [they] *do not encompass transsexuals.*[55]

The court went on to quote various dictionaries. It found that Black's Law Dictionary defined "marriage" as "the legal status, condition, or relation of one man and one woman united in law for life"; that Webster's New Twentieth Century Dictionary's entry for "male" spoke of "fertiliz[ing] the ovum," and that for female of "produc[ing] ova."[56] Thus, in the end the court reached the perhaps unsurprising conclusion that according to the general population and the dictionaries it had consulted, transsexuals were neither male nor female. So, especially in view of the legislature's recorded intention to "affirm the traditional view of marriage" and to declare all other marriages to be "void," and as the Court declared that "[w]e do not read into a statute something that does not come within the wording of the statute," they therefore announced that "transsexuals are not included."[57] Further, if "the legislature [had] intended to include transsexuals, it could have been a simple matter to have done so."[58]

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[53] Frank Rich, *Gay Kiss: Business as Usual*, N.Y. TIMES, June 22, 2003, at 2. The Senator in question is Rick Santorum.

[54] *Gardiner*, 42 P.3d at 126.

[55] *Id.* at 135 (emphasis in original).

[56] *Id.* at 135.

[57] *Id.* at 136.

[58] *Id.*

G. —And Finds Other Rights to Deny

Having ruled transsexuals out of Kansas marriage laws, the *Gardiner* court then took the opportunity to announce its agreement with the Seventh Circuit's position that transsexuals are *also* not included within the contemplation of Title VII of the Civil Rights Act. The court offered the following explanation:

> Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating . . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide.[59]

While employment discrimination and the Civil Rights Act are beyond the scope of this Note, this passage highlights the readiness of an influential government body like the highest court in Kansas to read transsexuals out of statutory existence. Its final word on the case at bar was simple:

> J'Noel remains a transsexual, and a male for purposes of marriage under K.S.A.2001 Supp. 23-101. We are not blind to the stress and pain experienced by one who is born a male but perceives oneself as a female . . . [h]owever, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court . . . . Our responsibility is to interpret K.S.A.2001 Supp. 23-101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not. [60]

H. The Seriousness of Discrimination

The consequences of decisions like these for the transgendered cannot be overemphasized. Michael Kantaras's marriage was declared invalid by a Florida court, endangering his position as the father of children he had adopted or conceived through artificial insemination during a ten-year marriage.[61] A litigant coming out of such a proceeding may find it impossible to change identifying documentation, including a driver's license, birth certificate, or passport, and thus becomes exposed to harassment, discrimination, and violence at any moment of daily living. Her vacation could be ruined, she may be denied a loan, or refused service at a bank. When ID is required, "purchasing . . . with a credit card . . . can become a nightmare: a transgendered person risks humiliation, refusal to be served,

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[59] *Gardiner*, 42 P.3d at 136 (quoting Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984)).

[60] *Gardiner*, 42 P.3d at 136-37.

[61] Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Cir. Ct, 2004), *rev. denied*, No. SC04-1953, 2005 Fla. LEXIS 373 (Fla. Feb. 23, 2005).

and possible harm by onlookers who—now aware of her gender variance because of the reaction of the store clerk—may follow her out of the store."[62]

The transgendered are indeed a small minority. Estimates of the number of people who may be only considering sexual reassignment hover around 60,000; a mere 25,000 have actually gone through with it.[63] These figures may amount to more than could fit in one room, but a tiny number among the many millions in this country. In view of the judicial treatment that is noted here, surely transsexuals—especially those who, though they have serious gender identity concerns, are unable to present to a court an expensive, newly finished "private" anatomy with a "good cosmetic appearance"[64]—must be considered a "discrete and insular minority" whose concerns do indeed warrant "a more searching judicial inquiry."[65] One day soon they may get it.

III. NEW YORK, NEW YORK, A WONDERFUL TOWN

A. Breaking Through to a New Paradigm

In stark contrast to the choice made by the *Gardiner* court, there are some jurisdictions in this county where a transformed anatomy is not only accepted, but *anatomy is considered irrelevant to the determination of gender identity.* Such an approach expresses respect for an individual's right to know one's proper gender and to act on that knowledge without attracting life-shattering consequences.[66]

One such jurisdiction is New York City, where the ruling civil rights ordinance's definition of "gender" declares that the term "shall include actual or perceived sex and shall also include a person's gender identity, self-image, appearance, behavior or expression, *whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the legal sex assigned to that person at birth.*"[67] This definition has had important practical consequences, because other sections of the local code on employment discrimination and discrimination in public accommodations have been changed to incorporate it.

State and federal courts in New York have enforced antidiscrimination statutes against the former employer of a transsexual.[68] Additionally, the highest

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[62] Matambanadzo, *supra* note 5, at 216.

[63] *Id.*

[64] *J.T.*, 355 A.2d at 206.

[65] *Carolene Products*, 304 U.S. at 153 n.4.

[66] See, e.g., Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 ("By the end of 2006, the number of local ordinances protecting transgender people had multiplied. There are now at least eighty-four such local ordinances.").

[67] N.Y.C. CODE § 8-102 (23) (emphasis added).

[68] *See, e.g.*, Rentos v. Oce-Office Systems, 1996 WL 737215 (S.D.N.Y., December 24, 1996) (Where former employee, a postoperative transsexual, sued former employer for sex discrimination and harassment, the court held that transsexuals were protected from discrimination under New York State

state court of New York took the opportunity of affirming its support of this approach when it answered a question certified to it by the Second Circuit. In its decision, the court considered an appeal from a district court's award of nearly $200,000 in attorneys' fees to prevailing transgendered plaintiffs—they were preoperative transsexuals—who had won an antidiscrimination suit in the Eastern District against a prominent retailer, Toys "R" Us, whose employees had told them to leave a store.[69] The jury had awarded plaintiffs one dollar each in nominal damages, and plaintiffs petitioned for attorney's fees.[70] The district judge granted their motion, and the Second Circuit noted with approval the district court's conclusion that plaintiffs should be awarded attorney's fees "because their lawsuit had served a significant public purpose by being the first to succeed at trial on a § 8-107.4(a) claim of unlawful discrimination against transsexuals in a public accommodation."[71] Interestingly, the district court judge had written that:

> This case is one of those unusual and infrequent instances in which attorneys' fees should be awarded . . . this was the first public accommodations case to go to trial under the Code, as well as the first case in which the rights of transsexuals were asserted and vindicated . . . . Moreover, in May 2001, when plaintiffs filed the complaint in this action, there was a substantial legal question whether the protections provided by the Code against gender and sexual orientation discrimination extended to transsexuals. This ambiguity was resolved legislatively only two months prior to the trial in this case when the New York City Council passed a bill, signed into law by the mayor on April 30, 2002, amending the definition of "gender" under the Code to include discrimination on the bases of "gender identity or expression." The function of an award of attorneys' fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel . . . . This purpose is served by an award of fees to plaintiffs' counsel in this case.[72]

In an unusual—yet illuminating—procedural wrinkle, the Second Circuit certified questions to the New York Court of Appeals, asking it to confirm that even though previous state cases had allowed transsexuals to prevail in *employment* discrimination cases, the case deserved the evaluation given it by the district court.[73] The state's highest court agreed, and also approved the district court's conclusion that "the verdict was significant and performed a public purpose because it involved a series of 'firsts'—e.g., it was the first public accommodation

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and New York City human rights laws).

[69] McGrath v. Toys "R" Us, Inc., 01 Civ. 3071, 2002 U.S. Dist. LEXIS 22610 (E.D.N.Y. Oct. 16, 2002).

[70] *Id.*

[71] McGrath v. Toys "R" Us, Inc., 356 F.3d 246, 249 (2d Cir. 2004).

[72] *McGrath*, 01 Civ. 3071, 2002 U.S. Dist. LEXIS 22610 at *6-7 (citations omitted).

[73] *McGrath*, 356 F.3d at 252-254.

case that went to verdict under the New York City Human Rights Law, and was the first judgment in favor of transsexuals."[74] Further, the high court observed that "a groundbreaking verdict can educate the public concerning substantive rights and increase awareness as to the plight of a disadvantaged class . . . many city residents might have been unaware at the time of verdict that discrimination against transsexuals was prohibited."[75]

In affirming the district court's evaluation of the case, the Second Circuit had in fact quoted those passages of the newly amended New York City human rights code referring to public accommodations, which now included a reference to gender identity implying an individual's freedom to self-define it:

> Section 8-107.4 provides, in relevant part: "It shall be an unlawful discriminatory practice for any person, being the . . . manager, . . . agent or employee of any place or provider of public accommodation, because of the actual or perceived . . . gender . . . [or] sexual orientation . . . of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or, directly or indirectly, to make any declaration . . . to the effect that any of the accommodations, advantages, facilities and privileges of any such place or provider shall be refused, withheld from or denied to any person on account of . . . gender . . . [or] sexual orientation . . . or that the patronage or custom of any person *belonging to, purporting to be, or perceived to be, of any particular . . . gender* . . . [or] sexual orientation . . . is unwelcome, objectionable or not acceptable, desired or solicited."[76]

Here we see that not only had the New York City Council expanded local human rights law, but district, circuit, and state courts were ready to affirm and applaud a verdict based on respect for the self-determination of gender identity. However, this may not be surprising: if Texas fundamentalism is at one end of some social-policy spectrum, the ancient tradition of social toleration in New York is perhaps at the other.

These decisions had nothing to do with anatomy. The preoperative transsexuals who brought the *McGrath* suit were not required to answer questions about their anatomies in court, as J'Noel had to in Kansas and Michael Kantaras had to in Florida. If they had been, they would have no doubt lost their cases immediately, since they were on record as preoperative, i.e., as not yet having had reassignment surgery. In fact, these transsexuals may chose to never have it. All three courts considered such issues completely irrelevant, in part because of the phrasing of the statute.

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[74] McGrath v. Toys "R" Us, Inc., 3 N.Y.3d 421, 436 (N.Y. 2004).

[75] *Id.*

[76] *McGrath*, 356 F.3d at 248 (*quoting* N.Y.C. CODE § 8-107.4(a)) (emphasis added).

B. The Great Hispanic Aids Discovery Dictum

Not long after these decisions, a New York Supreme Court judge took the opportunity to emphasize that a ruling regarding transgendered persons had nothing to do with anatomy.[77] *Hispanic Aids Forum v. Bruno* is an action still pending in New York State Supreme Court in which an HIV/AIDS clinic tenant is suing its landlord for unlawful discrimination in refusing to renew plaintiff's lease because of its transgendered clients. In July of 2007, the plaintiff survived a motion to dismiss, and the defendant was ordered to answer.[78] The historic 2003 ruling was concerned with a discovery dispute, where the landlord defendant had demanded biological and birth-sex information about an HIV/AIDS clinic's clientele in the course of defending against a wrongful eviction suit. Other tenants had complained that they did not like "'those men that look like women using the bathroom,'"[79] and the landlord's deputy manager had made several offensive comments and had ridiculed plaintiff's clients,[80] saying they were "bad for the image of the Building."[81]

In her discovery ruling, New York County Supreme Court Judge Marilyn Shafer rejected the defendant's discovery demands not only because information about the identity of HIV/AIDS patients must by law be kept confidential, but because of the irrelevance of biological or birth-sex information to the nature of transgendered individuals.[82] Her eloquent, yet matter-of-fact, explanation of that irrelevance was historic: "The status of a transgendered individual is not dependent upon their physical anatomy, [thus] information about . . . anatomical sex, . . . and whether and when such [persons] underwent physical procedures, is immaterial . . . ."[83] She also cited the DSM-IV[84] as saying that,

> Transgendered individuals include people who present as the other sex but take no hormones and have no surgery, people who take hormones to change their secondary sex characteristics but have no surgery, and people who have a range of surgical procedures to alter their anatomical sex. *Only a small percentage of transgendered people have surgery, and a still smaller percentage have all the surgery required to change all aspects of the anatomical sex.*[85]

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77 *See* Hispanic Aids Forum v. Bruno, 759 N.Y.S.2d 291 (Sup. Ct. 2003).

78 *See* Hispanic Aids Forum v. Bruno, 839 N.Y.S. 2d 691 (Sup. Ct. 2007).

79 *Hispanic Aids*, 759 N.Y.S.2d at 293.

80 *Id.* at 293.

81 *Hispanic Aids*, 839 N.Y.S.2d at 694.

82 *Hispanic Aids*, 759 N.Y.S.2d at 294-95.

83 *Id.* at 295.

84 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 532-33 (4th ed. 1994).

85 *Hispanic Aids*, 759 N.Y.S.2d 291, 292 (emphasis added).

C. Other Fits and Starts Along the Path

Unfortunately, such judicial opinions remain rare. Until very recently, bodies like the New York City Board of Health feared the consequences of birth certificates with a new designation of gender after reassignment surgery, and the courts backed them up. Even though New York State had long allowed such designations, new certificates issued by the local Board of Health bore a changed name but no designation of gender. Opinions refusing to countermand this practice offer an interesting, even curious, backward look at local jurisprudence on the subject.

In a 1968 case that set the pattern for years to come, a male-to-female transsexual petitioned in New York City Civil Court not only to allow his "obviously 'male' name to be changed to an "obviously 'female' name" on his birth certificate, but also to direct the Bureau of Records and Statistics of the Department of Health of the City of New York to change his birth certificate to indicate a change from male to female.[86] The Court advised that it was without power to direct the Health Department to physically change a birth certificate; this could only be achieved through an Article 78 proceeding in State Supreme Court—an action which was apparently never instituted.[87]

However, the court ruled that according to both common law and provisions of New York City's Civil Rights Law, it was empowered to grant a name change. It noted that the petition was the first of its kind to come before it and took the occasion very seriously. In a historic opinion, the court granted the petitioner that much. It declared that the matter presented "problems of immense proportions, not only from a medico-legal viewpoint, but especially as it affects our society as a whole."[88] The court also stated the matter provided an opportunity to show more "'enlightenment'" toward the "social problems of . . . so-called 'non-conformists'" who "do not, or cannot, conform to the 'norm,'" and whose problems, with the "rapid strides of the medical profession made within the last few years" were becoming better understood.[89] The court declared that although it might be easy to simply deny the petition on the grounds that the relief had never before been granted by any New York court, "[t]o do so would, in effect, sweep the problem under the proverbial rug," and that the difficulty was not so much "the nature of the problem" but trying to "apply, perhaps inadequately, static rules of law to situations . . . *which perhaps merit new rules* and/or progressive legislation."[90]

The court then noted that the sex-reassignment surgery, which had taken place in Casablanca in 1966, and during which "all male organs were removed," meant "there is no chance this petitioner will ever again function as a male either

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[86] In the Matter of Anonymous, 57 Misc.2d 813 (N.Y. Civ. Ct. 1968).

[87] *Id.* at 813-814.

[88] *Id.* at 814.

[89] *Id.*

[90] *Id.* at 836 (emphasis added).

procreatively or sexually. The petitioner is now capable of having sexual relations as a woman although unable to procreate. 'Her' physiological orientation is complete."[91]

Then, in a moment prophetic of the way these issues look today, the court asked, "Is the gender of a given individual that which society says it is, or is it, rather, that which the individual claims it to be?" and concluded that although it would be "very simple" to say a person's gender was "that which society says it to be," that would "disregard the enlightenment of our times."[92] It noted that some babies are assigned the wrong sex by a doctor at birth, and an erroneous birth certificate is filled out.[93] The court gave as an example a genetic female born with a "hypertrophied clitoris which, together with the gross appearance of the swollen labia," led the doctor to an "erroneous diagnosis of a 'male' newborn."[94] Sometimes, "reparative surgery" follows—discussed below in the section on intersexed children—which continues the misidentification of this genetic female as "male."[95] The court then asked, "must this individual, in later life . . . conform to the dictates of society and comport himself as a 'male,' or should this individual rather be permitted to carry out her role in life as a true 'female'?"[96]

In the case of the transsexual,

> "[B]y definition, his psychological sex, as distinguished from his anatomical sex, is that of the opposite sex . . . . [O]nce surgical intervention has taken place, whereby his anatomical sex is made to conform with his psychological sex, is not his position identical to that of the pseudo-hermaphrodite who has been surgically repaired? Should not society afford some measure of recognition to the altered situation and afford this individual the same relief as it does the pseudo-hermaphrodite?"[97]

The court continued:

> [T]he application of a simple formula... should be the test of gender, and that formula is as follows: Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. *Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes*

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91 *Anonymous*, 57 Misc. 2d at 815.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Anonymous*, 57 Misc. 2d at 815.
97 *Id.* at 816.

> *should be made.* Of course, such changes should be made only in those cases where physiological orientation is complete.[98]

This last "of course" is—of course—the territory of the current battleground, forty years later, and the terrain we survey here.

The court continued its path-breaking decision by noting that it had certainly studied a prior case that was controlling in New York City for many years,[99] *Matter of Anonymous v. Weiner*, itself a proper but unsuccessful Article 78 proceeding for an order directing the Health Department to change the gender designation on the petitioner's birth certificate from male to female.[100] The 1968 Civil Court judge took violent issue with the reasoning of the decision in *Weiner,* which had been based in part on conclusions reached by a committee convened in 1965 by the New York Academy of Medicine in a report entitled "Change of Sex on Birth Certificates for Transsexuals."[101] That report had taken the position that "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."[102] The Civil Court judge declared that he was "in complete disagreement" with this conclusion of the "learned committee."[103] He averred that,

> [a] male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact. This individual dresses, acts, and comports himself as a member of the opposite sex. The applicant appeared before this court and, were it not for the fact that petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any other female. It would seem to this court that the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to classify this individual as a 'male' when, in fact, as aforesaid, the individual comports himself as a 'female.'[104]

The prior decision had insisted that male-to-female transsexuals are still chromosomally males. The court ended its brave opinion by asking, "should the question of a person's identity be limited by the results of mere histological section or biochemical analysis, *with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation?*"[105] In answer to its own question the court wrote, "I think not."[106] On an even more prophetic note—this was, after all, the 1960's—the court

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98 *Id.* (emphasis added).

99 *Id.*

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

101 *Anonymous* at 816.

102 *Id.* at 817 (citation omitted).

103 *Id.*

104 *Id.* at 816-17.

105 *Id.* at 817 (emphasis added).

106 *Id.*

said "[i]n addition to the forgoing, there is a serious question in the court's mind whether the denial of the relief requested by the petitioner herein *would not be a violation of his civil rights*," and granted the petition for an "obviously female name."[107] The court then indicated that a copy of the order would be attached by the Health Department to the petitioner's birth certificate.

D. In 1973, the Petitioner Was "Deeply Disturbed"

In 1973, another attempt was made by Deborah Hartin to get a New York court to order the Health Department to alter a birth certificate after reassignment surgery.[108] The court noted that the surgery was complete, including removal of male sex organs, the creation of a "functional female primary sex organ," and the addition of breast implants.[109] "The sum effect of these operations rendered the petitioner physiologically and psychologically a female, termed medically a transsexual."[110] Petitioner had taken a "female name," and had effected "a change of name and sex upon a baptismal certificate, and upon the certificate of discharge from the United States Navy."[111]

Now the petitioner was seeking to have her sex changed on her birth certificate. The Health Department had issued a new certificate changing only the petitioner's first name, to "Deborah," and had "omitted any identity of sex."[112] The petitioner contended that the refusal by respondents—the administrators of the Board of Health—to include an indication of female identity on the new certificate was "arbitrary and capricious and constitute[d] an abuse of discretion."[113]

Unlike the Civil Court judge in 1968, the judge before whom Deborah Hartin appeared put great trust in the 1965 report of the Academy of Medicine committee, which had "revealed" that a transsexual such as petitioner is:

> deeply disturbed in his gender orientation and role. He has an overpowering desire to be a woman; to acquire her contour, to function sexually, and to be accepted socially and legally as a female. The male bodily configuration and genitalia are discordant factors which the transsexual strives to overcome through hormone treatment, and sometimes, by plastic surgery including the removal of the male genitalia and fashioning artificial female genitalia. Nonetheless, this abnormal individual, advises the report, is genetically a male as shown by

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[107] *Id.* (emphasis added).

[108] In the Matter of the Proceedings of Deborah Hartin v. Dir. of the Bureau of Records and Statistics, Dep't of Health of the City of New York and the City of New York, 75 Misc. 2d 229 (N.Y. Sup. Ct. 1973).

[109] *Id.* at 229.

[110] *Id.* at 230.

[111] *Id.*

[112] *Id.*

[113] *Hartin*, 75 Misc.2d at 230.

> chromosome and cell-chromatin studies, and the disorder manifests itself in various types of aberrations from minor to true hermaphroditism . . . .[114]

The Committee had also concluded that, whereas male-to-female transsexuals are "still chromosomally males," it is "questionable" whether records such as the birth certificate should be changed and "thereby used as a means to help psychologically ill persons in their social adaptation."[115] Thus, it opposed changing the sex indicated on the birth certificates of transsexuals, also claiming that "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud," the very claim the Civil Court judge had already so disagreed with.[116]

The *Hartin* court also reviewed approvingly the proceedings of the Board of Health which, even in the face of a position letter from the New York Civil Liberties Union advocating that information as to sex be included in a new certificate, had promulgated a new provision of the New York City Health Code, subdivision 5 of § 207.05(a).[117] This was done in an apparent effort to accommodate transsexuals seeking a new birth certificate. The amendment said nothing about indicating the sex of the applicant. The minutes also revealed that the Board had noted that reassignment surgery was merely "an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease," and that it does nothing to change sexuality.[118] One of the Board members had opined that "it would be unsound, if, in fact, there were encouragement to the broader use of this means of resolving a person's unhappy mental state."[119] The court concluded that it had no right to overrule the decision of the Board, denied the petition and dismissed the proceeding.

E. The Ground Shifts, the Outcome Remains the Same—For a While

In 1977, another State Supreme Court judge, while citing and lauding the 1965 medical committee report and denying a similar petition submitted by a male-to-female transsexual, was careful to dismiss the action, which was for a declaratory judgment ordering the Health Department to change the birth certificate, on the ground that it was nonjusticiable, since there was no opposition. The court declared that "it is basic that courts will not make a declaratory judgment in a vacuum."[120]

What is interesting is that this time the court offered *no substantive reason for denial*, and we can note progress in its rhetoric. In a routine tone, the court

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114 *Id.* at 231.

115 *Id.*

116 *Id.*

117 *Id.* at 232.

118 *Hartin*, 75 Misc.2d at 232.

119 *Id.* (internal citation omitted).

120 Anonymous v. Irving Mellon, as Dir. of the Bureau of Vital Records, Dep't of Health of the City of New York, 91 Misc.2d 375, 376 (N.Y. Sup. Ct. 1977).

noted without comment or any hint of skepticism that the petitioner had undergone "extensive psychological, psychiatric and endocrinological evaluation and workout" as well as reassignment surgery, was now "anatomically, as well as psychologically, a woman."[121] It also noted that her name had been already changed by court order in Canada, and that the United States Department of State had even given her a new passport bearing her new "female" name, also noting that the passport bore "a photograph of an attractive young woman."[122]

Of course, as with Deborah Hartin, upon request, the Board of Health nevertheless issued a new certificate without a designation as to sex; the court simply ruled that it was unable to overrule the decision, feeling constrained to find it "reasonable" and not "arbitrary."[123] Averring that it could take no position on the administrative decision, it broadly hinted at its substantive views: "However fascinating the information presented by psychologists, surgeons, endocrinologists and clergymen may be, the Court will not pick and choose one set of opinions over another if rational choices are equally available to the administrative body."[124] Thus, the decision turned on wholly procedural grounds, and did not touch on the merits of the petitioner's demand.

There were other clear shifts in the opinion as well. Referring to the 1965 committee report upon which the practice of the Department of Health was based, the court now disallowed the fraud argument, saying that it now regarded "the 'protection of the public interest against fraud' as being of virtually no significance, since it is dubious that anyone would go through such drastic procedures as sex reassignment surgery for the purpose of deceiving creditors or avoiding the draft."[125] Further, the court noted that "it has been judicially determined that chromosomal or genetic sex is not the determinative factor in deciding whether a person is male or female . . . . *The fact is that no single characteristic is determinative.*"[126] For that very reason, "it would be impossible... to declare that the refusal of the respondent to make a determination one way or the other [as to gender] is irrational, arbitrary and without basis."[127]

The court also brought up the issue of birth certificates as "official documents . . . admissible in evidence as such," claiming that "an administrative body . . . may properly decline to take a position which will be used as evidence in other proceedings to establish jural relationships or rights and obligations," and that since a sex designation may affect a wide range of future determinations, whether concerning "school admissions . . . vocational or recreational opportunities . . . military service... insurance and pensions, or... application for a marriage

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121 *Id.* at 376.
122 *Id.*
123 *Id.* at 379.
124 *Id.* at 376.
125 *Mellon*, 91 Misc.2d at 378.
126 *Id.* at 379 (emphasis added).
127 *Id.*

certificate," the Health Department could "appropriately decline to make a determination" that would affect such "possible future controversies."[128] The court then left open the possibility of the "facts" being "contested and established adversarially in subsequent proceedings."[129]

Finally, although it considered that the Health Department "may properly consider the general good and refuse to make exceptions for individual cases," the court noted that the department had in fact *not contested* "any of petitioner's contentions about the anatomic, endocrinological and genital changes which are alleged by petitioner" and only contended that its rule of "taking no position, is reasonable under the circumstances."[130] The court declined to overrule the non-position by the department, and denied the petition, dismissing the proceeding.[131]

Somehow, these policies of the New York City Department of Health remained in place until 2006, which was a very active year for the department. In that year, the Board of Health contemplated a great leap forward and made headlines by publicly entertaining the possibility of yielding to the most progressive advocates of gender rights by allowing those whose new gender identity had been validated only along the lines of Judge Shafer's opinion and the newly amended human rights ordinances to receive new birth certificates, complete with new sex designation, even *without* reassignment surgery and all the accompanying therapies. Such a new regulation was promulgated, only to be withdrawn in a few months. However, the department did bring New York City in line with the rest of New York State by deciding henceforth to include designation of the new gender on the newly issued certificate.[132]

IV. THE WAY FORWARD

A. The Organ with the Power

What are we to make of such a panoply of contradictory judicial treatments of transgender identity? In Kansas a transsexual cannot marry; in New York a fully transitioned transsexual can change her birth certificate and marry[133] and courts

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128 *Id.*

129 *Id.*

130 *Mellon*, 91 Misc.2d at 380.

131 *Id.* at 378-80.

132 The dramatic story of the hearings and the pioneering, but quickly withdrawn, new regulation would need a Note all to itself. *See*, Sylvia Rivera Law Project, http://www.srlp.org/index.php?sec?=03H&page=nycbc_newpolicy (last visited Sept. 2, 2008) (for information regarding the hearings); New York City Dep't of Health & Mental Hygeine, http://www.nyc.gov/html/doh/html/home/home.shtml (last visited Oct. 2, 2008) (for current New York State policy regarding changing a birth certificate); Allison, Becky, U. S. States and Canadian Provinces: Instructions For Changing Name And Sex On Birth Certificate, http://www.drbecky.com/birthcert.html (last visited Oct. 2, 2008) (for steps outlined in the California statute).

133 *See* Case Studies, http://ismsandsuch.com/TM/cases.html (last visited Oct. 2, 2008).

will protect a biological male, who is living as a woman and considering or preparing for reassignment surgery, from discrimination. Such a judicial landscape is perhaps typical of a society undergoing many kinds of changes at once, at a time when very old and very new definitions of fundamental things may dominate in different places simultaneously. The *Gardiner* court was ostensibly reflecting its equivocal position in this situation of flux when, after it had finally based its decision on two extremely limited and limiting texts—a dictionary and the words of Kansas's marriage statute—it did what many courts do: pass the social-policy ball into the legislature's court.

However, there is another possible conclusion, one that the Kansas court *may even have meant us to draw.* If one court can determine as a matter of law, that transsexuals have no place in the family law of the State of Kansas, while courts in other states such as New Jersey or New York, feel free to go in a diametrically opposed direction, then a person may not be able to move from one jurisdiction to another without experiencing drastic consequences. This general situation would not really be affected by piecemeal action on the part of state legislatures.

But a direct and proper remedy *does exist.* Congress is unlikely in the near future to take up a bill dealing with sexual identity. However, there exists an authoritative organ of our government perfectly suited to entertain the question and to lift courts such as the Supreme Court of Kansas and Court of Appeals for the Seventh Circuit out of the judicial ditch into which the constraints of strict statutory interpretation have pitched them. This is the Supreme Court of the United States, which, after having taken a deep breath, most certainly decided in *Lawrence v. Texas* to take another look at a state statute concerned with sexuality.[134] The Court declared the Texas sodomy law unconstitutional as interfering with the personal due process rights of just such a minority as Justice Stone was thinking of when he wrote his famous phrase in *U.S. v. Carolene Products.*[135]

Carolene Products has been identified as the last case, in a long line beginning with—or at least identified with—*Lochner*, in which the Supreme Court would even consider striking down a statute on grounds of "economic due process."[136] The Court's declining to do so in that case, where Congress's justifications or "findings" backing up the regulatory statute had been so scant or murky that the Court was ostensibly reduced to simply "presuming" them adequate, ushered in a long period that extends to the present day of what one might call "strict deference" to the legislature on economic matters.[137]

It was just at this turning point, in his *Carolene* opinion, that Justice Harlan Fiske Stone apparently felt it incumbent upon him to point out, in the famous Footnote 4 of that opinion, that his decision did *not* necessarily mean the end of all

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134 Lawrence v. Texas, 539 U.S. 558 (2003).

135 *Id.*

136 *Carolene Products*, 304 U.S. at 144.

137 KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 375 (16th ed. 2007).

"substantive due process;" and not just because the Court would always be ready to protect political rights guaranteed by the Constitution—such as the right to vote or freedom of expression and assembly—or to defend the rights of easily designated minorities like racial or religious groups. Rather, his point was that there *might always be other possible candidates for protection*, groups whose obscurity or lack of influence, or indeed the "prejudice" arrayed against them, might make it impossible for them to succeed in the rough-and-tumble of the political arena, "those political processes ordinarily to be relied upon to protect minorities."[138] In contrast to these minorities, corporate management and big labor could be trusted to take care of themselves through the political process. And thus, in his great moment of foresight, he advised the Court to remain always available to come to the aid of such minorities with "a more searching judicial inquiry."[139]

There is an argument to be made for the inclusion of the transgendered among those who deserve protection by the Supreme Court against unwarranted state intrusions into their private lives. It may be protested that *Carolene Products,* being a substantive due process case, was different from the recent line of cases after *Griswold,* "equal protection cases" extending constitutional protections to groups exercising the newly affirmed right to privacy. Yet, such a bifurcation was certainly not registered by Justice Powell when, in *Bakke*, he evaluated, in apparent agreement, the petitioner's argument—an explicit allusion to *Carolene Products*—that "white males are not a 'discrete and insular minority' requiring extraordinary protection from the majoritarian political process."[140] Justice Powell may or may not have been questioning whether white males were such a minority; he was certainly not questioning the propriety of using the language of *Carolene Products* Footnote 4 in the affirmative action—an equal protection—context. The high court in *Gardiner* was without question doing nothing less than *refusing protection* when it subjected J'Noel's rights to standards that had been established "by the majoritarian political process," *i.e.*, a vote of the Kansas legislature that explicitly excluded the transgendered from Kansas marriage law by the most majoritarian political process imaginable.[141] This Note chooses to read in the *Gardiner* opinion a clear hint that while change *could* be up to the legislature—the court, as courts so often do when they refuse to act themselves, explicitly invite such a move—it could also be within the discretion of our highest court to make a change. The Supreme Court is the only organ of government explicitly empowered to countermand the majoritarian process and lay down principles effectively altering such outcomes.

Moreover, there is no evidence that the *Gardiner* court believed the State of Kansas really had the kind of "compelling interest" that in recent years the

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138 *Carolene Products*, 304 U.S. at 153 n.4.

139 *Id.*

140 Regents of Univ. of California v. Bakke, 438 U.S. 265, 290 (1978).

141 *Gardiner*, 42 P.3d at 120.

Supreme Court has required under the "strict scrutiny" standard, which applies in cases of discrimination against a "suspect class."[142] Granted, in the citation to *Ulane* the Seventh Circuit underlined that transsexuals are not such a class in the Title VII context.[143] Even if they were, the Kansas court says *nothing* about any compelling interest in thwarting their needs in the case at bar. In *Loving v Virginia*, where the Supreme Court found that there was no state interest at all in prohibiting intermarriage between the black and white races except "White Supremacy"—certainly as far as you can get from a "compelling" interest—the Virginia antimiscegenation law was struck down.[144] The Kansas court absolutely refrained from any mention of a possible state interest as such—its decision was grounded in nothing more than the purpose of the legislators to affirm the dictionary definition of marriage, and never once used language about "state interest." This leaves room for the Supreme Court to treat the law in *Gardiner*, which the Kansas court felt constrained to follow, the way it treated the Virginia mixed-marriage law in *Loving*.[145] The *Gardiner* court could have suggested a more compelling reason the legislators might have had but it chose not to.[146]

Thus, it is not hard to imagine the Supreme Court in the future, at the very least, reversing a decision like *Gardiner* on the basis that the government has no "compelling state interest" to deprive transsexuals of the right to marry. It could simply rule that from now on a birth certificate in a new gender issued by Wisconsin, say, may no longer be deemed an exception to the Full Faith and Credit clause, but must be honored in every state. This would foreclose any court, like the Kansas Supreme Court, from invalidating a marriage like J'Noel's on the ground she wasn't female—and would thus be as effective as *Lawrence* has been in turning a social-policy page clearly and permanently.

Of course, granting people like J'Noel the right to marry would still hardly inaugurate a true right of gender self-determination. That would require different, no doubt, later decisions. One such step could come if a petitioner like Deborah Hartin—this time with a less than complete record of surgical reassignment—took a mandamus proceeding against a Board of Health all the way to the high court, and did better with it than Marbury did with his action against the Secretary of State so may years ago.[147] Not only might the Court grant the writ; it might take the opportunity to note that in court proceedings for a change of gender designation on a birth certificate, a state may not place an "undue burden" on the petitioner to

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[142] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under 'strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

[143] *Gardiner*, 42 P.3d at 136.

[144] Loving v. Virginia, 388 U.S. 1, 10 (1967).

[145] *Gardiner*, 42 P.3d at 120.

[146] *Id.* at 135. This is *literally* all the court says, in the briefest of statements: "The minutes of the Senate Committee . . . state that the amendment would 'affirm the traditional view of marriage.'"

[147] Marbury v Madison, 5 U.S. 137 (1803).

prove she is of the gender she attributes to herself. It could declare, for example, that anything more onerous that one year of living as and holding oneself out as a woman would fail that test. All that would be required, to use Judge Shafer's elegantly brief formulation, would be to simply "present as the other sex."[148] Also ruled distinctly unnecessary on this imaginary day in the future would be *any record of surgery at all*—just as the plaintiffs in *McGrath* needed no record of surgery to be accorded full respect by Judge Sifton of the Eastern District.

Once such an "undue burden" test was spelled out, another social-policy page would have been just as unassailably turned. Although it would be a radical step for the Court, it is conceivable given the passage of enough time. The aftermath of *Brown* certainly involved many such orders.[149] It would also reflect ideas that by that time could be more widely accepted, such as those in the Yogyakarta Principles, discussed below.[150] These include that people "of all . . . gender identities are entitled to the full enjoyment of all human rights" and to "legal capacity in all aspects of life;" that self-defined gender identity is the "deeply felt internal and individual experience of gender," not necessarily the sex assigned at birth; that gender can involve "freely chosen [] modifications of bodily appearance, dress, or mannerisms;" and finally, that no medical procedures should be required for its legal recognition.[151]

B. The Societal Context

For now, it cannot be denied that in the society at large, which the Court eventually tends to respond to, the portents of change are many. Massachusetts Representative Barney Frank says he is holding in reserve a bill on transgender discrimination,[152] though in the unlikely event that Congress were to pass such a bill any time soon—doubtful whether transsexuals are a constituency that will ever intimidate this Congress—it would probably not resolve all the problems outlined in this Note. Maureen Dowd wrote recently, quoting Hillary Clinton advisor Marc Penn, that "[u]nisex, a trend started by hip hair salons in the in the '70s, has blossomed into a 'third-sex category' that some say will be 'the next wave of the civil rights movement.'"[153] It is now commonplace for government and social-service agencies here and abroad, even for organizations sponsoring sporting events, to allow those filling out forms to self-identity as "male," "female," or

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148 *Hispanic Aids*, 195 Misc.2d at 367.

149 Brown v Board of Education, 347 U.S. 483 (1954).

150 The Yogyakarta Principals, http://www.yogyakartaprinciples.org (last visited Jan. 20, 2008).

151 *Id.* It is true that even at such a point, issues might remain. For example, those wishing to locate themselves at points on the "continuum" somewhere "between" male and female, as "bisexual" is "between" homosexual and heterosexual, might identify as "interesexed" or might use descriptors not yet conceived. Some courts might see a new bureaucratic "parade of the horribles," while others might find solutions.

152 David M. Herszenhorn, *Party's Liberal Base Proves Trying to Democrats Back in Power*, N.Y. TIMES, Oct. 12, 2007, at A23.

153 Maureen Dowd, *Cougars, Archers, Snipers*, N.Y. TIMES, Oct. 21, 2007, at 15.

"transgender," or to choose from the first two the gender "identified" with.[154] And civil rights activists around the country campaign for the rights of "GLBTQ" (gay, lesbian, bisexual, transgender and "questioning" or "queer") youth in state care to dress and be called by the names and pronouns of their choice, among others.[155]

Drawing ultimate distinctions between a "third sex" and a free continuum of self-determination of sexual identity, or elucidating the exact relationship of these to the established lobbies for gay and lesbian rights, is beyond the scope of this Note. However, mentioning such a possible new wave in the civil rights movement regarding sexual identity is relevant as I attempt to locate within recent landmark Supreme Court decisions formulations that provide the transgendered some promise of yet getting their "searching inquiry."

C. The Yogyakarta Principles

In addition, and unsurprisingly, groups outside the United States and around the world are currently active developing such possibilities, and at rather high levels. Such efforts are not necessarily to be ignored, even by the Supreme Court. Justice Kennedy did not do so in *Lawrence*.[156] One such group met under the auspices of the International Commission of Jurists and the International Service for Human Rights at Yogyakarta, Indonesia, in October of 2006. This group promulgated a document that was designed to occupy a place among honored conventions and treaties in international law, such as the International Labor Organization's "Convention Concerning Occupational Safety and Health of the Working Environment," adopted at that organization's 1981 convention; the 2000 "OECD Guidelines for Multinational Enterprises;" and the United Nations Human Rights Commission's 2003 "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."[157]

The 2006 document is entitled "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity."[158] Among the twenty-nine eminent signatories were Mary Robinson, the former President of Ireland and former United Nations High

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[154] *See, e.g.*, Application Procedures For Transgendered Individuals of the United States Golf Association, *available at* http://www.isga.org.championships/transgendered/index.html (last visited Oct. 16, 2008); Merseyside UK Police Authority, Transgender Conference Evaluation and Feedback Form, Nov. 21, 2006, *available at* http://www.merseysidepoliceauthority.gov.uk/assets/_files/documents/may_08/mpa__1211365957_Dysphoria_Results.pdf. (last visited Oct. 27, 2008). Finally, a New York social worker, in conversation with the author, described an intake form initially requiring that one of three boxes be checked; in keeping with contemporary confidentiality standards, she declined to have either herself or her agency identified. Interview with Anonymous Social Worker, in N.Y., N.Y. (Oct. 25, 2008).

[155] *See, e.g.*, Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy and Education*, 79 TEMPLE L. REV. 415 (2006).

[156] *See Lawrence*, 539 U.S. at 560.

[157] *See* DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 219-224 (2nd ed. 2006).

[158] The Yogyakarta Principals, *supra* note 153.

Commissioner for Human Rights; Philip Alston, UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions and an NYU Law School professor; Justice Edwin Cameron of the Supreme Court of Appeal, Bloemfontein, South Africa; Yakin Ertürk, UN Special Rapporteur on Violence against Women and Professor of Sociology at Middle East Technical University, Ankara, Turkey; and Martin Scheinin, UN Special Rapporteur on Human Rights and Counter-Terrorism and Director of the Institute for Human Rights, Abo Akademi University, Finland. [159]

Is such a development irrelevant to the United States Supreme Court's adumbration of constitutional law for this country? Not everyone would think so. As Justice Kennedy rejected *Bowers* once and for all, he noted in *Lawrence* that the "wider civilization," particularly in the form of the European Court of Human Rights, had already rejected that case's "reasoning and holding," and that "other nations ha[d] taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct."[160] He added that in this country there was no "governmental interest in circumscribing personal choice" any more "legitimate or urgent" than anywhere else; and, finally, that "*Stare decisis* is not an inexorable command."[161] In his dissent, Justice Scalia famously objected, incorporating words his dependable colleague Justice Thomas had used elsewhere, that the Court's discussion of such foreign views, especially as it ignored the many countries that have retained criminal prohibitions on sodomy, is meaningless dicta, in fact "dangerous dicta," since "this Court . . . should not impose foreign moods, fads, or fashions on Americans."[162] One wonders whether, if these two wise men had been among the Founders, Thomas Jefferson would have been allowed to include "a decent Respect to the Opinions of Mankind" in the one document this country has produced that may be even more important, historically, than our Constitution.[163]

Thus, *pace* Justices Scalia and Thomas, it may be worth the trouble to take note of the views on these matters that twenty-nine signatories agreed with so strongly they affixed their names to them.

The document declares that "[s]exual orientation and gender identity are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse," and that "[h]uman beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."[164] It ringingly defines "sexual orientation" and "gender identity" as follows:

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159 *Id.*

160 *Lawrence*, 539 U.S. at 560.

161 *Id.* at 560.

162 *Id.* at 598.

163 THE DECLARATION OF INDEPENDENCE (U.S. 1776).

164 The Yogyakarta Principals, *supra* note 153.

> Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.
>
> Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[165]

The Preamble goes on to explain that "[m]any States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves" and that "[t]he policing of sexuality remains a major force behind continuing gender-based violence and gender inequality."[166] Further, although "[t]he international system has seen great strides toward gender equality and protections against violence in society, community and in the family," at this point "the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent."[167] Thus, the document produced at Yogyakarta was designed "[t]o address these deficiencies" with a "consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity" and to "bring greater clarity and coherence to States' human rights obligations."[168]

The body of the document comprises the articulation of twenty-nine "principles," among them rights to "non-discrimination," "equality," "recognition before the law" and the right "to found a family," each accompanied by a list of "binding" requirements states are to address.[169] One example, the "right to recognition before the law" is described in these terms:

> Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. *No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or*

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165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 The Yogyakarta Principals, *supra* note 153.

parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.[170]

This particular principle is further particularized with six programs of action to be undertaken by all states.[171] Two of these are directives to all states to "[e]mbody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation . . . including by means of amendment and interpretation, and [to] ensure the effective realisation of these principles," and also to "[t]ake all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are *related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.*"[172]

We see here that some in the wider world have moved well beyond the desire of people like Deborah Hartin and J'Noel Gardiner to have their surgeries recognized. Such a document shows that the movement to establish the right of an individual to determine one's gender freely for oneself, and to have such a decision recognized by government, is a worldwide one, taken seriously by many public figures. It may take our Supreme Court a long time to recognize the principles espoused by the Yogyakarta signatories, but the idea is far from absurd, and the Court will be able to find excellent precedential support for such a step.

D. The Intersexed Perspective

Inevitably, other new groupings will also be part of the parsing process. For example, the intersexed, who up until now were routinely assigned a gender at birth—by others, of course—are usually subjected immediately to invasive surgery to forcefully conform their anatomies to their parents' and doctors' choices in the matter. "The child's doctors and parents must quickly choose a gender of assignment, and the child's genitals must be surgically altered so that he or she could develop as a 'clearly sexed individual' and avoid the stigma of sexual ambiguity."[173] This is done because these children's genitals "do not conform to dominant conceptions of what it means to be male (having a penis that allows standing urination and vaginal penetration) or female (having a "normal"-sized clitoris and a vagina that will permit penetration)."[174] Such children's genitals are viewed as "pathological," not because they are actually diseased, but because they

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[170] *Id.* (emphasis added).

[171] *Id.*

[172] *Id.* (emphasis added).

[173] Emily A. Bishop, *A Child's Expertise: Establishing Statutory Protection for Intersexed Children Who Reject Their Gender of Assignment*, 82 N.Y.U. L. REV. 531, 537 (2007).

[174] *Id.* at 540.

do not fit within a socially constructed gender framework.[175] Surgery has thus been seen as "an easy fix for the cultural 'problem' of intersex," allowing doctors and parents to evade the more difficult task of persuading society "to accept the genitals."[176]

There are reports that the parents of many intersexed children "go to extreme measures—including physical punishment—to keep their children in the gender roles to which they have been assigned," and many have also reported "suffering severe psychological trauma as a result of their parents' and doctors' actions, with some . . . considering suicide."[177]

In addition to the negative physical repercussions that can result from sex assignment surgery, the secrecy inherent in the treatment paradigm can leave psychological scars; apparently what causes the most harm is the basic attitude that "intersexuality is so shameful that it must be erased before the child can have any say in what will be done to his or her body."[178] In addition, "many intersexed persons report feelings of shame and humiliation as a result of repeated invasive physical examinations and the vaginal dilation procedure."[179]

Today such arbitrary decisions are being recognized by medical science as sometimes simply wrong, in view of the same sorts of inner, mental and other personal criteria that form the basis of rethinking gender among transsexuals.[180]

Emily Bishop has written that "[e]vidence of healthy psychosocial development in intersexed children who have not had surgery . . . calls into question the necessity and wisdom of the procedures"[181] and insists that "the harm caused by the parental decision to interfere with a child's gender expression removes such interference from the realm of constitutionally protected parental decision making."[182] She believes that "statutory protection of an intersexed child's expression of his or her gender identity could help"[183] and proposes a new statute which could "equat[e] parental interference" of natural gender self-selection "with actionable neglect"[184] and "[allow] intersexed children who reject their gender of assignment to adopt a different gender role, even in the face of parental opposition."[185] Bishop strengthens her case by pointing out that certain medical situations—abortion, for example—have already been carved out by the Supreme Court as exceptions to parental control.[186]

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175 *Id.*
176 *Id.*
177 *Id.* at 549.
178 Bishop, *supra* note 176, at 542.
179 *Id.*
180 *Id.*
181 *Id.* at 541.
182 *Id.* at 531.
183 Bishop, *supra* note 176, at 550.
184 *Id.* at 531.
185 *Id.* at 533.
186 *Id.*

E. Where The Path Will Lead

To conclude, whether in the next few years or later on in this century, a Justice of the Court may write in the same vein as Justice Kennedy did in *Lawrence,* when he said that *Bowers* could not "withstand careful analysis"[187] and resurrected Justice Stevens's dissent in that case, admitting Stevens had been right when he wrote:

> [That] the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting [it]; neither history nor tradition could save a law prohibiting miscegenation . . . . [I]ndividual decisions . . . concerning the intimacies of . . . physical relationship[s] . . . are a form of "liberty" protected by the Due Process Clause [and] this protection extends to . . . unmarried persons . . . .[188]

Justice Kennedy concluded that "Justice Stevens' analysis . . . should have been controlling in *Bowers* and should control here."[189] *Bowers* had defined itself as being about the constitutionality of a sexual—a physical—act, and Kennedy was in the process of correcting that by couching the question as concerning decisions about intimate relationships, not solely physical acts. Just as "liberty protects the person from unwarranted government intrusions into a dwelling," there are "other spheres of our lives and existence . . . where the State should not be a dominant presence," in particular "an autonomy of self that includes freedom of thought, belief, expression *and certain intimate conduct.*"[190] He averred that the case before the Court involved liberty "both in its spatial and *more transcendent dimensions.*"[191] Justice Kennedy recalled the right to privacy proclaimed by *Griswold* to exist in the marital bedroom; how that protected space, in which "certain decisions regarding sexual conduct" are made, had been "extend[ed] beyond the marital relationship" by *Eisenstadt,*[192] and how the combination of the two had led to *Roe v. Wade.*[193] He then summed up his reasoning by observing that to say that *Bowers* was simply about "the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[194]

Thus a statute that "purport[s] to do no more than prohibit a particular sexual act" has "more far-reaching consequences, touching upon *the most private human*

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[187] *Lawrence*, 539 U.S. at 577.
[188] *Id.* at 599.
[189] *Id.* at 578.
[190] *Id.* at 562 (emphasis added).
[191] *Id.* (emphasis added).
[192] *Lawrence*, 539 U.S. at 565.
[193] *Id.* (quoting Roe v. Wade, 410 U.S. 113 (1973)).
[194] *Id.* at 567.

conduct, sexual behavior:"[195] it seeks to control a kind of personal relationship that is "*within the liberty of persons to choose without being punished as criminals.*"[196] Most tellingly, he affirmed that when "sexuality finds overt expression in intimate conduct with another person" it is often "but one element in a personal bond that is more enduring," and that the liberty to make this choice is protected by the Constitution.[197] "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter . . . . As the Constitution endures, persons in every generation can invoke its principles *in their own search for greater freedom.*"[198]

And *Lawrence* in 2003 was of course only one in a considerable line of decisions stretching in both directions. Its language was not so far from that used by Justice O'Connor on the same theme at the beginning of *Casey*,[199] eleven years earlier, in a decision usually thought of in rather mechanical terms of parental consent and the measuring of trimesters. In her introduction, however, O'Connor characterized the protections that the Court had been extending to personal decisions, in the realms of "marriage, procreation, contraception, family relationships, child rearing, and education" as "intimate and personal choices . . . central to personal dignity and autonomy."[200] Then she added the words that, more than any others, hold out particular hope to the transgendered. If one day a future majority decides that it is time to consider the issue of the right to decide one's gender identity on the basis of one's own private belief as to the significance of those parts of one's body that, after all, have in ordinary language been known as "private parts," that future majority will find no better precedential language to start with than the words of O'Connor, which may one day be thought of as her crowning legacy: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define *the attributes of personhood were they formed under compulsion of the State.*"[201]

Taking *Lawrence* and *Casey* as representative of the line of cases leading to the final resolution of the problems I have outlined, all that remains is to see exactly just how to make the leap necessary to expand concepts about "intimate relations"—which already include "sexual conduct,"[202] the "mystery of human life,"[203] and "attributes of personhood"[204]—to encompass an individual's un-

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195 *Id.* at 567 (emphasis added).
196 *Id.* (emphasis added).
197 *Lawrence*, 539 U.S. at 567.
198 *Id.* at 579 (emphasis added).
199 Casey v. Planned Parenthood, 505 U.S. 833 (1992).
200 *Id.* at 851.
201 *Id.* (emphasis added).
202 *Lawrence*, 539 U.S. at 558.
203 *Casey*, 505 U.S. 833 at 852.
204 *Id.*

coerced decision about the character of one's gender. Expanding such concepts is only a matter of time.