

# Getting Sex “Right”: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship

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## ABSTRACT

*This Essay criticizes two negative tendencies in legal scholarship, lawyers’ arguments, and judicial opinions addressing the legal sex of and the validity of marriages involving transsexual and intersex persons. First, some pro-trans-recognition arguments display a tendency to treat questions of a person’s legal sex as simply a matter of biomedical fact or “truth.” These arguments typically treat views rejecting transgender persons’ self-identified sex as objectionable primarily for their failure to get sex “right,” that is, their failure to enshrine in law the current views of medical practitioners. Second, and relatedly, some pro-recognition arguments manifest an undefended heteronormativity, naturalizing not only sex, but also cross-sex desires. Canvassing U.S. judicial decisions in marriage-related cases that reject claims that a litigant’s sex had been legally changed, this Essay argues both that these arguments’ heterosexism is objectionable and unnecessary for making effective sex recognition arguments, and that the “getting sex right” approach fails to appreciate how legal sex is a normative, regulatory tool, not a natural fact. “Getting sex right” risks unaccountable legal decision-making and transfers of power to an alternative regime, that of medicine, that may seem more congenial than the legal arena at the current moment, but which is not guaranteed to promote the liberty and equality of transgender, or indeed any, persons.*

Litigants, judges, and scholars around the world have grappled with issues of sex determination. A frequent site of contestation has been civil marriage, which in modern times has, until recently, been formally restricted in most western jurisdictions to a union of one man and one woman.<sup>1</sup> When the validity

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1. As of the writing of this Essay, the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, and Argentina are the only countries that allow same-sex couples to marry. Massachusetts, Connecticut, Iowa, Vermont and New Hampshire are the only states in the U.S.A. to do so, along with the District of Columbia. In addition, the Coquille Tribe (in

of a marriage involving a transsexual or intersex person has been challenged, courts have had to respond, and have done so in countries including Australia, Canada, New Zealand, South Africa, the United States, the United Kingdom, and the European Union. The decisions have been mixed, some ruling against the transgender parties, some recognizing their lived sex. But critiques of the non-recognition decisions and arguments in favor of recognition have too often been framed either in terms that reinforce heterosupremacy, or as if the only problem has been the law's failure to follow some medical practitioners in embracing a more nuanced version of biological sex. While this approach, which I call "getting sex right," could have some positive results, I argue in this essay that it rests on a mistaken—and dangerous—view of legal sex as a mirror of natural fact.

As just noted, some progressive decisions have recognized the sex/gender of transpersons who have undergone surgical procedures, and concomitantly the validity of marriages into which they have entered. These include *M.T. v. J.T.*,<sup>2</sup> decided by an intermediate appellate court in New Jersey in 1976; the declaratory judgment action decided by the High Court of Wellington in *Attorney General v Otahuhu Family Court*<sup>3</sup> in New Zealand in 1994; the case of *In re Kevin*,<sup>4</sup> decided October 2001 by Justice Richard Chisholm of the Family Court of Australia and affirmed on appeal; and the landmark 2002 judgment of the European Court of Human Rights in *Goodwin v. U.K.*<sup>5</sup>

In many other instances, however, courts continue expressly to follow the unfortunate biologism of the path-breaking 1970 English judgment in *Corbett v. Corbett (otherwise Ashley)*.<sup>6</sup> *Corbett* began with a suit seeking a declaration of legal nullity of a marriage brought by an uncontested male, Arthur Corbett, against a transsexual woman,<sup>7</sup> April Ashley; Corbett had married Ashley with full knowledge that she had been identified male at birth and in adulthood had undergone various "sex reassignment" procedures, including vagino-plasty.<sup>8</sup> As framed by Justice Ormrod, "[t]he case . . . resolves itself into the primary issue of the validity of the marriage, which depends on the *true sex* of the respondent, and the secondary issue of the incapacity of the parties, or their respective willingness or unwillingness, to consummate the marriage, if there was a marriage to consummate."<sup>9</sup> The court held that the concordance of genitals, chromosomes, and gonads at birth naturally and indelibly marks a

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Oregon) allows couples to marry regardless of the parties' sexes. See generally Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT'L & COMP. L. 509 (2009).

2. 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976).

3. (1995) 1 NZLR 603, 607 (HC).

4. [2001] 28 Fam LR 158 (Austl.).

5. 35 Eur. Ct. H.R. 18 (2002); see also *I v. United Kingdom*, (2003) 36 E.H.R.R. 53.

6. 2 All E.R. 33 (1970) (Eng.).

7. By this I mean someone who currently identifies as a woman but who had been identified as male at birth. In this Essay I will also refer to such individuals as "transwomen" or "women with a transsexual history." Their gender counterparts are "transsexual men" or "transmen" or "men with a transsexual history."

8. See *Corbett*, 2 All E.R. at 36-37, 50.

9. *Id.* at 35 (emphasis added).

person as being of one specific sex for life,<sup>10</sup> that April Corbett née Ashley was therefore male, and that her marriage to Arthur was thus void because it was between two men rather than between a man and a woman.<sup>11</sup>

*Corbett* is in many respects an outrageous decision. The judge showed some, albeit limited, sympathy for the parties, including April,<sup>12</sup> but he adopted one expert's dismissive characterization of her: "the pastiche of femininity was convincing."<sup>13</sup> He also naturalized and essentialized heterosexual marriage, avowing that "sex is clearly an essential determinant of the relationship called marriage, because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for *natural* heterosexual intercourse is an essential element."<sup>14</sup> He then deployed, to unfortunate end, a classic, though increasingly contested,<sup>15</sup> feminist distinction: according to Ormrod, "[m]arriage is a relationship which depends on sex and not on gender."<sup>16</sup> Because for Ormrod, like diamonds, sex is forever, the fact that no one claimed April had been mistakenly identified as a boy at birth meant nature doomed her to eternal maleness.<sup>17</sup>

And, if that weren't enough to invalidate her marriage to playboy Arthur, Ormrod would have

h[e]ld that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr Burou, can possibly be described . . . as "ordinary and complete intercourse" or as "vera copula—of the natural sort of coitus." In my judgment, it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres.<sup>18</sup>

Such reliance on putative, unchanging, natural facts of sex is, unfortunately, not confined to the English judiciary. United States federal sex discrimination law, contained in the statute commonly referred to as "Title VII,"

10. See *id.* at 48 ("[I]f all three [i.e., chromosomes, gonads, and genitals] are congruent, [the law should] determine the sex for the purpose of marriage accordingly, and ignore any operative [i.e., surgical] intervention.").

11. *Id.* at 50.

12. See, e.g., *id.* at 36 ("I have been at some pains to avoid the use of emotive expressions such as 'castration' and 'artificial vagina' without the qualification 'so-called,' because the association of ideas connected with these words or phrases are [sic] so powerful that they tend to cloud clear thinking.").

13. *Id.* at 47.

14. *Id.* at 48 (emphasis added).

15. See, e.g., KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 30 (1994) (arguing that biological sex should be understood as just one of many understandings or types of gender); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 8-9 (1990) (arguing against the view that sex is a pre-social bedrock upon which gender is constructed).

16. *Corbett v. Corbett*, 2 All E.R. 33, 49 (1970) (Eng.).

17. See, e.g., *id.* at 47 ("The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.").

18. *Id.* at 49.

makes it unlawful to fire someone “because of” that person’s “sex.”<sup>19</sup> When commercial airline pilot Karen Ulane was fired by Eastern Airlines after transitioning from male to female, she sued arguing that her firing was because of sex.<sup>20</sup> Although the trial court agreed,<sup>21</sup> the federal appellate court reversed in *Ulane v. Eastern Airlines, Inc.*, holding that this was not discrimination because of sex, but discrimination because Ulane was transsexual,<sup>22</sup> which the court said Congress did not intend to prohibit when it adopted Title VII in 1964.<sup>23</sup> “The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men [.]” and, the court added, “a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s . . . discontent with the sex into which they were born.”<sup>24</sup>

It is that circumstance of biology at birth that determined Ulane’s sexual destiny. The appellate court graciously conceded that “Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot’s certificate, it may be that society, as the trial judge found, considers Ulane to be female.”<sup>25</sup> Then, however, the court dug in its heels:

But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case . . . 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.<sup>26</sup>

Thus, rejecting the relevance of Karen’s personal identity or her social treatment, the *Ulane* court, as in *Corbett*, clung to the notion that there was some underlying reality of sex that human intervention could not change (presumably, which could not plausibly have been misidentified at Karen’s birth) and that the law also embodied.

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19. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)-(2) (2006) (“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

20. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082 (7th Cir. 1984).

21. *Ulane v. E. Airlines, Inc.*, 581 F.Supp. 821, 838 (N.D. Ill. 1983), *rev’d*, 742 F.2d 1081 (7th Cir. 1984).

22. *Ulane*, 742 F.2d at 1085, 1087.

23. *Id.* at 1085-86.

24. *Id.* at 1085.

25. *Id.* at 1087.

26. *Id.* (emphasis added).

Recent U.S. appellate decisions in the context of disputed marriages involving transpersons come from Texas—*Littleton v. Prange*,<sup>27</sup> decided in 1999—from Kansas—*In re Estate of Gardiner*,<sup>28</sup> decided in 2002—from Ohio—*In re Marriage License for Nash*,<sup>29</sup> decided at the end of 2003—from Florida—*Kantaras v. Kantaras*,<sup>30</sup> decided in 2004—and from Illinois—*In re Marriage of Simmons*,<sup>31</sup> decided in 2005.<sup>32</sup> Both *Littleton* and *Gardiner* discuss *Corbett*, treat it favorably (whether explicitly or implicitly), and deny legal recognition of the claimed sex of the transgender litigants, and thus of their marriages;<sup>33</sup> *Nash* and *Kantaras* rely on *Gardiner* and an earlier Ohio marriage case that in turn followed *Corbett*.<sup>34</sup>

*Littleton* was a wrongful death decision where a doctor contested the validity of a marriage based on the sex of the widow, Christie Lee Littleton, a woman with a transsexual history whom the doctor claimed was still male.<sup>35</sup> The Texas court framed the issue as: “[w]hen is a man a man, and when is a woman a woman?”<sup>36</sup> It began its analysis of Christie Lee’s legal sex with *Corbett*, which it noted was routinely cited in subsequent transgender marriage cases.<sup>37</sup> Correctly reading *Corbett* as holding that “once a man, always a man,”<sup>38</sup> the *Littleton* court likewise believed that sex or gender is forever. In a passage suggesting a sectarian religious basis for that belief, the lead opinion said: “The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person’s gender immutably fixed by our Creator at birth?”<sup>39</sup> Because sexual confirmation treatments, including surgeries, cannot change male chromosomes, the court concluded that “[b]iologically a post-operative female transsexual is still a male.”<sup>40</sup> The Court believed (although with no other evidence of Christie’s chromosomes), that “[t]he facts contained in the original birth certificate were true and accurate,”<sup>41</sup> and that the “fact” of Christie’s birth sex, to which the court equated her legal sex, could not be changed by mere mortals.<sup>42</sup>

27. 9 S.W.3d 223 (Tex. App. 1999).

28. 42 P.3d 120 (Kan. 2002).

29. 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003); see also *In re Ladrach*, 513 N.E.2d 828 (Ohio Prob. Ct. 1987) (also denying legal recognition of transperson’s lived sex).

30. 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

31. 825 N.E.2d 303 (Ill. App. Ct. 2005).

32. See generally *In re Heilig*, 816 A.2d 68 (Md. 2003) (holding that state’s circuit courts had jurisdiction to declare that a person had changed sex and remanding for evidence of permanent and irreversible change on the part of the petitioner).

33. *Littleton v. Prange*, 9 S.W.3d 223, 232 (Tex. App. 1999); *Gardiner*, 42 P.3d at 136; *Simmons*, 825 N.E. 2d. at 956.

34. *But cf. Heilig*, 816 A.2d 68 (Md. 2003) (holding that state’s circuit courts had jurisdiction to declare that a person had changed sex and remanding for evidence of permanent and irreversible change on the part of the petitioner).

35. *Littleton*, 9 S.W.3d at 225.

36. *Id.* at 223.

37. *Id.* at 226.

38. *Id.* at 227.

39. *Id.* at 224.

40. *Id.* at 230.

41. *Id.* at 231.

42. *Id.*

Similarly, though without the overt religious overtones, the *Gardiner* court ousted transsexual woman J'Noel Gardiner from her inheritance after her husband died without a will.<sup>43</sup> The court accepted the plea of the deceased's son—allegedly estranged from his father for 16 years<sup>44</sup>—that the widow was not a woman, and so the marriage was invalid<sup>45</sup> because J'Noel had been born male.<sup>46</sup> Kansas's marriage statute limited marriage to a man and a woman, and the court held as a matter of law that J'Noel Gardiner was not a woman entitled to marry a man in Kansas.<sup>47</sup> The *Gardiner* court listed *Corbett* as the first in a line of cases treating birth biology as determinative of people's legal sex.<sup>48</sup> Although the *Gardiner* court purported to treat the issue of J'Noel's sex as "one of law and not fact,"<sup>49</sup> its analysis of the terms "sex," "male," and "female" in the marriage statute referenced dictionary definitions, which treated the terms as denoting biological facts.<sup>50</sup> J'Noel could not be a woman because "the ability to 'produce ova and bear offspring' does not and never did exist" on her part.<sup>51</sup> Because J'Noel was "born a male,"<sup>52</sup> the birth circumstance of biology determined her legal sex and inability to marry forever in the eyes of the Kansas Supreme Court.<sup>53</sup>

The following year, in contrast to *Littleton* and *Gardiner*, the Ohio Court of Appeals in *In re Marriage License for Nash*<sup>54</sup> did not cite *Corbett* in its opinion. *Nash's* logic was the same, however, and it did rely on *Gardiner*<sup>55</sup> and another case that in turn followed *Corbett*.<sup>56</sup> The case arose when transsexual man Jacob Nash's applications for a license to marry unquestioned woman Erin Barr were rejected. The trial court twice refused their applications because it viewed Jacob as female and the couple thus as same-sex and ineligible to marry in Ohio.<sup>57</sup> On appeal, Jacob again lost, with the appellate court viewing his legal sex as unalterably set by the fact of his birth biology. Even though Jacob had amended his Massachusetts birth certificate after his transition to indicate his sex as male,

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43. *In re Estate of Gardiner*, 42 P.3d 120, 136-37 (Kan. 2002).

44. *Id.* at 122; see also Brief of Appellant at 22, *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002) (No. 00-85030-A) (estranged from 1983 until death in 1999).

45. See, e.g., *Gardiner*, 42 P.3d at 137 ("J'Noel remains a transsexual, and a male for purposes of marriage under [Kansas law].").

46. See, e.g., *id.* at 135 ("A male-to-female post-operative transsexual does not fit the definition of a female."); *id.* at 137 ("We are not blind to the stress and pain experienced by one who is *born a male* but perceives oneself as a female. . . . However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.") (emphasis added).

47. *Id.* at 136-37.

48. *Id.* at 124.

49. *Id.* at 135.

50. See *id.* at 135.

51. *Id.* at 135.

52. *Id.* at 137.

53. *Id.*

54. 2003 WL 23097095 (Ohio Ct. App. Dec. 31, 2003).

55. *Id.* at \*7.

56. See *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) (citing, discussing, and reaching the same conclusion as *Corbett*).

57. See *In re Marriage License for Nash*, 2003 WL 23097095 at \*1-\*2.

the Ohio court held that (under Massachusetts law), the birth certificate was merely "prima facie evidence of the *facts* recorded,"<sup>58</sup> and here "the amended birth certificate submitted by Nash as evidence of his sex was rebutted by the evidence already in possession of the trial court, to wit, Nash's original birth certificate designating Nash's sex as female."<sup>59</sup>

Now, the original birth certificate could only trump the amended certificate if birth sex were given legal priority over "sex" as subsequently determined by the amending court, which had received a letter from Jacob's "family physician, indicating that Nash had undergone gender reassignment surgery."<sup>60</sup> Like prior non-recognition decisions, the *Nash* court was relying on the conception of legal "sex" as an unalterable natural fact about persons set no later than birth: "public policy in Ohio concerning changes to birth certificates is to allow a court to 'correct[ ] **Errors/Mistakes Only** on the original birth record,' and not changes in the sexual designation when the original designation was correct."<sup>61</sup>

Next, in *Kantaras*,<sup>62</sup> the appellate court in Florida decided that transsexual man Michael Kantaras' marriage was void because Michael was not a male as required by the marriage laws of Florida, and therefore not able to marry female Linda.<sup>63</sup> After surveying various decisions disputing or recognizing the avowed sex of transsexual persons,<sup>64</sup> the *Kantaras* court simply asserted, with scarce a word of explanation, that it "disagree[d]"<sup>65</sup> with the recognition decisions and chose instead to side with the non-recognition decisions, including *Gardiner*.<sup>66</sup> What the court did say was that it agreed that "the common meaning of male and female, as those terms are used statutorily, . . . refer[s] to immutable traits determined at birth."<sup>67</sup> So, once again, legal sex is taken to be a natural fact, unchangeable, established at birth.

In the most recent published sortie of a U.S. court in this area, the Appellate Court of Illinois affirmed the termination of Sterling Robert Simmons' parental rights, and thus any possibility of his seeking custody of his twelve-year-old child, because Mr. Simmons was a transsexual man.<sup>68</sup> There was no claim of fraud or deception by Simmons's non-transsexual spouse Jennifer; she and Simmons had their child via artificial insemination.<sup>69</sup> The problems arose only when Simmons later sought a divorce and custody of their child. In response, Jennifer argued that Simmons had no rights because the couple was not validly married as Simmons was not legally male. Agreeing, the court held that the

58. *Id.* at \*4 (emphasis added).

59. *Id.* at \*5.

60. *Id.* at \*1.

61. *Id.* at \*6 (emphasis in original).

62. 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

63. *Id.* at 155-56.

64. *See id.* at 158-60.

65. *Id.* at 161.

66. *See id.* at 158-61.

67. *Id.* at 161.

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

69. *See id.* at 307.

Simmons' marriage was invalid<sup>70</sup> and, thus, that the artificial insemination agreement and various state parentage laws were all inapplicable.<sup>71</sup>

*In re Marriage of Simmons* is a disconcerting, but sadly not atypical decision. The court did not engage in any examination (let alone a candid discussion) of the purposes of the mixed-sex requirement for civil marriage and of how recognizing Simmons' avowed sex, and thus the validity of his marriage, would or would not have served those purposes. The court offered no legal *definition* of sex, of male and female, for which it might then have been held accountable on appeal or for which the state legislature might be held accountable for its supposed political judgment that those were appropriate definitions and attendant limitations.

Rather, the Illinois judges uncritically acted as if *legal sex*, for purposes of various *statutory enactments*, were a mere brute biological *fact*. The court said that the trial court's decision "should be overturned only if it is against the manifest weight of the evidence."<sup>72</sup> And, given testimony that Simmons still had "all his female genitalia"<sup>73</sup> (despite having had all his "internal female organs" removed<sup>74</sup>), the appellate court concluded "that the judgment of the trial court that [Simmons] is a female and not legally a male was not against the manifest weight of the evidence."<sup>75</sup> Thus, Sterling Simmons's purported marriage to Jennifer was invalid. From that, the court therefore concluded that Simmons was not a married "man within the meaning of the [Illinois Parentage Act of 1984]."<sup>76</sup>

But the court was at best incomplete in its reasoning here, in a way engendered by its unvoiced commitments to a particular gender ideology.<sup>77</sup> The judges nowhere offered a definition of male or female for purposes of the Parentage Act, or any other Illinois law. Indeed, their conclusion (quoted above) was that there was no reversible error in the district court's holding that Simmons "is a female and not *legally* male"<sup>78</sup> or, as the court phrases it elsewhere, "is a *woman* and not *legally* male."<sup>79</sup> In the judges' views, so far as their official explanation allows them to be reconstructed, Simmons' womanhood was just a fact of nature. Thus, Simmons' corrected birth certificate identifying him as male was dismissed because it could not, "*legally speaking*,

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70. *Id.* at 309-10.

71. *Id.* at 311 (holding Section 3 of Illinois Parentage Act inapplicable); *id.* at 312 (holding Section 5 of Illinois Parentage Act of 1984 inapplicable); *id.* (holding common law breach of contract and promissory estoppel causes of action inapplicable); *id.* at 313 (rejecting de facto parent argument); *id.* (rejecting equitable estoppel argument); *id.* at 314 (holding laches and statute of limitations claims inapplicable). The court also rejected arguments that the minor child had a right to a legally recognized parental relationship with Sterling Simmons. *Id.* at 314-15.

72. *Id.* at 308 (emphasis added).

73. *Id.* at 309.

74. *Id.*

75. *Id.*

76. *Id.* at 312.

77. See David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1006-11 (2002), for a discussion on the ideological character of sex/gender beliefs.

78. *In re Marriage of Simmons*, 825 N.E.2d at 308 (emphases added).

79. *Id.* at 307 (emphases emphasis added).

make [him] a male” and its issuance did not “involve *fact-finding*.”<sup>80</sup> Hence, for these judges, any claim Simmons had to parental rights as a father must have been relying on a legal fiction, not the true facts that the court claimed the law reflected.

Even though Sterling Simmons was a transsexual man, that appears to the justices to have seemed not a way of being a male, but only a way of being a female. At least this was their view of someone such as Simmons who, the court suggested, “require[d] additional surgeries before sex reassignment c[ould] be considered completed.”<sup>81</sup> But considered by whom? The court relied on physicians who testified at trial,<sup>82</sup> yet Simmons’s expert, a member of the Harry Benjamin International Gender Dysphoria Association<sup>83</sup> who had “treated hundreds of transsexuals during his medical career[,] . . . described [Simmons] as a healthy *male* . . .”<sup>84</sup> When laws sanction the destruction of a parental relationship, we should understand the U.S. Constitution to require a greater justification than the unreflective acceptance of a gender ideology that allows invocation of supposed “facts of human nature”<sup>85</sup> to supplant need for any democratically embraced, functional, secular defense.<sup>86</sup>

*Corbett* and these other non-recognition decisions have been met with stern criticism from other academics besides me.<sup>87</sup> Yet ostensibly progressive critics

80. *Id.* at 310 (emphases added).

81. *Id.* at 309. Cf. JUDITH HALBERSTAM, *FEMALE MASCULINITY* 164 (1998) (referring to “full sex reassignment (if there is such a thing)”).

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

83. This group has since changed its name and is now known as The World Professional Association for Transgender Health, WPATH. See WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, <http://www.wpath.org> (last visited Oct. 4, 2010).

84. *Marriage of Simmons*, 825 N.E.2d at 308 (emphasis added).

85. Cruz, *supra* note 77, at 1023.

86. See *id.* at 1020-27.

87. See, e.g., Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275, 297-98 (1997) (concluding from Judge Ormrod’s explanation of his continued adherence to his viewst in *Corbett* “that shock alone has led the judiciary to rule that chromosomes are preferable to outward anatomy for the purposes of establishing sexual identity”); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN’S L.J. 219, 246 (1998) (“The logical flaws in the procreation argument [in *Corbett*] are glaringly obvious.”); Leslie I. Lax, Note, *Is the United States Falling Behind? The Legal Recognition of Post-Operative Transsexuals’ Acquired Sex in the United States and Abroad*, 7 QUINNIPIAC HEALTH L.J. 123, 141 (2003) (asserting “that even without the current medical knowledge, a much more humanitarian and practical decision could have been reached than that reached by the *Corbett* court.”); Helen G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 L. & SEXUALITY REV.: LESBIAN, GAY, BISEXUAL, & TRANSGENDER LEGAL ISSUES 87, 112 (2003) (“*Corbett*’s depiction of the essence of marriage is outdated today[.]”); Mark Strasser, *Harvesting the Fruits of Gardiner: On Marriage, Public Policy, and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 191 (2003) (“It is for good reason that the *Corbett* analysis has been subjected to strong criticisms which, in the words of the New Zealand High Court, ‘are difficult, indeed, impossible, to answer satisfactorily.’”) (citing *Attorney-Gen. v Otahuhu Family Court*, (1995) 1 NZLR 603, 606 (HC)); Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371, 375 n.12 (2004) (citing several critical articles from 1970 through 1990); Briana Lynn Morgan, Note, *The Use of Rules and Standards to Define a Transsexual’s Sex for the Purpose of Marriage: An Argument for a Hybrid Approach*, 55 HASTINGS L.J. 1329, 1341 (2004) (“Considering that [*Corbett*] is based on an outdated construct of marriage and over thirty-year-old inadequate scientific knowledge, it is unfathomable that any modern court would use this case as a basis for its decisions.”); Katrina C. Rose, *A History of Gender Variance in Pre-20th*

sometimes argue as if the problem is that law does not accurately track a more complex underlying fact of gender. At the same time they bracket the normative question of the propriety of the mixed-sex requirement for civil marriage, merely asking how the law should approach sex determination questions to get them “right” on the assumption that the mixed-sex restriction on marriage is proper. For example, Julie Greenberg, who has emerged as a leading legal authority on transgender and intersex issues, published a lengthy and influential article in the *Arizona Law Review* entitled, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*.<sup>88</sup> This article was extensively relied on by the intermediate appellate court in Kansas that was ultimately reversed by the Kansas Supreme Court in *Gardiner*.<sup>89</sup> In this piece, outstanding for bringing intersex issues into the legal literature in a sustained fashion, Professor Greenberg “proposes that the law reject the currently accepted biologically based model for determining sex and instead adopt a more flexible approach that emphasizes gender self-identification.”<sup>90</sup>

Now, of course, the need for “determining sex” only arose for the Kansas courts in the marriage context because, like most jurisdictions today, Kansas restricts civil marriage to people of, what it statutorily refers to, as “the opposite sex.”<sup>91</sup> Were this mixed-sex requirement not in place, the sex of transpersons would be generally irrelevant to the validity of the marriages into which they enter. But what does *Defining Male and Female* have to say about that? The article does not engage this root legal problem, asserting that, “[r]egardless of the legal, moral, and societal implications of prohibiting same-sex marriages,” the mixed-sex requirement “highlights the difficulty” of simplistic positions like that taken in *Corbett*.<sup>92</sup> It criticizes “[t]he currently accepted binary model that determines an individual’s sex based primarily on the appearance of his/her external genitalia at birth” as “an inadequate system” because “it does not reflect reality.”<sup>93</sup> According to the article’s view of scholarly imperatives, “[t]he dialogue must focus on whether sexual categories should be limited to the two traditional classifications of male and female or whether sex categorization should be expanded to include intersexuality as a sex category.”<sup>94</sup>

Setting aside the views of some intersex activists that a third sex category would not be a solution,<sup>95</sup> what of the mixed-sex requirement itself? Should not

*Century Anglo-American Law*, 14 TEX. J. WOMEN & L. 77, 85 n.29 (2004) (suggesting that Rose’s prior labeling of “*Corbett* as ‘Ormrod’s Monster’ . . . is perhaps even insufficiently harsh”); Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Settings*, 28 T. JEFFERSON L. REV. 167, 172 (2005) (criticizing “*Corbett*’s ostrich-like approach”).

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

89. See *In re Estate of Gardiner*, 22 P.3d 1086, 1094-1100, 1110 (Kan. Ct. App. 2001).

90. Greenberg, *supra* note 88, at 270.

91. *Gardiner*, 22 P.3d at 1092.

92. Greenberg, *supra* note 88, at 269.

93. *Id.* at 278 (emphasis added).

94. *Id.* at 294.

95. See Alice D. Dreger & April M. Herndon, *Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action*, 15 GLQ: J. LESBIAN & GAY STUD. 199, 217 (2009) (concluding that many intersex activist groups’ “advoca[cy of] raising all children as boys or girls,” is due to a belief that “intersex is not a discrete biological category, so someone would always be deciding who to raise as

scholarly discourse focus upon that limitation on marriage rights? *Defining Male and Female* does fleetingly aver that "the current system must be analyzed to determine what principles of justice it advances."<sup>96</sup> Yet the article immediately eschews such normative inquiry, retreating into mere considerations of efficiency: "the underlying purposes of legislation that categorizes people based upon sex need to be examined to determine whether the current interpretation meets its presumed goal."<sup>97</sup>

Moreover, there are volumes of scholarship detailing the unconstitutionality of the mixed-sex requirement.<sup>98</sup> A footnote late in the article *Defining Male and Female* gestures towards this, and makes a token obeisance toward justice with the perfunctory adjectives "persuasive" and "thoughtful," writing that "[a] critique of the statutes and cases that prohibit gay and lesbian marriages is beyond the scope of this Article and has been thoroughly discussed in other scholarly works."<sup>99</sup> Then, in a practical but fatalistic move, the article sets aside any qualms about the injustice of the exclusion of same-sex couples from marriage: "[d]espite these criticisms, it appears that marriage will continue to be limited to heterosexual unions in most if not all jurisdictions for the foreseeable future."<sup>100</sup> And so, *Defining Male and Female* continues, through nearly 500 footnotes, in an effort to help courts get sex "right" for transsexual and intersex persons.

I am not suggesting there is something intrinsically objectionable about academic investigations of a limited scope. But, in some circumstances, they can be dangerous.<sup>101</sup> Incremental reform projects that biologize legal sex run the risk of further entrenching sex naturalism and heterosexism. Indeed, they might be seen as akin to asking how a court should decide what a person's race 'really' is in a case involving possible violation of an anti-miscegenation law or possible race slavery.<sup>102</sup> Certainly mixed-race litigants facing the prospect of slavery in

male, female, or intersex: three categories don't solve the problem any more than two or five or ten do.").

96. Greenberg, *supra* note 88, at 295.

97. *Id.*

98. In an article published three years before Greenberg's *Defining Male and Female*, Lynn Wardle reported that sixty-nine of seventy-two "articles, notes, comments, or essays focusing primarily on same-sex marriage" published in law journals between 1990 and June 1995 "advocated, supported, or were generally sympathetic to same-sex marriage." Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18, 20 (1996). Regardless of his somewhat paranoid explanation for the "imbalance," *id.* at 18, in views, *see id.* at 20 (claiming existence of "an intellectual taboo against expressions unsympathetic to gay and lesbian prerogatives" as "at least partial[]" cause of said "imbalance"), all of these should have been available prior to publication of *Defining Male and Female*.

99. Greenberg, *supra* note 88, at 307 n.334.

100. *Id.*

101. *See, e.g.,* Dean Spade, *Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, in 30 WOMEN'S RTS. L. REV. 288, 312 (2009) ("In doing policy reform work we must assess whether any aspects of our reform project that are incremental are actually regressive. Doing so means having a clear vision of what the world is that we are fighting for, against which we can measure incremental steps in order to ensure that they are going in the right direction.").

102. *See* Taylor Flynn, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & CIV. RTS. L. REV. 465, 474 (2009) ("Significantly, the law's structure meant that Mr. Plessy had to frame his claim within the confines of racial identity as envisioned by

the antebellum United States<sup>103</sup> or invalidation of their marriages in the twentieth century<sup>104</sup> might have been excused (whether or not entirely justified) for arguing that they should be classified as white (and, thus, ineligible for chattel slavery, or eligible to marry a white person), thereby mitigating the unjust toll the racial regime of their era would have on them.

But I believe that scholars writing articles, rather than briefs for a party, have a higher professional ethical duty than advancing whatever might help one particular constituency. We ought to provisionally accept, or at least recognize and acknowledge, the harms our work can wreak. Alas, however, even in a later article, *When Is a Man a Man, and When Is a Woman a Woman?*,<sup>105</sup> critiquing the Texas decision in *Littleton*, Professor Greenberg simply takes as given “the policy concerns underlying the limitation of marriage to persons of the ‘opposite sex’” and argues that those concerns “must be analyzed and applied to marriages in which one of the spouses is a transsexual.”<sup>106</sup> *When Is a Man a Man* notes that “[n]umerous scholars have called for an end to the ban on same-sex marriages,”<sup>107</sup> but the article does not itself endorse this call. Rather, accepting

those in power at the time. He was thus required to run the risk that a successful claim would reproduce even (and ever) more intricate levels of racial apartheid, as courts determined how much ‘whiteness’ was ‘white enough’ to fit the racial identity standards of the day. History revealed that such rulings, nonetheless, became part of the legal landscape as courts adjudicated whiteness and blackness for others who did not fit neatly into a racial binary.”).

103. See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 1-2 (1994) (discussing *Hudgins v. Wrights*, 11 Va. 134 (Sup. Ct. App. 1806), in which the freedom of three generations of women rested on the legal determination of their race).

104. See, e.g., Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 348-54 (2007) (discussing three court cases from southwestern state supreme courts involving the validity of interracial marriages turning on the races of those married).

105. Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000).

106. *Id.* at 760.

My criticism here does not contradict my discussion of accountability *vel non* in *Simmons*. See *supra* paragraph after note 71. There, I criticized the court for refusing to define its terms, an action that could leave its definitions open to attack and thus foster accountability. Here, I criticize Greenberg for accepting unjust definitions without seeking in any manner to hold their promulgators responsible for their injustice.

This is a failing of which I have been guilty on occasion, for as Ruthann Robson points out (although in excessively strong terms), some of my earlier work on the expressive function of marriage fails to condemn unjust allocations of expressive authority. See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 798 (2002) (accusing David B. Cruz, “*Just Don’t Call It Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 937, 939, 942 (2001), of approving of certain social circumstances used to argue for equal rights for same-sex couples to the expressive resource of civil marriage). While I believe Professor Robson’s reading of my article uncharitably attributed approbation to me on the basis of an absence of condemnation, she was right to criticize the latter.

To be clear, I do not claim that Professor Greenberg actually approves of the anti-gay character of the mixed-sex requirement for civil marriage. I do maintain that her arguments about how to make mixed-sex requirements for civil marriage work better (for transsexuals and intersex people) are complicitous in the heterosexist project characterized by the exclusion of same-sex couples from civil marriage.

107. Greenberg, *supra* note 105, at 762.

the mixed-sex requirement for civil marriage, which David Richards has characterized as an element of "moral slavery,"<sup>108</sup> *When Is a Man a Man* then turns its attention to the question whether courts should declare "whether [transwoman] Christie [can] legally marry [unquestioned male] Jonathon or [unquestioned female] Jane?"<sup>109</sup> This complicity with heterosupremacy is troubling.

It is not that Professor Greenberg and I are all that far apart at the bottom line, although her arguments reinforce heterosexist laws (by seeking to apply, rather than to attack, the mixed-sex requirement for civil marriage) and valorize medical authority (by seeking to make legal sex match medical pronouncements—which is a bit curious in light of her extensive work questioning dominant medical approaches to the treatment of intersex persons). I suspect we are both committed to the proposition that, ideally, a person's sex should for many or most purposes be determined by that person herself or himself—and I am using these pronouns, with their validation of the male/female dichotomy, because of the gendered limits of the English language. And where law does not recognize such self-determination, I suspect we both would insist it have powerful (perhaps most often remedial) rationales for relying on sex to allocate legal rights or duties. We should all individually be able to make gender self-determinations in an exercise of our conscientious convictions as free and equal persons.

In my view, this is not only a moral conclusion but also the proper, constitutionally compelled legal conclusion, at least in the United States under its ostensibly secular, representative, and humanly accountable democracy. In other research currently in progress, I explore the foundations for such a conclusion in the First Amendment, the Due Process Clauses, and the Equal Protection Clause of the U.S. Constitution. But additional arguments have already been developed that support this conclusion.

The Constitution could be understood to protect individuals' free exercise of gender, as well as to require the disestablishment of sex and gender. As this phrasing reflects, I have argued this position by analogy to the constitutional treatment of religion: "Both religion and gender involve ideology and social organization, rely in their descriptions and prescriptions on extra-human authority, and implicate individual and group identity deeply, in ways making them simultaneously important as matters of conscience and potentially threatening as divisive forces tending toward installation or reinforcement of hierarchy."<sup>110</sup>

Like religion, gender is ideological, for it is a way of imposing order on, and making sense of, the world; it is a matter of belief, often nonrational and non-falsifiable. People commonly insist that there are precisely two mutually exclusive and exhaustive sexes, male and female. For example, when a bill was introduced to amend California law to allow transsexual persons born in the state to change the sex designation on their birth certificates, the Campaign for

108. See David A.J. Richards, *Abolitionist Feminism, Moral Slavery, and the Constitution: "On the Same Platform of Human Rights,"* 18 CARDOZO L. REV. 767, 832-33 (1996).

109. Greenberg, *supra* note 105, at 763.

110. Cruz, *Disestablishing Sex and Gender*, *supra* note 77, at 1005-06.

California Families (“CCF”) issued an “Assembly Floor Alert” opposing the bill and a publication entitled “The Anti-Nature Transsexual Agenda.” According to CCF:

AB 194 is an attack on nature. People are born with 46 chromosomes, XX for females and XY for males. You are born either male or female, and there are no in-betweens. This bill would promote an unnatural and radical sexual agenda that erodes nature and attacks the sensibilities of families. This bill would have the State supporting the gruesome procedure of men and women having their sex organs altered and removed.<sup>111</sup>

It may matter little to CCF that current medicine flatly contradicts these claims.<sup>112</sup> This convenient and, to many, comforting, binary schema is woefully inadequate to deal not only with science but also with the lived realities of intersex and transsexual persons. It is an ideological belief.

Like religion, gender is at the same time also a matter of social organization, a way to divide people into groups sometimes assumed to share many important commonalities with others in their gender group, but not with others in a different gender group. Gender is thus a matter of identification and affiliation. Indeed, gender identifications can run quite deep and prompt visceral reactions. Many readers of this Essay may not need to be reminded of the horrific violence that is often perpetrated on those who are seen as threatening the gendered order—and thus the perpetrators’ sense of their own place in our gendered world.<sup>113</sup>

Furthermore, both religion and gender have historically and recently turned to extra-human sources of descriptive and normative authority. God and Nature have both widely been taken to provide explanations for, and justifications of, a host of religious and gender beliefs. This displacement of human responsibility for our dividing practices constitutes a key and troubling point of commonality between religion and gender.<sup>114</sup>

And it is precisely the valorization of “nature” through notions of “medical science” and, thus, biology, and the attendant displacement of human responsibility, that I am concerned about. I worry that a similar refusal of

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111. *Id.* at 1015.

112. See, e.g., Greenberg, *supra* note 88, at 281, 283-84 (listing chromosomal patterns other than XX and XY and discussing chromosomal disorders); Vernon A. Rosario, *Quantum Sex: Intersex and the Molecular Deconstruction of Sex*, 15 GLQ: J. LESBIAN & GAY STUD. 267 (2009) (critiquing idea that sex is determined binarily by X and Y chromosomes); *id.* at 274 (“Rapid advances in the genetics of sex determination have completely trashed the 1950s notion that the human Y chromosome alone determines male sex.”); *id.* at 277 (concluding that “only the most distorted and simplistic reading of the contemporary molecular biology of sex determination would suggest that it leads to a dichotomization of sex or gender”); *id.* at 279 (“Molecular genetics is likely to require a shift from binary sex to quantum sex, with a dozen or more genes each conferring a small percentage likelihood of male or female sex that is still further dependent on micro- and macro-environmental interactions.”).

113. See, e.g., David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1342-44 (1999) (discussing anti-lesbigay violence); Cruz, *Disestablishing Sex and Gender*, *supra* note 77, at 1016-20 (critically discussing psychological mechanisms of sex identification and religion).

114. See Cruz, *Disestablishing Sex and Gender*, *supra* note 77, at 1011-16, 1020-27 (explaining and criticizing such displacements of responsibility).

judgment may underlie the eager embrace of the medical profession and medical standards by pro-reform scholars and judges dealing with transsexual and intersex identity. The appeal to the self-evident normative authority of an autonomous and seemingly objective discipline such as medicine might seem to shield one from the perils or responsibility of taking a stand in making a recommendation or decision on what is, after all, a matter of law and a social issue. Whether or not there are Platonic forms, pure essences that exist independent of human recognition, those are not what law uses. Law is a human project, using human categories instrumentally for human purposes.

It misdirects our focus, to someone's political detriment, to appeal to the natural or to "the facts" of sex (as proclaimed by medical practitioners) as the basis for what are really political judgments about what identities and relationships to recognize. This happens in articles and opinions that repeatedly invoke "reality" or "biological reality"; birth attendants that succeed or fail to record "accurate gender"; supposed "historical facts" in birth registries that all seem to presume there is some objective "truth" of sex or gender,<sup>115</sup> discernable if only we try harder to set aside old ways of thinking and turn to the "experts." Indeed, even many transsexual persons' "discovery narratives" (which we certainly must recognize are favored by clinicians and reform-minded courts) invoke some true essence of sex,<sup>116</sup> a truth recognizable by legal systems if only

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115. See, e.g., *In re Cossey*, [1991] Fam Law 362 ("An entry in a birth register and the certificate derived therefrom are records of facts at the time of birth. Thus, in England and Wales the birth certificate constitutes a document revealing not current identity, but historical facts. The system is intended to provide accurate and authenticated evidence of the events themselves . . ."); *Rees v. United Kingdom* [1993] 2 FCR 49 (refusing to find violation of European Charter of Human Rights in the United Kingdom's refusal to allow transsexual woman to change sex designation on birth certificate because those who were treated as records of historical facts); *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, at ¶ 23 (2002) ("A birth certificate accordingly constitutes a document revealing not current identity but historical facts."); *I v. United Kingdom*, 36 Eur. Ct. H.R. 53 (2003), at ¶ 21 ("The 1953 Act provides for the correction by the Registrar of clerical errors or factual errors. The official position is that an amendment may only be made if the error occurred when the birth was registered."); *Corbett v. Corbett*, 2 All E.R. 33, 47 (1970) (Eng.) ("The respondent's operation, therefore, cannot affect her true sex."); *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) (quoting same language from *Corbett* and "conclud[ing] 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."); *id.* (concluding that transsexual petitioner was not entitled to birth certificate change or to marry a male because she was "correctly designated 'Boy' on [her] birth certificate."); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971) ("[I]t would appear from the medical articles and other information supplied by counsel, that mere removal of the male organs would not, in and of itself, change a person into a true female."); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) ("No one claims the information contained in Christie's original birth certificate was based on fraud or error. . . . At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate . . ."). Cf. *Attorney-Gen. v Otahuhu Family Court*, (1995) 1 NZLR 603, 629 (HC) ("There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality."); *Sheffield v. United Kingdom*, (1999) 27 E.H.R.R. 163, 198 (De Meyer, J., Valticos, J., and Morenilla J., concurring) ("It was not contested that the birth certificates of the two applicants and the related entries in the register of births correctly mentioned the sex they were when they came into the world. The fact that they have subsequently 'changed' sex gives them no right to have their 'new' sex mentioned in their birth certificates or register entries. That would be a falsification.")

116. See, e.g., Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121 (1991).

they could get past simplistic measures of sex like the natal concordance of gonads, genitals, and chromosomes promulgated in *Corbett*.<sup>117</sup>

As Sally Sheldon has written about the medicalization of abortion law in Britain, “[t]he doctors’ power to define is accepted and reinforced, with other accounts pushed to the margins. This depoliticizes the judicial decision which can be legitimated with reference to scientific truth and is thus seen as uninfluenced by personal moral or political belief.”<sup>118</sup> This is as true of sex determination as it is of abortion. Now, Professor Sheldon found in her study that what “the courts did in these cases is actively to protect and entrench the monopoly of doctors, while policing those marginal cases which did not fall within the bounds of good medical practice.”<sup>119</sup> Again, my worry is that this can happen in the trans area, with those doctors whom I would consider more “progressive,” the ones more willing to come close to saying that a person’s sex ought to be determined by their gender identity regardless of surgical, hormonal, or other medical interventions, are likely to be the ones dismissed by law and marginalized.

Granted, there have been some practical benefits of medicalization in the abortion regulation context in Britain. As Sheldon found, “[i]n general, it seems that this largely acts to protect, rather than to impinge upon, women’s reproductive autonomy.”<sup>120</sup> Likewise, medicalization can give a way for some courts to recognize some litigants’ new legal sex identity,<sup>121</sup> and a way for some number of persons to access medical care and gender confirming surgeries through insurance, as well as to make disability discrimination claims.<sup>122</sup>

But Sheldon raises an important cautionary note that we should not overlook in this context:

If the courts continue to adhere to the position of strong preference for medical self-regulation which has been so in evidence, then it seems that where the law has been effective in protecting the doctor-patient relationship from outside attacks, it is likely to be less useful at protecting reproductive autonomy within it. As such, while the alliance with medical interests may have had strategic advantages, it remains inadequate as a basis for building and protecting women’s reproductive autonomy within the courts.<sup>123</sup>

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117. See *supra* text accompanying note 10.

118. Sally Sheldon, *Subject Only to the Attitude of the Surgeon Concerned: The Judicial Protection of Medical Discretion*, 5 SOC. & LEGAL STUD. 95, 96 (1996); see also *id.* at 97 (“By ‘medicalization,’ then, I intend a broad movement by which increased weight is placed on the value of medical knowledge and the power of medical professionals is extended and entrenched.”).

119. *Id.* at 106.

120. *Id.* at 107.

121. The Florida circuit court judge in *In re Kantaras* presided over a more-than-three-week trial replete with medical experts’ testimony and rendered an 809-page written opinion finding in favor of Michael Kantaras. *In re Kantaras*, No. 98-5375CA (Fla Cir. Ct. filed Feb. 21, 2003). This particular legal success, however, was short-lived, as the District Court of Appeal reversed the trial court. *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

122. See, e.g., Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 35 (2003).

123. Sheldon, *supra* note 118, at 108; see also Sydney Tarzwell, Note, *The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender*

Similarly, it may be that medicalization might undermine the law’s capacity to protect gender autonomy within doctor-patient relationships. By urging courts to defer to medicine where people have completed medical processes, courts could be more likely to side with a doctor over a trans client, particularly if the client exercises their constitutional right to refuse certain recommended treatments<sup>124</sup> in cases where there is a dispute about whether law should recognize them as a different sex now. Moreover, “it is important to remember that the women in the front of the queue to be sacrificed in the strategy of ‘playing it safe’ are the most vulnerable—those who are unable to afford a termination outside of the NHS and who have least knowledge of how to play the system.”<sup>125</sup>

The same is likely to be true with respect to transgender issues,<sup>126</sup> although this may to some extent be true of our legal system for any dispute: class and wealth matter. For example, as Dean Spade has observed, some jurisdictions rely on genital surgeries to determine when they will accept a gender reclassification, and this then “has an income-based impact, causing greater obstacles for middle- and low-income people who cannot afford to pay out of pocket for the procedure, if they even want or need it.”<sup>127</sup>

Turning from the arguments that should or should not be made by academics to those attorneys who must advocate to advance their clients’ interests, there are certainly better and worse ways of arguing for legal recognition of one’s own or one’s client’s identity. Consider, for example, the arguments made by counsel for J’Noel Gardiner, the widow of Marshall Gardiner whose sex identification and marriage were repudiated by the Kansas Supreme Court.<sup>128</sup> Many of the arguments made on J’Noel’s behalf might be

*Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 189 (2006); John M. Ohle, Note, *Constructing The Trannie: Transgender People And The Law*, 8 J. GENDER RACE & JUST. 237, 271 (2004); Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 536 (2000).

124. See, e.g., *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (recognizing “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment”).

125. Sheldon, *supra* note 118, at 108.

126. Dean Spade has suggested that “even if the U.S. passed a [Gender Recognition Act], the most vulnerable trans people in this country still would not benefit from the law for any number of reasons — because they do not have lawyers, they are not documented, the system is not set up for people with disabilities, or they are caught in the criminal punishment system.” Dean Spade, Assistant Professor, Seattle Univ. Sch. of Law, *Trans Law & Politics on a Neoliberal Landscape*, in 18 TEMP. POL. & CIV. RTS. L. REV. 353, 368 (2009) [hereinafter Spade, *Trans Law & Politics*]; see also *id.* at 370 (concluding that “the Swedish system [for gender reclassification] still tries to establish ‘proper’ men and women and then distributes life chances based on whether you can fit these regularities.”); Spade, *supra* note 101, at 288 (2009) (positing “questions about how expertise and specifically medical expertise and authority establish administrative norms that harm marginalized people”). Cf. Spade, *Trans Law & Politics*, *supra*, at 358 (“Trans people are disproportionately poor because of employment discrimination, family rejection, troubles accessing school, medical care, and social services.”); *id.* at 359 (“Most people who experience discrimination cannot afford to access legal help, so their experiences never make it to court.”).

127. Dean Spade, *Trans Formation*, 31 L.A. LAW. 34, 37 (2008).

128. See *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002). Cf. Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 730 (2005) (explaining how a medicalized approach to trans recognition disfavors low-

classified as part of an “Oppress Them, Not Me” strategy of playing to judicial heterosexism. Thus, as has happened in other pro-trans contexts,<sup>129</sup> J’Noel’s briefs frequently attempt to draw an unbridgeable gulf between gay and lesbian persons and transpersons, even in patently false ways. For example, J’Noel’s brief repeatedly beat the reader over the head with the assertion that “a transsexual is not a homosexual.”<sup>130</sup> While this refrain might have tried to make the mere point that there is no necessary connection between transsexuality and homosexuality, J’Noel goes further, avowing that “[a] homosexual engages in sexual relations with a member of his or her same sex. A transsexual does not.”<sup>131</sup> According to J’Noel, transsexuals “desire the removal of [the wrong sexual] apparatus and further surgical assistance in order that they may enter into normal heterosexual relationships.”<sup>132</sup> However much transsexuality and homosexuality are erroneously conflated in society, J’Noel’s claim is plainly not true of all transsexual persons, many of whom do identify as lesbian or gay. Moreover, as Judith Halberstam has observed, “the simple opposition of transsexual versus gay and lesbian masks many other lines of affiliation and coalition that already exist within multiple queer communities [. . . .]”<sup>133</sup>

There was no need for J’Noel’s attorneys to make such claims simply to distance her from homosexuality. Consider in contrast the litigation in the *Kantaras*<sup>134</sup> case in the state of Florida. There, an estranged wife, Linda Kantaras, challenged the validity of her marriage to transsexual man Michael Kantaras in a divorce and custody proceeding. Like J’Noel, Michael also tried to educate the court about transsexual persons, but he did not miseducate in the way that J’Noel did. Thus, although distinguishing between transsexuality and homosexuality, Kantaras’ attorneys recognized and admitted that some transsexual men “identify as gay because they are attracted to men.” This less inflammatory approach might not be coincidental, for Michael was represented by the National Center for Lesbian Rights.

Perhaps less praiseworthy is Kantaras’ argument, similar to J’Noel’s, though perhaps less strident, that “the state’s interest in limiting marriage to

income transpeople); Alvin Lee, *Trans Models in Prisons: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447, 458 (2008) (noting that low-income trans people may lack the “economic means to access the sophisticated health care involved with diagnosing and treating [Gender Identity Disorder]”).

129. See, e.g., HALBERSTAM, *supra* note 81, at 155-56 (“Although one is extremely sympathetic to the sense of being misidentified, the need to stress the lack of identification [between transsexual men and butch lesbians] inevitably leads to a conservative attempt to reorder the sex and gender categories that are in danger of being scrambled. . . . Lesbianism suddenly becomes a category of pathology next to the properly heterosexual and gender-normative aims of the transsexual man and his feminine partner.”); *id.* at 156 (“The distinction between lesbian and transsexual is undoubtedly an important one to sketch out, but there is always the danger that the effort to mark the territory of transsexual male subjectivity may fall into homophobic assertions about lesbians and sexist formulations of women in general.”).

130. Brief of Appellant at 13, 15, 16, 19, *In re Estate of Gardiner*, 22 P.3d 1086 (2000) (No. 00-85030-A), 2000 WL 35794477.

131. *Id.* at 19.

132. *Id.* at 16 (quoting *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 271 (N.Y. Sup. Ct. 1977)).

133. HALBERSTAM, *supra* note 81, at 159.

134. *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. Dist. Ct. App. 2004).

heterosexual unions . . . is most clearly and directly supported by recognizing rather than nullifying” the Kantaras’ marriage, based in large part on its social acceptance as a heterosexual union. On the other hand, one contending that his marriage is valid in order to preserve his parental rights cannot simply deny or ignore states’ marriage laws, however heterosexist they may be. Moreover, these arguments formed a very small portion of Kantaras’ briefs, which devoted many more pages to other arguments grounded in, for example, rights of medical privacy and autonomy.

This individualistic focus is, I have argued above, far more normatively appropriate, at least in the U.S. context, than attempts to “get sex right,” and illuminate the supposedly objective “truth” of sex. It better avoids a positivistic flight from normativity.

Such ostensible refusal of judgment was at the core of the Kansas Supreme Court’s decision in *Gardiner*. There, confronted with unruly bodies, with what it conceived as “people who do not fit neatly into the commonly recognized category of male or female,” the Court attempted to forswear judgment, concluding that “the validity of J’Noel’s marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court.”<sup>135</sup> But of course the court’s legal judgment did embody judgment, necessarily taking a stand on this “question of public policy” that had not been clearly addressed by any statute. And in the same fashion, the appeals court in *Kantaras* purported simply to be relying on the legislature’s judgment that “a postoperative transsexual” person could not marry as a member of his lived sex.<sup>136</sup> The court claimed it was simply enforcing “the common meaning” of “the terms male and female as they are used in the Florida marriage statutes,”<sup>137</sup> but they gave no evidence of the Florida legislature’s intent or understanding, citing only the decisions of other courts about this supposed “common meaning.”<sup>138</sup> Nor did the Florida court even bother to cite authority for the proposition that statutes were to be interpreted according to “common meaning.”<sup>139</sup> The court insisted that if public policy were to require a change, that would have to come from the legislature.<sup>140</sup> But the court never bothered to establish that the legislature’s policy would not recognize Michael Kantaras as male.<sup>141</sup> Really, then, all we are left with is these judges’ certitude that a statute drafted to keep same-sex couples from marrying obviously means that phenotypically different-sex couples, both of whom had been identified as the same sex at birth, could not marry. Presumably then, a phenotypically same-sex couple, one of whom had been identified as another sex at birth, would be allowed to marry—all as a

135. *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002).

136. *Kantaras*, 884 So.2d at 161 (“The controlling issue in this case is whether, as a matter of law, the Florida statutes governing marriage authorize a postoperative transsexual to marry in the reassigned sex. We conclude they do not.”).

137. *Id.*

138. *See id.* (“We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.”).

139. *See id.*

140. *Id.*

141. *See id.*

matter of the “common meaning” of “male” and “female.” This is not tremendously plausible, but it does allow the court to act as though it were making no interpretive choices, but simply following decisions of a community of linguistic practice.

My fear about instead relying on medicine alone is that it might not give courts the resources to start building a true doctrine of gender autonomy. Medicalization encourages a delegation of authority over gender not to individuals, but to medical professionals, a class that has largely maintained itself as gatekeepers over, hence deniers of, access to various gender confirming treatments.<sup>142</sup> Gender autonomy would instead vest primary authority for determining the gendered directions of our lives to us individually—something I think many people working and living in this area believe the law should do. Indeed, I would go further. Under a view such as the disestablishment of sex and gender,<sup>143</sup> almost all sex distinctions in law would be unconstitutional, and we thus would not need to fight these definitional legal battles day in and day out on as many fronts; to the extent that sex ceases to matter in law, getting sex “right” will seem less imperative. I recognize the likely challenges in getting courts to accept such arguments, but I believe those challenges must be confronted and, eventually, overcome so that scholars and attorneys can support trans people without bolstering the regulatory power of psychiatry and medicine or reinforcing heterosexism.

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142. Thus, it is medical professionals, not transgender persons, who deny individuals access to surgeries such as phalloplasties or vaginoplasties until after they pass a “Real-Life test,” living up to two years as a social member of their gender. *See, e.g.,* Dan Irving, *The Self-Made Trans Man as Risky Business: A Critical Examination of Gaining Recognition for Trans Rights Through Economic Discourse*, 18 TEMP. POL. & CIV. RTS. L. REV. 375, 387 (2009) (describing “Real-Life test”).

143. *See generally* Cruz, *supra* note 77.