

A Mere Switch or a Fundamental Change? Theorizing Transgender Marriage

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Focusing on the legal cases that have been litigated in the United States, and making references to popular culture, this article considers whether marriages in which one of the partners is transgendered necessarily challenge or necessarily reinforce heterosexual hegemony.

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

The segment I remember centered on a married couple with children. The twist was that they were transgendered. The man-born one was transitioning to a woman; the woman-born one was transitioning to a man. Someone said (someone on TV? someone in the room? both?) the couple could still be husband and wife and the children would still have a mother and a father. The audience could laugh— isn’t that strange?—but normality prevailed. And not merely the normality of the viewers, the normality of the world. If these two people wanted to “switch,” well then, that would be fine. Nothing fundamental

would be altered. We could get back to determining the ownership of private property and the liability of tortfeasors.

Long past law school, I experienced a similar sense while reading the popular novel, *Trans-Sister Radio*, by Chris Bohjalian (2000). The plot revolves around the character Dana's transition from male to female. For most of the book, Dana is involved with a divorced woman, Allison, whom Dana first meets when he is her male professor. After an intense affair, Allison and the now-female Dana break up what is often described as their lesbian relationship. Dana uneasily dates a few women, but when she falls in love—and lust—it is with Allison's ex-husband. The switch from Dana as Allison's partner to Dana as Allison's ex-husband's partner¹ in the last pages of the novel reestablishes heterosexual normality. Again, we are reassured that despite a small substitution, nothing fundamental has been altered.

This lack of fundamental alteration is what worries me about the legal discourse surrounding transgendered marriage. Like other movements, including other queer movements, transgendered legal reform has the potential to be merely accommodating—what I have called, in other contexts, domesticating. The legal discourse surrounding transgendered marriage too often serves to recapitulate and reinscribe the most traditional visions of marriage and heterosexuality. Like the cartoon image of a man and a woman used to represent humanity to alien beings who might discover the NASA-launched Pioneer 10 spacecraft, what Michael Warner has termed “heteronormativity” is incessantly being equated with humanness itself (1993, xxi-xxiii).

Perhaps the best-known example of such heterosexual insistence occurs in *M.T. v. J.T.*, decided by a New Jersey Superior Court in 1976, in which the court upheld the marriage between M.T., born a male who transitioned to a woman, and J.T, born a male who remained so.² The court made explicit that in determining the validity of the marriage, it is “the sexual capacity of the individual which must be scrutinized. Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the emotional orientation to engage in sexual intercourse as either a male or a female.”³ On this view, it is heterosexual intercourse, rather than birth certificates, chromosomes, or expert testimony about gender dysphoria, that is the talisman for sex-gender identity.

Traditional heterosexual intercourse is also the shibboleth for marriage itself. While particular distinctions might be made, and the importance of procreation as an outcome of sexual intercourse is often stressed, various doctrines surrounding the marital relation establish that heterosexual intercourse is the underpinning of marriage. For example, one party can generally annul a marriage if the other party does not have the capacity to engage in heterosexual intercourse.⁴ Likewise, in states that require grounds for divorce, one party can divorce another on the grounds of “constructive abandonment” for failure to

engage in traditional heterosexual intercourse, despite repeated requests to do so.⁵ (Interestingly, if the request is for nontraditional heterosexual intercourse, then the refusal will be justified and will not constitute abandonment).⁶

In one sense, one could theorize *M.T. v. J.T.* as upholding a functionalist rather than formalist perspective of marriage and gender identity. A formalist approach relies upon formal relationships dictated by law, while the functionalist approach emphasizes the functions or attributes or “realities” that are deemed to be operative (Robson 1998, 158–62). While this may be described as the difference between law and fact, it is more complex than that, because the argument is really that the law should take into account the “real” facts as opposed to mere formalities. For example, the legal definition of *family* is imbued with a functionalist hue in cases such as *Braschi*, in which New York’s highest court interpreted a New York City rent-control regulation that disallowed eviction of “either the surviving spouse of the deceased tenant or some other member of the deceased tenant’s family.”⁷ In considering whether *Braschi*, the surviving partner in a gay relationship, fit into the statutory exemption, the court approvingly referred to such factors as the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which they conducted their everyday lives and presented themselves, and the reliance they placed on each other for “family services.” The court relied upon underlying facts, such as their cohabitation for ten years, their regular visits to each other’s relatives, and their joint status as signatories on three safe-deposit boxes, bank accounts, and credit cards. By contrast, in the parenting context, the formalist viewpoint rejects any visitation or custody claim of the member of a lesbian couple who has no legal relationship to the child (whether as birth mother or by adoption), since the woman is not a legal parent.⁸ The functionalist perspective, however, is not content with the formal legal definition of *parent* and develops criteria to determine whether the law should recognize a person as a parent. These criteria generally include the fostering of the parent-child relationship by the legal parent, the nonlegal parent and child living in the same household, the nonlegal parent’s assumption of the obligations of parenthood “by taking responsibility for the child’s care, education, and development, including but not limited to financial contribution” without expecting financial compensation, and the existence of the relationship for a sufficient amount of time to have produced bonding.⁹

Functionalism and formalism are often deemed parallel to liberalism and conservatism, but this is inaccurate. While the functionalist approach may seem more liberal than the formalist approach, it actually enshrines the most conservative versions of the categories it determines. It prescribes and enforces its concept of normality. For example, if *Braschi* had been a partner in an “open” relationship that was not sexually exclusive, this fact would have been used to argue that he was not a family member entitled to stay in his home, regardless

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

In the transgender marriage context, the functionalist test employed by the court in *M.T. v. J.T.* also requires an application of the most traditional aspects of the functions at issue—here, a wife or husband is judged by the function of heterosexual intercourse. Again, the understandings or sexual satisfactions of the particular parties are irrelevant. The law may seem to be considering reality, but it is imposing a singular and dominant reality. However, in another sense, the functionalist strategy is only necessary because the court is troubled by the formal legal status which would otherwise control. In the case of *M.T. v. J.T.*, the trial court would never have delved beyond the formal marital status (evidenced by a proper marriage certificate) had not J.T. argued that the marriage was void, which would release him from his financial obligations of support.

More recently, in *Littleton v. Prange*, the Texas Court of Appeals was also troubled by the formal marital status of Christie Littleton and her deceased husband Jonathan Littleton.¹⁰ In this case, Christie Littleton sued her husband's physician for medical malpractice after her husband died. The court provides little details about any alleged negligence by the physician, but it is clear that the physician's defense was that Christie Littleton was not the deceased's wife and was thus not entitled to be a plaintiff in the lawsuit. The physician based his defense on the fact that Christie Littleton had been born male and had undergone sex reassignment surgery before entering into the otherwise valid marriage. As in *M.T.*, a proper marriage certificate evinced the marriage. Unlike the court in *M.T.*, however, the Texas courts did not uphold the marriage. Instead, the appellate court resorted to another formalistic document, a birth certificate, to undermine the validity of the formal marriage certificate. According to the court, the original birth certificate, despite the fact that it had been amended to reflect a change of name and gender, was absolutely controlling. In the words of the court, it described things the way "they just are" as opposed to things one might "will into being."¹¹ Born male, Christie Littleton remained male. She could not be the wife of the deceased male and, therefore, she could not sue for wrongful death.¹²

The Kansas Supreme Court has likewise refused to recognize a transgendered marriage in *In re Estate of Gardiner*, decided in 2002.¹³ As in *M.T.* and *Littleton*, the court was faced with a challenge to the seemingly lawful marriage of a man to a woman, and again the stakes were economic. The underlying facts of *Gardiner* will be familiar to anyone who has followed the exploits of Anna Nicole Smith, the former Playboy Playmate of the Year, who at age twenty-six married eighty-nine-year-old billionaire industrialist J. Howard Marshall. After the

elderly Marshall died the next year, his son successfully litigated to effectively disinherit the new wife and have the estate awarded to himself.¹⁴

Similarly, in *Gardiner*, the younger J'Noel Gardiner had married the older Gardiner, who died relatively soon afterward, and whose estranged son sought to claim the estate for himself. Mr. Gardiner had died intestate, and under the operative statute, J'Noel as the wife would inherit the entire estate. The son, however, sought to disinherit his stepmother by claiming the marriage was invalid. Unlike Anna Nicole Smith, the court described J'Noel as having a Ph.D. in finance and as a "teacher at Park College." Also unlike Anna Nicole Smith, the court determined J'Noel not to be a woman.

As related by the court, J'Noel had been born male, had undergone sex reassignment surgery, and had been issued a new birth certificate reflecting a change of name and gender. These facts are sufficient for the court to conclude that the marriage was invalid because the parties were not of "opposite" sexes. However, more than the Texas court deciding the gender of Christie Littleton, the Supreme Court of Kansas recognized that J'Noel's sex/gender had changed. But it had not changed to female; it had changed to "transsexual." This enabled the Kansas Supreme Court to invoke the Kansas "Little-DOMA" (defense of marriage) statute,¹⁵ which defined the marriage contract as a civil contract between "two parties who are of opposite sex" and declared all other marriages contrary to public policy and void. The court interpreted the DOMA statute to exclude transsexuals. "The plain ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria."¹⁶ Such an interpretation presumably precludes transgendered persons from marrying since they would have no "opposite sex." However, as Julie Greenberg presciently argued, such a position is difficult to defend, given the current constitutional jurisprudence that marriage is a fundamental right and here, as distinct from the same-sex marriage cases, the person is being denied the right to marry "anyone at all."¹⁷

In both *Littleton* and *Gardiner*, the courts concluded as a matter of law that the sex/gender identity of each MTF was not female and thus the marriages to their husbands were invalid. The courts do not change this conclusion if the sex-gender identity at issue involves an FTM. The 2004 opinion by a Florida appellate court in the *Kantaras* case, involving a female-to-male transsexual, Michael Kantaras, is ultimately consistent with earlier rulings but has attracted much more media attention. The *Kantaras* trial, which largely revolved around a custody dispute of the couple's children, had been televised on Court TV. It resulted in an eight-hundred-page opinion by the trial judge upholding the marriage and awarding custody to Michael Kantaras—thus departing from the rulings in cases such as *Littleton* and *Gardiner*. The Florida appellate court reversed the trial judge, concluding that the state statutes governing marriage do not "authorize a postoperative transsexual to marry in the reassigned sex."¹⁸

The court stated that it agreed with the Texas and Kansas courts, referring to *Littleton* and *Gardiner*, that the statutory use of the terms *male* and *female* mean “immutable traits determined at birth.” Thus, according to the court, the 1959 birth of Margo Kantaras as a female is determinative of lifelong sex, no matter subsequent sex reassignment procedures and a life including marriage as a man named Michael Kantaras.

After invalidating the marriage, the appellate court remanded the case for redetermination of the custody of the children, one of who was the wife’s from a former relationship and adopted by Michael Kantaras, and the other of who had been born during the marriage through alternative insemination with the sperm of Michael Kantaras’s brother. However, in 2005, the couple reached a highly publicized settlement agreement—on the television program of Dr. Phil and through the efforts of a mediator—sharing custody of the children, now aged sixteen and thirteen.¹⁹

Thus, in the United States, courts will generally “invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth,”²⁰ although there is more diversity of opinion in other jurisdictions as well as in administrative cases in the United States.²¹ However, while the result in such cases differs from *M.T. v. J.T.*, in all of these cases, the courts preserved the heterosexual matrix. In *M.T. v. J.T.*, heterosexual intercourse is established and thus the marriage is valid. In *Littleton*, *Kantaras*, and *Gardiner*, the judicial guardians of heterosexuality have dispatched the pretenders: Christie Littleton remained in reality a man, Michael Kantaras is forever the female baby Margo Kantaras, and while J’Noel Gardiner had transitioned, it was only from male to transsexual.

It is tempting to argue against the formalistic decisions in *Littleton*, *Gardiner*, and *Kantaras* by favoring the more functionalist approach displayed in *M.T. v. J.T.* Yet such arguments serve to reestablish and reinvigorate the normality of heterosexuality. As Australian scholar Andrew Sharpe has demonstrated, judicial approaches to transgender marriage in common-law countries have, despite their differences, displayed a concern to “insulate marriage from ‘unnatural’ homosexual incursion” (2002, 115). While Sharpe argues that at times the judicial concern outside the United States may not be focused on actual sexual functionality but can shift to aesthetic concerns—how the transgendered person appears when unclothed—he nevertheless links the concern with “homophobic anxiety.”²²

The judicial preoccupation with maintaining heterosexuality obviously has an impact on litigation strategy and also influences and mirrors theoretical and political positions. We may find ourselves objecting to the result in *Littleton* based upon our own preconceptions of the heterosexual arrangement of marriage: if we characterize Christie Littleton as a widow whose husband was killed by his doctor’s malpractice, this conveys a certain pathos in a heterosexist and

sexist society. While perhaps less sympathetically, J'Noel Gardiner is also easily stereotyped in sexist and heterosexist terms similar to those that might be applied to Anna Nicole Smith: J'Noel is "hardly the first widow to be accused of marrying a man twice her age for money instead of love, with a stepson she first met at her husband's funeral trying to block her inheritance" (Wilgoren 2002). With relative ease, our understandings of the equities of these cases recapitulate our notions of normality and heterosexuality. A slight switch is required, but the fundamental social, legal, and political arrangements remain unaltered.

The potentially more subversive situation is the one in which one partner in an existing marriage changes gender. As transgender activists Phyllis Randolph Frye and Alyson Dodi Meiselman have noted, powerful forces militated against such a possibility, given the refusal of the psychiatric and medical community to approve or provide genital surgery to married persons.²³ When such situations do occur, the unchanged spouse would most likely be able to procure a divorce, even in states that require grounds.²⁴ However, dissolving a valid marriage is quite different from declaring a marriage invalid. In dissolving a marriage, the legal recognition of the marriage occurs through the divorce's termination of the legal relation. In invalidating a marriage, the marriage is declared void. It is not that the marriage is terminated; it is as if it never existed.

Yet doctrinally, the facts giving rise to the invalid marriage occur at the time the parties enter into the marriage. Subsequent events may reveal such facts to the parties (for example, the parties could learn that the husband's previous marriage was not dissolved and thus the current marriage is void for bigamy), but subsequent facts cannot retroactively void the marriage. The application of such well-settled doctrine to the subsequent gender transition of one of the parties to the marriage means, as Frye and Meiselman have argued, that same-sex marriages do exist in the United States.²⁵ Under the reasoning of *Littleton*, Frye and Meiselman are surely correct. However, the subsequent judicial pronouncement of *Gardiner* has cast doubt on this conclusion: transgendered persons are neither female nor male and just as they have no *opposite* sex according to the court, they can have no *same* sex. Except, perhaps, for other transgendered persons, presumably those who have transitioned in the same—or the "opposite" manner.

As a litigation strategy, Frye and Meiselman are surely astute in recommending that the nontransgendered spouse should initiate or join the litigation, although I am less sanguine that such a person could not "be cast into the role of the degenerate" by a religious or conservative court (2001). Nevertheless, an analogy can be drawn to the U.S. Supreme Court case of *Turner v. Safley*, authored by Justice Sandra Day O'Connor—not known for her liberal views—in which the Court declared unconstitutional a prison regulation limiting marriage for inmates.²⁶ In a case that could have potentially more resonance than the oft-quoted *Loving v. Virginia*, in which the Supreme Court

finally declared miscegenation laws unconstitutional,²⁷ the Court in *Turner* deemphasized heterosexual intercourse as a rationale of marriage. While the Court did include the eventual (heterosexual) consummation of the prison inmate's marriage as significant—implicitly precluding the notion of conjugal visits—the Court first noted the importance of marriage as an expression of “emotional support and public commitment,” and next alluded to the religious and spiritual significance of marriage.²⁸ Additionally, after mentioning the sexual component, the Court recognized the tangible benefits of marriage, such as Social Security benefits and property rights, as well as intangible benefits, such as the legitimation of children.²⁹

Yet assimilation to heterosexuality remains strong as a litigation strategy. As Frye and Meiselman note, the evidence supporting the gender transition document, such as the amended birth certificate that will be used to obtain the marriage certificate, should be sufficient to allow the conclusion that “she has a vagina, or he has a penis, and can be sexually penetrated as a female or can sexually penetrate as a male” (Frye and Meiselman 2001, 1063 n. 24). While such a view is consistent with *M.T. v. J.T.* in which the court upheld the marriage, like *M.T.*, it makes heterosexual intercourse the *sine qua non* of marriage. Such a theoretical and social position undermines claims to same-sex marriage.³⁰

The larger question is whether marriage—whether heterosexual in fact, heterosexual by law, or even non-heterosexual—is consistent with a liberatory politic. The naturalist arguments for coupling and marriage that proclaim that such arrangements are “just the way things are” echo the *Littleton* court's pronouncement that Christie Littleton's gender just “is” the male gender assigned at birth. Moreover, such a coupling recapitulates and reinforces the dualism present male/female genders display. The traditional model of marriage, as opposed to plural marriage, for example, supports a dyadic and binary mode of social arrangement. The NASA Pioneer Spacecraft model of humanity as a “technological but benign Adam and Eve” becomes the theoretical construct and litigation position of this transgender politic (Warner 1993, xxiii).

Moreover, the solution of marriage to the problems faced by *M.T.*, Christie Littleton, and J'Noel Gardiner, is, at best, partial. As in same-sex marriage, the specter of benefits to spouses often appears as an advantage—and in these three cases, each putative wife sought an economic gain—yet the political, social, and legal arrangement of marriage can obscure other inequalities. Additionally, it allows the state to impose a bright line rule for the distribution and nondistribution of wealth, both private (as in these cases) and public. A regime of marriage allows the state to privatize problems of economic and other inequalities: the solution to a person not having medical care, for example, is not a government policy of universal health care but the individual marrying someone whose employer provides good health insurance. In other words, as a matter of reform,

it may be expedient to argue for the recognition of transgender marriages, but as a matter of critical change, the argument fails.

In a case involving child custody such as that of Michael Kantaras, again the solution of marriage is fractional. Even the Florida appellate court, reversing the recognition of marriage, remanded the case to the trial court to consider the “best interests of the children” regarding custody. Marriage as a determinative of relationships with children is as problematic as biology (Robson 1998). It is not an improvement.

I remain convinced that transgendered people can develop a liberatory politic beyond marriage, just as I remain hopeful that lesbians and other queers can develop such a stance, despite what seems to me to be the essential conservatism of present same-sex marriage strategies and theoretical perspectives (Robson 2002). In writing on the topic of transgendered marriage, I am cognizant that I am not situated within the transgendered movement, politic, or sensibility and that my observations and analysis spring from my life as a lesbian and my work on lesbian legal issues, including marriage. Yet when I survey the transgender marriage cases, arguments, scholarship, and theorizing, I confront the same uneasiness I experienced thirty years ago watching shoddy television journalism or, more recently, reading a popular novel. I am worried that only a few of the characters will be switched. And that nothing fundamental will be altered.

NOTES

1. Bohjalian calls readers’ attention to the “switch” character of this plot development by invoking Louisa May Alcott’s novel *Little Women* and noting that Laurie, “the lad who lives next door to the March girls,” had “spent years wooing the tomboy Jo March, and then, after she finally rebuffed him, he simply moved on to her younger sister Amy and married her. He believed he was destined to become part of the March clan” (334–35).

2. 355 A.2d 204 (N.J. Super. 1976).

3. *Id.* at 209.

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

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

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

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

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

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

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

11. *Id.* at 231.

12. Generally, the ability to sue for wrongful death is awarded by statute to the next of kin, with legal spouses being first in line. The availability of such a remedy is generally denied to nonmarried partners, unless statutorily awarded, as in the case of Vermont’s civil union statute, Vt. Stat. Ann. tit. 15, § 1204 (e) (2) (2002), which explicitly allows a partner to a civil union to litigate “causes of action related to or dependent upon spousal status, including an action for “wrongful death.” A California court, however, has ruled that Sharon Smith, the surviving partner of Diane Whipple, who was killed by neighbors’ dogs, is able to sue for wrongful death; the case is stayed until the neighbors finish serving their prison sentences. See http://www.ncrights.org/publications/pubs/smith_order.pdf. A New York court recently reached an opposite conclusion, considering a wrongful death suit for medical malpractice, *Langan v. St. Vincent’s Hospital*, 25 A.D. 3d 90, 802 N.Y.S. 2d 476 (2005).

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

14. This case, *Marshall v. Marshall*, was heard before the United States Supreme Court in 2006 on a jurisdictional issue, the Court ruling in favor of Vickie Lynn Marshall, a.k.a. Anna Nicole Smith, allowing the case to proceed in the lower courts.

15. In response to the Hawai’i Supreme Court’s decision allowing room for debate on the subject of same-sex marriage, *Baehr v. Lewin*, 852 P.2d. 44 (Haw. 1993), and the potentiality of other states being compelled to recognize Hawai’i’s same-sex marriages under the Constitution’s full faith and credit clause, Const. Art. IV §1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State”), the U.S. Congress passed the Defense of Marriage Act (DOMA), PL 104–199, 110 Stat. 2419, codified at 28 U.S.C. §1738C (1996), which provides that federal law shall only recognize opposite sex marriages and that states shall not be required to give effect to same-sex marriages from other states. The majority of states enacted their own DOMA statutes declaring that under their own state laws and public policy marriages were limited to those between a man and a woman, thus precluding

their recognition of any same-sex marriages possibly entered into in Hawai'i or any other state, as well as preventing the judiciary from entertaining challenges to state opposite sex marriage requirements or practices.

16. 42 P.3d at 135.

17. Julie Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?* 52 Fla. L. Rev. 745, 762 (2000) (discussion of *Littleton v. Prange*).

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

19. <http://www.nclrights.org/releases/pr-kantaras-061005.htm>.

20. <http://www.nclrights.org/releases/pr-kantaras-061005.htm>. Other cases in the United States include *In re Ladrach*, 513 N.E.2d 828 (Ohio Probate Ct. 1987) (holding that there is "no authority in Ohio for the issuance of a marriage license to consummate a marriage between a postoperative male to female transsexual person and a male person."); *Frances B. v. Mark B.*, 355 N.Y.S. 2d 712 (1974) (court stating that while the defendant may "function as a male in other situations and relationships," since he does not have male sexual organs or a "normal penis," he is not able to "function as a man."); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971) (declaring marriage between a man and a transitioning MTF who had male sex organs at the time of marriage and whom the husband believed to be a woman).

21. For example, the Family Court of Australia held that courts should construe "post-operative transsexuals as men or women in accordance with their sexual reassignment." *In re Kevin* (2001), 28 Fam. L. R. 158, aff'd, 30 Fam. L. R. 1 (Aust. Fam. Ct. 2003). For a discussion of other cases, see Sharpe 2002 (discussing cases from the United States, Canada, New Zealand, Great Britain, and Australia). Additionally, in an unreported case an immigration court found that the law was unsettled regarding the recognition of a marriage involving a transgendered spouse, *In re Ady Oren*, No. A79 761 848 - Portland, 2004 WL 1167318 (B.I.A. Jan. 21, 2004).

22. Sharpe (2002, 127–8). Sharpe is discussing the Aotearoa/New Zealand case of *Attorney General v. Otahuhu Family Court* [1995], 1 NZLR 603. In this discussion, Sharpe argues that I have not previously made enough of the distinction between functionality and aesthetics given the Otahuhu court's emphasis on the purpose of sex-reassignment surgery as being aesthetic. However, I would agree with Sharpe that "while an aesthetic concern over bodies is a consistent theme of transgender jurisprudence, it is usually masked, at least partially, by a preoccupation with heterosexual capacity" (127). I also agree with Sharpe in his interpretation of *Otahuhu* that while the decision may "undermine a view of marriage as being the necessary locus of 'natural' heterosexual intercourse" it is nevertheless founded on "the hetero/homo dyad" and the characterization of any sex that does occur as heterosexual is crucial (128).

23. "Until the 1990s, almost all married transgenders seeking sex reassignment were coerced into divorce by the medical profession" (Frye and Meiselman 2001, 1039).

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

25. Frye and Meiselman further argue that same-sex marriage advocates should avail themselves of such transgender same-sex marriage situations as a "wedge issue"

to promote same-sex marriage and concludes that their failure to do so is “incomprehensible” (2001, 1045). Yet given the essential conservatism of the quest for marital recognition, one could easily comprehend this failure. It is not only arguments on behalf of transgendered marriage that avail themselves of traditional functionalist strategies, but arguments on behalf of same-sex marriage also employ the “we are essentially like you” rhetorical claim.

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

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

28. *Turner*, 482 U.S. at 95–96.

29. *Id.* at 96.

30. Thus, while “the courts in transsexual marriage cases struggle with the same concerns as the opponents to same-sex marriage—the relative significance to marriage of [heterosexual] intercourse and procreation,” (Coombs 1998, 260), a litigation strategy on behalf of transgendered marriage which argues that the relationship that does include heterosexual intercourse is one that accedes to the validity of heterosexual intercourse as definitional of marriage.

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