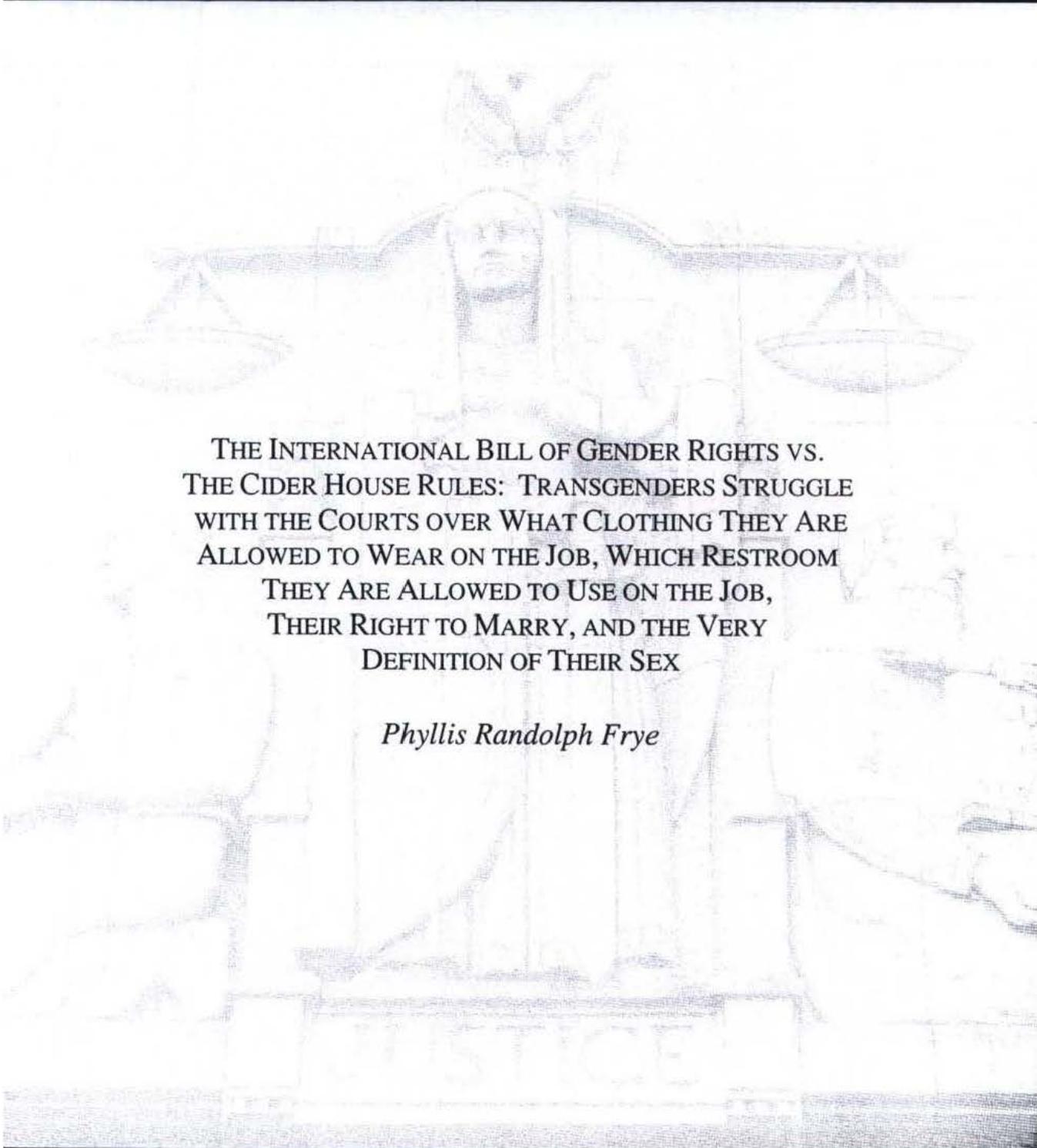


# William and Mary Journal of Women and the Law



THE INTERNATIONAL BILL OF GENDER RIGHTS VS.  
THE CIDER HOUSE RULES: TRANSGENDERS STRUGGLE  
WITH THE COURTS OVER WHAT CLOTHING THEY ARE  
ALLOWED TO WEAR ON THE JOB, WHICH RESTROOM  
THEY ARE ALLOWED TO USE ON THE JOB,  
THEIR RIGHT TO MARRY, AND THE VERY  
DEFINITION OF THEIR SEX

*Phyllis Randolph Frye*



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DEFINITION OF THEIR SEX**

**PHYLLIS RANDOLPH FRYE\***

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Phyllis Randolph Frye, age fifty two, has been an openly OUT transgender since 1976. She has been a trial attorney in private practice since 1981 and was an Adjunct Professor at the Thurgood Marshall Law School at Texas Southern University in Houston, Texas, from September 1999 through May 2000. In 1992, she founded the International Conference on Transgender Law and Employment Policy (ICTLEP). She was awarded the "Creator of Change" Award from the National Gay and Lesbian Task Force (1995) and the Virginia Prince Lifetime Contribution Award from the International Foundation for Gender Education (1999).

I am listing my accomplishments, while trying to be a man, primarily to destroy stereotypes. They include being an Eagle Scout, holder of the God & Country Award, Senior Patrol Leader, Brotherhood member of the Order of the Arrow, and a Junior Assistant Scoutmaster. At Thomas Jefferson High School in San Antonio, I was in A *Capella* Choir, Yearbook Staff, Senior Play, lettered twice on the Rifle Team, was ROTC Commander, and was an "A" student. At Texas A&M University, I was in the Corps of Cadets, Singing Cadets, and completed a B.S. in Civil Engineering and an M.S. in Mechanical Engineering while on four scholarships and one grant. I am a veteran and was honorably discharged as a 1st Lieutenant, U.S. Army in 1972. I obtained, and still retain, a Texas Professional Engineering License in 1975.

As evident from the above accomplishments, I did not become a woman because I could not cut it as a man. I was very successful as a man, but it did not fit my unshakable in-the-gut self-image of who I really was.

After my 1976 transition, I earned an M.B.A. and J.D. from the University of Houston. I have been a solo practitioner since 1981, working primarily in the area of criminal defense and on the cutting edge of transgender legal theory and strategy. I began my academic career in 1999 teaching Consumer Rights Law. I have been legally married to the same woman for twenty-eight years and have a grown child by a previous marriage. I wish to thank attorneys Alyson Meiselman of Maryland, Karen Kerin of Vermont, Beth Plottner of Illinois, Ally Howell of Alabama; paralegal Tere Prasse of Texas; law students Cynthia Russell of Pennsylvania, Brenda Kaye Silva of Texas; Lisa Turner of Texas, and Diane K. of Texas for their contributions, support, and insight. For additional information, please visit my web page at <http://transgenderlegal.com> (last visited Sept. 16, 2000).

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## I. INTRODUCTION

Christie Lee Cavazos legally married Jonathan Mark Littleton in Kentucky on December 31, 1989.<sup>1</sup> For the next seven years, Jonathan and Christie Lee lived happily together as man and wife, enjoying their marriage and their life together in much the same way as any couple.<sup>2</sup> That happiness ended in 1996, when Mr. Littleton died as the result of alleged medical malpractice by Dr. Mark Prange.<sup>3</sup> Following her husband's untimely death, Christie Lee Littleton filed a wrongful death suit against Dr. Prange under the Texas Wrongful Death and Survival Statute.<sup>4</sup> Dr. Prange filed a motion for Summary Judgment, asserting that Christie Lee Littleton had no standing as a surviving spouse to bring the suit because Mrs. Littleton was a transsexual.<sup>5</sup>

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1. *Littleton v. Prange*, 9 S.W.3d 223, 225 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25); *see also Christie Lee Littleton Story*, at <http://christielee.net> (last visited Sept. 17, 2000) (chronicling Mrs. Littleton's story, the status of the legal action, and the impact created by the ruling in the case).

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

3. *See id.*

4. *Id.*

5. *Id.*

On October 27, 1999, Chief Justice Phil Hardberger, of the Fourth Court of Appeals of Texas, located in San Antonio, declared that the Littleton's heterosexual marriage was invalid.<sup>6</sup> What information could possibly lead to such a conclusion? How could a judge ignore a marriage license, a wedding ceremony and seven years of happily married life? Chief Justice Hardberger concluded this marriage was invalid because it was a same sex marriage.<sup>7</sup> Christie Lee Littleton had been declared a male at birth.<sup>8</sup>

Christie Lee Littleton was born as a healthy baby, declared to be a boy, and given the name Lee Cavazos, Jr.<sup>9</sup> In 1977, after years of struggling with her identity, she legally changed her name to Christie Lee.<sup>10</sup> Three years later, she had undergone three corrective genital reassignment surgeries and, by all external appearances, was female.<sup>11</sup> Her genital appearance was corrected to finally match the gender she had identified with her entire life.<sup>12</sup> Disregarding the above facts, in *Littleton*, Chief Justice Hardberger concluded that because she was declared a male at birth and presumably had XY chromosomes, Christie

6. *Id.* at 231.

7. *Id.*

8. *Id.* In early 2000, Christie Lee Littleton hired attorney Alyson Meiselman and me to represent her as she continued to fight the court's ruling. After the Texas Supreme Court denied a Motion for Rehearing on May 18, 2000, we worked with a team of mostly transgendered, but also lesbian, gay, bisexual and straight attorneys, law professors, law students and activists to prepare for the next stage of the legal battle. On July 3, 2000, we filed a petition for writ of certiorari with the United States Supreme Court. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *petition for cert. filed*, 68 U.S.L.W. 3023 (U.S. July 3, 2000) (No. 00-25). On October 2, 2000, the Court denied the petition. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied* 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25). Tere Prasse created a web site documenting Christie Lee's struggle. *Christie Lee Littleton Story*, *supra* note 1.

9. *Littleton*, 9 S.W.3d at 224. It is important to note why I do not simply state that Christie Lee Littleton was "born a man" or "as a healthy baby boy." Christie Lee's entire struggle was that, from her earliest memories, she knew she was a woman, born as a healthy baby girl. She did not change, as implied by the incorrect term "sex change," from a man to a woman. She always knew that she was a woman who had been incorrectly labeled based on her genitals and spent the next twenty-five years correcting, not changing, her genitals, hormones and social gender presentation to fit the identity she knew was hers. She was not born a man; she was declared, incorrectly, a man at birth. This is a fundamental concept of transsexualism.

10. *Id.*

11. *Id.*; see also discussion *supra* note 9 (explaining the importance of the incorrect declaration at Littleton's birth that she was a boy and her struggle to correct her gender presentation to match her identity).

12. *Littleton*, 9 S.W.3d at 224. Lisa Gray best documented Christie Lee Littleton's life. Lisa Gray, *XX Marks the Spot*, HOUS. PRESS, Sept. 14, 2000, <http://www.houstonpress.com/issues/2000-09-14/gray.html>.

Lee Littleton would always be male.<sup>13</sup> He wrote that gender is “immutably fixed by our Creator at birth.”<sup>14</sup>

The decision reached by the court in *Littleton* underscores the need to remove or ignore the present body of case law and social mores that operate against transgenders. John Irving’s book *The Cider House Rules*<sup>15</sup> and the movie by the same name<sup>16</sup> serve as a clear parallel to the jurisprudential approach we must take toward this type of a legal environment. In *The Cider House Rules*, the experiences of Homer and Candy, both at the actual cider house and at the orphanage in St. Cloud, reveal a profound theme that cannot be ignored. In life, we are confronted with sets of rules that are legally imposed or socially ingrained. If these rules are absurd or inapplicable, we must ignore them to live our lives until we are able to change the rules or create new ones. Similarly, so long as the laws and social mores of society are absurd or inapplicable, transgenders must ignore them and continue to work toward having the rules changed or removed.<sup>17</sup>

## II. THE SOCIAL AND LEGAL CONTEXT

### A. *Medical Science and Transgender Images in Popular Culture*

A review of medical literature and the social culture shows that transgenders experience slow but continuing, progressive gains in the medical arena and society at large. Outdated medical thinking<sup>18</sup> still exists in some ways,<sup>19</sup> but the medical

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13. *Littleton*, 9 S.W.3d at 231. Though the court gave great weight to the gender that doctors declared at birth and presumed that Christie Lee Littleton had XY chromosomes, neither Mrs. Littleton nor Mr. Littleton ever had a chromosome test. Petition for Writ of Certiorari at 9, 9 S.W.3d 223 (Tex. App. 1999), cert. denied, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

14. *Littleton*, 9 S.W.3d at 224.

15. JOHN IRVING, *THE CIDER HOUSE RULES* (1985).

16. *CIDER HOUSE RULES* (Miramax Films 1999).

17. For a good discussion of the rules as used in the context of this Essay, see IRVING, *supra* note 15, at 453-57 (suggesting that every community follow its own set of rules and that no community should try to impose its rules on another community).

18. Many medical writers and transgender clinicians in the 1960s and 1970s, such as Robert Stoller, based their repressive ideas on what they had observed in their small clinical samples. See generally ROBERT J. STOLLER, *SEX AND GENDER: ON THE DEVELOPMENT OF MASCULINITY AND FEMININITY* (1968) (presenting the results of ten years of gender identity research based on studies of eighty-five patients). These clinicians were homophobic and would force a transgendered couple to divorce before the transgendered partner would be given certification by the clinic that he/she was ready for surgery. Leonard H. Clemmensen, *The “Real Life Test” for Surgical Candidates*, in *CLINICAL MANAGEMENT OF GENDER IDENTITY DISORDERS IN CHILDREN AND ADULTS* 124

gatekeepers are meeting an increasingly healthy transgender population that does not need "clinical treatment"<sup>20</sup> and is not guilt-ridden.<sup>21</sup> Indeed, transgendered physicians are emerging and educating their medical peers.<sup>22</sup>

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(Ray Blanchard & Betty W. Steiner eds., 1990). If a patient who was in the clinic to have surgery, professed to have sexual feelings for the sex that he/she was about to become, the patient would not be certified for surgery. See STOLLER, *supra*, at 251 ("I think that only those males who are the most feminine, have been expressing this femininity since earliest childhood, have not had periods of living accepted as masculine males, have not enjoyed their penises, and have not advertised themselves as males . . . should be operated on.").

19. The repressive attitude exhibited in the 1960s and 1970s is plainly reflected in the use of the pejorative terms "dysphoria" and "disorder" in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), which labels transgenders to be possessed by "gender dysphoria" and "gender identity disorder." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (4th ed. 2000). These terms have been used as evidence of wrong-mindedness and social-sickness in child custody proceedings and in the placement of transgender and other gender-variant youths into "treatment" by their homophobic parents. Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429, 465-68 (1998).

Such pejorative thinking and mistreatment via use of the DSM prompted the International Conference on Transgender Law and Employment Policy (ICTLEP) and the National Center for Lesbian Rights (NCLR) to issue a joint statement on Gender Identity Disorder in 1996. See Appendix A (providing the text of the joint statement). For a further discussion on the medicalization of transgenders, see GORDENE OLGA MACKENZIE, *TRANSGENDER NATION* 57-102 (1994).

20. In 1994, the Boulton and Park Society of San Antonio, Texas, published the results of a three-year survey on non-clinical transgenders that found that most transgenders are neither ill nor dysphoric. *The Large "n", Non-Clinical Surveys of Boulton & Park Society*, in 1994 PROC. FROM THE THIRD INT'L CONF. ON TRANSGENDER LAW & EMP. POL'Y app. D. at D-1 [hereinafter THIRD ICTLEP]. The Boulton and Park Society sponsored the Texas T-Party, one of the largest transgender week-long gatherings of the late 1980s and early 1990s. See *id.* Many of the attendees did not require and did not seek clinical help because they now had multiple peer group resources. Most of the attendees learned, via such large gatherings of similar minded people and supportive spouses, that they were not ill, "disordered" or "dysphoric." See *id.*

The Boulton and Park survey has the largest non-clinical "n" sampling value: 934. *Id.* It debunked many of the results from surveys with a small "n" that had been taken in clinical settings. *Id.*; see also George R. Brown, *Women in Relationships with Cross-Dressing Men: A Descriptive Study from a Nonclinical Setting*, 23 ARCHIVES OF SEXUAL BEHAV. 515, 515 (1994) reprinted in THIRD ICTLEP, *supra*, at app. D, D-17 (detailing the results of a survey of 106 women involved with men who cross-dress).

21. Since its emergence, the internet has become a helpful resource, providing support and a communications link for the transgendered population, which helps transgenders overcome their sense of guilt. The number of transgender chat rooms and the amount of information available on-line have grown significantly. The Transgender Forum offers resources, links, community news and other timely and pertinent information updated on a weekly basis. *The Transgender Forum*, at <http://www.tgforum.com> (last visited Sept. 17, 2000).

Even in the recent past, however, transgenders have been subjected to hate, violence and discrimination. They are targeted by religious groups, which often speak out against extending any protections to transgenders.<sup>23</sup> Tragically, transgenders continue to be the victims of frequent hate crimes.<sup>24</sup> In some instances, inaction by police or other

A large number of regional and national gatherings of transgenders and their spouses, both male-to-female (MTF) and female-to-male (FTM), are also available for support. Information about many of these gatherings can be found on the internet. *E.g.*, *Annual Conference of the International Foundation for Gender Education*, at <http://www.ifge.org/convention> (last visited Sept. 17, 2000); *California Dreamin*, at <http://home.flash.net/~dhome/cadreamin> (last visited Sept. 17, 2000); *Fall Harvest*, at <http://www.transgender.org/tg/maggie> (last modified Sept. 18, 2000); *Gold Rush*, at <http://www.transgender.org/gic/gold.html> (last updated Sept. 12, 2000); *Southern Comfort*, at <http://www.sccatl.org> (last updated Sept. 10, 2000); *True Spirit*, at <http://www.amboyz.org/TSC/TSC.html> (last updated Nov. 1, 1999).

22. Several of these OUT, transgender medical professionals serve on committees of the Harry Benjamin International Gender Dysphoria Association (HBIIGDA). See *HBIIGDA Committees, 1999-2001*, at <http://www.hbigda.org/committees.html> (last visited Sept. 17, 2000) (listing members of committees at the HBIIGDA).

23. So-called religious groups have long targeted transgenders separately from homosexuals. See *Homosexual Rights Bill on Fast Track in Congress*, COLO. CHRISTIAN NEWS, Aug. 1994, at A-26. Jerry Falwell denounced the City of Boulder, Colorado, after that city extended legal protection to transsexuals by amending a city ordinance that prohibited discrimination in housing, employment and public accommodations:

Boulder, Colorado has extended legal protection to yet another minority: transsexuals (individuals who have surgically altered their sexual gender). The Boulder City Council this week unanimously voted to protect transsexuals from discrimination in housing, employment and public accommodations. A transsexual was defined as an individual who has . . . "a persistent sense that a person's gender identity is incongruent with the person's biological sex." Other cities that have adopted similar policies include San Francisco, Seattle, and Pittsburgh. It is mind-boggling to witness the continued political acceptance and recognition of people simply because they have made deviant sexual choices. You will recall that last year the American Psychological Association published an article alleging that children who had suffered sexual abuse did not necessarily experience related problems as adults. (This article was later retracted after conservative leaders vociferously denounced it.) I would not be surprised to see, in the near future, an attempt to legally protect pedophiles simply because they claim to have been born with an uncontrollable attraction to children. We are rapidly heading down a slippery slope of immorality . . . . And this current moral regression is all the more distressing when one witnesses the continued political and social gains of people who have chosen to flaunt their sexual deviancies.

Jerry Falwell, *Falwell Confidential*, at <http://www.falwell.com/confiden/fc000204.htm> (Feb. 4, 2000).

24. See *Discrimination and Hate Crimes Against Gender Variant People*, IT'S TIME ILLINOIS . . . POLITICAL ACTION FOR THE GENDER VARIANT COMMUNITY (May 2000), at

government officials leads to the untimely deaths of transgender victims.<sup>25</sup> Transgender activists continue to seek a hate crimes category for transgenders that is separate from the hate crimes category for homosexuals.<sup>26</sup> Transgendered people continue to be subjected to various forms of discrimination and are often confronted with problems finding shelter or gaining access to health care.<sup>27</sup>

Although transgenders are not universally loved and embraced by all members of society, life has slowly and painfully improved for the transgender community as a whole. Transgenders are politically reintegrated with the lesbian, gay, and bisexual community,<sup>28</sup> and are coming out to lobby their

<http://www.itstimeil.org/reports/report2000.pdf> [hereinafter *Discrimination and Hate Crimes*].

25. *The Brandon Teena Story*, a documentary on the life of Brandon Teena, retold in the recent movie *Boys Don't Cry*, serves as evidence of this hate projected by some members of society. THE BRANDON TEENA STORY (Bless Bless Productions 1998); BOYS DON'T CRY (20th Century Fox 1999). There was a huge outcry by transgenders when Brandon Teena, an FTM transsexual, was killed after reporting his brutal rape to the police. See Davina Anne Gabriel, *Our History - Background of the Murder of Brandon Teena*, at <http://www.ftm-intl.org/Hist/Bran/bran.bkgr.html> (last modified Aug. 5, 2000). Even though Teena identified the men who raped him to the police, they did not apprehend or file rape and assault charges against the suspects until after he was killed. See *id.* Tyra Hunter, an MTF, is another victim of hate. Hunter bled and suffocated to death when an emergency medical service crew, responding to an accident she had been in, ceased treating her after the crew discovered she was transsexual. See *Analysis: Tyra Hunter Wrongful Death Trial*, at <http://www.gpac.org/archive/news/?cmd=view&archive=news&msgnum=50> (Dec. 13, 1998). Tyra Hunter's mother successfully brought a wrongful death and survival suit against the District of Columbia, the supervising emergency room physician and an emergency medical technician. See *id.*

26. See *Discrimination and Hate Crimes*, *supra* note 24.

27. See Jamison Green & Larry Brinkin, *Investigation into Discrimination Against Transgendered People: A Report by the Human Rights Commission City and County of San Francisco*, in THIRD ICTLEP, *supra* note 20, at M-15. Transgendered street people frequently have no where to go for homeless shelter. *Id.* Still pre-surgical and often not yet presenting well in their corrected gender, they are almost always turned away by male shelters and female shelters unless they go to the shelter that matches their genitals and present as that gender. See *id.* This is a vicious circle of unemployment and homelessness. Green & Brinkin's report also cites findings that transgenders' access to public health clinics is difficult due to harassment and refusal of service. See *id.* The full report may be ordered from the Commission at 25 Van Ness Avenue, Suite 800, San Francisco, CA, 94102-6033, telephone 415-252-2500.

28. See discussion *infra* note 77. Transgenders were at the very beginning of the Stonewall Rebellion in June 1969, which is considered to be the beginning of the modern Lesbian, Gay, Bisexual, Transgender (LGBT) political rights movement. See Arriola, *supra* note 19, at 432 n.14 ("The Stonewall Riots in Greenwich Village of Manhattan during June 1969 have been viewed as the critical event giving rise to a more organized and highly politicized gay civil rights movement."); see also Kay Dayus, *Transgenders Protest HRC Exec's Visit to Houston*, HOUS. VOICE, Sept. 29, 2000,

municipal governments,<sup>29</sup> state legislatures<sup>30</sup> and the U.S. Congress.<sup>31</sup> This situation is not limited to the United States.<sup>32</sup>

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<http://www.houstonvoice.com/houstonvoice/news/record.html?record=10530> (“[Elizabeth] Birch [executive director of the Human Rights Campaign] said she recognizes that the transgendered were in the front lines during Stonewall . . .”). For additional information on the Stonewall Rebellion, see Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE: PUBLIC POLICY, SEXUALITY, AND CIVIL RIGHTS* 451, 457 (John D’Emilio et al. eds., 2000).

The idea of reintegration is important. At the beginning of the struggle for transgender inclusion in ENDA (1994), many gay and lesbian detractors argued with us that we were simply trying to catch onto the coat tails of a twenty year old gay and lesbian political movement. It was akin to saying that we had not paid our dues: that we were trying to add on. On the airplane flight back from a heated discussion with the Human Rights Campaign (HRC) on September 17, 1995, Tere Prasse, Sarah DePalma and I were devompressing and rehashing what had been argued and discussed. Tere asserted that we needed to change our stance from being wanted in for the first time to being reintegrated into a community of which we originally belonged and only during the past two decades has been excluded. I had never thought of it that way, and from then on used Tere’s argument that we were trying to reintegrate rather than just tag along for the first time.

29. PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE & NAT’L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 17 (2000), available at <http://www.ngltf.org/library/index.cfm> (listing Harrisburg, Pa.; Minneapolis, Minn.; Seattle, Wash.; St. Paul, Minn.; City and County of Santa Cruz, Cal.; City and County of San Francisco, Cal.; Iowa City, Iowa; Ypsilanti, Mich.; Pittsburgh, Pa.; Olympia, Wash.; Evanston, Ill.; Cambridge, Mass.; York, Pa.; West Hollywood, Cal.; Toledo, Ohio; New Orleans, La.; Benton County, Or.; Tucson, Ariz.; Louisville, Ky.; Lexington-Fayette, Ky.; Ann Arbor, Mich.; and Atlanta, Ga., as having non-discrimination laws providing protection to transgendered and gender variant people); see also Shannon Minter, *Representing Transsexual Clients: An Overview of Selected Legal Issues*, at <http://academic.brooklyn.cuny.edu/polisci/pcurrah/genderlaw/translaw.htm> (last visited Sept. 17, 2000) (listing municipalities with local ordinances prohibiting discrimination against transgenders and transsexuals).

30. Minnesota has a state law protecting transgenders. MINN. STAT. ANN. § 363.01, subd. 45 (West Supp. 2000) (including people “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness” in its coverage of those protected on the basis of “sexual orientation”); see also Jane Fee, *Minnesota: The First State to Enact Legislation that Explicitly Protects the Transgendered from Discrimination*, in *THIRD ICTLEP*, supra note 20, at 14-21 (discussing events in Minnesota that led to the enactment of the statute protecting transgendered persons). Many states are currently undergoing intensive lobbying actions by either transgender activists alone or as part of a larger LGBT legal strategy. See, e.g., Sarah DePalma, *TGAIN Lobbying Results*, GAIN NEWS, Jan. 31, 1999, at <http://www.gender.org/gain/g99/g013199.htm> (discussing the January 1999 meeting of over fifty transgenders to lobby the Texas Legislature).

31. The organized national struggle for transgender political and legal rights began in July 1994 when Karen Kerin and I attended and submitted written testimony to the Senate Hearings on the Employment Non-Discrimination Act (ENDA). *To Prohibit Employment Discrimination on the Basis of Sexual Orientation: Hearing on S. 2238, the Employment Non-Discrimination Act of 1994 Before the Senate Labor and Human*

Transgender legal and political activity is occurring in countries throughout the world.<sup>33</sup>

Transgenders are coming out to their families, employers, churches and neighbors.<sup>34</sup> They, or empathetic transgender

*Resources Comm.*, 103d Cong. (1994) [hereinafter *Hearings*]; Frye, *supra* note 28, at 462. The first organized transgender effort to lobby members of Congress was a two day event held in February 1995, and was attended by Kerin and her spouse from Vermont, Jane Fee from Minnesota, Riki Wilchins of New York, and me and my spouse from Texas. See *Opinion: If ENDA Had Been TG Inclusive, It Would Have Passed the US Senate Vote*, at <http://www.abmall.com/ictlep/enda.html> (last visited Sept. 17, 2000). Kerin, Wilchins, and I organized the second national transgender lobbying event, held in October 1995. *Id.* Over 100 transgenders and their spouses, representing thirty-five states, attended this monumental event. *Id.* For additional transgender lobbying history, see Frye, *supra* note 28, at 457-68.

32. See 1996 PROC. FROM THE FIFTH INT'L CONF. ON TRANSGENDER LAW & EMP. POL'Y 41-43 [hereinafter FIFTH ICTLEP]. Other countries that are experiencing transgender activism include Italy, Turkey, the Balkan States, England, Netherlands, Australia, New Zealand, Namibia, Canada, South Africa, Brazil, China, India, Singapore, Japan and Egypt. *Id.*; see also Jenny Sand, *The Legal Situation for Transsexuals in Europe and Human Rights*, in THIRD ICTLEP, *supra* note 20, at app. K, K-21 to K-29 (discussing the legal situation of transsexuals in Europe). An organization called Press for Change has been very active in England and the European Court of Justice (ECJ). See THIRD ICTLEP, *supra* note 20, at app. K, K-16 to K-17.

The ECJ held that discrimination against a transsexual is discrimination on the basis of sex. See Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2143, [1996] 2 C.M.L.R. 247 (1996), reprinted in FIFTH ICTLEP, *supra*, at app. F, F-1 to F-20. This decision by the ECJ is contrary to the holdings in an American trilogy of cases. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-87 (7th Cir. 1984) (holding that Title VII does not protect transsexuals); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that the word "sex" in Title VII does not include transsexualism); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (holding that transsexuals are not a suspect class when determining due process or equal protection claims). The Ninth Circuit recently held, in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), that *Holloway* is no longer valid law, basing its conclusion on the analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Schwenk*, 204 F.3d at 1201-02 (stating that *Price Waterhouse* held that Title VII bars discrimination based on failure to conform to socially-constructed gender expectations).

33. See FIFTH ICTLEP, *supra* note 32, at 41-43.

34. *Femme Mirror*, the quarterly magazine of the Society for the Second Self, Inc. (Tri-Ess), and *Transgender Tapestry*, the official publication of the International Foundation for Gender Education, have reported multiple successful experiences of transgenders coming out to their families and friends. See, e.g., Julie Freeman, *Another Closet*, FEMME MIRROR, Summer 1999, at 26, 26 (discussing the process of coming out as a cross-dresser); Rachel Miller, *To Share or Not to Share. Is That Your Question?*, FEMME MIRROR, Summer 1999, at 47, 47 (same). See generally TRANS FORMING FAMILIES: REAL STORIES ABOUT TRANSGENDERED LOVED ONES (Mary Boenke ed., 1999) [hereinafter TRANS FORMING FAMILIES] (sharing stories written by families of transgenders); Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998) (seeking to determine if discrimination of transsexuals or transgendered people should fall within existing categories of discrimination or if new categories need to be created); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law*

characters, are appearing with more frequency in print,<sup>35</sup> radio and music,<sup>36</sup> television<sup>37</sup> and motion picture media.<sup>38</sup> Books about transgenders are of an autobiographical nature,<sup>39</sup> of a

*and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (seeking to reconceptualize gender ideals).

35. Over the past decades both *Dear Abby* and *Ann Landers* have covered transgender issues many times in their syndicated newspaper columns. *E.g.*, Ann Landers, *Dear Ann Landers*, CHI. TRIB., June 7, 1993, 1993 WL 11078366 (discussing transgenders and restroom use); Ann Landers, *Dear Ann Landers*, CHI. TRIB., Dec. 21, 1987, 1987 WL 3005740 (discussing ramifications on family life after undergoing sex-reassignment surgery); Abigail Van Buren, *Dear Abby*, CHARLESTON GAZETTE, Aug. 24, 2000, 2000 WL 2624361 (discussing the emotions surrounding the transition process); Abigail Van Buren, *Dear Abby*, CHARLESTON DAILY MAIL, Apr. 15, 1997, 1997 WL 7096276 (providing advice on restroom use); *see also* Abigail Van Buren, *Dear Abby*, UEXPRESS ONLINE, at <http://www.uexpress.com/ups/advice/da/archive/html> (last visited Sept. 17, 2000) (archiving past columns).

Transgenders have appeared in feature stories in magazines and newspapers. *E.g.*, Laura Lang, *The Transsexual Next Door: One Montgomery County Attorney's Transition from Boy Scout to Soccer Mom*, WASH. CITY PAPER, Sept. 17, 1999, at 13; Adolfo Pesquera, *Lawyer Ponders Effects of Transsexual's Case*, SAN ANTONIO EXPRESS-NEWS, Apr. 9, 2000, at 7B; John Taylor, *The Third Sex*, ESQUIRE MAG., Apr. 1995, at 102, 102-14.

36. Alice Cooper, Boy George, k.d. lang and Wendy Carlos are but a sampling of musicians who express their gender differently than what is expected by society. *See* MACKENZIE, *supra* note 19, at 120-22, 128-29 (discussing the use of transgender images in the music industry); Susan Reed, *After a Sex Change and Several Eclipses, Wendy Carlos Treads a New Digital Moonscape*, PEOPLE WEEKLY, July 1, 1985, at 83.

37. Daytime television talk shows have had shows devoted to transgender issues, including *Donahue*, *Oprah*, *Jerry Springer* and *Sally*. News format shows that have considered transgender issues include *A&E Investigative Reports* and *Good Morning America*. Numerous television sitcoms, such as *Night Court* (NBC television) and *Evening Shade* (CBS television), and television dramas, including *Chicago Hope* (CBS television) and *Picket Fences* (CBS television), have included transgender characters in their episodes.

38. Successful motion pictures dealing with transgender issues include *BIRDCAGE* (MGM/United Artists 1996), *LA CAGE AUX FOLLES* (United Artists 1978), *ROCKY HORROR PICTURE SHOW* (20th Century Fox 1975), *SOME LIKE IT HOT* (United Artists 1955), *TO WONG FOO, THANKS FOR EVERYTHING, JULIE NEWMAR* (Amblin Entertainment/Universal Pictures 1995), *TOOTSIE* (Columbia Pictures 1982), and *VICTOR/VICTORIA* (MGM 1982). *See generally* MACKENZIE, *supra* note 19, at 103-39 (discussing the treatment of transgendered people in motion pictures).

A comparison of two Academy Awards ceremonies illustrates the changes in society's understanding of and empathy for transgender issues over a span of just a few years. Jaye Davidson, who played the "Dil" character in *THE CRYING GAME*, was abused by being called a "he" at the 1993 Academy Award ceremonies. Hilary Swank, the "Brandon" character in *BOYS DON'T CRY*, was treated with respect at the 2000 Academy Award ceremonies.

39. *E.g.*, KATE BORNSTEIN, *GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US* (1994); CANARY CONN, *CANARY: THE STORY OF A TRANSSEXUAL* (1974); RHONDA D. HOYMAN, *RHONDA: THE WOMAN IN ME* (1999); CHRISTINE JORGENSEN, *CHRISTINE JORGENSEN: A PERSONAL AUTOBIOGRAPHY* (1967); JAN MORRIS, *CONUNDRUM* (1987); REN'EE RICHARDS, *SECOND SERVE: THE REN'EE RICHARDS STORY* (1983).

biographical or historical nature,<sup>40</sup> of a clinical or academic nature,<sup>41</sup> of a political nature,<sup>42</sup> of a family member outreach nature<sup>43</sup> or of a legal nature written by transgenders themselves.<sup>44</sup> *The International Bill of Gender Rights* (IBGR) is an excellent example of a document drafted with the intent to express fundamental rights from a gender perspective.<sup>45</sup> The next sections of this Essay discuss the IBGR in detail.

From a social acceptance context, an increasing number of employers, although still a minority, desire to retain their

Reading these autobiographies and learning about the authors' experiences left lasting impacts on me. Ms. Conn grew up within blocks of me and, but for a school district line and one year age difference, we might have been classmates. In 1970, I saw Ms. Jorgensen appear on a late night talk show. That was the first indication in my life that I was not the only person in the world who felt as I did about my gender. Ms. Morris' life story exemplifies the diverse and interesting background of transgenders. When she presented as a man during the first portion of her life, Ms. Morris climbed Mount Everest.

40. *E.g.*, LESLIE FEINBERG, *TRANS GENDER LIBERATION* (1993); GARY KATES, *MONSIEUR D'EON IS A WOMAN* (1995).

41. *E.g.*, DALLAS DENNY, *GENDER DYSPHORIA: A GUIDE TO RESEARCH* (1994); RANDI ETTNER, *CONFESSIONS OF A GENDER DEFENDER: A PSYCHOLOGIST'S REFLECTIONS ON LIFE AMONG THE TRANSGENDERED* (1996) [hereinafter ETTNER, *CONFESSIONS*]; RANDI ETTNER, *GENDER LOVING CARE: A GUIDE TO COUNSELING GENDER-VARIANT CLIENTS* (1999) [hereinafter ETTNER, *GENDER LOVING CARE*]; SHEILA KIRK, *HORMONES* (2nd ed. 1991); MACKENZIE, *supra* note 19; KIM STUART, *THE UNINVITED DILEMMA: A QUESTION OF GENDER* (1983).

42. *E.g.*, Frye, *supra* note 28; MARTINE ROTHBLATT, *THE APARTHEID OF SEX* (1995).

43. *E.g.*, JUST EVELYN, *MOM, I NEED TO BE A GIRL* (1998); PEGGY RUDD, *CROSSDRESSING WITH DIGNITY* (1990); PEGGY RUDD, *MY HUSBAND WEARS MY CLOTHES: CROSSDRESSING FROM THE PERSPECTIVE OF A WIFE* (1989) [hereinafter RUDD, *MY HUSBAND WEARS MY CLOTHES*]; *TRANS FORMING FAMILIES*, *supra* note 34.

44. *E.g.*, A. SPENCER BERGSTEDT, *TRANSITION AND BEYOND: A LEGAL GUIDE FOR FTM'S* (1997) [hereinafter BERGSTEDT, *FTM'S*]; A. SPENCER BERGSTEDT, *TRANSITION AND BEYOND: A LEGAL GUIDE FOR MTF'S* (1997) [hereinafter BERGSTEDT, *MTF'S*]; SISTER MARY ELIZABETH, *LEGAL ASPECTS OF TRANSSEXUALISM* (1990); SHEILA KIRK & MARTINE ROTHBLATT, *MEDICAL, LEGAL AND WORKPLACE ISSUES FOR THE TRANSSEXUAL* (1995); MELANIE MCMULLEN & STEPHEN WHITTLE, *TRANSVESTISM, TRANSSEXUALISM AND THE LAW* (1994). *See generally* 1992 PROC. FROM THE FIRST INT'L CONF. ON TRANSGENDER LAW & EMP. POL'Y [hereinafter FIRST ICTLEP] (transcribing presentations and compiling material concerning legal challenges faced by transgenders and discussing strategies for progressive change as presented at ICTLEP's annual conference); 1993 PROC. FROM THE SECOND INT'L CONF. ON TRANSGENDER LAW & EMP. POL'Y [hereinafter SECOND ICTLEP] (same); THIRD ICTLEP, *supra* note 20 (same); 1995 PROC. FROM THE FOURTH INT'L CONF. ON TRANSGENDER LAW & EMP. POL'Y [hereinafter FOURTH ICTLEP] (same); FIFTH ICTLEP, *supra* note 32 (same).

45. The *International Bill of Gender Rights* was initially adopted at the second annual meeting of the ICTLEP. *International Bill of Gender Rights*, in FIFTH ICTLEP, *supra* note 32, at 5. The IBGR has been revised since that time. *Id.*

productive transgender employees.<sup>46</sup> The attitudes of these employers have adjusted with the times and transgenders fighting to remain employed with these employers do not have to go to court to keep their jobs and stay off the street. As the attitudes exhibited by society continue to adapt, transgenders should find an increasingly accepting environment.

### *B. Current U.S. Law and the Cider House Rules*

In glaring contrast to the evolving attitudes of society, a review of United States statutes and case law presents a mostly hostile atmosphere for legal protections of transgenders, and even of their legal status.<sup>47</sup> Transgenders have little to no legal protection in the area of employment.<sup>48</sup> In that area, the largest concern facing transgenders remains workplace dress codes and use of gender assigned restrooms.<sup>49</sup> Further, transgenders have no standing for equal protection claims,<sup>50</sup> no right to insurance coverage<sup>51</sup> or government medical assistance,<sup>52</sup> no housing

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46. I base this assertion on over twenty-five years of personal observations as an activist and legal advocate. From the perspective of a rational employer, it is beneficial to find ways to keep a transitioning employee on the job. A company would have to spend a large sum of money to replace the employee. It is not worth spending that quantity of money merely to avoid retaining a transitioning employee. *See also* Sarah Schafer, *Working in a New Identity*, Jan. 8, 2001, at 3C ("Experts trace the shift toward acceptance in part to the nation's tight labor market and the imperative to retain talented workers.").

47. *But see* Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2143, [1996] 2 C.M.L.R. 247 (1996), *reprinted in* FIFTH ICTLEP, *supra* note 32, at app. F, F-1 to F-20 (holding that discrimination against transsexuals in the European Communities is discrimination on the basis of sex).

48. For an overview of case law concerning employment discrimination involving transgenders, see JoAnna McNamara, *Employment Discrimination and the Transsexual*, in *FOURTH ICTLEP*, *supra* note 44, at app. E, E-1 to E-22.

49. *See id.* at E-7 n.24 ("Which bathroom a pre-operative transsexual is to use is one of the most often cited problems facing an employer."). This assertion is also based on over twenty-five years of personal observations as an activist and legal advocate. I was fired in 1972, 1973, and 1976 over these issues.

50. *Doe v. Alexander*, 510 F. Supp. 900, 904 (D. Minn. 1981) (holding that transsexuals do not constitute a suspect class for purposes of equal protection under the Fourteenth Amendment); *see also* *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995) (holding that a transsexual prisoner's allegation that some prisoners were given hormone therapy when others were not was not sufficient to state a claim for which relief could be granted under a theory of equal protection).

51. Hazel Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You to Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 152-59 (1998); Lisa Middleton, *Insurance and the Reimbursement of Transgender Health Care*, in *THIRD ICTLEP*, *supra* note 20, at app. F, F-1 to F-12.

52. Civilian Health and Medical Program of the Uniformed Services, 32 C.F.R. § 199.4(C)(7) (1999) (stating that the Department of Defense, Civilian Health and Medical

protection<sup>53</sup> or access to homeless shelters,<sup>54</sup> no right to continue their military service,<sup>55</sup> no right to receive prison medical treatment<sup>56</sup> and no rights in other areas pertaining to prisons.<sup>57</sup>

As Christie Lee Littleton learned after unsuccessfully filing suit, United States statutes and case law also provide no protection for transgenders in marriage. In October 1999, in

Program excludes coverage for “[a]ll services and supplies directly or indirectly related to transsexualism or such other conditions as gender dysphoria”).

53. Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100.201 (2000) (“For purposes of [the Fair Housing Amendments Act of 1988, prohibiting discrimination based on a handicap,] an individual shall not be considered to have a handicap solely because that individual is a transvestite.”). Though transgenders are excluded from protection from discrimination under the Fair Housing Amendments Act, the need for such protection is real. I have received numerous telephone calls and e-mails throughout my years as an activist and lawyer, from transgendered people who have been forcibly removed from or locked out of their rental homes or apartments after the owner or landlord learned that they were transgendered. Sometimes the transgendered person comes home to find their belongings stacked on the porch. Usually the person is locked out until she makes arrangements to move.

54. See Green & Brinkin, *supra* note 27, at 45.

55. *Doe*, 510 F. Supp. at 903-05 (dismissing plaintiff’s section 1983 suit seeking to enjoin the enforcement of an army medical regulation disqualifying transsexuals from fitness for service).

56. *Long v. Nix*, 86 F.3d 761, 765-66 (8th Cir. 1996). In *Long*, the court held that evidence sustained the finding that prison officials had not been deliberately indifferent to the medical needs of a prisoner who claimed to be transsexual. *Id.* Thus, prison officials were not liable in the prisoner’s section 1983 action, which alleged that the prison officials’ failure to treat his gender-identity disorder constituted cruel and unusual punishment. *Id.* In *Long*, the court recognized that the prison’s medical staff had made numerous attempts to evaluate the prisoner’s psychological problems, but the prisoner had refused to cooperate with attempted psychological treatments. *Id.* at 766. *But see* *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (holding that the prisoner stated a claim under section 1983 and the Eighth Amendment, regardless of whether the prisoner was entitled to estrogen treatment for gender dysphoria, by alleging a medical need for, and general right to, medical treatment for gender dysphoria and by alleging that he had not been offered any treatment); *Meriwether v. Faulker*, 821 F.2d 408, 414 (7th Cir. 1987) (holding that an inmate stated a civil rights cause of action by alleging that he was a transsexual and that prison officials were deliberately indifferent to his medical needs by failing to provide him with treatment); *Phillips v. Mich. Dep’t of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (holding that an alleged transsexual inmate was entitled to a preliminary injunction ordering correctional officials to provide her with estrogen therapy).

57. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that a prison official cannot be found to have violated the Eighth Amendment unless the official disregards an “excessive risk to inmate health or safety”). *Farmer* involved a transsexual prisoner who was beaten and raped after being placed in the general prison population. *Id.* at 838-42. A recent Ninth Circuit case may be a turning point for better transsexual rights, both in prisons and in general. *Schwenk v. Hartford*, 204 F.3d 1187, 1205 (9th Cir. 2000) (holding that transsexuals are protected under section 1983 and the Gender Motivated Violence Act).

*Littleton v. Prange*,<sup>58</sup> the Fourth Texas Court of Appeals reverted the legal sex of all Texan post-surgical transgenders back to the sex<sup>59</sup> assigned to them at birth. This resulted in the negation of all Texan post-surgical transgenders' previously legal marriages to persons whose genitals were opposite to the transgenders' post-surgical genitals.

Writing for the majority in *Littleton*, Chief Justice Phil Hardberger wrote that sex was "immutably fixed by our Creator at birth."<sup>60</sup> Hardberger completely ignored over forty years of effort by the International Olympic Committee and the Amateur Athletic Association in the area of gender verification.<sup>61</sup> He also failed to consider the effects his decision would have on intersexed people, who are further stigmatized by having ambiguous genitals<sup>62</sup> "fixed by our Creator at birth,"<sup>63</sup> and on the

58. 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

59. "Sex" used herein refers to both "sex" and "gender." Motion for Rehearing at 1 n.1, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999) (No. 99-1214) [hereinafter Motion for Rehearing]; *see also Schwenk*, 204 F.3d at 1201-02 (holding that sex and gender have become interchangeable terms in litigation involving Title VII and the Gender Motivated Violence Act).

60. *Littleton*, 9 S.W.3d at 224; *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093-94 (9th Cir. 2000) (holding that sexual identity is an immutable characteristic). *But see* Motion for Rehearing, *supra* note 59, at 6 n.12:

There are at least ten statutes in which the laws of Texas overcome, erase or rewrite immutable biological facts to bestow rights, responsibilities and privileges upon its citizens. . . . These legal fictions are, in turn, perpetuated in additional statutes, creating permanent, irrebuttable, determining factors in civil and criminal matters. Taken as a whole, these statutes provide ample precedent for the lower courts to determine that the amended birth certificate is a valid means of recognizing Mrs. Littleton as a female under the law.

*Id.* (citations omitted).

61. *See infra* notes 193-208 and accompanying text. *See generally* Joe Leigh Simpson, *Gender Verification in Competitive Sports*, 16 SPORTS MEDICINE 305 (Nov. 1993) (discussing gender testing in athletics); Notice from the Chairman of the IAAF Medical Committee, International Amateur Athletic Federation, *Gender Verification* (June 1992) (same).

62. *See* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 267 n.7 (1999) (discussing intersexuality); *The Intersex Society of North America*, at <http://www.isna.org> (last visited Sept. 17, 2000) (same).

The population of intersexed Texans ranges from [200,000] to 800,000. Most intersexed do not know that they are intersexed, especially those who are older, for whom testing was not available to them as adolescents or young adults, and who had no outward physical manifestations or reproductive fertility problems. The intersexed are those humans who have chromosome patterns other than XX or XY. For example, XYY, XYYY, XO, XXY, XXXY and any other of the numerous combinations currently identified.

children of the marriages that his decision made void.<sup>64</sup> Finally, he neglected to consider how, when carried to its logical conclusion, his decision will radically alter the landscape in other areas of the law, including tort law, family law, health law, employment law, civil rights in public accommodations and prison law.<sup>65</sup>

The *Littleton* decision violates Texas law,<sup>66</sup> violates the Texas Constitution,<sup>67</sup> is totally at odds with a 1990 Veteran's

The number of Texans with Androgen Insensitivity Syndrome (A.I.S.) is much smaller but still significant at approximately 500 or more. These are the XY born vaginaed individuals. These and the [200,000] to 800,000 intersexed Texans will face voiding of their marriages and loss of benefits by application of the court of appeals sex test, as did Mrs. Littleton, retroactively.

The number of Texans who are transsexual is less well known. For this motion, the number of non-transsexual Texans who will be adversely effected if this decision remains is very large and significant in its own right.

Motion for Rehearing, *supra* note 59, at 1 n.2. I determined the population of intersexed Texans by multiplying the frequency of intersexuality by the population of Texas. See Greenberg, *supra*, at 267 n.7 (stating that between one and four percent of the population is intersexed); PRIMEDIA REFERENCE, INC., THE WORLD ALMANAC AND BOOK OF FACTS 2000, at 388 (Robert Famighetti et al. eds., 2000) (listing the 1998 population of Texas as 19,759,613). Ms. Greenberg's article was also the source of the information on chromosome patterns and the frequency of Androgen Insensitivity Syndrome. See Greenberg, *supra*, at 281, 286.

63. *Littleton*, 9 S.W.3d at 224.

64. See *infra* Part IV.A.4.ii.

65. See *infra* Part V.A; see also Motion for Rehearing, *supra* note 59, at 3 n.7 ("The court of appeals' opinion is already being cited in probate cases in other states where the deceased had remarried, later died intestate and the children of the deceased wished to block the step-parent from taking.").

66. See Motion for Rehearing, *supra* note 59, at 4 n.9.

By ignoring the stipulated medical evidence and imposing its own "test" based on genetic information (chromosomes), the court of appeals violated V.T.C.A. Art. 9031 which prohibits (with exceptions for which this case does not factually qualify) the use of genetic information by a "(8) State agency," defined to include the "judicial branch of state government."

Neither Mrs. Littleton nor her deceased husband have even had a chromosome test.

By granting and upholding a Summary Judgment based on the chromosome test, and by assuming that the vaginaed Mrs. Littleton is XY and the penisid deceased Mr. Littleton was XY, the lower courts are requiring Mrs. Littleton to test herself and reveal that information in violation of Art. 9031.

*Id*; see also TEX. FAM. CODE. ANN. § 1.101 (Vernon 2000) (stating that, unless a specific provision in the chapter makes a marriage void or voidable, the policy of Texas is to uphold a marriage).

Administration interpretation of the same Texas law and of similarly referenced case law<sup>68</sup> and violates the Constitution of the United States.<sup>69</sup> The decision conflicts with the American Medical Association's Code of Medical Ethics,<sup>70</sup> is arguably at odds with the findings of the Human Genome Project<sup>71</sup> and

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67. Mrs. Littleton based her state constitutional claim on Texas' prohibition of retroactive laws, stating:

The court of appeals' opinion also states that the Federal Defense of Marriage Act [of 1996] (D.O.M.A.) . . . is a basis for its testing of the validity of the Kentucky marriage. D.O.M.A. was enacted in September 1996. Mr. Littleton died in July 1996. Therefore, the use of D.O.M.A. violates the Texas Constitutional provision found in Art. 1, Sec. 16 banning retroactive laws.

Motion for Rehearing, *supra* note 59, at 4 n.9.

68. See BENEFIT DETERMINATIONS INVOLVING VALIDITY OF MARRIAGE OF TRANSSEXUAL VETERANS, DEPT OF VETERANS AFFAIRS, OFFICE OF GENERAL COUNSEL (1990), 1990 VAOPGCPREC LEXIS 1624, available at <http://www.va.gov/opc/opinions/1990/w1605201.asp> (holding that the marriage of a transsexual veteran married to a member of her former sex is valid for the purpose of determining entitlement to certain payments); *cf.* Attorney General v. Family Court at Otahuhu [1995] N.Z.F.L.R. 57, [1994] N.Z.F.L.R. LEXIS 51 (“[F]or the purpose [of a New Zealand marriage act] where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex.”).

69. See Motion for Rehearing, *supra* note 59, at 4 n.9.

The trial court and court of appeals actions also violate Art. I, Sec. 9 (impairment of contract), Art. IV, Sec. 1 (full faith and credit), and Amendments I (freedom of expression and privacy through the penumbra of *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), Amendment V (due process as applied to the States by Amendment XIV and *Roe v. Wade*), Amendment IX (certain rights retained by the people as applied to the States by Amendment XIV and *Roe v. Wade*), and Amendment XIV (due process and equal protection) of the United States Constitution.

*Id.* In her Petition for Certiorari, Christie Lee Littleton again argued that the court's rulings in the case violated the full faith and credit and equal protection clauses of the Constitution. See Petition for Writ of Certiorari at 6-8, *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

70. See AM. MED. ASS'N., CODE OF ETHICS § 2.132 (1998-1999) (stating that genetic testing by employers to exclude employees with a genetic predisposition to disease or injury is inappropriate); *id.* at § 2.135 (stating that physicians should not participate in providing genetic testing information to insurance companies); *id.* at § 2.137 (stating that genetic information should remain confidential unless the patient gives informed consent); *id.* at § 5.08 (stating that patient history, diagnosis or prognosis should not be disclosed to insurance companies absent consent); *id.* at § 5.09 (stating that pre-employment examinations by physicians that are retained by employers are still considered confidential absent authorization by patient).

71. In testimony before the Congressional Task Force on Health Records and Genetic Privacy, Dr. Francis S. Collins, Director of the National Human Genome Research Institute, reported that “[w]e all carry between five and as many as thirty genes that are

violates twenty years of prior consistent state actions.<sup>72</sup> Such can be the lofty and superior nature of judicial discrimination against transgenders from the bench. With few exceptions, these laws resemble the Cider House Rules. They are hypocritical and should be changed or removed.

### III. TRANSGENDER 101: THE STRUGGLE FOR EQUALITY AND THE INTERNATIONAL BILL OF GENDER RIGHTS

Despite the hypocritical rules imposed on transgenders by law and society, transgenders have written only a few law

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significantly misspelled and that place us at some risk for some future illness." *Privacy, Confidentiality and Discrimination in Genetics - Task Force on Health Records and Genetic Privacy Before the House Committee on Commerce*, 105th Cong. 6 (1997) (statement of Dr. Francis S. Collins, Director, National Human Genome Research Institute).

72. See Motion for Rehearing, *supra* note 59, at 8 n.14.

There were also approximately twenty years of prior consistent State actions of the Texas Courts and Executive Branch regarding Mrs. Littleton's legal identity as female that should prevent the trial court and court of appeals from currently voiding the Littleton's marriage via judicial fiat about Mrs. Littleton's legal sex.

Mrs. Littleton's transsexuality was treated in a state government funded, university hospital, by state government paid, university staff. One-half of her surgery to correct what she had always considered in her brain to be a birth defect was paid by the State.

Mrs. Littleton went to a State court and got a legal change of name. She took a verified letter from her physician as to her genital corrective surgery, and obtained a State of Texas, Department of Public Safety Identification Card listing her as female.

When she met her husband in Kentucky and applied for a marriage license, the State of Kentucky gave full faith and credit to Mrs. Littleton's State of Texas, Department of Public Safety Identification Card listing her as female.

Similarly, the State of Texas GAVE full faith and credit to the consummated (vagina-penis) marriage from the State of Kentucky. When they moved back to Texas, Mr. Littleton fell behind on his child support. The Attorney General of Texas pressured Mrs. Littleton, as the wife and sharing marital community property assets, to pay for Mr. Littleton's back child support with her income.

In addition, during their seven-year marriage, the federal government accepted their annual income tax returns as "married, filing jointly." The State of Texas benefited from the distribution of those federal tax funds.

After this lawsuit was filed, Mrs. Littleton went to a Texas court and obtained an order amending her birth certificate under Texas Health and Safety code, Sec. 191.028.

journal articles on legal issues pertaining to transgenderism.<sup>73</sup> The vast majority of articles on the topic have been written by non-transgenderers.<sup>74</sup> That is not to say that the writers have been insensitive or uncaring. Just as the early authors who wrote of non-white civil rights issues were white, the early writers who wrote of women's civil rights issues were male, and the early writers who wrote of gay, lesbian, and bisexual civil rights issues were straight, almost every author who has written about transgender civil rights issues has not been in-the-skin, living-the-life or feeling-the-pain.

This was the unfortunate situation in 1991. No lesbian or gay rights legal group was covering transgender legal issues. Though pockets of past grassroots legal activity existed, with some victories,<sup>75</sup> national transgender political and legal organizing and activism had not begun.<sup>76</sup> As a result of this absence, the International Conference on Transgender Law and Employment Policy was formed to hold law conferences for transgender lawyers and lay people. These conferences allowed

73. *E.g.*, BERGSTEDT, FTMS, *supra* note 44; BERGSTEDT, MTF'S, *supra* note 44; CURRAH & MINTER, *supra* note 29; KIRK & ROTHBLATT, *supra* note 44; MCMULLEN & WHITTLE, *supra* note 44; Alyson Meiselman, *Y2K - Looking Forward and Back on Marriage*, 33 MD. B.J., May/June 2000, at 48; Minter, *supra* note 29; Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box by Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEXUALITY 1 (2000); Kristine W. Holt, Comment, *Evaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283 (1997). Prior to the above articles and those in this Symposium edition, I do not know of any other OUT transgenderers who have been published in law journals on the topic of transgender legal issues.

74. *E.g.*, Arriola, *supra* note 19; Beh, *supra* note 51; Cain, *supra* note 34; Case, *supra* note 34; Mary Coombs, *Sexual Dis-Oriented: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219 (1998); Ronald R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121; Greenberg, *supra* note 62; Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329 (1999). Arriola, Coombs and Garet have given presentations at ICTLEP conferences. Elvia Arriola, *Getting Possessive About the Term "Lesbian"*, in FIFTH ICTLEP, *supra* note 32, at 81; Mary Coombs *Keynote Luncheon*, in FIFTH ICTLEP, *supra* note 32, at 19; Ronald R. Garet, *Self-Transformability*, in SECOND ICTLEP, *supra* note 44, at 175.

75. Much of this successful work was done in California by Sister Mary Elizabeth and her friends. Frye, *supra* note 28, at 458. *See generally* SISTER MARY ELIZABETH, *supra* note 44 (discussing a variety of legal issues facing transgenderers). Transgenderers filed several unsuccessful Title VII employment lawsuits in the 1970s and 1980s. *E.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977); *see also Chi. v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (involving a criminal cross-dressing case). For information on the lobbying efforts that led to the repeal of a Houston ordinance prohibiting people from appearing in public dressed as the opposite sex, *see infra* notes 297-299 and accompanying text.

76. *See Frye, supra* note 28, at 451-68 (discussing the history of the transgender movement).

transgenders to discuss and formulate future strategies, on both a grassroots and national scope, for changing the laws that adversely effect the lives of transgenders.<sup>77</sup>

Developed during the annual ICTLEP conferences, and building upon the early work of Sharon Stuart<sup>78</sup> and JoAnn Roberts,<sup>79</sup> two documents emerged in 1996 that are the underpinnings of the transgender political and legal rights movement. They are the *Declaration of Gender Liberty*<sup>80</sup> and the final version of the *International Bill of Gender Rights (IBGR)*.<sup>81</sup> The IBGR is so important to the transgender community and their rights as asserted in this Essay that the document is printed in its entirety as Appendix B.

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77. ICTLEP was founded in 1991 as a committee of the Gulf Coast Transgender Community (GCTC) in Houston. In August 1992, it held its first conference. In 1993 it was incorporated as a section 501-c-3, non-profit organization. Martine Rothblatt of Maryland, Sharon Stuart of New York, Laura Skaer of Colorado, Jackie Thorne of Texas and I were the original directors. ICTLEP held six annual conferences and published the conference proceedings from the first five. See *supra* note 44 (listing the published ICTLEP Proceedings). Beginning in 1996, directors and others from ICTLEP were elected to the National Lesbian and Gay Law Association (NLGLA), which began to make its annual "Lavender Law" conferences inclusive of transgender issues. See Frye, *supra* note 28, at 466. ICTLEP no longer needs to host the annual conference and now participates largely with the Lavender Law conferences. NLGLA changed its by-laws to become bisexual and transgender inclusive in 1998. See *id.* at 463; Bylaws of the National Lesbian and Gay Law Association, art. 1, § 1.01 (May 2000) (on file with the National Lesbian and Gay Law Association) ("The mission of the Corporation shall be to promote justice in and through the legal profession for the lesbian, gay, bisexual, transgendered and intersexed community . . .").

78. Sharon Ann Stuart, *Report from the International Bill of Gender Rights Project*, in SECOND ICTLEP, *supra* note 44, at 151-53.

79. Jo Ann Roberts, *A Bill of Gender Rights*, at <http://www.3dcom.com/pw/gbr.html> (last modified Apr. 3, 1999).

80. The attendees of the Fifth ICTLEP Conference adopted the Declaration of Gender Liberty at a night-time, candlelight ceremony on July 4th, 1996. *Declaration of Gender Liberty*, in FIFTH ICTLEP, *supra* note 32, at 1-4. The attendees waited until the local fireworks began and made those fireworks part of the ICTLEP celebration. See *id.* at 1. The ceremony was purposefully timed as personal retribution for a bitter pill endured ten years prior. In 1986, just four days prior to the celebration of the centennial of the Statue of Liberty, the Supreme Court decided *Bowers v. Hardwick*, 478 U.S. 186 (1986), holding that constitutionally protected rights do not extend to the private sexual conduct of homosexuals engaging in sodomy. *Id.* at 192. Three days later, the Court denied certiorari to *Baker v. Wade*, 774 F.2d 1285 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986), a second case challenging the constitutionality of state sodomy laws.

81. The fourth and final version of the IBGR can be found in Appendix B of this Essay.

#### IV. CIDER HOUSE RULES: THE IMPOSITION OF ILLOGICAL BUT SOCIALLY INGRAINED RULES ON THE TRANSGENDER COMMUNITY

##### A. *The Right to Define Gender Identity*

###### 1. *Terminology*

What does the term transgender mean? Who is included in this group? Transgenders wanted a term for themselves, self-created rather than imposed on them by the medical community or society.<sup>82</sup> Before the IBGR was even drafted, the need to self-define gender identity was so great that the community consciously seized upon the yet unwritten *Right to Define Gender Identity* and created the term “transgender.”<sup>83</sup> Therefore, “transgender” is a political term created to fill the need for self-definition by the transgender community. It is an umbrella term most fully defined by the San Francisco Human Rights Commission Report.<sup>84</sup> The report reads, in part, as follows:

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82. The transgender community is not the first to seek out its own identity and name. Often, minority or politically disadvantaged communities are first named by the politically advantaged majority. In recent history, women and feminist groups dealt with the negatives associated with “Mrs.,” “lady” and “girl.” African Americans have moved through the terms “Negroes,” “Afro-Americans” and “Blacks” in seeking their preferred name. Hispanic Americans have moved through the terms “Mexicans,” “Latinos” and “Chicanos.” Similarly, Native Americans struggle with the term “Indians.” The lesbian and gay community long ago discarded the term “homosexual.” So it is for some members of the transgender community, who were initially named “transvestites,” but prefer “cross-dresser.” See MACKENZIE, *supra* note 19, at 5. The community is still not sure what to think of the term “transsexual,” a word that implies a change, because it conflicts with the belief that a transgender is merely making corrections by transitioning. See discussion *supra* note 9.

83. The term transgenderist—as distinct from the terms transvestite and the transsexual—was coined by Virginia Prince in the 1970s to describe her full-time, non-surgical decision. See MACKENZIE, *supra* note 19, at 53.

In the heterosexual transgender cross-dressing community, the most noted and earliest education activist was Virginia Prince (formerly Charles Prince) of California. After many years of cross-dressing, he combined his small organization, Feminine Personality Expression (FPE), with Carol Beecroft’s larger Ma’melle Society to form the Society for the Second Self (SSS or “Tri-Ess”) in the 1970’s. Tri-Ess is known as a group for the heterosexual cross-dresser and his wife. Charles Prince then decided to live the rest of his life as Virginia, but without genital surgery. Thus Virginia Prince came into the world and the term *transgenderist*—as a distinction from the transvestite and the transsexual—was coined by her in the 1970s to describe her decision.

Frye, *supra* note 28, at 457.

84. See Green & Brinkin, *supra* note 27, at M-13.

[T]he term Transgender is used as an umbrella term that includes male and female cross dressers, transvestites, female and male impersonators, pre-operative and post-operative transsexuals, and transsexuals who choose not to have genital reconstruction, and all persons whose perceived gender and anatomic sex may conflict with the gender expression, such as masculine-appearing women and feminine-appearing men.<sup>85</sup>

All other terms—cross-dresser, transvestite, transsexual—are subsets of the umbrella term transgender.<sup>86</sup>

Notice in the above definition that gender-variant people are included in the definition of transgender. This inclusion is especially true of lesbian, gay and bisexual persons who are “read” or perceived to be “queer” because they present in a manner at variance to the gender that they are assumed to be. People often incorrectly draw a line between transgenders, who are incorrectly assumed to be homogeneously heterosexual,<sup>87</sup> and homosexual people, some of whom go “butch” or do “drag,” but are assumed not to be transgendered.<sup>88</sup> This line is ludicrous. There is a huge overlap of transgenders into all communities. Some have successfully argued that when the dust settles and all transgenders come out of their closets, it will be seen that sexual orientation, being straight or gay or bisexual, is a subset of gender identification.<sup>89</sup>

85. *Id.*

86. Referring to the “transgender and transsexual community” incorrectly names the group and one of its subsets as being equal.

87. How the term is defined, especially before or after genital surgery, demonstrates that the terms “homosexual” and “heterosexual” are social constructs and not orientations. To be oriented toward the opposite or toward the same rarely works for the post-surgical transsexual. Most transgenders, unless truly bisexual, find that they are still attracted to the men or women to whom they were always attracted. The sexual orientation is either toward men, toward women or toward both, but not toward same or opposite.

88. See, e.g., *Position Paper: Including Gender Protection in ENDA*, GENDERPAC (on file with author) (differentiating “butchy lesbians” and “effeminate gay men” from transsexual and transgender Americans in an analysis of the groups of people excluded from protection by the 1999 version of ENDA). In a 1998 survey conducted by GenderPac, the National Center for Lesbian Rights, and NGLTF, twenty-eight percent of gay, lesbian and bisexual respondents who reported discrimination felt that the discrimination was based in part on expression of gender and eight percent felt they were discriminated against based entirely on gender expression. *Id.*

89. On November 15, 1997, at the Tenth Annual Creating Change Conference in San Diego, sponsored by the NGLTF, Jamison Green, Shannon Minter and I held a workshop to ask the question, “Is Sexual Orientation a Subset of Gender Identity?” Frye, *supra* note 28, at 452; Audio tape: *Sexual Orientation Subset of Gender*, 10th Annual Creating Change Conference, held by the National Gay and Lesbian Task Force (Nov. 15, 1997) (on file with author). In a nutshell, the question turned on its head the common

## *2. Part-timers, Full-timers, Trans-WEST-ites, and the Intersexed*

After two-plus decades of transgender political advocacy, I have found that most people, judges<sup>90</sup> and legislators<sup>91</sup> understand transgenders better when discussed from the perspective of transgendered people being part-timers or full-timers.<sup>92</sup> There are basically two types of transgendered people.<sup>93</sup> One is the part-timer or partial gender crossover

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misperception that transgenders are a kind of hang-on or add-on group to the lesbian, gay and bisexual civil rights movement. Instead, the two groups would have nothing in common but for society lumping us all together as queer. The question posed at the workshop supposed that lesbians, gays and bisexuals are actually the subsets and members of the larger gender identity, gender variant or transgender community.

We titled the workshop with the intention of generating controversy. There are still many queer people who do not consider transgenders a part of the lesbian, gay and bisexual civil rights movement. The title was intended to make the attendees think about and spotlight this misperception. We expected a small group and much negative debate; however, in actuality, the large room filled to overflowing. Every gender variant lesbian, gay male and bisexual, not overwhelmingly drawn to another workshop, attended our workshop. Those in attendance entered the room agreeing with the workshop title and seeking a community of others who felt the same way. The silent majority of transgenders came to speak out.

Speaker after speaker from the audience confirmed that the discrimination he/she felt as a lesbian, gay man or bisexual was not because of whom they were sexually intimate with, but instead was because of the gender expectation that society imposed. Members of society did not see them actually having sex, but they did see and react angrily to two women holding hands, two men dancing and any person stretching the range of allowable gender expression. *Id.* at 452-53.

90. I represented myself in court in 1977 during my transition. As an attorney, I have taken hundreds of transgendered people before the courts and have educated many judges. In 1999, the election of all Republican judges in Harris County, Texas, a jurisdiction with a strong religious right political machine, pressured these judges to stop helping transgendered parties and to stop transferring cases to friendly courts. Susan Borreson, *Transsexual Name Changes Cause Furor: Houston Minister's Scrutiny Has Judges Running Scared*, TEX. LAW., June 21, 1999, at 1; Tim Fleck, *The Insider: What's In a Name (and Sex) Change? A Preacher Accuses the Judiciary of Allowing Same-Sex Marriage Fraud*, HOUS. PRESS, June 17-23, 1999, at 11.

91. For a discussion of successful lobbying efforts in Houston, see *infra* notes 297-99 and accompanying text. In January 1993, Sarah DePalma, head of the Texas Gender Advocacy and Information Network (TGAIN), and I began to lobby for transgender legislation in Texas. In 1995, we organized a second lobbying effort in Austin. In January 1999, Ms. DePalma organized a meeting of over fifty transgenders to lobby the Texas Legislature. We encountered no negative incidents. For information on lobbying the United States Congress, see discussion and sources cited *supra* note 31.

92. Posting of Phyllis Randolph Frye, prfrye@aol.com, to Phyllabuster List, *Opinion: USA Law in re Name and Sex Correction in Government Documents* (Sept. 18, 1997) (on file with author). The *Phyllabuster List* is a list of over 1,150 people and list-servers around the world who are interested in transgender legal and political activism.

93. *Id.*

person, of which I have found there are three variations.<sup>94</sup> The three variations of part-timers are: (1) an occasional, partial blending of gender variance, (2) a part-time yet complete blending of gender variance or (3) a continuous, partial blending of gender variance.<sup>95</sup> The occasional, partial blending of gender variance subset includes people who adopt some of the clothing assigned by society to the other gender for short periods of time, such as a few stolen moments or a few hours.<sup>96</sup> The part-time, yet complete blending of gender variance subset includes those transgenders who adopt the entire clothing and gender presentation assigned by society to the other gender for longer periods of time, such as an evening with friends, for a stage show or for a weekend.<sup>97</sup> Finally, the continuous, partial blending of gender variance subset includes those who adopt some clothing assigned by society to the other gender for the majority of their lives.<sup>98</sup>

The part-time transgendered person is often called a cross-dresser, transvestite, effeminate male, masculine female, drag queen, as well as a host of other labels.<sup>99</sup> Sometimes the person may not be labeled, but be seen, for example, as a heterosexual woman who always wears jeans, a man's shirt, work boots, no make-up and short hair. Essentially, these part-time people do not fit within the dichotomy of an all-male type of man or an all-female type of woman. With some social pain and difficulty, these people learn that they naturally fit somewhere between the two polar extremes.<sup>100</sup>

Even so, the part-timer's core gender identity<sup>101</sup> is within the parameters of what society has determined his/her gender to be.

94. I base these assertions on over twenty-five years of personal observations as an activist and legal advocate. While conducting workshops, talking with judges and counseling clients, I have found that these assertions seem to be easily recognized and understood by the listener.

95. See discussion *supra* note 94.

96. *Id.*

97. *Id.*

98. *Id.*

99. See Frye, *supra* note 92.

100. See MACKENZIE, *supra* note 19, *passim*.

101. See *Brain Neurochemicals Tell a Female to Act Like a Female, Not Her Gender, Cornell Biologists Discover*, CORNELL UNIV. NEWS SERVICE, at <http://www.news.cornell.edu/releases/Feb00/neurochemical.hrs.html> (Feb. 16, 2000); J.-N. Zhou et al., *A Sex Difference in the Human Brain and Its Relationship to Transsexuality*, 378 NATURE 68, 68-70 (1995), reprinted in 1 INT'L J. TRANSGENDERISM 1 (July-Sept. 1997), at <http://www.wssymposion.com/ijt/ijtc0106.htm>. A drawing accompanying a 1976 news article illustrates the idea that gender identity is in the brain. See Daniel St. Albin Greene, *What Makes a Person Want to Switch Sexes?*, NAT'L OBSERVER, Oct. 16, 1976, at 1.

Part-timers do not wish to totally or permanently change their full-time gender presentation. Rather, they are more comfortable living within a wider range of variance. In other words, they are gender variant.

When a child is born with what appears to be male genitalia, the doctors predict<sup>102</sup> that this person will grow up and be socialized to be the all-male type of man. If, instead, the child is born with what appears to be labial and vaginal tissue, the doctors predict<sup>103</sup> that this person will grow up and be socialized to be at the all-female type of woman. For the part-timer or partial gender crossover person—the cross-dresser, transvestite, effeminate male, masculine female or drag queen—the prediction of the socially assigned full-time gender is invalid and does not fit. It is cruel for this person to be made to suffer at that gender extreme throughout every moment of every day of his/her entire life.

Another way to conceptualize this crossover behavior is to examine a commonly observed analogous crossover behavior—that of the country and western trend across the United States.<sup>104</sup> Many farmers and ranchers in the United States adopt the country and western dress and culture. They like the clothes, the music and the social expectations. Other farmers do not; they do not wear the clothes, do not like the music and do not like the social expectations of the country and western culture. There are in-betweens of every shade and degree. Some of those who do not like the country and western social expectations may move to the city and adopt a different type of dress, musical taste and culture: hippy, military, leather, yuppie, surfer, hollywood or jock. On the other hand, those who don't like the country and western expectations remain on the farm or ranch, but are not "country and western." These are some mild

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102. A prediction of sex is all it can be at this point. The brain, which is still developing at the time a prediction is made, is not examined as to the sexual identity, which will develop and manifest itself in time. See ROTHBLATT, *supra* note 42, at 1-2 ("At birth a cursory examination is made of a baby's genitals. If the doctor sees a small penis, the parents are told, 'It's a boy.' A small vagina, 'It's a girl.'"). When I do workshops or public speaking engagements, I explain this idea by asking the attendees to reflect on their experiences of watching their children, grandchildren, nieces or nephews make the shift from a "feed-me, wipe-me" infant to a toddler, searching for speech and becoming self-aware. At some point, they begin to try to imitate daddy or mommy either in dressing or in play. Their own gender identity begins to emerge. We must wait, at least until that time, to try to rigidly fit children onto a specific gender path. I prefer that we wait longer, but certainly we should not apply the rigid fit at birth, before the children's brains have had the chance to tell us where they are.

103. See discussion and sources cited *supra* note 102.

104. See Frye, *supra* note 28, at 456.

forms of crossover behavior that may generate a tease or slight rebuke, but such behavior is mostly considered to be a comfortable social variance.

Conversely and within the same analogy, as the country and western fashion trend has grown in the United States, many "citified" people are now adopting a country and western lifestyle. They do not live on a farm or ranch and do not own a horse or cow, yet many go to rodeos, wear country and western clothes, listen to country and western music, and go to country and western bars and dance halls. Some people, who do not need a truck for work, will even drive a pickup truck so they can feel more country and western by driving their "cowboy Cadillacs." Some folks crossover to country and western a little; some folks do it a lot; still others make it a way of life. Whatever degree of their crossover variance, they usually do not leave the city. Because these people are not farmers or ranchers, they are also exhibiting crossover behavior. They are cross-dressing and could conceivably be called "trans-WEST-ites."<sup>105</sup>

The other transgender type is the full-time gender crossover person. These people are often called transsexuals, transgenderists, pre-ops, non-ops or post-ops.<sup>106</sup> The prediction of gender made at birth by the physician, nurse or midwife—whose socialized expectation of what usually results from pre-natal brain formation and social training is directly associated with at-

105. Pronounced as "transvestites," but replacing the "v" sound with a "w" sound. I first used this term in print when I was interviewed for the *Esquire* article. See Taylor, *supra* note 35. This term makes the point that *all* people crossdress to some extent to fit their brain's self-image.

106. The suffix "-op" is short for "the operation" and refers to the stage of genital surgery. In the opinion of many transgenders, too much emphasis is placed on completion of the operation. Though many post-ops tell group gatherings that they are happy with their surgery, on a one-on-one basis a substantial number has told me that they are not happy with the results or that, had they not been pressured to "complete" the process, they would not have had genital surgery. See MACKENZIE, *supra* note 19, at 19 ("Personal dissatisfaction with sex-reassignment surgery ranges from one-fourth to three-quarters of those interviewed."). This displeasure is a major reason why many FTMs do not have what is called "bottom-surgery" to create a neo-penis, and instead consider metaoidioplasty. See generally Katherine Rachlin, *Factors Which Influence Individual's Decisions When Considering Female-to-Male Genital Reconstructive Surgery*, 3 INT'L J. TRANSGENDERISM (July-Sept. 1999), at <http://www.symposium.com/ijt/ijt990302.htm> (analyzing the results of a survey on surgical decision-making). It is my belief that if courts and peers considered completion of the full gender presentation (through name change and hormonal adjustment) as being equal to genital corrective surgery, those who wanted genital corrective surgery would still get it, but those who did not want to exercise the surgical option would not. I have only had an orchiectomy because that was the correct decision for me. I consider myself as having clitoral hypertrophy. See Phyllis R. Frye, *Non-Operative TS: Clitoral Hypertrophy*, in SECOND ICTLEP, *supra* note 44, at 107-09.

birth genitalia—is a non-negligent, incorrect prediction and must be corrected.<sup>107</sup>

Full-timers are unlike the part-timers, whose occasional-partially, occasional-fully or always-partially forms of gender variance allow them to attempt to cope and function within their brain's gender identity and the socially assigned gender roles. The full-timers must always and fully correct the socially assigned gender role—and possibly their anatomy, which initially dictated their socially assigned gender role—in order to function in accordance with their brains' gender identity. This need to correct the gender is labeled “gender dysphoria,” which is a derisive and pejorative term with many social penalties.<sup>108</sup> The term should be changed, as it is society that has the problem of resisting gender correction.<sup>109</sup>

For full-timers, the correction process, called transition, is extremely difficult at best, as evidenced by the multiple biographies about people who have transitioned, medical texts and the media.<sup>110</sup> During the transition, transgendered people lose jobs,<sup>111</sup> are often ostracized by families of origin,<sup>112</sup> are subjected to religious guilt,<sup>113</sup> may experience divorces and loss

107. Correction is the proper term here. Nothing is being changed. When the brain's self-image and sexual identity manifests itself the transgender corrects her physical presentation to fit her comfort level and sense of need. I have never, in legal pleadings or writings, referred to “sex change,” but instead refer to the correction of genital and other birth defects to match the brain's self-image or similar language. See MORRIS, *supra* note 39, at 104 (“To myself I had been woman all along, and I was not going to change the truth of me, only discard the falsity.”); see also discussion *supra* note 9 (explaining Christie Lee Littleton's struggle to correct her gender after it was incorrectly declared at birth).

108. See *GID and the Transgender Movement*, *infra* app. A.

109. See discussion *supra* note 107.

110. See sources cited *supra* notes 39-40.

111. The primary problem for the transgendered community has been lost jobs or the inability to obtain new jobs. See Green & Brinkin, *supra* note 27, at 44. If a person has a job and income, it is more likely that she can learn over time to cope with the other problems accompanying transition, as well as the heartache of rejection. This is why the word “employment” was placed into the title of the International Conference on Transgender Law and Employment Policy. Fortunately, the situation is improving. See *supra* note 46 and accompanying text.

112. See Frye, *supra* note 28, at 451-52, 455. On January 13, 1998, I was a guest on the *Phil Donahue Show* to discuss the subject of *Being Rejected by Families*. I had written to Donahue with the idea of producing a show on families that rejected members for such things as marrying outside of the faith or the race, for dodging the Vietnam War, for being lesbian, gay, bisexual or transgendered, etc. I was invited as a guest because of my own experience. My father told me that I was dead to him at the time of my transition in August 1976. He took that view with him to his grave in January 1998.

113. See sources cited *supra* note 23. But see Diana Cicotello, *Ambi-Gendered: God's Special Gift*, in *THIRD ICTLEP*, *supra* note 20, at app. J; *Grace and Lace Letter*

of child or grandchild visitation,<sup>114</sup> and suffer cruelty from peers and neighbors.<sup>115</sup> In addition, legal hurdles for documentation correction add more layers of stress during this already difficult time.<sup>116</sup> Full-timers hire attorneys or independently follow the necessary state procedures to get legal documents in order during and after the transition.<sup>117</sup>

Once the transition is complete, this person is full-time in his/her gender correctional crossover. Some have genital surgery as soon as possible, but others wait for a variety of reasons.<sup>118</sup>

*International: An Evangelical Christian Newsletter for Crossdressers, Transgendered, and Transsexuals* (Sept. 2000), at <http://hometown.aol.com/gnlnews/index1.htm>.

114. Allegations, or threats of allegations, that a spouse is an occasional cross-dresser or transsexual are often used in divorce proceedings, whether or not children are involved. I have represented many transgendered persons involved in such litigation. I always refuse to accept a case unless the transgendered client agrees to come out of the closet, which reduces courthouse intimidation and coercion. Usually, I state in the opening paragraphs of the *Original Answer to the Divorce* that my client is transgendered and question how that fact relates to the allegations. My clients have never been hurt by this admission, probably due to the fact that I practice out of the closet. Other attorneys know I am a tough adversary, that I work well with juries and that I know how to preserve errors at trial for appeal. I have heard sad stories though, the most extreme of which was where a grandparent could not see the grandchild because the attorney did not preserve the error for appeal.

115. Vandalism is a common neighborhood weapon. See Lang, *supra* note 35, at 13. When I came out as transgendered in 1976, my home was frequently egged and obscenities painted on the driveway. Vandals burned plastic trash cans, placed burning and soiled baby diapers at my front door, and slashed car tires. Ironically, the obscene phone calls I received always came a few days before Christmas and a few days before Easter. This vandalism and harassment continued for many years until people learned that I had become lawyer. The situation became peaceful quickly thereafter.

116. See *Documentation Reports*, in FOURTH ICTLEP, *supra* note 44, at 141-62 and app. H (chronicling the numerous steps a transgender must make during her transition); see also Fleck, *supra* note 90.

117. See generally *Documentation Reports*, *supra* note 116. For additional reading on the procedures to follow when transitioning, see BERGSTEDT, FTM'S, *supra* note 44; BERGSTEDT, MTF'S, *supra* note 44.

118. The most common reason for delaying surgery is the cost, which can run from \$3,000 to \$40,000 depending on whether the person is an MTF or an FTM and the type of corrections desired. See Rachlin, *supra* note 106 ("[L]ack of money and dissatisfaction with surgical options [are] most frequently mentioned as a contributing factor [to surgical decisions]."). For the MTF, a simple orchiectomy may be sufficient. If a neovagina is to be created, additional surgeries may be scheduled for labiaplasty. See ETTNER, GENDER LOVING CARE, *supra* note 41, at 134. Additional costs could include a tracheal shave (reduction of the Adam's apple). See *id.* at 133. For the FTM, so-called "top surgery" is first, with a variety of surgical methods to remove the breasts so that the new man can go bare-chested on the beach. See Rachlin, *supra* note 106. For so-called "bottom surgery," a simple metaoidioplasty, in which a microphallus is created by freeing the hormonally enlarged clitoris from the vaginal hood, may be sufficient. ETTNER, GENDER LOVING CARE, *supra* note 41, at 135. If the person desires a phalloplasty, other costs could arise for urethral implant, erectile implant or scrotal shaping with testicular

On the other hand, some full-timers decide that with their completed full-time gender correctional crossovers, some or all of the various surgeries are not important to them.<sup>119</sup> Using the language of the prior trans-*WEST*-ite analogy, these people may have moved from the city to a farm or ranch, but do not want to own horses or cattle.

There are a range of possibilities for transitioning full-timers. They take physiologically altering hormones, often with effects that are irreversible absent surgical intervention.<sup>120</sup> Some go through electrolysis, voice therapy, tracheal shave, breast reduction surgery, scalp hair transplant, breast augmentation surgery, hysterectomy, orchiectomy or metaoidioplasty.<sup>121</sup> At this point, they are all “completed” transsexuals regardless of whether they have had the so-called genital alteration surgery. Only by making transsexualism “complete” at this stage, without the precondition of genital alteration surgery, can the transsexual decide if surgery is really the correct thing for him/her to pursue.<sup>122</sup>

implants. *See* Rachlin, *supra* note 106. Another reason to delay surgery is that the results of some procedures may not be that good. *See id.* Still another reason is that, as with any surgery, people can, and do, face risks. *Id.*

119. Some people choose to wait or decide not to have surgery because their spouses accept them as they are with hormonal and gender appearance correction.

120. Consider the MTF who has grown breasts. If this person reverts back to being male, he will have to have breast reduction surgery. *See* ETTNER, GENDER LOVING CARE, *supra* note 41, at 128-32. Or consider the FTM who has developed facial hair and male pattern baldness. *See id.* If this person reverts back to her initial gender presentation, she will have to undergo electrolysis and hair transplants. *See id.* As with the MTF for whom earlier adolescent testosterone thickened her vocal chords and lowered her voice, the FTM who takes testosterone will have permanently thickened vocal chords and a lowered voice, even after reverting back and stopping testosterone therapy. *See id.*

121. *See* Spencer Bergstedt, *Report From the Workshop, Female to Male (FTM) Issues*, in FIFTH ICTLEP, *supra* note 32, at 55-61; Phyllis Randolph Frye, *Freedom from the Scalpel: Genital Surgery NOT Required for Legal Change of Sex*, TRANSGENDER TAPESTRY, Spring 1999, at 32, 32-33.

122. For the past five years, I have represented long-term, non-surgical, both MTF and FTM, in the courts to get their sex determination legally corrected. I tie the verified surgeon’s letter to the brain’s own determination of sex, as evidenced by a lifetime of experience, and allege that the sex on the birth certificate was a non-negligent misstatement and an error that needs to be corrected, *not changed*. I believe that if this court process were accomplished routinely during the earlier parts of the Real Life Test, the one-year minimum period during which transsexuals must demonstrate their ability to live successfully in the corrected gender prior to sex reassignment surgery, TRANSFORMING FAMILIES, *supra* note 34, at 140, a substantial minority of transgenders would not bother with surgery and its costs and dangers.

Even so, I am not anti-surgery. I simply feel that society rushes our community into surgery. I believe that if non-surgical and surgical transitions had the same legal

It must be noted at this point that only teenaged and adult full-time transgenders face these hurdles. That is, society erects those hurdles after a person is past puberty. The hypocrisy, however, begins before puberty, usually shortly after birth. When an infant is born with uncertain genital appearance or born intersexed with both genitals appearing completely or in part, the parents and physician make a blind prediction, assign a gender and perform surgery to make the assigned gender complete.<sup>123</sup> The infant's mental imprint, the brain's gender identity, is not consulted.<sup>124</sup> After the infant's surgery, first the parents, and then society, apply the selected gender extreme as the child grows. Sometimes the prediction does not match the child's brain.<sup>125</sup> Such commonplace procedures are deemed culturally and medically acceptable when performed at or shortly after birth, even though there is no way of knowing how the child's brain formed prior to performing the surgery.<sup>126</sup> In contrast, it is culturally difficult at best, and often socially brutal, when an adult wants to undertake the same procedures to correct mistakes in his/her genital presentation. The legal hurdles are high and the process difficult.<sup>127</sup> It is hypocritical and cruel to permit surgeons and parents to force surgery on an intersexed infant without consent or examination of the brain's gender identity,<sup>128</sup> but to erect extreme legal and social barriers for an adult who has chosen to have the same surgery and whose lifetime of experience has provided a good indication of the brain's gender identity.

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status as relates to sex correction, then a choice of whether to have surgery or not would be a true choice. Many in the transgendered community dislike me for that belief.

123. See generally Edmund G. Howe, *Intersexuality: What Should Careproviders Do Now*, 9 J. CLINICAL ETHICS 337 (Winter 1998) (exploring what caregivers should do when a child is born with ambiguous genitals).

124. See Zhou, *supra* note 101 (reporting research on brain structures that suggests gender identity is determined in the developing brain).

125. See Howe, *supra* note 123, at 337 ("[M]any who have had this surgery report that they subsequently acquired a gender identity that is different from their anatomically assigned gender.").

126. See discussion *supra* note 102 (discussing the prediction made at birth of an infant's gender).

127. See generally BERGSTEDT, *FTM'S*, *supra* note 44 (guiding transsexuals through the many legal processes that must be completed during transition); BERGSTEDT, *MTF'S*, *supra* note 44 (same).

128. See *Recommendations for Treatment*, (Intersex Society of North America), at <http://www.isna.org/recommendations.html> (last modified July 6, 2000) (announcing a treatment model that counsels against surgery for intersexed infants).

Even more hypocritical is the fact that these same legal surgical decisions can be made for an infant if the normally formed clitoris is larger than normal or if the normally formed penis is too small<sup>129</sup> or damaged in circumcision.<sup>130</sup> These decisions, though forced upon the infant, are blessed by medicine, society and law. The law creates a high hurdle, however, for an adult trying to have the same surgery after a life of dealing with a gender extreme that did not fit with the gender identity in the transgender's brain.<sup>131</sup>

### *3. Emerging FTM and People of Color Communities Dash the Stereotypes*

The most visible and well-known stereotypical image of the transgender community until the mid 1990s was of a white MTF who was assumed to be homosexual.<sup>132</sup> The stereotype presumed that the transgender desired to complete the surgical alteration in order to have legal sex with other men.<sup>133</sup> In reality, many transgenders are heterosexual MTFs, wish to remain part-time and continue to have legal sex with females.<sup>134</sup> The emergence of the FTM transgender community<sup>135</sup> and the beginning of the people of color (POC) transgender community<sup>136</sup> have added

129. See Greenberg, *supra* note 62, at 271-72.

130. See generally JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL (2000) (describing the life of David Reimer, who was raised as a girl following surgery that removed his penis after a botched circumcision).

131. See sources cited *supra* note 101.

132. While lobbying for the repeal of City of Houston Ordinance 28-42.2, see *infra* notes 297-99, I was invited by then Houston Police Chief "Pappy" Bonds to discuss the matter with then Vice-Squad Captain Fred Bankston. I will omit the fears I felt entering the police station that day.

Bankston began the interview in a very hostile manner, asserting that we were all homosexual. He was surprised to learn that I was heterosexual and in a monogamous marriage with a woman. He next asserted that we did this so that when we were arrested, we could be put in the men's cell in the jail and have sex. I assured him that nothing would terrify me more. When I left, he was almost courteous. I was not arrested when I left the police station that day.

133. See discussion, *supra* note 132.

134. Jamison Green, *Introduction to CURRAH & MINTER*, *supra* note 29, at 4. See generally RUDD, MY HUSBAND WEARS MY CLOTHES, *supra* note 43 (discussing women's experiences with cross-dressing mates); *Crossdressers' Significant Others Online Forum*, at [http://www.geocities.com/triess\\_cds/](http://www.geocities.com/triess_cds/) (last revised July 7, 2000) (providing a forum for females in relationships with cross-dressers).

135. See *Report from the Workshop, Female to Male (FTM) Issues*, in FIFTH ICTLEP, *supra* note 32, at 55-62 (discussing ways in which FTMs feel neglected by the larger transgender community).

136. See *Discrimination in Ethnic, Black and Transgender Communities*, in FOURTH ICTLEP, *supra* note 44, at 100-18 (discussing the similarities in the struggles of minority and transgendered communities); *In Equal Protection and Due Process: The Black*

missing, though very necessary, elements to the theater of political and legal activism and to the struggle to overcome stereotypes and the Cider House Rules.

In my experience, nothing destroys the stereotypes of transgenders better than when a person unexpectedly meets a long-term FTM. FTMs have the same statistical height range of females and are usually shorter than the average male;<sup>137</sup> however, testosterone is a potent hormone. With hormone therapy, long-term FTMs usually have definite shoulder and upper arm muscle development. They grow facial, chest and back hair, and acquire a deeper voice. FTMs acquire other characteristics typically associated with men, such as a receding hairline or baldness, large facial pores and oiliness of complexion.<sup>138</sup> Add breast reduction surgery, which leaves little noticeable scarring if done correctly, and FTMs can walk on any beach or in a gym without a shirt and no one might ever know.<sup>139</sup> Their bodies adapt to the testosterone more quickly than the MTF adapts to the loss of testosterone and introduction of estrogen.<sup>140</sup>

FTMs completely obliterate the stereotype of the transgender.<sup>141</sup> FTMs also provide a strong link to the feminist movement. Because many of them have backgrounds in lesbian and women's rights politics, they are able to bring training, insight and political connections to the transgender

*Experience and the Transgender Experience Are the Same*, in THIRD ICTLEP, *supra* note 20, at 96-102 (same); *Reports from the Workshop: TG People of Color*, in FIFTH ICTLEP, *supra* note 32, at 63-68 (same).

137. See KIRK & ROTHBLATT, *supra* note 44, at 30 (stating that because an FTM will not experience any skeletal changes, he will appear to be a small male).

138. See ETTNER, GENDER LOVING CARE, *supra* note 41, at 130-32 (discussing impacts of hormonal treatments); Louis J.G. Gooren, *Hormonal Sex Reassignment*, 3 INT'L J. TRANSGENDERISM (July-Sept. 1999), at <http://www.symposion.com/ijt/ijt990301.htm> (same).

139. See LOREN CAMERON, BODY ALCHEMY: TRANSSEXUAL PORTRAITS (1996) (displaying portraits of transgenders).

140. Compare ETTNER, GENDER LOVING CARE, *supra* note 41, at 130 (explaining that the FTM begins to develop a deep voice after beginning hormonal injections), with KIRK & ROTHBLATT, *supra* note 44, at 23 (stating that the MTF will have to have vocal therapy or voice box surgery to change the pitch of her voice because her vocal cords thickened during puberty).

141. For general information about FTMs, referrals and support, see *FTM International*, at <http://www.ftm-intl.org> (last modified Sept. 4, 2000); *The American Boyz*, at <http://www.amboyz.com> (last modified Sept. 2, 2000).

community.<sup>142</sup> Unfortunately, just as with MTFs, FTMs are targets of hate related violence.<sup>143</sup>

The FTM POC carries an extra burden. Several of my FTM POC friends told me that, because they are now perceived as black males, they sense that other people fear them as night approaches and that police scrutinize them extra carefully. They complain that this is an unfair and undeserved burden.

It is still unclear what effect the emergence of the POC transgender community will have on the larger transgender community. Obviously their numbers, energy and intellect are welcome and very much needed. I believe that their lifelong experience with racial discrimination gives a depth of sincerity to their arguments against discrimination that many white transgenders do not initially possess. I anxiously await their growth as a community and the incorporation of more of them into the larger transgender political and legal struggle.<sup>144</sup> I also hope they will help bridge this struggle into an historical civil rights movement.<sup>145</sup>

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142. I have had many FTMs tell me about their previous experiences in lesbian political circles. Mr. Kitt Kling, who was a part of the transgender team meeting with staffers from the Human Rights Campaign (HRC) in Washington, D.C., in September 1995, is a notable example. Long-time lesbian activist Nancy Buermyer recognized Kling as a former lesbian activist friend. Mr. Shannon Minter, the staff attorney for the National Center for Lesbian Rights (NCLR), is a second notable example of a member of the transgender community who had a background in lesbian politics. When Mr. Minter first began his service with the NCLR, he was known as Ms. Shannon Minter. Finally, Mr. Spencer Bergstedt, author of several sources cited in this Essay, told me that when he was a lesbian, he had been very active with the National Lesbian & Gay Law Association.

143. Brandon Teena, an FTM, was murdered even after he asked the police for protection. See Gabriel, *supra* note 25 (discussing the murder of Brandon Teena); *Discrimination and Hate Crimes*, *supra* note 24 (reporting the results of an annual report on crime statistics).

144. See sources cited *supra* note 136 (discussing the transgendered POC community).

145. See generally Monica Roberts, *Transgenders of Color- Why Many Aren't in the TG Movement*, NAT'L TRANSGENDER ADVOC. COALITION, at <http://www.ntac.org/news/000813monica.html> (last updated Aug. 13, 2000) (discussing reasons POCs may be reluctant to be involved in the transgender community, including a perception among transgenders of color that transgender organizations fail to adequately address employment issues and a sense that they are not valued members of the transgender community).

#### 4. *Definition of Gender and the Hypocrisy of Littleton v. Prange*

##### i. *The Hypocrisy of Littleton v. Prange*

In *Littleton v. Prange*,<sup>146</sup> the Fourth Texas Court of Appeals held that transsexuals in the jurisdiction could not legally change their sex, regardless of how precisely they followed medical and scientific rules or what types of surgeries they had.<sup>147</sup> This means that all transsexuals who had previously obtained court orders correcting their legal sex held meaningless orders.<sup>148</sup> Chief Justice Hardberger stated that the court that had earlier granted Mrs. Littleton's petition to amend her birth certificate, so that it reflected her corrected sex, had acted in a mere ministerial fashion, conducted no fact-finding and had erred in finding an inaccuracy in Mrs. Littleton's original birth certificate.<sup>149</sup>

Chief Justice Hardberger's intentions were obvious: he sought to impose his personal beliefs on the citizens of Texas. The court reached its decision in order to deny a transsexual standing to bring a wrongful death suit as the surviving spouse.<sup>150</sup> Chief Justice Hardberger's decision allowed the court to avoid bringing an insurance company backed-physician into court on an allegation of medical malpractice as the cause of the death of a transsexual's husband. He did it all to prevent same sex marriages.<sup>151</sup>

Chief Justice Hardberger and others like him justify continuing to impose their Cider House Rule that gender is "immutably fixed by our Creator at birth."<sup>152</sup> This justification is particularly relevant to the transgender community, especially the transsexual subset. This justification concerns genitals, chromosomes and the mind. These issues were the actual legal battleground of the *Littleton* decision.<sup>153</sup>

146. 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

147. *Id.* at 231 ("There are some things we cannot will into being. They just are.").

148. *See id.* at 230-31.

149. *Id.* at 231.

150. *See id.* at 225.

151. If Hardberger's goal was to prevent same sex marriages, he has apparently failed. *See discussion and sources cited infra* note 278.

152. *Littleton*, 9 S.W.3d at 224.

153. *See id.* at 230-31 (discussing the factual findings the court made to determine that the Littletons' marriage was void).

The legal majority in some countries routinely allow for, and legally bless, alterations from the genital presentation that was "fixed by our Creator at birth."<sup>154</sup> Circumcision, whether of boys at infancy or puberty or of girls at puberty, is common in some cultures.<sup>155</sup> Whether I condone either practice is not important. Circumcision is the custom and religious practice in many societies;<sup>156</sup> however, according to Chief Justice Hardberger, this practice contradicts what was "immutably fixed by our Creator at birth."<sup>157</sup>

Mistakes can occur during circumcision, as was reported in a case of a baby whose penis was so badly mutilated by the doctor that his parents were advised to raise the boy as a girl.<sup>158</sup> With the blessing of society, the medical and legal fields, and the baby's parents, the infant's genitals were completely removed and he was reared as a girl.<sup>159</sup> Even though he lacked a penis or scrotum and was unaware of his parent's earlier decision, his mind told him he was a boy.<sup>160</sup> He fought being treated as a girl during his entire childhood.<sup>161</sup> When he finally learned the truth, he reverted to the gender his mind told him was correct.<sup>162</sup> Although he had no penis or scrotum, he began to live as a man, proclaiming that he did not need a penis to be a man.<sup>163</sup>

Sometimes infants are born with imperfect genitals<sup>164</sup> or with a mixed gender presentation.<sup>165</sup> Although the infant was born this way and the genitals were "immutably fixed by our Creator at birth"<sup>166</sup> in that manner, society, the medical and legal fields, and the parents bless the surgical transfiguration of

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154. *Id.* at 224.

155. See *History of Circumcision*, Circumcision Information & Resource Pages, at <http://www.cirp.org/library/history> (last visited Oct. 14, 2000) (discussing the origin and history of male circumcision).

156. See *id.* (discussing the history of circumcision in Judaism).

157. *Littleton*, 9 S.W.3d at 224.

158. See COLAPINTO, *supra* note 130, at 11-13, 49-55.

159. See *id.* at 49-55.

160. See *id.* at 81.

161. See *id.* at 56-64, 80-96.

162. See *id.* at 180-82.

163. See *id.* at 182-85.

164. Who defines what is imperfect? Is this a social norm? Was not the gender presentation immutably fixed at birth? The definition of imperfect genitalia is of particular concern when a physician uses various measuring standards to determine whether an infant's penis is too small or clitoris large. See sources cited *supra* notes 102, 123; see also Greenberg, *supra* note 62, at 271 n.28 (discussing standards doctors employ to determine whether to surgically alter an infant's genitals).

165. See generally Howe, *supra* note 123, (discussing ambiguous genitalia).

166. *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

the infant's genitals, often with drastic consequences.<sup>167</sup> If the clitoris is deemed too long, it is shortened, resulting in the loss of nerve endings and a reduction of sensation.<sup>168</sup> If the penis is too small or is underdeveloped, it may be removed and the child raised as a girl.<sup>169</sup> If the genitals are mixed or ambiguous, they may be surgically altered to present male genitalia or female genitalia, sometimes resulting in lost sensation due to cut nerves.<sup>170</sup> Furthermore, there is no certainty that the decision-makers made the correct choice in fashioning the genitals.<sup>171</sup>

Finally, when a baby is born with so-called normal genitals "immutably fixed by our Creator at birth,"<sup>172</sup> we still have to consider that there are variations in chromosome patterns and the brain. Chief Justice Hardberger considered only the typical XX and XY chromosome patterns in his analysis in *Littleton*.<sup>173</sup> However, at least seven other chromosome patterns, including XXX, XXY, XXXY, XYY, XYYY, XYYYY and XO, are "immutably fixed by our Creator at birth."<sup>174</sup> People born with these combinations are called intersexed.<sup>175</sup> Researchers estimate that between one and four percent of the world's population is intersexed,<sup>176</sup> which, with a 1997 United States population of 266,487,000,<sup>177</sup> could mean that as many as two and one half million to over ten million of our citizens are intersexed. Even if the frequency of intersexuality is as low as one-tenth of one percent of the population, or one quarter million people, intersexuality is "as common as . . . cystic fibrosis and Down's Syndrome."<sup>178</sup>

What is the legal sex of the intersexed? According to the research in Professor Julie Greenberg's article on legal sex

167. See *Recommendations for Treatment*, *supra* note 128 (recommending that parents and physicians avoid subjecting infants to unnecessary genital surgery because of its potential emotional and physical consequences).

168. See Greenberg, *supra* note 62, at 272.

169. See *id.* at 271-72.

170. See Howe, *supra* note 123, at 338.

171. See sources cited *supra* notes 124-25 and accompanying text.

172. *Littleton v. Prange*, 9 S.W.2d 223, 224 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

173. See *id.* at 230.

174. See Greenberg, *supra* note 62, at 281 (citing ROBERT POOL, *EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES* 70-71 (1994)).

175. See *id.*

176. See *id.* at 267 n.7 (citing Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, *SCIENCES*, Mar.-Apr. 1993, at 20, 21).

177. *Id.* at 267, n.8 (CITING U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1998, at 9 tbl.4 (118th ed. 1998)).

178. *Id.* at 267 n.7 (citing ALICE D. DREGER, *HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX* 43 (1998)).

determinations,<sup>179</sup> and as confirmed by Chief Justice Hardberger's majority opinion in *Littleton v Prange*,<sup>180</sup> the only chromosome patterns that are currently of legal consequence are XX and XY.<sup>181</sup> The *Littleton* decision is particularly mean-spirited and goal driven,<sup>182</sup> as it was made in spite of the access the justices had to the information contained in Professor Greenberg's article. I had asked Professor Greenberg to mail her article to Chief Justice Hardberger. Because Justice Angelini referred to the article in the concurring opinion,<sup>183</sup> I know the court received the article before it issued the ruling. How can a court of law completely ignore the existence of such a large number of citizens whose chromosome patterns, though not XX or XY, were "immutably fixed by our Creator at birth?" Such arrogance flies in the face of decades of scholarship on this issue.

Consider also persons with XY chromosomes who have Androgen Insensitivity Syndrome (AIS).<sup>184</sup> Their sex was "immutably fixed by our Creator at birth," but neither their genitals nor their other so-called sex characteristics match their chromosomes.<sup>185</sup> They are XY males, but have an insensitivity to androgen and are born with what appear to be female genitals and grow up as so-called normal girls.<sup>186</sup> Approximately 1 out of every 20,000 genetic males has AIS.<sup>187</sup> In what legal closet does Hardberger's decision hide these people?

As for the brain, some studies indicate that sexual behavior and sexual identity are rooted in "immutable" levels of neurochemicals and brain structure.<sup>188</sup> As Professor Greenberg

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179. See Greenberg, *supra* note 62, at 278-92.

180. 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No.00-25).

181. See generally Keller, *supra* note 74 (arguing that judges structure decisions to maintain their personal gender ideologies to the detriment of transsexuals who have raised difficult issues).

182. The *Littleton* majority was obviously seeking to kill any and every kind of same-sex marriage, even if that pursuit meant negating seven years of penis-vagina intercourse and leaving unpunished the alleged medical perpetrator of a wrongful death. See *Littleton*, 9 S.W.3d at 231. For a discussion of how state courts have defined "sex" for the purpose of marriage, see Greenberg, *supra* note 62, at 296-304. See generally Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000) (discussing policy considerations that exist when courts are presented with the issue of determining the legality of marriages involving transsexuals).

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

184. For a detailed description and discussion of AIS, see Greenberg, *supra* note 62, at 286-87.

185. See *id.* at 286.

186. *Id.*

187. *Id.* (citing ROBERT POOL, *EVE'S RIB: SEARCHING FOR THE BIOLOGICAL ROOTS OF SEX DIFFERENCES* 68 (1994)).

188. See sources cited *supra* note 101.

suggests, “one could argue that sex, to a certain extent, is socially constructed while sexual identity is a fixed status.”<sup>189</sup> It is impossible to read about the decades of struggle that Christie Lee Littleton experienced because of the messages her brain sent about her immutable core identity and not be startled that Justice Hardberger disregarded those experiences.<sup>190</sup>

Knowing Christie Lee Littleton’s story, and having read the autobiographies and biographies cited earlier in this Essay<sup>191</sup> about people who struggled for decades because of these same immutable core identity issues, I find it incredible that Justice Angelini would concur with the majority in *Littleton*, agreeing that “biological considerations are preferable to psychological factors as tools for making the decision [the court] must make.”<sup>192</sup> Consider the many inconsistencies and hypocrisies of the legal majority discussed in this section. Such meanness and insensitivity do not belong in the courtroom. These are Cider House Rules that we should ignore and remove.

*ii. The Adverse Effects on Transgenders, Intersexed, AISs and Their Children*

Chief Justice Hardberger and Justice Angelini, in holding that Christie Lee Littleton’s chromosomes were the key to her legal sex, ignored many important issues in their rush to place another stake into the possibility of legal same-sex marriage. They judicially legislated the legal determination of sex, taking it out of the hands of the medical and scientific communities in order to pursue own their political agenda.

Political agendas, sex and chromosomes have been linked for almost four decades concerning the potential for fraud in women’s sporting events through gender verification testing.<sup>193</sup> Sports, specifically the Olympics, became concerned with gender verification during the 1960s and made plans to ensure that men masquerading as women did not enter women’s competitions.<sup>194</sup> Interestingly, there has never been a fear of fraud in sports over

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189. See Greenberg, *supra* note 62, at 271 n.25.

190. See *Littleton v. Prange*, 9 S.W.3d 223, 223-25 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

191. See sources cited *supra* notes 39-40. Christie Lee was forty-seven years old at the time of the decision. See *Littleton*, 9 S.W.3d at 224. That age, minus her gender-awakening at age three or four, means that Justices Hardberger and Angelini discounted approximately ninety-five percent of Christie Lee Littleton’s life. See *id.*

192. *Littleton*, 9 S.W.3d at 232.

193. See Simpson, *supra* note 61, at 308.

194. See *id.*

the verification of the male gender.<sup>195</sup> There were, however, fears of Iron Curtain countries substituting men for women in women's competitions.<sup>196</sup> The first gender verifications were nude walk-bys past a team of physicians who viewed the genital presentation.<sup>197</sup> As Justice Hardberger noted in *Littleton*, "Every schoolchild, even of tender years, is confident he or she can tell the difference [between a man and a woman], especially if the person is wearing no clothes."<sup>198</sup>

Although the "wearing no clothes" confidence remained, athletic associations decided to change the method for gender verification testing because athletes complained that the walk-bys were embarrassing and intrusive.<sup>199</sup> As a result, the Olympics changed to a chromosome test, not for better results, but to achieve less intrusive and less embarrassing results.<sup>200</sup> Predictably, problems arose when intersexed women with a chromosomal combination other than XX and women with androgen insensitivity syndrome and XY chromosomes, both with female genitalia, were disqualified.<sup>201</sup> To the embarrassment of officials in athletic associations, some women disqualified from competing as women based on chromosome testing gave birth to children in the years following testing.<sup>202</sup> This test was turning away legitimate, competitive women with vaginas, not fraudulent entry applicants.

A new way to verify gender was introduced—Spandex. It was an improvement to the "wearing no clothes" verification method.<sup>203</sup> There is no way for a man to hide himself and pretend to be a woman while vigorously competing in today's

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195. See Press Release, International Amateur Athletic Federation, Gender Verification (July 30, 1991) (on file with author) (announcing that, though male and female athletes would be required to undergo a physical examination prior to competition to ascertain their health and confirm the athlete's gender, only females would be required to present a Gender Certificate or undergo additional gender verification).

196. See, e.g., *20/20* (ABC television broadcast, Oct. 13, 2000) (detailing how East Germany doped some women athletes for physical enhancement).

197. See Simpson, *supra* note 61, at 308.

198. *Littleton v. Prange*, 9 S.W.3d 223, 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

199. See Simpson, *supra* note 61, at 308.

200. See *id.*

201. See Joan Stephenson, *Female Olympians' Sex Tests Outmoded*, 276 JAMA 177, 178 (July 17, 1996).

202. Todd Ackerman, *Marriage, A Changing Union?*, HOUS. CHRON., Sept. 17, 2000, at A1, 2000 WL 24511982. Eva Klobukowska, a Polish sprinter who was banned from competing in the European Cup in 1967 following a chromosome test that revealed an XXY chromosome set, gave birth to a healthy baby a few years after being disqualified. *Id.*

203. See Stephenson, *supra* note 201, at 178.

spandex sport outfits.<sup>204</sup> Resulting from the bad chromosome testing results and the revealing nature of spandex, the International Amateur Athletic Federation, the world's largest sports federation, eliminated gender verification testing in 1992.<sup>205</sup> Prior to the Sydney games in 2000, the International Olympic Committee announced that it too was, at least temporarily, suspending gender verification testing.<sup>206</sup> Other groups on record against requiring gender verification for athletic competitions include the American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American College of Physicians, American Medical Association, American Society of Human Genetics and the Endocrine Society.<sup>207</sup>

The test that had been historically used by the International Olympic Committee was not the best test, but the organization considered it to be a less intrusive and less embarrassing test when compared to the walk-by test.<sup>208</sup> Chief Justice Hardberger demonstrated his political agenda by adopting a test that all major organizations have dropped and that has been roundly criticized after forty years. Mrs. Littleton's doctors provided sworn affidavits stating in effect that she was physically a female.<sup>209</sup> The court apparently ignored these affidavits. As discussed above, the court in *Littleton* also ignored Professor Greenberg's article on intersexed people.<sup>210</sup>

I have highlighted the hypocrisy of the legal majority's varying approach to "immutable" body characteristics: willingly altering the immutability of those characteristics when it suits the majority, such as when infants are born with ambiguous genitals, but seizing on the immutability of those characteristics when it does not agree with a change. What has not been examined is the adverse effects flowing from the holding that sex

204. See Simpson, *supra* note 61, at 311.

205. See Stephenson, *supra* note 201, at 177.

206. Janet Rae Brooks, *IOC's Gender Tests are a Cold War Relic*, SALT LAKE TRIB., Apr. 6, 2000, at E1, 2000 WL 3756616 ("[A]fter prodding from athletes and scientists, Olympic officials finally agreed to abolish the controversial gender-verification test introduced at the 1968 Mexico City Olympics."); Press Release, International Olympic Committee, IOC Plans Random Drug Testing for Sydney (June 17, 1999) ("The IOC . . . agreed to refrain, on an experimental basis, from performing gender tests at the 2000 Games in Sydney.");

207. See Stephensen, *supra* note 201, at 178.

208. See *id.* at 177.

209. See *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

210. See *supra* notes 62 and 183 and accompanying text.

is chromosome-fixed and that only two chromosomal sets, XX and XY, are of import in the determination of legal sex.

The minor children of the formerly legal marriages destroyed by the *Littleton* decision are of principal concern. There are many couples that were legally married before *Littleton* that have children. These formerly legally married couples with children include my clients, my friends and people I meet when I travel to transgender events and host transgender workshops. These couples went through all of the medical and scientific gates, as well as what they believed to be the necessary legal gates, to form legally recognized families. They followed all the rules in place at that time. These marriages have children.

Transgender couples that were legally married prior to *Littleton* could have become parents in a number of ways. In an MTF case, such as Christie Lee Littleton's, had her husband not died, the couple could have adopted children after they were married. If the MTF was divorced or widowed, the children could have been hers by a former marriage. She would have been the biological father, but the children would have been adopted by the transgender couple and come to know the husband as "Dad." If an MTF has a sister, the sister could be a surrogate mother with the MTF's husband providing the sperm. The baby would have some of the MTF's DNA and would know her as "Mom."

In an FTM marriage, it works much the same way. As a married couple, they could adopt children. Or, if the FTM was divorced or widowed, the children could have been the FTM's by a former marriage. The FTM would have been the biological mother, but now the children would have been adopted and come to know the wife as "Mom." If an FTM has a brother, the brother could have been a sperm donor and impregnated the FTM's wife. The baby would have some of the FTM's DNA and would know him as "Dad."

In these instances, the State of Texas has, through *Littleton*, imposed the dissolution of a marriage that Chief Justice Hardberger says never existed.<sup>211</sup> There is now a "never marriage." Depending upon which of the above scenarios occurred, one parent or the other is no longer a legal parent. I feel certain that the children of such a previously legal transgender marriage will grow up angry at the State of Texas for destroying the loving, and state-recognized, family that they had previously. These are destructive Cider House Rules.

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

In a marriage involving a person with AIS, if the couple stayed married after learning the AIS wife was not able to conceive children, they may have adopted and raised children. The court in *Littleton* declared that this marriage never existed either. This is because the chromosomes of the partners will match, even though, as in the case of the MTF or FTM marriages, the genitals of the partners do not match. The children are now legal bastards. What is the basis for this absurdity?

And what will become of the children of the intersexed, either biological or adopted? One of the parents does not have the appropriate chromosomal makeup for his/her gender. Are these people married? Who remains the legal parent of the children if *Littleton* dissolved their marriage?

The court in *Littleton* based its entire decision on the XX and XY chromosomes. What is the legal and marital status of people who have other chromosome patterns? Can these people legally marry each other, or an XX or XY person? If so, what will happen if another like-minded "judicial legislation" court, ignoring science and medicine and carrying on full throttle with an agenda of stamping out same-sex marriages amongst transgenders, such as the court in *Littleton*, is presented with such a scenario? Will such a court say that those previously legal marriages also never existed?

### *B. The Right to Employment: The Right to Expression of Gender Identity and the Right of Access to Gendered Spaces Within the Context of Employment*

The right to employment is crucial for the transgendered. Though they face "severe discrimination,"<sup>212</sup> transgenders are not protected from discrimination by Title VII of the Civil Rights Act of 1964.<sup>213</sup> Transgenders have much less access to homeless shelters<sup>214</sup> and public medical facilities<sup>215</sup> than non-transgendered persons, so unemployment is particularly harsh. If a transgendered person is arrested as a result of being forced to live on the street, he/she may not fare well in a prison.<sup>216</sup> Because two primary reasons for transgenders losing jobs

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212. Green & Brinkin, *supra* note 27, at 44.

213. See *infra* notes 226-28 and accompanying text.

214. Green & Brinkin, *supra* note 27, at 45.

215. *Id.*

216. See *supra* notes 56-57 and accompanying text.

concern gender based dress codes<sup>217</sup> and the use of restrooms at the workplace,<sup>218</sup> the rights to expression of gender identity and of access to gendered spaces are essential components of the right to employment.

*1. In the Name of ICTLEP and the Need for ENDA Inclusion*

When ICTLEP was forming, the name of the conference was going to be *The Transgender Law Conference*.<sup>219</sup> The term "International" was added after a request from the international community.<sup>220</sup> Although the IBGR had not yet been written,<sup>221</sup> it was clear to the organizers that to be able to define and freely express one's own gender identity, rights which became the first and second rights in the bill, transgenders had to be able to keep their jobs or be hired for new jobs. This became right number three in the IBGR.

Employment is the key. As with any other person, if a transgender can earn enough money to pay for food and a place to live, all other obstacles and problems can be handled in time. Hormone therapy, electrolysis and new clothes can be obtained later, but only if the transgender is not on the street and hungry. Ostracism from parents and siblings, divorce, lost custody of children, guilt from religious organizations and even fears of violence can all be endured if the transgender is not on the street and hungry.<sup>222</sup>

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217. See *infra* Part IV.B.3.

218. See *infra* Part IV.B.4.

219. The organization now goes by either that name or ICTLEP.

220. Professor Stephen Whittle, from Manchester, England, requested the inclusion of International. For further information about Professor Whittle's credentials and publications, see sources cited *supra* note 44.

221. See *supra* note 81 and accompanying text.

222. See generally Green & Brinkin, *supra* note 27 (discussing findings from a 1994 San Francisco report on transgendered street people and clinic problems). Specifically, the commission found:

10. That some transgendered persons may be driven to suicide in response to the severe discrimination they may face on a daily basis.

...

12. That transgendered persons are subject to severe discrimination in employment, housing and public accommodations.

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14. That transgendered persons have experienced great difficulty in obtaining medical and social services from hospitals, public health agencies, rape crisis centers, battered women's shelters, homeless shelters, and other organizations in San Francisco. Many of these providers treat transgendered patients and clients with great reluctance, sometimes pointedly harassing them and embarrassing them in waiting rooms, or condoning harassing behavior on the part of other patients and clients.

...

18. That some transgendered women who are raped, battered, homeless, or otherwise in need of services, as well as transgendered men who require medical attention for female anatomy, are frequently denied services from women's support agencies based on their transgender status or identity. While some agencies providing services for women are working to educate themselves with respect to the transgender community and to combat the internal prejudices that lead to denial of services to the transgendered community, the Commission finds that greater effort must be made to eliminate discrimination based on transgender status or identity.

19. That transgendered youth frequently are unable to find sources of support for their difference. Feminine boys are often harassed and tortured by their peers and by their parents. Masculine girls are usually teased and/or ignored. Both boys and girls are called queer and left alone to traverse the difficult terrain between gender identity and sexual orientation. With no language to talk about their feelings, no social support, and little (if any) education about sex and gender, transgendered youth are at high risk for attempting suicide, being rejected by family or peers, becoming runaways, becoming subject to medical incarceration, getting stuck on the bottom rungs of the economic and social ladder in this society. One agency in San Francisco reported receiving nearly 2000 calls in the past year from transgendered or gender-questioning youth. These youth express deep isolation, the desire to connect with other youth who share their feelings, and a desperate need to escape harassment, abuse and rejection because of who they are. The demand for transgender services is roughly 20% of the total demand for youth services at this agency which serves lesbian, gay, bisexual, and transgendered youth. This indicates that comprehensive gender-issues-related social services are necessary for the community-at-large.

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21. That the economic hardship imposed on some transgendered (particularly male-to-female transsexual) persons due to discrimination in employment and in medical and insurance services frequently forces them to live in poverty or to turn to sex work to survive.

Homeless shelters simply do not exist for transgendered people.<sup>223</sup> Transgenders who are unemployed and have no other safety net may resort to prostitution<sup>224</sup> and theft or commit suicide.<sup>225</sup>

The Employment Non-Discrimination Act (ENDA)<sup>226</sup> seeks to amend Title VII in limited ways in order to prohibit discrimination on the basis of sexual orientation and protect the jobs of some lesbians, gays and bisexuals.<sup>227</sup> There has been a pitched battle between the transgender community and a decreasing number of lesbians and gays because the bill will not cover transgenders, gender variant lesbians, gender variant gays or gender variant bisexuals.<sup>228</sup> If ENDA is enacted with the inclusion of transgenders and all other gender variant people, then transgenders will be protected from discrimination in employment.

## *2. A Small but Growing Number of Employers Are Transgender Friendly*

I remember when I lost my engineering career in 1976. At the time, I was a married heterosexual who was merely cross-dressing at home, but not going out in public cross-dressed. I was fired, word got around that I was cross-dressing, and I was blackballed from any engineering job in the Greater Houston area.<sup>229</sup> As an OUT, transgender activist, I have received countless phone calls and letters, and lately e-mail, from people

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223. *See id.* at 45.

224. *Id.* at 46.

225. *Id.* at 44. In an interview during a September 2000 event, Sarah DePalma, Executive Director of the Texas Gender Advocacy and Information Network, "recounted how many transitioning transsexuals . . . are driven to the brink of suicide and beyond over the long-term unemployment and prospects of homelessness and prostitution as a survival toon, and the incumbent fears of violence in those prospects." Vanessa Edwards Foster, *Guess Who's Coming to Dinner? HRC . . . and TATS*, TATS NEWSLETTER, (Tex. Ass'n for Transsexual Support, Bellaire, Tex.), Nov. 2000, at 1, 1.

226. H.R. 2355, 106th Cong. § 1 (1999).

227. Heterosexuals are protected under ENDA. *Id.* § 3(9) (defining "sexual orientation" for purposes of the Act). I doubt that gender variant heterosexuals would be protected by the Act.

228. The organized bisexual community agrees with the transgender community about the need for transgenders to be included in ENDA. For additional information about the struggle for inclusion, see discussion and sources cited *supra* note 31; Frye, *supra* note 28, at 457-68.

229. The word got around because I was trying to come out of the closet, and therefore, not making a secret of my activities away from work, on my own time. I could no longer cope with living two separate but parallel lives. I was blackballed, even though at the time I had two engineering degrees, engineering licenses in three states and good job performance reports.

fired after the employer discovers that they cross-dressed away from the job,<sup>230</sup> from people fired for trying to transition on the job, from people not hired when they were honest about their completed full-time gender transition and from people fired because they had lied about their gender on the job application and the employer later discovered the person was transgendered.

Based on personal observation and experience, the situation is slowly changing for the better with employers. Although friendly employers are still the minority, my experience and knowledge from conversations with transgenders and employers suggest that a steadily increasing number of employers are not firing transgenders or are willing to hire the openly transgendered.<sup>231</sup> My understanding, from talking to many people when I tour the nation and over the internet, is that more employers are learning that it is not economically sound to lose good employees who have worked satisfactorily and in whom the employers had invested thorough training. I remain uncertain whether that trend would continue if unemployment rates were to increase dramatically.

### 3. *Dress Codes in the Workplace*

Employers who retain or are willing to hire openly OUT transgenders are usually motivated by two economic factors. One is the value of a good employee who is able to facilitate an increase in earnings for the company. The second is having an employee who causes little to no disruption with the customer base or co-workers and does not interfere with the business.

The employers I have consulted with or heard about who were most successful in retaining or hiring the openly OUT transgender employee and minimizing co-worker disruption have all adopted the Branch Rickey approach to integration.<sup>232</sup> In the Branch Rickey approach, the uppermost top management, such as the owner or the chief executive officer, ensures that it is understood in absolutely no uncertain terms, throughout all

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230. On October 23, 2000, the American Civil Liberties Union filed a lawsuit in federal court, alleging that Winn-Dixie fired long-time employee Peter Oiler after discovering he cross-dresses off the job. Joe Gyan, Jr., *Cross-dressing Trucker Sues over Firing*, BATON ROUGE ADVOC., Oct. 24, 2000, 2000 WL 4504276.

231. See discussion and sources cited *supra* note 46.

232. Rickey owned the Brooklyn Dodgers and is responsible for the integration of Black Americans into Major League Baseball in the late 1940s. Steve Sailer, *How Jackie Robinson Desegregated America*, NAT'L REV., Apr. 8, 1996, at 38, 38-41.

levels of the company, but especially by middle and lower management, that the transgendered employee will continue to work while transitioning or will be hired to work after transition.<sup>233</sup> Moreover, top management makes it clear to the organization that disruptions from co-workers and immediate supervising managers absolutely will not be tolerated. Top management then directs the creation of workshops and counseling to explain what is going on, sends policy-enforcing memos, stands ready to quash any discriminatory acts, no matter how small, and does, in fact, openly quell the first and any subsequent discriminatory acts. The Branch Rickey method is effective because it expressly informs employees of company policy and expectations while ensuring the cooperation of all management personnel. By utilizing this top-down approach, employers can squelch discriminatory acts immediately, while educating employees about the importance and benefits of diversity in the workplace.

By and large, the dress code is not a problem at these businesses; the new FTM or MTF dresses in the attire of the transitioned gender and appears just like everyone else. Men do not appear for office jobs or for construction or assembly line tasks wearing “five-inch heels and sequined dresses.”<sup>234</sup> The dress code issue is mostly a non-issue. My decades of observation reveal that it is not an oxymoron to write that most transgenders wish to conform with society.<sup>235</sup>

If the employer wants to have written guidelines dealing with dress code, I suggest the employer consider the following three scenarios that deal with: (1) mode of dress away from the job site for all employees, (2) mode of dress on the job for non-

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233. Rickey's field manager was Leo “the Lip” Durocher. When it became obvious to Durocher that the team was going to resent Jackie Robinson playing with them, and following the top-down directives of Rickey, Durocher told the team:

I don't care if the guy is yellow or black, or if he has stripes like a f\_\_ zebra. I'm the manager of this team, and I say he plays. What's more, I say he can make us all rich. And if any of you can't use the money, I'll see that you are all traded.

*Id.* at 40.

234. In July 1994, at the Senate Hearings on ENDA, Robert Knight, Director of Cultural Affairs with the Family Research Council, spoke against the bill. *Hearings*, *supra* note 31, at 90-93. He stated that requiring employers to hire homosexuals would force employers to accept male employees who showed up for work in “five inch heels and sequined dresses.” *Id.* at 91.

235. CURRAH & MINTER, *supra* note 29, at 62 (“Like non-transgendered people, transgendered people simply want to go to work in clothes that conform to their gender identity, clothes that they feel the most comfortable wearing.”). Indeed, it is my biggest goal as an activist to convince transgendered people to come out while they are trying to conform by passing as the corrected gender.

transitioning transgenders who do not present themselves as transgenders all the time and (3) mode of dress for transgenders who present themselves as such full-time and/or transitioning transgenders.

*i. Mode of Dress Away from the Job Site for All Employees*

If a person is actually, or perceived to be, transgendered or a gender variant lesbian, gay or bisexual, or a gender variant heterosexual, and exhibits gender variant dressing while off the job, he/she should not lose his/her job on that basis alone. This means that if such transgendered or gender variant behavior while off the job comes to the knowledge of the employer or co-workers, he/she should not lose his/her job because of that knowledge. This policy guideline would prevent job discrimination based solely on the person's status, or perceived status, while off the job. Therefore, the following policy guideline would apply:

*The company dress code policy for transgendered people (including gender variant lesbians, gays, bisexuals, and heterosexuals) does not allow this employer to restrict the employee's manner of dressing while the employee is away from the job site. This policy does not allow the employer to prevent the actual knowledge of the employee's manner of dressing while the employee is away from the job site from becoming known by other employees.*

*ii. Mode of Dress on the Job for Non-Full-Time Transgenders and Non-Transitioning Transgenders*

These policy guidelines can include an exception that excludes from protection any employee who abruptly, without timely notice, warning or negotiation, sporadically or intermittently adopts any gender variance in appearance at the job site. Such gender variance could adversely affect or disturb the job performance of co-workers and the employer's income from its the customer base.<sup>236</sup> Such behavior would undermine

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236. This disruptive type of dress is the scenario Mr. Knight envisioned, prompting his comments at the Senate Hearings on ENDA. *See Hearings, supra* note 31, at 91. It is neither a protected employee right nor is it even appropriate for any woman to show up dressed in "five inch heels and a sequined dress" in an office or assembly line. Negotiated or planned transitions do not cause such a disruption in the workplace. A

the employer's mission to educate employees and management about its non-discrimination policy. Therefore, the following policy guideline would apply:

*The company dress code policy for transgendered people (including gender variant lesbians, gays, bisexuals, and heterosexuals) does allow this employer to foster consistency in day to day dress at the job site and to prevent non-negotiated, sporadic, and/or intermittent gender variant presentation in an employee's manner of dress while the employee is at the job site.*

If a woman always wears slacks and menswear, that type of dress is permissible under this policy. If a man always wears a skirt, this policy permits that as well. Changes back and forth, without negotiation and if done sporadically and in a manner that alters the routine, are not permitted.

### *iii. Mode of Dress for Full-Time, Transitioning Transgenderers*

The transgendered employee who announces his/her transition plans to management in a timely manner and seeks a negotiated agreement that allows a full-time transition rather than an intermittent, flip-flop of gender presentation, moots any concerns about job site disruptions or customer concerns. The employer and employee can thus mutually adopt a timetable that is reasonable for both parties and that works towards a long-term goal of consistent, transgender presentation. The following policy guideline would apply to situations involving a

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policy that allows limited variations in gender presentation would be advisable. The new Boulder, Colorado ordinance, denounced by Jerry Falwell, *see Falwell, supra* note 23, allows a maximum of three alterations in eighteen months. *See BOULDER, COLO. REV. CODE ch. 12-1-3 (d) (1981)*. This language was probably adopted to allow for an employee to begin, and then stop, a Real Life Test, but will not cause disruptions in the workplace. Although not a frequent occurrence because the initial hurdle is so high, a transgender who changes appearance full-time may feel that the transition is either not right for him/her after all or that the transition is not working because of family and other pressures. That person then returns to their previous gender presentation. If the person can later get affairs and concerns in order, the transition will recur. This scenario would be possible with a code that allows three alterations in eighteen months. In my decades of activism and legal practice, I have known only three people who transitioned back. Of those three who went back to the initial gender presentation, two later re-transitioned to the corrected gender after they had gotten their lives back into order.

transgendered person who is ready for full-time gender transition:

*The company dress code policy for transsexual employees (including gender variant lesbians, gays, bisexuals and intersexuals) does not allow this employer to prevent an employee who has announced his or her intentions to management and negotiated a timely transition, from transitioning to his or her long-term goal of a consistent, change of gender presentation in manner of dress.*

#### *4. The Right of Access to Gendered Spaces and Participation in Gendered Activities: Suggested Guidelines for Restroom Use*

In the non-transgender world, gendered spaces are often a problem because of inadequate architectural standards for women's restrooms.<sup>237</sup> If a company wants to fire a transgendered employee, the restroom issue is often the chosen way to do so.<sup>238</sup> When co-workers or the employer oppose a transitioning transgendered employee, objections at the workplace frequently center around the transgender's change in restroom use from the women's to the men's room or from the men's to the women's room.<sup>239</sup>

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237. I frequently tell people that I did not become a woman in order to stand in very long lines during intermission when men have little or no lines. I often jest, "The men who made the standards must think that all women do is wash and primp because there are often as many sinks and mirrors as there are toilet stalls. More toilet stalls, many more toilet stalls, would be preferred and fewer sinks and mirrors would be an acceptable price."

238. The last time I was fired, as a known cross-dresser who was seeking to transition full-time at work, the termination was over the restroom issue. My boss would not allow me to continue to use the men's restroom, nor was I allowed to use the women's room. So I was fired.

239. Cf. Stefanie Asin, *Woman Acquitted in Bathroom Caper: Jurors Flush Prosecutor's Arguments*, HOUS. CHRON., Nov. 3, 1990, at A1, 1990 WL 2969969. During a concert, a Houston woman named Denise Wells simply could wait no longer for the overcrowded women's room with its long lines. *Id.* Instead, she used the men's room and was arrested immediately afterward. *Id.* She fought and won. *Id.* For more on "potty parity" bills, see Claudia Feldman, *Poll Says Women Unwelcome in Men's Room, Locker Room*, HOUS. CHRON., Nov. 11, 1990, (Lifestyle Section), at 16, 1990 WL 2971739; "Potty-parity" Bill Wins New Life as Senate OKs Measure, HOUS. CHRON., Mar. 19, 1993, at A23, 1993 WL 9542231.

When I was a second year law student, one of my friendly classmates told me that a few other classmates were concerned over where I went to the restroom. The friend, in defending me, spoke to these classmates in a cutting and sarcastic tone of voice, saying that "Maybe you would be happier if Phyllis just used a trash can and squatted in the hallway." They backed down after that defense.

If a company wants to keep its valued transsexual employee, it should adopt the Branch Rickey approach<sup>240</sup> and find an acceptable ad hoc solution. Unfortunately, even companies that want to keep transsexual employees are uncertain of what has been done or how to accomplish it.<sup>241</sup> Much of the following discussion is typical of how I advise employers who want to keep the employee, but are not sure how to handle the issues that arise during the transition period.

As a child growing up in the South in the 1950s, the segregation of restrooms puzzled me.<sup>242</sup> The “colored” restrooms were not segregated by sex like the “white” restrooms were.<sup>243</sup> The purpose of segregating restrooms by race was not to save money, but the segregationist business establishment did not complain about the money it saved by not segregating the “colored” restrooms by gender. Equally hypocritically, the modern business establishment is unwilling to build additional restrooms to accommodate transgenders, but will spend money to build additional traditional facilities.

Employers’ attempts to keep women out of traditionally all-male careers by claiming the cost of building additional restrooms was prohibitive<sup>244</sup> is yet another illustration of the hypocrisy of this method of discrimination. A company that did not want to hire women for certain work would assert that they could not hire women because the company had no women’s restrooms at the job site or at the job training site.<sup>245</sup>

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240. See *supra* notes 232-33 and accompanying text.

241. This struggle over gendered spaces is a part of the battle for equal access to funding and accommodations for women’s sports in the schools pursuant to Title IX. See 20 U.S.C. §§ 1681-1688 (1994).

242. These were the “Jim Crow” laws for racially segregated restrooms, water fountains, buses, schools, restaurants, hotels and all manner of public accommodations. See generally STETSON KENNEDY, *JIM CROW GUIDE* (1959) (discussing segregation and its wide-ranging impact).

243. The usual configuration, as I witnessed growing up in Texas, was three restrooms—Men’s (whites only), Women’s (whites only) and Colored (for men AND women to share). Frye, *supra* note 28, at 467.

244. In reality, the cost of construction related to restrooms varies. See Karen E. Field, Note, *The Americans with Disabilities Act “Readily Achievable” Requirement for Barrier Removal*, 15 CARDOZO L. REV. 569, 570 (1993) (stating that the estimated cost of modifying restrooms to comply with the Americans with Disabilities Act, in 1988 prices, varies from \$300 to \$3000).

245. For an example of this method of discrimination, see Martha Ackmann, *For a Shot at Space*, Hous. Chron. Mag., Feb. 27, 2000, at 8. Wally Funk is an early female pilot who was tested in the earliest NASA astronaut classes and later bumped in favor of the men-only club of astronauts during the first decades of space flight by the United States. *Id.* Prior to the NASA test classes, Ms. Funk had sought to become a pilot with Continental Airlines and United Airlines, but was turned down in the 1950s “because there were no ladies’ bathrooms in the training facilities.” *Id.* at 10.

During the first half of the last century, women who were allowed into certain industries fought for the right to use restrooms and actually be allowed to take rest breaks when on the assembly lines.<sup>246</sup> When the 1964 Civil Rights Act was promulgated to prevent discrimination based on sex, men sought this same access to restroom and rest breaks.<sup>247</sup> Rather than extend these rights equally to men, the business establishment, citing excess costs, convinced the courts to eliminate the women-favored restroom and rest break laws.<sup>248</sup> The courtroom result left no one with the right to take restroom or rest breaks, a misguided decision that satisfied the Act. Absent the presence of strong unions or occupational safety standards, assembly line workers used, and some continue to use, adult diapers for the day's duration at the assembly line.<sup>249</sup>

To some extent, federal workplace restroom guidelines<sup>250</sup> and decisions<sup>251</sup> mitigate most of the restroom construction cost arguments used by the business establishment. Occupational Safety and Health Administration (OSHA) guidelines and decisions imply that each employee has the right to timely use of a restroom within a reasonable distance from his/her work area.<sup>252</sup> These guidelines and decisions specify the number of men's and women's toilets or urinals that an employer must provide.<sup>253</sup>

In light of the OSHA Compliance Letter, a transsexual employee who is beginning or in transition is entitled to use "a" restroom, "some" restroom, or "any" restroom, rather than "no" restroom,<sup>254</sup> with timely access and within a reasonable distance

246. See generally MARC LINDER & INGRID NYGAARD, VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME (1998) (examining the rise and decline of rest periods in the workplace).

247. *Id.* at 4.

248. *Id.*

249. *Id.* at 49.

250. See, e.g., OSHA General Environmental Controls, 29 C.F.R. § 1910.141(c)(1)(i) (1999) (mandating that employers shall provide toilet facilities in accordance with the requirements of the section).

251. See, e.g., OSHA Standards Interpretation and Compliance Letters, 04/06/1998 - Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities, at [http://www.osha-slc.gov/OshDoc/Interp\\_data/I19980406.html](http://www.osha-slc.gov/OshDoc/Interp_data/I19980406.html) [hereinafter OSHA Compliance Letter] (citing several medical studies on the need to use restrooms and explaining that the words "shall be provided" in the law mean that employers must make toilets available so that employees can use them when they need to do so).

252. See sources cited *supra* notes 250-51.

253. See *id.* (detailing the minimum number of water closets a facility may have).

254. If push comes to shove in a job situation during a transition, the transgender should have the right to use the restroom he/she had used previously. An employer may demand that the employee use the restroom assigned to the initial gender, anticipating

of their work area in all employment covered by OSHA. This implied legal right of transgendered workers to the use of “a” restroom on the job, even if it is the previously gender segregated restroom with all of the accompanying potential problems, does not conflict with municipal restroom ordinances. Such ordinances are criminal in nature and were written primarily to keep molesters and “peeping toms” in check.<sup>255</sup> These ordinances usually begin with some version of “it shall be unlawful” and typically continue with language about men not using the women’s restroom and women not using the men’s restroom.<sup>256</sup> In addition, the ordinances usually include provisions that allow maintenance personnel to clean restrooms without the fear of being arrested.<sup>257</sup> These ordinances are written in a variety of ways, but almost always contain a final provision that requires a culpable mental state or an intention to cause a disturbance.<sup>258</sup>

The fact that employers are already building additional restrooms to accommodate those persons covered by the Americans with Disabilities Act (ADA)<sup>259</sup> offsets complaints from

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that the transgender will quit before agreeing to such a term. Instead, the transgender should call the employer’s bluff. During the initial stage of my transition, because I did not pass well as a female at that stage, I used the men’s restroom a few times. The result was zippers flailing and men scrambling to leave. If the MTF transitioning employee is required to continue using the men’s room, the employer must ensure that she is protected from assault and harassment.

255. *See, e.g.*, *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (stating that then-existing section 24-42.6 of the City of Houston Code of Ordinances, prohibiting any person from entering a restroom designated for the opposite sex, was intended to prevent crimes in restrooms).

256. *E.g.*, HOUSTON, TEX., CODE OF ORDINANCES § 28-20 (2000).

257. *See id.*

258. *See Asin, supra* note 239 (discussing Denise Well’s arrest for violating an ordinance that prohibited anyone from using a restroom designated for the opposite sex with intent to create a disturbance). This is a situation that calls for an ad hoc legal exception allowing a company to accommodate transgenders by giving the company control over the on-premise restrooms.

Now deceased transgender activist Dee McKellar recounted her use of the women’s restroom when she was an employee of the local League of Women Voters. The building management called the then League President, citing complaints about a transgender using the women’s restroom. The League President, in a bold Branch Rickey manner, *see supra* notes 232-33 and accompanying text, told the building management that Ms. McKellar was a League employee, had to use “a” restroom and would cause far more disturbance using the men’s room. The parties agreed that McKellar would only use the restroom on her floor and the complaining women could use any of the restrooms on the remaining five floors of the office building.

259. The requirement of additional restrooms to accommodate the disabled does not help the situation of the transgendered. The ADA specifically excludes transgendered

the business establishment that the cost of building extra restrooms restricts their ability to accommodate the restroom needs of transgenders. Frequently, these ADA restrooms are available for use by either sex and have a locking device on the door.<sup>260</sup>

Providing secure, clean, well maintained and equipped, multiple stall restrooms with locking doors on each stall in accordance with OSHA requirements should squelch any privacy arguments against allowing a transgender to use such facilities. If the business establishment has a complaint or concern about transgenders use of restrooms, I suggest the establishment ensure that a separate transgender restroom is available or that their multiple stall restrooms are secure, clean, well maintained and equipped, and have individual stall doors with working locking devices for privacy.<sup>261</sup>

The only way for an outsider to be shocked or embarrassed when a transgender uses a properly designed and locked individual restroom stall is if that person snoops in an extreme and deliberate manner. If the outsider is shocked or embarrassed, then that person was likely looking where he/she should not be looking.<sup>262</sup> This person was invading the privacy of the transgender who was merely trying to void the bladder and bowel. If a workplace also includes sex-segregated shower and locker room facilities, similar logic would apply for those facilities. Thus, providing individual curtained showers and changing areas should satisfy any privacy concerns in these situations as well.

Transgender-friendly employers should consider this information before setting their restroom policies so that they feel secure in their ad hoc decisions. In addition, the employer should try not to dehumanize any of its employees—

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people. Americans with Disabilities Act, 42 U.S.C. § 12211(b)(1) (1994) (excluding transvestites, transsexuals and persons with gender identity disorders from the definition of disability under the Act).

260. *E.g.*, Ted Byrd, *Restroom Law Would Aid Disabled*, TAMPA TRIB., Dec. 23, 1999, at 1, 1999 WL 21350371 (reporting that Raymond James Stadium has eight locked restrooms available for its disabled patrons).

261. *See* sources cited *supra* notes 250-51; discussion *supra* note 254.

262. *Cf.* Liebman v. State, 652 S.W.2d. 942, 945-48 (Tex. Crim. App. 1983) (holding that, where an adult theater's adjoining "glory hole" booths had doors without cracks, locks, seven-foot high walls and open tops that could not be looked over unless one was standing on something, defendants, charged with public lewdness while in booths, had a subjective expectation of privacy while in the booths).

transgendered employees or concerned co-workers—in its search for the appropriate ad hoc solution.

One viable ad hoc solution is to install a door lock on the restroom nearest to the transsexual. Thus, a concerned co-worker who does not want the transsexual employee to enter the restroom while he/she is using it can simply lock the door. Although this could present a problem for an unconcerned co-worker who also cannot enter the nearest, now locked, multiple stall facility, it could also present an opportunity for the unconcerned co-worker to ease the concerned co-worker out of his/her concerns and, over time, might convince him/her not to lock the door. Another possibility is for the transgendered employee to place a note on the restroom door to alert the concerned co-workers not to enter the restroom at that time.

A less viable solution is to restrict the transgendered employee's use to certain restrooms. Any concerned co-workers can use all of the restrooms.<sup>263</sup> A further option is for the concerned co-workers to exclusively use certain restrooms and the transgenders to use any of the remaining facilities.<sup>264</sup> I suggest that the restroom designated for the transsexual employee be located in the same building as, and no more than one floor above or below, the employee's work station. Most employers seeking restroom solutions find this suggestion to be reasonable.<sup>265</sup> With any of the foregoing solutions, the ultimate

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263. When I was a law student, I adopted a modification of this approach and used the women's restrooms that were closest to my study carrel, to my section's assigned classroom and to the law library. The five concerned classmates were able to use those three restrooms, as well as the other three on the law school campus. This preserved my right to access restroom facilities while not offending the sensibilities of the concerned students.

264. This arrangement is the preferred option when an employee is in the initial stages of transition. It causes less concern and/or embarrassment for everyone, but should only be implemented if no employee has to travel more than two floors, an unusually long distance, or be forced to leave the building to use a restroom.

265. OSHA requires availability of restroom facilities. See OSHA Compliance Letter, *supra* note 251. A one-floor maximum treats everyone fairly and avoids problems of making employees use facilities that are distant from their work station. An example of unfair treatment occurred when I was in law school and was interning for a semester with the Harris County District Attorney's Office. I was assigned to an individual restroom that was located eight floors from where I worked. It was on the elected District Attorney's access-restricted floor. Access to the locked floor required permission from the secretary who worked the electronic lock. I then had to parade past twelve rows of secretaries to get to the restroom. This demeaning process took over five minutes. To avoid this situation, I did not use the restroom very much during my internship. As a result, I suffered bladder infections and had several accidents. After informing the judge in my assigned court of these conditions, he immediately called his staff into his office and told them that I was to have unlimited use of his private restroom for the remaining time I spent in his courtroom.

goal should be that education about transgender issues and transsexualism, along with the open support of management for the transitioning employee, alleviate any trepidation co-workers may have.<sup>266</sup>

In my professional experience, usually all tension disappears within a few weeks, after the concerned co-worker learns from the unconcerned co-workers that it is simply “no big deal” to work with a transgender.<sup>267</sup> Therefore, the following restroom guideline would apply:

*The company restroom policy for transsexual employees encourages top management and co-workers to seek ad hoc solutions on the use of sex-segregated restrooms (showers and locker rooms) at the workplace by transitioning transsexual employees. Such ad hoc solutions shall not dehumanize or generate ridicule or hatred toward any employee. This policy recognizes that numerous ad hoc solutions exist.*

At some point after transition, usually after several years, the transition of the transsexual employee becomes medically or legally complete.<sup>268</sup> Upon reaching this point, using the restroom, shower and locker room should no longer be controversial. The following policy guideline would apply to medically or legally complete transgendered employees:

*The company restroom policy for transsexual employees recognizes that once a transsexual employee has either medically or legally completed his or her transition, that employee must be granted access to all sex-segregated restrooms that other employees of the same medical or legal sex use.*

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266. If the transition is properly done over time, eventual acceptance is the usual result. In law school, I noted that the five, initially concerned, law students began to frequent the same restrooms that I used after the first year.

267. See discussion *supra* notes 263, 265 (describing “concerned” students who attended my law school).

268. See discussion and sources cited *supra* notes 16-17 (discussing the requirements for completion of the transition). The timing of completion depends on the extent of medical treatment sought and the jurisdiction in which the person lives. See discussion and sources cited *supra* note 118.

## V. ADVOCACY TECHNIQUES: QUIT SUING AS TRANSGENDERS AND ERASE OR IGNORE CIDER HOUSE RULES

### A. Civil Advocacy: Using Littleton to Make the Legal Majority Feel Life Under the Cider House Rules

If court and legislative action will not be successful in attaining the rights in the *International Bill of Gender Rights*,<sup>269</sup> the non-violent, Ghandi/King, civil disobedience, “in-your-face” type of confrontation may be the necessary political action to remove the Cider House Rules, inconsistencies and hypocrisies that result from decisions like *Littleton*. I propose several ways to take bad and discriminatory laws, turn them around, and “ram them down [the] throats”<sup>270</sup> of the non-transgendered, non-intersexed and non-AIS majority. If these suggestions are followed, the hypocrisy of *Littleton* will become quickly apparent to the majority.

#### 1. Tort Law

The *Littleton*<sup>271</sup> case was pure tort law. Christie Lee Littleton brought a wrongful death case against an insurance company that did not want a jury to hear the facts of alleged medical malpractice.<sup>272</sup> As a result of the reasoning in *Littleton* in Texas and *Ladrach* in Ohio,<sup>273</sup> it could be malpractice per se for a defense attorney in any tort case that has marriage as an element of the civil prosecution to fail to demand a chromosome test for both spouses, including a deceased spouse. If either spouse was intersexed or had AIS, then the marriage is a *Littleton* “never marriage” and the defendant walks regardless of any resulting injustice.

All defendants who lose in wrongful death cases, or other tort matters where marriage is an element must immediately sue their attorney for malpractice if he/she had not forced a chromosome test on both spouses during discovery, and before

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269. *International Bill of Gender Rights*, in FIFTH ICTLEP, *supra* note 32, at 8-9. The full IBGR is attached as Appendix B.

270. Connie Moore, *Family Law Project*, in FIRST ICTLEP, *supra* note 44, at 308.

271. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

272. *See id.* at 225.

273. *In re Ladrach*, 513 N.E.2d 828 (Ohio 1987) (denying a marriage license to an MTF transsexual who wanted to marry a male).

the cremation or burial of a deceased spouse when applicable. Though the percentages of people in affected marriages is low, the raw numbers are simply too high<sup>274</sup> for "never marriages" not to exist with some regularity.

## 2. Probate Law

When a spouse dies intestate and the surviving spouse is not the parent of the surviving children, the situation in probate is similar to that of tort law. To force the bad law of *Littleton* down the throat of the court, *Littleton* could be used to cut the surviving spouse out of intestate distributions. The children merely have to ask for chromosome tests of the dead parent and the surviving spouse and hope for an intersex or AIS chromosome display.<sup>275</sup>

## 3. Family Law<sup>276</sup> and Health Law

To prevent and uncover more *Littleton* "never marriages" and destroy more children's lives in the pursuit of preventing same-sex marriage, state health departments must require that all doctors and hospitals run a chromosome test whenever a patient comes in for blood work or other extensive testing. The results should be retained and compared against those of the legal spouse when that person is similarly routinely tested. Computers can easily handle these record-keeping and comparison tasks. Any result that is not a perfect match of one XX and one XY spouse would trigger an announcement from the

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274. See Greenberg, *supra* note 62, at 296-308.

275. Attorneys arguing on behalf of the son of a deceased millionaire successfully used *Littleton* in a recent Kansas probate case. See Mubarak Dahir, *Genetics v. Love*, *ADVOC.*, Oct. 10, 2000, at 25, 26. J'Noel Ball, an MTF, married Marshall Gardiner in 1998, several years after undergoing sex reassignment surgery. *Id.* The next year, Marshall Gardiner died intestate, leaving a \$2.5 million estate. *Id.* In the process of fighting J'Noel's claim to half of the estate, Joe Gardiner, Marshall Gardiner's son, discovered that J'Noel had been declared a male at birth. *Id.* The court held that the marriage between J'Noel and Marshall Gardiner was void, declaring that the person's sex as determined at birth remains that person's sex. *Id.* Because Joe Gardiner had found that Ms. Gardiner's sex, as declared at birth, was the same as his deceased father's, he was able to defeat any claim she had to the estate. *Id.*

276. In Texas, *Littleton* is being used in an effort to remove a child from his FTM father and to sever the FTM's parental rights. *Id.* at 29. Prior to *Littleton*, a California FTM went through a similar struggle to retain custody of his child. *Id.* Unlike *Littleton*, the judge in that case determined that the FTM was legally male and was able to retain joint custody of his child. *Id.*

*Littleton* marriage police. The previously happy couple would be told that their marriage never existed, that their children are bastards, and that they no longer have spousal insurance health benefits, Medicare spousal benefits, can no longer file their taxes jointly, and will have to pay penalties for past incorrect filings. According to the court in *Littleton*, the goal is to prevent a same-sex marriage.<sup>277</sup>

Every child will have to be chromosome-tested at birth. All AIS and intersexed children can then be socially reared with the expectation that they have no legal sex designation and will never be allowed to marry.

Marriage licenses will require a chromosome test. To highlight the hypocrisy of relying on chromosomes to determine the legality of marriage, transgender activists should orchestrate marriages between transgendered couples, one of whom is post-surgical. These marriages would be between people with XX and XY chromosomes, but with gender appearances and genitals that match. These couples will be legally opposite-sexed according to the rules of *Littleton*, but society will view them as a same-genitaled, same-sex marriage.<sup>278</sup> With a copy of their chromosome tests and a copy of the *Littleton* decision, these couples will demand marriage licenses. Imagine the fun as couples in each appellate district in Texas and Ohio do this on the same day and, if denied that marriage license, begin the appellate process, forcing the state to use tax dollars to sort it out.

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

278. A lesbian couple from Houston, Texas was legally married on September 16, 2000, after having successfully sought a marriage license in Bexar County, Texas, based on the decision in *Littleton*. Ackerman, *supra* note 202. In that ceremony, Robin Wicks married Jessica Wicks, an MTF transsexual. *Id.* By all appearances, it was a wedding between two females. Under *Littleton*, however, the marriage was a legal ceremony between people presumed to have XX and XY chromosomes. Karen M. Goulart, *Attorney Sees 2 Sides of Texas Law*, PHILA. GAY NEWS, Sept. 29 – Oct. 5, 2000, at 3. Four days after the Wicks were married, a second lesbian couple received a marriage license from the same Bexar County clerk's office. John Gutierrez-Mier, *2 More Women Obtain County Marriage License: 1 Member of Couple Was Born a Man*, SAN ANTONIO-EXPRESS NEWS, Sept. 21, 2000, at 7B, WESTLAW (All News Database). Both women had driver's licenses identifying them as female, but one member of the couple was able to present a birth certificate that showed she was designated a man at birth. *Id.* For additional news articles on these marriages, see <http://christielee.net>.

#### 4. *Employment Law*

Employment law is a problem area for transgenders, but *Littleton* and *Ladrach* may have created a loophole in Texas and Ohio that provides protection against employment discrimination.<sup>279</sup> Before the recent decision in *Schwenk v. Hartford*,<sup>280</sup> which held that both sex and gender are encompassed in the word "sex" in Title VII,<sup>281</sup> post-operative transgenders in Texas and Ohio who were discriminated against could sue under the pre-*Schwenk* Title VII interpretations in *Holloway*, *Sommers* and *Ulane*.<sup>282</sup> In Texas and Ohio, the transgendered person never "changed" his/her sex and cannot do so, according to *Littleton* and *Ladrach*,<sup>283</sup> therefore, any discrimination because the person is transgendered must be sex discrimination.

All transgenders who have been fired should go to the EEOC with a copy of *Schwenk*.<sup>284</sup> Assuming that circuits outside of the Ninth Circuit follow *Schwenk*, courts may find that discrimination based on gender is discrimination based on sex and, therefore, prohibited under Title VII.<sup>285</sup> Texas and Ohio transgenders should also take a copy of *Littleton* or *Ladrach* in the event that the EEOC refuses to follow the *Schwenk* decision.

#### 5. *Civil Rights in Public Accommodations*

Under the reasoning relied on in *Littleton*, an FTM transgender with presumed XX chromosomes and a surgical phallus, beard and deep voice should use spaces designated for

279. Based on the holdings in *Littleton*, 9 S.W.3d at 231, and *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio 1987), transsexuals who have had corrective genital surgery to match their brains' identity cannot legally change their sex in Texas and Ohio. It can, therefore, be argued that *Sommers* and *Ulane* do not apply in Texas or Ohio. Because change of sex is not possible in those states, Title VII must apply to transsexuals. I strongly suggest that transgenders who have been fired in these two states swamp the Equal Employment Opportunity Commission with discrimination complaints.

280. 204 F.3d 1187 (9th Cir. 2000).

281. *Id.* at 1202 (holding that both sex and gender are encompassed in the word "sex" in Title VII and overruling its holding in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

282. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that "sex" refers to physical characteristics only); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (same).

283. *Ladrach*, 513 N.E.2d at 832; *Littleton*, 9 S.W.3d at 231.

284. *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

285. *See id.* at 1202.

women.<sup>286</sup> Similarly, the MTF with XY chromosomes, who now has breasts and a vaginal opening, should use the spaces designated for men. All vaginal, XY AIS women should be required to use the men's room. If the chromosome rule announced in *Littleton* is widely applied,<sup>287</sup> intersexed people may not use any gender-designated restrooms. This may be a good reason to require more unisex facilities.

## 6. Prisoner Rights<sup>288</sup>

The Ninth Circuit, in *Schwenk v. Hartford*,<sup>289</sup> dispensed with many of the issues facing imprisoned transgenders. In Texas and Ohio, post-surgical transgenders and all AIS and intersexed people currently in prisons should sue for

286. This would make a good strategy for peaceful civil disobedience in Texas and Ohio. I suggest that a group of activists who have genitals that match their gender presentation, but do not match their presumed chromosomes, invite the media to record them entering the public restrooms marked for the sex that matches their presumed chromosomes.

287. *Littleton*, 9 S.W.3d at 230.

288. See *Report from the Imprisonment Law Project*, in SECOND ICTLEP, *supra* note 44, at 134-41 (addressing prisoner rights); THIRD ICTLEP, *supra* note 20, at 83-86 (same). The *Policy for the Imprisoned, Transgendered*, adopted at the second ICTLEP conference, August 28, 1993, reads as follows:

1. Segregation in the interest of the inmate's safety and dignity shall not deprive any inmate from the rights, privileges and facilities afforded to other general population inmates.
2. Access to counseling shall be afforded all transgendered inmates and shall include peer support group participation by those from inside the institution and those from outside where possible. Counseling professionals should be qualified with respect to the current standard in gender science.
3. Transgendered inmates shall be allowed to initiate or to continue hormone therapy, electrolysis and other transgender treatment modalities as prescribed by the involved professionals.
4. The transgendered inmate shall have access to clothing, personal items and cosmetics that are appropriate to the gender presentation of that inmate and appropriate within the institutional setting.
5. Special care shall be taken not to make a spectacle of transgendered inmates to the amusement of others, or to deny or to deprive transgendered inmates of their dignity.
6. A process shall be established to afford the hearing of grievances to the above policy items and appropriate resolution shall be made.

*Policy for the Imprisoned, Transgendered*, in SECOND ICTLEP, *supra* note 44, at 3.

289. 204 F.3d 1187 (9th Cir. 2000). In *Schwenk*, a pre-operative MTF transgender prisoner sought damages after a prison guard attempted to rape her. *Id.* at 1192. In that decision, the court held that the gender of a rapist or victim is irrelevant to Eighth Amendment claims. *Id.* at 1198. More importantly, the court held that the Gender-Motivated Violence Act includes protection for transsexuals. *Id.* at 1202.

chromosome-defined, third, fourth, fifth, sixth and seventh sex-segregated facilities.<sup>290</sup>

### *B. Dress Codes: Gender Expression and Stereotyping*

As an advocate and consultant, I find that employers who are reluctant or unwilling to have either a transgender transition on the job or to hire an openly OUT transgender have several concerns related to dress codes in addition to formulating ad hoc solutions to the dress code itself. These employers usually frame these additional concerns in moral or criminal terms or based on their notions of what is, in their opinion, natural and immutable.

#### *1. Criminal Dress Code Ordinances*

Although cross-dressing ordinances are now few in number,<sup>291</sup> there is a long history of city ordinances that made it illegal for someone to dress in the clothing of the opposite sex.<sup>292</sup> Most of these ordinances evolved from the community's sense of morality and earlier expansions of nudity statutes.<sup>293</sup> Some cities designed ordinances to prevent criminals from disguising their appearance in an attempt to flee.<sup>294</sup> There were legal challenges to these ordinances, particularly in the 1970s, but these challenges were frequently lost.<sup>295</sup>

In the late 1970s, I challenged a Houston ordinance that prohibited cross-dressing, not through a lawsuit,<sup>296</sup> but through the legislative route. I lobbied judges, police chiefs, state

290. See Greenberg, *supra* note 62, at 281 (explaining that there are at least seven chromosomal patterns).

291. William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1208 (2000).

292. See generally Laura Richards Craft & Matthew A. Hobel, *City of Chicago v. Wilson and Constitutional Protection for Personal Appearance: Cross-Dressing as an Element of Sexual Identity*, 30 HASTINGS L.J. 1151 (1979) (discussing cases involving an individual's right to control his/her appearance).

293. See, e.g., Rose, *supra* note 73, at 33-35.

294. See Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN'S L.J. 195, 202 (1997) (stating that an 1845 New York ordinance enacted to prevent criminals from evading capture was later used to prosecute cross-dressers).

295. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law*, 144 U. PA. L. REV. 1, 66-68 (1995).

296. For an example of a lawsuit that successfully challenged the constitutionality of the Houston, Texas ordinance, see *Doe v. McConn*, 489 F. Supp. 76, 79-80 (S.D. Tex. 1980) (holding that Houston's cross-dressing ordinance was unconstitutional as applied to transsexuals undergoing psychiatric preparation for sex-reassignment surgery).

legislators, the mayor and city council members.<sup>297</sup> Each day I remained in Houston while the ordinance was in effect, I was subject to arrest simply because I was transsexual and was, therefore, cross-dressing. On August 12, 1980,<sup>298</sup> the City Council repealed section 28-42.4 of its Municipal Code.<sup>299</sup> I was no longer violating the law in Houston. For this reason, I urge those in the transgender community to check their local ordinances to determine their legal situation; however, I know of no other ordinances that are currently being fought or used to arrest transgenders who cross-dress in public.<sup>300</sup>

## *2. Gender Dress and Other Cider House Rules: Inconsistencies and Hypocrisies*

The establishment tends to frame the issue of gender-appropriate dress in terms of the appearance it considers to be natural, customary and immutable.<sup>301</sup> This mindset is exemplified by those cases that involve an employer's rights to determine the length of men's hair<sup>302</sup> and, until recently, to require women flight attendants to wear high heeled shoes on airplanes and when walking through the airport.<sup>303</sup>

A new and very extreme set of Cider House Rules was expressed in the majority and concurring opinions in *Littleton v.*

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297. I chronicled my lobbying efforts in *Warstory - The Repeal of City of Houston Ordinance 28-42.4*. For the complete text of this chronicle, see Phyllis Randolph Frye, *Warstory - The Repeal of City of Houston Ordinance 28-42.4* (Mar. 22, 2000), at <http://www.transgender.org/gic/frye003c.txt>.

298. Interestingly, the twentieth anniversary of the repeal of the Houston ordinance will closely coincide with the publication of this Essay. Please celebrate with me.

299. HOUSTON, TEX., CODE OF ORDINANCES § 28-42.4 (repealed Aug. 12, 1980).

300. In 1997, at the 10th Annual Creating Change Convention, held in San Diego and sponsored by the National Gay and Lesbian Task Force, many local transgender activists considered filing a lawsuit against the city because of its cross-dressing ordinance. I encouraged the activists to lobby for change instead of pursuing legal action, as litigation can last for five or more years. On August 3, 1998, by an eight to one vote, the City Council of San Diego repealed the city's cross-dressing ordinance. Transgenders in San Diego won their battle with the city, having successfully fought for repeal of the city's cross-dressing ordinance. San Diego, Cal., Ordinance 18554 (Aug. 3, 1998).

301. This statement is an observation based on my involvement in numerous arguments and debates on the issue.

302. See, e.g., *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1333 (D.C. Cir. 1973) (holding that having different hair grooming requirements for men and women does not constitute sex discrimination under Title VII).

303. See Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 298 (1997).

*Prange*.<sup>304</sup> The case directly relates to transgender issues, but also illustrates the many inconsistencies and hypocrisies that the establishment tends to ignore. These range from gender dress to the brain's gender identity. In *Littleton*, Justices Hardberger and Angelini discounted extensive medical evidence about transsexuals, chuckled at the notion of transsexuals in Texas as an almost foreign concept,<sup>305</sup> made light of the plaintiff's nearly twenty years of extreme psychological difficulty,<sup>306</sup> belittled her legal marriage from another state,<sup>307</sup> and declared that sex and gender meant male and female only.<sup>308</sup> Intersex was not mentioned, implying a Cider House Rule that sex and gender are defined only by chromosome patterns XX and XY.<sup>309</sup> The justices openly demonstrated what motivated their holding—their belief in what they believe is natural, customary and what is “immutably fixed by our Creator at birth.”<sup>310</sup> In other words, their belief in the Cider House Rules.

These beliefs are evident in *Littleton*: Chief Justice Hardberger's second paragraph defines a person's gender as being “immutably fixed by our Creator at birth.”<sup>311</sup> It is important to explore his line of thinking and the creation of his Cider House Rules. I will now examine in detail the many ways that the establishment ignores the inconsistencies found in its “immutability” assertion.

To explore whether a person's gender is expressed through his/her clothing choices, it is important first to review the history of fashion and its cycles and fluctuations. Examples abound of when the manliest of men dressed colorfully, decoratively, with lace and frills, and wore facial cosmetics, perfumes and the highest of heeled shoes.<sup>312</sup> Gender dress fluctuates and is about power.<sup>313</sup>

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304. 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

305. *See id.* at 225.

306. *See id.* at 224.

307. *See id.* at 231.

308. *Id.* at 230-31.

309. *See id.* at 227.

310. *Id.* at 224.

311. *Id.*

312. *See* ROSEMARY HAWTHORNE, *KNICKERS - AN INTIMATE APPRAISAL* (1985) (studying changes in knickers); KATES, *supra* note 40; Linder, *supra* note 303 (chronicling the advent of high heeled shoes in fashion); BARBARA CLARK SMITH & KATHY PEISS, *MEN AND WOMEN: A HISTORY OF COSTUME, GENDER AND POWER* (1989) (examining social rules for dress and appearance in the United States).

313. SMITH & PEISS, *supra* note 312, at 10 (“There are links between appearance and power.”).

For those who seek to impose their Cider House Rules regarding gender custom, and deem those rules immutable, the characteristics would focus on more than fashion. An examination of the “immutable” gender qualities of the naked body is in order. Specifically, there must be an examination of those apparently “immutable” characteristics that the majority nonetheless permits to be altered.

Most men are born with an immutable tendency to grow facial hair, yet today the majority of Western men shave their faces.<sup>314</sup> Indeed, the majority of businesses, and especially the military, strongly discourage or do not allow men to leave hair, although immutable, on their cheeks or chins.<sup>315</sup> Yet the majority’s acceptance of the naturalness of facial hair is so trend-oriented that several United States Presidents routinely sported beards, mustaches or chops.<sup>316</sup> That was natural and immutable then.

Men also have hair on their heads that, if left uncut, will grow long. Though this long hair is natural, today’s society tends to look down on men with long hair.<sup>317</sup> Courts permit businesses to require men to cut their immutably growing hair as part of job dress codes.<sup>318</sup> Men who are immutably balding seek a variety of cures, including hair implant surgery, with the blessing and encouragement of the establishment.

Though a woman’s hair will grow long naturally, society allows her to alter this natural process through haircuts.<sup>319</sup> Though not common, some women have unwanted facial hair under the nose, on the chin, between the eyebrows or even on the chest and back.<sup>320</sup> Although hair in those areas is immutable and placed there by the Creator, western society allows and

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314. This assertion is based on observations I have made in my travels.

315. See, e.g., *United States v. Youngman*, 48 M.J. 123, 124 (C.A.A.F. 1998) (involving defendant convicted by court-martial of disobedience of a lawful general regulation requiring the shaving of facial hair) (*rev’d* on other grounds).

316. *Presidential Profiles*, at <http://www.whitehouse.gov/WH/glimpse/presidents/html/presidents.html> (last visited Sept. 17, 2000). John Quincy Adams, Martin Van Buren, Zachary Taylor, Abraham Lincoln, Ulysses S. Grant, Rutherford B. Hayes, James A. Garfield, Chester A. Arthur, Grover Cleveland, Benjamin Harrison, Theodore Roosevelt and William Howard Taft all retained some or all of their immutable facial hair. See *id.* The rest of the Presidents removed their facial hair, in violation of the Hardberger “immutably created” doctrine. See *id.*

317. This assertion is based on observations I have made in my travels.

318. See *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973).

319. This assertion is based on my observations.

320. Drug and department stores have products available to assist women who desire to remove this unwanted hair. See, e.g., Advertisement, *COSMOPOLITAN*, Oct. 2000, at 234; Advertisement, *MS.*, Sept. 1989, at 91; Advertisement, *SEVENTEEN*, Nov. 2000, at 30.

encourages women to remove that hair by tweezing, electrolysis or some other method.<sup>321</sup> Women also immutably grow hair under their arms and on their legs. Some western cultures encourage women to remove that hair and have developed entire industries and advertising campaigns to remove that immutable, Creator-made hair.

The clothing and grooming choices available to western women today vary and many of the current choices were once available primarily to men. The following is a list of alterations that society allows women to make and oftentimes condones: use of cosmetics; use of hair products, including perming or straightening procedures; use of artificial nails; use of perfumed and deodorizing products; and the use of body shaping products, such as girdles and push-up bras. Note that these processes and changes, though widely accepted in our society, do not leave a person in an *au natural*, Creator-made state.

The majority of society prefers or allows both women and men to make other decisions that change or alter the Hardberger-Angelini immutably fixed, Creator-made, characteristics, including: breast augmentation surgery or breast reduction surgery; cosmetic surgery; circumcision of men and/or women in some cultures and religions; hysterectomy<sup>322</sup> and birth control methods; artificial insemination and other pregnancy-enducing procedures; Viagra and other sexual enhancing medications and methods; and sexual libido decreasing medications and methods.

Most of the advances by the medical profession and life-enhancing products and procedures arguably stand against the Hardberger-Angelini immutable way the Creator made each of us. We think nothing of surgery for an infant or child with a cleft palate or a sixth finger or toe. We commonly place braces on teeth to make them straight and prostheses on the body to correct birth defects. We give hearing aids to the hard of hearing and glasses or eye surgery to those who were immutably fixed at

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321. See sources cited *supra* note 320.

322. In *Littleton*, Chief Justice Hardberger cited a case in which the doctor said "that after the operation his patient had no uterus or cervix, but her vagina had a 'good cosmetic appearance' and was 'the same as a normal female vagina after a hysterectomy.'" *Littleton v. Prange*, 9 S.W.3d 223, 228 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25). Despite the similarities between a post operative MTF vagina and a post-hysterectomy, non-MTF vagina, the *Littleton* court refused to recognize Christie Lee Littleton as a woman. *Id.* at 225. Does this mean that all XX women who have a hysterectomy can no longer be married? Or does it mean that former Senator and Presidential candidate Bob Dole, who has erectile dysfunction, and makes television pitches for drugs to treat ED, can no longer be married?

birth by our Creator with a predisposition to poor eyesight. We celebrate vaccines and even organ transplants, though these innovations do not follow the immutable way the Creator made each of us. We alter genes in the process of cross breeding animals and crops and now alter genes at the microscopic level.

To be consistent, if the establishment is going to embrace, legalize and provide options for going against some of the immutable characteristics made by the Creator for the above reasons, it must support options for changing all immutable characteristics. It is hypocritical for the Hardberger majority in *Littleton* to strike down the actions of the transgendered community that correct defects between gender presentation and gender identity because those immutable characteristics made by the Creator are of the type that the Hardberger majority does not want altered.

### *3. Women Wearing Men's Clothes Easier Today Than Men Wearing Women's Clothes*

Over the past several decades in the United States, it has become acceptable for women to wear men's clothing, although this does not often apply to the workplace as it does to the home and to other off-the-job activities. Occasionally, television commercials show a woman draped in her husband's undershirt or dress shirt. In most cases, both on and off the job, women choose between wearing pants or a skirt, men's fashions or women's, actual men's clothes or women's clothes, high-heeled shoes or flats, and all in a variety of colors, patterns and textures. In addition, they must choose whether to wear their hair long or short and decide whether to wear cosmetics, a bra or nail polish.

For the FTM, this reality allows him to come to grips at least partially with what his brain tells him about his core identity. Growing up as a tomboy is okay. Assuming the parents agree,<sup>323</sup> remaining a tomboy is okay. Likewise, it has become feasible to find jobs that allow someone who is curious about whether he is an FTM to explore that possibility. An appearance including pants, jeans, t-shirts, no cosmetics, shorter hair, heavy socks, boots or rough shoes are all acceptable, as is an androgynous look. In the FTM's late teens or early twenties, estrogen will generate a feminine face and form. Male hormones

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323. See Arriola, *supra* note 19, at 439-45, 454-55 (discussing parental reactions to their children's actual or perceived homosexuality).

will not be present; therefore, facial hair and a deep voice do not develop. As a result, this person presents and is accepted as a woman, possibly butch, but a woman.

Often this more masculine look on females falls within today's accepted gender variance. As a result, this person may not be certain of being, or may even deny being an FTM. Many FTM's are able to cope with their identities at this stage for decades, if not for the rest of their lives. All the while, they are curious and explore gender variance in this partially closeted existence, allowing them to deny or shade most of their feminine qualities and frequently experience most of their masculine qualities. Although this description represents a typical FTM story,<sup>324</sup> such a life is not always an easy existence.<sup>325</sup>

Even if a person is not FTM and has no issues with conflicting core identity, women in today's society continue to fight for the right to do the same work as men and wear men's clothing when so desired.<sup>326</sup> It has been a horrible fight, but one that was and still is necessary, as best documented by the wide array of studies and feminist writing not discussed within this Essay.<sup>327</sup>

Unlike the FTM transsexual experience, it is more difficult in today's world for the MTF to cope with what her brain tells her about her core identity. Growing up as a "janegirl"<sup>328</sup> is unacceptable. Few parents allow it<sup>329</sup> and presenting as a "janegirl" can be particularly dangerous.<sup>330</sup> Likewise, finding a job that allows someone to explore whether she is an MTF often

324. See TRANS FORMING FAMILIES, *supra* note 34; see also Our Trans Children: A Publication of the Transgender Special Outreach Network of Parents, Families and Friends of Lesbians and Gays (PFLAG), PFLAG, Jan. 1998.

325. See discussion and sources cited *supra* note 25.

326. Females have gained acceptance in many traditionally male fields and are continuing to increase their numbers in these arenas. See Bethany Tarbell, *Day in the Life: Jockey*, SEVENTEEN, Nov. 2000, at 116 (describing the experiences of a female jockey).

327. See, e.g., Ernest Bailey, *Women City Workers Paid Less, Report Shows*, HOUSTON POST, Dec. 4, 1976, at 4A (reporting that a study showed that female employees for the City of Houston earned less than males for comparable work).

328. I coined the term "janegirl" to be used as the opposite of the common term "tomboy."

329. See Arriola *supra* note 19, at 439-45, 454-55.

330. See *Discrimination and Hate Crimes*, *supra* note 24; see also Green & Brinkin, *supra* note 27, at 44. Halloween is the exception to the danger of an MTF presenting as a woman. I remember the jealousy and envy at age seven when I was dressed as a cowboy and a neighbor boy got to dress as a girl with patent leather shoes. Halloween can easily be considered a celebrated event in the lesbian-gay-bisexual-transgender community, a time when gay men who do not dress in drag during the rest of the year come out to "strut their stuff." I know many closeted, heterosexual, married cross-dressers who come out for this event.

proves impossible.<sup>331</sup> Wearing anything frilly, the lightest cosmetics, or longer hair and fingernails is possible only if she is willing to pay a heavy social price of taunts, ostracism and violence.<sup>332</sup> An androgynous or punk look is also ridiculed.<sup>333</sup>

With few exceptions, a male exhibiting a feminine look and behavior falls outside of today's accepted gender variance. In the MTF's late teens or early twenties, testosterone generates a masculine face and form, facial hair and a deepened voice. Because estrogen is not present, the feminine form does not develop. This person presents herself and is accepted as a man, possibly queer, but a man. As a result, this person may not be certain of her gender identity or even deny being an MTF. In fact, most MTFs deny their core identity and try to prove themselves as men. Many MTFs cope with their identities through denial, secret cross-dressing, joining the military or a similar macho profession, or a combination of these. All the while she is curious and frustrated because this closeted existence does not allow her to experience any of her feminine qualities and because she has to hide by greatly exaggerating her masculine qualities.<sup>334</sup> This is a typical MTF story.<sup>335</sup>

*4. Transgenders Should Sue, but Not as Transgenders:  
Sue Instead as a Price Waterhouse<sup>336</sup> Woman Who "Fails  
to Act Like" a Woman or a Price Waterhouse Man Who  
"Fails to Act Like" a Man*

Very recently, the Ninth Circuit stated in *Schwenk v. Hartford*<sup>337</sup> that the court's judicial approach to cases such as *Holloway v. Arthur Andersen*<sup>338</sup> had been overruled by the logic

331. See Green & Brinkin, *supra* note 27, at 44.

332. This hostility is present in schools as well as workplaces. See Press Release, Gay & Lesbian Advocates & Defenders, Brockton Court Rules in Favor of Transgender Student (Oct. 12, 2000) (on file with author) ("[A] large number of transgender students face serious hostility from teachers and administrators who lack a basic understanding about gender identity.").

333. Cf. *25 Feared Victims of 'Suicide' Killers*, FLA. TIMES-UNION, Apr. 21, 1999, at A1, 1999 WL 9669468 (describing the ridicule felt by Columbine High School students in Colorado who did not fit in with their peers before the tragic 1999 shootings at the school); *Schools Panel Recommends Student Uniforms*, FLA. TIMES-UNION, Apr. 22, 1999, at A1, 1999 WL 9669586 (same).

334. I am, and I know of many other transgenders, who are Eagle Scouts, military veterans and engineers.

335. E.g., JUST EVELYN, *supra* note 43.

336. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

337. 204 F.3d. 1187 (9th Cir. 2000).

338. 566 F.2d. 659 (9th Cir. 1977). *Holloway* was the first in a trilogy of federal appeals court cases that ended any hope of Title VII coverage for transgenders in

and language of *Price Waterhouse*. *Schwenk* was a prison case involving a pre-operative transsexual inmate who alleged attempted rape against a guard.<sup>339</sup> The guard, in an attempt to obtain summary judgment, stated that even if the 1994 Gender Motivated Violence Act (GMVA)<sup>340</sup> did apply to men via its legislative history and via *Oncale v. Sundowner Offshore Services, Inc.*,<sup>341</sup> the GMVA did not apply to transsexuals in general.<sup>342</sup> The court in *Schwenk* pointed out, however, that the Supreme Court, in *Price Waterhouse*, “held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed ‘to act like a woman’—that is to conform to socially-constructed gender expectations.”<sup>343</sup> The court in *Schwenk* also noted that the Court’s decision in *Oncale* made clear that “same-sex discrimination is cognizable under Title VII under certain circumstances.”<sup>344</sup>

Continuing its *Price Waterhouse* analysis, the court in *Schwenk* went on to state that:

[I]n the mind of the perpetrator [the guard] the discrimination is related to the sex of the victim [the transsexual inmate]: here, for example, the perpetrator’s actions stem from the fact that he believed that the victim was a man who “failed to act like” one. Thus, under *Price Waterhouse*, “sex” under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII. Accordingly, the argument [of the guard] that the GMVA parallels Title VII and applies only to sex is in part right and in part wrong. The GMVA does parallel Title VII.

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employment sex discrimination cases. The other two were *Sommers v. Budget Marketing, Inc.*, 667 F.2d. 748 (8th Cir. 1982), which was not mentioned in *Schwenk*, and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d. 1081 (7th Cir. 1984), a case that was discussed in conjunction with *Holloway* in the *Schwenk* discussion. The court in *Schwenk* also cited *Dobre v. National Railroad Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993), a decision which relied on *Holloway*-type rulings and held that “perceived handicap” under Pennsylvania law did not cover transgenders.

339. *Schwenk*, 204 F.3d at 1192.

340. Gender Motivated Violence Act, 42 U.S.C. § 13981 (1994).

341. 523 U.S. 75 (1998).

342. *Schwenk*, 204 F.3d at 1195.

343. *Id.* at 1202.

344. *Id.* at 1201 n.13.

However, both statutes prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms "sex" and "gender" have become interchangeable.<sup>345</sup>

*Schwenk* guides us in the use of the *Price Waterhouse* and *Oncale* cases and announced that the *Holloway* case is no longer valid in the Ninth Circuit.<sup>346</sup> What should the strategy be, therefore, in applying the *Schwenk* analysis to future transgender employment discrimination cases? I suggest not suing as a transgender, but instead suing as a *Price Waterhouse* Woman who "fails to act like" a woman or a *Price Waterhouse* Man who "fails to act like" a man.<sup>347</sup>

For part-time FTM transgenders, a direct *Price Waterhouse* lawsuit is obvious. Sue as a *Price Waterhouse* Woman who "fails to act like" a woman. Likewise, a direct *Price Waterhouse* lawsuit should also be successful for all part-time MTF transgenders. This is especially true because the part-time MTF is usually only a cross-dresser off the job. Earlier, I stated that it is easier for women than men to cross gender variance lines in dressing. In the case of the part-time MTF who does not cross-dress at work, any firing will most likely result from an employer somehow learning that the employee cross-dresses while away from work. Such a plaintiff should be able to overcome any business necessity, legitimate business interest or customer distaste defense. Provided that the plaintiff does not have long hair, he should be able to use the Professor Marc Linder article<sup>348</sup> that relies on the Bona Fide Occupational Qualifications argument and the *Dictionary of Occupational Titles*<sup>349</sup> to help combat these defenses.<sup>350</sup> Business necessity,

345. *Id.* at 1202.

346. I would assume that *Sommers* and *Ulane* are also overruled in the Ninth Circuit.

347. For the cross-dressing, part-time portion of the transgender community, this strategy will probably be embraced. For the full-time, transsexual portion of the transgender community, however, this strategy will probably be resisted. Transsexual people have struggled all of their lives to finally be who they are, living in their corrected and full-time gender role. To file a lawsuit that takes the position that they are the gender they recently freed themselves from will take either strong-willed plaintiffs or plaintiffs who were so destroyed by their employers that they are extremely angry.

In my opinion, taking this strategy will be on par with the strategy taken by transgenders who call the restroom bluff and use the restroom they used prior to their gender correction. See *infra* Part V.C. Even so, from a legal strategy standpoint, I suggest that this strategy be tried in an effort to break through the barriers in employment discrimination.

348. See generally Linder, *supra* note 303 (analyzing dress codes and the rights workers have under Title VII and other statutory regimes).

349. *DICTIONARY OF OCCUPATIONAL TITLES* (4th ed. 1991).

350. See Linder, *supra* note 303, at nn. 145, 192-95.

legitimate business interest or customer distaste should not even come into play for a male employee who looks like a man during the entire workday. Therefore, the plaintiff should sue as a *Price Waterhouse* Man who "fails to act like" a man away from the job site.

For the full-time FTM transgender, the court's analysis of *Price Waterhouse* and Title VII in *Schwenk* will still apply. There are too many non-FTM women who wear men's clothing on a regular basis for it to be otherwise. FTMs should be able to sue as a *Price Waterhouse* Woman who fails to act like a woman.

Of the four permutations, the legal hurdle will still exist for full-time MTF transgenders. As discussed earlier, the MTF is the stereotypical transgender, and was the type of plaintiff in the *Holloway*, *Sommers* and *Ulane* cases.<sup>351</sup> These are the employees about whom most male employers usually feel the uneasiest. For these plaintiffs, applying the *Schwenk* analysis should be the same, as will the strategy of their having shorter hair in order to avoid any employer defense.<sup>352</sup>

In courts outside the Ninth Circuit, the full-time MTF transgender will require additional arguments to apply *Schwenk* and overcome the *Holloway*, *Sommers* and *Ulane* trilogy.<sup>353</sup> First, the plaintiff will want to show that society has changed since the 1977-1984 time period of those decisions. Much of what was presented in Part II of this Essay may be used to demonstrate these changes. Second, the plaintiff will want to point out the inconsistencies highlighted in of Part V.B of this Essay. Finally, in response to the argument that the thrust of the *Holloway*, *Sommers* and *Ulane* trilogy was based on the notion that Title VII prevented discrimination based on sex but was silent on the changing of sex,<sup>354</sup> the plaintiff will need to convince the courts that transsexuals should be covered by the term "sex" in Title VII. To do this, the plaintiff should use an

351. See *Ulane v. E. Airlines, Inc.*, 742 F.2d. 1081, 1083 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d. 748, 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d. 659, 661 (9th Cir. 1977).

352. When a plaintiff is involved in a lawsuit that is within a cutting edge area of law, why provide the court the easy out of granting summary judgment for the employer based on the men with long hair cases?

353. In *Schwenk v. Hartford*, 204 F.3d. 1187 (9th Cir. 2000), the court stated that the approach taken in *Holloway* and *Ulane* had been overruled by *Price Waterhouse*. *Id.* at 1201. *Schwenk* is a Ninth Circuit Court of Appeal's opinion and its holding is not mandatory authority in other circuits.

354. The fundamental problem is that it is seen as a *change*. Instead it should be seen as a *correction*. Also, as noted in *Schwenk*, before *Price Waterhouse*, the terms sex and gender were used differently. Now they are used in much the same way. See discussion and sources cited *supra* notes 59 and 107.

analogy Joanna McNamara offered in 1995, an analogy that to date has been overlooked. She wrote:

If a non-sabbatarian changes his religion to become a sabbatarian [someone who observes Saturday as the Sabbath] and is fired for making that change the courts have not had trouble finding that he was discriminated against on the basis of religious discrimination [rather than change of religion discrimination]. In the sabbatarian cases the courts have not focused on the question of whether or not Title VII was passed to protect a particular religion, no matter how radical or on the fringe it might be, but have focused on the general protection for religion. The courts should not focus on whether or not the change is specifically protected, but on whether the category is protected.<sup>355</sup>

This argument illustrates that the holdings of *Holloway*, *Sommers* and *Ulane* are merely more Cider House Rules that need to be removed.

Considering how the decision in *Schwenk* is written, people from all four of the transgender permutations who are fired solely for being transgenders should file a complaint with the EEOC.<sup>356</sup> Even if *Schwenk* is ultimately overruled or distinguished on this point and *Price Waterhouse* is deemed not to cover transgenders, the EEOC would then have valuable statistics on the magnitude of gender discrimination that exists in the workplace.

### *C. Restrooms: Call the Employer's Bluff and Then Call OSHA*

The issue of restrooms and criminal law, along with construction of facilities within business establishments, was previously discussed in detail. I articulated the issue in the context of my experience with many employers who want to retain transgendered employees through their transition or who want to hire an openly OUT transgender. Even if these employers may wish to use the Branch Rickey approach<sup>357</sup> to do what they feel is humane and economically advantageous, the employers may have already talked to friends, personnel staff

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355. See McNamara, *supra* note 48, at E-8 (citations omitted).

356. In *Schwenk*, the court recognized that Title VII prohibits discrimination because "one fails to act in the way expected of a man or woman." *Schwenk*, 204 F.3d at 1202.

357. See discussion *supra* notes 232-33.

and lawyers about concerns over the perceived obstacles. As a result of these talks, the employers may still balk at the restroom issue and either fire or refuse to hire transgenders.

Any transgender fired over the issue of which restroom to use,<sup>358</sup> however, has a legitimate complaint to file with OSHA.<sup>359</sup> Unfortunately, the Occupational Safety and Health Act<sup>360</sup> does not allow an employee to file a private cause of action.<sup>361</sup> Nonetheless, any formal complaint filed by transgenders fired over the restroom issue should be taken seriously, and it is important that such complaints are filed so OSHA is aware of the violation.<sup>362</sup>

When an employer balks at retaining a transitioning transgender, the employer frequently will not allow the employee to use the restroom intended for the new gender presentation. The employer will not fire the transitioning transgender, however, because a person who quits a job has less chance of winning unemployment compensation or successfully suing for wrongful discharge. This means that the transitioning employee must continue to use the restroom assigned to the previous gender presentation or quit the job. In my experience, almost all transgenders quit when faced with this scenario.

If the employer insists that the employee either use the previous gender restroom or quit, the transgender should call the employer's bluff and use that restroom. Experience proves that such a situation will not last long. Usually the employer will either fire the employee, opening the way for unemployment compensation and an OSHA complaint, or will find a reasonable ad hoc solution to accommodate the parties.<sup>363</sup>

358. This refers to firings based only on the restroom issue, when the firing is not otherwise illegally discriminatory by some local or state statute and does not breach the company's written procedures for a due process claim.

359. See sources cited *supra* notes 250-51; Occupational Safety & Health Act, 29 U.S.C. § 654(a) (1994) ("Each employer —(1) shall furnish to each of his employees . . . a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this chapter.").

360. Occupational Safety & Health Act, 29 U.S.C. §§ 651-78 (1994).

361. *Taylor v. Brighton Corp.*, 616 F.2d 256, 264 (6th Cir. 1980).

362. In an April 2000 telephone conversation, an OSHA Compliance Officer told me that the biggest problem with compliance is that employees do not file complaints. Although a transgender fired over the restroom issue will not be able to bring a private cause of action to recover for the violation of OSHA, it is important that the person notify the Occupational Safety and Health Administration of the violation.

363. Why am I so certain that this will be the reaction? In the early days of my transition, I was not a lawyer and able to understand exceptions in the restroom ordinance. When the local anti-cross-dressing ordinance was still in effect, I deliberately decided to continue to use the men's public restroom. In the first few mens' restrooms I

In summary, if an employer refuses to accommodate a transgender's restroom needs, the employee should call the bluff and agree to the employer's demand as to which restroom to use. If the location of that restroom is unreasonable, unclean, not properly maintained, if the locks on the stalls do not function, if the transgender employee is threatened with assault or assaulted, or if the employee is fired, the employee should file a complaint with OSHA and attempt to collect unemployment compensation. The employee may have a potential EEOC claim if the complaint is couched in terms of having been fired based on an OSHA complaint. When the transgender employee files the complaint, she should be sure to have a copy of *Schwenk* in her hands as well. By using these ideas to advance their position, transgenders will be able to overcome the hypocritical Cider House Rules imposed on them by law and society.

## VI. CONCLUSION

Though the climate transgenders face in society is slowly beginning to improve, Chief Justice Phil Hardberger's decision in *Littleton v. Prange*<sup>364</sup> serves as a stark reminder that hypocritical Cider House Rules remain firmly in place. Chief Justice Hardberger utilized one of these hypocritical rules and held that a transgender could not legally change her gender<sup>365</sup> because it had been "immutably fixed by our Creator at birth."<sup>366</sup> As long as these absurd rules continue to exist, transgenders must challenge them and attempt to overcome their absurdity.

The business community is beginning to work with transgendered employees. Hopefully that trend will continue. Reasonable dress codes and ad hoc solutions to restroom issues allow many transgendered people to remain employed rather than be turned out on the street and seeking unemployment compensation. Congress may eventually change its stance and recognize that the transgender community needs to be included

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entered during those earliest days of my transition, the response was an audible "yipe!" and a stampede out the doors.

364. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), *cert. denied*, 69 U.S.L.W. 3229 (U.S. Oct. 2, 2000) (No. 00-25).

365. *Id.* at 231.

366. *Id.* at 224.

in protection against employment discrimination.<sup>367</sup> Until that change occurs, implementation of the previously unused strategies discussed in this Essay may encourage uncooperative employers to appropriately deal with their transgendered employees.

The ability of transgenders to legally enter into same-sex marriages in Ohio and Texas<sup>368</sup> is partial community compensation for the anti-transgender laws and rulings—the Cider House Rules—that exist in those same states. These hypocritical rules deny transgenders the right to opposite-sex marriages and destroy the transgendered community's definition of sex. As an in-your-face retaliation against those Cider House Rules, these transgender same-sex marriages are causing the media to take favorable notice of the situation<sup>369</sup> and bring it to the attention of the public.

In the near future, more OUT transgenders will seek to assert their legal rights,<sup>370</sup> more OUT transgender law students will receive licenses and begin to litigate,<sup>371</sup> more transgendered litigators will come OUT,<sup>372</sup> and more litigators in general will become familiar with OUT transgendered people themselves.<sup>373</sup> If they use the transgender political and legal history and strategies as described in this Essay, coupled with the guiding principles of the *International Bill of Gender Rights*, an increasing number of Cider House Rules will be challenged and overcome. It is hoped that more people will recognize that the *International Bill of Gender Rights* is a quest for *all* gender freedoms.

367. This comment refers to the need for transgenders to be included in Title VII, 42 U.S.C. §§ 2000e-2000e-17 (2000), and the Employment Non-Discrimination Act H.R. 2355, 106th Cong. § 1 (1999).

368. See discussion and sources cited *supra* note 278.

369. After the notice of the Wicks' marriage became public, see Ackerman, *supra* note 202, I was inundated with a media feeding frenzy for several weeks. As a result of this media attention, I have over three hours of audio tape from a variety of radio talk shows and a large file of newspaper clippings from around the nation. Neither my clients nor I were treated badly by any of the media.

370. I have seen a steady increase in requests for legal help on my Phyllabuster internet e-mail list.

371. I hear from new OUT law students at a slow but increasing rate.

372. By my estimation, there were more OUT transgender litigators as workshop panelists at the Lavender Law Conference 2000 than ever before.

373. Christie Lee Littleton told me that she felt that her initial attorneys were very uncomfortable around her after she revealed to them that she was transgendered.

## APPENDIX A

GID AND THE TRANSGENDER MOVEMENT: A JOINT STATEMENT  
BY THE INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND  
EMPLOYMENT (ICTLEP) AND THE NATIONAL CENTER FOR  
LESBIAN RIGHTS (NCLR)<sup>374</sup>

Gender Identity Disorder (GID) is listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association (APA). TransGendered is an inclusive term describing all persons (including transsexual people) within this community. Transsexual people seek to live full-time in the corrected gender role, usually with hormone therapy, name change and gender identification correction on documents and the option of surgical interventions.

The existence of GID as a psychiatric diagnosis raises complicated and important issues. Unfortunately, much of the discussion around these issues has become polarized. In the past two years, both ICTLEP and NCLR (along with other LGBT/lesbiagatr—groups) have been criticized by some transsexual activists who fear that we are advocating an immediate and wholesale elimination of GID, without regard for the potential impact on access to hormones and surgeries, reimbursement and other issues. Given the importance of the issues at stake, we want to correct this misconception and to provide those who are interested with a joint statement on GID.

Children and adults have different legal and practical relationships to GID. As minors, children are under the legal power of parents or other adults. Children diagnosed with GID have little or no control over their treatment, which typically consists of behavior modification and counseling to eliminate the child's cross-gender behavior and identification. GID is used to identify so-called "pre-homosexual" and "pre-transsexual" children and youth, with the long-term goal of preventing adulthood transsexualism or homosexuality. Most children diagnosed with GID grow up to be lesbian, gay or bisexual, [and] a smaller number grow up to be transsexual. In addition to the damage inflicted on individual youth, right-wing groups have appropriated the concept that gay and transgendered youth suffer from a psychiatric disorder. These groups are exploiting GID to oppose legal protections for lesbigatr-questioning youth,

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374. Shannon Minter & Phyllis Randolph Frye, *GID and the Transgender Movement*, in FIFTH ICTLEP, *supra* note 32, at app. A, A-1 to A-2.

particularly in public schools, by arguing that lesbigr-questioning youth need "treatment" rather than civil rights.

In contrast, the majority of adults diagnosed with GID are self-identified transsexuals who usually must receive the diagnosis in order to get hormones, surgeries, and in some cases reimbursement for transition-related care. GID has also been used to gain legal protections for transgendered people in some jurisdictions, under the aegis of laws prohibiting discrimination against people with psychiatric disabilities. Because we understand these realities, **WE DO NOT ADVOCATE** an immediate, blanket elimination of GID in a vacuum, without an alternative means of ensuring continued access to and reimbursement for hormones and surgeries.

We believe that the best long-term solution to this dilemma is to eliminate GID as a psychiatric disorder and to redefine transsexualism as a medical condition. The existing system of access to transition-related health care is grossly inadequate and unfair. It vests psychiatrists with far too much power over access to hormones and surgeries. It denies our right to autonomy and self-definition. And it excludes the vast majority of transsexual people from any hope of reimbursement for transition-related care. We believe that shifting the definition of transsexualism from a psychiatric to a medical status will help to alleviate these problems. We also recognize that achieving this goal will be a difficult task. As a first step, it is essential for transgendered people to demand more accountability from the psychiatric professionals who wield so much power over our lives.

We also believe that transgendered people need and deserve explicit civil rights protections. For a number of reasons, we do not believe that the disability rights model is either the only or the most effective way to achieve this goal. First, GID is explicitly excluded from protection in the Americans with Disabilities Act (ADA) and in the Federal Rehabilitation Act, as well as from most state disability laws. Second, legal protections based on GID as a psychiatric disability have some serious drawbacks, not the least of which is the perpetuation of the stereotype that transgendered people are inherently unstable or disturbed. Accepting the idea that we are mentally ill in order to gain protection on the basis of disability will not, for example, protect transgendered parents who are denied custody or the right to adopt because courts believe that a parent with GID is harmful or "confusing" to children. Even under the ADA and

similar laws, the extent to which employers must accommodate people with mental illnesses is highly contested and unclear.

Third, the disability model invests mental health professionals with too much arbitrary and unchecked power over our lives. In the prisons, for example, this drawback has already had very negative consequences. While some transsexual inmates have won legal cases holding that transsexuals have a right to treatment based on a diagnosis of GID, courts have consistently deferred to the professional judgment of prison psychiatrists and held that psychotherapy, tranquilizers, and even forced testosterone "therapy" for self-identified female transsexuals are sufficient to satisfy this legal right. Under the psychiatric disability model, the ultimate authority to define our identities will always belong to psychiatrists, not to us.

Finally, the strongest argument against exclusive reliance on a disability model is the growing number of jurisdictions that prohibit discrimination against transgendered people without reference to GID. These include Minnesota, San Francisco (CA), Santa Cruz (CA), Seattle (WA), Cedar Rapids (IO) [sic], Minneapolis (MN), and St. Paul (MN). At the international level, the European Court of Justice recently held that employment discrimination against transsexual people violates the fundamental human right to be free of discrimination based on sex. We believe these victories are the beginning of a new era in transgendered civil rights, and solid evidence that we have the potential to move beyond the disability model to a more comprehensive civil rights movement.

SHANNON MINTER  
STAFF ATTORNEY, NCLR

PHYLLIS RANDOLPH FRYE  
EXECUTIVE DIRECTOR, ICTLEP

## APPENDIX B

THE INTERNATIONAL BILL OF GENDER RIGHTS<sup>375</sup>*The Right to Define Gender Identity*

All human beings carry within themselves an ever-unfolding idea of who they are and what they are capable of achieving. The individual's sense of self is not determined by chromosomal sex, genitalia, assigned birth sex, or initial gender role. Thus, the individual's identity and capabilities cannot be circumscribed by what society deems to be masculine or feminine behavior. It is fundamental that individuals have the right to define, and to redefine as their lives unfold, their own gender identities, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role.

*Therefore, all human beings have the right to define their own gender identity regardless of chromosomal sex, genitalia, assigned birth sex, or initial gender role, and further, no individual shall be denied Human or Civil Rights by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role.*

*The Right to Free Expression of Gender Identity*

Given the right to define one's own gender identity, all human beings have the corresponding right to free expression of their self-defined gender identity.

*Therefore, all human beings have the right to free expression of their self-defined gender identity; and further, no individual shall be denied Human or Civil Rights by virtue of the expression of a self-defined gender identity.*

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375. *International Bill of Gender Rights*, in FIFTH ICTLEP, *supra* note 32, at 7-9.

*The Right to Secure and Retain Employment and to Receive Just Compensation*

Given the economic structure of modern society, all human beings have a right to train for and to pursue an occupation or profession as a means of providing shelter, sustenance, and the necessities and bounty of life, for themselves and for those dependent upon them, to secure and retain employment, and to receive just compensation for their labor regardless of gender identity, chromosomal sex, genitalia, assigned birth sex, or initial gender role.

*Therefore, individuals shall not be denied the right to train for and to pursue an occupation or profession, nor be denied the right to secure and retain employment, nor be denied just compensation for their labor, by virtue of their chromosomal sex, genitalia, assigned birth sex, or initial gender role, or on the basis of a self-defined gender identity or the expression thereof.*

*The Right of Access to Gendered Space and Participation in Gendered Activity*

Given the right to define one's own gender identity and the corresponding right to free expression of a self-defined gender identity, no individual should be denied access to a space or denied participation in an activity by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex, or initial gender role.

*Therefore, no individual shall be denied access to a space or denied participation in an activity by virtue of a self-defined gender identity which is not in accord with chromosomal sex, genitalia, assigned birth sex or initial gender role.*

*The Right to Control and Change One's Own Body*

All human beings have the right to control their bodies, which includes the right to change their bodies cosmetically, chemically, or surgically, so as to express a self-defined gender identity.

*Therefore, individuals shall not be denied the right to change their bodies as a means of expressing a self-defined gender identity; and further, individuals shall not be denied Human or Civil Rights on the basis that they have changed their bod[i]es cosmetically, chemically, or surgically, or desire to do so as a means [of] expressing a self-defined gender identity.*

#### *The Right to Competent Medical and Professional Care*

Given the individual's right to define one's own gender identity, and the right to change one's own body as a means of expressing a self-defined gender identity, no individual should be denied access to competent medical or other professional care on the basis of the individual's chromosomal sex, genitalia, assigned birth sex, or initial gender role.

*Therefore, individuals shall not be denied the right to competent medical or other professional care on the basis of chromosomal sex, genitalia, assigned birth sex, or initial gender role, when changing their bodies cosmetically, chemically, or surgically.*

#### *The Right to Freedom from Involuntary Psychiatric Diagnosis and Treatment*

Given the right to define one's own gender identity, individuals should not be subject to involuntary psychiatric diagnosis or treatment.

*Therefore, individuals shall not be subject to involuntary psychiatric diagnosis or treatment as mentally disordered, dysphoric, or diseased on the basis of a self-defined gender identity or the expression thereof.*

#### *The Right to Sexual Expression*

Given the right to a self-defined gender identity, every consenting adult has a corresponding right of free sexual expression.

*Therefore, no individual's Human or Civil Rights shall be denied on the basis of sexual orientation; and further, no individual shall be denied Human or Civil Rights for expression of a self-defined gender identity through private sexual acts between consenting adults.*

*The Right to Form Committed, Loving Relationships and Enter into Marital Contracts*

Given that all human beings have the right to free expression of self-defined gender identities, and the right to sexual expression as a form of gender expression, all human beings have a corresponding right to form, committed loving relationships with one another, and to enter into marital contracts, regardless of their own or their partner's chromosomal sex, genitalia, assigned birth sex, or initial gender role.

*Therefore, individuals shall not be denied the right to form committed loving relationships with one another or to enter into marital contracts by virtue of their own or their partner's chromosomal sex[,] genitalia, assigned birth sex or initial gender role, or on the basis of their expression of a self-defined gender identity.*

*The Right to Conceive, Bear, or Adopt Children; the Right to Nurture and Have Custody of Children and to Exercise Parental Capacity*

Given the right to form a committed loving relationship with another, and to enter into marital contracts, together with the right to express a self-defined gender identity and the right to sexual expression, individuals have a corresponding right to conceive and bear children, to adopt children, to nurture children, to have custody of children, and to exercise parental capacity with respect to children, natural or adopted, without regard to chromosomal sex, genitalia, assigned birth sex, or initial gender role, or by virtue of a self-defined gender identity or the expression thereof.

*Therefore[,] individuals shall not be denied the right to conceive, bear, or adopt children, nor to nurture and have custody of children, nor to exercise parental capacity with respect to*

*children, natural or adopted, on the basis of their own, their partner's, or their children's chromosomal sex[,] genitalia, assigned birth sex, initial gender role, or by virtue of a self-defined gender identity or the expression thereof.*