THE TRANSGENDER MARRIAGE DILEMMA

Julian N. Larry[*]

Acknowledgments[**]

Foreword

A good transgender friend of mine suggested that discussing gender and sex with other transgender and gender-variant people is akin to a refreshing exercise in philosophic discourse. Discussing the gender/sex distinction with cisgender people, by comparison, can tempt one to reach for crayons and construction paper. The sentiment, however impolite, reflects many trans people's encounters while fighting for recognition and basic rights in a society that is, at a fundamental level, often both uninformed and misinformed about them.

I will be frank. A reader who lacks an open mind and the willingness to re-evaluate their firmly-held notions surrounding sex and gender will take nothing from this paper. I will be more frank: a reader who does not seek from these pages a deeper understanding of transgender people and the legal issues we face may as well not waste their time reading this article. The following pages explain a devilishly complex legal situation produced by Americans' evolving understanding and perception of sex and gender. Such readers will only find this experience frustrating and uninformative, or worse mis-informative—I hope to avoid that, for all our sakes.

Readers who lack familiarity with the societal issues confronting trans people, despite earnestly desiring such understanding, will likely find this article a tedious one that requires active reading. I endeavored not to write for

---

[*] J.D., 2017, Vanderbilt Law School; B.A., 2014, Vanderbilt University (English/History Interdisciplinary Studies; minors in Spanish, Film Studies, and Philosophy). Law Clerk, Transgender Law Center (Summer 2015). Trans man extraordinaire (1993-_).

[**] This contribution to the corpus of literature surrounding non-cisgender individuals would never have come to fruition without several players. Professor Beverly Moran of Vanderbilt Law, who oversaw my writing process, was invaluable to this work. I owe Professor Yesha Yadav, also of Vanderbilt, a great debt of gratitude for her unparalleled influence on my thought. Without Professor Terry Maroney's and Ms. Samiyyah Ali's encouragement, I seriously doubt this piece would ever have been submitted. Provost Carolyn Dever at Dartmouth College has my eternal gratitude for cultivating my boundless curiosity.

readers who already know the difference between a drag queen or king and a trans person (or a butch lesbian and a trans man), to the exclusion of readers who wish to become trans allies but do not know where to start learning more about trans people and our culture. Engaged readers will not only grasp the distinction between sex and gender, but will also inform themselves of a trend of cases that invalidate marriages between transgender and cisgender people on bases, the propriety of which American society must question.

Abstract

I'd just finished my internship at the Transgender Law Center and returned to my birthplace of Houston, Texas, the day *Obergefell*[3] brought marriage equality to America. One would think that the historic *Obergefell* decision permits couples (assuming no family relation or age-of-consent issues) who comply with applicable marriage-related State laws and county procedures[4] to enter a valid marriage, regardless of their sex. That is a basic premise of marriage equality—that people of the same sex should undergo the same process and degree of difficulty to obtain an effective marriage license as different-sex couples do.

However, sex can still be used to invalidate marriages of transgender[5] individuals married before *Obergefell*. The reality is that while the advent of marriage equality made subsequent same-sex marriages valid, the intersection of the legal principle of retroactivity and courts' methods of interpreting which facts determine a marriage's validity can keep some married trans people decidedly unequal, even post-*Obergefell*. The problem, at its core, is entirely one of timing.

This issue can be approached by considering it as resting on two axes: the *Obergefell* (or same-sex marriage) axis and the legal-sex axis (i.e., the trans person's successful amendment of the sex reflected on their legal documents).[6] Put simply, the validity of one axis overrides the absence of the other axis and would, in a perfect world, permit a trans individual to enter a legal marriage

3. Obergefell v. Hodges, 135 S. Ct. 2584, 2584-85 (2015).

4. In many states, the parties must appear before the clerk with applicable fees and documents such as a driver's license or birth certificate that verify the parties' age, obtain a marriage license from the clerk and perform a wedding ceremony within a given time frame of receiving the license (typically 30-90 days), then sign the marriage license and submit it to the clerk. The clerk will then return a marriage certificate that the couple should keep. *See*, *e.g.*, WIS. STAT. §§ 765.09(3), 765.12(1)(a) (2015-16); 750 ILL. COMP. STAT. ANN. 5/202, 5/203 (LexisNexis 2018).

5. David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51, 61 n. 1 (2011) ("Since about 1995, the meaning of *transgender* has begun to settle, and the term is now generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.").

6. This government view of one's sex culminates in the gender marker, which is the "M" or "F" that appears next to the "sex" category on one's driver's license, passport, social security card, etc.

with a cisgender person.[7] For example, in the post-*Obergefell* world, a trans person can marry a cis person because same-sex marriages are now legal throughout the U.S. (the *Obergefell* axis at work). However, even without *Obergefell*, a trans person who amended their legal documents to reflect their gender identity would still be able to marry a cis person, as that would qualify as a "traditional" different-sex marriage (the legal-sex axis).

A trans person can prevail the *Obergefell* axis (falling back on the legality of same-sex marriages) by having married after the *Obergefell* decision. It follows then that, applying the pervasive legal principle of retroactivity, the *Obergefell* axis only applies to those couples who married after July 25, 2015. Because same-sex couples in the U.S. won the right to marry in 2015, a trans person can still marry someone with the same sex they were assigned at birth because same-sex couples may now marry. When the legal-sex axis intersects with the *Obergefell* axis (e.g., a trans person who both updated their gender marker and marries a cisgender individual of the same sex the trans individual was assigned at birth post-*Obergefell*), another valid marriage results. The *Obergefell* axis allows same-sex marriages, and the trans person has legally updated their gender marker and married someone of the opposite sex—therefore, the marriage is valid either way.[8]

However, if the couple has neither the legal-sex axis nor the *Obergefell* axis on their side (the couple having married pre-*Obergefell* without the trans partner having updated their gender marker in a State that statutorily authorizes such amendments), their marriage may be held invalid. This article illuminates precedent demonstrating that successfully altering the legal-sex axis, even when complemented by the *Obergefell* axis (the fact that same sex couples may now marry), surprisingly does not compel the validation of marriages of trans people married before *Obergefell* because of either (1) federal and State legislatures' silence regarding, or denial of, trans peoples' attempts to amend their legal sex or (2) judicial interpretations of legislative ambiguity in statutes that could allow trans people to amend their legal sex, and judicial refusal to grant Full Faith and Credit to amendments of legal sex effected in other jurisdictions.

This article sheds light on a "perfect storm" in the legal system that traps some trans individuals in highly unfortunate situations. I will take this space to explain how the intersection of the Full Faith and Credit Clause; retroactivity; inconsistent, and often conflicting, State and federal statutory standards for amending one's legal sex; and practical fiscal and informational constraints on

7. This article only addresses heterosexual couples in which one partner is transgender and one partner is cisgender, although a myriad of different combinations are possible. The same complication addressed here could also apply to couples in which one or both partners are bisexual and one is transgender. This issue would not apply to a homosexual couple in which one partner is trans; it is possible that a judge would find that, despite the fact that the couple are gay, the trans partner retains the sex they were assigned at birth, making the two a straight couple in the end.

8. I speak of gender in binary terms to simplify the analysis.

many trans people's resources create grave impacts on trans folks' everyday life.

TABLE OF CONTENTS

I. INTRODUCTION 27
II. EXEMPLUM GRATIS 27
III. THE BENEFITS OF MARRIAGE AND DEFINING "TRANSGENDER" 30
A. The Obergefell Axis 30
1. *U.S. v. Windsor* 30
B. The Legal-Sex Axis 32
1. Trans People and the Sex/Gender Distinction 32
2. Medical Transitions: Hormones, Surgeries, and Any Combination Thereof 34
C. Legal Transitions: Amending One's Legal Documents to Reflect Transition Sex 36
IV. MARRIAGE AND THE JUDICIAL SYSTEM 38
A. Determining a Marriage's Validity: The Retroactivity Problem 38
B. Implications for Trans People Marrying 39
C. Judicial Views of Attempts to Transition 40
V. PRE-OBERGEFELL TRANS MARRIAGE CASES 41
A. Medical Transitions and the Immutability of Sex 42
1. *Corbett v. Corbett* 42
2. *Anonymous v. Anonymous* 42
3. *B. v. B.* 44
4. *M.T. v. J.T.* 45
B. Weighing the Legal Transition in its Own Right 46
1. *In Re Ladrach* 46
2. *Littleton v. Prange* 47
C. The Full Faith and Credit Clause for Legal Transitions Effected Elsewhere 49
1. *In re Estate of Gardiner* 50
2. *Radtke v. Misc. Drivers & Helpers Union* 51
3. *In re Estate of Araguz* 53
VI. RETROACTIVITY AND THE DECLARATION OF INFORMAL MARRIAGE 54
A. Retroactivity, "Make Whole" Relief, and Obergefell 55
B. Declaration of Informal Marriage 57
C. Need for Federal Legislation 59

I. INTRODUCTION

This article sprouted from an entirely selfish inquiry. In the Spring of 2014, I was a sprightly college senior preparing for university commencement. A friend and I were studying in our favorite coffee shop, bemoaning the unfortunate state of our love lives when he asked me a peculiar question. He peered at me over his coffee cup and ventured, "Can you even get married? Because you're. . .you know." My eyes flitted about as several old accusations came to mind. "Overly independent? Stubborn?" I prompted.

"No. I meant because you're transgender."

My friend's lack of tact aside, I had to pause before answering. I had no idea. The U.S. did not recognize same-sex marriages at the time, and I had not updated the gender marker on my legal documents. Presuming that updating my legal gender to "male" would lay the issue to rest, I forgot about it entirely. Now, a bit older and hopefully more than a bit wiser, I've taken up the topic once more.

II. EXEMPLUM GRATIS

Say a trans man,[9] such as myself, updated the legal sex on his identifying documents and married a cisgender woman back in 2014. We went through the motions of having a validly-officiated ceremony and obtaining a marriage certificate from our county clerk, and now consider ourselves married in the eyes of the law. Let's say my wife and I also have a child (which she will carry and I will subsequently adopt) and spend a few happy years together. Unfortunately, we later decide that our marriage, like all good things, must come to an end.

As we headed into child custody proceedings, I would discover that I faced a much larger problem than just my imploding matrimony. A judge may take it upon herself to decide that a trans lad like me cannot simply change the sex I was assigned at birth. "How silly," the judge might say, "Why, it's right there on this birth certificate in indelible ink, next to the line that reads 8 pounds 4 ounces! No, sex is immutable. This person is, for all intents and purposes, a female."[10]

---

9. It may be tempting to think that a transgender man is an individual who was assigned to the male sex at birth but identifies as female. In reality, it is just the opposite. A transgender man is a person who was assigned "female" at birth but identifies as male. Think of "transgender" as just another adjective. A trans man is just another type of man—just like tall men, freckled men, athletic men, and well-dressed men are.

10. Some older cases base the decision to invalidate legal transitions on the basis of a trans person's inability to reproduce in the same fashion as a cisgender person of the same gender. *See* B. v. B., 355 N.Y.S.2d 712, 717 (Sup. Ct. Kings Cty. 1974).

Since my soon-to-be-ex-wife and I married before *Obergefell*, the judge would deem us to be a same-sex couple who married in a State that did not recognize marriage equality at the time. Unbeknownst to my wife and me, we were simply never validly married due to this *ex post* interpretation of marriage validity. My ex-wife would presumably then get custody of our child.[11]

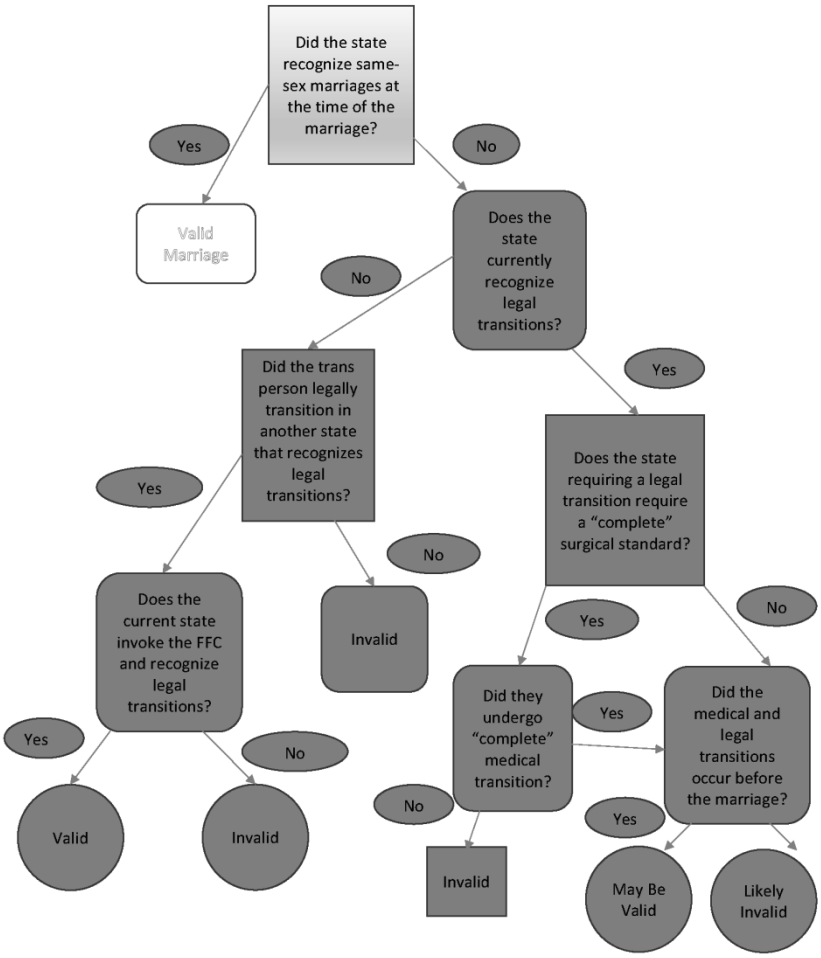
"But I transitioned!" I would cry to the high heavens. "How on Earth could this judge rule my wife and I were a same-sex couple when we look nothing of the sort? I present as a man—I dress in "men's" clothes, I even have a meticulously-groomed beard.[12] And what of *Obergefell*? Even if this judge declared me a female as a matter of fact, does *Obergefell* not permit me to have wed someone of the same sex?" The unfortunate reality is that I would have no recourse. Through this work, I explain why this result arises and question whether it makes sense.

Article III explores the public policy advantages of marrying and frames the definition of gender identity within the medical and legal contexts. Article IV explores the effect that retroactivity, or rather the lack thereof, has on the trans marriage dilemma. Because American civil law avoids retroactivity of legal decisions, *Obergefell* is of no help to trans people who married cis partners before *Obergefell*. Article V surveys past jurisprudence on trans marriages and situates the cases into separate categories, according to the dominating rationale upon which they were decided. To be brief, case law up to the point of this publishing have invalidated trans marriages as pre-*Obergefell* same-sex marriages, even if the trans person amended their legal documents. Article VI describes potential routes around the trans marriage dilemma, such as the declaration of informal marriage and constitutional arguments, and call for consistent federal legislation on legal transition requirements. Ultimately, I find, those solutions are unsatisfactory.

The following page offers a roadmap of the topic this article discusses, based on the results of case law beginning in 1970.

11. Some courts hold that since my wife carried the child and another man provided genetic material, I would simply not be a parent as a matter of family law. This is the same situation in which some gay couples find themselves post-separation. *See, e.g.*, Peter Nicolas, *Backdating Marriage*, 105 CAL. L. REV. 395, 418, 421 (2017).

12. I do not dare imply that undertaking a medical transition or "passing" makes one's trans experience more legitimate than choosing not to do either. My example speaks of my physical qualities only.


Did the state recognize same-sex marriages at the time of the marriage?
Yes
No
Valid Marriage
Does the state currently recognize legal transitions?
No
Yes
Did the trans person legally transition in another state that recognizes legal transitions?
Yes
No
Does the current state invoke the FFC and recognize legal transitions?
Invalid
Yes
No
Valid
Invalid
Does the state requiring a legal transition require a "complete" surgical standard?
Yes
No
Did they undergo "complete" medical transition?
Yes
Did the medical and legal transitions occur before the marriage?
No
Yes
Invalid
May Be Valid
Likely Invalid

III. THE BENEFITS OF MARRIAGE AND DEFINING "TRANSGENDER"

A. The Obergefell Axis

Why do couples want to marry at all? Like many monogamous societies, the United States have historically attached a special significance to the institution of marriage and granted various advantages to married couples.[13] Unmarried couples are ineligible for joint federal and state tax returns, gift and estate tax benefits, Social Security and Disability Insurance benefits, and inheritance rights.[14]

Married status also affords couples several other benefits: the rules of intestate succession, hospital access, medical decision-making authority, adoption rights, birth and death certificates, worker's compensation benefits, health insurance, and child custody and visitation rules.[15] Marriage equality supporters cited the denial of these benefits to same-sex couples in the litigation that eventually guaranteed same-sex couples access to the same benefits afforded by state recognition.[16] I hope to use these rationales, as put forth in the marriage equality litigation, to shed light on how trans people left in the cold by these policies are disadvantaged in concrete ways.

1. *U.S. v. Windsor*[17]

Under the Internal Revenue Code, a "surviving spouse" may escape taxation on "any interest in property which passes or has passed from the decedent to his surviving spouse."[18] However, the IRS levied a $363,053 estate tax on Mrs. Edie Windsor on the ground that the federal Defense of Marriage Act (DOMA) defined "marriage" as being between two opposite-sex partners, thereby preventing any same-sex spouse from qualifying as a "surviving

13. U.S. v. Windsor, 133 S. Ct. 2675, 2681 ("The State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."); A. Wilson, *Same-Sex Marriage: A Review Symposium on Diversity and the Law*, 17 WM. MITCHELL L. REV. 539, 543 (1991).

14. Wilson, *supra* note 13, at 546; Editors, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193, 198 (1979) (discussing married couples' eligibility for many entitlements, including, special tax treatment, Social Security benefits, survivors' benefits upon death of a veteran spouse, benefits of intestate succession, favorable immigration laws, property and support rights upon divorce, and, often times, special insurance benefits and lower insurance rates).

15. Obergefell v. Hodges,135 S. Ct. 2584, 2601.

16. *Id.* at 2590 ("[S]ame-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable.").

17. *Windsor*, 133 S. Ct. at 2675 (decided exactly two years before *Obergefell*, to the day).

18. *Id.* at 2683 (citing 26 U.S.C. § 2056(a) (2018)).

spouse" within the meaning of that Code provision. Ms. Windsor brought suit for a refund of that estate tax and thereby challenged the constitutionality of DOMA.[19]

To the average American taxpayer, Ms. Windsor's stakes were high: a $363,000 bill from the IRS based on the theory that she entered an invalid same-sex marriage. At the risk of stating the obvious, Ms. Windsor could not solve this issue by remarrying.

Similarly, the *Obergefell* litigation included two female nurses who adopted three children.[20] Since Michigan does not permit same-sex couples to adopt, their three children would be treated as only having one parent.[21] The Court observed that if tragedy were to befall either of the women, the surviving spouse would be left with no legal rights regarding the children that Michigan law prevented her from adopting.[22]

The *Obergefell* Court held that marriage is a fundamental right of same-sex couples that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, may not be deprived.[23] The Court also held that the Fourteenth Amendment requires States to, not only license same-sex marriages within their own borders, but also recognize same-sex marriages performed in other States.[24] But the Court did not state, and the opinion does not purport to hold, that this momentous holding was intended to be retroactive—same-sex couples married before the *Obergefell* holding may not turn to that decision to protect their union.

I pause here to emphasize the fact that although some trans couples who married pre-*Obergefell* can simply remarry and move forward with comparatively few serious repercussions, others will find themselves in a more complex predicament. They may find themselves in court over a tax issue, a child custody issue, or any of the multitude of family law situations that arise in everyday life. Like Ms. Windsor, their only option will be to litigate the matter. Should they find themselves at the mercy of a judge who views them as a same-sex couple who married before *Obergefell*, the results could be disastrous.

In fact, Professor Peter Nicholas at the University of Washington argues that same-sex couples have a constitutional right bestowed by *Obergefell* to

19. *Id.*

20. *Obergefell*, 135 S. Ct. at 2595.

21. *Id.* at 2595, 2601 ("That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State."). Trans litigants' ability to procreate as a cisgender person can form the basis of several adverse results. B. v. B., 355 N.Y.S.2d 712, 717 (Sup. Ct. Kings Cty. 1974); M.T. v. J.T., 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976).

22. *Obergefell*, 135 S. Ct. at 2595. *See also* Patricia Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1327 n.30 (1998) ("The non-biological second mother is rarely recognized as a parent for purposes of seeking visitation with a child she has raised jointly with the biological mother.").

23. *Obergefell*, 135 S. Ct. at 2597-99.

24. *Id.* at 2607-08.

have their marriages "backdated" in order to reflect the actual length of their relationships, despite the fact that they were prevented from marrying legally, in order to take advantage of the federal and State law benefits that require minimum absolute lengths of valid marriage in order to qualify.[25] Professor Nicholas also catalogues various legislative, administrative, and judicial efforts to backdate same-sex civil unions and ceremonial marriages to more authentic dates that reflect when the relationship actually began.[26] Article III fleshes out Professor Nicholas's argument and examines the necessity of a constitutional argument in addressing the trans marriage dilemma.

B. The Legal-Sex Axis

This section addresses what it means for a person to be transgender and on what terms States permit trans people to amend the sex noted on their legal documents to reflect their gender identity. As we will see, the discrepancies in how courts interpret State legislation governing amendments to legal documents created significant circuit splits on whether or not trans people could enter valid marriages with cis people in many States. Further, some courts' denial of Full Faith and Credit to trans people who successfully alter their legal documents in their home States but married in other States that do not recognize such amendments only complicates the issue.

1. Trans People and the Sex/Gender Distinction

A confusing point for many people is how sex differs from gender and gender identity. The distinction is one between physiology and psychology.[27]

Sex is a physical characteristic that is determined at birth, based almost exclusively on what genitalia a physician sees when an infant exits the womb.[28] The physician's determination that the child is either male or female is memorialized on their birth certificate with a gender marker reading "M" or

25. Nicolas, *supra* note 11, at 396, 398.

26. *See id.* at 404-17.

27. *See* American Psychological Association, *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, APA, https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf [https://perma.cc/QB8T-AFSL] (last visited Apr. 20, 2018).

28. *See* Susan Donaldson James, *Intersex Babies: Boy or Girl and Who Decides?*, ABC NEWS (Mar. 17, 2011), http://abcnews.go.com/Health/intersex-children-pose-ethical-dilemma-doctros-parents-genital/story?id=13153068 [https://perma.cc/TXT3-Z43N] (discussing how Jim Bruce's delivering physician saw his "ambiguous" genitalia at birth, removed his penis, and prescribed him "female hormones," despite the fact that he has XY chromosomes. Bruce transitioned back into a man after years of battling depression, but that initial procedure sterilized him).

"F."[29] For most people, that initial determination lines up with their gender identity. For others, however, that initial determination does not align with how they see themselves.

Gender identity, on the other hand, is what gender a person perceives themselves to be, regardless of what sex they were assigned at birth.[30] Everyone has a gender identity. For people who think "I'm a girl" and have female genitalia, or who think "I'm a boy" and have male genitalia, their gender identity aligns with their sex. We call such people "cisgender" or "cis" due to that alignment.[31] Some cis people find the concept of gender identity difficult to grasp, because they have not noticed any incongruence between their sex and their gender identity—they simply have not noticed it, because everything seems to be in order.

On the other hand, for people who think "I'm a girl" and have male genitalia, or who think "I'm a boy" and have female genitalia, their gender identity is at odds with the sex they were designated at birth.[32] We call those people "transgender" or "trans"[33] due to that misalignment.[34] Some trans people, though certainly not all, decide to undergo medical intervention to bring their outward appearance and secondary sex characteristics[35] into closer alignment with their gender identity—they decide to "transition."

---

29. *See generally* NAT'L CTR. FOR HEALTH STATISTICS, U.S. PUB. HEALTH SERV., DEP'T OF HEALTH & HUMAN SERV., HOSPITALS' AND PHYSICIANS' HANDBOOK ON BIRTH REGISTRATION AND FETAL DEATH REPORTING 10 (1987), https://www.cdc.gov/nchs/data/misc/hb_birth.pdf [https://perma.cc/98GD-5FU3].

30. *See* James, *supra* note 28.

31. *About Purportedly Gendered Body Parts*, DEAN SPADE, http://www.deanspade.net/wp-content/uploads/2011/02/Purportedly-Gendered-Body-Parts.pdf [https://perma.cc/KWC4-64GQ] (last visited Apr. 20, 2018) ("When we want to talk about someone and indicate that they are not trans, we can say. . . 'cisgender.'"). Dean Spade is a renowned scholar on gender identity law, poverty law, and gender inclusivity issues. I had the pleasure of seeing one of Dean's lectures at Vanderbilt in 2013.

32. *In re* Estate of Gardiner, 42 P.3d 120, 123 (Kan. 2002) (citing Williams & Wilkins Lippencott, STEDMAN'S MEDICAL DICTIONARY 1841 (26th ed. 1995) ("[A] transsexual is a person with the eternal genitalia and secondary sexual characteristics of one sex, but whose personal identification and psychological configuration is that of the opposite sex.").

33. The term "trans" or "trans*" has developed into an umbrella term incorporating various nomenclature surrounding various gender identities. While the exact meaning is still debated, I understand both terms to incorporate transgender, transsexual, agender, androgynous, intersex, gender non-conforming, and genderfluid individuals.

34. *GLAAD Media Reference Guide – Transgender*, GLAAD, http://www.glaad.org/reference/transgender [https://perma.cc/6LSR-9ESN] (last visited Apr. 20, 2018) (also contains a helpful explanation of the difference between the terms "transgender" and "transsexual.").

35. Think facial hair, muscle mass, fat distribution, etc.

2. Medical Transitions: Hormones, Surgeries, and Any Combination Thereof

Let us delve further into the medical transition. As explained above, some trans people seek medical intervention to bring aspects of their physical sex into alignment with their gender identity. However, some trans people do not desire to undergo a medical transition at all.[36] For some trans men, a haircut and some men's (or simply more androgynous) clothes suffice to make them feel comfortable. For many trans people without access to health insurance, the costs of a medical transition can be prohibitive.[37] As a further complication, the vast majority of American physicians lack adequate training to care for trans bodies or simply lack the desire to do so.[38] For the purposes of the scope of this article, I will discuss various facets of medical transitions,[39] with the goal of later explaining how courts evaluate the adequacy of these medical procedures

36. Cain, *supra* note 22, at 1332 ("I had never considered the possibility of using medical science to accomplish the goal of my unanswered prayers until I began this project. . . But it took very little time for me to realize that, somewhere between the ages of four and forty, I made peace with my female body and masculine gender identity."); *see generally id.* at 1336-42 (discussing trans men who "passed" as male without medical intervention).

37. As an aside, I beg readers with Katie Couric-esque curiosity toward trans people and their transitions (*see generally* Couric's fairly invasive interview with trans actress Laverne Cox, asking Cox about her bottom surgery) not to allow the current "bathroom bill" hysteria to encourage them to ask trans people whether they've had any medical procedures. It's quite rude. I only disclose this fun fact because you've persisted thus far in reading my work. However, please recall that you're not entitled to any trans person's medical information; my disclosure should not convince you otherwise. My own top surgery cost me nearly $9,000 out of pocket because my student health insurance did not cover such procedures.

38. University of Louisville claims to be the first medical school to offer a pilot program that includes care for trans individuals despite the fact that the Association of American Medical Colleges released the first guidelines for training physicians to care for LGBT and gender non-conforming individuals in 2014. Laura Ungar, *National Pilot Program to Train Doctors in Transgender Health*, USA TODAY, June 11, 2015, http://www.usatoday.com/story/news/nation/2015/06/11/training-doctors-in-transgender-health/71060642/ [https://perma.cc/4K2Z-C9Q9]; *see generally* THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NON-CONFORMING PEOPLE (SEVENTH VERSION) (2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf [https://perma.cc/G525-JDKH] (establishing standards of care and clinical guidelines for medical and mental health professionals caring for trans people); *but see generally* the University of California, San Francisco's mind-blowing Center of Excellence for Transgender Health, http://transhealth.ucsf.edu/trans?page=lib-00-00 [https://perma.cc/VK9Z-3YTP] (last visited Apr. 22, 2018).

39. Naturally, my perspective on what an average medical transition entails can only be informed by my personal experience and by that of the trans men I've met. I do not intentionally exclude trans women from this narrative, but have simply not gained an appropriate sample size to attempt to draw a conclusion on what constitutes an "average" transition for them.

to change one's sex in the eyes of the law, and so avoid classification as a person in a same-sex relationship.[40]

The facet of transitioning with which the general public is probably most familiar, and least informed, is hormone replacement therapy. Everyone has both estrogen and testosterone in their bodies already, with the former higher in women and the latter higher in men.[41] Hormone replacement therapy is basically a matter of shifting the balance of which hormone dominates in order to bring out different secondary sex characteristics.[42] Thus, trans men will increase their levels of testosterone, and trans women will increase their levels of estrogen.

As well-known as, but undoubtedly more misunderstood than hormone replacement therapy, are gender-confirming surgeries.[43] There are, frankly, too many procedures to discuss each in detail. At a minimum, the reader should be aware that (1) there is no single surgery[44] and (2) there are "top" and "bottom" surgeries for both trans women and trans men. For trans men, top surgery consists of one of a variety of procedures that all have the same effect of removing breast tissue from the chest, reshaping, and thereby "masculinizing" it.[45] Bottom surgery for trans men can range from a traditional hysterectomy to the more complex phalloplasty.[46] Top surgery for trans women usually refers to

---

40. In the same way that some trans people decide not to pursue medical intervention in their transitions, some trans people use some procedures but not others or use them in various orders. For instance, some trans men start taking testosterone ("T") and then get top surgery while others get top surgery without taking T. Some people take hormones for a certain period of time then stop, satisfied with those physical changes that are largely irreversible, and may choose to start again in the future. Some people decide to have top surgery but not bottom surgery, possibly out of concern for the comparative degree of complication of certain bottom surgery procedures. To each, it is said, their own. *See generally* CLAUDINE GRIGGS, S/HE: CHANGING SEX AND CHANGING CLOTHES 81-86 (1998) (discussing the prices of surgery to trans men and trans women).

41. E. Dillon, Astrid Horstman & Randall Urban, *The Role of Androgens and Estrogens on Healthy Aging and Longevity*, 67 J. GERONTOL. BIOL. SCI. MED. SCI. 1140, 1142 (2012) ("Women have about four times the amount of estrogens compared with men.").

42. *See generally* Wylie Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. OF CLINICAL ENDOCRINOLOGY & METABOLISM 3132 (2009).

43. These procedures have historically been called "sex reassignment surgeries."

44. Again, kindly refrain from asking trans people if they've had "the surgery." Besides being an invasive inquiry, the question is perplexing in its inaccuracy.

45. The buttonhole, double incision, inverted-T, peri-areolar, and keyhole top surgery procedures are all various procedures designed to remove breast tissue, excess skin, and the infra-mammary fold, and resize and reposition the nipples into a more "masculine" appearance. Selecting a procedure depends foremost on the size of the breasts and skin elasticity. *See* FTM Top Surgery Network, *FTM Top Surgery Procedures*, TOP SURGERY, http://www.topsurgery.net/procedures/ [https://perma.cc/Q83U-467J] (last visited Apr. 22, 2018).

46. Other procedures include colpectomy (removal of the vaginal cavity), scrotoplasty (creation of a scrotum using testicular implants), and various phalloplasty techniques (construction of a penis using skin donated from other parts of the body). *See Hudson's FTM*

breast augmentation, while bottom surgery may refer to vaginoplasty or penectomy and oriechtomy.[47] Trans women may also choose to undergo "facial feminization" procedures such as tracheal shaves and electrolysis.[48]

A trans person who decides to transition may also choose to update the name and gender marker on their legal documents (or undergo a "legal transition," as opposed to a medical one) to reflect the fact that they have transitioned; not making such amendments can lead to a number of complications down the road.

C. Legal Transitions: Amending One's Legal Documents to Reflect Transition Sex

I use the term "legal transition" to describe the process of amending one's name and gender marker on all pertinent legal documents, including: one's birth records, driver's license, Social Security card, passport, etc. Successfully altering both the name and gender marker on these documents, particularly on a birth certificate, permits trans people to perform vital legal functions like obtaining marriage licenses and providing documentation for jobs.[49]

Some States permit trans people to amend the name and gender marker on their birth records, or at least give Full Faith and Credit to legal transitions effected in other States.[50] However, other states such as Tennessee have passed statutes that explicitly prohibit such amendments from being made.[51] The States that do permit such amendments usually have standards of proof for effecting the amendments, which are significantly more stringent than the standards

---

Resource Guide, FTM GUIDE, http://www.ftmguide.org/grs.html [https://perma.cc/WY3P-7SNW] (last visited Apr. 22, 2018).

47. *See* The Philadelphia Center for Transgender Surgery, *Male to Female Price List*, THE TRANSGENDER CENTER, http://www.thetransgendercenter.com/index.php/mtf-price-list.html [https://perma.cc/NA7U-ZCT3] (discussing various procedures) (last visited Apr. 22, 2018).

48. *Id.* But, of course, some trans women and gender-fluid folks choose to keep their beards and grow out their hair. My American readers, simply Google "Eurovision," and you can find the likes of Dana International and Conchita Wurst.

49. I invite the reader to reflect on how many times they must present a legal document in order to perform a desired action. Driving, buying an alcoholic drink, obtaining a job, enrolling in school, and other quotidian activities can be difficult, if not outright dangerous, situations for trans people. I further invite my reader to imagine how problematic having a document, say a driver's license, that does not reflect their chosen name or denotes a gender marker that does not comport with the sex they outwardly present can be. Such mundane situations can, unfortunately, be quite problematic for trans people who are unable to "legally transition."

50. *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 830 (Ohio C.P. Stark Cty. 1987).

51. TENN. CODE ANN. § 68-3-203(d) (2009) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

imposed by federal agencies such as the Social Security Administration or the State Department.[52]

The majority of states permitting gender marker amendments impose a surgical standard on trans people who wish to update their records, requiring that they provide proof of gender confirmation surgery as well as a medical need to undergo the procedure. The state statutes imposing these standards are so varied, and usually so vague,[53] that they evade clear definition. However, a number of States have removed the surgical standard and replaced it with more lax requirements.[54]

Generally, a trans person who wants to effect a legal transition must obtain a court order requiring a change of name and gender marker.[55] In States that maintain a surgical standard, the applicant must first raise the funds to

---

52. The State Department and the State of California have a "clinical treatment" standard, *see* U.S. Department of State, *Gender Designation Change*, TRAVEL.STATE, https://travel.state.gov/content/travel/en/passports/apply-renew-passport/gender.html [https://perma.cc/FUF8-YVJ9] (last visited Apr. 22, 2018), which permits trans people who have had or are in the process of obtaining such treatment to update their gender marker by obtaining a medical certification from their physician. The phrase "clinical treatment" is sufficiently vague to include lower medical thresholds such as a physician prescribing and supervising hormone treatment, instead of a surgery. Other States, however, have a "surgical standard," requiring trans people to provide proof of having undergone some surgery in order to transition.

53. John Parsi, *The (Mis)Categorization of Sex in Anglo-American Cases of Transsexual Marriage*, 108 MICH. L. REV. 1497, 1502-03 (2010) ("The problem is that there is no set standard for what 'need' entails. For instance, in Kansas the Department of Health and Environment requires medical certification of a sex change operation, whereas in New York, a court order, made at the judge's discretion based on surgical documentation, is required. Thus, despite statutory or administrative mechanisms for recognizing a change in birth certificates, some changes are not approved.").

54. As of 2015, Maryland, California, Oregon, Washington, New York, Connecticut, Hawaii, and the District of Columbia replaced their previous requirements that trans people show a court order and proof of gender confirmation surgery with the requirement that the trans person has obtained "clinically appropriate treatment." *See* Nat'l Ctr. for Transgender Equality, *Maryland Becomes 7th State to Modernize Birth Certificate Access*, TRANS EQUALITY, http://www.transequality.org/blog/maryland-becomes-7th-state-to-modernize-birth-certificate-access [https://perma.cc/YRT4-8SE3] (last visited Apr. 22, 2018); *see also* Mitch Kellaway, *Connecticut Makes Changing Birth Certificates Easier for Trans Folks*, ADVOCATE (June 2015), http://www.advocate.com/politics/transgender/2015/06/30/connecticut-makes-changing-birth-certificates-easier-trans-folks [https://perma.cc/2W7D-3ZSK].

55. In Texas, obtaining a court order means going to court and answering somewhat invasive questions about your identity from an at best somewhat-insensitive judge in a room full of people. *See* TEX. FAM. CODE ANN. § 45.102 (West 2017). In my experience, the judge made a joke about Caitlyn Jenner while reading the docket—truly an inauspicious start. Since I was only applying for a name change at the time, I suspect my experience could've gone much worse. The judge seemed friendly enough, though he persisted in asking why I wanted to change my name and why my parents gave me my dead name in the first place (hint: my assigned sex was on the petition and my dead name was read from the docket, so it wasn't hard to figure out). The judge proved very curious. As you might imagine, it was quite awkward to discuss the matter in front of strangers there to resolve their parking tickets.

undergo said procedure. After undergoing such a procedure, the applicant must then convince their surgeon to write them a letter to the effect that the applicant was under their care and received surgery to change their sex.[56] Physician's letter in one hand and court fee[57] in the other, the applicant can appear before the court with their application for name and gender change.

Assuming all goes well and the court grants both the name and gender change orders, the applicant can then obtain several copies of the court order[58] and apply to have their various legal documents updated.

After going through that lengthy process, trans people can present those identifying documents during a traffic stop or when they want to obtain a marriage license from a county clerk. However, in the majority of pre-*Obergefell* cases, courts invalidated marriages they characterized as being between people of the same sex, despite trans people's honest attempts to enter into valid marriages. Understandably, after going through the arduous, costly, and frequently humiliating process of completing a legal transition in order to obtain a valid marriage license, only to be told that one entered an invalid same-sex marriage after all can be quite distressing. By discussing these cases, I will illustrate why the *Obergefell* decision now nullifies that logic for couples marrying after its holding but why it will not save trans and same-sex marriages effected before its holding.

IV. MARRIAGE AND THE JUDICIAL SYSTEM

A. Determining a Marriage's Validity: The Retroactivity Problem

Courts typically do not involve themselves in questions concerning marriage until the marriage's validity is challenged in some way, whether by a divorce proceeding, an annulment, or a custody hearing. Rather, a couple's initial interaction with the judicial system occurs almost exclusively with a county clerk or similar executive branch position.

---

56. As vague and confusing as the statutory requirement defining (or not defining, as the case may be) what surgeries will affect a sex change is, so may the physicians' letters stating the sufficiency of their treatments be. Some physicians only write such letters for top or bottom surgery patients. Others will write those letters for patients for whom they've prescribed hormone replacement therapy. *See Know Your Rights FAQ About Identity Documents*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/trans-identity-document-faq [https://perma.cc/YP2J-K8Y9] (last visited Apr. 22, 2018).

57. Such fees are approximately $200 in some Texas counties. *See I Want to Change My Name*, TEXAS LAW HELP, https://texaslawhelp.org/toolkit/i-want-change-my-name [https://perma.cc/X72C-ZBXW] (last visited Apr. 22, 2018).

58. One for the State Department of Motor Vehicles, one for the Social Security Administration, one for the State Department, one for the state Health Department or Department of Vital Records, several for one's university, one to show an employer, and a few more just to be safe. *See id.*

The couple go to their county clerk and present state-issued identifying documents that verify their age and identity, such as a driver's license or birth certificate. If the clerk believes the documents to be sufficient, they will issue the couple a marriage license. The couple must then marry before an individual permitted to officiate marriage ceremonies,[59] sign their marriage license, and return the license to the clerk within a statutorily-prescribed time frame. The clerk will then issue a marriage certificate to the couple. The clerk does not, however, perform an ex ante fact-finding function or investigate the background of the identifying documents presented during the process.

When the marriage's validity is challenged later down the line, a court will consider the pertinent facts and rule on whether the couple entered a valid marriage in the first place. Courts determine a marriage's validity from the date the parties obtained their marriage license. Thus, whatever facts were true at that point in time control the marriage's validity in the future, regardless of what changes occurred after that point.

For instance, suppose Gabe separated from his wife April and initiated divorce proceedings against her. Further suppose that while their divorce was still pending, Gabe met and quickly became enamored with Katherine. If Gabe marries Katherine before his divorce from April is finalized and Katherine later decides to challenge her marriage to him, Gabe's second marriage will be invalidated under American anti-bigamy laws as having been invalid when he and Katherine married.[60] Perhaps Gabe genuinely did not know that his divorce had not yet been finalized when we married Katherine—that fact will not save him.

Unfortunately, couples have no way to know *ex ante* whether a higher court will invalidate their marriage until their marriage is challenged later. Predictably, a trans person who has amended their legal documents and married a cis person also have no way to know whether their marriage will later be deemed invalid as a pre-*Obergefell* same-sex marriage.

B. Implications for Trans People Marrying

Before California permitted same-sex domestic partnerships in 1999 and Vermont authorized same-sex civil unions in 2000[61], same-sex unions were not legal in America—so, trans people with un-amended legal documents had no

59. Such persons vary from state to state, according to statute, but can include religious leaders, judges, governors, county clerks themselves, mayors, and speakers of the state House or Senate. *See* TENN. CODE ANN. § 36-3-301 (2017).

60. *See generally* N.C. GEN. STAT. §14-183 (2018); GA. CODE ANN. § 16-6-20 (2017); TEX. PENAL CODE ANN. §25.01 (2011); CAL. PENAL CODE §281 (2018).

61. Richard Wolf, *Timeline: Same-Sex Marriage Through the Years*, USA TODAY, June 24, 2015, https://www.usatoday.com/story/news/politics/2015/06/24/same-sex-marriage-timeline/29173703/ [https://perma.cc/CT4P-ACPN]. As of the writing of the *Windsor* opinion on June 26, 2013, only 11 states and the District of Columbia recognized same-sex marriages.

avenue through which to marry cis people of the same sex they were assigned at birth. In an era when the fight for marriage equality was largely just beginning, the concept of a gender-sex distinction still evaded population comprehension[62]; with the *Obergefell* axis effectively rendered inactive, the legal sex axis becomes the lynchpin to the trans marriage analysis. Thus, if a court decides that the trans spouse cannot effectively change their sex, then the marriage will be invalidated as between two people of the same sex.[63]

Thus, transgender people who desired to marry before the advent of same-sex marriage under *Obergefell* were left with two options: (1) marry in one of the few States that permitted same-sex marriage at the time or (2) in a State that prohibited same-sex marriage, amend their legal documents to reflect the fact they had transitioned to the "opposite"[64] sex and then enter what would then be considered a "traditional" opposite-sex marriage. A trans person who married in a same-sex State and remained there[65] fortunately avoided the entire issue pertaining to their sex. Trans people who took the second route faced still more hurdles.

C. Judicial Views of Attempts to Transition

A court that views sex as immutable will not give effect to a transgender person's attempt to amend their legal documents to reflect their "new" sex.[66] These same courts, when situated in States prohibiting same-sex marriages, would characterize any marriage entered into by a transgender person as an invalid same-sex marriage.[67]

A similar view espoused by some courts in "traditional marriage States" was that a transgender person who did not transition until after they obtained a

---

62. One of the earliest legal protections acknowledging gender identity that I was able to identify was Minneapolis' 1975 Civil Rights Ordinance acknowledging, "affectional preference," which the city defined to include "projecting a self-image not associated with one's biological maleness or one's biological femaleness." Emma Margolin, *How Minneapolis Became First U.S. City to Pass Trans Protections*, NBC NEWS, June 3, 2016, https://www.nbcnews.com/feature/nbc-out/how-minneapolis-became-first-u-s-city-pass-trans-protections-n585291 [https://perma.cc/3CNV-GJ28].

63. *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 832 (Ohio C.P. Stark Cty. 1987); Littleton v. Prange, 9 S.W.3d 223, 231-32 (Tex. App. 1999) (Angelini, J., concurring).

64. While I view gender as lying on a spectrum, I will describe it in binary terms for the purposes of this discussion.

65. Like same-sex couples, trans people who married in "marriage equality States" but relocated to "traditional marriage States" faced the possibility that their new home would not give Full Faith and Credit to their marriage. *See* 28 U.S.C.A. §1738C (West 1996) (also known as Section 2 of DOMA); *see* U.S. v. Windsor, 570 U.S. 744, 764 (2013) ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States.").

66. *See generally Ladrach*, 513 N.E.2d at 832; *Littleton*, 9 S.W.3d at 231-32.

67. *See Ladrach*, 513 N.W.2d at 832; *Littleton*, 9 S.W.3d at 231-32.

marriage license also entered an invalid marriage since, at the point at which the spouses obtained the marriage license, the transgender spouse had not physically transitioned to the opposite sex yet. Therefore, the marriage was between two people of the same sex when it was entered and would be invalidated.

Trans people, having transitioned and entered what they believed to be legitimate opposite-sex marriages only to discover their marriages might be invalidated, were left with no clear path out of the quagmire.

V. PRE-OBERGEFELL TRANS MARRIAGE CASES[68]

The cases examined here arise from *ex post* challenges to the validity of a trans person's marriage either by their spouse or by a third party in order to (1) avoid spousal support obligations, (2) divest the trans spouse of an estate, (3) deny the trans spouse custody of a child, or (4) deny the trans spouse health benefits. Despite the variety of approaches taken by the courts, one can discern several macro-trends from the case law.

The first is a focus on the supposed immutability of sex and questioning whether medical intervention, regardless of the degree of its "completion,"[69] can ever truly change one's sex as assigned at birth.[70] Second, judges shifted their focus to legal transitions as various States enacted statutes permitting trans people to amend their legal documents to reflect their gender identity. Last, cases decided in the new millennium place an increased emphasis on the Full Faith and Credit Clause and determining whether a valid legal transition effected in another State mandates a victory for the trans spouse in a State that does not recognize legal transitions. I will summarize each case in the context of the "era" in which it falls.

---

68. Alice Newlin's brilliant article inspired my approach to identifying the macro-trends in this case law. While we both identify the foci on consummation and a general judicial trend toward statutory interpretation of State law, I have the temporal advantage of engaging cases that more fully consider the Full Faith and Credit Clause but were decided after her article was published in 2008. Her article provides an apt identification and summary of pertinent cases, and I encourage inquiring minds to engage with her work. *See* Alice Newlin, *Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 462 (2008).

68. Corbett v. Corbett [1970] 2 All E.R. 33 (Eng.).

69. Some courts require trans people to undergo every medical procedure available before recognizing their transition and their amended documents. That could include requiring top and bottom surgery for people who only want one procedure, or no procedure at all.

70. Kantaras v. Kantaras, 884 So.2d 155, 161 (Fla. Dist. Ct. App. 2004) ("We agree with the Kansas, Ohio, and Texas courts in their understanding of the common meaning of male and female, as those terms are used statutorily, to refer to immutable traits determined at birth.").

A. Medical Transitions and the Immutability of Sex

1. *Corbett v. Corbett*[71]

Although *Corbett* is an English case from 1970, I will briefly address it here since several American cases cite its reasoning and its four-factor test for determining the sex of trans individuals.[72] In *Corbett* the Probate, Divorce and Admiralty Division considered whether a post-operative trans woman could enter a valid marriage with a cis man who knew the details of her transition.[73] Judge Ormrod examined Ms. Corbett's (1) chromosomal sex, (2) gonadal sex, (3) genital sex, and (4) psychological sex;[74] he held that while she was psychologically "a transsexual," she was "of male chromosomal sex, male gonadal sex, [and] of male genitalia."[75] Ultimately, he held that since she was a biological male from birth, her marriage was void because she was "physically incapable of consummating a marriage and using the artificial cavity could never constitute true intercourse."[76]

2. *Anonymous v. Anonymous*[77]

Anonymous, a 1971 Queens County, New York Supreme Court case, is somewhat unique in the line of cases this article considers in that it is one of three cases in which the trans spouse underwent medical transition after getting married.[78] This case also features the most colorful characters in this line of cases.

The anonymous trans woman's alleged husband was an Army officer who met her on a street in Augusta, Georgia and "spent a short time" with her in a brothel.[79] The husband testified that he neither saw her unclothed nor "ha[d] any sexual relations" with her that night. The two married some months later, whereupon the husband discovered that she had not undergone a medical transition and still retained her male sex organs.[80] The next day, she informed

71. Corbett v. Corbett [1970] 2 All E.R. 33 (Eng.).
72. Littleton v. Prange, 9 S.W.3d 223, 227 (Tex. App. 1999).
73. *Corbett*, 2 All E.R. at 33-34.
74. *Id.* at 44.
75. *Id.* at 46-47.
76. *Id.* at 33, 49.
77. Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. App. Div. 1971).
78. *Id.* at 499.
79. *Id.*
80. *Id.*

him that she intended to undergo bottom surgery to remove the male reproductive organs.[81]

The parties did not cohabitate after that point and did not engage in a sexual relationship. Shortly after the marriage, the husband was deployed for 11 months.[82] When he returned from overseas, he arranged for her release from jail, after an arrest on a prostitution charge, and initiated annulment proceedings.[83]

The court held that the trans woman "was not a female at the time of the marriage ceremony" and went on to opine that bottom surgery may be an insufficient medium, by itself, by which to achieve "true" femininenes.[84] The court went on to hold that, "What happened to the defendant after the marriage ceremony is irrelevant, since the parties never lived together."[85]

The supreme court highlights several significant considerations that appear throughout this line of cases even decades later. The first is an emphasis on the trans woman's lack of medical transition at the time her marriage ceremony took place, which broadens into a general question of whether medical transitions can successfully effect a change of one's sex.[86] Both of these points assume central significance in later jurisprudence, as subsequent courts continue to question the degree of "completion" of medical transition[87] as it relates to whether a legal transition is valid. Second, the court places an emphasis on the trans woman's ability to consummate the marriage, a motif throughout these cases that *Obergefell* should adequately dispel.[88]

---

81. *Id.*

82. *Id.*

83. *Id.* I encourage the reader to explore the intersection of trans people and sex work. The National Center for Trans Equality partnered with the Red Umbrella Project and the Best Policy Practices to write a 2015 article. *See* BEST PRACTICES POLICY, RED UMBRELLA PROJECT AND NAT'L CTR. FOR TRANSGENDER EQUAL., MEANINGFUL WORK: TRANSGENDER EXPERIENCES IN THE SEX TRADE (Dec. 2015), http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf [https://perma.cc/9UA7-ARAZ].

84. Anonymous, 325 N.Y.S.2d at 500 ("It may be that since that time [of the marriage ceremony] the defendant's sex has been changed to female by operative procedures, although it would appear from the medical articles. . .that mere removal of the male organs would not, in and of itself, change a person into a true female.").

85. *Id.*

86. *Id.*

87. Some cases require trans people to prove that they have pursued their medical transition to the utmost limit of contemporary technological advances. *See* B. v. B., 355 N.Y.S.2d 712, 717 (Sup. Ct. Kings Cty. 1974) ("In the same way surgery has not reached that point that can provide a man with something resembling a normal female sexual organ, transplanting ovaries or a womb. Those are still beyond reach."); M.T. v. J.T., 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976) ("Sexual capacity or sexuality in this frame of reference requires the coalescence of both the physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.").

88. Consider, for example, the court's observation in *B. v. B.* "[t]hat the law provides that physical incapacity for sexual relationship is ground for annulling a marriage sufficiently indicates the public policy that the marriage relationship exists with the result and for the purpose of begetting offspring." B., 355 N.Y.S.2d at 717 (citing Mirizio v.

3. *B. v. B.*[89]

This 1974 Kings County, New York Supreme Court case is one of comparatively few in this line of cases that include a trans man. Mark B., previously Marsha B., amended his birth certificate to reflect his chosen name[90] after explaining to the court that he had undergone a "mastectomy"[91] and a hysterectomy.[92] His wife argued that he "fraudulently represented"[93] to her that he was male; she sought an annulment, arguing that he lacked male sex organs that would permit him to consummate their marriage.[94]

Justice Heller goes on to observe that "physical incapacity for sexual relationship" permits a spouse to annul a marriage.[95] Her cheeky holding merits direct quotation:

> Assuming, as urged, that defendant was a male entrapped in the body of a female, the record does not show that the entrapped male successfully escaped to enable defendant to perform male functions in a marriage. Attempted sex reassignment by mastectomy, hysterectomy, and androgenous [sic] hormonal therapy . . .. have not succeeded in supplying the necessary apparatus to enable defendant to function as a man for purposes of procreation.[96]

Justice Heller, as did the supreme court in *Anonymous*,[97] espouses the view that medical transition, however complete, does not impart the ability to procreate in the post-transition sex and thus cannot change one's sex to permit

---

Mirizio, 150 N.E. 605, 607 (N.Y. 1926)). Given the holding in *Obergefell*, I believe it appropriate to revisit the idea that consummation is the purpose of marriage and, as a result, to question whether a trans person's ability to procreate (or lack thereof) should count for, or against, them in this inquiry.

89. B. v. B., 355 N.Y.S.2d 712 (Sup. Ct. Kings Cty. 1974).

90. *Id.* at 714. Although Mark B. amended his birth certificate to reflect his chosen name, the court does not address whether he successfully amended the gender marker on any of his legal documents. Since I define "legal transitions" to include the rigorous process of demonstrating sufficient surgical procedures and medical intervention to convince a court to amend the gender marker on one's legal documents, Mark B.'s name change does not qualify as a full legal transition. Therefore, this case does not fall within the "legal transition era."

91. *Id.* at 715. While top surgery for trans men does resemble a double mastectomy in concept, the technical medical terms for this procedure have progressed since a mastectomy does not attempt to "masculinize" the chest by adjusting the size of the nipples.

92. *Id.*

93. *Id.* at 713.

94. *Id.* at 713-14.

95. *Id.*

96. *Id.* at 717.

97. Anonymous v. Anonymous, 325 N.Y.S.2d 499, 499 (N.Y. App. Div. 1971).

a trans person to enter a valid marriage with a cis person of the same sex as the trans person's birth sex.[98]

4. *M.T. v. J.T.*[99]

M.T. v. J.T., a 1976 New Jersey Superior Court case, involving a trans woman seeking spousal support and maintenance from her cis husband, is the only case validating a trans marriage in this "medical transition" era. Here, the trans wife underwent bottom surgery (for which her husband paid) and then applied with the State of New York to have her birth certificate changed.[100] Later, the two married in New York and returned to New Jersey, at which point they had intercourse.[101]

In considering whether she was sufficiently "female" to support the validation of her marriage, the court provides a detailed description of the nature of her bottom surgery and the adequacy of her new vagina for intercourse.[102] The court uses this information to find that since expert testimony considered her unable to procreate as a male after her medical transition, she should be considered a female.[103]

The court rejected the conclusion in *Corbett* "that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard,"[104] arguing instead that while "the anatomical test, the genitalia of an individual, is unquestionably significant,"[105] it is the "sexual capacity of the individual" that must ultimately be evaluated.[106] The court held that she "has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy" and thus may enter into a valid marriage with a cis man.[107]

---

98. B. v. B., 355 N.Y.S.2d 712 (Sup. Ct. Kings Cty. 1974) (placing emphasis on Mark's inability to procreate, a distinct consideration from the "consummation" viewpoint that permits some courts to hold some trans marriages valid, as we will see shortly in *M.T. v. J.T.*).

99. M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

100. *Id.* at 205.

101. *Id.*

102. *Id.* at 205-06. I encourage readers to consider whether the prospect of having the general public read such intimate details of their own anatomy 40 years hence would be a cause for consternation, even despite the anonymity provided by the use of initials as the case name and the passage of time. I try in vain to imagine another circumstance in which describing in such painstakingly accurate detail the size, shape, angle, and feeling of a person's vagina might be deemed appropriate.

103. *Id.* at 206, 209.

104. *Id.* at 209.

105. *Id.* at 208.

106. *Id.* at 209.

107. *Id.* at 210-11.

This court, while addressing the trans woman's ability to consummate her marriage at the time of its effectuation, largely abandoned the emphasis on procreation as the driving consideration behind questioning whether her marriage is valid, considering instead whether her gender and outward sex had been "harmonized through medical treatment."[108] This line of logic directly conflicts with that of *B.*, which invalidated Mark B.'s marriage due to his inability to procreate despite the fact that he underwent a medical transition[109] and may have had the "sexual capacity" to consummate the marriage similarly to how Mrs. T. did here.

B. Weighing the Legal Transition in its Own Right

After the 1970s, courts grappling with whether to recognize trans marriages largely turned their attention to State statutes permitting trans people to amend their names and gender markers. I treat this macro-trend separately from that of the Full Faith and Credit Clause to explicitly mark the reasoning employed in some courts' decision to ignore legal transitions, before considering whether courts perceive they must recognize legal transitions effected in other States due to the Full Faith and Credit Clause.

1. *In Re Ladrach*[110]

Ladrach, a 1987 Ohio probate court case, invalidated a trans woman's marriage after holding that Ohio's birth certificate amendment statute does not permit amendments to the gender marker on one's birth certificate for the purposes of a legal transition, although the statute explicitly permits amendments to correct "errors" of the listed sex.[111] Elaine Francis Ladrach successfully changed her name in April 1986, underwent a medical transition, and applied for a marriage license before amending the gender marker on her birth certificate.[112] In accordance with Ohio's statutory prohibition on same-sex marriage,[113] the court dismissed the Ladrachs' petition for a marriage license.[114]

---

108. *Id.* at 211.

109. B. v. B., 355 N.Y.S.2d 712, 717 (Sup. Ct. Kings Cty. 1974) ("Apparently, hormone treatments and surgery have not succeeded in supplying the necessary apparatus to function as a man for purposes of procreation.").

110. *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828 (Ohio C.P. Stark Cty. 1987).

111. *Id.* at 828, 831.

112. *Id.* at 829.

113. OHIO REV. CODE ANN. § 3101.01 (West 2018).

114. *Ladrach*, 513 N.E.2d at 832.

After noting that only fifteen States, at that time, allowed trans people to amend the gender marker on their birth certificates after undergoing surgery,[115] the court held that the "Ohio correction of birth record statute . . . is strictly a 'correction' type statute, which permits the probate court when presented with appropriate documentation to correct errors such as spelling of names, dates, race and sex, if in fact the original entry was in error."[116] In the Ohio court's opinion, the amendment of a trans person's gender marker to comport with their gender identity does not constitute the type of "error" contemplated by the statute.[117] This stance is important, because later cases in other districts utilize the ambiguity of the "correction" function of such statutes to permit trans people to amend their birth records despite the lack of explicit permission for trans people to use the amendment mechanism to effect a legal transition.[118]

The *Ladrach* court completely abandoned the common-law consummation inquiry in favor of inquiring whether the pertinent Ohio statute would recognize her legal transition, signaling a new emphasis in the judicial eye. While this case did not resolve in favor of the trans wife, the court made an important concession: "It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue . . . ."[119]

In addition to leaving open the possibility that this court would be required to recognize trans marriages if the Ohio legislature provided more explicitly for them, later courts in other jurisdictions relied on this language in coming to affirmative conclusions about whether ambiguous State legislation such as "corrective" statutes were intended to sweep trans marriages into their purview.[120]

2. *Littleton v. Prange*[121]

This well-known[122] 1999 case of first impression out of Texas, which would be overruled nearly 20 years later,[123] framed its inquiry as the following: "Can a physician change the gender of a person with a scalpel, drugs and

115. *Id.* at 830.

116. *Id.* at 831.

117. *Id.*

118. *See e.g.*, *In re* Heilig, 816 A.2d 68, 81-83 (Md. 2003).

119. *Ladrach*, 513 N.E.2d at 831.

120. *Heilig*, 816 A.2d at 85.

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

122. *Id.* at 227, 231 (*Littleton* is infamous in some circles for such comedic exertions as: "once a man, always a man," "the plaintiff made this unpleasant discovery on his wedding night," and "a surgery that would make most males pale and perspire to contemplate.").

123. *See In re* Estate of Araguz, 443 S.W.3d 233, 235 (Tex. App. 2014).

counseling, or is a person's gender immutably fixed by our Creator at birth?"[124] Ms. Littleton brought a malpractice suit for the wrongful death of her husband, which the defendant physician challenged on the grounds that her marriage was invalid because she and her husband were of the same sex.[125]

The court noted that Ms. Littleton did in fact obtain a successfully amended Texas birth certificate that reflected her new gender, but invalidated that amendment, following the same line of logic that the *Ladrach* court did.[126] The *Littleton* court held that the Texas Health Code statute permits corrections to the "sex" listed on a Texas birth certificate when that record is "incomplete or proved by satisfactory evidence to be inaccurate."[127] Apparently, the inaccuracy of a birth record reflecting a trans person's now outdated gender marker does not constitute the type of inaccuracy the Texas Legislature envisioned when it enacted that provision.

The court explained its rejection of the duly amended birth certificate issued by the Department of Vital Records by concluding that the magistrate judge who issued the court order permitting that amendment engaged in a mere ministerial act; that act did not constitute a legal decision and thus, "the words contained in the amended certificate are not binding on this court."[128]

This decision highlights the integral role the judiciary plays in interpreting State statutes in the context of determining the validity of trans marriages. Had either the *Ladrach* or *Littleton* courts decided to parse the language of the State statute less finely, both marriages could have been upheld. As we will see shortly, some courts interpret such correction statutes more broadly to include those amendments to birth records that would permit trans people to enter into valid marriages with people of the opposite sex.[129]

---

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

125. *Id.* at 225.

126. *See id.* at 231; *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 831 (Ohio C.P. Stark Cty. 1987). It is worth noting the Texas court's arguably broader opportunity than that presented to the Ohio court in *Ladrach*. Texas law allowed holders of Texas birth certificates to amend them if the record was "incomplete or proved by satisfactory evidence to be inaccurate," which presented the judiciary with more leeway than in *Ladrach* where Ohio law only allowed for an amendment if it was proved by satisfactory evidence that the information on the original birth certificate was "incorrect." TEX. HEALTH & SAFETY CODE ANN. § 191.028(b) (West 2017); OHIO REV. CODE ANN. § 3705.22 (West 2018). While the difference between "incorrect" information in the Ohio statute and "incomplete or . . . inaccurate" information in the Texas statute may seem nuanced, the latter affords an equal, if not greater, corrective opportunity.

127. *Littleton*, 9 S.W.3d at 231; TEX. HEALTH & SAFETY CODE ANN. § 191.028(b) (West 2017).

128. *Littleton*, 9 S.W.3d at 231. *But cf. id.* at 233 (Lopez, J., dissenting) ("Retention of the original filing date indicates that the amended birth certificate has been substituted for the original birth certificate in the same way an amended pleading is substituted for an original pleading in a civil lawsuit.").

129. Radtke v. Misc. Drivers & Helpers Union Loc. #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1033 (D. Minn. 2012) ("There is no law in Minnesota that prohibits recognition by the state of a person's changed sex. Minnesota is among 43 jurisdictions, including Wisconsin, that permits individuals who have undergone sex

C. *The Full Faith and Credit Clause for Legal Transitions Effected Elsewhere*

Particularly in States that did not permit legal transitions by trans people, the judiciary turned their attention to whether the Full Faith and Credit Clause would require those States to recognize marriages in which a trans person legally transitioned in a State that did permit trans people to amend their legal documents. Again, the courts take scattered approaches to addressing this question, some of which resemble those on display in *Ladrach* and *Littleton*.

Perhaps unsurprisingly, the Full Faith and Credit Clause played a negligible role in deciding the question. Under the U.S. Constitution, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state."[130] The rationale, not applied in the marriage equality context, but more applicable to general conflict of laws situations, is that no State should be required "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[131]

As Professor Steve Sanders observes in the marriage equality context, States seem to have "abandoned the comity required by a sensible choice of law regime and made 'protection' of their own marriage policies 'the first (and often final) principle',"[132] leaving States to "discriminate against marriages they disapprove of because there is no constitutional rule to prevent the 'chaotic results' that can occur when choice of law is left 'almost entirely in the hands of state courts.'"[133] That is why, in the marriage equality context pre-*Obergefell*, States that did not recognize same-sex marriages effected within their borders also did not recognize same-sex marriages validly effected in

---

reassignment surgery to change their birth records to recognize the change of sex."). The difference in philosophy between the approaches of different states is whether a state statute does not prohibit corrections to a gender marker or if the statute explicitly permits such a change.

130. U.S. CONST. art. IV, § 1.

131. Steve Sanders, *Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 102 (2014) (citing Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939)).

132. Steve Sanders, *Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 101-02 (2014) (citing Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 B.Y.U. L. REV. 1855, 1919 (2008)).

133. Steve Sanders, *Is the Full Faith and Credit Clause Still "Irrelevant" to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 101 (2014).

other States without such prohibitions—they simply did not have to.[134] Perhaps, given that explanation, the inter-court disparities in how much deference to allow the Full Faith and Credit Clause in deciding matters of whether States should honor the legal transition procedures of other States does not seem quite so unusual.

1. *In re Estate of Gardiner*[135]

Gardiner, a 2002 case from Kansas, is another case that is widely-cited for its reasoning. J'Noel Gardiner, a trans woman who successfully amended her birth certificate pursuant to Wisconsin statutes, ran the risk of disinheritance from her late husband's estate after he died intestate and his son petitioned for letters of administration declaring himself the sole heir.[136] The court ultimately decided that the question was whether Kansas must give Full Faith and Credit to Gardiner's Wisconsin birth certificate, as duly amended under Wisconsin law.[137]

The court viewed the issue on appeal as one of law, not one of fact.[138] Thus, it endeavored to ascertain whether the Kansas legislature would permit trans people to amend their birth records and then enter into marriages with cis people of the same sex as their birth sex. Notably, the court proceeded to examine the meaning of the Kansas marriage statute[139] instead of turning to any Kansas birth record amendment statute similar to that which allowed Ms. Gardiner to amend her birth certificate in Wisconsin. If Kansas had a birth record "correction" statute similar to those at issue in *Ladrach* and *Littleton*, this court would have had the same opportunity to permit the amendment to Gardiner's birth certificate. Instead, interpreting the ordinary usage words "sex," "male," and "female" in the marriage statute to exclude trans people, the court subsequently invalidated the marriage.[140]

While the court invoked the Full Faith and Credit Clause in its inquiry, it certainly could have adhered more closely to its application.[141] This court construed the Full Faith and Credit Clause as requiring the court to simply admit into evidence Gardiner's successfully amended Wisconsin birth

134. *Id.* ("In the midst of all this, the Constitution's Full Faith and Credit clause sits there, seemingly with nothing to do—because it has never been asked to do anything.").

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

136. *Id.* at 122-23.

137. *Id.* at 134.

138. *Id.* at 135.

139. *Id.* at 125, 135 (The court provided the statutory language and then framed its interpretation of the statute as its primary inquiry.).

140. *Id.* at 135-37.

141. Shawn Gebhardt, *Full Faith and Credit for Status Records: A Reconsideration of* Gardiner, 97 CAL. L. REV. 1419, 1426 (2009) ("The error is to treat the Clause as requiring a forum state to *merely admit into evidence* a sister state's action (regardless of its form), when in fact the Clause requires the forum state to give the action its *full legal effect*.").

certificate.[142] This judicial reluctance to apply the Full Faith and Credit Clause despite acknowledging its relevance to the case recurs throughout this line of cases.

2. *Radtke v. Misc. Drivers & Helpers Union*[143]

This 2012 Minnesota case upheld the lower court's finding that the validity of marriages would be based on the sex of the partners at the time of marriage instead of at the time of their birth and validated a trans woman's amended birth certificate issued in Wisconsin.[144] Christina Radtke brought suit against an ERISA fund that denied her status as an eligible family dependent after her husband died; the fund viewed her marriage as one between two people of the same sex, in contravention of Minnesota state law prohibiting same-sex marriage.[145]

Prior to the suit, Mrs. Radtke filed a petition with the Goodhue County, Minnesota district court to direct the Wisconsin State Registrar to amend her name and birth certificate after she underwent medical transition pursuant to Wisconsin state law,[146] which the Wisconsin State Registrar granted.[147] Mrs. Radtke and her late husband applied for and received a marriage license from Goodhue County that same day.

The court framed the pertinent question as whether Mrs. Radtke had sufficiently legally transitioned so that Minnesota must recognize her marriage as valid.[148] In answer, the court upheld the lower court's holding that courts deciding these questions must examine "the designation appearing on the current birth certificate issued to that person by the State in which he or she was born" as well as "to the official government documents issued by the State of Minnesota, including court orders and marriage certificates and licenses."[149] Further, it held that any judicial inquiry that examined records other than those in force at that point in time "would be absurd."[150]

---

142. *Gardiner*, 420 P.3d at 135.

143. Radtke v. Misc. Drivers & Helpers Union Loc. #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012).

144. *Id.* at 1035-36.

145. *Id.* at 1027.

146. *Id.* at 1025-26 ("The state registrar may change information on a birth certificate registered in this state which was correct at the time the birth certificate was filed under a court or administrative order issued . . . in another state . . . if: (a) The order provides for a . . . name change with sex change . . .." (quoting WIS. STAT. § 69.15(1) (2017-18)).

147. *Id.* at 1025-26.

148. *Id.* at 1031.

149. *Id.* at 1032.

150. *Id.* at 1032-33 ("Minnesota's requirements for the capacity to enter into a marriage contract, by their very nature, apply at the time the marriage is entered into. For example, both parties must have 'attained the full age of 18 years.' Minn. Stat. § 517.02. Both parties must not be married to anyone else. Minn. Stat. § 517.03. To apply these requirements as of some time other than the time of the marriage would be absurd—divorced

Turning next to the Full Faith and Credit inquiry, the court pointed out that no Minnesota law "prohibits recognition by the state of a person's changed sex."[151] At the time, Minnesota law provided two ways for trans people to effect a legal transition.[152] Mrs. Radtke had changed her gender marker with the Social Security Administration, the Minnesota Department of Revenue, the Minnesota Department of Health, and the IRS. The court then reasoned that since Minnesota permitted amendments of birth records and had "a long-established policy of allowing transgender individuals to change the sex designated on their birth records,"[153] "there is no basis to conclude that Minnesota recognizes Plaintiff as female for some purposes – birth records and driver's licenses, but not for others – marriage certificates."[154]

The court construed legislative silence in the face of sufficient notice that trans people were invoking the statute to pursue legal transitions and entering opposite-sex marriages as constituting legislative compliance with that interpretation.[155] Thus, Mrs. Radtke would have been permitted to amend her document had she been born in Minnesota.[156] Further, the court reasons, the Goodhue County Court "made the legal decision that Minnesota law permitted it to order the amendment of Plaintiff's birth certificate."[157]

Notably, the *Radtke* court's approach to determining the validity of the marriage when it was entered is similar to that taken by Judge Lopez in her dissenting opinion in *Littleton*.[158] Both of those opinions allowed the magistrate a certain amount of deference by couching the issuance of the marriage license by the magistrate as a legal conclusion that should be respected by the court instead of as a mere "ministerial act."[159]

Most importantly, the *Radtke* court illustrates a different understanding of how congressional silence affects whether a court will interpret a statute as permitting trans people to amend their legal documents.[160] Where the *Littleton* court refused to consider the magistrate's issuance of an amended birth

individuals would be prohibited from marrying, and adults could not marry because they once were children.").

151. *Id.* at 1033.

152. *Id.*

153. *Id.* (citing MINN. STAT. §144.218(4) (2017)).

154. *Id.* at 1034.

155. *Id.* at 1033-34.

156. *Id.* at 1034.

157. *Id.*

158. *Compare* Littleton v. Prange, 9 S.W.3d 223, 232 (Tex. App. 1999) (Lopez, J., dissenting), *with* Radtke v. Misc. Drivers & Helpers Union Loc. #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1036 (D. Minn. 2012).

159. *See Littleton*, 9 S.W.3d at 232; *Radtke*, 867 F. Supp. 2d at 1036.

160. *Compare Radtke*, 867 F. Supp. 2d at 1034 (the court interprets congressional silence as compliance), *with Littleton,* 9 S.W.3d at 233 (the court emphasizes that the Texas legislature must be more explicit in allowing amendments for "inaccuracies" in a trans person's birth certificate) and *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 831 (Ohio C.P. Stark Cty. 1987) (the court emphasizes that the Ohio legislature must be more explicit in allowing amendments for "errors" in a trans person's birth certificate).

certificate despite the fact that the Texas Health Code allowed amendments for "inaccuracies"[161] and the *Ladrach* court watched for an explicit legislative indication that the statute allowing corrections to "errors" permits amendments to sex,[162] the *Radtke* court, subject to similar constraints, took an entirely different approach to the issue.[163]

3. *In re Estate of Araguz*[164]

Araguz, a case that received plenty of media attention in Houston after the 2014 decision, reversed *Littleton* due to an amendment to the Texas Family Code, permitting trans persons to enter opposite-sex marriages.[165] Nikki Araguz, born in California, successfully changed her name in Texas in 1996, amended her birth certificate in California three months later to reflect the name change, obtained a driver's license in Kansas with the gender marker reflecting that she was a female, and used the Kansas driver's license to obtain a Texas driver's license reflecting that she is a female.[166] In 2008, Araguz presented her Texas driver's license to the Wharton County Clerk to obtain a marriage license listing her as a female, although she did not undergo a medical transition until two months later.[167] Upon her husband's death two years afterward, she petitioned for and received an amended California birth certificate indicating that she is female.[168]

When her husband died in the line of duty as a firefighter, her mother-in-law and her husband's ex-wife both moved for summary judgment attempting to declare their marriage invalid as between two people of the same sex.[169] The lower court entered a final judgment in favor of the decedent's mother and ex-wife, invalidating the marriage as a matter of law.[170]

The Court of Appeals held that *Littleton* had been overruled by a 2009 amendment to § 2.005 of the Texas Family Code[171] and that the Texas Legislature clearly contemplated permitting trans people to amend their birth

161. *Littleton*, 9 S.W.3d at 231.
162. *Ladrach*, 513 N.E.2d at 831.
163. *Radtke*, 867 F. Supp. 2d at 1034.
164. *In re* Estate of Araguz, 443 S.W.3d 233 (Tex. App. 2014).
165. *Id.* at 245.
166. *Id.* at 236.
167. *Id.*
168. *Id.* at 237.
169. *Id.* at 234-35.
170. *Id.* at 235.
171. *Id.* at 240, 244-45 (adding "an original or certified copy of a court order relating to the applicant's name change or sex change" to the list of acceptable "proof of identity and age" documents for purposes of obtaining a marriage license (citing TEX. FAM. CODE ANN. § 2.005(b)(8))).

records in order to obtain a valid marriage license.[172] The court rejected the argument that Araguz was male because she was designated as such on her California birth certificate, giving weight to expert testimony that "surgery per se is not the definitive point that makes someone female."[173] The court allowed Mrs. Araguz to survive the summary judgment motion brought against her but did not grant her own summary judgment motion, because she brought a no-evidence motion.[174]

Unlike past precedent, the Texas Court of Appeals gives relatively short shrift to the issue of whether Mrs. Araguz had legally transitioned at the time of the marriage ceremony and relies instead on an analysis of the statutory amendment allowing trans people to amend their birth records.[175] Looking to the Texas Health Code statute that specifically contemplates trans people changing their gender marker, instead of to Texas' birth certificate amendment statute, the court allowed Mrs. Araguz to survive summary judgment.[176]

The court just as easily could have disregarded the marriage provision as being superseded by the specific birth certificate amendment provision, which has not been amended since the *Littleton* decision. Thus, the court could have upheld *Littleton* despite the amendment to the marriage statute and invalidated the marriage at the summary judgment stage, but chose not to do so.

VI. RETROACTIVITY AND THE DECLARATION OF INFORMAL MARRIAGE

As we saw in the macro-trends of pre-*Obergefell* cases, courts take different approaches to whether they interpret State statutes as capturing legislatures' intent to include trans people's attempts to amend their legal sex in enacting document correction statutes. Recall that the *Littleton* court relied on the Texas birth certificate amendment statute to invalidate a trans marriage while the *Araguz* court later took the opportunity to decline that logic and allow Mrs. Araguz to present a material issue of fact moving forward in litigation.[177]

---

172. *Id.* at 245 ("Here, the legislature has clearly used the words 'sex change' in a way that establishes that a person who has had a sex change is eligible to marry a person of the opposite sex such that the marriage is between one man and one woman, as set forth in the Texas Constitution.").

173. *Id.* at 248.

174. *Id.* at 249.

175. *Id.* at 243-48.

176. *Id.* at 239-47 ("The legislature amended the family code to add a court order related to an applicant's 'sex change' as a form of acceptable proof to establish an applicant's identity and age, and thus, eligibility, to obtain a marriage license." (citing TEX. FAM. CODE ANN. § 2.005(b)(8) (2017)). "Here, the legislature has clearly used the words 'sex change' in a way that establishes that a person who has had a sex change is eligible to marry a person of the opposite sex.").

177. Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999); *Araguz*, 443 S.W.3d at 250.

While both the *Ladrach* and *Littleton* courts interpreted the State "correction" statutes not to encompass a trans person's sex post-transition as an "error" or "inaccuracy" sufficient to merit an amendment to their birth records,[178] the *Radtke* court cited congressional silence in the face of their supposed awareness of trans people's use of the statute and a "long-established policy" of permitting such amendments in recognizing the amendment.[179]

I argue that this hodge-podge of State statutes creates (1) glaring inconsistencies between the laws of each State, regarding whether and how trans people are legally acknowledged; (2) conflicts among the States regarding the application of the Full Faith and Credit Clause; and (3) inconsistent standards of proof for updating one's gender marker, between federal and State legal documents. Federal legislation, therefore, seems rather appropriate. In its absence, however, I address other legal arguments that may be helpful from a practical standpoint.

A judge may still look to a case with background facts similar to those in *Araguz* or *Radtke* and cling to the rule that marriages are valid as of the date they were entered. I posit that judges addressing challenges to the validity of trans marriages that occurred during the pre-*Obergefell* era should, considering the degree of judicial discretion on this topic due to inconsistent or nonexistent legislation on the matter, contemplate two arguments: that of retroactivity and the common-law declaration of informal marriage.

A. Retroactivity, "Make Whole" Relief, and Obergefell

Obergefell itself guaranteed that (1) States must recognize same-sex marriages that arise within their own borders after the decision's release and (2) States may not invalidate same-sex marriages that arise in other States.[180] However, like the overwhelming majority of decisions on any legal issue, *Obergefell* is not retroactive on its face. It does not purport to validate same-sex marriages that took place before its holding.[181] The fact remains that *Obergefell* does not make any difference to couples, same-sex and trans[182] alike, who married before it was decided.

I turn now to Professor Nicolas's argument for retroactivity of same-sex marriages in light of *Obergefell*. Professor Nicolas argues that same-sex couples are entitled to retroactive and remedial relief in light of *Obergefell* and voluntary State remedial action.[183] He then identifies four reference points that

178. *In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 832 (Ohio C.P. Stark Cty. 1987); *Littleton*, 9 S.W.3d at 231.

179. Radtke v. Misc. Drivers & Helpers Union Loc. #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1033-36 (D. Minn. 2012).

180. Obergefell v. Hodges, 135 S. Ct. 2584, 2605, 2609 (2015).

181. *See id.* at 2605-08.

182. Again, meaning a couple consisting of at least one trans person.

183. Nicolas, *supra* note 11, at 429.

administrative, legislative, and judicial proceedings have used to calculate the proper back-date of same-sex relationships: (1) the date the couple satisfied common-law marriage requirements; (2) the date of the couple's civil union, if applicable; (3) the date of a religious ceremony; and (4) the date on a marriage license issued in a State that permitted same-sex marriages.[184] From there, he asserts that courts should evaluate the totality of the circumstances when attempting to identify an appropriate backdate, with the goals of both providing a remedy that makes the same-sex couple whole and overcoming the discriminatory effects to which they were subjected.[185]

In line with Professor Nicolas's backdating argument falls Travis County Probate Judge Guy Herman's historic 2015 decision, which effectively backdated a same-sex marriage and allowed a surviving widow to inherit her partner's devise.[186] Judge Herman held that Stella Powell had entered into a common-law marriage when, diagnosed with colon cancer, she agreed to split her assets with her partner Sonemaly Phrasavath.[187] Phrasavath and Powell held a Zen Buddhist marriage ceremony in 2008 (long before *Obergefell*).[188] Powell's family argued that, because same-sex marriages were not recognized in Texas in 2008 when the couple married, Phrasavath was not entitled to take part in Powell's estate.[189] Judge Herman, however, was not convinced.[190] State Attorney General Ken Paxton, who intervened in the case, wrote in his motion:

> Phrasavath asks the court to reach back in time and declare that a relationship that at all points of existence could not have been a valid marriage under Texas law is now—over a year after the death of one spouse—a valid informal marriage under Texas law. The court should not rewind history and supplant statutory requirements to establish as valid what state law at the time foreclosed as invalid.[191]

Judge Herman disagreed, and in doing so, he broke the mold.

Estate of Powell is nothing short of monumental, particularly when one considers the potential effects the decision has in a jurisdiction with decidedly unhelpful case law on trans marriages. Judge Herman validated a pre-

184. *Id.* at 430.

185. *Id.* at 436.

186. Estate of Powell, No. C-1-PB-14-001695 (Tex. Prob. Ct. Feb. 17, 2015); Matt Ferner, *Texas Judge Recognizes Same-Sex Common Law Marriage in Historic Ruling*, HUFF. POST, Sept. 18, 2015, https://www.huffingtonpost.com/entry/texas-judge-recognizes-same-sex-common-law-marriage_us_55fc868ae4b08820d918c34d [https://perma.cc/7XMD-65DM].

187. Ferner, *supra* note 186.

188. *Id. See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

189. Estate of Powell, No. C-1-PB-14-001695 (Tex. Prob. Ct. Feb. 17, 2015); Ferner, *supra* note 186.

190. Estate of Powell, No. C-1-PB-14-001695 (Tex. Prob. Ct. Feb. 17, 2015).

191. Fener, *supra* note 186.

Obergefell same-sex marriage as a common-law marriage, allowing a surviving spouse to enter the probate estate of her deceased wife, based largely on an inter vivos agreement to that effect. Clearly, judicial backdating of same-sex marriages via the common law has profound implications for the trans marriage dilemma.

Let us return briefly to the problem explained above. Trans people, despite having sought medical intervention and updated their legal documents to align with their gender identity, have had their marriages invalidated as having been between two people of the same sex. Before same-sex marriages were legal in the U.S. Courts have held that (1) sex is immutable or (2) the court need not apply Full Faith and Credit to the amended legal documents validly issued by another State;[192] either way, the issue boils down to evaluating whether a trans person may change their sex. If the answer to that inquiry is no, then the marriage would be invalidated as having been between two people of the same sex before such unions were legal in the State in question.

A judicial backdating approach such as that taken in *Powell* is the key to solving the trans marriage dilemma, absent federal legislation on legal transitions. In common-law marriage States, backdating would allow trans people facing challenges to the validity of their marriages to point to a different date than the ceremonial marriage that had been invalidated by a court and rely on the common-law marriage requirements to keep their union in play during child custody or estate proceedings.

B. Declaration of Informal Marriage

Another tool I had not seen mentioned in discussions on this topic is the Declaration of Informal Marriage.[193] I will say from the outset that the Declaration of Informal Marriage, as a creature of common law, is no deus ex machina for two reasons. First, many States no longer recognize common-law marriages; further, those that do, also have stipulations on that recognition.[194] Second, a couple must have initiated a proceeding in recognition of their informal marriage within two years of creating a marital agreement, or a presumption arises that the couple did not in fact agree to be married.[195]

192. *See generally In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 832 (Ohio C.P. Stark Cty. 1987); *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002).

193. Having earned a law degree from a Tennessee institution, I did not stumble upon the Declaration until I studied for the Texas Bar Exam. Later, as often occurs, I discovered Professor Nicolas' reference to the Declaration in his recently published article.

194. *See, e.g.*, TEX. FAM. CODE ANN. § 2.401 (2017) (This law requires three stipulations: (1) an agreement to be married, (2) to have lived together as husband and wife, and (3) held themselves out as married).

195. *See, e.g.*, TEX. FAM. CODE ANN. § 2.401(b) (2017) ("If a proceeding in which a marriage is to be proved by Subsection (2)(a) is not commenced before the second anniversary of the date on which the parties separated and ceased living together, it is rebuttably presumed that the parties did not enter into an agreement to be married.").

Therefore, the Declaration is of little use where a challenge to the marriage has already arisen. However, in States with common-law marriage and Declarations of Informal Marriage, such a tool can give trans individuals in a marriage dilemma firmer ground to stand upon.

Texas is one State that has a Declaration of Informal Marriage.[196] In Texas, a couple that has not been formally married or has not received a marriage license may file a Declaration of Informal Marriage with the local county clerk's office.[197] The Declaration's requirements are relatively simple. The parties must have agreed to be married, lived together in Texas after the agreement, and held themselves out as a married couple in Texas (possibly through witness statements, signed contracts and lease agreements, or the filing of a joint tax return).[198] The couple may elect the date on which they agreed to be married.[199] Thus, we arrive—sans handwringing over constitutional arguments and fundamental rights—at Professor Nicholas's desired outcome for backdating, albeit via a different route.

Specifically, the State of Texas provides a Declaration of Informal Marriage that provides:

> I solemnly swear (or affirm) that we, the undersigned, are married to each other by virtue of the following facts: on or about _____ (space provided internally) we agreed to be married, and after that date we lived together as husband and wife and in this state presented to others that we were married. Since the date of marriage to the other party I have not been married to any other person. This declaration is true and the information in it which I have given is correct.[200]

Eligible couples may simply file a declaration of informal marriage with the local county clerk for about $37.[201] While it is no silver bullet to the trans marriage dilemma, the Declaration of Informal Marriage and other common-law marriage tools can act as a backstop to the alternative of having no protection whatsoever. Additionally, with approaches to common-law marriages like the one Judge Herman employed, it seems more likely that a challenged trans marriage would survive, even in the face of contrary case law based on a same-sex marriage argument.

196. *See* TEX. FAM. CODE § 2.402 (2005).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Harris County Clerk's Office, *Personal Records: Fee Schedule*, http://www.cclerk.hctx.net/Personal_Rec/Fee_Schedule.aspx [https://perma.cc/8WLR-YYSJ] (last visited Mar. 19, 2018).

C. Need for Federal Legislation

In re Rocher, a post-*Araguz* and post-*Obergefell* case[202] emerged from Houston and captures why legislation in most States continues to trap trans people in a state of limbo by allowing case law to dictate whether trans people may amend their legal documents, and thus avoid discrimination through housing, on the job, and in using public accommodations.

Alex Hunter, born in Pennsylvania, applied for a name and gender marker change through court order in Texas in 2015 under Texas Family Code section 45.102 (governing legal name changes).[203] Hunter relied on *Araguz* and on Texas Family Code section 2.005(b)(8),[204] the avenue seemingly left open by *Araguz* for trans people to leverage statutory ambiguity to effect their legal sex amendment. However, like the courts in *Ladrach* and *Gardiner*, the appellate court closed yet another door:

> In *Araguz*, the court of appeals concluded based on section 2.005(b)(8) that 'Texas law recognizes that an individual who has had a 'sex change' is eligible to marry a person of the opposite sex.' The *Araguz* court did not, however, suggest that the section authorized a trial court to order a change in a gender designation...Hunter acknowledges, however, that as a native of Pennsylvania, the Texas birth provisions would not apply.[205]

In a familiar move, the Texas appellate court both declined to use legislative ambiguity to a trans litigant's benefit and threw the Full Faith and Credit Clause by the wayside instead of crediting Pennsylvania's sex amendment statutes.[206] To place this judicial action in context, recall that refusals to grant individuals the ability to amend the legal sex on their driver's licenses have serious consequences for trans individuals every day.

Trans people in most States cannot obtain legal documents that reflect their gender identity and gender presentation due to financial constraints, which means they are also far more susceptible to being refused work and housing. The National Transgender Discrimination Survey found that 15% of respondents made less than $10,000 per year.[207] States which, as most do,

---

202. *In re* Rocher, No. 14-15-00462-CV, 2016 WL 4131626 (Aug. 2, 2016). *See* Obergefell v. Hodges, 135 S. Ct. 1584, 2605, 2608 (2015); *In re* Estate of Araguz, 443 S.W.3d 233, 243-48 (Tex. App. 2014).

203. *In re* Rocher, No. 14-15-00462-CV, 2016 WL 4131626 (Aug. 2, 2016).

204. *Id.*

205. *Id. See In re* Declaratory Relief for Ladrach, 513 N.E.2d 828, 832 (Ohio C.P. Stark Cty. 1987); *In re* Estate of Gardiner, 42 P.3d 120, 137 (Kan. 2002).

206. *In re* Rocher, No. 14-15-00462-CV, 2016 WL 4131626 (Aug. 2, 2016).

207. Jaime M. Grant, Lisa A. Mottet & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* at 2 (2015)

require proof of various medical procedures that can cost $8,000 as a standard for trans people to change their gender markers clearly presents an issue for people who either cannot afford the procedures or simply do not want them.[208]

A stroke of a pen by a judge motivated by a duty to preserve a State's public policy of declining to legitimize trans identities, for whatever reason, translates into what can be life or death situations for other human beings. The entire gender-marker amendment process in the majority of States is a process fraught with exorbitant expenses (in comparison with the median income of this community) and the forfeiture of privacy.

For various reasons, many trans people are unable to jump through all of the hoops that constitute this arduous gender marker amendment process. Those who have been able to achieve a legal transition but unwittingly made the mistake of marrying pre-*Obergefell* are rewarded with more adverse effects from the judicial system—perhaps they lose custody of their children, run the risk of being disinherited from their partner's estates,[209] are deprived of wrongful death damages for their partner's death,[210] or may be deprived of ERISA benefits as legal spouses.[211]

At the end of the day, the American legal system subjects trans people to the equivalent of a judicial squat-and-cough test. The judiciary, empowered by legislative silence or ambiguity, waves before us the proverbial carrot of legal sex amendment and everything that comes with it—jobs and the ability to earn an income, increased safety from harassment, access to public facilities, and the ability to marry.

But here is the stick: we are asked to lift our skirts and drop our trousers, to subject ourselves to invasive questions about our genitalia—their shape, feeling, and texture, as in *M.T.*—and our reproductive capabilities. If we are particularly unfortunate, we get the denial of our identities memorialized by a judge who makes their amusement with our life experiences known through their judicial opinion, as occurred in *Littleton*.[212] The entire process does violence to the transgender psyche by exposing a private situation to a very public process, placing them at the mercy of State employees, say at the Department of Motor Vehicles, who typically have not been formally trained in interacting with trans clients and thus must rely on their own knowledge and empathy, or lack thereof, to navigate the situation.

---

http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [https://perma.cc/K4U5-97X9].

208. *See, e.g.*, WIS. STAT. § 69.15(4) (2017-18) ("May petition a court to change the name and sex of the registrant of the certificate due to a surgical sex-change procedure."); IOWA CODE ANN. § 144.23(3) (West 2018) (Requires a "notarized affidavit by a licensed physician and surgeon stating that by reason of surgery or other treatment by the licensee, the sex designation of the person has been changed.").

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

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

211. *See* Radtke v. Misc. Drivers & Helpers Union Loc. #638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023 (D. Minn. 2012).

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

Left to the States alone, the issue of legal transitions has become an unwieldy hydra that breeds inconsistency not only among the States, but between States and the federal government. Without federal legislation addressing these issues, trans people will remain vulnerable to the indirect consequences of America's evolution of thought surrounding sex and gender.