Seattle Journal for Social Justice

Volume 1 | Issue 3 Article 59

December 2002

Assimilation, Resistance, and Recent Transsexual Marriage Cases

Anthony S. Winer

Follow this and additional works at: http://digitalcommons.law.seattleu.edu/sjsj

Recommended Citation

Winer, Anthony S. (2002) "Assimilation, Resistance, and Recent Transsexual Marriage Cases," *Seattle Journal for Social Justice*: Vol. 1: Iss. 3, Article 59.
Available at: http://digitalcommons.law.seattleu.edu/sjsj/vol1/iss3/59

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized administrator of Seattle University School of Law Digital Commons.

Assimilation, Resistance, and Recent Transsexual Marriage Cases

Anthony S. Winer[1]

In the field of Sexuality Law, there is a current debate among certain activists and commentators concerning "assimilation" and "resistance."[2] Some assert that the goal of assimilation should guide policy choices. The view may be, for example, that by framing the goals of sexual minorities in the context of the values of the larger population, the larger population will identify more readily with sexual minorities and be more receptive to policy changes that benefit these minorities. On the other hand, other critics and advocates assert that the situation of sexual minorities is so unique, and their genuine needs so radically distinct from those of the dominant population, that assimilation is inimical to the minorities' cause, and resistance is the only appropriate approach. The predominant debate tends to presume that these two approaches are mutually exclusive.

Recent developments on the issue of transsexual marriage cast doubt on the usefulness of this dichotomy. Transsexual people who enter into legal marriages with persons whom they consider to be of the opposite sex can be said to be engaging in behavior that is simultaneously assimilative and resistive. In advocating for the concerns of people in this position then, activists and commentators cannot neatly pin their theoretical foundations exclusively on either assimilation or resistance.

This theoretical observation is put in sharp relief by recent events. The last few months have witnessed major developments in this country in the case law of transsexual identity, particularly transsexual marriage. Recent cases decided by the high courts in Kansas[3] and Maryland,[4] and by a trial court in Florida,[5] serve to emphasize the degree to which transsexual people living in opposite-sex marriages are engaged in behavior that cannot be explained as solely assimilation or resistance.

A more useful theoretical basis for analyzing the efforts of transsexual people in this context comes from the late work of Michel Foucault. Specifically, Foucault's development of the idea of "*askēsis*" can serve as a basis for understanding and advancing the movement for transsexual marriages. Adoption of this approach can move the analysis that courts have been using in this area in directions that will be more inclusive and less tied to social and theoretical stereotypes.

DEFINITIONS OF ASSIMILATION AND RESISTANCE

Initially, I offer my own definitions of assimilation and resistance.[6] These definitions capture the dynamics of the Gay/Lesbian/Bisexual/Transgender (GLBT) experience, while at the same time being sufficiently general so as not to lose sight of the foundational meanings of the terms themselves. These definitions are as follows:

- *assimilation* is undertaking a set of behaviors patterned after the behavior of members of a social group for the purpose of securing a place in that group;[7]
- *resistance* is undertaking a set of behaviors amounting to a rejection of the need to secure such a place.[8]

An example of assimilation in this sense would be a young gay male developing an interest in playing conventionally masculine team sports (for example, football or hockey) in an effort to secure a place in the societal group of young athletic men. An example of resistance would be a young gay male choosing instead to pursue an individual sport (such as tennis or swimming), in part as a means of demonstrating the lack of a need to secure a place in the societal group of players of conventionally masculine team sports. A further example of resistance, of course, would be a young gay male choosing not to participate in sports of any kind, but rather focusing on activities such as art, fashion, or theater, thereby demonstrating a rejection of the behaviors of the dominant societal group.[9]

One observation that emerges from these definitions is that the same act can be characterized as assimilative or resistant, depending on which societal perspective is adopted. This can be illustrated using the sample factual circumstances discussed above. If, in rejecting team sports, the gay male chooses instead to develop an interest in grand opera, one might say that he was engaging in resistance behavior, because grand opera is far removed from stereotypically male interests such as team contact sports, boxing and automobile racing. On the other hand, he could be said to be assimilating into certain dominant expectations regarding stereotypical interests of gay males.[10]

It might be asserted that assimilation is best thought of as being assimilative into a *dominant* group or sub-culture. In this sense of the term, adopting behaviors of gay male opera fans would not be assimilation because the group whose behavior is being adopted is not socially dominant. However, this is an unsatisfying approach. For me, the *mechanisms* of assimilation and resistance are interesting. Whether one is attempting assimilation into a dominant or non-dominant group, one is still adjusting behavior to secure a place in the group. The psychological aspects of the decision to assimilate (or resist) still involve an exercise of self-definition, regardless of the direction in which one is assimilating (or resisting).

THE FLUIDITY OF ASSIMILATION AND RESISTANCE WITHIN TRANSSEXUAL MARRIAGE

The fluidity of the supposed dichotomy between assimilation and resistance is well illustrated by considering the prototypical fact pattern of transsexual marriages that have become the subject of recent court cases. In these situations (described more fully below), a transsexual person who has undergone sex reassignment surgery has married a non-transsexual person of the primary sex other than the sex transitioned-to. Facts develop after the marriage is entered into calling its validity into doubt. Either one spouse

subsequently dies and there is a dispute over the estate,[11] or there is an attempt to obtain a court order for maintenance payments,[12] or there is a child custody dispute,[13] or some other basis for legal challenge[14] emerges.

At this point, it is worth considering certain general aspects of this prototypical fact pattern to investigate further, what assimilation and resistance mean. First, the decision to recognize one's self as transsexual involves an internal resistance to societal forces. Conventionally, a person born with a particular anatomical sex, but experiencing the identity of the other primary anatomical sex, is expected to assimilate. That is, the person is expected to adopt behaviors (particularly in styles of dress) characteristic of the assigned anatomical sex at birth. Refusing to adopt these behaviors can be viewed as resistance.

This mode of resistance is all the more acute when a transsexual person undergoes sex-reassignment surgery, as in each of the cases discussed below. One might feel that there could be no greater resistance than completing a surgical procedure to reject biological traits that would otherwise be seen to exert a requirement to assimilate. On the other hand, undergoing sex reassignment surgery can also be viewed as an act of assimilation. A person identifying as a member of one sex, but bearing physical characteristics of the other primary sex, voluntarily and at some burden and expense, undertakes a physical operation to be more like the sex of identification. Although the mechanism for change is physiological rather than behavioral, a type of assimilation takes place.

The prototypical fact pattern in the recent cases seems to involve even a greater degree of assimilation as the transsexual person marries a non-transsexual spouse. Heterosexual marriage between one man and one woman is the norm for marital relationships in this country; indeed, it is the only form of marriage sanctioned by the laws of any state.[15] Traditional marriage is so emblematic of conventional relations between the sexes that social critics, such as feminists[16] and queer activists,[17] have viewed it as problematic for years.

Accordingly, entering into a traditional male-female marriage can be viewed as significantly assimilationist for any couple. This is even more dramatically true when one spouse is a post-operative transsexual. The act of marriage to a non-transsexual spouse would be behavior that has the effect of placing the transsexual spouse very much in the center of expected societal norms for persons of the gender transitioned-to.[18]

The insufficiency of a dichotomous approach would come as no surprise to those at the vanguard of the current transgender movement. Some of the most active and aggressive advocates for transgender issues are rejecting a strict dichotomy of male and female. Gender for them is not a question of either/or. Rather, gender is perceived as existing in a wide variety of forms.

Once again, it is best to be clear at the outset regarding terminology. In this essay, the word "transgender" is used as an umbrella term that covers transsexuals, transvestites, and all those who identify (for one purpose or another, or to one extent or another) with a sex other than that with which they were born. The phrase "transsexual person," on the other hand, specifically references a person born with physiological characteristics of one sex, who desires to live as a member of the other primary sex.

The traditional view of transsexualism was susceptible to conforming to the conventional dichotomy between male and female. One was born as a male, but identified as a female, or one was born as a female, but identified as a male. This presented the choice to a transsexual person of whether or not to opt for sex-reassignment surgery. By viewing that choice as a matter of either assimilation or resistance, the analysis ultimately resulted in a degree of ambiguity and equivocation, as noted in the discussion above. A transgender person's transition to a different sex could be viewed as both resistance and assimilation. It could be seen as resistance because the person was behaving in a way that rejected the anatomical sex at birth. It could also be seen as assimilative because in adopting the behaviors, dress and physiognomy of the sex of identification, the transitioning person was making use of conventionally defined patterns of gender presentation.

However, the rejection by many modern transgender activists of the male/female dichotomy eliminates this ambiguity. For these activists there is no perceived need to solidly identify as either completely male or completely female.[19] Rather, they can refer to a "constellation" of genders and eschew the idea of one's gender being exclusively male or female.[20] Accordingly, the need to undergo surgery, or even assume any consistent form of sexual identity, does not exist.

Of course, one can consider this developing constellation approach to gender as being squarely on the resistance side of the assimilation/resistance divide. Eschewing the conventional male/female dichotomy is a revolutionary approach, essentially rejecting a tenet that many would regard as socially foundational. One might therefore assert that the development of the constellation approach is a straightforward example of resistance, and that the assimilation/resistance dichotomy still retains analytical vitality.

Even with the constellation approach to gender, most transgender people would still be making use of tropes of masculinity and femininity. The identification of certain characteristics with one of the two primary sexes is, at least for the moment, inescapable. Even if a transgender person refuses to identify solely as male or female for all purposes, or at least for some purposes at a given point in time, that person's identification will be made of a collection of factors and influences (style of dress, hair style, jewelry, make up, gait, demeanor, voice, etc.). Even if the totality of these factors and influences is conventionally ambiguous, each one will still key individually into established norms of sexual identification.

Accordingly, even under the vanguard constellation approach to transgender identity, there is substantial fluidity between the concepts of assimilation and resistance. It is difficult to say in any given instance whether one is assimilating or resisting, since the same act can be viewed as an example of either phenomenon at the same time. Indeed, the situation of transgender people in the current environment solidifies, rather than weakens, this observation.

FLUIDITY OF IDENTIFICATION AND THE LATE WORK OF MICHEL FOUCAULT

The work of French philosopher and historian Michel Foucault has been extremely influential in recent years.[21] His work includes significant references to the idea of resistance,[22] and accordingly may be viewed as a progenitor of the assimilation/resistance dichotomy.

Among the most significant[23] of Foucault's later works were *The Use of Pleasure*[24] and *The Care of the Self*.[25] In these works, Foucault investigates selected philosophical sources from antiquity to determine the origins of intellectual views of sexuality.[26] Two of the main themes developed in these volumes are *askēsis*, practical training of an individual in order to form as a moral subject,[27] and "the cultivation of the self," a fundamental and time-consuming process requiring concentration on the individual soul and its development.[28]

Carlos Ball has given substantial attention to these works and has emphasized that they evince attention to "technologies of the self," which allow individuals to undertake "a certain number of operations on their own souls, thoughts, conduct and way of being."[29] He concludes that the classical approaches elucidated by Foucault had as their goal a transformation "in order to attain a certain state of happiness, purity, wisdom, perfection or immortality."[30]

Although these final works by Foucault have attracted less attention than those produced earlier in his career, other commentators have also provided some attention to them. For example, David Halperin has investigated Foucault's idea of *askēsis* in detail.[31] He determined that although it bears some relation to the modern idea of asceticism, it was not necessarily a form of self-denial.[32] Rather, Halperin sees it is an exhortation to the pursuit of discipline to achieve well-being and self-actuation, rather than repression. It thus can transform a person who experiences gratifications and desires without understanding and control, into a person who understands, controls, and deploys them for optimal self-actuation.

In these late works, Foucault seems to suggest that being governed by a sensitivity akin to classical *askēsis* can be productive. Although these late volumes certainly do not say so explicitly, Foucault seemed to be going in the direction of concluding that modern individuals should at least consider the possibility that optimal behavior in sexual areas could be best informed by an enlightened development of the self. This would no doubt be as opposed to an externally-imposed legal code of behavior, but quite possibly a socially-imposed code as well, even if it were not explicitly legal in character.

A modern kind of *askēsis*, understood as a care of the self, can thus present an analytical tool distinct from an assimilation/resistance dichotomy. A part of the problem with the assimilation/resistance dichotomy, as outlined above, is that its meaning depends on a reference to a societal group. One is either assimilating to an explicit societal group or sub-group, or rejecting it through resistance. Since society always consists of numerous sub-groupings, and since human motivations are almost always multi-dimensional, any analysis along the assimilation/resistance spectrum must to a degree be ambiguous and indeterminate.

However, focusing on a more "Foucauldian" idea of *askēsis* does not require a societal reference in order to derive meaning. Rather, the precepts of conduct can emanate from one's own self-cultivation, the product of a lifetime of sincere and honest inquiry, reflection, and experimentation. This dynamic is more consonant with the modern transsexual experience than a dichotomy of assimilation and resistance. A given behavior or set of behaviors may partake of both assimilation and resistance at the same time, but perhaps this is not important. What may be more important is the development of the self and the process of *askēsis* through which it arose.

The process undertaken by transsexual people is a paradigmatic example of what Foucault must have been suggesting as a modern idea of *askēsis*. A male-to-female post-operative transsexual, for example, pursues a process of self-development and self-definition with diligence and determination, in

an effort to achieve well-being. It is a demanding and arduous process that warrants respect. It is a prime example of an "operation on the soul . . . in order to attain a state of happiness"[33] and produce a transformation to attain self-actuation.[34]

Given that this is the case, it should not matter whether the transformative process is viewed within the mold of assimilation or resistance. A transsexual's own definitions of his or her own self should be what matters, not his or her relationship with societal expectations. If the theoretical focus on the assimilation/resistance dichotomy is not helpful in viewing transsexuals generally, it certainly is even less helpful when considering the case of transsexuals in opposite-sex marriages, since there the distinction, as shown above,[35] is even less determinate. The ultimate implication is that if the dichotomy is not helpful in the context of transsexual marriage, it may not be very helpful in viewing other aspects of queer experience either.

In the transsexual marriage cases described below, the courts wrestle with the process of defining the sex of transsexual persons for purposes of applying state marriage laws. There is some degree of progress, from an activist's perspective, in the way more recent decisions have considered a broader set of criteria in defining sex. However, even this broader approach can be viewed as basically an exercise in assimilationist analysis. It will be shown that this creates unfortunate implications. At some point, the assimilationist model will be insufficient, and an approach more akin to Foucauldian *askēsis* will become more appropriate.

RECENT TRANSSEXUAL MARRIAGE CASES

Through the end of the 20th Century

Until the end of the 1990's, the situation involving transsexual marriage in the United States was relatively clear. Although one state intermediate appellate court found in favor of the legitimacy of a marriage involving a transsexual person, four other decisions in four other jurisdictions, one

issued by the highest civil court in the state, found against the validity of such marriages.

The favorable decision was *M.J. v. J.T.*,[36] decided by the Appellate Division of the New Jersey Superior Court. The facts involved a transsexual woman who, after the completion of sex-reassignment surgery, had engaged in a ceremonial marriage with a man, from whom she later sought a court order for maintenance.[37] Upon the instigation of her suit for maintenance, the man argued that the plaintiff was not a woman and that therefore the marriage was void. The court held that, upon the completion of a person's successful reassignment surgery, there was no legal barrier to prevent that person from marrying a person of the sex that was opposite to the transitioned-to sex.[38]

The four negative cases could be treated as a related series, beginning with *Corbett v. Corbett*.[39] *Corbett* was actually an English case, but it had been, and continues to be, cited by U.S. courts so consistently that it came to be viewed as integral to U.S. case law on the subject. The facts involved a male-to-female transsexual who had undergone sex-reassignment surgery prior to her marriage with a man. The English court determined that "the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means."[40] The court determined the three tests that should be used for sexual identity should be chromosomal, gonadal, and genital.[41] By these standards, the transsexual woman was a man, and therefore the marriage was void.

The next case in the series was *Anonymous v. Anonymous*, a New York State Supreme Court case from 1971.[42] The facts were unusual for cases in this area, in that the non-transsexual spouse claimed, and the court found, that prior to the marriage there had been no knowledge of the other party's transsexualism. The court held that the marriage was not valid.

The remaining cases were *In re Ladrach*,[43] from an Ohio county probate court in 1987, and *Littleton v. Prange*,[44] from the Texas Court of Appeals in

1999. *Ladrach* falls outside of the prototype for these cases, because the issue was joined when the transsexual applied for a marriage license, whereas the other cases involve the validity of a marriage that has already occurred. The Texas case has been the more influential of the two, in part due to its provenance from the highest civil appellate court in the State. Both *Ladrach* and *Littleton* cited *Corbett*, and both determined that the marriage, or requested marriage, involving the transsexual person was invalid.

These early cases indicated that U.S. courts would probably look at a restrictive set of factors, primarily chromosomal, gonadal, and genital characteristics, in determining sex for purposes of marriage. The New Jersey court in *M.T. v. J.T.* was an exception, but even that opinion did not include a detailed discussion of various factors that could be used in determining sex. Rather, the court seemed to base its determination that the male-to-female transsexual was a woman for purposes of marriage on the fact that she had undergone sex-reassignment surgery.[45]

In re Gardiner in 2001 and 2002

It appeared as though the situation might change in 2001 with the issuance of the intermediate appellate court opinion for *In re Estate of Marshall G. Gardiner*.[46] In *Gardiner*, the court adopted a detailed and multifaceted approach to determine sex for the purpose of marriage. The state supreme court overruled this approach in 2002.[47] However, the approach of the intermediate court had nonetheless been published, which established the possibility of more favorable rulings elsewhere in the future.

The facts involved Marshall Gardiner, a northeast Kansas businessman who had accumulated "some wealth." Somewhat later in life, he married J'Noel Ball, who was a post-operative male-to-female transsexual. Marshall had a son, named Joe, by an earlier marriage, from whom he was estranged at the time of his marriage to J'Noel. Marshall died intestate, and Joe and J'Noel filed opposing court papers concerning the proper

disposition of Marshall's estate. Joe ultimately asserted in these papers that the marriage between Marshall and J'Noel was invalid, on the theory that J'Noel was a man under relevant Kansas statutes, and that under Kansas law there could be no marriage between persons of the same sex.[48]

The state trial court found that the marriage was invalid, because J'Noel was born a male and, in the court's view, remained a male for the purposes of Kansas's marriage law.[49] The Kansas Court of Appeals, however, determined that the issue of whether an individual was male or female at the time of marriage is a matter of fact in each case. The appellate court held that a trial court "may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision."[50]

The appellate court adopted the criteria suggested by Professor Julie Greenberg in a 1999 law review article as the additional factors a trial court should consider.[51] These criteria were: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity.[52] The appellate court reversed the trial court and remanded for a full hearing, to allow each side to present evidence on at least the factors enumerated in the Greenberg article.[53]

At that time, many GLBT and transgender activists viewed this result as salutary. Clearly, the appellate court's insistence that sex be determined according to a variety of factors, rather than merely chromosomes, seemed less narrow and less hostile than previous decisions resting on chromosomes alone. Nevertheless, there was cause for some misgivings regarding the appellate court analysis. The Court of Appeals still was treating J'Noel's sex as a "question of fact."[54] The employment of this approach in some cases could lead courts to find that some transsexuals, even those who had undertaken substantial steps to transition, were still not of the sex of identification.

Furthermore, under the appellate court's approach, a transsexual person's status could depend on the extent of that person's assimilation. That posited assimilation could be of a particularly onerous variety. For example, a

male-to-female transsexual could be considered female to the extent her various characteristics approximated those of someone born female. Yet, as much as she might wish to be considered female, and as much as that desire would be valid, everyone would concede that she, in fact, was not born morphologically female, at least not completely.

Accordingly, not only was the endeavor prescribed by the appellate court one of assimilation, but it required a transsexual wife in such a case to assimilate to that which all would agree she was not: someone who had been born morphologically female. Her marital rights thus depended on the extent to which her assimilation had approximated something that she admittedly was not. Theoretically, this was not a completely comforting result even if it did help J'Noel's position from the standpoint of the legal strategy.[55]

This observation illustrates the perils of attempting to use an assimilationist strategy in the legal context. Assimilationism is, in many instances, an approximation to something that is not. This is the case for the gay man attempting to *become like* heterosexual men by adopting an interest or facility in team sports. However, the fact that he might succeed in adopting the interest or facility, and thus assimilate into a social group of heterosexual men, does not mean that he himself is not gay. When "the chips are down" and "push comes to shove," when it really matters whether one is gay or straight, his assimilation may not protect him.

Similarly, a male-to-female transsexual may assimilate into the context of heterosexual marriage by marrying a man. But, when the situation becomes greatly intensified, as in the case of a contest over the husband's estate, if her rights depend on the extent to which she has assimilated into the role of someone who was born female, the results may be no less negative. It would be open to a trier of fact to determine that, although she may well have assimilated in many respects, she still had not assimilated enough. One suspects that in the minds of some triers of fact applying the Kansas appellate court's test, no collection of characteristics could amount to

adequate assimilation. The model toward which assimilation was directed, being born a female, was something that could never strictly be achieved.

It would be better in such cases to employ a test that did not depend on the extent of assimilation measured by objective factors. It may be understandable why the Kansas appellate court employed this approach. However, a more welcoming and more humane approach would focus simply on the extent of the self-identification experienced by the transsexual woman herself. This approach would also be more in line with the Foucauldian idea of the culture of the self and the deployment of individual *askēsis*.

In any event, even under Kansas law, the importance of a married transsexual's degree of assimilation was short-lived. Less than a year after the appellate court's opinion in *Gardiner*, the Kansas Supreme Court reversed in all respects relevant to this discussion. The court's opinion was couched in non-inflammatory terms, and it included copious and lengthy verbatim quotes from the appellate opinion. However, the actual effects of this opinion may be more chilling, and more vicious, than its non-confrontational rhetoric would indicate.

Whereas the appellate court had treated J'Noel's sex as a matter of fact, the supreme court stated, "[w]e view the issue in this appeal to be one of law and not fact."[56] Quoting from *Black's Law Dictionary*, the supreme court defined marriage, in relevant part as, "the legal status, condition or relation of one man and one woman united in law for life, or until divorced."[57]

In perhaps the most chilling passage, the supreme court declared simply that "[t]he words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."[58] Thus, the court seemed to be saying that in order to be married under Kansas law, one needs to have the sex of either male or female, and transsexuals are not encompassed by either term.

It does not take much to supply what may be the most apparent conclusion to these major and minor premises. Namely, that under Kansas

law it may be that transsexuals may not marry at all, regardless of the sex of their chosen partners. This, at any rate, seems to be the most direct reading of the state supreme court's opinion. Given the stunning import of the court's approach, it was almost anti-climatic for the court to offer, in concluding its discussion on this point, that "J'Noel does not fit the common meaning of female."[59]

Post-Gardiner *Cases from February 2003*

In February of 2003, a trial court in Florida and the highest court in Maryland both issued decisions that seem, at first glance, to advance the interests of transsexuals. The opinions contain much that is positive. However, the trial court opinion provides a further indication of the dangers of an assimilationist analysis, and the Maryland court is actually silent on the most salient points regarding transsexual marriage.

In the case of *In re the Marriage of Michael Kantaras,*[60] the Sixth Judicial Circuit Court for Pasco County, Florida issued an exceptionally detailed opinion, 809 pages in length. The case involved a post-operative female-to-male transsexual, Michael Kantaras, who married a non-transsexual female, Linda. The couple was married for nine years before filing cross-petitions for divorce and custody of the two children they had raised together.[61] Linda's court papers contended that, because Michael was born a woman, the marriage was void.[62] The court determined that Michael was a male and that the marriage was legal.[63] The court went on to award primary residential custody to Michael.[64]

Kantaras determined that there were essentially five factors that established that Michael was legally a male: (1) as a child his parents and siblings, observing his male characteristics, agreed he should have been born a boy; (2) Michael had always perceived himself as a male and had played male sports, performed male household chores, and refused to wear female clothing; (3) prior to marriage he had "successfully completed the full process of transsexual reassignment;" (4) at the time of the marriage,

Linda was informed and accepting about Michael's transsexual status; and (5) before and after the marriage, Michael had been accepted as a man in a variety of social and legal ways.[65]

The result of the *Kantaras* decision, the detail and care with which it treated its subjects, and the comparatively broad scope of factors it took into account in arriving at its determination, can all be viewed as positive for the transsexual cause. It remains to be seen, of course, whether the decision will survive any possible appeals or subsequent holdings. Even apart from later judicial developments, the approach the trial court took is problematic with respect to the assimilationist dangers discussed above.

The emphasis that the *Kantaras* court placed on *full* sex reassignment surgery raises a problem. The complete language of the court's ruling on this point is as follows:

> Prior to marriage he successfully completed the full process of transsexual reassignment, involving hormone treatment, irreversible medical surgery that removed all of his female organs inside of his body, including having a male reconstructed chest, a male voice, a male configured body and hair with beard and moustache, and a naturally developed penis.[66]

By placing such a pointed emphasis on the completeness of the surgical and physiological processes, the *Kantaras* court adopts an assimilationist approach. The approach of the court in *Kantaras* is similar to that of the intermediate appellate court in *Gardiner*. The approaches are also different in some respects. In *Gardiner*, the court numerically listed seven biological and experiential factors that should be considered when judicially determining sex, whereas in *Kantaras*, the court puts substantial weight on the completeness of sex-reassignment surgery.

However, in both cases the emphasis is on the degree to which the transsexual person has conformed himself or herself to a person who was born with the sexual morphology of a person of the transitioned-to sex. As noted earlier in the discussion of *Gardiner*, the result of this approach is that

the transsexual's case hinges on the extent to which he or she resembles something that he or she is not, someone who was born with the anatomical morphology of the transitioned-to sex.

The difficulty becomes more apparent if one posits a situation like that of Michael Kantaras, but where the medical or surgical procedures have been less extensive. For example, someone who has received hormone treatment and some medical treatment to alter secondary sex characteristics, but has not undergone invasive surgical alterations of primary sex organs. It seems quite possible that, based on the rationale of the *Kantaras* decision, such a person will not have "successfully completed the full process of transsexual reassignment."

A more satisfactory approach, and one more in keeping with a Foucauldian idea of *askēsis*, would rely not so much on the *fullness* of the medical process engaged in, but rather on the extent of everything the transsexual person had done. Such factors as the length of time Michael had been living as a man, the commitment he had exhibited to living as a male, and the extent to which he had taken steps to alter his legal status for legal, professional and social purposes would all be primary factors.

The other positive case development in February of 2003, was the opinion of the Maryland Court of Appeals in, *In the Matter of Robert Wright Heilig; Janet Heilig Wright*.[67] This case involved a female-to-male transsexual who petitioned for an order that would change his name and also change his sexual identity designation.[68] The trial court refused to grant the petition, concluding that gender was not subject to modification.[69]

The Maryland high court vacated and remanded with instructions. The court's opinion contains a concise, but inclusive, review of medical authorities on the subject of transsexualism.[70] The court came to a conclusion that is welcome in the transsexual community, "a person's psychological gender identity has received recognition as one of the determinants of gender and plays a powerful role in the person's psychic makeup and adaptation."[71] The high court also stated, "gender … may be,

or possibly may become, other than what is recorded on the person's birth certificate."[72] The court vacated the trial court's ruling, since that ruling had concluded that gender was not subject to modification, and directed the trial court "to consider admissible evidence relevant to the issue" as to whether the petitioner had changed his sex.[73]

As affirmative as this may seem for transsexuals, the *Heilig* case is problematic in two pivotal respects. First, the opinion is deliberately vague on what a petitioner must show to successfully obtain an order reflecting a change in designated sexual identity. To the extent it gives guidance on the issue, the opinion, in line with *Kantaras*, places significant emphasis on surgical operations.

The *Heilig* court's discussion does not list factors to consider, but simply recites the requirement in effect in many states that, in order to change a birth certificate, the individual's gender must have been changed "by surgical procedure."[74] The court observes that laws requiring surgery as a condition to recognizing a change in sex "rarely, if ever, specify the kind of surgery that will suffice."[75] The court goes on to warn that, "[a]ny reasoned legal conclusion [must] be based on admissible evidence of medical fact."[76] The court purposely concludes thereafter, without giving any further indication as to what one must do in order to successfully obtain a designation of changed sex. What the court does provide suggests the pre-eminence of a surgical procedure and other physiological operations. Again, this leaves open the possibility discussed regarding the *Gardiner* intermediate holding and the *Kantaras* opinion. The indication of these decisions is that, where the court determines that a person's physiological changes are not full or complete, the individual may not receive a positive result. This, in turn, reflects the unsuitability of an assimilative approach.

The second problem with *Heilig*, in this context, is that it explicitly excludes any direct relevance to the subject of marriage. In directing the trial court to reconsider the requested sex-change designation, the court emphasized that it was not opining on "*what the collateral effect of any*

judgment attesting to a change in gender might be."[77] The possibility that a legal change of sex can affect a person's capacity to marry is relegated to a long footnote that cites *Corbett, M.T. v. J.T., Littleton* and *Gardiner*.[78] But having referenced these cases and after briefly discussing some related points, the court concludes at the end of this footnote that "[t]his is an issue that is not before us in this case and upon which we express no opinion."[79]

CONCLUSION

The particular analysis and holding in the Kansas Supreme Court's decision of the *Gardiner* case may have destructive effects for transsexuals in Kansas. If such an approach is adopted broadly by other states, the consequences for transsexuals around the country could be devastating. Indeed, they could well provide added evidence for the assertion by Paisley Currah and Shannon Minter that, in many contexts, transsexuals are not viewed as fully human.[80] Fortunately, recent cases may presage a move away from these consequences, but it will be important for the transgender and GLBT communities to keep track of these developments and take appropriate action.

I have focused on the circumstances of transsexual marriage from a more theoretical perspective. My intent has been to explore what the legal treatment of marriages involving transsexuals has to say about the dynamic of assimilation and resistance. The application of these two terms cannot help but be indeterminate and ambiguous in the context of GLBT issues. The journey of the *Gardiner* case through the Kansas state courts, in particular, illustrates the difficulties that can arise when courts, and perhaps litigating parties as well, apply analytical techniques sounding in the assimilation/resistance dichotomy.

From a theoretical perspective, ideas about assimilation and resistance may ultimately turn out to be less useful than other, more individually-directed, ideas. An example would be the kind of cultivation of the self and individual *askēsis* developed by Michel Foucault in his *History of Sexuality*.

Such a view approaches sexuality issues from the standpoint of the need to effectuate those transformations of the self that result in a state of optimal fulfillment. Indeed, for some time, transsexuals and transgender activists have explored and experienced the pull of the self in the forces that define their lives. The true imperatives of this issue are less about assimilation or resistance, and more about self-fulfillment.

Specifically, the imperative for *askēsis* would dictate that substantial weight be given to the *experience* of the transsexual spouse in transitioning from one sex to the other. It is an improvement when courts credit a broad set of factors to determine sex in these cases, but there is danger as well, to the extent that the factors used evince an assimilationist perspective. A more comprehensive improvement involves placing the transitioning person in more direct control of the determination of sex, through emphasis on his or her own discipline and commitment to the endeavor.

The endeavor of sexual transition, as experienced by the person undergoing the transition, is an exercise in Foucauldian *askēsis*. With regard to the long-term suitability of the interests of transsexuals, the most meaningful factors to consider should accordingly be those related to the ascetic endeavor of the individuals involved including: length of time spent living as the transitioned-to sex; actions taken to effectuate the transition for legal, social, and professional purposes; and other elements of the transsexual person's own experience. These factors should be given substantial weight in addition to, and perhaps even as primary over, physiological factors.

The alternative approach I am suggesting is hardly free of difficulty. It does however, have the advantage of beginning from precepts less dependent on relations to the *other*, and more dependent on relations to the *self*.

---

[1] Professor of Law, William Mitchell College of Law, St. Paul, Minnesota. I would like to thank my research assistants, Jonathan Schmidt, Amber Lee and Jennifer Tweeton, for their help in preparing this essay.

[2] One example of this debate would be a symposium held at the Seattle University Law School on September 20-21, 2002, on the subject of Theorizing Assimilation and Resistance. An earlier version of this essay was presented as a paper at this symposium.

[3] *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002), discussed *infra* in text and at notes 46–59.

[4] *In re* Heilig, 816 A.2d 68 (Md. 2003), discussed *infra* in text and at notes 67–79.

[5] *In re* Marriage of Kantaras v. Kantaras, No. 98-5375CA (Fla. Cir. Ct., 6th Jud. Dist., Feb. 21, 2003), *available at* http://www.transgenderlaw.org/cases/kantarasopinion.pdf, discussed *infra* in text and at notes 60–66.

[6] Nancy Levit has contributed one of the most recent discussions of assimilation and resistance in the legal academic literature of sexual orientation. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867 (2000). She seems to suggest that "assimilation" can be viewed as the "acceptance of sexual others by the dominant culture", while "resistance" can be thought of as "radical resistance to many of the culture's traditional institutions and interpretations." *Id.* at 870. Her proposal for a "shared humanity theory" to help resolve the tension between assimilation and resistance is thoughtful and bears consideration. However, I believe that it is most constructive to focus on the choice between "assimilation" and "resistance" as an election made by individuals in daily life. My definitions thus focus more on the intentionality of persons making decisions about their relationships with society. Many other scholars have addressed the idea of "assimilation" in significant detail, without necessarily casting it as a counterpoint to "resistance." One of the most recent would be Kenji Yoshino, who discusses assimilation, not explicitly in contrast to resistance, but rather in connection with its place in the practice of discrimination against lesbians and gay men. Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002). For example, he asserts that, in the gay context, "assimilation can be an effect of discrimination as well as an evasion of it." *Id.* at 772. The idea that a refusal to assimilate may sometimes have the effect of re-enforcing destructive societal categorizations has been recently addressed and challenged. Kerry L. Quinn, *Mommy Dearest: The Focus on the Family in Legal Feminism*, 37 HARV. C.R.—C.L. L. REV. 447, 472–74 (2002). *See also, e.g.,* Ruthann Robson, *Making Mothers: Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RTS. L. REP. 15, 17–18 (2000) (discussing assimilation in connection with a feature of the Jewish intellectual tradition described by William Rubenstein, as contrasted with how such a feature would be received as an element of feminist theory); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1408 (2000) (discussing a "downside of assimilation").

[7] The dictionary I have consulted defines "assimilation," in the most relevant context, as "an act, process, or instance of assimilating," which is defined as "[absorbing] into the cultural tradition of a population or group." WEBSTER'S NEW COLLEGIATE DICTIONARY 67 (1981). The definition I offer above places greater emphasis on, among other things, the intentionality behind an act of assimilation.

[8] Webster's dictionary defines resistance as "an act or instance of resisting," which is defined as "[withstanding] the force or effect of." *Id.* at 977. The definition I offer above

places the act of resistance in the specific context of social behavior, while still allowing my use of the term to remain consonant with the technical dictionary sense.

[9] One of the earliest and one of the best discussions of the relationship between team sports and social identification with masculinity is BRIAN PRONGER, THE ARENA OF MASCULINITY (St. Martin's 1990). Pronger noted, *inter alia*, that "athletics is one of the major venues for apprenticeship in the orthodox expression of masculinity;" and that "[s]port in contemporary Western culture also dramatizes the myth of masculinity." *Id.* at 4, 15. Specifically regarding American football and hockey, he noted that "[v]iolent combative team sports are the next best thing [to] war-making" (quoting a former NFL player's assertion that "I play football because it is the only place where you can hit people and get away with it," and that hockey is "a man's game," noting that "violence and fighting constitute major attractions"). *Id.* at 21.

[10] Wayne Koestenbaum has presented perhaps the most exhaustive illustration of the relationship between opera and a sub-group of gay men referred to, sometimes derisively and sometimes affectionately, as "opera queens":

> The very phrase 'opera queen' performs an accusation. Who dares to wear the name? You call someone an opera queen if you want to criticize his affection for opera, or if, yourself a worshipper of the operatic, you want to elevate your own affection [to] signal your membership in a subculture, and remind the world of opera that the queens are in charge.

WAYNE KOESTENBAUM, THE QUEEN'S THROAT 32 (1993).

[11] *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

[12] M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), discussed *infra* in text and at notes 36–38.

[13] *In re* Marriage of Kantaras v. Kantaras, No. 98-5375CA (Fla. Cir. Ct., 6th Jud. Dist., Feb. 21, 2003).

[14] Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000) (involving a wrongful death action after the marriage with respect to the deceased non-transsexual spouse), discussed *infra* in text and at notes 43–44.

[15] Vermont instituted a statewide system of civil unions by statute after prodding from the state supreme court. *See* 15 VT. STAT. ANN. §§ 1202–1207 (2002) (setting forth terms regarding the requisites for validity of civil unions, the benefits, protections and responsibilities appurtenant to them, and modes for modification and dissolution); Baker v. State, 744 A.2d 864 (Vt. 1999). However, in spite of this salutary development, the state's laws are still providing an opportunity for GLBT people to engage in "civil unions," rather than formal marriage itself.

[16] Even the earlier strands of modern feminism contained critical observations regarding marriage. *E.g.,* SIMONE DE BEAUVOIR, THE SECOND SEX 456 (H.M. Parshley ed., David Campbell Pub. Ltd. 1993) (1949) ("Marriages, then are not generally founded upon love. It is implied in the very nature of the institution, the aim of which is to make the economic and sexual union of man and woman serve the interest of society, not assure their personal happiness"). *Id.* More recent commentators have not refrained from criticism, either. ANDREA DWORKIN, LETTERS FROM A WAR ZONE 120–21 (Lawrence Hill 1993) ("In marriage, male ownership of a woman's body and labor (reproductive,

carnal, and domestic) is sanctified by god and/or state. She has sold herself not only for economic support, but also for protection"). *Id.*

[17] Paula Ettelbrick has been one of the most influential commentators on marriage from the ranks of lesbian and gay activists and academics. *E.g.,* Paula L. Ettelbrick, *Since When is Marriage A Path to Liberation? in* SAME SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 164–68 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (Marriage is "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis…." "Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships".) *See also* Paula L. Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753 (2000) (asserting that the increased availability of formalization for LGBT couples through devices such as the Vermont civil union should not preclude recognition of families not using such formalized devices).

[18] By making this point I do not mean to imply that transsexual people who marry heterosexually are, in any sense, culpable for being assimilative. I do not believe there is any culpability associated with assimilation. Rather, there is inadequacy in a perspective that reduces the experiences of people engaged in such situations to a dichotomy of "assimilation" and "resistance."

[19] Mary Coombs, for example, notes that "[t]ransgenderism also includes people who cannot be neatly pigeonholed as either transsexuals or cross-dressers, but who live in a variety of ways that reject the dichotomy of gender, the place they have been assigned within that dichotomy, or both." Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 240 (1998). She cites Martine Rothblatt's criticism of this dichotomy as the "apartheid of sex." *Id.* at n.89, *citing* MARTINE ROTHBLATT, THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER (1995).

[20] The concept of a "constellation" of genders is taken from an address by Dylan Vade, a staff member at the Transgender Law Center (TLC) in San Francisco, at the symposium Theorizing Assimilation and Resistance, held at Seattle University School of Law in Sept. 2002. The TLC website references the view of least some transgender activists that "there are an infinite number of beautiful genders." *See* http://www.transgender lawcenter.org/about.html (last visited Apr. 16, 2003).

[21] In addition to the academic writers cited in further footnotes to this essay, there have been numerous collections of academic criticism, recent biographies, *see* JAMES MILLER, THE PASSION OF MICHEL FOUCAULT (Simon & Schuster 1993), and extensive treatments in legal academic periodical writing. Scholars working in various areas have included compilations of such references for their particular contexts. *See* Susan Boyd, *(Re)Placing the State: Family, Law and Oppression*, 9 CAN. J. L. & SOC. 39, 50 n.40 (1994) (noting nearly a dozen academic references to Foucault's ideas of the dispersion of power on a localized basis).

Foucault himself is often considered as belonging to a group of French post-modern academics that would include Jean-François Lyotard, Jacques Derrida, and others. *See, e.g.,* POSTMODERNISM: THE KEY FIGURES xii–xiii (Hans Bertens & Joseph Natoli eds., 2002) (describing postmodernism as among other things, "a set of philosophical

propositions that are centered around the rejection of Realist epistemology and of the Enlightenment project that builds upon that epistemology," and citing among its exponents Lyotard, Derrida, Foucault and others); THE TRUTH ABOUT TRUTH: DE-CONFUSING AND RE-CONSTRUCTING THE POSTMODERN WORLD (Walter Truett Anderson, ed., 1995) (describing the centrality of Lyotard's work to postmodern criticism, at 4; referencing Foucault both in the Introduction, at 7, and through the transcription of an interview, at 40–45; and introducing Derrida's work by setting forth Derrida's "deconstruction" of Jean-Jacques Rousseau).

[22] Foucault famously observed, for example, that "there are no relations of power without resistances." MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 142 (Colin Gordon ed., Pantheon 1980). Hunt and Wickham determine that one of Foucault's "four principles of governance" is that "[g]overnance involves power (but only in a very particular sense) and as such involves politics and resistance." ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 80 (1994). The Foucauldian idea of resistance, used in this sense, of course, differs from the sense in which it is used in this essay, by most of the participants in the September 2002 symposium, and by most activists at large. Foucault meant a kind of intrinsic social and individual reaction to exertions of power that is part of the power relation itself. We, and they, are referring to resistance as a more conscious strategy by individuals and societal sub-groups. Nevertheless, the consciousness that many activists have of resistance as a strategy option owes at least a significant amount, I believe, to Foucault's work.

[23] In the final years of his life, Foucault began a project that was designed to be a six-volume work entitled *The History of Sexuality*. He succeeded only with respect to the first three volumes, having died before the completion of the remaining volumes. With the last two volumes in this series, his work went in a direction that was noticeably distinct.

[24] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 2:THE USE OF PLEASURE (Gallimard 1984) (Robert Hurley, trans., Random House 1985) [hereinafter *The Use of Pleasure*].

[25] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 3: THE CARE OF THE SELF (Gallimard 1984) (Robert Hurley, trans., Random House 1986) [hereinafter *The Care of the Self*].

[26] The first volume in the series is somewhat more widely read than the later two. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME 1: INTRODUCTION (Gallimard 1975) (Robert Hurley, trans., Random House 1978). Its discussions have already been cited in connection with transgender issues. *See, e.g.,* Jody Lynee Madeira*, Law as a Reflection of Her/His-Story: Current Institutional Perceptions of, and Possibilities for, Protecting Transsexuals' Interests in Legal Determinations of Sex*, 5 U. PA. J. CONST. L. 128, 137–41 (2002) (using discussions from Foucault's "Introduction" volume as one basis for a "body-as-text" analysis confronting "delusions of gender").

[27] FOUCALT, *supra* note 24, at 77.

[28] FOUCALT, *supra* note 25, at 45–68.

[29] Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N. C. L. REV. 371, 388–89 (2002), quoting MICHEL FOUCAULT, *Technologies of the Self*, *in* ETHICS: SUBJECTIVITY & TRUTH 225 (Paul Rabinow, ed., 1997).
[30] *Id.* at 389.
[31] DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 76–79, 96–97 (1995).
[32] *Id.* at 76.
[33] Ball, *supra* note 29, at 387–89.
[34] *Id.;* HALPERIN, *supra* note 31, at 76–79, 96–97.
[35] *See supra* notes 11–18 (describing ways in which a marriage between a transsexual person and a person of the sex opposite to that "transitioned to" can be viewed as being equally assimilative and resistive).
[36] M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).
[37] *Id*. at 204.
[38] *Id*. at 210–11.
[39] Corbett v. Corbett, 2 W.L.R. 1306 (P.D.A. 1970).
[40] *Id*. at 1323.
[41] *Id.* at 1325.
[42] Anonymous v. Anonymous, 67 Misc. 2d 982 (N.Y. Sup. Ct. 1971). This case did not actually cite *Corbett*, but its totalistic approach to the question of sexual identity for purposes of marriage adequately places it in the "line" of cases that followed *Corbett*.
[43] *In re* Ladrach, 513 N.E.2d 828 (Ohio 1987).
[44] Littleton v. Prange, 9 S.W.3d 223 (Tex. Civ. App. 1999), *cert. denied*, 121 S. Ct. 174 (2000).
[45] M.T. v. J.T., 355 A.2d at 211.
[46] *In re* Estate of Gardiner, 22 P.3d 1086 (Kan. Ct. App. 2001).
[47] *In re* Estate of Gardiner, 42 P.3d 120(Kan. 2002).
[48] 22 P.3d at 1090–91.
[49] *Id.* at 1091.
[50] *Id.* at 1110.
[51] *Id*. at 1094–1100, quoting at length from Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collisions Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).
[52] *Id*. at 1110; *see also* Greenberg, *supra* note 51, at 278.
[53] *Id.*
[54] Katrina Rose, *Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality*, 70 UMKC L. REV. 257, 290 (2001) (providing this interpretation and discussing difficulties that could arise at the trial level if *Gardiner* were heard on remand).
[55] At least slightly less problematic in this regard was the approach of the New Jersey appellate court in *M.T. v. J.T.*, 355 A.2d at 209. The court in that case determined that "a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character."
[56] *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002)
[57] *Id.*

[58] *Id.*
[59] *Id.*
[60] In re Marriage of Kantaras v. Kantaras, No. 98-5375CA (Fla. Cir. Ct., 6th Jud. Dist., Feb. 21, 2003), *available at* http://www.transgenderlaw.org/cases/kantarasopinion.pdf.
[61] *Id*. ¶¶ 1–6, at 2–3 (under "Pleadings in the Case").
[62] *Id.* ¶¶ 6–10, at 3–6.
[63] *Id.* ¶ 25, at 796 (under "Outline of Conclusions of Law").
[64] *Id.* ¶ 3, at 799 (under "Final Judgment of Dissolution of Marriage").
[65] *Id.* ¶ 24(a)–(e), at 795–796 (under "Outline of Conclusions of Law").
[66] *Id.* ¶ 24(c), at 795.
[67] *In re* Heilig, 816 A.2d 68 (Ct. App. Md. Feb. 11, 2003).
[68] *Id.* at 69.
[69] *Id.*
[70] *Id.* at 71-79.
[71] *Id.* at 79.
[72] *Id.*
[73] *Id.* at 87.
[74] *Id.* at 86.
[75] *Id.*
[76] *Id.* at 87.
[77] *Id.* at 85 (*italics in original*).
[78] *Id.* at 85-86, note 9.
[79] *Id.* at 48, note 9.
[80] Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 39–40 (2000). "For the most part, transgender people have not been excluded from civil rights protections because of conceptual or philosophical failures in legal reasoning, but rather because they have not been viewed as worthy of protection or, in some cases, even as human." *Id.*