3 Hous. J. Health L. & Pol'y 301-330

ISSN 1534-7907

Marriage, Transsexuals, and the Meaning of Sex:

On DOMA, Full Faith and Credit, and Statutory Interpretation

Mark Strasser*

Introduction

Recent high-profile cases in Texas and Kansas highlight some of the difficulties faced by post-operative transsexuals and their spouses. States differ with respect to how to define an individual's sex, which in turn affects whom transsexuals are permitted to marry. Further, federal law is in a state of flux with respect to the protections offered transsexuals. The language of the Defense of Marriage Act (DOMA)[1] is unclear both with respect to whether a marriage between a post-operative transsexual and his or her spouse will be recognized for federal purposes and with respect to whether such a marriage falls within any exception to the Full Faith and Credit Clause[2] possibly created by the Act. Finally, to make a complex area even more complicated, the background law with respect to whether marriages validly celebrated in a sister domicile must be recognized by the other states is relatively undeveloped. It is only a matter of time before the Supreme Court will have to resolve these issues. The way that these issues are decided will have important implications for the Court's commitment to protecting interests which are at the core of the right to privacy.

* Trustees Professor of Law Capital University Law School.

[1] 28 U.S.C. § 1738C (1996) "No State, . . . of the United States, . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State." [Hereinafter DOMA or the Act].

[2] *Id.*

Marriage involves a fundamental interest,[3] and the refusal of states to recognize marriages valid in other domiciliary states at the time of celebration should only be held constitutionally permissible if compelling state interests are furthered, and if the relevant statutes are narrowly tailored to promote those interests. It is extremely doubtful that legitimate, much less compelling, state interests are served by refusing to recognize marriages involving post-operative transsexuals and, in any event, it is difficult to imagine how the relevant statutes could be narrowly tailored to promote whatever compelling interests are purportedly promoted by refusing to accord that recognition. The recent cases involving transsexual marriages offer yet another illustration of why both state and federal laws related to marriage must be rewritten if they are to respect constitutional guarantees.

Part II of this article discusses the differing positions adopted in the states with respect to whom transsexuals are legally permitted to marry, as well as the full faith and credit constraints imposed on states with respect to whether they can refuse to credit the acts and records of other states. Part III discusses some of the federal case law involving transsexuals, the Defense of Marriage Act, and the background law related to the interstate recognition of marriage. The article concludes by suggesting that current marriage laws in many states neither promote good public policy nor meet constitutional requirements and should be changed at the earliest opportunity.

I. STATE LAWS REGARDING MARRIAGES INVOLVING TRANSSEXUALS

Recently, two cases involving marriages between a male and a post-operative male-to-female transsexual made national headlines.[4] In each case, the husband married his wife, fully aware of her transsexual status, and the state nonetheless refused to recognize the marriage after the husband died, thereby preventing his widow from receiving financial benefits that would otherwise have been due. In each case, the court construed the law in an implausible way to reach its desired conclusion, thereby illustrating why current

[3] Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

[4] Littleton v. Prange 9 S.W.3d 233 (Tex. App.—San Antonio, 1999, pet. denied); *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

legal protections of marriage need to be further strengthened. Both cases help illustrate that the fundamental right to marry is not being accorded adequate protection either by the states or by the courts.

A. *Littleton*

In *Littleton v. Prange*,[5] a Texas appellate court held that the marriage of a man and a post-operative male-to-female transsexual (Christie Littleton) was void.[6] The court reasoned that because an individual's sex is determined at birth, the marriage at issue was really a marriage between two men,[7] appearances notwithstanding. The court concluded that the marriage was a nullity because Texas does not recognize same-sex marriages.[8]

The case was complicated, at least in part, because Littleton's amended birth certificate indicated that she was female.[9] The court looked at the original rather than the amended birth certificate to help determine Littleton's sex,[10] finding that the "words contained in the amended certificate are not binding on this court,"[11] because the lower court's role in approving the modification to the original birth certificate had merely been "ministerial."[12] After all, the appellate court pointed out, the lower court had not engaged in "fact-finding or consideration of the deeper public policy concerns presented."[13]

The appellate court's justification for ignoring the trial court's approval of the amendment to the birth certificate was unpersuasive. The trial court was "presented with the uncontroverted affidavit of an expert stating that Christie is a female."[14] Given (1) the expert's uncontroverted affidavit, (2) a birth certificate that listed her as male, and (3) a statute permitting amendments to a birth certificate if the pre-amended record was "proved by satisfactory evi-

[5] 9 S.W.3d 223 (Tex. App.—San Antonio, 1999, pet. denied).

[6] *Id.* at 223.

[7] *Id.* at 231.

[8] *Id.* at 225 (stating that "Texas (and Kentucky, for that matter), like most other states, does not permit marriages between persons of the same sex.").

[9] *See id.* at 231 (noting that "[d]uring the pendency of this suit, Christie amended the original birth certificate to change the sex and name.").

[10] *See Littleton*, 9 S.W.3d at 231.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

dence to be inaccurate,"[15] the trial court found that the evidence met the statute's requirements for permitting a change. The *Littleton* trial court had not acted in a ministerial fashion but instead had interpreted a statute, weighed the evidence before it to see whether the statute's requirements had been met, and then acted in light of that judgment and interpretation.

Texas law provides that "[a]n amending certificate may be filed to complete or correct a record that is incomplete or proved by satisfactory evidence to be inaccurate."[16] Basically, the trial and appellate courts disagreed about what the statute permitting amendments to birth certificates was designed to accomplish. The trial court interpreted the statute as permitting a change to a birth certificate if the "facts" listed there were not *now* accurate,[17] regardless of whether they were accurate at an earlier point in time. For example, an individual who had undergone sex reassignment surgery and thus could no longer accurately be described as male could have her birth certificate amended, even if that individual might have been accurately described as male at a previous point in her life. The appellate court rejected the trial court's interpretation, instead offering a much more restrictive construction of the statute.[18]

The *Littleton* appellate court explained there were fifteen states in which post-operative transsexuals could have their birth certificates amended to reflect their current sex, citing *In re Ladrach*[19] for support.[20] Actually, even more states permit such changes—*Ladrach* was decided over a decade before *Littleton*[21] and thus did not reflect the number of states permitting such changes at the time *Littleton* was decided.[22]

---

[15] *See Littleton*, 9 S.W.3d at 231 (quoting language from TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992)).

[16] TEX. HEALTH & SAFETY CODE ANN. § 191.028 (b) (Vernon 2001).

[17] *See Littleton*, 9 S.W.3d at 231 (the trial court "construed the term 'inaccurate' to relate to the present.").

[18] *See* notes 24-27 and accompanying text *infra*.

[19] 513 N.E.2d 828 (Ohio 1987).

[20] *Littleton*, 9 S.W.3d at 229.

[21] *Ladrach* was decided in 1987 and *Littleton* was decided in 1999.

[22] Katrina C. Rose, *Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality*, 70 UMKC L. REV. 257, 259 (2001) (noting that "[a]lmost half of the state and territorial jurisdictions in the United States have statutes that explicitly provide mechanisms for post-operative transsexuals to change the sex on their birth certificates and other legal documentation.").

Presumably, *Ladrach* was not cited because it had up-to-date information regarding how many states permitted post-operative transsexuals to have their birth certificate amended, but because the *Ladrach* court had refused to issue a marriage license to a post-operative male-to-female transsexual who wished to marry in Ohio.[23] Ironically, the *Ladrach* court's refusal to issue that license was based, at least in part, on Ohio's prohibiting post-operative transsexuals from having their birth certificates amended.[24] However, Kentucky, the state in which the Littletons were married,[25] does allow post-operative transsexuals to amend their birth certificates.[26] While the difference between Kentucky and Ohio law was not dispositive with respect to the way that the *Littleton* court decided the case,[27] it was certainly relevant and should have been addressed.[28]

When construing the Texas statute, the *Littleton* appellate court mirrored the approach that the *Ladrach* court used in interpreting the Ohio statute.[29] The *Littleton* court held that the statute only permitted a correction to a birth certificate if it had been inaccurate at the time of birth.[30] Because the "facts contained in the original birth certificate were true and accurate"[31] at the time they were recorded,[32] they should not have been amended.

---

[23] *See Ladrach*, 513 N.E.2d at 832.

[24] *See id.* at 831.

[25] *See Littleton*, 9 S.W.3d at 225.

[26] *See* KY REV. STAT. ANN. § 213.121 (5) (Michie 1999).

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

[27] *See* notes 101-12 and accompanying text *infra* (discussing full faith and credit).

[28] *See Littleton*, 9 S.W.3d at 225. To make matters even more complicated, the Littletons married in 1989, and the Kentucky statute did not become effective until July 13, 1990. *See id.*; KY. REV. STAT. ANN. § 213.121.

[29] *See Ladrach*, 513 N.E.2d at 831 (holding "[i]t is the position of this court that the Ohio correction of birth record statute, R.C. 3705.20, is strictly a "correction" type statute, which permits the probate court . . . to correct errors such as spelling of names, dates, race and sex, if in fact the original entry was in error.").

[30] *See Littleton*, 9 S.W.3d at 231 (suggesting that "the legislature intended the term 'inaccurate' in section 191.028 to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth.").

[31] *Id.*

[32] *But see* notes 44-45 and accompanying text *infra* (suggesting that the recorded "facts" were inaccurate even at birth).

The point of contention between the Texas trial and appellate courts was not whether the trial court somehow erred when performing a "ministerial" action[33] but, instead, whether the trial court had correctly interpreted the statute. When rejecting the lower court's interpretation, the appellate court did not offer any reason to believe that its own interpretation was superior—instead, it merely registered its belief that "the legislature intended the term 'inaccurate' in section 191.028 to mean inaccurate at the time the certificate was recorded; that is, at the time of birth."[34] Ironically, while the section is less clear than might be desired, the trial court's interpretation of the section seems much more plausible.

Section 191.028 specifically and expressly includes a cross-reference to section 192.011.[35] Section 192.011(a) says the section "applies to an amending birth certificate that is filed under Section 191.028 and that completes or corrects information relating to the person's sex, color, or race."[36] Section 192.011(b) permits an individual to have the original birth certificate corrected rather than have the original birth certificate issued along with a supplementary amending certificate attached.[37]

At least two points might be made about section 191.011. First, the Texas Legislature seems to have appreciated something that the *Littleton* appellate court did not—it would be an unnecessary and possibly embarrassing invasion of privacy to require someone who had sex-reassignment surgery to announce that fact to everyone who might have legitimate access to her birth certificate. By correcting the original record, rather than including both the original and the amended record, this needless embarrassment might be avoided. Basically, an individual who had a legitimate reason for seeing Christie Littleton's birth certificate would not thereby learn that she had a sex-change operation, which might occur if the person had access to both the original and the amended record. Rather, this person would only see the record indicating that Christie Littleton is female.

[33] *See* BLACK'S LAW DICTIONARY 996 (6th ed. 1990) (citing Arrow Exp. Forwarding Co. v. Iowa State Commerce Comm'n, 130 N.W.2d 451, 453 (1964) to define ministerial as "[t]hat which involves obedience to instructions, but demands no special discretion, judgment or skill.").

[34] *See Littleton*, 9 S.W.3d at 231.

[35] *See* TEX. HEALTH & S. CODE ANN. § 191.028 (b) (Vernon 2001).

[36] § 192.011 (a).

[37] *See* § 192.011 (b).

Second, the *Littleton* appellate court plainly erred regarding the conditions under which birth certificates might be amended. Fifty years earlier, the Texas Attorney General issued an opinion making clear that section 192.011 would permit an amendment to the birth certificate of a child born to an unwed mother who *subsequently* married the child's father.[38] A notation to that opinion is included in the discussion notes accompanying the statute itself.[39] Were amendments only permissible if there was an inaccuracy at the time of birth, amendments in cases involving a *subsequent* marriage would not be permitted. It is thus clear that the statute should not be construed as only providing a method by which to correct errors made at the time of birth, appellate court's claims to the contrary notwithstanding.

Even had the *Littleton* appellate court's interpretation been correct that the statute permitted birth certificates to be amended only if they were inaccurate at the time of birth, the court's conclusion about the validity of the marriage would still have been open to question. A separate issue not discussed by the court involves the criteria that should be used to determine sex at the time of birth. There are a number of possible criteria that might be used including consideration of the person's chromosomes, gonads, internal or external morphologic sex, hormones, secondary sexual characteristics, assigned sex, or sexual identity.[40] An individual might be male according to one of these criteria but female according to another, and it is by no means obvious which of these criteria should be used for purposes of establishing an individual's sex.

Justice Angelini explained in her *Littleton* concurrence that the court adopted the *Corbett*[41] test, which defines an individual's sex in terms of the individual's "chromosomes, gonads, and genitalia at birth."[42] Yet, there is no requirement that these characteristics be privileged above others.[43] For example, some research suggests that

[38] *See* § 192.011, notes of decisions (citing Op. Tex. Att'y Gen. No. V-811 (1949)).

[39] *See id.*

[40] *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999) (arguing that "sex" is defined by more than just organs).

[41] Corbett v. Corbett, [1970] 2 All E.R. 33, 1970 WL 29661.

[42] *See Littleton*, 9 S.W.3d at 232 (Angelini, J., concurring).

[43] *Cf.* M.T. v. J.T., 355 A.2d 204, 208 (N.J. Super. Ct. App. Div. 1976) (deciding, "[t]he evidence before this court teaches that there are several criteria or standards which may be relevant in determining the sex of an individual.").

sexual identity has a biological basis.[44] If sexual identity is established *during* pregnancy, then a person might be held to be a member of her psychological sex, even if neither the court nor the individual herself could have ascertained the individual's sexual identity until some time after birth. Basically, according to this approach, the sex designation recorded at birth is subject to retroactive revision if physicians subsequently determine that the original designation failed to reflect the individual's sexual identity.

It is hardly surprising that a person might have a particular condition even if the condition's existence cannot be ascertained until some time later. For example, some patients have Alzheimer's Disease during their lives, notwithstanding that such a diagnosis cannot be confirmed given current knowledge, technology, etc., until a post mortem is performed.[45] In the case of the transsexual, surgery corrects a condition that may have existed since before birth, namely, the individual's physical self's failure to correspond with his or her sexual identity.

Admittedly, there are difficulties with an approach suggesting that an individual's sex should be defined in terms of that individual's sexual identity *at birth*. For example, if the sexual identity of some but not all individuals is established at or before birth, some rationale would have to be provided to justify permitting a post-operative male-to-female transsexual to be recognized as a woman if her sexual identity is established at or before birth but not if it is established two months or two years later.[46] Even if such a rationale could be offered, an additional difficulty is that the content of the individual's sexual identity might not be clear to the individual herself or to anyone else until sometime after birth. It is thus not at all clear how one would know which sexual identities had been established early enough to meet the "at or before birth" requirement.

The difficulty of determining whether one's sexual identity is established at or after birth does not suggest that sexual identity should not be a criterion to determine an individual's sex, but merely that an individual's sexual identity *at or before birth* should

[44] *See* Brown v. Zavaras, 63 F.3d 967, 971 (10th Cir. 1995).

[45] Rochelle K. Seide & Janet M. MacLeod, *Drafting Claims For Biotechnology Inventions*, 501 PRACTICING LAW INST. (PLI Order No. G4-4013) 353, 590 (1997) (stating that "[w]ith respect to Alzheimer's disease, one skilled in the art knows that the disease has no known cure, no known cause or mechanism, and can not even be truly diagnosed until a post mortem examination is done").

[46] *Cf.* Pinneke v. Preisser, 623 F.2d 546, 547 (8th Cir. 1980) (observing that "Pinneke began life as a male, but quickly became uncomfortable with the male gender identity").

not be used. Rather, it is much more sensible to classify a post-operative transsexual in light of his or her self-identified sex, regardless of when that sexual identity becomes fixed.

An important point to consider is that sexual identity, once established, may *not* be mutable.[47] There is evidence to suggest that an individual who appears to be male but self-identifies as female will not, for example, be able to undergo counseling and then self-identify as male. If sexual self-identity, like one's chromosomes, cannot be changed,[48] then it makes sense not to irrevocably "establish" an individual's sex for legal purposes until that person's sexual identify is known. Otherwise, an individual might be damned to a life in which his or her legal and psychological sex could never be the same.

In *M.T. v. J.T.*,[49] a New Jersey appellate court held that a post-operative male-to-female transsexual was a woman who had entered into a valid marriage with a man.[50] After noting that the plaintiff had "become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy,"[51] the court held that the "plaintiff should be considered a member of the female sex for marital purposes."[52] The *M.T.* court recognized the wisdom of rejecting that "for purposes of marriage sex is somehow irrevocably cast at the moment of birth."[53]

The *Littleton* court dismissively described *M.T.*[54] as "the only United States case to uphold the validity of a transsexual marriage."[55] Yet, there are very few cases involving transsexual marriages, and thus saying that *M.T.* is the only case to uphold such a marriage is quite misleading.[56]

[47] *See* Greenberg, *supra* note 40, at 294 (suggesting that sexual identity, once established, cannot be changed).

[48] *Id.*

[49] 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

[50] *Id.* at 211 (deciding the "plaintiff at the time of her marriage was a female and that defendant, a man, became her lawful husband, obligated to support her as his wife.").

[51] *Id.*

[52] *Id.*

[53] *Id.* at 209.

[54] *Littleton*, 9 S.W.3d at 227-28.

[55] *Id.* at 227.

[56] After *Littleton* was decided, a Florida court recognized a marriage between a woman and a post-operative female-to-male transsexual. *See* Associated Press, *Transsexual in Florida Is Awarded Child Custody*, ST. LOUIS POST DISPATCH at A11, Feb. 23, 2003, *available at* 2003 WL

In *Anonymous v. Anonymous*,[57] a New York court held that a marriage between a man and a *pre*-operative male-to-female transsexual was void. In *Anonymous*, the plaintiff met the defendant on a street.[58] They went to a house of prostitution, where they spent a short time together.[59] The plaintiff testified that he did not see the defendant unclothed and did not have any sexual relations with the defendant,[60] although it is possible that this was predicated upon a particular interpretation of how sexual relations should be defined.[61] In any event, the plaintiff and defendant subsequently married.[62]

On their wedding night, the intoxicated plaintiff fell asleep.[63] However, early the next morning, he reached over and found to his surprise that his wife had male sex organs.[64] He immediately left and "got drunk some more."[65]

Over a year later, the plaintiff and defendant again met. The defendant, by this point, had undergone sex reassignment surgery and said she "was now a woman."[66] The *Anonymous* court found "the defendant was not a female at the time of the marriage ceremony"[67] and held that there was no legal marriage because the marriage had occurred prior to the surgery.[68]

The court was uncertain about how to characterize the defendant's sex once she had undergone surgery.[69] While recognizing

3557655 (discussing decision holding that Florida law recognized the marriage between Michael (nee Margo) and Linda Kantaras).

[57] 325 N.Y.S.2d 499 (1971).

[58] *Id.* at 499.

[59] *Id.*

[60] *Id.*

[61] *See* Carl T. Hall, *Students Affirm Clinton Definition of Sex, Study Says*, S.F. CHRON., Jan. 16, 1999, at A5, *available at* 1999 WL 2678173 (A majority of college students—according to a survey conducted long before the Clinton-Lewinsky scandal broke—did not define oral sex as having 'had sex,' a new study concluded yesterday.).

[62] *Anonymous*, 325 N.Y.S.2d at 499.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 500.

[67] *Anonymous*, 325 N.Y.S.2d at 500.

[68] *Id.* at 501. A separate issue beyond the scope of this article is whether same-sex marriage bans are themselves constitutionally permissible. *But cf.* MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 23 (Cornell University Press 1997) (arguing that same-sex marriage bans violate Fourteenth Amendment guarantees).

[69] *Anonymous*, 325 N.Y.S.2d at 500.

that "mere removal of the male organs would not, in and of itself, change a person into a true female,"[70] the court was open to the possibility that "the defendant's sex has been changed to female by operative procedures."[71] The court seemed almost thankful that it did not have to decide whether or at what point the defendant's sex had changed, reasoning that "[w]hat happened to the defendant after the marriage ceremony is irrelevant, since the parties never lived together."[72]

The *Littleton* appellate court's treatment of *Anonymous* is instructive, if only because of its de-emphasis of factors that other courts consider crucial. The *Littleton* court characterized the facts of *Anonymous* as "less complicated"[73] than the facts of the *Littleton* case, because in *Anonymous* "there had been no sexual change operation, . . . the 'wife' still had normal male organs,"[74] and the plaintiff had not known his wife was a pre-operative transsexual.[75] In *Littleton*, the husband clearly knew of his wife's post-operative transsexual status.[76]

The differences highlighted by the *Littleton* court are hardly mere complications. Central to the *Anonymous* court's holding that no marriage had taken place was the fact that the defendant was pre-operative at the time of the ceremony.[77] While the *Anonymous* court was ambivalent about the point at which a male-to-female transsexual is appropriately characterized as belonging to her self-identified sex and expressly noted articles in the medical literature making clear that removal of the male sex organs would not alone suffice to change a person's sex,[78] the court clearly implied that sex is not something which is irrevocably fixed at birth.

The *Anonymous* court would likely have found the facts of *Littleton* quite compelling. Christie Littleton had not "merely" had

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Littleton*, 9 S.W.3d at 227.

[74] *Id.*

[75] *See id.* (noting that the plaintiff had made the unpleasant discovery that the defendant had male sexual organs on their wedding night).

[76] *See id.* ("The husband was fully aware of the true state of affairs and accepted it. In fact, in the instant case, Christie and her husband were married for seven years, and, according to the testimony, had normal sexual relations.").

[77] *Anonymous*, 325 N.Y.S.2d at 500.

[78] *Id.*

male sexual organs removed[79] but, in addition, had a vagina and labia constructed[80] and breast construction surgery.[81] Further, doctors testified that in their expert opinion Christie Littleton was a woman.[82] Had the *Anonymous* court been presented with a case like Christie Littleton's, the court likely would have held that the defendant was indeed a woman.

It is somewhat difficult to tell whether the *Littleton* court was trying to make a judgment about the conditions, if any, under which an individual's sex might be changed or, instead, the conditions, if any, under which an individual of one sex will be permitted to marry someone of his or her own sex. For example, after noting that Littleton "wants and believes herself to be a woman"[83] and "she has made every conceivable effort to make herself a female, including a surgery that would make most males pale and perspire to contemplate,"[84] the court concluded that "[t]here are some things we cannot will into being. They just are."[85] Here, the court implied that sex is fixed at birth and nothing can be done to change that fact.[86] The court was not thereby suggesting, however, that transsexuals would never be able to marry individuals of their chromosomal sex, since the court also recognized that "it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals."[87] The court thus implied that marriage laws are subject to legislative control even if one's sex is not.

On a different reading of the opinion, the court was suggesting that sex need not be understood as fixed at birth, but that it would be for the legislature rather than the courts to develop the appropriate test to determine when one's sex had changed.[88] As legal matters now stand in Texas, a post-operative male-to-female

[79] *Littleton*, 9 S.W.3d at 224.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 225.

[83] *Id.* at 230.

[84] *Littleton*, 9 S.W.3d at 230-31.

[85] *Id.* at 231.

[86] *See In re* Estate of Gardiner, 42 P.3d 120, 133 (Kan. 2002) ("In *Littleton*, the thread running throughout the majority's opinion was that a person's gender was immutably fixed by our Creator at birth.").

[87] *Littleton*, 9 S.W.3d at 230.

[88] The *Littleton* court suggested, "It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex." *Id.* However, the court suggested, "[t]his court has no authority to fashion a new law on transsexuals, or anything else." *Id.*

transsexual can marry a woman but not a man, and a post-operative female-to-male transsexual can marry a man but not a woman.[89]

One element that distinguishes *Anonymous* from *Littleton* and *M.T.* is whether the husband knew of his wife's transsexual status. Knowledge of the partner's transsexual status *might* be a matter of some importance to the individual who is not transsexual, just as it *might* be important for an individual to know if his or her spouse is unable to bear or beget children.[90] In *M.T.*, the court noted the plaintiff had not only undergone "surgery for the removal of male sex organs and the construction of a vagina,"[91] but the defendant had "paid for the operation."[92] There was thus no question that the defendant had understood that his wife was a post-operative transsexual, just as it was clear in *Littleton* that the husband had understood that his wife was a post-operative transsexual.[93]

Just as it might be important to know whether one's spouse will be able to bear or beget children, it might be important to know whether or not one will be able to have sexual intercourse with one's spouse.[94] In *Anonymous*, the couple did not have sexual intercourse, whereas the couples before the *M.T.* and the *Littleton* courts had.[95] The facts of *Anonymous* were not simply "less complicated" but, instead, were so different from those involved in *M.T.* and *Littleton* that *Anonymous* is more plausibly construed as having supported rather than undermined Christie Littleton's legal claims.

[89] *Cf. Woman, Transsexual Wed in San Antonio Ceremony*, DALLAS MORNING NEWS, Sept. 19, 2000, at 22A, *available at* 2000 WL 26903464 (describing a marriage between a woman and a post-operative male-to-female transsexual).

[90] *Cf.* Richardson v. Richardson, 103 N.Y.S.2d 219 (N.Y. 1951) (annulment granted based on husband's fraudulent representation that he was willing to have children).

[91] *See M.T.*, 355 A.2d at 205.

[92] *See id.*

[93] *See Littleton*, 9 S.W.2d at 227.

[94] *See* T. v. M., 242 A.2d 670 (N.J. 1968) (annulment granted because of inability to have intercourse); Manbeck v. Manbeck, 489 A.2d 748 (Pa. 1985) (annulment for inability to have intercourse).

[95] *See M.T.*, 355 A.2d at 205 ("They lived as husband and wife and had intercourse."); *Littleton*, 9 S.W.3d at 227 ("Christie and her husband were married for seven years, and, according to the testimony, had normal sexual relations.").

B. *Gardiner*

In *In re* Estate of Gardiner,[96] the Kansas Supreme Court decided whether a marriage celebrated between a man and a post-operative male-to-female transsexual was valid.[97] J'Noel Ball had an amended birth certificate which indicated that she was female.[98] That birth certificate had been amended pursuant to a Wisconsin statute.[99] The questions before the court included, among others, whether full faith and credit must be given to the Wisconsin record (J'Noel's amended birth certificate).[100]

Section one of Article IV of the United States Constitution reads in relevant part, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[101] The plain wording of the provision suggests that the degree of faith and credit to be given to acts should equal that which is given to records which should equal that which is given to judicial proceedings.[102] Yet, implication of the express language to the contrary notwithstanding, the Court has suggested that the faith and credit due to sister state judgments is more robust than the faith and credit due to sister states' acts (statutes) or records. Thus, in *Baker v. General Motors Corp*,[103] the United States Supreme Court made clear there is "no roving 'public policy exception' to the full faith and credit due *judgments*."[104] A "final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."[105] However, the amount of credit due judgments is greater than the amount of credit due to laws[106] or

[96] 42 P.3d 120 (Kan. 2002).

[97] *Id.* at 120.

[98] *Id.* at 122.

[99] *Id.*

[100] *Id.* at 134.

[101] *See* U.S. CONST. art IV, § 1.

[102] *Cf.* Baehr v. Lewin, 852 P.2d 44, 65 (Haw. 1993) (suggesting that because art. 1, § 4 of the Hawaii Constitution expressly includes sex along with race, religion, and ancestry as protected categories, each should be accorded the same level of strict scrutiny when used as a classification).

[103] 522 U.S. 222 (1998).

[104] *Id.* at 233.

[105] *Id.*

[106] *See id.* at 232 ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments.").

records,[107] since the required recognition of the latter is subject to a public policy exception.[108]

The Kansas Supreme Court was correct to reject[109] that the Wisconsin record indicating that J'Noel was female[110] had to be accorded full faith and credit.[111] The United States Supreme Court has made clear that the "Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'"[112] However, the Kansas court was incorrect that according full faith and credit to the Wisconsin record would contradict Kansas public policy. Indeed, in order to rule against J'Noel Ball, that court had to ignore its own stated position with respect to the deference due the legislature.

The Kansas Supreme Court made clear the "fundamental rule of statutory construction is that the intent of the legislature governs."[113] The court suggested a "male-to-female post-operative transsexual does not fit the definition of female,"[114] and implied that if male-to-female post-operative transsexuals are to be allowed to marry men, that is something that the legislature would have to decide to permit.[115]

The Kansas Supreme Court implied in its opinion that it was working with a clean slate, as if nothing relevant had been said or done by the legislature to indicate the state's position on the matter

[107] *See* Steele v. Campbell, 82 N.E.2d 274, 275 (Ind. 1948) (suggesting that full faith and credit need not be given to birth certificate from another state).

[108] McDonald v. City of West Branch, 466 U.S. 284, 287-88 (1984) (explaining that only judicial proceedings are entitled to full faith and credit); *In re* C.M.A., 557 N.W.2d 353, 356 (Minn. 1996) (suggesting that full faith and credit need only be given to issues that have been fully litigated); *In re* Laura F., 99 Cal.Rptr.2d 859, 866 (Cal.App. 5 Dist. 2000) (suggesting that statutes and records should be treated in same way for full faith and credit purposes and that neither is due the robust faith and credit which judgments are due).

[109] The *Gardiner* court noted that the "Court of Appeals found no error in the district court's not giving the Wisconsin birth certificate full faith and credit." *Gardiner*, 42 P.3d at 124. Given that the state supreme court's decision is predicated on the Wisconsin record not being given full faith and credit, it seems safe to assume that the court is approving of the position taken by the lower courts on this matter.

[110] *See id.* at 122.

[111] *See id.* at 134 (discussing the claim that full faith and credit had to be accorded).

[112] *Baker*, 522 U.S. at 222 (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)).

[113] *Gardiner*, 42 P.3d at 135.

[114] *Id.*

[115] *See id.* at 136.

before the court. Basically, the court implied that (1) the legislature had not spoken to the issue before the court, (2) the issue was something appropriately decided by the legislature rather than the court, and (3) the court was simply refusing to usurp the legislature's function. After all, "if the legislature wishes to change public policy, it is free to do so, . . . [the court is] not."[116] Ironically, had the court really been willing to defer to the legislature on public policy matters and to take legislative silence as an endorsement of the status quo, it would have recognized J'Noel Ball's status as a woman.

A little background is required to understand why the court would have reached a different conclusion if it had taken its own espoused position more seriously. First, as the Kansas Court of Appeals recognized, existing regulations promulgated by the Kansas Department of Health and Environment permitted "individuals to change the sex designation on their birth certificates 'with a medical certificate substantiating that a physiological or anatomical change occurred.'"[117] These regulations are important to consider in any analysis of Kansas public policy. For example, assuming that these regulations were valid, there would be no need to examine whether the Full Faith and Credit Clause *required* recognition of the Wisconsin record change. After all, Kansas should be quite willing to credit an amendment to a birth certificate in another state if the amendment would have been permitted locally under those same conditions, since one then could hardly claim that legal recognition of the amended birth certificate would somehow undermine an important Kansas public policy.[118]

The Kansas Court of Appeals held that Health Department had exceeded its authority when promulgating the regulation which permitted amendments to birth certificates in cases like J'Noel Ball's.[119] Basically, the court suggested that the legislature had authorized the Secretary of Health and Environment to make regulations which "prescribe procedures for making minor corrections to certificates or records."[120] Because a change of sex was a "fundamental change," the court held that the regulation "oversteps" permissible bounds and thus cannot be considered to reflect Kansas law.[121]

[116] *See id.* at 136-37.

[117] *See In re* Estate of Gardiner 22 P.3d 1086, 1106 (Kan App.) (citing KAN. ADMIN. REGS. 28-17-20(b) (1) (A) (i)).

[118] *See id.* at 1107 ("J'Noel argues that Kansas public policy not only is not violated by granting full faith and credit to the Wisconsin birth certificate but that it supports such an approach.").

[119] *Id.*

[120] *See id.* at 1108 (citing K.S.A.200 Supp. 65-2422c).

The intermediate appellate court's analysis is unpersuasive for several reasons. First, if indeed the legislature had not intended to permit fundamental changes such as modifications to an individual's sex designation, then the legislature would have been precluding changes regarding sex designation even if those changes had been made shortly after the individual had been born. Thus, on the appellate court's reading of the enabling statute, the Secretary was only permitted to prescribe regulations for a particular category of changes, namely, those which would be minor. Because changes involving the sex of an individual allegedly did not fall within that category, the Secretary would be precluded from prescribing procedures to change the designation of sex, even if that procedure was designed to correct a mistake that had been made when the individual was born.[122]

The intermediate appellate court presumably did not believe that the Secretary was precluded as a general matter from prescribing procedures to amend the sex designation on birth certificates. Indeed, the court cited the *Littleton* decision with approval,[123] as if wanting to adopt the *Littleton* interpretation of when changes regarding an individual's sex designation would be permitted. However, the *Littleton* analysis did not suggest that a change in sex designation was so fundamental that it could not ever be permitted but instead that some sex designation changes were permissible and some not. Ironically, the explanation offered by the *Gardiner* intermediate appellate court would have precluded adoption of the approach advocated by the *Littleton* appellate court, notwithstanding the *Gardiner* court's sympathy for that very approach.[124]

Presumably, when the appellate court was distinguishing between minor and fundamental changes, it was not really distinguishing among categories such as sex versus time of birth. Rather, the court instead was suggesting that minor changes were those that

[121] *See id.* at 1108.

[122] *See id.* ("To correct, generally means to make right what is wrong. [citing Black's Law Dictionary 347 (7th ed. 1999)] This court could find that giving ordinary meaning to the term 'correct,' the Department of Health and Environment exceeded its statutory authority in promulgating K.A.R. 28-17-20 (b) (1) (A) (i) as it related to amendments of sex designations in response to anatomical changes.").

[123] *See id.* at 1108.

[124] *See* notes 24-27 and accompanying text *supra* (discussing times when changes to the sex designation could be made according to the *Littleton* court).

involved no changes to the external world but merely involved changes to the record so that it would more accurately reflect what was true at the time it was made.[125] If this was the court's implicit approach,[126] then corrections would be permissible even to a sex designation if, for example, the newborn's sex had been misrecorded. However, a separate question is whether the appellate court accurately reflected legislative intent, and a variation of the scenario illustrating the implausibility of the Texas appellate court's interpretation of the Texas statute[127] casts doubt on the *Gardiner* intermediate appellate court's interpretation, too.

If the legislature had only wanted to permit corrections to birth certificates to achieve a more accurate reflection of the world existing at the time of the recording, then one would not expect the Kansas Legislature to have permitted paternity that had been established only subsequent to the birth to be reflected on the birth certificate as if it had been known earlier.[128] After all, in the scenario envisioned, the child's father would not have been known at the time of birth and the record would have accurately reflected that fact. Yet, there are public policy considerations in addition to accuracy at the time of recording that should be included when deciding which "correcting" policy is best. Arguably, just as the lack of knowledge regarding the child's father at the time of birth should not preclude that information from being correctly reflected on the birth certificate once that information is known, the lack of knowledge of the child's sexual identity should not preclude that information from being correctly reflected on the birth certificate once that information is known.[129]

There is a more subtle difficulty with the interpretation offered by the Kansas Court of Appeals. The Secretary's prescribed procedures for amending birth certificates had been promulgated and the legislature had been on notice that changes were permissible in a

[125] *In Re Gardiner*, 22 P.3d 1086.

[126] *See* note 109 *supra* (suggesting the kind of correcting interpretation offered in both *Littleton* and *Ladrach*).

[127] *See* notes 33-34 and accompanying text *supra*.

[128] *But see* KAN. STAT. § 38-1128 (b) ("The fact that the father and child relationship was declared after the child's birth shall not be ascertainable from the new birth registration, but the actual place and date of birth shall be shown.").

[129] Admittedly, these may be disanalogous if sexual identity is not established at or before birth. *See* note 40-41 and accompanying text *supra*. Of course, birth records serve numerous functions, only one of which would be to reflect the facts at the time of birth, so this possible difference may not be that important.

case like J'Noel Ball's. Yet, the legislature had done nothing to indicate either that it believed this a usurpation of authority or that it disagreed substantively with the position adopted by the Secretary. Given the legislature's tacit approval or, at least, acquiescence, a court not wanting to usurp legislative roles would presumably refrain from claiming that the Secretary's action and policy had contradicted the intent of the legislature. Indeed, given that the legislature had not indicated any disagreement with the underlying policy reflected by the prescribed regulations, a court bent on refraining from making policy would presumably be loath to step in and claim that the legislature's policy had been undermined.

When trumpeting its own commitment to deference to the legislature on policy-making matters, the Kansas Supreme Court failed to mention the Secretary's promulgated regulation and the legislative silence that had followed the promulgation of the policy. By omitting that feature of the background of the case, the court could imply that it had been given no guidance and, perhaps, that the proper course was simply to defer. Had the court mentioned the existing regulation when explaining its own duty to defer, the court would have had some difficulty justifying its denial of the validity of J'Noel Ball's marriage and certainly would not have been able to claim that the legislative silence was somehow indicative that J'Noel Ball's marriage should not be recognized.[130]

Suppose that there had been something amiss in the process whereby the relevant regulation had been adopted or promulgated by the Secretary of Health and the Environment. That the legislature had remained silent after the regulation had been promulgated might at the very least be taken as an indicator that the substance of the regulation was not undermining public policy[131] and thus as militating against a finding that according the Wisconsin record full faith and credit would undermine Kansas policy. The Kansas Court of Appeals instead treated the regulation as neither helping nor hurting J'Noel Ball's legal position.[132]

The Kansas Supreme Court ignored the Secretary's promulgated regulation concerning changes to sex designation, instead em-

[130] *See Gardiner*, 42 P.3d at 136 ("We view the legislative silence to indicate that transsexuals are not included.").

[131] *Cf.* PSB v. Comerica, Inc., 391 N.W.2d 371, 375 (Mich. App. 1986) (legislative silence construed to indicate agreement with Bureau's interpretation).

[132] The *Gardiner* court instead decided to treat the regulation as neutral. *See id*. at 108 ("We read the Kansas regulation as neutral, favoring neither J'Noel's nor Joe's positions on the effect of the Wisconsin birth certificate.").

phasizing that the Kansas Legislature had limited marriage to one man and one woman[133] and that the "words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."[134] The court noted that 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 disphoria,"[135] and then concluded that a "male-to-female post-operative transsexual does not fit the definition of a female."[136] Yet, the court's analysis proves too much. If neither 'male' nor 'female' encompasses transsexuals, then one would expect that the Kansas Supreme Court would not permit post-operative transsexuals to marry anyone at all.

While the legal analyses offered by the Kansas and Texas courts were disappointing, they nonetheless established law in those states and post-operative transsexuals there are only permitted to marry individuals of their apparent sex.[137] In New Jersey, post-operative transsexuals can marry individuals of their chromosomal sex.[138]

Consider a post-operative transsexual who marries someone in accord with local law. That marriage will be recognized as long as the couple stays within the state. However, a more complicated issue is presented if the couple wishes to determine whether the federal government or other states will recognize the marriage. Thus, a separate question is whether a New Jersey marriage in which one of the parties is a post-operative transsexual will be recognized in Texas and vice versa.

III. FEDERAL AND STATE MARRIAGE RECOGNITION LAWS

Married individuals are entitled to a variety of federal benefits to which they would not otherwise be entitled,[139] and it might be important to know whether the Federal Government would recog-

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

[134] *Id.* at 135.

[135] *Id.*

[136] *Id.*

[137] This is true as long as the marriage does not involve *two* post-operative transsexuals.

[138] *See M.T v. J.T.*, 355 A.2d 204 (N.J. App. 1976).

[139] Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 145 (2000) (discussing "over 1049 federal laws that include marital status as a factor").

nize a marriage that is recognized by an individual's domicile. Further, society is becoming ever-increasingly mobile and individuals whose marriages are recognized locally might want to know whether their marriage would be recognized in a different jurisdiction where the couple plans to move. While there is no case law on point,[140] there are a number of cases and statutes which are at least of some relevance to these issues.

A. Federal Benefits

To determine whether the Federal Government would recognize a marriage between a post-operative transsexual and his or her marital partner, it will be necessary to consider the Defense of Marriage Act (DOMA),[141] as well as some cases in which courts discuss the federal protections which are accorded to transsexuals. A few difficulties should be noted at the outset, however. One is that the definition of "sex" for purposes of DOMA has not yet been litigated, so the interpretations of "sex" for purposes of other federal statutes may be helpful but certainly will not be dispositive on this issue. Another is that the interpretations of "sex" for purposes of other statutes have often focused on whether a provision prohibiting discrimination on the basis of sex includes protections for transsexuals—they have not focused on whether the sex of a post-operative transsexual corresponds to his or her apparent rather than chromosomal sex.

[140] The marriage at issue in *Gardiner* had been celebrated in Kansas. *See Gardiner*, 42 P.3d at 122. The marriage at issue in *Littleton* had been celebrated in Kentucky. *See Littleton*, 9 S.W.3d at 225. However, it is unclear whether Kentucky would recognize the marriage if it had been known that Christie was transsexual. The *Littleton* court did not address this issue and thus of course did not address whether Texas should recognize a marriage validly celebrated in another domicile. The only references to Kentucky law in the *Littleton* opinion were to Kentucky's refusal to recognize same-sex marriages, *see id.* at 225 (referring to Ky. Rev. Stat. Ann. § 402.020(1)(d)) and *id.* (referring to Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973)). The court chose not to refer to the Kentucky statute permitting changes to birth certificates where the individual has undergone a sex-change operation. *See* note 21 *supra*. While the existence of the Kentucky statute would not be dispositive with respect to whether Texas would have to recognize the Littleton's marriage, *see* notes 159-73 and accompanying text *infra*, it is something that the court should at least have mentioned, if not considered.

[141] The *Littleton* court mentioned DOMA. *See Littleton*, 9 S.W.3d at 226, (cryptically suggesting, "[s]o even if one state were to recognize same-sex marriages it would not need to be recognized in any other state."). *See id.* Of course, one of the questions at hand is whether the Littletons' marriage was a same-sex marriage.

The Defense of Marriage Act[142] has two different sections which differ in important ways. One part defines marriage for federal purposes:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[143]

The provision makes quite clear that only marriages between one man and one woman will be recognized for federal purposes.[144] However, it is simply unclear whether the federal government will defer to the states with respect to which marriages involve a legal union of one man and one woman or instead will use its own definitions. Thus, it may be that even after DOMA the federal government would recognize the marriage at issue in *M.T.* and would also recognize a marriage of a post-operative transsexual with someone of his or her apparent sex,[145] as long as the respective domiciles characterized these unions as involving one man and one woman. Or, it may be that the federal government has implicitly adopted definitions of "man" and "woman" for purposes of DOMA so that only certain marriages involving transsexuals will be recognized.

In *Holloway v. Arthur Andersen and Company*,[146] the Ninth Circuit Court of Appeals refused to find that Title VII was designed to protect transsexuals against employment discrimination if they were being discriminated against because of their transsexual status.[147] However, the court did suggest that "transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII."[148] In *Schwenk v. Hartford*,[149] the same circuit suggested that the jurisprudence had developed subsequent to *Holloway*[150] and that Congress had intended to enact

[142] Pub. L. 104-199, 110 Stat. 2419.

[143] 1 U.S.C. § 7.

[144] A separate issue is whether such a limitation violates federal constitutional guarantees. *See* note 61 *supra*.

[145] *See* note 80 *supra*.

[146] 566 F.2d 659 (9th Cir., 1977).

[147] *See id.* at 664.

[148] *Id.*

[149] 204 F.3d 1187 (9th Cir. 2000).

[150] *See id.* at 1202 (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

legislation barring discrimination on the basis of sex and gender.[151] Because Congress also wished to offer protection on the basis of gender, the court reasoned that discrimination on the basis of transsexual status might also be actionable.[152]

In *Miles v. New York University*,[153] a federal district court held that a pre-operative transsexual could sue New York University under Title IX for sexual harassment.[154] A professor employed by the University had made numerous unwelcome advances[155] because of the plaintiff's apparent sex.[156] The court suggested that the pre-operative plaintiff was male,[157] but did not address whether a post-operative transsexual should be classified in terms of her apparent rather than chromosomal sex.

The central issue here is how the sex of a post-operative transsexual should be classified for purposes of the Defense of Marriage Act. Two federal cases are relevant in that they discuss marriages involving post-operative transsexuals, although they do not address the Defense of Marriage Act and they occurred prior to the development of much of the case law involving transsexuals.[158]

In *Hoffburg v. Alexander*, Marie von Hoffburg challenged her discharge from the Army.[159] Von Hoffburg had married a female-to-male transsexual, and the Army had claimed not only that the marriage was a nullity but that von Hoffburg should be discharged for "homosexual tendencies."[160] The *Hoffburg* court remanded the case to the Army Board for Correction of Military Records for a determination of whether von Hoffburg was "a 'homosexual' within the meaning of the DOD's [Department of Defense's] policy directive" and whether she possessed the prohibited tendencies referred

[151] *See id.*

[152] *See* 204 F.3d at 1202 ("we conclude that Schwenk's assertion that the attack occurred because of gender easily survives summary judgment"). The *Schwenk* court was analyzing the Gender Motivated Violence Act (GMVA). *See id.* at 1198. But the court's analysis applied both to the GMVA and to Title VII. *See id.* at 1201-02.

[153] 979 F. Supp. 248 (S.D.N.Y. 1997).

[154] *See id.* at 250 (denying defendant's summary judgment motion).

[155] *See id.* at 249.

[156] *See id.* ("The issue before us is whether Title IX protects a biological male who has been subjected to discriminatory conduct while perceived as a female.").

[157] *See id.*

[158] Both cases occurred over twenty years ago. *See* notes 144 and 151 *infra*.

[159] Hoffburg v. Alexander, 615 F.2d 633, 634 (5th Cir. 1980).

[160] *Id.* at 635-36.

to in the statutory language.[161] The *Hoffburg* court implied that the difficult issue was not whether von Hoffburg's marital partner was female but whether von Hoffburg should be thought lesbian.[162] Thus, the *Hoffburg* court seemed confident that post-operative transsexuals remained members of their chromosomal sex.

In *Darnell v. Lloyd*, the plaintiff sued the Connecticut State Commissioner of Health to have the sex designation recorded on her birth certificate changed from male to female.[163] The plaintiff had undergone sex reassignment surgery and wanted her birth certificate to reflect that change because "she will be unable to obtain a license to marry a man unless she can produce a birth certificate proclaiming her a female."[164] The court suggested that because "one's fundamental interest in marriage . . . [may be] implicated," the Commissioner could not refuse to change the sex designation on the birth certificate without showing some substantial state interest that would be undermined by such a change.[165] The *Darnell* court thereby implied both that a post-operative transsexual could marry someone of his or her chromosomal sex and that a post-operative male-to-female transsexual has indeed changed her sex.[166]

While not squarely addressing the issue here, the *Hoffburg* and *Darnell* courts implicitly took opposite approaches with respect to whom transsexuals would be permitted to marry. Under DOMA, marriages will only be recognized if the marital partners are members of the opposite sex. One infers that the *Hoffburg* and *Darnell* courts would disagree about whether Littleton's or Ball's marriage would fall within the DOMA exception. Congress simply failed to specify whether the determination should be made solely in terms of the individual's chromosomes or, instead, by looking at a variety of factors. Absent clarifying language, one can only expect a great deal of litigation until the matter is resolved, although it is not at all

[161] *Id.* at 639.

[162] *See id.* at 640 ("Whether Marie von Hoffburg's alleged marriage and presumed sexual contacts with a biologically female transsexual fall within the provisions of AR 635-200 pertaining to homosexuals is an issue which should be determined by the appropriate authorities after full administrative review.").

[163] Darnell v. Lloyd, 395 F. Supp. 1210, 1211 (D. Conn. 1975).

[164] *Id.* at 1213-14.

[165] *Id.*

[166] *Darnell*, 395 F. Supp. 1210; *cf.* Richards v. United States Tennis Ass'n., 400 N.Y.S.2d 267, 272 (1977) (suggesting that according to all indicators except chromosomal, Renee Richards was female).

clear how courts could even decide this issue absent more direction from Congress.

B. Interstate Recognition

The other provision of DOMA is at least as complicated and difficult to interpret. That provision discusses the full faith and credit implications of same-sex marriages or marriage-like relationships. It reads:

> No state, territory or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.[167]

This provision seems to suspend the traditional full faith and credit rules for marriage-like relationships involving individuals of the same sex.[168] Yet, it does not specify which law determines whether the parties are of the same sex and thus whether their relationship need not be given full faith and credit. It would matter, for example, whether the relevant law is the law of the state where the individuals were married, the law of the forum state, or federal law, and there simply is no specification in the statute itself.

Consider the marriage at issue in *M.T.*[169] Suppose that the couple had remained married but had moved to Texas. According to New Jersey law, this is a marriage between two individuals of different sexes and thus was not a same-sex marriage at the time that it was celebrated. However, according to Texas law, this is a same-sex marriage. It is simply unclear whether this is the kind of marriage that DOMA was intended to cover.

Under one interpretation of DOMA, this marriage would not have to be recognized, since according to Texas law it is a "relationship between persons of the same sex that is treated as a marriage under the laws of . . . [another] State."[170] On another interpretation, this would not fall within the DOMA exception because under New Jersey law this is not "a relationship between members of the same

[167] 28 U.S.C. § 1738C.

[168] A separate question is whether Congress has the power to make such an exception. For reasons to think that it does not, *see generally* Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279-323 (1997).

[169] 355 A.2d 204 (N.J. App. 1976).

[170] *Id.*

sex that is treated as a marriage."[171] On yet another interpretation, the question is whether under the federal criteria for determining sex, the marriage celebrated in New Jersey was between members of the same sex or of different sexes.

Congress failed to specify whose law to use to determine sex, because it was not focused on marriages involving post-operative transsexuals when passing DOMA. However, lack of specified intention notwithstanding, courts will have to guess what Congress intended, either trying to capture congressional intent or hoping that Congress will make the appropriate correction if its intent is misconstrued.

Even if congressional intent were clear on this matter, not all issues would then be resolved. DOMA allegedly creates an exception to the full faith and credit guarantees afforded by the Constitution. However, there is an additional wrinkle to these matters which is not settled by DOMA.

Suppose that DOMA were interpreted to apply only to those marriages which were viewed by the domicile at the time of celebration as involving same-sex partners. On this interpretation, the marriage at issue in *M.T.* would not fall within the exception created by DOMA because the New Jersey court characterized that marriage as being between a man and a woman.[172] In that event, background law would not have been changed by DOMA and the issue would be whether the Full Faith and Credit Clause permits states not to recognize a marriage validly celebrated in another jurisdiction.

Both the First and the Second Restatement of the Conflict of Laws suggest that a marriage valid in the states of celebration and domicile at the time of celebration should be recognized throughout the country.[173] As the Court explained in *Loughran v. Loughran*, "marriages not polygamous or incestuous or otherwise declared void by statute [in the domicile] will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction."[174] Yet, the *Loughran* court did not suggest that marriages valid in the states of celebration and domicile at the time of the marriage would have to be recognized in every other jurisdiction as a constitutional matter, and the First and Second Restatements do not bind the states.[175] It is simply unclear whether the Constitution requires that such marriages be recognized in all of the states.

[171] *Id.*

[172] 355 A.2d 204 (N.J. App. 1976).

[173] *See* FIRST RESTATEMENT OF THE CONFLICT OF LAWS §§ 121, 132. The possible exception regarding remarriage discussed in § 131 is not relevant here. *See also* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 283.

[174] Loughran v. Loughran, 292 U.S. 216, 223 (1934).

Full faith and credit must be given to judgments,[176] which means that there is no public policy exception which permits states to refuse to recognize divorces granted in other jurisdictions,[177] absent lack of jurisdiction.[178] However, marriage does not involve a judgment but instead an act or record,[179] and thus the Full Faith and Credit Clause does not require a state to recognize a marriage which violates an important public policy.[180]

Suppose then that DOMA is not held to be applicable to marriages involving transsexuals or that DOMA is held unconstitutional and so applicable to no marriages. It would be important to decide what the background law (i.e., without DOMA) permits states to do. This law is relatively undeveloped. While there are some cases dealing with interracial marriages which were valid in the domicile at the time of celebration but were subsequently challenged when the couples moved to states refusing to recognize such marriages, no clear pattern has emerged with respect to whether such marriages must be recognized.[181]

Kentucky has a statute permitting individuals to have their birth certificates modified after they have had sex-reassignment surgery.[182] Suppose that the Kentucky Supreme Court were to follow *M.T.* and hold that post-operative transsexuals who have had their birth certificates amended could marry individuals of their chromosomal sex. Suppose further that the facts of *Littleton* are modified.

[175] Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS. L. J. 41, 52 n.49 ("The restatements are, after all, syntheses rather than codifications of the common law and are not binding upon the states.")

[176] *See* notes 90-92 and accompanying text *supra*.

[177] *See* Williams v. North Carolina, 317 U.S. 287 (1942).

[178] *See* Sherrer v. Sherrer, 334 U.S. 343, 356 (1948) (divorce granted by court of competent jurisdiction must be given full faith and credit).

[179] *See* Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 25 (2000) (noting that states can refuse to credit marriages but not judgments because of a public policy exception).

[180] A separate question would be whether other constitutional constraints would be violated by a state's refusal to recognize a marriage that had been valid in the domicile at the time of celebration. *See* MARK STRASSER, THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERAL PRINCIPLES AND CONSTITUTIONAL PROTECTIONS, ch. 6 (1999).

[181] For a discussion of these cases, *see id.*

[182] *See* note 21 *supra*.

A post-operative male-to-female transsexual has her sex designation changed in accord with local law and then marries a man in Kentucky. The couple adopts children or, perhaps, one of the parties has children from a previous marriage.[183] Then, several years later, the couple moves to Texas to take advantage of a job opportunity and the validity of the marriage is challenged in Texas.

Even without DOMA,[184] it is not clear if Texas would be constitutionally *required* to recognize the marriage. Nonetheless, there would be several important reasons why Texas as a matter of good public policy should recognize such a marriage. The reasonable and justified expectations of the parties which had been created when they married in accord with local law would certainly militate in favor of the marriage's recognition, as would the interests of the children. The comity and respect that is accorded to other states would also militate in favor of the recognition, especially because Texas would presumably want the marriages of its current or former domiciliaries to be recognized when those parties traveled through or moved to other states. Indeed, it is not clear what state interests would be undermined by affording recognition to the marriage, although it is clear that individual interests and justified expectations would be destroyed by the failure to afford that recognition. These are precisely the kinds of interests which the Fifth and Fourteenth Amendments should protect even if the Full Faith and Credit Clause does not. Those interests notwithstanding, however, the United States Supreme Court has never held that states are constitutionally required to recognize marriages valid in the domicile at the time of celebration.

IV. CONCLUSION

Currently, post-operative transsexuals and their spouses are at risk. States differ in defining sex, so a post-operative transsexual who travels across state lines may not have his or her marriage recognized, even though it is recognized in the state of domicile. This is simply intolerable. The interests implicated in marriage are of fundamental importance and it is difficult to imagine a state interest

[183] For example, Renee Richards fathered children before having had sex-reassignment surgery. *See Richards*, 400 N.Y.S.2d at 272 ("When an individual such as plaintiff, a successful physician, a husband and father . . .").

[184] It is assumed for purposes of this section that DOMA is either inapplicable or has been declared unconstitutional.

so important that it would justify refusing to recognize a marriage which is valid in a sister state.

There are many reasons why it is irrational for states to suggest that because marriage is inherently related to providing a setting in which children can be raised there is justification for refusing to recognize transsexual or transgender marriages. First, a post-operative transsexual and his/her marital partner might be raising children biologically related to at least one of them. Second, if the claim is that the couple cannot now have a child through their union,[185] this would speak to precluding post-operative transsexuals from marrying anyone at all. No state has such a policy and any state attempting to adopt such a policy would thereby seem to abridge the fundamental right to marry. In *Zablocki v. Redhail*, the Court recognized that "the right to marry is of fundamental importance for all individuals."[186] No asterisk was added to suggest that transsexuals were not included.

Littleton and *Gardiner* help illustrate what should have been obvious before they were decided. States are not respecting the fundamental right to marry when denying transsexuals the right to marry their life-partners. Regrettably, the Court refused to hear both *Littleton* and *Gardiner*,[187] perhaps out of a recognition that granting certiorari would entail recognizing the marriage rights of a variety of groups or overruling established privacy jurisprudence. For example, the interests militating in favor of recognizing marriages involving transsexuals also militate in favor of recognizing same-sex marriages, and the Court probably recognizes that it would be even more difficult to offer a credible denial that the Constitution protects same-sex marriages if the Constitution protects marriages involving transsexuals. Of course, that difficulty arises precisely because the same interests militating in favor of constitutional protection of different-sex marriages also militate in favor of constitutional protection for marriages involving transsexuals or same-sex couples. It can only be hoped that the Court will soon

[185] Those claiming that same-sex couples should not be permitted to marry appeal to the inability of such couples to have a child through their union, but such couples can and do have children, e.g., by adopting or making use of artificial insemination or surrogacy. For a discussion of some of these arguments, *see* MARK STRASSER, THE CHALLENGE OF SAME-SEX MARRIAGE, ch. 7.

[186] Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

[187] *See Littleton v. Prange*, 531 U.S. 872 (2000) *cert. den.*; *Gardiner v. Gardiner*, 2002 WL 1402225 *cert. denied*.

reaffirm that the United States Constitution protects the marriage rights of all individuals and that neither the states nor Congress can simply abridge these rights without justification.

3 HOUS. J. HEALTH L. & POL'Y 331-340

Houston Journal of Health Law & Policy
ISSN 1534-7907

BRIEF OF THE AMERICAN COLLEGE OF LEGAL MEDICINE IN *OREGON V. ASHCROFT*

Miles J. Zaremski*
& Maxwell J. Mehlman**

In 1994, Oregon voters by referendum adopted the Oregon Death with Dignity Act, and after surviving challenges in the courts and from voters, the act went into effect in 1997.[1] The law establishes a detailed procedure whereby physicians may prescribe lethal oral doses of controlled substances for terminally ill Oregon residents.[2] Approximately 129 Oregonians have availed themselves of the relief provided for by the act.[3]

Physician-assisted suicide is not supported by some segments of society, including the American Medical Association and the right-to-life movement. The Oregon law has provoked efforts to block its operation not only in Oregon but at the federal level. One approach opponents have used is to interpret the Controlled Substances Act[4] (CSA) to prohibit physicians from prescribing controlled substances to facilitate patient suicide. In 1997, the administrator of the Drug Enforcement Administration, the unit in the Justice Department that enforces the CSA, issued such an interpretation, only to have it reversed by Attorney General Janet Reno.[5] But after the Bush administration took office, Attorney General John Ashcroft re-issued this interpretation. By memorandum dated No-

* J.D., Case Western Reserve University; Partner, Kamensky and Rubenstein; and Immediate Past President, American College of Legal Medicine.
** J.D. Yale Law School; Arthur E. Petersilge Professor of Law and Director, The Law-Medicine Center, Case Western Reserve University School of Law; Professor of Bioethics, Case Western Reserve University School of Medicine. The authors wish to thank Elizabeth Hammack for her research assistance.

[1] OR. REV. STAT. § 127.800 et seq. (1997).

[2] § 127.815.

[3] Death with Dignity National Center, Oregon's Death with Dignity Act, Key Statistics, http://www.deathwithdignity.org/resources/oregonstats.htm (last visited April 2, 2003).

[4] Controlled Substances Act, 21 U.S.C. §§801-950 (2000).

[5] Memorandum for the Attorney General, U.S. Department of Justice, Washington, D.C., from Sheldon Bradshaw, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, June 27, 2001, *reprinted in* 17 ISSUES L. & MED. 269, 270 (2002).