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Citation: 52 Fla. L. Rev. 745 2000

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WHEN IS A MAN A MAN, AND WHEN  
IS A WOMAN A WOMAN?

*Julie A. Greenberg\**

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I. INTRODUCTION

“When is a man a man, and when is a woman a woman?”<sup>1</sup> According to Chief Justice Hardberger, that was the basic question that the Texas Court of Appeals needed to answer in *Littleton v. Prange*. According to Justice Hardberger, “[e]very school child, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes.”<sup>2</sup> Yet when Christie Littleton, a person who dressed as a woman, had the breasts, hormones and genitalia of a woman, and who every school child would identify as a woman, presented herself to the Texas Court of Appeals, the court declared she was legally a man.

How could the court reach a result that even a school child would find hard to understand? It reached this result because Christie is a transsexual and had been identified as a male at birth. According to the Texas Court of Appeals, this identification, and the presence of male anatomy at birth, permanently established Christie’s legal sex as male.

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\* Professor of Law, Thomas Jefferson School of Law. J.D., 1979, University of Michigan; B.A., 1972, University of Michigan. I want to thank Marybeth Herald, Robert Irving, and Sherri Groveman for the helpful comments they provided on earlier drafts of this article.

1. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999).

2. *Id.*

In *Littleton*, the court was faced with the question of how to determine a post-operative transsexual's legal sex for purposes of marriage.<sup>3</sup> This issue is complex because although Christie was born with male anatomy, Christie's anatomy was predominantly female at the time of trial.<sup>4</sup> Because the Texas legislature had not provided any guidelines on how to determine a person's sex<sup>5</sup> and Texas case law on the subject did not exist, the court had the opportunity to look to case law and legislation from other jurisdictions, and guidance from experts in other fields, such as medicine and psychology. The court should have based its holding on an examination of the developments in other disciplines, an analysis of the policy concerns that arise in cases involving sex determination, and a comparison of the justifications for the contrary results reached in other jurisdictions on similar cases. Instead, it chose to rely on religious rhetoric, and ruled that when God created Christie Littleton, God created a man that neither the law nor the medical community could turn into a woman.<sup>6</sup>

This Article examines the policy considerations that arise when courts are faced with the issue of determining the legality of marriages involving post-operative transsexuals.<sup>7</sup> The enactment of federal<sup>8</sup> and state<sup>9</sup>

3. *Id.* at 225.

4. At the time of the trial, the only male biological attribute she retained was presumably an XY chromosomal structure. In actuality, her chromosomal make-up was not admitted into evidence, so whether she actually had XY chromosomes is unclear.

5. Although the Texas legislature has not passed any legislation on this issue, a number of other states have determined that transsexuals who have undergone genital modification surgery are entitled to amend their official documents to indicate their self-identified sex. *See, e.g.*, ALA. CODE § 22-9A-19 (1997); ARIZ. REV. STAT. ANN. § 36-326(a)(4) (West 1993); COLO. REV. STAT. ANN. § 25-2-115(4) (West 1990); D.C. CODE ANN. § 6-217(d) (1995); GA. CODE ANN. § 31-10-23(e) (Harrison 1998); 10 GUAM CODE ANN. § 3222 (1998); HAW. REV. STAT. § 338-17.7(4)(b) (1993); 410 ILL. COMP. STAT. ANN. § 535(d)17 (West 1997); IOWA CODE ANN. § 144.23.3 (West 1997); LA. REV. STAT. ANN. § 40:62 (West 1992); MD. CODE ANN. HEALTH-GEN. I, § 4-214(b)(5) (1999); MASS. GEN. LAWS ANN. Ch. 46 § 13(e) (West 1993); MICH. COMP. LAWS § 333.2891(9)(a) (1998); MO. ANN. STAT. § 193.215(9) (West Supp. 1999); NEB. REV. STAT. § 71-604.01 (1999); N.J. STAT. ANN. § 26:8-40.12 (West 1999); N.M. STAT. ANN. § 24-14-25(D) (Michie 1997); N.C. GEN. STAT. § 130A-118(b)(4) (1997); OR. REV. STAT. § 432.235(4) (1997); UTAH CODE ANN. § 26-2-11 (Supp. 1998); WIS. STAT. ANN. § 69.15(1)(a) (West 1990). Whether such an amendment to one's official documents will change the transsexual's legal sex for purposes of marriage is unclear. *See infra* note 116 and accompanying text.

6. *See Littleton*, 9 S.W.3d at 231.

7. The resolution of this issue has a direct effect on the tens-of-thousands of persons who are transsexuals, the millions of people who are intersexuals (people whose biological sex attributes are not all congruent), and the millions of people who transsexuals and intersexuals have married or seek to marry. The exact incidence of transsexuality and intersexuality are unknown. Some estimates indicate that between 3000 to 6000 transsexuals have undergone hormonal and surgical sex modifications in the United States. *See* DAVID W. MEYERS, *THE HUMAN BODY AND THE LAW* 221 (2d ed. 1990). Another 30,000 to 60,000 people consider themselves candidates. *See id.* Some estimates indicate that approximately 10,000 transsexuals live in the United States. *See id.* Although

legislation during the late 1990s and recent Supreme Court decisions in Hawaii and Vermont<sup>10</sup> have caused the validity of same-sex marriages to become part of a growing national debate. An analysis of marriages involving transsexuals helps to illuminate some of the policy concerns that should shape that debate.

Part II of this Article sets forth the factual and legal setting of *Littleton v. Prange*. Part III examines the three opinions in the *Littleton* decision. Part IV concludes that the court opinions in *Littleton*, and other similar cases, lack the rigorous analysis that is required to resolve this complex and important issue. Part IV also explores the policy issues that should be considered when courts<sup>11</sup> and legislatures are inevitably presented with this critical question.<sup>12</sup>

## II. LITTLETON V. PRANGE—THE FACTUAL AND LEGAL SETTING

### A. *The Facts*

Christie Littleton was born with normal male genitalia; at birth she had

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the exact incidence of intersexuality is also uncertain, intersexuals constitute between one-tenth of one percent to four percent of the population. See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCIENCES, Mar.-Apr. 1993, at 21; see also ALICE D. DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 42-43 (1998).

8. Congress enacted the Defense of Marriage Act ("DOMA"), 110 Stat. 2419 (1996). See *infra* notes 146-47 and accompanying text.

9. See *infra* notes 118-45 and accompanying text.

10. See *infra* notes 148-49 and accompanying text.

11. The Texas Supreme Court denied a review of the appellate court decision in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), review denied on Mar. 3, 2000; rehearing of petition for review overruled on May 18, 2000. Ms. Littleton's attorneys filed a petition for writ of certiorari with the United States Supreme Court on July 3, 2000.

12. A number of cases on this subject are in the process of being negotiated or litigated. For example, in California, a post-operative male-to-female transsexual married a female in England and sought employment-related benefits for her spouse. See Chris Beam, *For Better or For Worse?*, OUT, May 2000, at 60, 60-63. In Kansas, a male-to-female post operative transsexual's right to inherit from her husband's estate is being litigated. See Devon Spurgeon, *Double Bind: Woman in Missouri Is a Man in Kansas, and Why*, WALL ST. J., July 7, 2000, at A-1. In New Hampshire, the U.S. Postal Service is refusing to acknowledge a male-to-female transsexual's right to be treated as a female. (Copies of the court documents in these cases are on file with the author.) These and other similar cases will likely reach the appellate courts. Now that the transsexual and intersexual movements are gaining momentum, the number of cases being brought to determine the legal sex of a transsexual are likely to increase dramatically. Evidence of the increased interest in the issues involving transsexuals and intersexuals is evident from the number of times they have been the subject of the popular press and the media. Recent television programs, including *Dateline NBC* and ABC's *Primetime Live*, news articles in publications such as the *New York Times*, the *Wall Street Journal*, *Newsweek*, and *Time* magazines, and movies such as the recent Golden Globe and Academy Award winner, *Boys Don't Cry*, have focused on transsexual or intersexual issues.

a penis, scrotum, and testicles.<sup>13</sup> The birth attendant identified Christie as a male and her parents named her Lee, after her father.<sup>14</sup> At a very young age, when she was only three or four, Christie realized that she identified as a female.<sup>15</sup> At some point, her parents took her to a physician, who prescribed male hormones.<sup>16</sup> Despite the presence of natural male hormones and the administration of additional male hormones, Christie's self-identity remained female throughout her life.<sup>17</sup>

By age seventeen, Christie began searching for a doctor to perform surgery to conform her physical attributes to her gender identity.<sup>18</sup> Starting at age twenty-three, Christie underwent the psychological and psychiatric treatment that is required prior to sex modification surgery.<sup>19</sup> At age twenty-five, Christie had her name legally changed and she began to receive various treatments and female hormones.<sup>20</sup> Two years later, she underwent three surgical procedures in which her penis, scrotum and testicles were surgically removed and a vagina and labia were surgically created.<sup>21</sup> She also underwent breast construction surgery.<sup>22</sup> After the successful completion of these medical treatments, Christie appeared to be a woman.<sup>23</sup> She dressed as a woman, her body had only female external attributes (breasts, vagina, and labia), and she was able to engage in sexual intercourse as a woman.<sup>24</sup>

In 1989, at age twenty-seven, Christie married Jonathon Mark Littleton in Kentucky.<sup>25</sup> They lived together as husband and wife until Jonathon's death in 1996.<sup>26</sup> Throughout this time, Jonathon was aware of Christie's medical history and he accepted Christie as a woman and as his wife.<sup>27</sup>

Jonathon was not the only person to accept Christie as a woman.<sup>28</sup> In addition, three different legal institutions acknowledged that Christie was a woman. In 1977, Texas officials allowed Christie to legally take a woman's name.<sup>29</sup> In 1989, Kentucky officials allowed Christie to marry a

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13. *See Littleton*, 9 S.W.3d at 224.

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.* at 225.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.* at 224. This name change does not have the effect of changing Christie's legal

man.<sup>30</sup> Finally, a Texas trial court acknowledged that Christie was a woman when it granted Christie's petition to amend her original birth certificate to indicate that her name was Christie and her sex was female.<sup>31</sup>

### B. *The Legal Setting*

Christie and Jonathon lived together as a married couple for seven years until Jonathon's death.<sup>32</sup> After Jonathon died, Christie brought a medical malpractice suit under the Texas Wrongful Death and Survival Statute in her capacity as Jonathon's surviving wife.<sup>33</sup> Dr. Mark Prange, the defendant, brought a motion for summary judgment challenging Christie's status as a proper wrongful death beneficiary.<sup>34</sup> Dr. Prange asserted that Christie was a male and she did not have standing to bring an action under the wrongful death statute because legally she could not be the surviving spouse of another man.<sup>35</sup> The trial court agreed with Dr. Prange and granted his motion for summary judgment.<sup>36</sup> The Texas Court of Appeals affirmed the trial court's ruling.<sup>37</sup>

According to Justice Hardberger, the case involved two legal issues: the validity of same-sex marriages and the legal sex status of post-operative transsexuals.<sup>38</sup> The law in Texas on the first issue is clear: if Christie were a man, she could not legally be married to Jonathon because same-sex marriage is illegal in Texas.<sup>39</sup>

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sex.

30. *See id.* at 225. Kentucky does not allow marriages between individuals of the same sex. *See Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *see also* KY. REV. STAT. ANN. § 402.020(1)(d) (Banks-Baldwin 1999). Therefore, the official who issued the Kentucky marriage license accepted Christie's status as a woman. It is not clear, however, whether the Kentucky official knew that Christie was a transsexual. If the legality of the Kentucky marriage were to be litigated in Kentucky, the Kentucky court could choose to ignore the marriage certificate and adopt the same holding as did the Texas court.

31. The Texas trial court granted the petition based upon TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992) which allows an amendment if the record was "incomplete or proved by satisfactory evidence to be inaccurate." The trial court granted the amendment based upon the uncontroverted affidavit of an expert stating that Christie is a female. Therefore, it appears that the Texas court that authorized the amendment to the birth certificate acknowledged that post-operative transsexuals are legally entitled to amend their official documents to indicate their self-identified sex.

32. *See Littleton*, 9 S.W.3d at 225.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.* at 231.

38. *See id.* at 225.

39. TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998) provides: "[a] license may not be issued for the marriage of persons of the same sex."

The second issue is more complex. Numerous legislatures<sup>40</sup> and some courts<sup>41</sup> in jurisdictions other than Texas have ruled on the factors that control sex determination for transsexuals. The Texas legislature has never adopted legislation on this matter and at the time this action was filed, the Texas courts had not been faced with the issue. The only indication of the legislature's intent in this matter is Texas Health and Safety Code § 191.028 which entitles people to amend their birth certificates if their birth records were "incomplete or proved by satisfactory evidence to be inaccurate."<sup>42</sup> The legislative intent of this statute is unclear. It does not specifically refer to transsexuals, and when it was drafted transsexuals were not likely considered or discussed.<sup>43</sup> Therefore, the case was one of first impression for the Texas Court of Appeals and no binding legislation or precedent dictated the outcome.

The evidence presented to the appellate court was not extensive. The facts presented above were introduced as well as Christie's original birth certificate indicating that she was a male.<sup>44</sup> The only additional evidence was the stipulation of the parties as to the intended testimony of the medical experts who had treated Christie.<sup>45</sup> These medical experts consisted of Dr. Donald Greer, a board certified plastic surgeon, and Dr. Paul Mohl, a board certified psychiatrist.<sup>46</sup> Both parties to the litigation stipulated that the doctors, if allowed to testify, would assert that:

- Christie Littleton is a transsexual, someone whose physical anatomy does not correspond to his/her sense of being or sense of gender.<sup>47</sup>
- Medical science has been unable to identify the exact cause of transsexuality, but it is probably a combination of neuro-biological, genetic, and neonatal environmental factors.<sup>48</sup>
- Male-to-female transsexuals are psychologically and psychiatrically female before and after their sex

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40. See *supra* note 5. Legislatures that have enacted statutes allowing an amendment to the sex indicator on a birth certificate typically have allowed post-operative transsexuals to amend their official documents so that they reflect the transsexual's self-identified sex. *Id.* One state specifically denies this right to transsexuals. See TENN. CODE ANN. § 68-203(d) (1996).

41. See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 288-307 (1999) for a detailed discussion of the court opinions.

42. TEX. HEALTH & SAFETY CODE ANN. § 191.028 (West 2000).

43. See *Littleton*, 9 S.W.3d at 231.

44. See *id.* at 224.

45. See *id.*

46. See *id.*

47. See *id.*

48. See *id.*

- reassignment.<sup>49</sup>
- Christie Littleton has the capacity to function sexually as a female.<sup>50</sup>
  - Christie Littleton “*is medically a woman.*”<sup>51</sup>

The Texas Court of Appeals believed that it was within the legislature’s province to determine the guidelines that should govern the recognition of marriages involving transsexuals.<sup>52</sup> The court acknowledged that it had no control over whether or when the legislature would choose to make such a determination.<sup>53</sup> Although the court admitted that it could write a “protocol” for determining the legal sex of a transsexual, it believed it had no authority to fashion a “new law on transsexuals, or anything else.”<sup>54</sup> According to the court, its responsibility was to determine whether the jury, as a fact finder, could be called upon to determine the legality of the marriage of Christie to Jonathon.<sup>55</sup> The court held that in the absence of guidelines, which it declined to establish, a jury could not make such a determination.<sup>56</sup> The court instead decided that Christie’s sex was purely a question of law to be determined by the court in the absence of a legislative ruling.<sup>57</sup>

Based upon the lack of legislative guidance and the sparse evidence presented, the Texas Court of Appeals, in a 2-1 decision, ruled that Christie Littleton was legally a male and therefore could not be Jonathon Littleton’s legal wife.<sup>58</sup> The two justices who ruled against Christie found that Christie’s sex was not a factual issue, but was solely a legal issue.<sup>59</sup> They declared as a matter of law that Christie was a male.<sup>60</sup> The dissenting justice believed that the issue was a factual one and that the evidence raised a genuine issue of fact about whether Christie was a male or female and summary judgment was therefore inappropriate.<sup>61</sup>

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49. *See id.*

50. *See id.* at 225.

51. *Id.* (emphasis added).

52. *Id.* at 230.

53. *See id.*

54. *Id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.* at 231.

59. *See id.*

60. *See id.*

61. *See id.* at 234 (Lopez, J., dissenting).



### III. THE COURT'S OPINION

Chief Justice Phil Hardberger wrote the opinion for the court.<sup>62</sup> Justice Karen Angelini concurred<sup>63</sup> in the judgment and Justice Alma Lopez dissented.<sup>64</sup> This part of the Article reviews and critiques the basis for each opinion.

#### A. Chief Justice Hardberger's Opinion

According to Justice Hardberger, this case involved only one issue: Is Christie Littleton a male or a female?<sup>65</sup> Justice Hardberger restated the issue three times in his opinion.<sup>66</sup> His phrasing of the issue foretold the result he would reach. Justice Hardberger phrased the issue as follows:

- “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>67</sup>
- “Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?”<sup>68</sup>
- “[T]he question remains whether the law will take note of these changes” (the surgical and hormonal alteration of her body and the legal change in name and sex on her birth certificate) “and treat her as if she had been born a female.”<sup>69</sup>

Justice Hardberger acknowledged that the issue of sex determination involved profound philosophical,<sup>70</sup> metaphysical,<sup>71</sup> and policy concerns.<sup>72</sup> Despite these profound concerns, Justice Hardberger resolved the issue in a simple manner. According to Justice Hardberger, Christie was born a male and therefore she remained a male the rest of her life.<sup>73</sup> In reaching

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62. *See id.* at 223.

63. *See id.* at 231 (Angelini, J., dissenting).

64. *See id.* at 232 (Lopez, J., dissenting).

65. *See id.* at 223.

66. *See id.* at 224-26.

67. *Id.* at 224.

68. *Id.* at 225.

69. *Id.* at 226.

70. *See id.* at 224.

71. *See id.* at 231.

72. *See id.* at 230.

73. *See id.* at 225. The only recognition of the importance of Christie’s surgical and hormonal treatment was in Justice Hardberger’s statement of his conclusions when he acknowledged that Christie has “made every conceivable effort to make herself a female, including a surgery that

this result, Justice Hardberger assumed that Christie's sex modification surgery was of no legal import, even though after the surgery, medical experts agreed that she was medically a woman.<sup>74</sup>

To determine whether Christie Littleton was a female or male, Justice Hardberger needed to establish the factors that should control the determination of a person's legal sex. According to medical experts, the typical medical criteria of sex include: genetic or chromosomal sex; gonadal sex; internal morphologic sex; external morphologic sex; hormonal sex; phenotypic sex; assigned sex/gender of rearing; and gender identity.<sup>75</sup>

Justice Hardberger's opinion does not explain the evidence or reasoning that allowed him to conclude that Christie was currently a male. No evidence was admitted regarding Christie's chromosomal make-up, but Justice Hardberger presumed she had male (XY) chromosomes at birth and at the time of trial.<sup>76</sup> Christie's gonads, internal and external morphological sex, hormones, and phenotype were male at birth, but had been altered during her sex modification treatments.<sup>77</sup> At the time of trial, her gonads and internal morphology were neither male nor female because her internal sex organs had been surgically removed. Her external morphology and phenotype were female because of surgical alteration and hormonal administration. Christie had been reared as a male, but her self-identity was female.<sup>78</sup> Therefore, Christie's sex indicators at the time of the trial were ambiguous. Without a clear delineation of the factors that determine an individual's legal sex, the basis for Justice Hardberger's ruling is unclear.<sup>79</sup> Although Christie was labeled a male at birth, Justice Hardberger did not provide any support for his conclusion that the sex designated at birth must remain Christie's sex throughout her life.

Three pages of Justice Hardberger's opinion are devoted to a summary of some of the cases that have involved the determination of a transsexual's

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would make most males pale and perspire to contemplate." *Id.* at 231.

74. *See id.* at 224.

75. See JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES 4 (2d ed. 1994); *see also* Greenberg, *supra* note 41, at 278-92 for a discussion of sexual differentiation.

76. *See Littleton*, 9 S.W.3d at 230.

77. *See id.* at 224.

78. *See id.*

79. Justice Hardberger listed a number of Christie's biological sex attributes in his conclusion. *See id.* at 230-31. For instance, he stated that Christie's female attributes included breasts, external genitalia, and a vaginal canal. *See id.* at 230. He acknowledged that her internal organs were neither male nor female. *See id.* He concluded, however, that her chromosomes were not surgically or hormonally altered and that therefore she was "[b]iologically . . . still a male." *Id.* His conclusion was that Christie's female anatomy was all "man made" and she inhabited a male body in "all aspects other than what the physicians have supplied." *Id.* at 231.

sex for purposes of marriage.<sup>80</sup> Some of these cases have held that a transsexual's sex should be determined by a combination of biological factors, such as chromosomes, gonads and genitalia,<sup>81</sup> while other courts have emphasized the importance of psychological factors and self-identification.<sup>82</sup> Although Justice Hardberger cited the former cases with approval, he did not clearly adopt any of the approaches chosen by these courts. Instead, he assumed that Christie had been born a male, and absent a legislative enactment declaring that post-operative transsexuals legally become their self-identified sex, she would forever remain a male under the law.<sup>83</sup>

The weakness in Justice Hardberger's approach is evident from recent developments in research regarding sex determination. Medical and psychological experts all agree that science has not yet determined the factors that control gender self-identification.<sup>84</sup> The only evidence that the Texas court had before it when it rendered its decision were the affidavits of two medical experts.<sup>85</sup> Both experts asserted that Christie was medically a woman and that her self-identity as a woman was probably a result of neuro-biological, genetic, and neonatal environmental factors.<sup>86</sup> In other words, the evidence indicated that Christie's sex at birth was a combination of male and female attributes. She had the chromosomes, hormones, gonads and genitalia of a male, but her biological gender identity was in all likelihood female.<sup>87</sup> The proffered testimony of the medical experts in this case indicated that they, and other medical authorities, recognize that Christie is medically a woman and in all likelihood was biologically

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80. See *id.* at 226-29; see also Greenberg, *supra* note 41, at 299-307 for a thorough discussion of the cases cited by Justice Hardberger as well as other cases that have addressed this issue.

81. See, e.g., *Corbett v. Corbett* [1970] 2 All E.R. 33 (Eng.).

82. See, e.g., *M.T. v. J.T.*, 255 A.2d 204, 207 (N.J. 1976); *Attorney Gen. v. Otahuhu Family Court* [1994] 1 N.Z.L.R. 603.

83. See *Littleton*, 9 S.W.3d at 231.

84. A 1995 study indicates that a section of the brain that is essential for sexual behavior is larger in men than in women and that the brain structure of genetically male transsexuals is more similar to female brains than to male brains. See Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 68-70 (1995). William Reiner is conducting a study of 27 infants born without penises. Twenty-five were raised as girls and two were raised as boys. Of the 25 children raised as girls, 14 have already declared themselves to be boys. See *Study: Gender Identity Decided in Womb*, CHI. TRIB., May 13, 2000, at 5.

85. See *Littleton*, 9 S.W.3d at 224-25.

86. See *id.* at 224.

87. Obviously, gender identity at birth is impossible to determine and cannot be considered when officials establish the sex that originally will be indicated on an infant's birth certificate. Nothing in the statutory or common law of Texas, however, mandates that the sex fixed at birth is legally unalterable.

destined to self-identify as a female.<sup>88</sup> The court, however, decided as a matter of policy to completely ignore Christie's sexual anatomy at the time of trial and her gender self-identification as legal sex determinants.

Whether self-identity should be the paramount factor in the determination of a person's legal sex is debatable,<sup>89</sup> but gender self-identity should be at least one of the factors, especially for post-operative transsexuals. If a court chooses to emphasize other biological factors over self-identity for policy reasons, the position is defensible. To ignore, however, the relevance of self-identity completely, as Justice Hardberger chose to do, leads to a result that is contrary to current medical and psychological research.<sup>90</sup>

Although Justice Hardberger acknowledged that the issue of sex determination raises profound policy concerns,<sup>91</sup> his opinion fails to identify or address any of these concerns. More problematic is the fact that the opinion does not state the factors that led Justice Hardberger to conclude that Christie is legally a male. His opinion appears to hinge on the fact that he believed "Our Creator" created a man that science tried unsuccessfully (at least for legal purposes) to turn into a woman.<sup>92</sup> According to Justice Hardberger, "The body Christie inhabits is a male body in all aspects other than what the physicians have supplied."<sup>93</sup> If Christie inhabits a male body, the only indication that the body is male are her chromosomes, which the court presumed were XY.<sup>94</sup>

At the end of his opinion, Justice Hardberger simply concludes:

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, and the words contained in

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88. See *Littleton*, 9 S.W.3d at 225. Of the eight factors that medical authorities use to determine sex, only two factors, chromosomes and self-identified sex, appear to be immutable. Gonads, internal and external morphology, hormones and phenotype can be altered. See e.g., Milton Diamond & H. Keith Sigmundson, *Sex Reassignment at Birth: Long-Term Review and Clinical Implications*, 151 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 298 (1997); William Reiner, *To Be Male or Female—That Is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224 (1997). An argument can be made that gender self-identity should be the paramount factor for determining a person's legal sex. See Greenberg, *supra* note 41, for a detailed examination of this approach.

89. See Greenberg, *supra* note 41, for a discussion of the arguments in favor of emphasizing self-identity as the critical determinant of a person's legal sex.

90. See Diamond, *supra* note 88; Reiner, *supra* note 88; Zhou, *supra* note 84.

91. See *Littleton*, 9 S.W.3d at 230.

92. *Id.* at 224.

93. *Id.* at 231.

94. Ironically, there was no evidence to indicate Christie's chromosomal make-up. Therefore, summary judgment was inappropriate because Christie's chromosomal structure was a question of fact.

the amended certificate are not binding on this court. ¶There are some things we cannot will into being. They just are.<sup>95</sup>

### B. Justice Angelini's Concurring Opinion

Justice Karen Angelini's concurring opinion is brief. She agreed with Justice Hardberger that summary judgment was appropriate because the court was presented with pure issues of law and public policy.<sup>96</sup> She also agreed that biological considerations are preferable to psychological factors as tools for determining sex.<sup>97</sup> She did, however, acknowledge that when biological factors are considered alone, that some people's sex may be ambiguous, and that when that case is presented to the Texas court, the analysis would necessarily be more complex.<sup>98</sup> For a person who is a transsexual, however, Justice Angelini agreed with Justice Hardberger that physical anatomy at birth is dispositive.<sup>99</sup> She, too, reached this conclusion without analyzing the policy concerns at stake.

### C. Justice Lopez's Dissenting Opinion

Justice Alma Lopez, in her dissent, also acknowledged that sex determination is a matter best addressed by the legislature.<sup>100</sup> In the absence of legislation, however, Justice Lopez believed the court had two options: it could establish guidelines for determining sex, which would serve as precedential legal authority, or it could treat the issue as a question of fact to be determined at the trial court level.<sup>101</sup> Justice Lopez believed the court should not establish the factors that should control sex determination because the court would be speculating on public policy concerns that had not yet been addressed by the Texas legislature.<sup>102</sup> Instead, she examined the evidence to see if a triable issue of fact existed regarding Christie's sex. In reviewing the evidence, Justice Lopez found that the evidence was contradictory.<sup>103</sup> Christie's original birth certificate indicated that she was a male, but her amended birth certificate, which was approved by a trial court, indicated that she was female.<sup>104</sup> Given this contradictory evidence, Justice Lopez believed that summary judgment was inappropriate.<sup>105</sup>

95. *Littleton*, 9 S.W.3d at 231.

96. *See id.* (Angelini, J., concurring).

97. *See id.* at 232 (Angelini, J., concurring)..

98. *See id.* (Angelini, J., concurring).

99. *See id.* (Angelini, J., concurring).

100. *See id.* at 234 (Lopez, J., dissenting).

101. *See id.* at 232-34 (Lopez, J., dissenting)..

102. *See id.* at 233 (Lopez, J., dissenting)..

103. *See id.* (Lopez, J., dissenting).

104. *See id.* (Lopez, J., dissenting).

105. *See id.* (Lopez, J., dissenting).

Although Justice Lopez was willing to let a fact finder determine Christie's sex, it is clear from her opinion that she believed a transsexual's self-identified sex should play an important role in the determination of her legal sex. Justice Lopez acknowledged that birth attendants who are charged with declaring a child's sex at birth do not always record an accurate gender.<sup>106</sup> She also believed that Christie's gender was lawfully corrected to read female pursuant to Texas law.<sup>107</sup> Therefore, she decided that a fact finder should determine whether the original birth certificate or the amended birth certificate accurately reflected Christie's true sex.

#### IV. WHEN IS A WOMAN A WOMAN REVISITED

States have the power to establish an individual's legal sex. The exercise of this power has enormous consequences for the person whose sex is at issue.<sup>108</sup> For example, sex determination may affect whether an individual is entitled:

- to be a husband/wife<sup>109</sup> or father/mother;<sup>110</sup>
- to have a sex indicator on the person's official documents

106. *See id.* (Lopez, J., dissenting).

107. *See* TEX. HEALTH & SAFETY CODE ANN. § 191.028 (Vernon 1992).

108. In addition to the ramifications discussed in this Article, sex determination may also affect an individual's military obligations, liability under various criminal statutes, ability to participate in some sporting events as a woman, right to social security benefits, right to protection under particular disability statutes, and the right to be incarcerated with inmates of one's self-identified sex if convicted of a crime. For a discussion of all the implications of sex determination, see Greenberg, *supra* note 41, at n.20. Sex determination for one individual will also affect others who are involved in relationships with the person whose sex may be ambiguous. *See, e.g., Von Hoffburg v. Alexander*, 615 F.2d 633 (5th Cir. 1980). In *Von Hoffburg*, Maria Von Hoffburg was contesting her discharge from the United States Army for alleged homosexual tendencies. *Id.* at 634. Maria Von Hoffburg self-identified as a heterosexual, but she was discharged because the person she married was a female-to-male transsexual, and the army therefore declared that Maria was a lesbian. *See id.* at 634-35.

109. *See* Greenberg, *supra* note 41, at 299-308. Whether a husband/wife relationship exists also has profound implications. It will control, among other things, the right to: inherit, receive employment related benefits such as social security and insurance, file a joint tax return, receive spousal and child support in the event of a marital dissolution, and as in *Littleton*, state a cause of action for wrongful death.

110. *See, e.g., Transgender Ruling*, L.A. DAILY J., Nov. 26, 1997, at 1 (citing *Vecchione v. Vecchione*, Civ. No. 96D003769). In *Vecchione*, a woman, Kristie, married a post-operative female-to-male transsexual, Joshua. *See id.* Kristie maintained that Joshua should not have custody rights to the child who was conceived during their five year marriage by artificial insemination using sperm from Joshua's brother. *See id.* If Kristie could successfully void the marriage, Joshua would not be the child's legal father. *See id.* The trial court ruled that the marriage was valid and Joshua was the legal father. *See id.*

that accurately reflects the individual's gender identity;<sup>111</sup>  
and

- to state a gender-based claim for employment discrimination or violation of the constitutional right to equal protection.<sup>112</sup>

For most people, sex classification is not a controversial issue. For transsexuals, however, sex determination is complex. Many state legislatures and courts have not yet ruled on the legal sex status of transsexuals. A number of state legislatures, however, have examined the issue and have adopted legislation allowing post-operative transsexuals to alter their official documents so that the documents reflect their owner's self-identified sex.<sup>113</sup> The U.S. government has adopted this approach for passports.<sup>114</sup> Because not all state legislatures have adopted controlling legislation, courts in some states have established the guidelines for sex determination.<sup>115</sup>

Although some legislatures and courts have established guidelines for determining which sex will appear on a person's official documents, this sex determination may not control whether individuals can legally marry as their self-identified sex. In some cases, courts may simply ignore the sex designation on the official document as Justice Hardberger did in Christie's case. In other jurisdictions, courts have acknowledged that different policy concerns are relevant for determining an individual's sex for purposes of marriage and for other purposes.<sup>116</sup> Therefore, the sex designation indicated

111. See *supra* note 5 for relevant statutes and Greenberg, *supra* note 41, at 308-17 for a detailed discussion of the relevant cases.

112. See Greenberg, *supra* note 41, at 317-25.

113. See *supra* note 5.

114. Foreign Relations, Evidence of U.S. Citizenship or Nationality, 22 C.F.R. § 51.43 (1999) (controlling the issuance of passports). The Department of State Procedures Manual (on file with the author) states that new passports indicating an individual's self-identified sex will be issued to individuals who have undergone surgery. Pre-operative transsexuals can obtain temporary passports that are valid for one year and can be extended upon submission of appropriate medical documentation that shows the surgery was completed. Although the sex indicator on the passport cannot determine an individual's sex for purposes of state law, the passport may be used by its holder for identification purposes. Therefore, if a post-operative transsexual uses the passport to obtain a marriage license, and no one later contests the validity of the marriage (as did Dr. Prange), the parties to the marriage will receive all the benefits married couples receive.

115. See Greenberg, *supra* note 41, at 317-35 for a thorough discussion of these cases.

116. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). In *M.T. v. J.T.*, the court acknowledged that several criteria may be relevant in determining an individual's sex. *Id.* at 208-10. It declared that in most instances external genitalia should be the most significant determinant of sex classification at birth. See *id.* at 208-09. The court distinguished sex classification at birth from other areas and found that for purposes such as public records, service in the military, participation in athletic competitions, and eligibility for certain kinds of employment, other tests in addition to genitalia may be important. See *id.* at 209.

on a person's official documents may not comport with the sex role in which the person can legally marry.

In marriages involving transsexuals, the major policy issue that concerns the courts, as Justice Hardberger indicated in *Littleton*, is the state's interest in limiting marriages to heterosexual unions.<sup>117</sup> A majority of states have adopted statutes that prohibit marriages between individuals of the same sex. The jurisdictions that have statutes that specifically prohibit same-sex marriages include: Alaska,<sup>118</sup> Arizona,<sup>119</sup> Arkansas,<sup>120</sup> California,<sup>121</sup> Colorado,<sup>122</sup> Delaware,<sup>123</sup> Florida,<sup>124</sup> Georgia,<sup>125</sup> Hawaii,<sup>126</sup> Idaho,<sup>127</sup> Illinois,<sup>128</sup> Indiana,<sup>129</sup> Kansas,<sup>130</sup> Louisiana,<sup>131</sup> Maryland,<sup>132</sup> Michigan,<sup>133</sup> Minnesota,<sup>134</sup> Missouri,<sup>135</sup> Montana,<sup>136</sup> New Hampshire,<sup>137</sup> North Carolina,<sup>138</sup> Puerto Rico,<sup>139</sup> South Carolina,<sup>140</sup> South Dakota,<sup>141</sup> Tennessee,<sup>142</sup> Texas,<sup>143</sup> Utah,<sup>144</sup> and Virginia.<sup>145</sup> Congress has also passed DOMA, the Defense of Marriage Act,<sup>146</sup> which defines marriage at the federal level as a "legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the

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

118. See ALASKA STAT. § 25.05.011(a) (Michie 1998).

119. See ARIZ. REV. STAT. ANN. § 25-101(c) (West 1998).

120. See ARK. CODE ANN. § 9-11-109 (Michie 1998).

121. See CAL. FAM. CODE § 300 (West 1994 & Supp. 1999).

122. See COLO. REV. STAT. ANN. § 14-2-104 (West 1997).

123. See DEL. CODE ANN. tit. 13 § 101(a) (Supp. 1998).

124. See FLA. STAT. ANN. § 741.04(1) (West Supp. 1999).

125. See GA. CODE ANN. § 19-3-3.1 (1998).

126. See HAW. REV. STAT. ANN. § 572-1 (Supp. 1997).

127. See IDAHO CODE § 32-201(1) (1997).

128. See 750 ILL. COMP. STAT. ANN. 5/212(a)(5) (West 1998).

129. See IND. CODE ANN. § 31-11-1-1 (Michie 1997).

130. See KAN. STAT. ANN. § 23-101 (Supp. 1998).

131. See LA. CIV. CODE ANN. art. 86 (West 1993).

132. See MD. CODE ANN. § 2-201 (1991).

133. See MICH. STAT. ANN. § 551.1 (Law. Co-op. 1992 & Supp. 1998).

134. See MINN. STAT. ANN. § 517.01 (West 1999).

135. See MO. ANN. STAT. § 451.022 (West 1997).

136. See MONT. CODE ANN. § 40-1-103 (1997).

137. See N.H. REV. STAT. ANN. § 457:1 (1992).

138. See N.C. GEN. STAT. § 51-1.2 (1997).

139. See P.R. LAWS ANN. tit. 31 § 221 (1993).

140. See S.C. CODE ANN. § 20-1-15 (West 1998).

141. See S.D. CODIFIED LAWS § 25-1-1 (Michie 1998).

142. See TENN. CODE ANN. § 36-3-104 (1999).

143. See TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998).

144. See UTAH CODE ANN. § 30-1-2(5) (Michie 1995).

145. See VA. CODE ANN. § 20-45.2 (Michie 1998).

146. Defense of Marriage Act, 110 Stat. 2419 (1996).



opposite sex who is a husband or a wife.”<sup>147</sup> Thus far, all courts (other than the courts in Hawaii<sup>148</sup> and Vermont<sup>149</sup>) that have been asked to resolve the issue have ruled that same-sex marriages are illegal.<sup>150</sup>

In making the determination that “same-sex” marriages are illegal, the courts and legislatures were not considering marriages involving post-operative transsexuals; they were considering gay and lesbian marriages.<sup>151</sup> Adding transsexuals into the marital equation makes identifying “same-sex” marriages more problematic. To fully understand the implications of the court decisions that have ruled that transsexuals cannot legally marry in their post-operative self-identified sex, the policy concerns underlying the limitation of marriage to persons of the “opposite sex” must be analyzed and applied to marriages in which one of the spouses is a transsexual.

Two types of marriages involving post-operative transsexuals (Marriage A and Marriage B) can potentially occur.<sup>152</sup> Marriage A mirrors the facts

147. 1 U.S.C. § 7 (Supp. 1997). According to its legislative history, DOMA has two primary purposes: “to defend the institution of traditional heterosexual marriage” and “to protect the rights of the states to formulate their own public policy regarding the legal recognition of same-sex [marriages].” 28 U.S.C.A. § 1738C (West Supp. 1998).

148. In *Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993), the Supreme Court of Hawaii held that the state’s failure to recognize same-sex marriages is subject to strict scrutiny under the Hawaii Constitution, and the state would have to show a compelling interest to justify its restriction. It remanded the case to the trial court to determine whether the state could demonstrate such an interest. *See id.* at 68. On remand, the trial court found that the state did not demonstrate a compelling interest. *See Baehr v. Miike*, CIV. No. 91-1934, WL 694235, at \*21 (Haw. Cir. Ct. Dec. 3, 1996). This circuit court decision was stayed, pending a second appeal to the Hawaii Supreme Court. *See id.* The courts’ actions were challenged by a referendum. On November 3, 1998, voters in Hawaii approved a legislative act to prohibit same-sex marriages in their state (changing the Hawaii state constitution to read, “the Legislature should have the power to reserve marriage to opposite-sex couples”). Cheryl Wetzstein, *Two States Define ‘Marriage’*, WASHINGTON TIMES, Nov. 1, 1998, at A4.

149. In *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999), the Vermont Supreme Court held that under the Vermont Constitution, same sex couples could not be deprived of the statutory benefits and protections afforded to persons of the opposite sex who choose to marry. The court held that these benefits could be provided by either recognizing same-sex marriages or by adopting a statutory equivalent to marriage for same-sex couples, such as a domestic partnership law. *See id.* The court left the decision of whether to recognize same-sex marriages or adopt a domestic partnership law to the Vermont legislature. The Vermont legislature enacted a statute that recognizes civil unions between same-sex couples. The legislation provides such couples the same benefits as married heterosexual couples. *See Ross Sneyd, Vermont Governor Signs Gay Union Bill*, Associated Press, Apr. 26, 2000, available in 2000 WL 19884854.

150. *See Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 42 n.165 (1995).

151. *See, e.g., Dean v. District of Columbia*, 653 A.2d 307 (D.C. App. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

152. To simplify the analysis, only post-operative male-to-female transsexuals are being

in *Littleton v. Prange*. In other words, in Marriage A, a male (Jonathon) marries a post-operative male-to-female transsexual (Christie), and they live in what they consider to be a heterosexual relationship. Marriage B also involves a marriage to a post-operative male-to-female transsexual (Christie), but in this case the other spouse is a female (Jane) and Christie and Jane live in what they consider to be a same-sex marriage. The relationships described in Marriage B exist and will eventually come before the courts.<sup>153</sup> It has been well-established that gender identity and sexual orientation do not necessarily correlate and should not mistakenly be conflated.<sup>154</sup>

When faced with determining the legality of these two marriages, courts and legislatures have four options:

1. They could declare that Christie is a man and rule that Marriage A violates the state's prohibition against same-sex marriage. If Christie is legally a man, then presumably Marriage B must be valid.
2. They could declare that Christie is a woman and rule that Marriage B violates the state's prohibition against same-sex marriage. If Christie is legally a woman, then presumably Marriage A must be valid.
3. They could declare that Christie is neither a man nor a woman and she cannot legally marry anyone. Under this approach, neither Marriage A nor Marriage B would be valid.
4. They could declare that Christie could be either a man or a woman and Marriage A and Marriage B are both valid.

It is doubtful that Texas, or most other jurisdictions, would choose the fourth option. To do so would be contrary to our binary sex classification

discussed. Two other types of marriages involving transsexuals could also occur. A post-operative female-to-male transsexual could marry either a male or a female. If a post-operative female-to-male transsexual marries a woman, the marriage would be analogous to Marriage A; if he marries a man, the marriage would be similar to Marriage B.

153. See Chris Beam, *For Better or For Worse?*, OUT, May 2000, at 60, 64; Jilly Beattie & Sara Lain, *The Wedding with Two Brides . . . and One Is a Man!; Lesbian Lovers Both Wear a Dress for Britain's Weirdest-Ever Marriage; "I Was a Chick-with-a-Dick-Then I Had My Op and Woke up as a Girl:" Lesbians to Legally Marry Because One Is an Ex-Man*, THE PEOPLE, June 11, 1995, at 2; *Oregon Couple Adds Twist to Love Story: The Bride and Groom Plan to Wed Legally, But Then the Man Intends to Have His Gender Altered*, MORNING NEWS TRIB. (Tacoma, Wash.), Dec. 14, 1996, at A3; Afi-Odelia E. Scruggs, *Tying Legalities into Tangled Knot*, PLAIN DEALER (Cleveland), Oct. 7, 1996, at 1B; Michael Vigh, *Transsexual Weds Woman in Legally Recognized Union*, SALT LAKE TRIB., Feb. 5, 1999, at 1C.

154. See ROBERT POOL, *EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES* 137 (1994).

system and would also be an acknowledgment that same-sex marriages may be legal. Numerous scholars have called for an end to the ban on same-sex marriages.<sup>155</sup> Despite the criticisms leveled against limiting marriage to opposite sex couples, it appears that marriage will continue to be limited to heterosexual unions in most jurisdictions.<sup>156</sup>

Most jurisdictions are also unlikely to adopt the third option and declare that post-operative transsexuals cannot legally marry. Although an Australian court adopted the third approach in a case involving a marriage between a woman and an hermaphrodite,<sup>157</sup> it would be difficult for a United States court to constitutionally defend this position. The United States Supreme Court has acknowledged that marriage is a fundamental right under the United States Constitution.<sup>158</sup> Therefore, denying an individual the right to marry anyone at all should be held to be unconstitutional.

Unless courts and legislatures are willing to deny transsexuals the constitutional right to marry, they have only two choices. They must recognize the validity of either Marriage A or Marriage B. In other words, legal institutions must decide whether Christie is legally entitled to marry Jonathon or Jane.

In *Littleton*, the court declared that Christie was legally a male and thus could not marry Jonathon. Therefore, Marriage A is illegal in Texas. Although the court did not confront the issue, the court implicitly found that Christie could legally marry Jane because it ruled that Christie is legally a male. To determine whether this decision is correct, the policy concerns that have led states to limit marriage to heterosexual unions must be considered.

The traditional arguments against same-sex marriage fall into four groups:<sup>159</sup> (1) marriage has always been a union between one man and one woman and same-sex marriage violates the traditions and morals of

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155. For an overview of these arguments, see SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997).

156. Mary Coombs has argued that the acceptance of transsexual marriages will eventually lead to a deconstructing of the sexual categories and the acceptance of marriage for all individuals regardless of their sex or sexual orientation. Mary Coombs, *Sexual Dis-orientation: Transgendered People and Same-Sex Marriage*, 8 U.C.L.A. WOMEN'S L.J. 219, 260 (1998). Although this goal may eventually be reached, in the interim, courts and legislatures must set a standard for sexual determination so that transsexuals are able to marry someone.

157. See *Marriage of C. and D. (Falsely called C.)*, (1979) 35 F.L.R. 340, 343 (Austl.).

158. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

159. See Coombs, *supra* note 156, at 228.

society;<sup>160</sup> (2) traditional marriage is both a core of our civilization and an institution currently under threat; putting same-sex relationships on the same level as traditional marriages would undermine the status that is necessary to preserve traditional marriage;<sup>161</sup> (3) marriage is a vehicle for procreation; the essence of marriage is the potentially procreative marital sexual act; and such an act cannot occur in same-sex relationships;<sup>162</sup> and (4) same sex marriages pose a risk to children because of a threat to moral values and the possibility that children would be raised in less than an ideal household arrangement containing a mother and a father.<sup>163</sup>

Given these policy concerns, should courts and legislatures declare that Christie can legally marry Jonathon or legally marry Jane?

Opponents of same-sex marriages would probably oppose legalizing either marriage. Opponents of same-sex marriage would likely assert that both Marriage A and Marriage B:

- threaten societal traditions and morals because Marriage A legally sanctions transsexuals changing the sex that was “fixed by our Creator,” while Marriage B to all outward appearances looks like a same-sex marriage;
- undermine traditional marriages by putting transsexual marriages on the same footing as traditional marriages;
- are non-procreative because all post-operative transsexuals are incapable of impregnating someone or carrying a child to term;<sup>164</sup> and
- fail to model the moral values that should be instilled in children. Marriage A does not provide a positive model because it does not reflect society’s traditional view of sex and gender roles and children would likely perceive Marriage B to be a same-sex marriage.

Thus, opponents of same-sex marriage would likely oppose both Marriage A and Marriage B. Therefore, the policy reasons that lead opponents of same-sex marriage to oppose gay and lesbian marriages do not help to clarify whether Christie legally should be able to marry Jonathon or Jane. Unless courts and legislatures are willing to take the extreme step of ruling that post-operative transsexuals are neither males nor

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160. *See id.*

161. *See id.*

162. *See id.* at 229.

163. *See id.*

164. Post-operative transsexuals could become biological parents of a child if, prior to their sex-modification operation, they have their sperm or eggs frozen and later use the sperm or eggs in an artificial insemination procedure.

females and are not entitled to the constitutional right to marry guaranteed to every other person, they must analyze policy concerns in addition to the concerns related to the prohibition against same-sex marriages. The courts and legislatures must consider whether legalizing the marriage between Christie and Jonathon or legalizing the marriage between Christie and Jane better furthers the values that the law and society seek to promote.

The justices who decided *Littleton* and other courts that have reached the same result did not adequately analyze the values they promoted when they rendered their decisions.<sup>165</sup> Most of the courts that have denied post-operative transsexuals the right to marry as their self-identified sex did so for one of two reasons. Some ruled against the transsexual because of the perceived inability of the post-operative transsexual to engage in "true heterosexual sex"<sup>166</sup> and to perform the "essential role that a woman or a man must perform in marriage."<sup>167</sup> Others justified their ruling on the theory they did not want the legal system to be used to help psychologically ill persons in their social adaptation.<sup>168</sup>

As indicated above, whenever post-operative transsexuals marry, they will be entering into a relationship in which they will not be engaging in "traditional" heterosexual sex. In Marriage A, the sexual act will utilize genitalia that were created by doctors and therefore under the view of some courts it could not be "true" heterosexual sex.<sup>169</sup> In Marriage B, the sexual act will utilize genitalia that are identical in appearance and therefore the sexual act clearly does not fit into the "traditional" concept of heterosexual sex.

The second concern, not wanting to assist "psychologically ill persons" in their social adaptation, does not reflect or incorporate current research on transsexuality. As indicated above, current studies indicate that transsexuality may have a biological basis<sup>170</sup> and core gender identity

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165. The facts of the cases involving transsexual marriages have not been provided because the facts are not critical to the policy concerns being discussed here. Some of the cases involved pre-operative transsexuals, but most involved post-operative transsexuals. In all cases, the non-transsexual participant in the marriage was contesting the validity of the marriage. For a thorough discussion of the facts of these cases, see Greenberg, *supra* note 40, at 299-307.

166. See, e.g., *Corbett v. Corbett* [1970] 2 All E.R. 33, 48 (Eng.). In *Corbett*, the court found that "sexual intercourse, using the completely artificial cavity," cannot be described as "ordinary and complete intercourse." *Id.* at 49. The court also stated, "When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crual intercourse is, in my judgment, to be measured in centimetres." *Id.*

167. *Id.*; see also *B v. B*, 355 N.Y.S.2d 712, 713-714 (N.Y. Sup. Ct. 1974); *W v. W* [1976] 2 SALR 308.

168. See, e.g., *Hartin v. Director of the Bureau of Records*, 347 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1973).

169. See *Corbett v. Corbett* [1970] 2 All E.R. 33, 49-50 (Eng.).

170. See Zhou, *supra* note 84.

appears to be fixed at birth and likely is not subject to alteration.<sup>171</sup> Therefore, regardless of whether the court chooses to recognize their marriages, transsexuals will continue to live in their self-identified sex role.

If the *Littleton* court had held that Christie's marriage to Jonathon was legal, what values would it have promoted? Legalizing Christie's marriage to Jonathon would:

1. Bring the law into conformity with other disciplines such as medicine and psychology;
2. Encourage uniformity in the law by allowing transsexuals to marry in the sex that conforms to the sex indicator on their official documents;
3. More accurately reflect society's view of what constitutes a same-sex marriage;
4. Encourage socially responsible behavior by parties to a marriage; and
5. Have a positive therapeutic effect on the people most affected by these rulings.

As indicated above, recent developments in medicine and psychology indicate that core gender identity probably has a biological basis and appears to be immutable.<sup>172</sup> Therefore, many scientific experts accept the fact that transsexuality is not a disorder that can be cured by drugs or counseling. If legal institutions ban transsexuals from marrying in their post-operative sex role, transsexuals will be encouraged by the medical community to live in their self-identified role and at the same time will be legally barred from marrying someone of the "opposite sex."

Allowing post-operative transsexuals to marry as their self-identified sex will also help to promote uniformity in the law. Most legislatures that have addressed the issue have decided that post-operative transsexuals are legally entitled to amend their identity documents so that they accurately reflect their self-identified sex.<sup>173</sup> It appears that only one legislature that has specifically addressed this issue decided that post-operative transsexuals cannot amend their official documents.<sup>174</sup> The U.S. government has also adopted this approach for passports.<sup>175</sup> Therefore, allowing post-operative transsexuals to marry in their self-identified sex will encourage uniformity in the law by bringing marital law into conformity with the law regarding official documents.

Allowing post-operative transsexuals to marry as their self-identified

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171. See Diamond, *supra* note 88; Reiner, *supra* note 88.

172. See Diamond, *supra* note 88; Reiner, *supra* note 88; Zhou, *supra* note 84.

173. See *supra* note 5.

174. See TENN. CODE ANN. § 68-3-203(d) (1996).

175. See *supra* note 114 and accompanying text.

sex will also more accurately reflect society's perception of what constitutes an "opposite-sex" marriage. Society viewed Christie's marriage to Jonathon as a heterosexual union. The official in Kentucky who issued the marriage licence and the official in Texas who issued the amended birth certificate both believed that Christie was a woman. If Christie's marriage to Jonathon is legal, to all outward appearances, the marriage looks like a heterosexual relationship. If instead, Christie's marriage to Jane is declared legal, the marriage will appear to be a state sanctioned same-sex marriage.

Legalizing Christie's marriage to Jonathon will also promote socially responsible behavior by the parties to the marriage. Except for *Littleton*, all reported cases challenging the validity of a transsexual marriage have been brought by the transsexual's spouse.<sup>176</sup> Typically, these actions have been brought to avoid paying spousal support or to avoid a declaration that a child born during the marriage was legally the child of both parties to the marriage.<sup>177</sup> Allowing a party to a marriage to avoid an obligation that they knowingly and voluntarily assumed is not a value society or the law typically seeks to promote. Declaring such marriages invalid frustrates the original intent and agreement of the parties to the marriage.

Finally, denying post-operative transsexuals the right to marry as their self-identified sex is extraordinarily harmful to transsexuals. Transsexuals are seeking to have their gender self-identity recognized by the law and by society. Transsexuals have traditionally been forced into the closet because of the ostracism society has directed at them.<sup>178</sup> Denying post-operative transsexuals the fundamental right to marry in their self-identified sex further ostracizes and marginalizes them. The promotion of emotional well-being should be one of the goals of the law as long as such promotion does not subordinate other important justice values.<sup>179</sup> Forbidding post-

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176. It appears that other cases are now being brought by people other than the parties to the marriage. For example, in Kansas, the son of a decedent who died intestate challenged the right of the decedent's wife's (a post-operative male-to-female transsexual) to inherit. The case is currently on appeal and as of this date no decision has been rendered. See Spurgeon, *supra* note 12. (Trial court documents are on file with the author.)

177. See, e.g., *Transgender Ruling*, L.A. DAILY J., Nov. 26, 1997, at 1 (citing *Vecchione v. Vecchione*, Civ. No. 96D003769). In *Vecchione*, a wife sought a declaration that her five-year marriage to her transsexual husband, Joshua, was invalid. See *id.* She sought this declaration so that Joshua would not be able to claim that he was the legal father of their daughter. See *id.* Some marital annulment actions involve fraud because the complaining spouses were unaware of their partners' transsexual status at the time of the marriage. Marriages entered into on the basis of fraud are typically voidable and the courts do not need to declare these marriages invalid on the basis of sex determination. See, e.g., *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

178. See KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US* 8 (1994).

179. This position has been advocated by supporters of therapeutic jurisprudence. Therapeutic jurisprudence calls for the exploration of the ways in which the law can achieve therapeutic consequences that are consistent with other legal values. Bruce J. Winick, *The Jurisprudence of*

operative transsexuals the right to marry in their self-identified sex does not promote any important legal or societal values. Conversely, allowing post-operative transsexuals to marry in their self-identified sex will promote therapeutic consequences and does not conflict with any other justice values.

The reported cases that allowed post-operative transsexuals to marry in their self-identified sex recognized and emphasized the importance of the social and psychological aspects of sex and gender identification<sup>180</sup> and found that allowing post-operative transsexuals to marry in their self-identified sex is practical, realistic and humane.<sup>181</sup> According to one court, it will promote the transsexual's quest "for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality."<sup>182</sup>

## V. CONCLUSION

Most of the cases that have held that post-operative transsexuals cannot legally marry as their self-identified sex were decided almost thirty years ago. Since these cases were decided, two significant events have occurred. First, scientific research on sexual identity and sexual orientation has established that: (a) core gender identity is likely established prior to birth and may be immutable;<sup>183</sup> (b) transsexuality is not necessarily related to sexual orientation;<sup>184</sup> and (c) post-operative transsexuals are medically considered to be their self-identified sex.<sup>185</sup> Second, the transsexual movement has become more active and many more actions involving transsexual marriages will likely reach the appellate courts.

Thus far, courts have only had to determine whether a marriage between individuals like Christie and Jonathon is valid. Soon, they likely will have to resolve whether individuals like Christie can legally marry Jane. Most of the cases that have ruled that post-operative transsexuals do not legally acquire their self-identified sex have believed that such rulings would

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*Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 645, 646 (David B. Wexler & Bruce J. Winick eds., 1996).

180. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976); *Attorney Gen. v. Otahuhu Family Court* [1994] 1 N.Z.L.R. 603.

181. See *M.T.*, 355 A.2d at 209.

182. *Id.* at 211.

183. See *Zhou*, *supra* note 84; *Diamond*, *supra* note 88; *Reiner*, *supra* note 88.

184. See *supra* note 153; *POOL*, *supra* note 154.

185. The *Littleton* court even accepted the stipulation of the parties as to this fact. See *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999). The court did not appear to be troubled by the fact that another discipline, medicine, had determined that Christie is a female. Although legal institutions are not bound by medical findings, Justice Hardberger never stated any reason to justify his complete rejection of the experts' proffered testimony and the stipulation of the parties that Christie is medically a female.



promote traditional morals and values. When these same courts are inevitably presented with a marriage of a post-operative transsexual who also identifies as a gay or lesbian, they will have to reassess exactly what values their earlier rulings furthered. When courts are asked to resolve the fundamental question of “when is a man a man, and when is a woman a woman,” they need to thoroughly consider exactly what values they are advancing when they render their decisions. Until partners in same-sex unions are guaranteed the same rights as married, heterosexual couples, allowing post-operative transsexuals to marry in their self-identified sex is the most humane result and better furthers the values society seeks to promote.