Introduction

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In the past thirty years, the transgender movement in the United States has gained surprising visibility and strength. In the legislative arena, transgender advocates have successfully fought for inclusion in nondiscrimination and hate crime laws in several states and dozens of municipalities. More than two hundred employers, including some Fortune 500 companies, and more than sixty colleges and universities now include gender identity in their nondiscrimination policies. In 2004, overturning decades of prior case law, a federal court of appeals ruled for the first time that transgender people who are discriminated against in the workplace are protected under Title VII of the Federal Civil Rights Act of 1964, which prohibits discrimination based on sex. Trans activists have formed hundreds of social service and advocacy organizations, such as the Transgender Law Center in California, the Sylvia Rivera Law Project in New York, and the International Foundation for Gender Education. In several cities, trans activists have created community gender identity centers and clinics to counterbalance the power of doctors, therapists, and psychiatrists. Every major LGB national organization has changed its mission statement to include transgender people. In higher education, trans people are no longer simply an "object" of study in abnormal psychology textbooks. Rather, transgender issues have become a topic of serious and respectful inquiry in virtually every scholarly field, from medicine to political theory, and scholarly works by trans authors are now widely available.

At the same time, violence and discrimination against transgender people persists in daily life. In 2003 Gwen Araujo, a transgender teenager from a small town in Northern California, was murdered by a group of young men who beat her to death with a shovel after discovering that she had male genitalia. The attorneys representing the young men argued that their clients' actions were justified by Gwen's "deception" in not disclosing her transgender identity to them. Far from an isolated event, Gwen's brutal murder was one of thousands of similarly lethal hate crimes against transgender people that have been documented by the community Web site, Remembering Our Dead. While this epidemic of actual violence goes largely unnoticed by the mass media, it is an ever-present reality for transgender people—and especially for transgender women, who are most often the victims of such crimes. This vulnerability is amplified in prisons and jails, where transgender prisoners typically are housed by their birth sex and where transgender women are particularly vulnerable to rape by both fellow prisoners and guards.

The legal status of trans people in other arenas is equally precarious. In the past few years, appellate courts in Texas, Kansas, Ohio, and Florida have ruled that transsexual people are prohibited from marrying; in three of these cases, the courts held that marriages of many years' duration were null and void, simply because one of the spouses in each case was transsexual. In 2002 a federal court in Louisiana ruled that it was not discriminatory for Winn-Dixie to fire Peter Oiler for occasionally cross-dressing outside work. In prior decisions, federal courts routinely have excluded transsexual people from any protection under federal nondiscrimination laws, thereby leaving employers free to fire transsexual workers at will. In many states, obtaining a driver's license or birth certificate that reflects one's new gender is extremely difficult; in some, it is impossible.

In short, while the gains won by the U.S. transgender movement are impressive, most transgender people still are deprived of any secure legal status. In the eyes of the law in most states, they are nonpersons, with no right to marry, work, use a public bathroom, or even walk down the street in safety.

The Movement

What does transgender mean? Since about 1995, the meaning of *transgender* has begun to settle, and the term is now generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth. At the same time, related terms used to describe particular identities within that broader category have continued to evolve and multiply. As new generations of body modifiers and new social formations of gender resisters emerge, multiple usages coexist, sometimes

easily, sometimes with much generational or philosophical tension: *transvestite, cross-dresser, trannie, trans, genderfuck, genderqueer, FTM, MtM, trans men, boyz, bois.* Transgender is an expansive and complicated social category.

The term *transgender* offers political possibilities as well as risks. Any claim to describe or define a people or a set of practices poses the danger of misrepresenting them. The danger is not trivial; distorted representations lead readily to misguided advocacy. The term can, at times, mask the differences among gender nonconforming people and risks implying a common identity that outweighs differences along racial and class lines. Nonetheless, there is also considerable value in a term that can draw together people who believe that individuals should have a right to determine and express their gender without fear, stigmatization, marginalization, or punishment.

One particular area of tension is the inclusion of intersex people in the definition of transgender. Intersex activists argue, rightly we think, that being intersex is not the same as being transgender. Being intersex denotes, according to Alice Dreger, "a variety of congenital conditions in which a person has neither the standard male nor the standard female anatomy."[1] The attempt simply to assimilate intersex identities and political interests within a transgender rubric too often has meant ignoring the urgency of ending the surgical mutilation of intersex children. In this collection, we hope to make some connections visible without erasing the specific concerns of the intersex movement. So while this collection is titled *Transgender Rights,* we have included an important court decision about an intersex child and a critical introduction to the case. We do so on the grounds that, while transgender and intersex politics refer to different constituencies and have significant differences in their goals, the materials we are publishing here nonetheless grapple with questions of autonomy and gender self-determination. In doing so, we hope to acknowledge the specificity of intersex rights without abandoning an awareness of the interconnections between the interests of transgender and intersex peoples.

Ultimately, the effectiveness with which the transgender movement addresses the diversity of its constituents will depend less on finding a satisfactory vocabulary and more on how actual strategies for social change are implemented. The same is true for creating effective connections with people who do *not* see themselves as transgender. Put simply, the movement's effectiveness will depend heavily on who benefits from its successes.

Ultimately, *transgender* refers to a collective political identity. Whether we have psychological features in common or share a particular twist in our genetic codes is less important than the more pressing search for justice and equality. *This book is not concerned either with supporting or with refuting any*

claims about why we exist. It is a matter of fact that trans people conceive of themselves in many radically different ways: as transsexual women and men who have always known that they were female or male; as genderqueers living in an existential rebellion against the biopolitics of the dominant society; as butches who move complexly among lesbian and transgender identities and communities; as quietly androgynous femme boyz. Despite their profound differences, these groups all share a common political investment in a right to gender self-determination.

In practice, *transgender* is a useful term in many contexts, yet insufficiently inclusive or too imprecise in others. Many activists organize directly under the transgender rubric: the National Transgender Advocacy Coalition, the National Center for Transgender Equality, the Transgender Law and Policy Institute, and the Massachusetts Transgender Political Coalition. Other activists have embraced what appears to be a more universal term, *gender:* the International Foundation for Gender Education, Gender Education and Advocacy, the Gender Rights Advocacy Association of New Jersey, and GenderPAC. Still other groups such as FTM International and American Boyz use more gender-specific labels to describe their constituencies. Nonetheless, when these groups seek justice and equality for people whose gender identity or expression contravenes social norms, they become facets of the same movement.

The Work

This collection evolved out of the contributors' ongoing intellectual and activist projects. Responding to the realities of transgender political work, these essays implicitly reflect many of the goals and principles enunciated by the International Bill of Gender Rights (IBGR). Produced in 1993 by the International Conference on Transgender Law and Employment Policy, the IBGR offers an important public articulation of the aspirations of transgender people. Written in the discourse of civil and human rights, it begins by declaring that "all human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role." The IBGR goes on to call for the following freedoms and rights: freedom of gender expression; equal employment opportunities; freedom from involuntary psychiatric diagnosis and treatment; freedom to form sexual, familial, and marital relationships; freedom to control and change one's own body; access to competent medical and professional care; access to gendered space and activities; the right to have and adopt children; the right to nurture and have custody of children. We provide the full text of the IBGR in this book as an appendix.

To many nontransgender people, such aspirations might seem surprisingly ordinary. However, this collection implicitly argues that the radical dimensions of the transgender movement arise neither from simply claiming that trans people are "normal," which we certainly are, nor from claiming that we are "exceptional," which we also are, but from arguing that being transgender is eminently compatible with all else that comes with being human, the ordinary as well as the extraordinary.

Law

Until recently, nondiscrimination laws did not define sex or gender. Consequently, it was left to the courts to decide whether discrimination against trans people should be recognized as a type of sex discrimination. The judiciary's record on this issue has been poor. The exemplary case in this area is *Ulane v. Eastern Airlines,* a 1984 case that is still binding precedent. In *Ulane,* a federal appellate court found that the plaintiff, a transsexual woman, was not discriminated against on the basis of sex. Rather, the court explained, "it is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."[2] The court's evasive logic has seemed weak even to people equipped with only a dictionary's definition of transsexuality; after all, it seems hardly an affront to reason to think that, if it is wrong to fire someone for being a woman, it is equally wrong to fire someone for becoming a woman. Nonetheless, this decision, and scores of others exactly like it, is symptomatic of the broader patterns of exclusion and misrepresentation faced by transgender people in the law.

Trans activists have put their energies into changing both laws and cultural perceptions. Perhaps the most visible strategy used to counter judicial hostility has been to ask legislatures to define sex, gender, or even sexual orientation within nondiscrimination laws so as to explicitly include trans people, or to add a new category, usually gender identity. At the same time, trans advocates have drawn on the tools provided by other civil rights movements to change the judiciary's understanding of who counts as a person deserving of protection. In "Gender Pluralisms under the Transgender Umbrella," Paisley Currah examines how, in both legislative work and litigation, trans advocates have worked to counter the dehumanizing legal decisions that construct the gender of trans people as outside the realm of legal protection. Trans advocates have made strategic choices, he argues, to frame rights for types of persons, rather than rights for particular practices (such as speech), in order to

place gender nonconforming people firmly within the compelling legal and cultural logics of the civil rights tradition.

Cases involving marriage and other gendered legal arrangements may demand other modes of advocacy. In "The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families," Taylor Flynn observes that "we live in a highly gendered society where sex distinctions have significant legal consequences, particularly within the realm of the family—these distinctions affect issues including whom you can marry, whether you can inherit your spouse's estate, or whether you provide an 'appropriate' role model for your children." Taylor explains that in cases involving marriage and child custody, trans advocates largely have stayed within the bounds of the existing gender paradigm, arguing that trans men *are* men and that trans women *are* women, rather than attacking the state's ability to define one's legal gender.

In "The Roads Less Traveled: The Problem with Binary Sex Categories," Julie A. Greenberg argues that the law's role in gender assignment is multifaceted and contradictory. Reviewing both legal constructions of sex and current medical data, Greenberg argues that the legal assumption that sex is fixed and binary is fundamentally at odds with current medical knowledge and practice. Greenberg's work lays the groundwork for reversing the commonly held assumption that the body provides a much simpler, more clear-cut, and secure foundation for legal sex classification than gender self-identification.

Challenging medical models in which differences are pathologized has been central to transgender politics. In doing so, activists have followed a critical path opened up by the disability rights movement. Jennifer Levi and Ben Klein provide a detailed exploration of that intersection in "Pursuing Protection for Transgender People through Disability Laws." For decades, disability rights activists have suggested that the problem for people with disabilities lies not in their bodies but in the social architectures—legal, physical, normative—that turn a physical or cognitive difference into a disability. Similarly, transgender activists have targeted the physical, legal, and social structures—from sex-segregated bathrooms to legal sex-classification systems—that prevent trans people from functioning as equal economic, social, and civic actors. At the same time, some trans people and trans allies have felt profoundly uncomfortable with the use of disability rights laws for trans advocacy. This is a consequence, ironically, of having fallen prey to the stigmatizing discourse surrounding disability. Levi and Klein ask that trans persons reconsider their reluctance; while the fear of reinforcing our own pathologization is not to be dismissed lightly, such a fear stems from a fundamental misunderstanding of contemporary disability rights advocacy.

Workplaces can be precarious for trans people. Kylar Broadus, who was forced to leave his own job after transitioning in the workplace, explores the evolution of employment discrimination case law for transgender people from the vantage of both an attorney and an unsuccessful litigant in his own case. In addition to describing the emergence of a new judicial receptiveness to sex discrimination claims by transgender people, Broadus addresses the personal significance not simply of winning or losing but of finding one's humanity either mirrored or occluded by the law. For transgender people, the law often has been a source of terrible disempowerment and loss; conversely, Broadus argues, the emergence of a new recognition and respect for transgender people in the courts can be a source of great political power.

While trans advocates argue for the centrality of gender self-determination, intersex activists are engaged in a related struggle to give intersex people the right to self-determination and to resist surgical mutilations that attempt to produce, as the intersex activist Cheryl Chase notes, "normatively sexed bodies and gendered subjects through constitutive acts of violence."[3] At present in the United States, there is no substantive right to bodily autonomy and integrity for intersex infants and children. In a groundbreaking 1999 decision, however, Colombia's highest court ruled that the interests of intersex infants and children should be weighed. We publish here, for the first time, selections in English of this decision, translated by Nohemy Solórzano-Thompson. Morgan Holmes frames these selections with her essay "Deciding Fate or Protecting a Developing Autonomy? Intersex Children and the Colombian Constitutional Court" and outlines the significance of the decision's emphasis on autonomy and consent. Holmes also reckons with the limitations of the precedent, observing that "the ruling does not actually recognize intersexuality as an integral feature of one's being." What remains to be affirmed is a substantive right to bodily autonomy and integrity.

History

Transgender civil rights struggles arise within a complex historical context in which the transgender movement is visible as both an important social movement in itself and part of a broader fabric of struggles. In "Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion," Shannon Price Minter reminds us of the historical interdependence of transgender and lesbian, bisexual, and gay communities. He identifies the key question raised by our interlocking histories to be "not whether transgender people can justify their claim to gay rights, but rather how did a movement launched by bull daggers, drag queens, and transsexuals in 1969 end up viewing transgender people as outsiders less than thirty years later?"

In "Transgender Communities of the United States in the Late Twentieth Century," Dallas Denny, the founder of several major transgender organizations, traces an often-overlooked genealogy of formal and informal community building by gender nonconforming people. In an effort to track the emergence of transgender self-identification and community, Denny offers a portrait of tumultuous interactions, from uneasy compliance to the outright refusal by trans people of pathologizing and criminalizing discourses. In Denny's essay, the development of a medical understanding of transsexuality is only one branch, and by no means the dominant one, of transsexual and transgender history. Her work makes visible a fuller palette of networks, writings, groups, and gatherings.

Transgender organizations develop in the midst of larger social changes: Willy Wilkinson offers an account of community organizing around the AIDS crisis. The vulnerability and marginalization of trans people in the public health arena were brought into stark relief by the epidemic's disproportionate impact on trans women. It became an epidemic that demanded a community response. In "Public Health Gains of the Transgender Community in San Francisco: Grassroots Organizing and Community-Based Research," Wilkinson offers a case study of how trans people successfully engaged with non-trans researchers and policymakers to document the specific health-care needs of trans people and create changes in service provision.

Politics

Transgender discrimination is not simply a consequence of private distastes; individual acts, from instances of employment discrimination to hate crimes, are made possible and channeled by public ideologies and a host of social and economic structures. In turn, the politics of the movement must address broader structural realities. Dean Spade, in "Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy," expands the work of feminist theorists who have explored the impact of welfare regulation on women and shows how such regulations enforce gender conformity and magnify the economic marginalization of trans people. Spade notes that mainstream LGB organizations have tended to focus too narrowly on the needs of middle-class constituents. An effective trans movement, he argues, must be grounded on antipoverty work, the widening of economic opportunity and redistribution, and the decriminalization of poverty.

Similarly, in "Transgendering the Politics of Recognition," Richard M. Juang argues that discrimination against people of color and discrimination against transgender people are, in fact, "two faces of one ideological coin." Through an analysis of the rhetoric associated with two historically pivotal

deaths, Tyra Hunter and Vincent Chin, Juang argues for the importance of a politics of recognition that addresses both racial and gendered forms of discrimination.

While this collection cannot fully represent the political concerns of transgender people across the globe, it is important to note that the United States is neither alone nor at the "forefront" of transgender activism. Indeed, a rich critical dialogue has emerged in national and transnational settings in which the United States is only one locale among many. Many U.S. activists are aware of the recent decision of the European Court of Human Rights in *Goodwin & I v. United Kingdom,* which held that the UK's refusal to permit transsexual people to obtain new birth certificates or to marry in their new gender violated the European Convention on Human Rights. As a result, the UK passed in 2005 the Gender Recognition Act, which allows transsexual people to apply for legal recognition of their new gender, including the issuance of new birth certificates.[4] The development of transgender rights in countries outside the United States and Western Europe may be much less familiar to activists here. In an effort to bridge that gap, in "(Trans)Sexual Citizenship in Contemporary Argentina" Mauro Cabral and Paula Viturro analyze the ideological conditions within which transsexual and transgender people have emerged into legal visibility in Argentina. To an extent, the compromised status of "(trans)sexual citizenship" that Cabral and Viturro identify in Argentina is similar to the constraints faced by trans people in the United States. However, Cabral and Viturro also explore the specific and in many respects quite unfamiliar legal and ideological demands placed on transsexual and transgender persons within the context of Argentinian law.

Drawing the collection to a close, Judith Butler and Ruthann Robson explore the meaning and risks of a politics of normalcy. As Butler observes in "Undiagnosing Gender," the diagnosis of gender identity disorder (GID) remains one of the primary interfaces between service providers and trans persons, particularly transgender children and youth. Butler asks, what is the price demanded by the diagnosis in terms of the autonomy it constrains and the behavioral and psychological norms it imposes, even as it appears strategically useful to gain access to resources and recognition? The design and structure of GID diagnosis creates, she argues, a paradoxical situation in which "it is possible to say, necessary to say, that the diagnosis leads the way to the alleviation of suffering, and it is possible, necessary, to say that the diagnosis intensifies the very suffering that requires alleviation."

In "Reinscribing Normality? The Law and Politics of Transgender Marriage," Robson highlights the assimilationist tendencies of transgender marriage litigation. The discourse concerning transgender marriage, Robson

argues, "too often serves to recapitulate and reinscribe the most traditional visions of marriage and heterosexuality." Marriage is not simply a private emotional union but a state-sponsored mechanism for the distribution or denial of economic resources. In short, Robson asks the thought-provoking question, how "normal" do we want to be and who bears the costs of that normalcy?

Many of the scholars—independent or institutionally located—who contributed to this collection are also, often primarily, advocates for trans people. By foregrounding the political concerns and efforts of trans people, we hope this collection helps shift the center of gravity for intellectual work about transgender people. There is a substantial body of literature in the law, social sciences, and humanities in which trans people appear; however, in much of this work, we tend to be used as exciting examples of the subversion or reification of gender, the undiscovered edges of legal discourse, or some hot new cultural underground. That we are persons with a complex or unacknowledged relationship to state and civil society is often forgotten. This collection strives to be an act of intellectual production that does *not* situate trans people as a means to an end or an intellectual curiosity but considers the well-being of trans people as an end in itself.

These essays bring trans people's activism into view, articulate the specific civil rights challenges we face, and offer a range of concrete perspectives and strategies. While the essays in this collection do not address every type of discrimination faced by transgender people, we hope they provide a real sense of the many types of activism propelling the transgender rights movement. This collection also reflects the current state of the transgender movement and of civil rights activism generally. The essays here generally express a liberalism and a humanism that prize individualism, freedom, and autonomy. Almost certainly, this is not a sufficient political agenda. For the moment, it is a necessary one.

Foundations and Futures

If we return to foundational questions, perhaps the most important one to ask is, simply, "why rights?" For some, the rolling back of the gains of the traditional civil rights movement and the critique of identity-based movements as insufficiently inclusive and incapable of addressing nonidentitarian concerns such as class and poverty lead to a belief that activists and theorists must find a better focus of political practice. Nonetheless, rights discourse remains the commonsense of politics in the United States. The idea of rights provides a familiar, and thus quietly powerful, lexicon through which to challenge injustice. This is particularly the case when violence and exclusion are clearly targeted at particular *kinds* of persons.

What needs to change? Protections on paper are, of course, inadequate. The legal recognition of trans people is meaningful only when it is part of a larger cultural transformation. For example, although Minnesota has included trans people in its nondiscrimination law since 1993, that state's highest court ruled in 2001 that Julie Goins had not been discriminated against when her employer told her she could not use the women's bathroom. The judges in that decision understood quite clearly that the law prohibited discrimination on the basis of "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Nonetheless, it seemed nonsensical to them that Goins should have access to women-only space. The success of rights-based arguments depends on creating a culture in which trans people are not just a curiosity or a perversion of nature. At the same time, struggles organized around civil rights are also a form of cultural work. For example, including transgender people in hate crime laws does not create change by enhancing penalties but by educating legislators, the media, the police, and the courts about the violence faced by trans people and by asking the public at large to side with the victims rather than the perpetrators of hate.

Why *transgender* rights? Feminism already has established the ethical and legal basis for gender equality. The idea of gender equality includes transgender people, and so it may seem redundant to argue for the specific inclusion of transgender persons in nondiscrimination legislation. Logically, transgender people already should be covered by existing gender nondiscrimination laws; discrimination on the basis of gender nonconformity is, by its very nature, gender discrimination. In practice, however, courts, civil society, and the mass media typically have failed to apply the principle of gender equality to transgender people. One reason for this broad failure of logic and imagination is that trans people have been seen as examples of sexual "deviants," in the same way that homosexuals have been cast as gender inverts. As a consequence, the transgender movement, as Shannon Price Minter notes in this collection, has continued to be affiliated more strongly with the LGB movement than with the feminist movements that began in the 1960s and 1970s, despite significant conflicts. In the legal arena, the transgender rights movement has striven to expand the inclusivity of the term *gender* beyond its current cultural and legal boundaries; similarly, our political goals also have the potential to close the significant gaps created by the institutional separation between LGB and women's rights advocacy.

The transgender movement is a highly accelerated and fragile reality. In thirty years, trans people have moved from meeting in secret to lobbying Congress, from being arrested for cross-dressing to mobilizing public protests against transphobic violence. We are optimistic that the goals articulated in this book will be achieved. But in reaching our goals, transgender people will not disappear as a constituency or identity. Instead, transgender political work will take on different forms and become reoriented toward other projects and goals. Achieving equality will not be an end for trans people, but the start of a dramatic widening of the cultural and social imagination. What such a new world will look like, and what the transgender generations who live in it will make of their world, remains as yet unwritten.

Notes

1. Dreger complicates this definition: "In fact, because of ever-more discoveries of sexual variation and ever-more developments in sexual politics, medical and lay definitions of 'male' and 'female' have changed repeatedly and continue to change" (Alice Domurat Dreger, "A History of Intersex: From the Age of Gonads to the Age of Consent," in *Intersex in the Age of Ethics,* ed. Alice Domurat Dreger [Hagerstown, MD: University Publishing Group, 1999], 5–6).

2. *Ulane v. Eastern Airlines,* 742 F.2d 1081 (7th Cir. 1984), *cert. denied,* 471 U.S. 1017 (1985).

3. Cheryl Chase, "Hermaphrodites with Attitude," *GLQ* 4, no. 2 (1998): 189–211.

4. Stephen Whittle, "*Goodwin & I v. United Kingdom:* What Does It Mean?" http://www.pfc.org.uk/legal/gimeans.htm. See also the Gender Recognition Act information page, http://www.gra-info.org.uk/.

15. Reinscribing Normality? The Law and Politics of Transgender Marriage

Ruthann Robson

Almost thirty years later, I still recall an episode of a television show I saw while I was in law school. I was sitting around with some of my classmates watching a small black-and-white TV, probably drinking and smoking, definitely stalling preparation for another boring class that seemed to have no connection with reality. So, perhaps not surprisingly, the show *Real People* seemed to be a student favorite, this precursor to "reality TV" and a spawn of *Candid Camera.* The show's concept, such as it was, seemed to be that truth is stranger than fiction. It not only provided diversion from unpleasant tasks such as studying fee simple and proximate cause, it invited the viewing audience to laugh at the show's subjects and meanwhile feel reinforced in our own normalcy.

The segment I remember centered on a married couple with children. The twist was that they were transgendered. The man-born one was transitioning to a woman; the woman-born one was transitioning to a man. Importantly, someone said (someone on TV? someone in the room? both?) the couple could still be husband and wife and the children would still have a mother and a father. The audience could laugh—isn't that strange?—but normalcy prevailed. And not merely the normalcy of the viewers, the normalcy of the world. If these two people wanted to "switch," well then, that would be fine. Nothing fundamental would be altered. We could get back to determining the ownership of private property and the liability of tortfeasors.

Recently, long past law school, I experienced déjà vu while reading *Trans-Sister Radio,* by Chris Bohjalian. The novel's plot revolves around the

character Dana, transitioning from male to female. For most of the book, Dana is involved with a divorced woman, Allison, whom Dana first meets when he is her male professor. After an intense affair, Allison and the now-female Dana break up what is often described as their lesbian relationship. Dana uneasily dates a few women, but when she falls in love—and lust—it is with Allison's ex-husband. The "switch" from Allison as Dana's partner to her ex-husband as Dana's partner in the last pages of the novel reestablishes heterosexual normalcy.[1] Again, we are reassured that despite a small substitution, nothing fundamental has been altered.

This lack of fundamental alteration is what worries me about the legal discourse surrounding transgendered marriage. Like other movements, including other queer movements, transgendered legal reform has the potential to be merely accommodating, what I have called in other contexts domesticating. The legal discourse surrounding transgendered marriage too often serves to recapitulate and reinscribe the most traditional visions of marriage and heterosexuality. Like the cartoon image of a man and a woman used to represent humanity to alien beings who might discover that NASA launched Pioneer 10 spacecraft, what Michael Warner has termed "heteronormativity" is incessantly being equated with humanness itself.[2]

Perhaps the best known example of such heterosexual insistence occurs in *MT v. JT,* decided by a New Jersey court in 1976, in which the court upheld the marriage between M. T., born a male who transitioned to a woman, and J. T, born a male who remained so.[3] The court made explicit that in determining the validity of the marriage, it is "the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the emotional orientation to engage in sexual intercourse as either a male or a female."[4] On this view, it is heterosexual intercourse, rather than birth certificates, chromosomes, or expert testimony about gender dysphoria, that is the talisman for sex/gender identity.

Traditional heterosexual intercourse is also the shibboleth for marriage itself. While particular distinctions might be made, and the importance of procreation as an outcome of sexual intercourse is often stressed, various doctrines surrounding the marital relation establish that heterosexual intercourse is the underpinning of marriage. For example, generally a marriage can be annulled by one party if the other party does not have the capacity to engage in heterosexual intercourse.[5] Likewise, in states that require grounds for divorce, one party can divorce another on the grounds of "constructive abandonment" for failure to engage in traditional heterosexual intercourse, despite repeated requests to do so.[6] (Interestingly, if the request is for nontraditional heterosexual intercourse, then the refusal will be justified and will not constitute abandonment.)[7]

In one sense, *MT v. JT* can be theorized as upholding a functionalist rather than formalist perspective of marriage and gender identity. The formalist approach relies upon formal relationships dictated by law, while the functionalist approach emphasizes the functions or attributes or "realities" that are deemed to be operative. While this may be described as the difference between law and fact, it is more complex than that, because the argument is really that the law should take into account the "real" facts as opposed to mere formalities. For example, the legal definition of "family" is imbued with a functionalist hue in cases such as *Braschi,* in which New York's highest court interpreted a New York City rent-control regulation disallowing eviction of "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family."[8] In considering whether Braschi, the surviving partner in a gay relationship, fit into the statutory exemption, the court approvingly referred to factors such as the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which they conducted their everyday lives and presented themselves, and the reliance they placed upon each other for "family services." The court relied upon underlying facts such as their cohabitation for ten years, their regular visits to each other's relatives, and their joint status as signatories on three safe deposit boxes, bank accounts, and credit cards. Similarly, in the parenting context, the formalist viewpoint rejects any visitation or custody claim of the member of a lesbian couple who has no legal relationship to the child (whether as birth mother or by adoption), since the woman is not a legal parent.[9] The functionalist perspective, on the other hand, is not content with the formal legal definition of "parent" and develops criteria to determine whether a person should be recognized by the law as a parent. These criteria generally include the fostering of the parent-child relationship by the legal parent, the nonlegal parent and child living in the same household, the nonlegal parent's assumption of the obligations of parenthood "by taking responsibility for the child's care, education, and development, including but not limited to financial contribution, and did not expect financial compensation," and the existence of the relationship for a sufficient amount of time to have produced bonding.[10]

A critique of the functionalist approach is that while it may seem more "liberal" than the formalist approach, it actually enshrines the most conservative versions of the categories it determines. It prescribes and enforces its concept of normalcy. For example, if Braschi had been a partner in an "open" relationship that was not sexually exclusive, this fact would have been used to argue that he was not a family member entitled to stay in his home, regardless

of any understandings between Braschi and his lover. Likewise, if a lesbian partner agrees to coparent but maintains a separate residence, she will not be deemed a functional parent, again regardless of any understandings between the parents or the quality of relationship with the child.

In the transgender marriage context, the functionalist test employed by the court in *MT v. JT* also requires an application of the most traditional aspects of the functions at issue—here a "wife" or "husband" is judged by the function of heterosexual intercourse. Again, the understandings or sexual satisfactions of the parties are irrelevant.

The law may seem to be considering "reality," but it is imposing a singular and dominant reality. However, in another sense, the functionalist strategy is only necessary because the court is troubled by the formal legal status that would otherwise prevail. In the case of *MT v. JT,* the trial court would never have delved beyond the formal marital status (evidenced by a proper marriage certificate) had not JT argued that the marriage was void, which would release him from his financial obligations of support.

More recently, in *Littleton v. Prange,* the Texas Court of Appeals was also troubled by the formal marital status of Christie Littleton and her deceased husband, Jonathan Littleton.[11] In her medical malpractice suit against the physician who had treated her husband, it became known that Christie had been born male and had undergone sex reassignment surgery before entering into the otherwise valid marriage, again evinced by a proper marriage certificate. Unlike the court in *JT,* however, the Texas courts did not uphold the marriage. Instead, the appellate court resorted to another formalistic document—the birth certificate—to undermine the validity of the formal marriage certificate. According to the court, the original birth certificate, despite the fact that it had been amended to reflect a change of name and gender, was absolutely controlling. In the words of the court, it described things the way "they just are" as opposed to things the way one might "will into being."[12] Born male, Christie remained male, and she could therefore not be the wife of the deceased suing for wrongful death.

The Kansas Supreme Court has likewise refused to recognize a transgendered marriage in *In re Estate of Gardiner,* decided in 2002.[13] As in *MT* and *Littleton,* the court was faced with a challenge to the seemingly lawful marriage of a man to a woman who was MTF. Again, the stakes in *Gardiner* were economic: the challenge came from the estranged son of the man who died intestate, seeking to disinherit his stepmother, J'Noel Gardiner. Ms. Gardiner had been born male, had undergone sex reassignment surgery, had been issued a new birth certificate reflecting a change of name and gender, and several years later had met and married Marshall Gardiner. Invalidating the

marriage, the court concluded that J'Noel is not a woman. However, more than the Texas court, the Supreme Court of Kansas recognized that J'Noel's sex/gender had changed. But not to female—to transsexual. This enabled the Kansas Supreme Court to invoke the Kansas so-called little-DOMA statute,[14] which defined the marriage contract as a civil contract between "two parties who are of opposite sex" and declared all other marriages contrary to public policy and void. The court interpreted the DOMA statute to exclude transsexuals. "The plain ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria."[15] Such an interpretation presumably precludes transgendered persons from marrying, since they would have no "opposite sex." However, as Julie Greenberg presciently argued, such a position is difficult to defend, given the current constitutional jurisprudence that marriage is a fundamental right and here, as distinct from the same-sex marriage cases, the person is being denied the right to marry "anyone at all."[16]

In both *Littleton* and *Gardiner,* the courts conclude, as a matter of law, that the sex/gender identity of each MTF is not female and thus the marriages to their husbands are invalid. This position is consistent with most of the other cases in the United States that have considered the issue and is now the majority view, although there is more diversity of opinion in other jurisdictions.[17] However, while the result in such cases differs from *MT v. JT,* in all of these cases the courts preserve the heterosexual matrix. In *MT v. JT,* heterosexual intercourse is established, and thus the marriage is valid. In *Littleton* and *Gardiner,* the judicial guardians of heterosexuality have dispatched the pretenders: Christie Littleton remained in reality a man, while J'Noel Gardiner had transitioned from male to transsexual.

It is tempting to argue against the formalistic decisions in *Littleton* and *Gardiner* by favoring the more functionalist approach displayed in *MT v. JT.* Yet such arguments serve to reestablish and reinvigorate the normalcy of heterosexuality. As Andrew Sharpe has demonstrated, judicial approaches to transgender marriage in common law countries have, despite their differences, displayed a concern to "insulate marriage from 'unnatural' homosexual incursion."[18] While Sharpe argues that at times the judicial concern in the non-U.S. context may not be focused on actual sexual functionality but can shift to aesthetic concerns—how the transgendered person appears when unclothed—he nevertheless links the concern with "homophobic anxiety."[19]

The judicial preoccupation with maintaining heterosexuality obviously impacts litigation strategy and also influences and mirrors theoretical and political positions. We may find ourselves objecting to the result in *Littleton* based upon our own preconceptions of the heterosexual arrangement of marriage: a

characterization of Ms. Littleton as a "widow" conveys a certain pathos in a heterosexist and sexist society. While perhaps less sympathetic, Ms. Gardiner is also easily stereotyped in sexist and heterosexist terms: she is "hardly the first widow to be accused of marrying a man twice her age for money instead of love, with a stepson she first met at her husband's funeral trying to block her inheritance."[20] With relative ease, our understandings of the equities of these cases recapitulate our notions of normalcy and heterosexuality. A slight "switch" is required, but the fundamental social, legal, and political arrangements remain unaltered.

The potentially more subversive situation is the one in which one partner in an extant marriage changes gender. As the transgender theorist and activist Phyllis Randolph Frye has noted, powerful forces militated against such a possibility, given the refusal of the psychiatric and medical community to approve or provide genital surgery to married persons.[21] When such situations do occur, the unchanged spouse would most likely be able to procure a divorce, even in states that require grounds.[22] However, dissolving a valid marriage is quite different from declaring a marriage invalid. In the former instance, the legal recognition of the marriage occurs through terminating the legal relation by the divorce. In the latter instance, the marriage is declared void. It is not that the marriage is terminated; it is as if it never existed.

Yet doctrinally, the facts giving rise to the voided marriage occur at the time the marriage is entered into by the parties. Subsequent events may reveal such facts to the parties (e.g., the parties could learn that the husband's previous marriage was not dissolved and thus the current marriage is void for bigamy), but subsequent facts cannot retroactively void the marriage. The application of such well-settled doctrine to the subsequent gender transition of one of the parties to the marriage means, as Frye has argued, that "same-sex marriages" do exist in the United States.[23] Under the reasoning of *Littleton,* Frye is surely correct. However, given the subsequent judicial pronouncement of *Gardiner,* Frye's conclusion has been cast into doubt: the transgendered person is neither female nor male, and just as she or he has no *opposite* sex according to the court, she or he can have no *same* sex. Except, perhaps, for another transgendered person, presumably one who has transitioned in the same manner.

As a litigation strategy, Frye is surely astute in recommending that the nontransgendered spouse should initiate or join the litigation, although I am less sanguine that such a person could not "be cast into the role of the degenerate" by a religious or conservative court.[24] Nevertheless, an analogy can be drawn to the U.S. Supreme Court case of *Turner v. Safley,* authored by Justice Sandra Day O'Connor—not known for her liberal views—in which the

Court declared unconstitutional a prison regulation limiting marriage for inmates.[25] In a case that could have potentially more resonance than the oft-quoted *Loving v. Virginia* in which the Supreme Court finally declared miscegenation laws unconstitutional,[26] the Court in *Turner* de-emphasized heterosexual intercourse as a rationale of marriage. While the Court did include the eventual (heterosexual) consummation of the prison inmate's marriage as significant—implicitly precluding the notion of conjugal visits—the Court first noted the importance of marriage as an expression of "emotional support and public commitment," and next alluded to the religious and spiritual significance of marriage.[27] Additionally, after mentioning the sexual component, the Court recognized the tangible benefits of marriage, such as Social Security benefits and property rights, as well as intangible benefits, such as the legitimation of children.[28]

Yet assimilation to heterosexuality remains strong as a litigation strategy. As Frye notes, the evidence supporting the gender transition document, such as the amended birth certificate, which will be used to obtain the marriage certificate, should be sufficient to allow the conclusion that "she has a vagina, or he has a penis, and can be sexually penetrated as a female or can sexually penetrate as a male."[29] While such a view is consistent with *MT v. JT* in which the court upheld the marriage, like *MT,* it makes heterosexual intercourse the sine qua non of marriage. Such a theoretical and social position undermines claims to same-sex marriage.[30]

The larger question is whether marriage—whether heterosexual in fact, heterosexual by law, or even nonheterosexual—is consistent with a liberatory politic. The naturalist arguments for coupling and marriage that proclaim that such arrangements are "just the way things are" echo the *Littleton* court's pronouncement that Christie Littleton's gender just "is" the male gender assigned at birth. Moreover, such a coupling recapitulates and reinforces the dualism displayed by present male/female genders. The traditional model of marriage, as opposed to plural marriage, for example, supports a dyadic and binary mode of social arrangement. The NASA Pioneer spacecraft model of humanity as a "technological but benign Adam and Eve" becomes the theoretical construct and litigation position of this transgender politic.[31]

Moreover, the solution of marriage to the problems faced by MT, Christie Littleton, and J'Noel Gardiner is, at best, partial. As in same-sex marriage, the specter of benefits to spouses often appears as an advantage—and in these three cases, each putative wife sought an economic gain—yet the political, social, and legal arrangement of marriage can obscure other inequalities. Additionally, it allows the state to impose a bright line rule for the distribution and nondistribution of wealth, both private (as in these cases)

and public. A regime of marriage allows the state to privatize problems of economic and other inequalities: the solution to a person not having medical care, for example, is not a government policy of universal health care but the individual becoming married to someone whose employer provides good health insurance. In other words, as a matter of reform, it may be expedient to argue for recognizing transgender marriages, but as a matter of critical change, even the success of the argument fails.

I remain convinced that transgendered people can develop a liberatory politic beyond marriage, just as I remain hopeful that lesbians and other queers can develop such a stance, despite what seems to me to be the essential conservatism of present same-sex marriage strategies and theoretical perspectives. In writing on the topic of transgendered marriage, I am cognizant that I am not situated within the transgendered movement, politic, or sensibility, and that my observations and analysis spring from my life as a lesbian and my work on lesbian legal issues, including marriage. Yet when I survey the transgender marriage cases, arguments, scholarship, and theorizing, I confront the same uneasiness I experienced thirty years ago watching shoddy television journalism or more recently reading a popular novel. I am worried that only a few of the characters will be switched. And that nothing fundamental will be altered.

Notes

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1. The author calls readers' attention to the "switch" character of this plot development by invoking Louisa May Alcott's novel *Little Women* and noting that Laurie, "the lad who lives next door to the March girls," had "spent years wooing the tomboy Jo March, and then, after she finally rebuffed him, he simply moved on to her kid sister Amy and married her. He believed he was destined to become part of the March clan" (Chris Bohjalian, *Trans-Sister Radio* [New York: Crown, 2000], 334–35).

2. See Michael Warner, introduction to *In Fear of a Queer Planet: Queer Politics and Social Theory,* ed. Michael Warner (Minneapolis: University of Minnesota Press, 1993).

3. 355 A.2d 204 (N.J. Superior Ct. Appellate Division 1976).

4. Ibid., 209.

5. For a general discussion of the doctrine, see *Incapacity for Sexual Intercourse as Ground for Annulment,* 52 A.L.R. 589 (1974).

6. For example, section 170 of the New York Domestic Relations Law, which includes as a ground for divorce "the abandonment of the plaintiff by the defendant for a period of one of more years" (NY DRL § 170[2]). This abandonment may be actual or constructive, and it is "well-settled that to establish a cause of action for constructive abandonment, the spouse who claims to have been constructively abandoned must prove that the abandoning spouse refused to fulfill the basic obligations arising from the marriage contract." See *Silver v. Silver,* 253 A.2d 756, 757 (N.Y. App. Div. 1998) (citing cases). As the cases make clear, having heterosexual intercourse is a basic obligation of the marriage contract.

7. Again, as is well settled, the refusal to fulfill the basic marital obligation of sexual relations must be "unjustified, willful, and continue despite repeated requests." See *Silver v. Silver,* 757. In *George M. v. Mary Ann M.,* 171 A.D.2d 651 (N.Y. App. Div. 1991), the court held that the wife's refusal to engage in sexual intercourse was "entirely justified" because of the husband's "consistent and repeated demands for anal and oral sex, as well as his demands that his wife retire in erotic nightwear" (652).

8. *Braschi v. Stahl Associates,* 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

9. This formalist viewpoint is exemplified by *Alison D. v. Virginia M.,* 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991), in which the same court that decided *Braschi* rejected the lesbian coparent's claim to visitation based upon her de facto parent status, concluding that she had no "standing" to bring an action for visitation because she was not a parent.

10. See *In re Custody of H.S.H.-K. (Holtzman v. Knott),* 193 Wis. 2d 649, 533 N.W.2d 419 (1995). See also *VC v. MJB,* 163 N.J. 200, 748 A.2d 539 (N.J. 2000).

11. *Littleton v. Prange,* 9 S.W.3rd 223 (Tex. Ct. App. 1999), *cert. denied,* 531 U.S. 872 (2000).

12. Ibid., 231.

13. 42 P.3d 120 (Kan. 2002).

14. In response to the Hawai'i Supreme Court's decision allowing room for debate on the subject of same-sex marriage, *Baehr v. Lewin,* 852 P.2d. 44 (Haw. 1993), and the potentiality of other states being compelled to recognize Hawai'i's same-sex marriages under the Constitution's full faith and credit clause, 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"), the United States Congress passed the Defense of Marriage Act, DOMA, PL 104–199, 110 Stat. 2419, codified at 28 U.S.C. §1738C (1996), which provides that federal law shall recognize only opposite-sex marriages and that states shall not be required to give effect to same-sex marriages from other states. The majority of states enacted their own DOMA statutes declaring that, under their own state laws and public policy, marriages were limited to those between a man and a woman, thus precluding their recognition of any same-sex marriages possibly entered into in Hawai'i or any other state, as well as preventing the judiciary from entertaining challenges to state opposite-sex marriage requirements or practices.

15. 42 P.3d at 135.

16. Julie Greenberg, "When Is a Man a Man, and When Is a Woman a Woman?" *Florida Law Review* 52 (2000): 745, 762 (discussion of *Littleton v. Prange*).

17. Other cases in the United States include *In re Ladrach,* 513 N.E.2d 828 (Ohio Probate Ct. 1987) (holding that there is "no authority in Ohio for the issuance of a

marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person"); *Frances B. v. Mark B.,* 355 N.Y.S. 2d 712 (1974) (court stating that while the defendant may "function as a male in other situations and relationships," since he does not have male sexual organs or a "normal penis," he is not able to "function as a man"); *Anonymous v. Anonymous,* 325 N.Y.S.2d 499 (1971) (declaring marriage between a man and a transitioning MTF who had male sex organs at the time of marriage and whom husband believed to be a woman). For discussions of these cases, as well as cases from other nations, see Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish, 2002), 89–134 (discussing cases from the United States, Canada, New Zealand, Great Britain, and Australia); Mary Coombs, "Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage," *UCLA Women's Law Journal* 8 (1998): 219.

18. Sharpe, *Transgender Jurisprudence,* 115.

19. Ibid., 127–28. Sharpe is discussing the Aortearoa/New Zealand case of *Attorney General v. Otahuhu Family Court* [1995], 1 NZLR 603. In this discussion, Sharpe argues that I have not previously made enough of the distinction between functionality and aesthetics, given the Otahuhu court's emphasis on the purpose of sex-reassignment surgery as being aesthetic (Sharpe, *Transgender Jurisprudence*). However, I would agree with Sharpe that "while an aesthetic concern over bodies is a consistent theme of transgender jurisprudence, it is usually masked, at least partially, by a preoccupation with heterosexual capacity" (ibid., 127). I also agree with Sharpe in his interpretation of *Otahuhu* that while the decision may "undermine a view of marriage as being the necessary locus of 'natural' heterosexual intercourse," it is nevertheless founded on "the hetero/homo dyad," and the characterization of any sex that does occur as heterosexual is crucial (128).

20. Jodi Wilgren, "Suit over Estate Claims a Widow Is Not a Woman," *New York Times,* January 13, 2002.

21. Phyllis Randolph Frye and Alyson Dodi Meiselman, "Same-Sex Marriages Have Existed in the United States for a Long Time Now," *Albany Law Review* 64 (2001): 1031, 1039–40 ("Until the 1990s, almost all married transgenders seeking sex reassignment were coerced into divorce by the medical profession").

22. See *Steinke v. Steinke,* 357 A.2d 674 (Super. Ct. Pa. 1975) (holding that wife had grounds for divorce given husband's exploration of the possibility of sex reassignment, including dressing as a woman and taking hormones, although husband did not undergo surgery and eventually "resumed living as a man").

23. Ibid. Frye further argues that same-sex marriage advocates should avail themselves of such transgender same-sex marriage situations as a "wedge issue" to promote same-sex marriage and concludes that their failure to do so is "incomprehensible" (Frye and Meiselman, "Same-Sex Marriages," 1045). Yet given the essential conservatism of the quest for marital recognition, this failure is easily comprehended. It is not only arguments on behalf of transgendered marriage that avail themselves of traditional functionalist strategies; arguments on behalf of same-sex marriage also employ the "we are essentially like you" rhetorical claim.

24. Frye and Meiselman, "Same-Sex Marriages," 1065.

25. *Turner v. Safley,* 482 U.S. 78 (1987).

26. *Loving v. Virginia,* 388 U.S. 1 (1967). The Court's decision in *Pace v. Alabama,* 106 U.S. 583, 585 (1883) was considered the precedent for allowing miscegenation statutes, and previous to *Loving,* the Court three times declined to review constitutional challenges to miscegenation statutes; see *Jackson v. Alabama,* 348 U.S. 888 (1954) (memorandum opinion denying certiorari to Alabama Supreme Court opinion upholding conviction for marital miscegenation against a fifth and fourteenth amendment challenge); *Naim v. Virginia,* 350 U.S. 891 (1955) (holding that the "inadequacy of the record as to the relationship of the parties to the Commonwealth of Virginia at the time of the marriage in North Carolina and upon their return to Virginia, and the failure of the parties to bring here all questions relevant to the disposition of the case, prevents the constitutional issue of the validity of the Virginia statute on miscegenation tendered here being considered 'in clean-cut and concrete form, unclouded' by such problems"); *Naim v. Virginia,* 350 U.S. 985 (1956) (memorandum opinion stating that federal question not properly presented). Three years before *Loving,* the Court declared unconstitutional a Florida statute criminalizing interracial cohabitation; see *McLaughlin v. Florida,* 379 U.S. 184 (1964).

27. *Turner v. Safley,* 95–96.

28. Ibid., 96.

29. Frye and Meiselman, "Same-Sex Marriages," 1063.

30. Thus, while "the courts in transsexual marriage cases struggle with the same concerns as the opponents to same-sex marriage—the relative significance to marriage of [heterosexual] intercourse and procreation" (Coombs, "Sexual Disorientation," 260), a litigation strategy on behalf of transgendered marriage that argues that the relationship does include heterosexual intercourse is one which accedes to the validity of heterosexual intercourse as definitional of marriage.

31. See Warner, *In Fear of a Queer Planet,* xxiii.