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OUR PAST MUST BE OUR PRESENT (TO OURSELVES): HOW TRANSSEXUALS CAN SURVIVE PROPOSITION 8

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Introduction

> *I'm sure that eventually the no vote on Proposition 8 will give us transgender use of public toilet facilities. Those who were born men wanting to use woman's facilities and vice-versa*.[1]
>
> *The bill would restore some sense of morality to the state of California*.[2]

On November 4, 2008, a clear majority of American voters elected to the presidency to a man who, five years earlier, had attached his name as co-sponsor to a bill that would outlaw discrimination against not only gays and lesbians but also transgender people.[3] Perhaps owing to such a concept actually not being terribly radical in nature – or, perhaps, because of what his Republican opponent actually decided to attack him on instead, from the substantive (such as his position on drilling-based solutions to the nation's energy needs, "drill baby drill!" not withstanding) to the inane (such as his tenuous connection to William Ayers of the Weather Underground) – Barack Obama's sponsorship of LGB*T* anti-discrimination legislation while in the Illinois Senate in 2003 was all but absent from the presidential campaign.

However, because of Obama's unwillingness to support same-sex marriage unequivocally he found himself on the short end of criticism from some gays and lesbians before and after the election.[4] The criticism only intensified when Obama invited Rick

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[1] Larry Niemotka, *Fairness Calls For Yes on 8*, THE REPORTER (Vacaville, Cal.), Oct. 19, 2008, *available at* http://www.thereporter.com/opinion/ci_10759721 (last visited Oct. 19, 2008)

[2] *Senate Approves Measure Banning Gay Marriages*, LOS ANGELES TIMES, Aug. 12, 1977, at I-33 (quoting Sen. John V. Briggs).

[3] 2003 ILL. S.B. 101 (co-sponsored by Sen. Barack Obama).

[4] Alex Blaze, *Barack Obama on Gay Marriage*, BILERICO PROJECT, April 7, 2008, *available at* http://www.bilerico.com/2008/04/barack_obama_on_gay_marriage.php ("Barack Obama gets asked about same-sex marriage, answers with the same old civil unions blah blah blah.") (last visited Jan. 5, 2009). *See also, comments to*: Michael Crawford, *The LGBT Case for Barack Obama*, BILERICO PROJECT, Oct. 14, 2008, *available at* http://www.bilerico.com/2008/10/the_lgbt_case_for_barack_obama.php (last visited Jan. 5, 2009); Jeremy Bishop, *Finally, Change We Really Can Believe in*, BILERICO PROJECT, Sept. 13, 2008, *available at* http://www.bilerico.com/2008/09/finally_a_good_advertisement.php (last visited Jan. 5, 2009); Pam Spaulding, *Breaking: Obama Goes on MTV and Declares Opposition to Prop 8*, PAM'S HOUSE BLEND, Nov. 3, 2008, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=7959 (last visited Jan. 5, 2009); John Aravosis, *Hillary, Obama and McCain on CA Gay Marriage Decision*,

Warren to give the invocation at his inaugural.[5] Warren was a prominent proponent of California's Proposition 8, which put a stop to legal same-sex marriage in California, via the May 15, 2008, *Marriage Cases* decision from the California Supreme Court.[6]

Voters in Florida and Arizona also approved anti-same-sex marriage constitutional provisions on Nov. 4, but California's Proposition 8 has led to very visible intra-community friction, with some in alternative media taking aim at gays in the mainstream media.[7] This is in addition to the intra-community sniping over the management of the anti-8 campaign, widely viewed as having been mismanaged by an elite, permanent gay activist class.[8] The aftermath of the 2008 elections has set three volatile matters on a collision course:

- What I have come to call 'marriage derangement syndrome,'[9] the recent obsession with placing same-sex marriage above all other goals of the LGB(T) movement, no matter the cost;

- The crop of repeal sown by complacency in the first state with existing same-sex marriages to put such marriages to a popular vote; and

- A president with an actual track record of being pro-T as well as pro-LGB as to all issues except same-sex marriage.[10]

AMERICABLOG, May 15, 2008, *available at* http://www.americablog.com/2008/05/hillary-obama-and-mccain-on-ca-gay.html (last visited Jan. 5, 2009).

[5] James Kirchick, *When a Nod's Not Enough*, THE ADVOCATE, Feb. 2009 at 53, 56-57.

[6] 183 P.3d 384 (2008).

[7] Michelangelo Signorile, *Whither Maddow? Where is Our Lesbian Pundit-in-Chief When it Comes to Delivering the Incisive TV Commentary We Need in the Wake of Proposition 8?*, THE ADVOCATE, Feb. 2009 at 70.

[8] As critiqued on *DailyKos*:

> The anti-Prop 8 campaign wasn't helped by a shoddy operation that most observers who interacted with it admit was incompetent and ill-suited to wage a statewide campaign. While the Mormon Church flooded the state with ground troops for the fight, our side had no ground game.

Kos, *Proposition 8*, DAILYKOS, Nov. 5, 2008, *available at* http://www.dailykos.com/storyonly/2008/11/5/13351/ 5326/393/654565 (last visited Jan. 4, 2009); *see also* Dain Aiello, Prop 8 Foes Slow to Pick Up on Mormon Involvement, Bay Area Reporter, Feb. 12, 2009, http://www.ebar.com/news/article.php?sec=news& article=3713 (last visited Feb. 12, 2009); *and* Ben Ehrenreich, *Anatomy of a Failed Campaign*, THE ADVOCATE, Dec. 16, 2008 at 34.

[9] I derive this term from wording utilized by conservative bloggers and columnists to defend conservative politicos who come under intense mediaanalysis, the most notable recent example being the use of "Palin Derangement Syndrome" to attack those who critiqued Republican Vice-Presidential nominee Sarah Palin. For example, *see* Cinnamon Stillwell, *Palin Derangement Syndrome: Obama's Worst Enemy?*, SAN FRANCISCO CHRONICLE, Sept. 18, 2008, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/g/a/2008/09/ 18/cstillwell.DTL (last visited Jan. 14, 2009); Howie Carr, *Moonbats Dropping Like Flies from PDS Epidemic*, BOSTON HERALD, Sept. 12, 2008; Michelle Malkin, *Palin Derangement Syndrome*, MICHELLEMALKIN.COM, Aug. 31, 2008, *available at* http://michellemalkin.com/2008/08/31/palin-derangement-syndrome/ (last visited Jan. 14, 2009).

[10] Nevertheless, on the eve of Obama's inauguration, it was revealed that in 1996, in response to a questionnaire from *Outlines*, a now-defunct Chicago gay paper, Obama stated, "I favor legalizing same-sex marriages, and would fight efforts to prohibit such marriages." Tracy Baim, *Obama Changed Views on*

Seemingly, it has set the stage for same-sex marriage to play the same role in the Obama Administration that gays-in-the-military did in the Clinton Administration,[11] an early-first-term flashpoint whose fallout effectively derailed any possibility of progress on any other LGB concern.[12]

With 'same-sex marriage can solve any problem' as dominant mantra,[13] all other concerns of gays and lesbians (not to mention transgender people) either disappear or, even worse, become deceptively subsumed.

Gay Marriage, WINDY CITY TIMES, Jan. 14, 2009 at 6 (quoting the answer on the 1996 questionnaire). And, as the oral arguments in the suit challenging Proposition 8 approached, it was revealed that Obama had voiced opposition to the measure but that those managing the anti-8 campaign opted not to make use of that opposition. Michael Petrelis, *Alice B. Toklas Killed Obama's Pro-Gay Letter*, PETRELIS FILES, March 6, 2009, *available at* http://mpetrelis.blogspot.com/2009/03/alice-b.html (last visited March 11, 2009). In 2004, Obama had indicated that he disapproved of the *strategy* of seeking marriage instead of civil unions.

> [S]trategically, I think we can get civil unions passed. I think we can get [the trans-inclusive anti-discrimination bill] SB 101 passed. I think that to the extent that we can get the rights, I'm less concerned about the name. And I think that is my No. 1 priority, is an environment in which the Republicans are going to use a particular language that has all sorts of connotations in the broader culture as a wedge issue, to prevent us moving forward, in securing those rights, then I don't want to play their game.

Tracy Baim, *Obama Seeks U.S. Senate Seat*, WINDY CITY TIMES, Feb. 2, 2004, *available at* http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=3931 (last visited Jan. 15, 2009) (quoting Barack Obama). The bill Obama referred to did not pass, but a different trans-inclusive bill did pass, but the final vote came a few days after he had left the Illinois Senate for the U.S. Senate. Andrew Davis, *Gov. Signs Gay Bill*, WINDY CITY TIMES, Jan. 26, 2005, http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=7206 (last visited Jan. 15, 2009).

[11] Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375 (1995).

[12] I purposely leave off the 'T' here given that, during the majority of the Clinton Administration – and certainly during his first term – no credible case can be made that the dominant national gay rights hierarchy considered trans issues at all, much less actually put them on the active civil rights agenda. Trans people were actively excluded from even testifying at the first ENDA hearing in 1994, though Phyllis Frye and Karen Kerin eventually were allowed to submit written statements. Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY & CIVIL RIGHTS (John D'Emilio, William B. Turner and Urvashi Vaid, eds. 2000), 451, 462. Subsequent sessions of Congress during the Clinton Administration led primarily to lingering accusations that the Human Rights Campaign negatively 'pre-lobbied' key members of Congress whenever trans activists sought to lobby Congress in favor of trans inclusion in ENDA. For example, see Anne Casebeer, *Pre-Lobbying Sen. Tom Harkin*, in HRC WATCH, THE SUBVERSION OF THE AMERICAN TRANSGENDER MOVEMENT, 2000, http://www.gendernet.org/hrcwatch/subvert.htm (last visited May 31, 2000) (website no longer active, but hard copy in possession of author).

[13] *Compare* Renee Perry, *The Avoidable Death of Thomas Disch*, ADVOCATE.COM, July 29, 2008, http://advocate.com/exclusive_detail_ektid58444.asp ("On July 4, 2008, the out science fiction writer shot himself in his New York apartment. Could gay marriage have saved him?") (last visited Jan. 5, 2009); Alex Blaze, *Sorry, Same-Sex Marriage Won't Solve All Our Problems*, BILERICO PROJECT, Aug. 3, 2008, *available at* http://www.bilerico.com/2008/08/sorry_samesex_marriage_wont_solve_all_ou.php (last visited Jan. 5, 2009).

> On the very same day that we made history by electing an African-American president, the passage of Proposition 8 and other anti-gay measures told LGBT people, "Your relationships don't count."[14]

Unfortunately, that is not true. Or, at the very least, it leaves out essential details. While the statement is clearly accurate as to the election of Barack Obama, it thereafter goes astray referring to (presumably) the anti-same-sex marriage measures passed by the voters of Florida, Arizona and California as "anti-gay," asserting that the message sent by the measures was directed not simply to gays and lesbians but also to bisexuals *and* transgender people.

In purely cultural terms, Solmonese may well have a point. With increased trans visibility comes increased negative trans-specific rhetoric from the religionist right.[15] As to the law, however, Solmonese is dangerously overbroad, conceding a point that should not even be acknowledged as having been in play. Perhaps just sloppily phrased, there is a substantive difference between the scope of his wording and the specificity employed by Jerry Simoneaux:

> Proposition 8 was a voter initiative in California to amend their constitution to eliminate *the right to marry* from their gay and lesbian, bisexual and transgender citizens *who are in same-sex relationships*.[16]

Anyone, even anyone opposed to the concept, can understand what a same-sex marriage is (or is supposed to be.) The same is now true for a "civil union." But what is a *bisexual marriage*? A bisexual person married to someone of the opposite sex is still in an opposite-sex marriage; the converse if married to someone of the same sex. Pointing this out is not being dismissive of bisexuality; rather, it is simply a reminder that, unless one raises the specter of one person being married to both a male and a female at the same time, then, where the operation of marriage law is concerned, there is no 'B.'

And as for the 'T'? What is trans*gender* marriage?

Any aspect of gender variance has the potential to cause problems with legally-sanctioned relationships; particularly, when it comes time to dissolve the relationship or to address custody of any children that came from the relationship. Gender transgression

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[14] Joe Solmonese, e-mail dated Dec. 23, 2008 (mass e-mail from HRC).
[15] Compare *Doe v. Board of Elections*, No. 61 (Md. Dec. 19, 2008); *with* Charlie Butts, *MD Voters 'Up the Creek' on Gender Identity Law*, ONE NEWS NOW, Sept. 10, 2008, *available at* http://www.onenewsnow.com/ Legal/Default.aspx?id=245326 (last visited Jan. 22, 2009).
Still, this is not to say that I agree with the cynicism behind Barney Frank's dismissal a decade ago of the significance of Minnesota's 1993 gay rights law being trans-inclusive. *See* Gary Schiff, *Six Minutes With Barney Frank – Openly Gay Congressman Talks About ENDA, Transgender Visibility, and the Bradley/Gore Thing*, LAVENDER MAGAZINE, Oct. 22, 1999 at 15.
[16] Audio Recording: *Queer Voices* (KPFT radio broadcast Nov. 17, 2008) (comment of Jerry Simoneaux) (emphasis added) (on file with author).

in general – be it cross-dressing[17] or transitioning during[18] or after a marriage[19] – does not make a marriage statutorily (or constitutionally) void *ab initio*.[20] However, the fact that one of the spouses may have transitioned[21] from one sex to the other at some point *prior* to a marriage, which, at the time of solemnization, was opposite-sex could – and, in some jurisdictions, *has*.[22] As Julia Serano noted in *Whipping Girl*, "The focus on 'transgender' as a one-size-fits-all category for those who 'transgress binary gender norms' has inadvertently erased the struggles faced by those of us who lie at the intersection of multiple forms of gender-based prejudice."[23]

Where legality of marriage is at issue, the 'T' that matters is trans*sexual*, not trans*gender*, which, unless explicitly denoted otherwise *is* the 'T' in the alphabet quartet 'LGBT.' But the word "transsexual" has become nearly extinct in LGBT discourse, which is sadly ironic given that after almost forty years of open gay rights activism, more states' laws positively recognize the existence of transsexualism than recognize a cause of action for being discriminated against because of being lesbian, gay, bisexual (or trans-anything.)[24]

To be absolutely fair to Solmonese and HRC, they are not alone in misuse of the term 'LGBT.'[25] Often, it is as anachronistically applied to all temporal subdivisions of *gay* history[26] as it is to current socio-political matters.[27] This may seem to be of little

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[17] *D.F.D. v. D.G.D.*, 862 P.2d 368 (Mont. 1993); *Summers-Horton v. Horton*, No. 88AP-622, 1989 Ohio App. LEXIS 1183 (Ohio App. March 30, 1989); *In re V.H.*, 412 N.W.2d 389 (Minn. App. 1987).
[18] *Daly v. Daly*, 715 P.2d 56 (Nev. 1986).
[19] *Christian v. Randall*, 516 P.2d 132 (Colo. App. 1973).
[20] I am, however, aware of a Canadian provincial court that annulled a heterosexual marriage on the grounds that the wife "was, at the date of the marriage, a latent transsexual," meaning that she decided to transition to male and had harbored those feelings at the time of the marriage. *M. v. M.*, [1984] 42 R.F.L. (2d) 55 at ¶ 2 (P.E.I.S.C.) at ¶ 2 (Can.).
[21] Or failed to have satisfactorily completed the process. *Simmons v. Simmons*, 825 N.E.2d 303 (Ill. Ct. App. 2005).
[22] *See generally*, Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box by Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEX. 1 (1999-2000)
[23] JULIA SERANO, WHIPPING GIRL – A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 3 (2007).
[24] Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 POL. & CIV. RTS. J.L. REV. (forthcoming 2009).
I recognize all trans peoples' concerns as valid; the fact patterns, however, differ. Off-the-job cross-dressers such as Peter Oiler, and transitioned transsexuals such as Karen Ulane are all vulnerable to employment discrimination. For example see *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984); and *Oiler v. Winn-Dixie*, Civ. No. 00-3114 Sec. I, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).
Yet, the transsexual has the added concern of legal identity. For example, see *Ulane*, 742 F.2d at 1081; and *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008).
[25] Julius Turman and Susan B. Christian, *Dear President-Elect Obama*, BAY AREA REPORTER, Dec. 25, 2008.
[26] For example, referring to the 1940s-50s, Marci Eads writes:

> If anything characterizes the LGBT experience in this time period, it was the widespread oppression, discrimination and violence experienced by LGBT people who were open about their sexuality, or who were "caught" and exposed as *homosexuals*.

relevance to any discussion – but I assert that it is extremely relevant. The reader should not interpret this as thinly-veiled advocacy for trans separatism, however; I've long advocated that LGB and T should be together. [28] Nevertheless, the reality is that in many crucial respects, there are divisions – and, while some may be able to honestly disagree about the quantity and degree of such twenty-first-century divisions, [29] there can be no legitimate denial that a multiplicity of gay-trans schisms occurred in the 1970s which, for all practical purposes, eliminated trans people and issues from what had, by then, become the organized gay rights movement.

Marci L. Eads, *Political Opportunities, Grievances and the Lesbian, Gay, Bisexual and Transgender Movement in the United States*, 1988-2001 (Ph.D. Diss. Univ. of Colorado 2002), 6 (emphasis added). See also, Anthony S. Winer, *How a Marriage Discrimination Amendment Would Disrespect Democracy in Minnesota*, 33 WM. MITCHELL L. REV. 1059, 1071 (2007). According to Winer, "Minneapolis adopted its LGBT-protective civil rights ordinance in 1974." However, the ordinance enacted by Minneapolis in 1974 was gay-only. Not until after a ferocious intra-community battle during an attempt to insert the same gay-only language into state law the following year was the 1974 ordinance rectified to be trans-inclusive. Rose, *Where the Rubber Left the Road*, supra note 24.

[27] For example, an assertion that the incoming chair of the Democratic National Committee has a rather thin record on LGBT issues notes:

> Save and except for the theoretical *protections afforded LGBT state employees* under Executive Order 1 (2006), LGBT Virginians have ZERO employment non-discrimination protections. That's right. Zero protection from being summarily fired due to their *sexual orientation*. Sadly, Kaine's execution of Executive Order 1(2006) appears in retrospect to have been window dressing he never planned to have enforced based on a recent mealy mouthed letter from Kaine's office. The Executive Order was apparently a mere crumb thrown for show to the LGBT Virginians who helped get him elected.

New DNC Chair No Real Friend to Gay Rights, MICHAEL IN NORFOLK, Jan. 5, 2009, *available at* http://michael-in-norfolk.blogspot.com/2009/01/new-dnc-chair-no-real-friend-to-gay.html (last visited Jan. 6, 2009). However, the order in question, even if enforced as aggressively as the comment's author would prefer, would provide transgender state employees with "zero" protections, only "specifically prohibit[ing] discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age, political affiliation, or against otherwise qualified persons with disabilities." Gov. Tim Kaine, Executive Order 1 (2006), *available at* http://www.governor.virginia.gov/initiatives/ExecutiveOrders/2006/EO_1.cfm (last visited Jan. 6, 2009). The policy says nothing about 'gender identity,' and "sexual orientation" by itself will not be interpreted to include trans-specific discrimination. *See also*, *Arkansas*, *available at* http://www.ballot.org/pages/arkansas (last visited Jan. 10, 2009) (referring to the Arkansas adoption amendment as one of "LGBT Equality").

[28] I share Serano's observation:

> While I do believe that all transgender people have a stake in the same political fight against those who fear and dismiss gender diversity and difference in all of its wondrous forms, I do not believe that we are discriminated against in the same ways and for the exact same reasons.

SERANO, *supra* note 23 at 2-3; *see also* Katrina C. Rose, *Three Names in Ohio*: In re Bicknell, In re Maloney *and Hope for Recognition that the Gay-Transgender Twain Has Met*, 25 T. JEFFERSON L. REV. 89 (2002). My view is that there is overlap and disconnect both as between transgender people and non-trans gays and lesbians and as between transsexuals and non-transsexual trans people. As an example, birth certificates and other identity documentation matters are not the concern of non-transsexual trans people that they are for transsexuals. And, however much transsexuals may want to disassociate themselves from the concept of cross-dressing, laws that criminalize cross-dressing have historically been used against transsexuals as well as cross-dressers. *See City of Chicago v. Wilson*, 389 N.E.2d 522 (Ill. 1978) (local anti-cross-dressing law invalidated, in part, via pre-emption by state transsexual birth certificate statute).

[29] Even somewhat objective looks at the re-emergent trans activism of the early 1990s spoke more in terms of "cross-dressing" and "drag" than of those who fully transition. *For example, see* Keith Clark, *Cross-Dressing Crossing Over Into the Mainstream*, TEXAS TRIANGLE, July 14, 1993 at 18.

That discord happened – and it has substantive meaning. Erroneous usage of inclusive terminology has the potential for substantive harm – even above and beyond the third-class status that trans people were relegated to by the non-trans-inclusive gay rights laws that emerged from that era.[30] Inaccuracy aside, the subtractive downside potential is great; the additive upside non-existent.[31]

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[30] The reality of a legal framework governed by a non-trans-inclusive gay rights law is that lesbians, gays and bisexuals who are not transgender have legal sanction to discriminate against trans people, meaning that, if all LGBT people ordinarily would be regarded as 'second class', then trans people being at the mercy of non-trans LGBs makes trans people 'third class.' Rose, *supra* note 28 at 147 note 21. This embodies the concern trans people have over the possibility of a federal gay rights law being non-trans-inclusive and, in turn, creating a federally-sanctioned 'third class' status for trans people nationwide.

[31] A microcosm would be California's neighbor, Nevada. The one statement from a Nevada court about transsexuals, the 1986 interstate custody decision *Daly v. Daly*, which refused to address the recognition of the validity of transsexualism by the state of residence of the residence of the MTF parent (that state, ironically enough, being California), tacitly, albeit backhandedly and insultingly, acknowledged the transition of that parent. 715 P.2d 56, 59 (Nev. 1986) ("It was strictly Tim Daly's choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.") *Daly* should only be read narrowly and *only* for its specific issue: The approval by the Nevada Supreme Court of the termination of parental rights of a parent who transitions, a question which is disjunctive from the matter of legal recognition of gender transition. *Daly v. Daly*, in and of itself, should not be read as indicative of any intent by Nevada to view a marriage between a male-to-female transsexual and a non-transsexual male to be a same-sex relationship – legally unrecognizable in Nevada. Inaction by the Nevada Legislature as to a transsexual birth certificate statute is not a statement against recognition of transition but the enactment of a non-trans-inclusive gay rights law in 1999 shows that the Legislature does know the difference between homosexuals and transsexuals. 1999 Nev. Laws Ch. 410. In turn, the electorate must be presumed to have known that difference when, via the general elections of 2000 and 2002, it added the language, "Only a marriage between a male and female person shall be recognized and given effect in this state," to the state's constitution. NEV. CONST. ART. I, § 21. Mainstream media coverage evidences as little connection between same-sex marriage and any trans concept as could be imagined. A search in the *Access World News* database for articles in the two major Nevada newspapers during the years 2000-02 that contained either the terms "same sex marriage" or "gay marriage" *and* either "transsexual," "sex change" or "transgender" yielded but one article – about the potential effect of California's Proposition 22 on Nevada, and the only trans reference was in the description of "The Center, which protects the interests of gays, lesbians, bisexuals and transgender individuals in Southern Nevada." Sean Whaley and Glenn Puit, *Marriage Vote Boosts Opposition*, LAS VEGAS REVIEW-JOURNAL, March 8, 2000. A ruling that even the pre-existing proscription against gay marriage would encompass a heterosexual marriage involving a transsexual would necessitate holding that the sexual orientation clause of the state's anti-discrimination law, worded so as to be limited to "having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality," would nevertheless cover transsexuals. Such an additive misinterpretation of LGB(T) unity is unlikely. The compiled legislative history of that 1999 statute contains no actual references to transsexuals. The closest that anything in those 182 pages of documents comes is a single 1996 Family Research Council (FRC) document which refers to an unverifiable 1993 California case that had been brought under a "sexual orientation" theory by a person that the document's author, Robert Knight (later a primary spokes*man* for the 'Concerned Women for America'), referred to as "a man dressed as a woman," though an honest read of even Knight's summary actually would suggest that the person in question was a male-to-female transsexual. This document, which appears in the record three times, and another FRC document, lamenting the UN's utilization of the word "gender" to encompass "homosexuals, bisexuals and the 'transgendered,' as well as the traditional sexes of male and female," are the only references to transgendered people in the record. The word "transsexual" does not appear – and the record of committee discussions and debated does not lend itself to any suggestion that it was ever discussed, even by those opposed to the bill. In addition to the occurrence

I also have no desire to exacerbate existing intra-community wounds. However, accurate acknowledgement that the process of ejection of trans people and issue from the movement was well underway when same-sex marriage first was discussed – and that the schism was still maintaining its vitality when same-sex marriage first became viable – at least can prevent further damage to some, and perhaps all, transgender people, and it should definitely prevent further harm to transsexuals.

The first of the two quotes at the beginning of this article suggests that its author, a Vacaville letter-to-the-editor writer, was ignorant not only of the state's 2003 enactment of transgender civil rights[32] but also of the 1977 enactment of legislation acknowledging the existence of transsexualism;[33] consequently, it is also suggestive of a belief that transition *recognition* in California only came into existence via the *Marriage Cases* decision (or, perhaps even, that the state has never recognized it at all.) How legally substantive could such an erroneous belief be? And how likely could it be that that trans-specific belief might find itself judicially *added onto* the statute being referred to in the second of the quotes – the state's 1977 anti-same-sex marriage statute? And the state's subsequent proscriptions against same-sex marriage? For if same-sex marriage was immoral in 1977, then what was transsexual marriage?[34]

The answer is not simple. As illustrated by that second quote, its author, notorious anti-gay California state senator John Briggs, was oblivious to the fact that the Senate was at that very time considering a bill already approved by the Assembly, that recognized transsexualism – or, perhaps, he did not think that his chamber would pass the transsexual bill. Or, stepping outside the box of conventional wisdom, perhaps he didn't view transsexuals as immoral. Though this is unlikely given that he did not vote for the transsexual bill, the author of the anti-same-sex marriage bill, Republican Bruce Nestande, *did*.[35]

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noted immediately above, the document also appears at pages 107 and 128 in the legislative history, which are in the second of two large PDF files located on the Nevada Legislature's website. *Available at* http://www.leg.state.nv.us/lcb/research/library/ 1999/AB311,1999pt2.pdf (last visited Jan. 11, 2009); Tim McFeely, *Homosexuality is* Not *a "Universal Human Right,"* at 2, 5 note 4, *reproduced in*, Legislative History, 1999 NEV. A.B. 311, at 144, 147.

[32] 2003 CAL. LAWS Ch. 164.

[33] 1977 CAL. LAWS Ch. 1086.

[34] For purposes of this article a "transsexual marriage" is a marriage involving either a transitioned male-to-female transsexual and a non-transsexual male or a transitioned female-to-male transsexual and a non-transsexual female – in other words, a marriage that is to the parties and appears to society to be opposite-sex. Certainly, this issue has the potential to affect couples which are, post-transition, same-sex. My position, however, is that under an anti-same-sex regime, the post-transition legal sex of a transsexual in such a marriage is unlikely to be championed in order to invalidate the marriage. Instead, the marriage likely would be declared to be opposite-sex – validating the marriage, but invalidating the legal identity of the transsexual spouse. *See* John W. Gonzalez, *Lesbians Legally Exchange Vows – Marriage of Same-Sex Couple From Houston a First for Texas*, HOUSTON CHRONICLE, Sept. 17, 2000 at A-25 ("The homosexuals are saying it's a same-sex wedding but its not that at all. It is a hoax on their part.")

[35] 1977 CAL. ASSEMBLY J. 6708, 9700.

Today, many on the pro-LGBT side (and even more on the anti-LGBT side) would assume that transsexuals' legal marital prospects were the same as gays' in 1977 – and certainly not more favorable.[36] All but forgotten is that throughout the last four decades, some of the same people who have cast legislative votes against same-sex marriage have also cast votes for legal recognition of result of sex reassignment surgery: legal change of sex.[37] Each state has a specific legislative history of course, but California *is* one of those states.

And that matters. It mattered before Proposition 8. It matters even more now – and will continue to matter irrespective of the outcome of *Strauss v. Horton*.

This article is not about the pros and cons of same-sex marriage *per se* – whether as a moral issue or a legal one – though it will include numerous facets of pure political analysis of the issue and it will include some criticism of the *pro*-same-sex marriage movement. This article also is not a critique of the California Supreme Court's 2008 decision in the *Marriage Cases*. Nor is it a critique of any particular opinion from the *Marriage Cases* or its precursor.[38]

So what *is* this article?

It is a call to remember that, whatever else transsexual marriage and transsexual existence may or may not have been in 1977 in California, they were legal. And, it is a call to not be deceived into believing that either ceased being so in 2000 or 2008. Stated differently, the article is a preemptive strike against two arguments that inevitably will be made, either in California or one of the other states that has statutorily recognized transsexualism but has also subsequently established a constitution-level man-woman limitation on marriage.[39] Following that which asserted that Proposition 8 nullified those "interim" (as those opposed have come to pejoratively call them) same-sex marriages which, by the time of election day 2008, existed in California[40] will one day be the

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[36] Some gays who oppose trans-inclusion in federal civil rights proposals put a negative spin on this, implying that the current status quo – in which transsexuals in some jurisdictions can marry post-transition – balances the employment law inequity that results from gay-only rights laws. Chris Crain, *ENDA Gets Trans-Jacked*, WASHINGTON BLADE, Aug. 13, 2004, http://washblade.com/2004/8-13/view/editorial/ (last visited Jan. 23, 2009).

[37] *See* Katrina C. Rose, *Is the Renaissance Still Alive in Michigan? Or Just Extrinsic? Transsexuals' Rights After* National Pride at Work, 35 OHIO N.U. L. REV. 107, 115 (2008).

[38] *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. App. 2006); *In re Marriage Cases*, Coord. Proc. No. 4365 (Cal. Super. Ct. S.F. Co. March 14, 2005).

[39] *See generally* Rose*, supra* note 37 at 109-10.
Notably, Ohio's Supreme Court recently declined to judicially legislate additions to that state's anti-same-sex marriage amendment. Eric Resnick, *Justices Won't Expand Ohio Marriage Ban Amendment*, GAY PEOPLE'S CHRONICLE, Jan. 16, 2009, http://www.gaypeopleschronicle.com/stories09/january/0116093.htm (last visited Jan. 22, 2009).

[40] An argument co-authored by former Whitewater prosecutor Kenneth Starr:

> Proposition 8's effect on foreign same-sex marriages provides a useful key for analyzing its effect on interim marriages. If a same-sex couple in Massachusetts married in July 2008 and moved to California in December 2008, under the plain language of Proposition 8 their marriage would not

argument that heterosexual marriages involving transsexuals, pursuant to the 'tradition' that anti-same-sex marriage law purportedly embraces, are same-sex marriages and, in turn, were erased by Proposition 8. And, flowing from *that* eventually will be the argument that Proposition 8 also nullified the very statutory mechanism that has, for *far* longer than gay couples in California had (or believed that they had) the right to marry, caused California law to recognize the reality of gender transition.

Proposition 8 targeted a 5-month "interim"? It would seem so.

Proposition 8 targeted a *31-year* "interim"? I think not.

Transsexuals 'traditional'? Perhaps not according to conventional straight – or even gay – interpretations of history. But taking into account relevant aspects of legal history, I assert so. If, as the California Supreme Court presumed in the *Marriage Cases*, "the average voter is likely to have understood" that the 2000 anti-same-sex marriage initiative Proposition 22 was intended "to apply to marriages performed in California as well as to out-of-state marriages"[41] what will the Court presume the voters of 2008 "likely to have understood" about Proposition 8's applicability to transsexual marriages?

According to Michael McDermott, an amicus supporting Proposition 8 on behalf of himself (and male heterosexuality), "The clarity of the language of Proposition 8 is matched by its unambiguous nature. There is no wriggle room in the text approved by the Voters, who knew full well the meaning of what they enacted. "[42] How many people *even in the LGBT community* – much less in the overall populace of California – actually took the time to think about how a constitution-level limitation of marriage to 'one man and one woman' might affect those persons whose designation as 'man' or 'woman' changes at some point during their lives?[43] And, even if one sympathizes with every

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> be valid or recognized in California. That is not to say their marriage is void, or that the couple was not legally married in Massachusetts, or that the couple would not be legally married in a jurisdiction that recognizes same-sex marriages. It is only to say that their marriage is not currently valid or recognized in California. The same is true of a same-sex couple married in California in July 2008.

Intervener's Opposition Brief at 37-38, *Strauss v. Horton* (No. S168047) (Cal. brief filed Dec. 19, 2008)(citing Proposition 8 and *Li v. State*, 134 110 P. 3d 91 (2005)) (footnote omitted). But, it should not be true of an opposite-sex couple married in California before or after July 2008 *even if* that couple might be denigrated by the laws of some states as being two people of the same sex. Of course, in Starr's view – articulated at the oral arguments – the people "have the *raw* power to define rights." Matthew S. Bajko, *Breaking News: CA Supreme Court Grapples with Prop 8 Cases*, BAY AREA REPORTER, March 12, 2009, *available at* http://www.ebar.com/news/article.php?sec=news&article=3785 (last visited March 12, 2009).

[41] 183 P.3d at 411.

[42] Amicus Brief of Michael J. McDermott in Support of Proposition 8 at 5, *City and County of San Francisco v. Horton*, No. S168078 (Cal. Filed Jan. 15, 2009).

[43] Even amicus McDemott, though presuming that "Proposition 8 makes it clear that Marriage is between a Man (XY) and a Woman (XX)" in spite of the chromosomal limitation not being the initiative that the voters of California passed judgment upon, nevertheless seemed to place more chromosomal emphasis on *parentage* than on marriage.

> Marriage is and Always has been between members of the Opposite Gender, meaning the Immutable and Inherited characteristics of birth that makes us all Male and Female; as

aspect of pro-same-sex-marriage gay conservative Andrew Sullivan's willingness to accept the outcome of the Proposition 8 vote:

> We lost the Prop 8 battle because we ran a dreadful campaign run by the usual craven Human Rights Campaign cowards and incompetents. We deserved to lose. We do not deserve to get a do-over via court power. There are some interesting legal and constitutional arguments here that are not as easily dismissed as George [Will] might like. But as a political matter - and this is a political struggle - I hope the court decides to allow Prop 8 to stand. I do not want civil equality imposed by judicial fiat in the most populous state in America - in the face of a close initiative vote. It would be a horribly pyrrhic victory. It would taint this movement's power and message and moral standing.[44]

There still will be more than a "political struggle." There *also* will still be the legal question of what Proposition 8, and provisions like it in other states, really mean. Perhaps gays and lesbians do not deserve what Sullivan terms a "pyrrhic victory." But transsexuals do not deserve to lose our very existence as part of a pot in poker game that not only were we not allowed to participate in[45] but one which few, if any, people – LGB or T – thought had anything other than *gay marriage* in its pot.

> Scientifically Proven by the presence of XY and XX Chromosomes differentiating between Men and Women. Attempts by the Courts to use the Constitution to promote an inherently separatist and exterminationist Agenda of Misandry denying the fact that Every Child has a Male (XY) Father and a Female (XX) Mother, are invalid and all rulings deriving from such fundamental error Null and Void. *Id.* at 3, 8 (excessive capitalization in original).

[44] Andrew Sullivan, *Marriage, Democracy And California*, THE DAILY DISH, Jan. 15, 2009, *available at* http://andrewsullivan.theatlantic.com/the_daily_dish/2009/01/marriage-democr.html (last visited Jan. 15, 2009) (referencing George F. Will, *Of Judges, By Judges, For Judges*, WASHINGTON POST, Jan. 15, 2009 at A19).

[45] Somewhat ironically, a trans man, Shannon Minter, actually argued the *Marriage Cases* for the same-sex couples at the California Supreme Court. Zak Szymanski, *Officials Announce HRC Dinner Boycott*, BAY ARA REPORTER, *available at* http://ebar.com/news/article.php?sec=news&article=3113 (last visited Jan. 23, 2009). Nevertheless, the presence of trans people on the paid staffs of national gay rights groups is still extremely rare – even more so for transsexual women. In its nearly 30-year history, HRC has had scarcely a handful of trans employees, first hiring a trans woman – one virtually unknown among the constituency she ostensibly represents – only after the 2007 ENDA debacle. Dennis McMillan, *HRC Comes to Town, Greeted by Unified Diverse Protests*, SAN FRANCISCO BAY TIMES, July 31, 2008, *available at* http://www.sfbaytimes. com/?sec=article&article_id=8686 (last visited Feb. 4, 2009); Marti Abernathey, *HRC's Project Win Back, Part II*, BILERICO PROJECT, July 19, 2008, *available at* http://www.bilerico.com/2008/07/ hrcs_project_win_back_ part_ii.php (last visited Feb. 4, 2009); Autumn Sandeen, *Transwoman Hired at the HRC*, July 21, 2008, PAM'S HOUSE BLEND, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=6200 (last visited Feb. 4, 2009). Though this near-total lack of ability to have any real substantive impact on the 'gay agenda' becomes most evident during skirmishes over trans people seeking to be *in*cluded in civil rights legislation, the failure to *ex*clude trans issues from the scope of discussion where applicable is also a major problem. The entire issue of the near absence of trans employees among the professional activist class is one that receives little media attention. An exception was actress Candis Cayne's recent praise for GLAAD. "I like the way that they include transgender people in this, because a lot of organizations don't." Candis Cayne, *I Advocate…*, THE ADVOCATE, March 2009 at 80.

Part II of this article will present some background on Proposition 8, what led to it and its aftermath. Part III will move back in time to a decidedly different moment in civil rights history – of gay and lesbian progress and separate trans progress. Trans exclusion was accepted without a second (and rarely a first) thought, but one particular exclusion was a positive counterpart to a piece of unquestionably trans-positive legislation. This nearly-forgotten juxtaposition forms the what should be the core of any trans legal analysis in the world according to Proposition 8. Part IV presents an analytical lens through which practitioners and jurists should view the interaction between the work of the 1977-78 session of the California Legislature and the work of the proponents of Proposition 8 in 2008.

To some, the subject of this article may seem like a simple matter. *A person has a sex change operation and the person is the other sex, right?* To others, it may seem as though I am constructing and pulverizing a straw man. *The issue of transsexuals' rights is not part of the Proposition 8 battle, right?* I agree that it should *not* be.

Cases seeking marriage equality[46] for gay couples and lesbian couples generally are planned (some, of course, better than others.[47]) With few exceptions, however, cases that become, or are regarded as, transsexual marriage cases are not planned as such.[48] They simply happen. They arise, often completely without warning to the trans community and those legal professionals with expertise in trans law.

How?

A heterosexual couple marries, believes that their marriage is legal, and then go about life. Then, death or divorce or some other aspect of law or life imbued with law intercedes. Either the non-transsexual spouse,[49] survivors of the non-transsexual

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[46] Here I distinguish marriage equality from something specific denied to one or both parties because of legal marriage being an *See* impossibility. *See* FREEHELD (Lieutenant Films 2007). Of course, post-*Marriage Cases* (and post-*Goodridge*), these have involved legal same-sex marriages. *See In re Golinski* (9th Cir. order dated Jan. 13, 2009); and *In re Levenson* (9th Cir. order dated Feb. 2, 2009). The interstate strength of certain incidents of civil unions also has become the subject of unplanned litigation. *See Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008).

[47] *See* Phil LaPadula, *As Lawsuits Fade, Marriage Plaintiffs and Activists Shift Focus – Amendment called Threat to Florida's Domestic Partnership Paws*, SOUTH FLORIDA BLADE, April 29, 2005, *available at* http://www.floridablade.com/2005/4-29/news/localnews/lawsuits.cfm (last visited Feb. 3, 2009); *and* Phil LaPadula, *Rubin Files Gay Marriage Suit in Palm Beach*, SOUTH FLORIDA BLADE, July 9, 2004, *available at* http://www.floridablade.com/2004/7-9/news/localnews/rubin.cfm (last visited Feb. 3, 2009).

[48] These include cases in which transsexuals seek to conform their identity documentation to reflect post-transition reality. *See In re Ladrach* 513 N.E.2d 828 (Ohio Prob. Ct. Stark Co. 1987). Certainly, the transsexual initiates the action – but rarely is this done purposefully as a 'test case.' A recent exception is an attempt to overturn an administratively-created restriction on who can utilize the Illinois transsexual birth certificate statute. *Kirk v. Arnold* (Ill. Cir. Ct. Cook Co. filed Jan. 28, 2009); *see also* Steve Schmadeke, *2 Transsexuals Sue State to Switch the Gender on Their Birth Certificates*, CHICAGO TRIBUNE, Jan. 29, 2009, *available at* http://www.chicagotribune.com/news/local/chi-transgender-birth-certificatjan28,0,701815.story (last visited Jan. 29, 2009).

[49] *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004).

spouse,[50] or those seeking to craftily benefit from the possibility of a legal heterosexual marriage being converted on-the-fly into an invalid same-sex relationship[51] turn some other type of case into a transsexual marriage case. When – *not* if, but when – that happens in California, for a just result to emerge, practitioners and jurists need to have access to more than dictionaries, queer theory tomes, blogs, anecdotes, [52] general notions of fairness, and whatever they might *think* that they know about the relationship between Proposition 8, sex definition and marriage definition.

California: 2008

Prelude, 2000

As was the case at the federal level[53] and in most of the states, during the mid-1990s, California experienced an effort to enact legislation to insulate the state from having to recognize same-sex marriages that might one day be allowed in some other jurisdiction(s). Throughout most of the decade the impetus for the fear, of course, was Hawaii.[54] Several efforts by the California Legislature to build on its 1977 anti-same-sex marriage statute failed.[55] Undaunted, Sen. Pete Knight, a former X-15 pilot with gay relatives and a reputation both for racial insensitivity and anti-gay sentiment,[56] shifted to the initiative method of legislating, the "end-run"[57] around the Legislature provided for in the California constitution. As Stephanie Salter wrote in the *Ventura County Star*:

> Knight's initiative which twice failed in the state Legislature seems to some a simple and harmless declaration of the status quo. Since 1977 the state's Family Code has defined marriage as "a personal relation ... between a man and a woman."
>
> But anti-gay rights folks like Knight are worried that some other state – Hawaii, Vermont or Alaska – might do the unthinkable and include

[50] *In re Gardiner*, 42 P.3d 120 (Kan. 2002).
[51] *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. – San Antonio 1999, pet. denied); *In re Lovo Lara*, 23 I&. & N. Dec. 746, 749 (BIA 2005) (immigration law).
[52] A recent ABA Journal article pointed to what some transgender advocates call "anecdotal evidence show[ing] that society is beginning to accept transgender people into their communities and working worlds." Specifically referenced was President Obama's announcement of "his intention to include gender identity in the new administration's nondiscrimination employment policy." Anna Stolley Persky, *Free to Be - Recent Decisions Show Growing Acceptance of Transgender Rights*, ABA JOURNAL, Feb. 2009. Missing, though, was any mention of the foundational elements of trans law: the birth certificate statutes.
[53] Defense of Marriage Act. Pub.L. No. 104-199 (Sept. 21, 1996), 110 Stat. 2419, codified at 1 U.S.C. § 7; and 28 U.S.C. § 1738C.
[54] *See generally* House Conf. Report 104-464, 104th Cong., 2d Sess. 1996.
[55] 1995 CAL. A.B. 1982; 1996 CAL. A.B. 3227; 1997 CAL. S.B. 911.
[56] Jon Matthews, *Famed Ex-Pilot Fights Gay Marriage – Now a State Senator, Knight Sponsors Ballot Initiative*, SACRAMENTO BEE, Oct. 6, 1999 at A01; Jon Matthews, *Senator Scolded in Ad by His Gay Son for Fighting Against Same-Sex Marriage*, SACRAMENTO BEE, Oct. 15, 1999 at A4.
[57] Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1065 (2001) (referring to the initiative process as a "complete end-run around the legislature").

> homosexual unions under the definition of marriage. Then gay people could move to California and their marriages would be recognized as valid – just as the state recognizes marriages between cousins from states where that combination is legal.[58]

Of Knight's anti-same-sex marriage initiative, already set to go to the voters the following March, Republican state Rep. Bruce Thompson told a group of ministers in June 1999, "This issue will be the issue that will divide this country and this state more than any other."[59]

Arguably, Thompson was being only slightly hyperbolic.

During a debate in the 1998 gubernatorial campaign, Democrat Gray Davis said, "California is not ready for gay marriages."[60] Yet, he ultimately opposed the Knight Initiative (also known as Proposition 22), saying that it was unnecessary because California law already limited marriage to opposite-sex couples.[61] Both sides viewed the Altering the landscape on Dec. 20, 1999, was the Vermont *Baker* decision. [62] Both sides viewed it as having potential to affect the California initiative vote.[63] If any, the effect was negative for those favoring same-sex marriage. Proposition 22 passed by a comfortable margin.[64]

Same-sex marriage advocates eventually tried to rely on a strained interpretation of the measure to assert that it only targeted out of state marriages, which would thereby leave the Legislature free to attempt to statutorily establish same-sex marriage. The Legislature did try to do so, but met with a veto – twice.[65] Governor Schwarzenegger viewed the issue as having been decided by the voters in 2000.

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[58] Stephanie Salter, *It Isn't Too Early to Start Fighting a Bad Initiative*, VENTURA COUNTY STAR, June 25, 1999 at B08.
[59] Ethan Rarick, *Activists to Battle Over Gay Marriage*, CONTRA COSTA TIMES, June 5, 1999 at A01 (quoting Rep. Bruce Thompson).
As would be the case in 2008, officials of the Mormon Church also expressly supported Proposition 22 in 2000. *Gay-Marriage Ban Gains Mormon Backing - Letters From Church Officials Urge Fund-Raising in Support of the California Ballot Measure*, RIVERSIDE PRESS-ENTERPRISE, Aug. 9, 1999 at A03; Hannah Wolfson, *Mormon Conference Attacks Gay Marriage*, CONTRA COSTA TIMES, Oct. 3, 1999 at A16. However, the anger directed toward the Mormon Church was considerably greater in the aftermath of Proposition 8. Seth Hemmelgarn, *FPPC to Investigate Mormon Involvement in Prop 8*, BAY AREA REPORTER, Nov. 27, 2008, *available at* http://www.ebar.com/news/article.php?sec=news&article=3518 (last visited Jan. 23, 2008)
[60] Greg Lucas and Lynda Gledhill, *Defeat of Bill Banning Gay Bias Foretells Battle - First Salvo Fired in Same-Sex Marriage Debate*, SAN FRANCISCO CHRONICLE, June 5, 1999 at A15 (quoting Gray Davis).
[61] Aurelio Rojas, *Davis Says He's Against Measure on Gay Marriage*, SACRAMENTO BEE, Jan. 29, 2000 at A3.
[62] *Baker v. State*, 744 A.2d 864 (Vt. 1999).
[63] Hallye Jordan, *Arguments Intensify in California*, SAN JOSE MERCURY NEWS, Dec. 21, 1999 at 1A.
[64] Elaine Herscher, *Gay Marriage Ban Pleases Leader of Mormon Church – But Opponents of Measure Say Passage Isn't All Bad News*, SAN FRANCISCO CHRONICLE, March 9, 2000 at A6.
[65] 2005 CAL. A.B. 849; and 2006 CAL. A.B. 43.

Even the 'out-of-state only' interpretation of Proposition 22 would cause a certain category of marriages not to be recognizable under California law. But were there already any marriages within that category for Proposition 22 to invalidate? If the initiative targeted only same-sex marriages, then no; *Goodridge*, after all, was still three years away. [66] However, if the initiative also targeted certain but that would be viewed by some other states as same-sex, then conceivably the answer could be yes.

Could Proposition 22 legitimately be interpreted as invalidating the type of marriage ruled to be same-sex by a Texas appellate court in Oct. 1999, even though California has the type of statute that, presumably, would have caused the Texas court to uphold transsexual marriage? What was *actually* was viewed by the masses – those whose ballots determined the measure's fate – to be encompassed by Proposition 22? Were the voters connecting transsexuals to same-sex marriage in 2000?

Was anyone? A search in the *Access World News* database for California newspapers from Jan. 1, 2000, to the day of Proposition 22's approval, March 7, 2000, yielded 199 hits on "gay marriage" and 177 on "same sex marriage," with little overlap; 327 items contained one or the other of the two terms.[67] Searching inside those 327 items, one finds but three that include either "transgender," "transsexual" or "sex change." California courts have an uneven relationship with sources of legislative history even when such history comes from members of the legislature,[68] but I nevertheless offer the information as food for thought.

One of the three seemingly trans-related items appeared in the *Long Beach Press-Telegram* and was about gay columnist Dan Savage, then having recently made national mainstream news for having infiltrated the Republican presidential primary campaign of religionist extremist Gary Bauer – and the only trans reference in the item was to Savage having "discussed the pros and cons of genital cosmetic surgery for a transsexual" in one of his columns.[69]

Yet that item did not even mention Proposition 22.

Two others did, but the only mention of anything trans in a *San Jose Mercury News* item on the eve of the election was a general description of a multi-church vigil against the initiative as being "a place where gay, lesbian, bisexual and transgender

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[66] 798 N.E.2d 941 (Mass. 2003).
[67] *Access World News* database search, conducted Dec. 10, 2008. The numbers for all of the year 2000 searches are smaller than one might expect. Of the 93 California sources in *Access World News*, only 29 cover the time period of Proposition 22. However, I have no reason to believe that the ratios involved here would be significantly different if more sources were included.
[68] *Ross v. Ragingwire Telecommunications, Inc*., 174 P.3d 200, 208 (Cal. 2008); *California Teachers Ass'n v. San Diego Comm. Coll. Dist*., 621 P.2d 856, 860 (Cal. 1981); *see also* Russell Holder, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 U.C. DAVIS L. REV. 569 (1997).
[69] Laurence M. Cruz, *Gay Writer Takes on Conservatives*, LONG BEACH PRESS-TELEGRAM, Feb. 10, 2000 at A15.

people can feel welcomed in a spiritual context."[70] Only one – a letter to the editor in the *Los Angeles Daily News* – connected transsexuals to Proposition 22 in any way.

> The whole idea of civil rights law is to prevent discrimination based on factors that law-abiding adults cannot control. Were Prop. 22 to state: "Only marriage between those whose heights and ages differ by five inches or years maximum is valid or recognized," the discrimination would be obvious. Prop. 22 denies marital validity, due not to sexual orientation (a gay man and a lesbian could wed!) but to gender, which – transsexual operations notwithstanding – is no more within one's control than one's age or height.

That letter also contained a prediction:

> Prop. 22 is a violation of civil rights law and, if passed, will be immediately blocked and soon thrown out in court.[71]

That prediction by Thomas E. Braun was, of course, somewhat off the mark. It was not *immediately* thrown out.

Four Years Later

Governor Gray Davis was re-elected in 2002.[72] However, that second term would end unceremoniously and abruptly – a fall from political grace perhaps only surpassed in magnitude and embarrassment by the second term of Illinois Governor Rod Blagojevich.[73] Extreme dissatisfaction with Davis led to a recall campaign – which quickly degenerated into a political circus,[74] yet nevertheless succeeded in replacing Democrat Davis with Republican Arnold Schwarzenegger, a social moderate known to

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[70] Loretta Green, *Coalition Will Unite in Prayer Monday in Hopes of Defeating Prop. 22*, SAN JOSE MERCURY NEWS, March 5, 2000 at 1B.
[71] Thomas E. Braun, *Violates Civil Rights*, LOS ANGELES DAILY NEWS, Jan. 28, 2000 at N20.
[72] Carla Marinucci, John Wildermuth and Lynda Gledhill, *GOP Takes Congress; Davis Wins Tight Race – Governor Re-elected After Long, Costly, Bitter Campaign*, SAN FRANCISCO CHRONICLE, Nov. 6, 2002 at A1.
[73] John Wildermuth, *Dismal Day as Davis Sees His Dreams Vanish - Democrats in Shock at Election Outcome*, SAN FRANCISCO CHRONICLE, Oct. 8, 2003 at A20; Bob Secter and Rick Pearson, *U.S.: Senate Pick Was for Sale – Governor Allegedly Viewed Selection as 'Golden' for Him*, CHICAGO TRIBUNE, Dec. 10, 2008 at 5; Ray Long and Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich Has Been Removed from Office*, CHICAGO TRIBUNE, Jan. 30, 2009, *available at* http://www.chicagotribune.com/news/local/chi-blagojevich-impeachment-removal,0,5791846.story (last visited Jan. 30, 2009).
[74] To put this into perspective, at slightly over one-half of one percent, the 1 out of 199 percentage of relevant articles in the 2000 *Access World News* sampling is only slightly better than the 0.2 percent of the vote the former child star Gary Coleman received in his joke candidacy in the 2003 recall election. *Statewide Special Election – October 7, 2003*, *available at* http://vote2003.sos.ca.gov/Returns/summary.html (last visited Feb. 3, 2009).

not see eye-to-eye with his party on LGBT issues.[75] Schwarzenegger would go on to sign many (though not all[76]) pieces of pro-LGBT legislation that the Legislature sent to him. Yet it would be Davis, before leaving office, that signed the bill to rectify the state's anti-discrimination law to clearly cover trans people.[77] Marriage, though, would be the major gay flashpoint that the Schwarzenegger administration would have to address.

On February 10, 2004, Gavin Newsom, the Mayor of the City and County of San Francisco directed the county clerk to determine the changes that would need to be made to the forms and documents used to apply for and issue marriage licenses, in order for licenses to be provided to couples "without regard to their gender or sexual orientation." The county clerk designed revised forms and on February 12, the City began issuing marriage licenses to same-sex couples.[78] The next day, two separate actions were filed in San Francisco Superior Court – seeking an immediate stay and relief via writ – to prohibit the City from issuing marriage licenses to same-sex couples.[79]

After the Superior Court declined to grant an immediate stay in the actions brought by the Campaign for California Families and a group calling itself the Proposition 22 Legal Defense Fund – and the City continued allowing same-sex marriages – the California Attorney General and "a number of taxpayers" filed two separate petitions seeking to have the California Supreme Court issue an original writ of mandate, asserting that the City's actions were unlawful and warranted the high court's immediate intervention.[80]

On March 11, 2004, the high court issued an order to show cause in the writ proceedings, and, pending the determination in those matters, directed City officials not only to enforce the existing marriage statutes but also to refrain from issuing marriage licenses not authorized by those statutes. That March 11th order also stayed all proceedings in the two cases then pending in San Francisco Superior Court, yet did not preclude a direct challenge to the constitutionality of those marriage statutes that the City had essentially tried to revise on the fly.[81]

Shortly after the March 11, 2004, order, and while the Attorney General's cases still were pending, the City filed a writ petition and complaint for declaratory relief in Superior Court, seeking a declaration that Proposition 22 was inapplicable to marriages solemnized in California, and, beyond that, that all California statutes limiting marriage to unions between a man and a woman violate the California Constitution. Thereafter,

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[75] For example, *see* Mary Rettig, *Calif. Activist Outs Pedophiles' Involvement in 'Gay Pride' Event,* AGAPE PRESS, July 11, 2005, *available at* http://headlines.agapepress.org/archive/7/afa/112005c.asp (last visited Jan. 22, 2009).
[76] For example, *see* 2005 CAL. A.B. 849; and 2006 CAL. A.B. 43.
[77] Meaning, oddly enough, that Davis and Blagojevich each signed his respective state's trans civil rights legislation into law. 2003 CAL. LAWS Ch. 164; 2005 ILL. LAWS 093-1078.
[78] *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).
[79] *Id*.
[80] *Id*.
[81] *Id.*

several same-sex couples initiated actions on essentially the same grounds.[82] All of those actions, as well as one filed by a separate group of same-sex couples challenging the constitutionality of the state's marriage statutes, were consolidated into a single proceeding dubbed the *Marriage Cases*.[83]

On August 12, 2004, while the *Marriage Cases* proceeding was pending in the superior court, the Supreme Court ruled not only that San Francisco had exceeded its authority in issuing marriage licenses to same-sex couples in the absence of a judicial mandate, but also concluded that the approximately 4,000 same-sex marriages performed in San Francisco during the month that the licenses were being issued were "void from their inception and a legal nullity." Additionally they commanded the City officials to "correct their records to reflect the invalidity of these marriage licenses and marriages."[84] Nevertheless, the Supreme Court did *not* decide the substantive question of the constitutionality of California's heterosexual-only marriage statutes.[85]

In November, eleven states added language to their constitutions that explicitly limited marriage to non-polygamous heterosexual couples.[86] California was not one of them, though anti-gay forces in the state quickly geared up to try to do so, not simply attempting to ride the 2004 anti-same-sex-marriage momentum or even responding specifically to the beginning of legal same-sex marriage in Massachusetts but instead responding to the then-impending attempt by Representative Mark Leno to legislatively establish same-sex marriage in California.[87]

Four *More* Years Later

The 2008 *Marriage Cases* Decision

On May 15, 2008, a sharply divided California Supreme Court opened up marriage in the state to same-sex couples, removing Massachusetts' uniqueness on that front. The majority observed:

> Although the California statutes governing marriage and family relations have undergone very significant changes in a host of areas since the late 19th century, the statutory designation of marriage as a relationship between a man and a woman has remained unchanged.[88]

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[82] *Id.* at 403.
[83] *Id.*
[84] *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 499 (Cal. 2004)
[85] *In re Marriage Cases*, 183 P.3d at 403.
[86] Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah followed Missouri and Louisiana, which had done so earlier in the fall. Daniel H. Walker, *Are State Marriage Amendments Bills of Attainder?: A Case Study of Utah's Amendment Three*, 2005 BYU L. REV. 799 (2005).
[87] *TVC Chairman Announces California Marriage Amendment!*, TRADITIONAL VALUES COALITION, Dec. 9, 2004, *available at* http://www.traditionalvalues.org/print.php?sid=2047 (last visited Dec. 10, 2004).
[88] *In re Marriage Cases*, 183 P.3d at 408.

Nevertheless, a 1971 statutory revision which equalized the minimum age for men and women, also eliminated references to "male" and "female," leaving behind language stating simply that "[a]ny unmarried person of the age of 18 years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage."[89] The majority noted, however, not only an utter lack of indication in the legislative history of that enactment that the change was intended to authorize same-sex marriage but that numerous other marriage statutes "reflecting the long-standing understanding that marriage under California law refers to a union between a man and a woman" had not changed.[90]

In further recounting the history of the state's marital statutes, the majority recalled that in the mid-1970's, several same-sex couples in California had attempted to rely on the 1971 change. All not only were they unsuccessful, but together spurred legislation specifying that marriage was indeed opposite-sex-only.[91] But there were no mass protests as there were following Prop 8. "The organized gay community," at the time according to *NewsWest*, "for the most part, sat out the debate, explaining that the issue is not of major consequence in comparison to other issues – employment protection, for example."[92]

That changed over the following quarter-century.

By the time of the *Marriage Cases*, all of the parties involved agreed that the 1977 language limits marriage, when performed in California, to opposite-sex couples.[93] However, there was not such agreement about the language enacted through Proposition 22 in 2000: "Only marriage between a man and a woman is valid or recognized in California." Those in favor of same-sex marriage believed it was applicable only to marriages entered into in another jurisdiction, meaning that "it should not be interpreted to speak to or control the question of the validity of marriages performed in California." The Proposition 22 Legal Defense Fund and the Campaign for California Families contended that the 2000 statute limited out-of-state marriages as well as marriages performed in California.[94]

The same-sex marriage proponents relied on the initiative's "legislative history," specifically asserting that the arguments relating to the initiative set forth in the voter information guide "indicate that this initiative measure was prompted by the proponents' concern that other states and nations might authorize marriages of same-sex couples, and by the proponents' desire to ensure that California would not recognize such marriages."[95] Despite agreeing generally that the "principal motivating factor underlying

[89] *Id*. at 408 (quoting 1971 CAL. LAWS Ch. 1748, § 26).
[90] *In re Marriage Cases*, 183 P.3d at 408-09.
[91] *Id*. at 409.
[92] *Gay Marriage Ban Gets Approval*, NEWSWEST, April 28-May 12, 1977 at 14.
[93] *In re Marriage Cases*, 183 P.3d at 409.
[94] *Id*. at 409-10.
[95] *Id*. at 411.

Proposition 22" was preventing California from recognizing out-of-state same-sex marriages, language could not properly be interpreted to apply "only to marriages performed outside of California."[96] In fact, the majority went so far as to presume that "the average voter is likely to have understood the proposed statute to apply to in California as well as to out-of-state marriages."[97]

Of course, the court did not stop there. It went on to invalidate that opposite-sex-only framework, rejecting as "fundamentally flawed" the anti-same-sex marriage parties' asserted linkage of the constitutional right of marriage to procreation.[98] Moreover, the court concluded that

> the distinction drawn by the current California statutes between the designation of the family relationship available to opposite-sex couples and the designation available to same-sex couples impinges upon the fundamental interest of same-sex couples in having their official family relationship accorded dignity and respect equal to that conferred upon the family relationship of opposite-sex couples.[99]

Then, the court wove a different tapestry with existing legislative threads:

> [I]t is readily apparent that extending the designation of marriage to same-sex couples clearly is more consistent with the probable legislative intent than withholding that designation from both opposite-sex couples and same-sex couples in favor of some other, uniform designation. In view of the lengthy history of the use of the term "marriage" to describe the family relationship here at issue, and the importance that both the supporters of the 1977 amendment to the marriage statutes and the electors who voted in favor of Proposition 22 unquestionably attached *to the designation of marriage*, there can be no doubt that extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the equal protection remedy that is most consistent with our state's general legislative policy and preference.[100]

But what about "probable legislative intent" as to "sex"?

Proposition 8? Hate?[101] Or Too Late?

The May 15th ruling was not the end, however. Even before the *Marriage Cases* opinion was issued, opponents of same-sex marriage had begun the process of putting a

[96] *Id.*
[97] *Id.*
[98] *Id. at* 430-31.
[99] *In re Marriage Cases*, 183 P.3d at 446.
[100] *Id. at* 453 (emphasis added).
[101] This derives from anti-Proposition 8 forces referring to the measure as 'Proposition Hate' and 'Proposition H8.'

same-sex marriage ban into the state's constitution via citizen initiative. On Dec. 11, 2007, Larry Bowler and Randy Thomasson submitted paperwork to begin the process to submit an initiative they had dubbed "The Voters' Right to Protect Marriage Initiative." It contained the following language:

> Only marriage between one man and one woman is valid or recognized in California, whether contracted in this state or elsewhere. *A man is an adult male human being who possesses at least one inherited Y chromosome, and a woman is an adult female human being who does not possess an inherited Y chromosome.* Neither the Legislature nor any court, government institution, government agency, initiative statute, local government, or government official shall abolish the civil institution of marriage between one man and one woman, or decrease statutory rights, incidents, or employee benefits of marriage shared by one man and one woman, or require private entities to offer or provide rights, incidents, or employee benefits of marriage on unmarried individuals. *Any public act, record, or judicial proceeding, from within this state or another jurisdiction, that violates this section is void and unenforceable*.[102]

This sex-defining aspect of *this* proposal did not go unnoticed – either by gay media[103] nor by the Attorney General, who on Jan. 31, 2008 noted the following in his official summary of the proposal, which he had re-titled "Marriage. Elimination of Domestic Partnership Rights." The summary noted that the proposal, "Defines man and woman" and added:

> Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local government: Unknown, but potential increased costs for state and local governments. *The impact would depend in large part on future court interpretations*. [104]

The impact, of course, *would have* gone beyond mere fiscal matters for the state. How many "public act[s], record[s], or judicial proceeding[s], from within this state" would have been invalidated by the abjectly unscientific,[105] chromosomally essentialist definitions of "man" and "woman"?

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[102] Proposed Calif. Initiative No. 07-0098, *available at* http://ag.ca.gov/cms_attachments/initiatives/pdfs/i769_07-0098.pdf (last visited Jan. 22, 2009) (emphasis added).
[103] Heather Cassell, *Gay Group Quietly Preparing for Initiative Fight*, BAY AREA REPORTER, Aug. 9, 2007.
[104] Title and Summary of Proposed Calif. Initiative No. 07-0098, *available at* http://ag.ca.gov/cms_attachments/initiatives/pdfs/i769_07-0098_title_and_summary.pdf (last visited Jan. 22, 2009) (emphasis added).
[105] I am not intending to give short shrift to the intersexed – particularly those who possess "at least one inherited Y chromosome." In fact, it appears as though the author of that initiative has less knowledge of intersexuality than the title character of the movie *Juno*, who was at least able to articulate knowledge of "neuter babies with no junk." JUNO (20th Century Fox 2007). When grown, of course, it is doubtful that many such people would fit comfortably into the Y-chromosome-demarcation that such a framework would have consecrated.

> Marriages?
> Birth certificates?
> Even drivers licenses?
> However, this was *not* the anti-same-sex marriage initiative that became

Proposition 8 and went to the California voters in November 2008. *That* measure contained but fourteen words:

> Only marriage between a man and a woman is valid or recognized in California.[106]

Even before election day, campaign tactics on both sides of the battle over Proposition 8 were vicious: the Mormon Church commanded its adherents in California to do all that they could to assure its passage[107] and the anti-Proposition 8 forces began to 'out' people and businesses who gave financial support to the measure.[108]

Though returns on election night were unclear, despite the vote being much closer than the Proposition 22 vote had been eight years earlier and despite the election nationally being viewed as one of hope triumphing over fear and cynicism in California Proposition 8 did indeed pass.[109]

After the Election – And After the Aftermath

When it finally became clear that Proposition 8 had indeed passed, a range of emotions erupted from same-sex marriage supporters; from sadness over what was lost to anger, not only at those perceived to have had a hand in taking it[110] (including further

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[106] 2008 Calif. Proposition 8, *enacting* CAL. CONST., art. 1, § 7.5.
[107] Scott Taylor, *LDS Church Urges Pro-Proposition 8 Calls*, DESERET NEWS, Oct. 8, 2008, *available at* http://deseretnews.com/article/1,5143,700264880,00.html (last visited Jan. 27, 2009); Peggy Fletcher Stack, *LDS Call to Ban Gay Marriage Widens*, SALT LAKE TRIBUNE, Oct. 8, 2008 at LDS Local.
[108] Seth Hemmergarn, *Yes on 8 Threatens to 'Out' Businessman as Foe*, BAY AREA REPORTER, Oct. 30, 2008, *available at* http://www.ebar.com/news/article.php?sec=news&article=3433 (last visited Jan. 23, 2009).
[109] Bob Egelko and John Wildermuth, *Prop. 8 Foes Concede Defeat, Vow to Fight on*, SAN FRANCISCO CHRONICLE, Nov. 7, 2008 at B1.
[110] The Utah-based LDS (Mormon) Church was a heavy financial backer of the initiative, and Mormon temples throughout the nation saw protests after passage. Seth Hemmelgarn, *More Protests Planned Against Prop 8*, BAY AREA REPORTER, Nov .13, 2008, *available at* http://www.ebar.com/news/article.php?sec= news&article=3476 (last visited Jan. 22, 2009). Though later analysis called them into question, assumptions about African-Americans' attitudes toward same-sex marriage had led to accusations that the large pro-Obama turnout actually helped Proposition 8 pass. Raymond Leon Roker, *Stop Blaming California's Black Voters for Prop 8*, HUFFINGTON POST, Nov. 7, 2008, *available at* http://www.huffingtonpost.com/ raymond-leon-roker/stop-blaming-californias_b_142018.html (last visited Jan. 22, 2009); Seth Hemmelgarn, *Race Overstated in Prop 8 Passage, Report Says*, BAY AREA REPORTER, Jan. 8, 2009, *available at* http://www.ebar.com/news/article.php?sec=news&article=3634 (last visited Jan. 22, 2009); and *Curtians for Prop 8: 'Ave. Q' Comments on Nasty Measure's Lifespan*, GOOD AS YOU, Jan. 23, 2009, *available at*

campaigns of 'outing' Prop 8 supporters[111]) but also at all who were perceived as not having done enough to prevent the initiative's passage.[112]

The opponents of Proposition 8 came to attack the initiative on two fronts: the courts and the ballot. The court challenge asserts that Proposition 8 was improperly submitted to the voters.[113] However, even by January 2009, one proposed initiative had been filed which would simply repeal Proposition 8,[114] and yet another would go further and also remove the word "marriage" from California's legal lexicon, to be replaced by "domestic partnership."[115]

But after all of the discord and protestation, for transsexuals an all-but-unasked question remains: What did Proposition 8 do to transsexuals? As noted above, the vision of a California anti-same-sex marriage initiative that would have purported to define "man" and "woman" was not the proposal that the state's voters passed judgment upon on Nov. 4, 2008. There was no sex-definition language; only *marriage*-definition language. Not surprisingly then, the potential effect of Proposition 8 on existing – meaning pre-dating not simply the *Marriage Cases* but also the events of 2004 – rights of transsexuals received consideration to no more than the same degree that they received consideration in states such as South Dakota, Minnesota and Texas: next to none.[116]

However, unlike those three states, when an anti-same-sex marriage constitutional amendment arrived on California's legal landscape – as had been the case in Louisiana, Hawaii, Alabama, Kentucky, Virginia, Georgia, Arkansas, Missouri, Nebraska, Colorado, Utah, Oregon, Arizona and Wisconsin – transsexuals had long since broken positive

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http://www.goodasyou.org/good_as_you/2009/01/curtains-for-prop-8-ave-q-comments-on-nasty-measures-lifespan.html (last visited Jan. 23, 2009). Of course, despite the anger, humor was not absent. See *Prop 8 – The Musical*, FUNNY OR DIE, *available at* http://www.funnyordie.com/videos/c0cf508ff8/prop-8-the-musical-starring-jack-black-john-c-reilly-and-many-more-from-fod-team-jack-black-craig-robinson-john-c-reilly-and-rashida-jones (last visited Jan. 22, 2009).

[111] Christopher Lisotta, *Buying into Boycotts - Part One of a Series of Articles on the Boycott Targeting Proposition 8 Supporters*, FRONTIERS, Dec. 16, 2008 at 51; *see also, Dishonor Roll*, CALIFORNIANS AGAINST HATE, http://californiansagainsthate.com/dishonorRoll.html (last visited Jan. 23, 2009). The 'outing' of Proposition 8's supporters even spurred some of the supporters to file a federal lawsuit to overturn the portions of California's campaign finance laws that make the information about donations public. Seth Hemmelgarn, *Prop 8 Backers Want to Hide Donors' Info*, BAY AREA REPORTER, Jan. 15, 2009, http://www.ebar.com/news/article.php?sec=news&article=3638 (last visited Jan. 23, 2009).

[112] Seth Hemmelgarn, *Critics Assail No on 8 Campaign*, BAY AREA REPORTER, Nov .13, 2008, http://www.ebar.com/news/article.php?sec=news&article=3473 (last visited Jan. 22, 2009); *Focus Grouped to a Fault*, BAY AREA REPORTER, Nov. 13, 2008, *available at* http://ebar.com/openforum/opforum.php?sec=editorial&id=180 (last visited Feb. 1 2010).

[113] Matthew S. Bajko, *Repeal of Prop 8 Launched*, BAY AREA REPORTER, Nov .13, 2008, *available at* http://ebar.com/news/article.php?sec=news&article=3474 (last visited Jan. 22, 2009).

[114] Proposed Calif. Initiative 09-0002, filed Jan. 12, 2009, *available at* http://ag.ca.gov/cms_attachments/initiatives/pdfs/i799_09-0002.pdf (last visited Jan. 22, 2009).

[115] Proposed Calif. Initiative 09-0003, filed Jan. 12, 2009, *available at* http://ag.ca.gov/cms_attachments/initiatives/ pdfs/i800_09-0003_domestic_partnership_initiative.pdf (last visited Jan. 22, 2009).

[116] Rose, *supra* note 24, (Forthcoming 2009).

statutory ground on transition recognition and have more than reasonable expectations that pre-*Marriage Cases* law recognized their existence.[117] Many opponents of Proposition 8 referred to it as 'Proposition H8,' but if the intent of the measure's proponents was to negatively impact *hetero*sexual *trans*sexual marriages as being same-sex marriages, then perhaps a better epithet would be 'Proposition Too Late.' To fully understand why – and to fully understand the meaning of that pre-2008 presence – and in turn I assert, to accurately assess what, if any, effect any of California's restrictions of marriage to one man and one woman may have had on marriages in which the "one woman" began life with a presumptive designation of "one man" (or vice versa), one must go back to when the groundbreaking occurred.

California: 1977

Historical Preface

Though spotlighted for purposes of this article's argument, 1977 nevertheless was not 'year one' for the presence of transsexuals in California. Historian Susan Stryker's magnificent documentary, *Screaming Queens*,[118] not only places transsexuals in San Francisco in the mid-1960s but also shows how that community ignited a collective protest against police brutality – almost three years before the traditionally-accepted 'beginning' of the modern gay rights movement, New York City's 1969 Stonewall Riots.[119] (And this is in addition to a drag queen entering mainstream San Francisco politics a generation before Harvey Milk.[120]).

And 1977 also is not 'year one' for transsexual *law* in California. Not surprisingly, infamous enactments such as anti-crossdressing ordinances plagued transsexuals (as well as gays and lesbians.)[121] Much earlier, Attorney General (later governor) Pat Brown had opined that SRS ran counter to ancient, yet seemingly then-still-extant, proscriptions against castration – effectively (though not entirely) rendering SRS unavailable in California (and, practically speaking, the U.S.) until the mid-1960s.[122] In 1973, a pre-op transsexual woman was accused of "deception" and "giving false information" (in addition to "female impersonation") after identifying herself using a female name to a Los Angeles police officer.[123] In October 1976, the *San Francisco*

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[117] Minnesota, despite being a pioneer in perhaps every other aspect of trans-positive law, has never enacted a transsexual birth certificate statute. And, sadly, Minnesota's leading trans case, the *Goins v. West Group* employment discrimination case, suggests that the state would be more Kansas than New Jersey. 635 N.W.2d 717, 725 (Minn. 2001).

[118] SCREAMING QUEENS: THE RIOT AT COMPTON'S CAFETERIA (2005).

[119] DAVID CARTER: STONEWALL – THE RIOTS THAT SPARKED THE GAY REVOLUTION (2004).

[120] MICHAEL R. GORMAN, THE EMPRESS IS A MAN – STORIES FROM THE LIFE OF JOSÉ SARRIA 203-07 (1998).

[121] SUSAN STRYKER, TRANSGENDER HISTORY (2008), 31-35.

[122] JOANNE MEYEROWITZ, HOW SEX CHANGED – A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 47-48 (2002).

[123] Douglas Sarff, *Police Create Nightmare for Transexual*, NEWSWEST, Oct. 3-16, 1975 at 7. As Stryker notes, this sort of harassment of "people whose appearance might not match the name or gender designation on their IDs" was nothing new. STRYKER, TRANSGENDER HISTORY, *supra* note 121 at 60-61.

Chronicle even trumpeted that "Few Transsexuals Can Adjust Easily to New Gender."[124] Even assuming that to be true, could it have been because they were women walking around with male identification papers and men walking around with female identification papers? [125]

Of course, in the late-1970s all was not bad – or, perhaps more accurately, much that was bad was on the verge of getting better. A trans woman was outed by the *Oakland Tribune* in 1978, but an appellate court eventually saw a cognizable privacy interest in the process of transition. [126] Medi-Cal was refusing to cover transition-related healthcare, but would lose a pair of appeals in 1978.[127] And while that year's San Francisco gay rights ordinance – the one that grew out of Harvey Milk's 1977 victory against 'the machine' – was not trans-inclusive,[128] the 1979 Los Angeles ordinance was[129] (a fact largely forgotten in gay activism and history.[130]).

Of course, much of this is peripheral to the question of whether the state would actually recognize in law the physical result of SRS (or any medical procedures bringing about a change of sex.) However, it was in 1977 that the issue came before the California Legislature. And the Legislature would consider the bill to allow transsexuals to change the sex designation on their birth certificates – a bill authored by future-San Francisco Mayor Willie Brown, who, in the previous legislative session, had authored successful

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[124] Betty Liddick, *Few Transsexuals Can Adjust Easily to New Gender*, SAN FRANCISCO CHRONICLE, Oct. 14, 1976 at 1.

[125] Or, as was the case with Steve Dain, a transsexual man walking around without a job. Marci Rasmussen, *School Suspends Sex-Change Teacher*, SAN FRANCISCO CHRONICLE, Oct. 9, 1976 at 4.

[126] *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Cal. App. 1983).

[127] *G. B. v. Lackner*, 145 Cal. Rptr. 555 (Cal. App. 1978); *J.D. v. Lackner*, 145 Cal. Rptr. 570 (Cal. App. 1978). *See also* Ivan Sharpe, *She Wants Medi-Cal to Make Her a Woman*, SAN FRANCISCO EXAMINER & CHRONICLE, May 30, 1976 at A25.

[128] This was rectified in 1994. *San Francisco Passes Gender Identity Anti-Discrimination Law*, TRANSSEXUAL NEWS TELEGRAPH, Spring 1995 at 10; Clarence Johnson, *'Transgender' Bias is Banned in S.F. – Supervisors Create a New Civil Right*, SAN FRANCISCO CHRONICLE, Dec. 13, 1994 at A15.

[129] *L.A. Passes Gay Rights Bill*, LESBIAN TIDE, July-Aug. 1979 at 23; Paisley Currah and Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 45 (2000).

[130] *See Los Angeles, City of*, HRC.ORG, *available at* http://www.hrc.org/bb/asp_search/results.asp?skey=sDetail&id=302 (declaring that, per the 1979 ordinance, Los Angeles has "No law covering gender identity") (printout dated Nov. 13, 2001, on file with author).

In fairness to HRC, its *WorkNet* has not been the only resource to omit the full significance of the Los Angeles ordinance. A 1982 report by a study committee Task Force of the Michigan House of Representatives made no distinction among the then-existing ordinances, distinguishing neither L.A. nor Minneapolis. *Committee on Civil Rights, Family and Sexuality Task Force, State of Michigan House of Representatives* (1982), Michigan Organization for Human Rights (MOHR) Records, 1973-1994, Coll. No. 85287, Bentley Historical Library, University of Michigan, Ann Arbor, Michigan. Notably, that 1982 report lists the L.A. ordinance as having been enacted in 1977 – an apparent error. More interesting, however, is the vintage given for the Minneapolis ordinance, 1974, which is accurate for the *gay-only* version of the ordinance, but is also indicative of the trans-inclusion amendment of 1975 either being unknown or of no relevance to the Task Force. For a possible explanation if the former, *see* Rose, *supra* note 24.

legislation that decriminalized same-sex sexual activity[131] – at the same time that it would first consider the question of whether same-sex couples should be able to get married.

Transsexuals.

Gay Couples.

Each group faced the California Legislature in 1977.

One group won and the other did not – an instance in which the gay-trans twain did not meet[132] and should never be read by courts as having met.

The Year of Living Definitionally

Context

Perhaps not surprisingly, California's 1977 effort to outlaw same-sex marriage featured some of the same hyperbole as the more recent efforts. Orange County Republican Assembly Member Bruce Nestande expressed concern about children being taught about same-sex marriage, because "Its not a family unit. Family implies procreativity." He added, "What they do doesn't bother me. But I would be bothered by institutionalizing it."[133]

But what was the legislature doing in 1977 – and *not* doing?

An opponent of the marriage bill remarked, "There's no reason to pass legislation which seeks to answer a problem when the problem hasn't arisen."[134] Of course, by August 1977, gay couples in California *had* already attempted to get marriage licenses;[135] they simply did not have the caliber of governmental backing that California couples did in 2004.[136] Interestingly, Assembly committee approval of the transsexual birth certificate bill occurred a week *after* the attempt by Mikhail F. Itkin and Larry L. Lawrence to obtain a marriage license in Los Angeles.[137]

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[131] 1975 CAL. LAWS Ch. 71.

[132] This is a reference to the hope I expressed several years ago in the title of my article about a lesbian couple and a transsexual woman facing the same issue – a denial of the right to change their names – in front of the same judges and being disrespected in the same manner. Rose, *supra* note 28; *In re Maloney*, 774 N.E.2d 239 (Ohio 2002); *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002).
The general notion of trans issues being expunged from the movement during the late 1970s, does not mean that they were completely absent from the gay press. For example, *NewsWest* mentioned the transsexual birth certificate bill along with other "rights bills" introduced in the California Legislature in 1977. *Four Rights Bills in Assembly Hopper*, NEWSWEST, April 28-May 12, 1977 at 23.

[133] *Moves to Prohibit Same-Sex Marriage*, NEWSWEST, April 1-15, 1977 at 10. He also did not want to institutionalize it even merely by decriminalizing it, voting against the bill to decriminalize same-sex activity in 1975. 1975 CAL. A.B. 489; 1975 CAL. ASSEMBLY J. 1501; 1975 CAL. ASSEMBLY J. 4607.

[134] *Senate Approves Measure Banning Gay Marriages*, LOS ANGELES TIMES, Aug. 12, 1977, at I-33 (quoting Sen. Milton Marks). Marks also carried the transsexual birth certificate bill in the Senate. *Vote to Let Transsexuals Adjust ID*, SAN FRANCISCO CHRONICLE, Sept. 13, 1977 at 3.

[135] Myna Oliver, *Gay Couple Can't Wed*, LOS ANGELES TIMES, March 16, 1977, at II-6.

[136] *See supra* Part II, A, 2.

[137] Oliver, *supra* note 135 at II-6; *New Birth Certificates*, LOS ANGELES TIMES, March 24, 1977, at I-2. Presumably, the committee members knew the difference between homosexuals and transsexuals.

Assembly member Fred Chel exemplified how one could be in favor of legalizing same-sex sex, but not be in favor of legalizing same-sex marriage. In the 1975-76 session he had voted to repeal the state's sodomy law, but also supported outlawing same-sex marriage in 1977. "The historical purpose of marriage has been to procreate and continue the family name," Chel said.[138] "They want a license to cohabit. They're asking you to sanctify it."[139] Presumably then, if Chel's vote for A.B. 607 was a vote against sanctification of same-sex marriages, then it would be proper to say that his vote for A.B. 385 was a vote for sanctification of transsexuals' change of legal sex.[140]

Also presumably, the same would be true for Nestande's 1977 votes. He authored the anti-same-sex marriage bill and, though he initially voted against the transsexual bill, he later did vote for it.[141] When asked about his 1977 marriage bill in the aftermath of Proposition 8, Nestande said he had authored it because he was informed by a county clerk that two men wanted to obtain a marriage license. He recalled thinking, "That doesn't make sense," and thereafter sought to "clarify" that if marriage is between two persons, "it must mean male and female."[142]

Nevertheless, the question of who could be male and who could be female, while not completely *non*-controversial,[143] did not generate the consternation that the possibility of male-male and female-female marriage did.[144] According to the *Bay Area Reporter,* even initially the transsexual bill had the "backing of the Brown administration and Bay Area legislators." Nevertheless, transsexuals and their friends were "urged to write their legislators asking their support (especially potentially hostile sex-phobic lawmakers). Letters that personally detail embarrassing, humiliating, absurd experiences where a birth certificate contradicts a person's present anatomy and physical appearance, would be most convincing."[145] The efforts to convince legislators – or at least enough of them[146] – worked.

Still, after passage by the Senate, "Some legislators and spectators found the measure amusing, and titters could be heard during the discussion."[147] Testifying against

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[138] *Gay Marriage Ban Gets Approval*, NEWSWEST, April 28-May 12, 1977 at 14.
[139] *Assembly OKs Ban on Gay Marriages*, LOS ANGELES TIMES, April 22, 1977, at I-20 (quoting Rep. Fred W. Chel).
[140] 1977 CAL. ASSEMBLY J. 1846.
[141] 1977 CAL. ASSEMBLY J. 9700.
[142] Carla Marinucci, *Brown's Switch on Prop 8 Reflects Times*, SAN FRANCISCO CHRONICLE, Jan. 9, 2009 at A1.
[143] The issue did receive such an official designation in Iowa two years earlier. 1975 IOWA H.F. 798; 1975 IOWA HOUSE J. 1347-48.
[144] According to the *San Francisco Chronicle*, debate on the bill on the Assembly floor "was low-key compared to the passions aroused by sex legislation in previous sessions." John Balsar, *An Assembly Victory for Transsexuals*, SAN FRANCISCO CHRONICLE, April 12, 1977 at 1, 20.
[145] *New Birth Certificate for Transsexuals*, BAY AREA REPORTER, March 17, 1977 at 2. At an assembly committee hearing a "delegation of transsexuals" was present but none were called upon to testify. *Id.*
[146] Balsar, *An Assembly Victory, supra* note 144 at 1.
[147] *Senate Passes Transexuals ID Change*, BAY AREA REPORTER, Sept. 15, 1977 at 16.

the transsexual bill when it had come before the Health Committee was Donald Meyer of the Contra Costa County Health Department, who said that the bill would create "nonpeople."[148] Republican Sen. Ray Johnson of Chico said he had difficulty keeping "a straight face" during the debate, and wondered about whether it would be used by gays to circumvent the new same-sex marriage ban or by men who wanted to avoid combat duty in wartime.[149] Yet, as had been the case in Louisiana a decade earlier, legislative laughter did not equate to legislative rejection.[150]

Dennis Carpenter, also a Republican and "one of the Legislature's most conservative members," actually argued in favor of the transsexual bill by saying that transsexualism was a legitimate physical disorder and that forcing transsexuals to show identification that did not match their appearance "is an embarrassment that I think is unfair to ask of them."[151] Carpenter's Republican credentials indeed were not lightweight. He had been a protégé of Ronald Reagan during the future president's rise to the governorship of California in 1966. In fact, his being in the California Senate had been the result of then-Gov. Reagan's insistence that Carpenter seek an Orange County seat in a 1970 special election.[152] He was still in the California Senate in 1977 by virtue of having been unsuccessful in 1976 in seeking the Republican nomination for the U.S. Senate, losing out to future Johnny Carson punch line S.I. Hayakawa.[153] As Sister Mary Elizabeth (then Joanna Clark[154]) recalls, when Carpenter, after having "sat there and listened to the arguments against the bill" and having announced that he would vote for it, "you could have heard a pin drop. I think everyone was shocked."[155]

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[148] John Balsar, *Sex Change for Birth Certificates*, SAN FRANCISCO CHRONICLE, March 15, 1977 at 2. Sister Mary Elizabeth actually recalls this official as being in support of the bill, but not the transsexual component.

> He had a young boy who had just entered the school system, and there was a typo on his birth certificate - stating he was female. There was nothing in the law to accommodate correcting typos, and the boy was literally being emotionally destroyed.

Sister Mary Elizabeth, e-mail to author, April 14, 2008; *see also*, *Boy's ID Nightmare Infuriates Readers*, SACRAMENTO BEE, Jan. 13, 2000 at B1.

[149] *Id*.; *See also Vote to Let Transsexuals Adjust ID*, *supra* note 134 at 3.

[150] Katrina C. Rose, *The Proof is in the History: The Louisiana Constitution Recognizes Transsexual Marriages and Louisiana Sex Discrimination Law Covers Transsexuals – So Why Isn't Everybody Celebrating?*, 9 DEAKIN L. REV. 399, 410 (2004).

[151] *Vote to Let Transsexuals Adjust ID*, *supra* note 134 at 3. In opposition to the bill in the legislature's other chamber, Republican Assemblyman Gordon Duffy stated, during a committee hearing on A.B. 385, that based on dictionary definitions of male and female reproductive capacity was what counted, adding that, for transsexuals, "I have no problem if you want to set up a new category - N, for neuter." Balsar, *Sex Change For Birth Certificates*, *supra* note 148 at 2. A transsexual commented afterward that "By his (Duffy's) definition, he has neutered every man who had a vasectomy and every woman who had a hysterectomy." *Id.* (quoting Barbra Mosher).

[152] Jean O. Pasco, *Dennis Carpenter, 75; GOP State Senator Turned Lobbyist*, LOS ANGELES TIMES, Dec. 25, 2003 at B-11.

[153] *Id*.

[154] *Ex-Navy Man is an Ex-Army Woman*, SAN FRANCISCO CHRONICLE, Sept. 27, 1977 at 4.

[155] Sister Mary Elizabeth, e-mail to author, April 14, 2008.

Also bear in mind that these two bills moved through the California Legislature at the same[156] – a time when, nationally, there was as much of a backlash to gay rights in general as there was to gays in the military in 1993 or, later, to the successful same-sex marriage court decisions. While both bills were pending, Miami's gay rights ordinance[157] fell to the onslaught of Anita Bryant's 'save our children' crusade.[158] And in California, Sen. John Briggs was laying the groundwork for what would become the Briggs Initiative (also known as Proposition 6) the following year, intended not only to drive all gay and lesbian teachers out of California public schools but to do similarly to anyone who advocated for gays and lesbians.[159] That proved to be too much even during the 1970s anti-gay backlash, finding itself openly opposed not simply by then-President Jimmy Carter, a Democrat, but even by Reagan and eventually going down to defeat by a wide margin.[160] A scare-tactic, however, had been the specter of male teachers wearing dresses. This was a particularly incendiary assertion given the children-oriented propaganda of Bryant and her acolytes. [161] With non-marital gay rights relatively homogenized, this tactic maintains vitality but primarily for trans rights, morphing somewhat from the classroom to the bathroom.[162]

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[156] See *infra* Part III, C.

[157] Which was *not* trans-inclusive. Metropolitan Date Co., Fla. Ord. No. 77-4 (1977), reprinted in D. Jason Berggren, Responding to the Spirit of Stonewall: Righteous Referendums, Ecumenism and the Anti-Gay Rights Politics of the Christian Right (1995) (unpublished M.A. Thesis, Florida State University).

[158] *Anita Bryant's Crusade*, WASHINGTON POST, June 11, 1977 at A16. And the Bryant crusade had an effect on 1977 California anti-discrimination bills: nervousness. San Francisco Assembly member Art Agnos said that "the fall out from that has made some of the legislators very nervous." *Agnos Postpones Rights Bills*, NEWSWEST, June 23-July 7, 1977 at 5.

[159] Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 288 (1994).

[160] *See generally* THE TIMES OF HARVEY MILK (New Yorker Video 1984).

[161] *Id*. Attorney General Evelle Younger blatantly conflated pedophilia fears with gender non-conformity (though still not directly invoking trans*sexuals*.) According to *NewsWest*, "Younger said the so-called aggressive gay male teacher would likely wear a dress to class reasoning that if a woman teacher can wear a pants suit, 'why can't a homosexual wear a dress?'" *Evelle Younger – 'Some Gay Teachers Might Don Dresses'*, NEWSWEST, June 23-July 7, 1977 at 5. Somewhat ironically, Younger added, "There is a tendency, in a political campaign, to oversimplify these issues, to make it a case of 'are you for them or are you against them?'" *Id*. To say that the Briggs Initiative did not fall into that category would be disingenuous to say the least.

[162] *See generally* Autumn Sandeen, *AFA Michigan's Gary Glenn Up To The Usual Fear Tactics – This Time In Kalamazoo*, PAM'S HOUSE BLEND, Jan. 4, 2009, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=8915 (last visited Jan. 31, 2009); see also *Help Us Overturn Bill 23-07*, http://www.notmyshower.net (no longer active, archived image available at: http://web.archive.org/web/20071216013220/http://www.notmyshower.net/index.html (last visited Feb. 1, 2009)) (referring to a trans-specific anti-discrimination ordinance as one that "*may* result in forcing even religious schools to hire transgender teachers; and *then also* allow *cross-dressing* but biological *males* in your daughter's school locker room") (emphasis in original).

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Statistics

385 vs. 607

Despite the relative ease with which it passed (in comparison to other California sexuality legislation of the era), of the states that actually have enacted transsexual birth certificate statutes,[163] California's met with as much resistance as any – perhaps even more than any. For example, even though transsexuals did win over "Mr. Conservative"[164] Dennis Carpenter and the author of the anti-same-sex marriage bill, Bruce Nestande, they did not win over the notoriously anti-gay William Dannemeyer.[165] However, as the contemporary news coverage suggests, this was not simply a liberal-vs.-conservative or Democrat-vs.-Republican issue. And while it is possible to extract comparisons between legislative votes on pro-transsexual bills and anti-same-sex marriage bills in almost all of those states,[166] California appears to be the only one in which one law of each type was enacted at the same time by the same group of elected officials. Consequently, a bare statistical comparison may shed further light – if not on the ultimate legal question, then certainly on the notion that sex-definition and marriage-definition are not viewed through the same 'traditionalist' lens by lawmakers who have the opportunity to pass judgment on both issues.

Nine senators voted against same-sex marriage but for transition recognition.[167] A majority – five of the nine – were Republican.[168] In contrast, three senators voted for transition recognition *and* for same-sex marriage – and even one of those was Republican.[169] Only one senator, H.L. Richardson, voted against both transsexuals and same-sex marriage. Clearly, if same-sex marriage and change of sex were substantively indistinguishable to the legislature, one would expect to see all of those who voted to ban the former also vote against recognizing the latter.

The Assembly numbers show more of an expected Democrat-Republican divide, but still not a complete one. A comparison of each bill's first floor vote (the two took place ten days apart) shows that 18 Assembly members voted against same-sex marriage

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[163] There have, of course, been some efforts that did fail. 2006 W.V. H.B. 4585 (introduced); 2005 TENN. S.B. 37; 1995 TEX. H.B. 358; 1999 TEX. H.B. 1579; 1979 OHIO H.B. 750; 1977 TENN. S.B. 162 (introduced).
[164] Sister Mary Elizabeth, e-mail to author, April 14, 2008.
[165] *See* WILLIAM DANNEMEYER, SHADOW IN THE LAND (1989).
[166] New Mexico, for example, does not have a state DOMA, so there is no clear intrastate comparison between an anti-same-sex marriage law and the state's 1981 transsexual birth certificate statute. Additionally, none of the state's federal representatives or senators in 1996 were in the state legislature in 1981 (though Sen. Jeff Bingaman was attorney general at the time.)
[167] For purposes of this comparison, a vote for A.B. 385 is a vote for transition recognition and a vote for A.B. 607 is a vote against same-sex marriage; a vote against A.B. 385 is a vote against transition recognition and a vote against A.B. 607 is a vote for same-sex marriage.
[168] The Republicans, in addition to Carpenter, were Robert Beverly, Lou Cusanovich, Ray Johnson and Robert Nimmo.
[169] The Republican was Milton Marks, who actually carried the bill in the Senate; the two Democrats were John Dunlap and John Foran.

but for transition recognition, though only three were Republican.[170] No Republicans voted both for transsexuals and for same-sex marriage, but 12 Democrats did. Far more evenly divided were the group of 28 who voted against both transition recognition and same-sex marriage; 16 were Republican, but 12 were Democrat.[171]

For each bill's second floor vote, the willingness to harmonize transsexualism with the same-sex marriage ban grew; 40 Assembly members voted for both bills, ten being Republican. Only two Assembly members cast votes for both same-sex marriage and for transsexuals, both Democrats.[172] Strangely, eight of the 14 who voted against both same-sex marriage and transsexuals were Democrat.

In addition, one other Democrat approved of both A.B. 385 and A.B. 607, though not a member of the legislative branch. Gov. Jerry Brown signed both bills into law. That connection returned to significance three decades later, with Brown, back in state elected office as Attorney General after serving as Oakland's mayor, having an official role in the Proposition 8 battle. Some others who had an official role in the 1977 legislative process only had to wait two decades to come face-to-face once again with the issue of same-sex marriage.

1977 vs. 1996

The 2000 California anti-same-sex marriage law came into being via citizen initiative. Even though some pre-Proposition 22 attempts did make some headway in the legislature, the passage of time leaves little by which to compare 1977 to the anti-Hawaii 1990s legislator-by-legislator – at least at the California Legislature.

However, six 1977 California legislators were in Congress (all in the House) two decades later when same-sex marriage emerged as a national issue – and became national legislation. Three of the six – Democrat Vic Fazio, and Republicans Jerry Lewis and William Thomas – voted for the federal DOMA. The other three – Democrats Maxine Waters, Julian Dixon and Howard Berman – voted against it.[173] But how does *this* line up with their votes from 1977?

[170] Charles Imbrect, Paul Priolo and Dave Stirling.
[171] And, perhaps oddly, one Assembly member, Democrat Curtis Tucker voted against transition recognition and against the same-sex marriage ban.
[172] Art Torres and John Vasconnellos.
[173] Cong. Rec., 104th Cong., 2nd Sess., July 12, 1996, H7505-06.

Legislator	**Votes on transsexual birth certificate bill 1977 AB 385[174]**				**Votes on anti-same-sex marriage bill 1977 AB 607[175]**				**1996 House vote on federal DOMA[176]**		
	vote	Y	N	A/NV	vote	Y	N	A/NV	Y	N	A/NV
Howard L. Berman (D)	TA1 TA2	• •			MA1 MA2		• •			•	
Julian C. Dixon (D)	TA1 TA2	• •			MA1 MA2		• •			•	
Vic Fazio (D)	TA1 TA2	•		•	MA1 MA2		• •			•	
Jerry Lewis (R)	TA1 TA2		• •		MA1 MA2	• •			•		
William Thomas (R)	TA1 TA2	•	•		MA1 MA2	• •			•		
Maxine Waters (D)	TA1 TA2	• •			MA1 MA2		• •			•	

Yes, a complete disconnect – all voting against same-sex marriage and for transsexuals – would be the ideal illustration of my point. Yet, the votes of these six legislators do not provide perfect correlation the other way either. Not all Democrats voted for same-sex marriage and not all Republicans voted against transsexuals.

I point out both of the above comparisons because such disconnects are not unique to California. Anti-same-sex marriage members of Congress from other states also have track records of voting for transsexual birth certificate statutes – and, in the

[174] The first vote (TA1) on the transsexual birth certificate bill was April 11. The second vote (TA2) was Sept. 14.
[175] The first vote (MA1) on the anti-same-sex marriage bill was April 21. The second vote (MA2) was Aug. 12.
[176] Cong. Rec., 104th Cong., 2nd Sess., July 12, 1996, H7505-06.

case of Sen. Christopher Bond, signing one as governor in 1984.[177] Jerry Brown attempted to move to Congress in 1982, but was unsuccessful, losing a Senate race to Republican Pete Wilson. By 1982, however, Brown had seen both sides of the homosexual-transsexual divide. He played a major role in the events of 1977, signing both A.B. 385 *and* A.B. 607 into law – a precursor to the political tightrope he walks today regarding Proposition 8.

Beyond 1977

Analysis During the "Difficult Decades"[178]

Today, more and more people are sifting through legislative documents in the hope of finding that elusive legislative intent supportive of their position.[179]

The mixed signals of 1970s California officeholders has not been completely ignored of late. When Jerry Brown entered the 2006 Attorney General race, a Brown spokesman noted contradictions from his tenure as governor – though not *that* specific one, instead juxtaposing his 1975 signing of the bill that decriminalized same-sex sexual activity[180] against 1977 A.B. 607. When attention turned to the 2010 governor's race – and the possibility of Brown entering it – scrutiny of his signing of the 1977 anti-same-sex marriage bill revived.[181]

I, however, am not the first to analyze the legal conundrum posed by A.B.s 385 and 607 emerging from the same session of the California Legislature with many legislators having voted for both. Catherine Kunkel Watson entered the debate in 1986, when, practically speaking, there was no debate. Nationally, the near-decade following the two 1977 California statutes had seen the extermination of what was left of the gay-trans alliances of the early 1970s.[182] 1979 brought the dual whammy of Janice Raymond's *Transsexual Empire*[183] and the dubious Meyer-Reter 'study.'[184] 1980 brought the founding of the Human Rights Campaign Fund,[185] the epitome (even now, as

[177] Governor of Missouri. Rose, *Renaissance*, *supra* note 37 at 115.
[178] STRYKER, TRANSGENDER HISTORY, *supra* note 121 at 91.
[179] Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W. L. REV. 128, 132 (1972).
[180] Zak Szymanski, *Brown MIA on Marriage Issue*, BAY AREA REPORTER, March 23, 2006, *available at* http://www.ebar.com/news/article.php?sec=news&article=683 (last visited Feb. 7, 2009).
[181] Carla Marinucci, *Brown's Switch on Prop 8 Reflects Times*, SAN FRANCISCO CHRONICLE, Jan. 9, 2009 at A1.
[182] STRYKER, TRANSGENDER HISTORY, *supra* note 121 at 110-11.
[183] Janice G. Raymond, THE TRANSSEXUAL EMPIRE: THE MAKING OF THE SHE-MALE (1979).
[184] Jon Meyer and Donna Reter, *Sex Reassignment: Follow-Up*, 36 ARCHIVES OF GENERAL PSYCHIATRY 1010 (1979). Together, the two heralded the end of the Johns Hopkins gender identity program and legitimized the anti-transsexual hatred that had been bubbling up in lesbian feminism.
[185] Matt Comer, *What You Didn't Know About the Human Rights Campaign: An Inside Look at the Organization Everyone Knows, but not Really*, Q NOTES, Feb. 21, 2009, *available at* http://www.q-

the Human Rights Campaign) of mainstreamed corporatist civil rights 'activism.' At the time of Watson's article, *In re Ladrach*[186] was a year away (in Ohio), with the modern line of transsexual marriage cases (beginning, oddly enough, with California's unreported pro-transsexual *Vecchione v. Vecchione*,[187] though soon followed by *Littleton v. Prange*[188]) not to emerge for a decade after that.

In 1986, as Watson pointed out, there were "no cases concerning the legitimacy of transsexual marriages in California," and there were no "legislative or judicial definitions of 'man' and 'woman' to guide a court."[189] Citing Richard Nunez's philosophizing upon legislative intent[190] and *Estate of Ryan*,[191] however, Watson viewed the pro-transsexual birth certificate and the anti-gay marriage statutes as being

> complementary and harmonious. The California Legislature has adopted the view that the legal sex of the postoperative transsexual shall be that of her postoperative sex. Simultaneously, the legislature has expressly barred homosexual marriages in California.[192]

In short, homophobia cannot always be assumed to equal transphobia; the definitions of 'marriage' and 'sex' can be – and were in 1977 – addressed independently.[193]

Looking at the area in which California courts had by then addressed transsexual matters,[194] the "humanistic view" that courts outside of New York had taken on transition recognition as well as the actions of the California Legislature in 1977, Watson concluded that California would "follow New Jersey's enlightened approach to the legal definition of 'woman' for the purposes of transsexual marriages, and thus will uphold such marriages when the question is squarely presented."[195]

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notes.com/ 2009/02/21/what-you-didnt-know-about-the-human-rights-campaign/ (last visited Feb. 24, 2009).

[186] 513 N.E.2d 828 (Ohio Prob. Ct. Stark Co. 1987).

[187] No. 95D003769 (Cal. Sup. Ct. Nov. 26, 1997), *cited in* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 416 n. 138 (2001).

[188] 9 S.W.3d 223 (Tex. App. – San Antonio 1999, pet. denied).

[189] Catherine Kunkel Watson, *Transsexual Marriages: Are They Valid Under California Law?*, 16 SW. U. L. REV. 505, 524-25 (1986).

[190] Nunez, *supra* note 179 at 130.

[191] 133 P.2d 626, 635 (Cal. 1943).

[192] Watson, *supra* note 189 at 526-27.

[193] There is, of course, some overlap. The organization that decried California legislators' introduction of a resolution opposing Proposition 8 uses the Janice Raymond-era epithet "she-male" to refer to transsexual women. See *Rampage in California from Homosexual Radicals*, TRADITIONAL VALUES COALITION, Jan. 29, 2009, http://www.traditionalvalues.org/modules.php?sid=3540 (last visited Feb. 9, 2009); and *She-Male Wins Lawsuit Against Library of Congress*, TRADITIONAL VALUES COALITION, Sept. 25, 2008, http://www.traditionalvalues.org/modules.php?sid=3422 (last visited Feb. 9, 2009).

[194] Such as the generally positive reception in the Medi-Cal cases. *G.B. v. Lackner*, 145 Cal. Rptr. 555 (Cal. App. 1978); *J.D. v. Lackner*, 145 Cal. Rptr. 570 (Cal. App. 1978).

[195] Watson, *supra* note 189 at 531.

Watson may or may not have been able to foresee that within one decade Hawaii would come close to actually allowing same-sex marriages[196] and that within two California,[197] along with Massachusetts[198] and Connecticut,[199] actually would allow them (in addition to the states that established same-sex civil unions.[200]) Similarly, she may or may not have been able to foresee that not only would most states follow California's view on statutory prohibition of same-sex marriage but that many would go farther and put such prohibitions into their state constitutions.

Hers, however, is a rather straightforward contextualized reading of the actions of the California Legislature in 1977. Even standing alone, it should be sufficient to guide courts toward seeing that an interpretation of marriage-definition law and sex-definition law that accommodates transsexual reality is no contortion of statutory or constitutional language or even of legislative intent.

And it would *not* be "judicial fiat."

One of the many criticisms of the push for same-sex marriage is its habitual venue: the courts. Almost exclusively thus far, the same-sex marriage victories have occurred not in the legislative arena but in court.[201] However, as summarized with anti-same-sex marriage spin by Lynn Wardle, "public perception that marriage is in danger of being radically redefined by judicial decree is not speculative or fantastic. It is based on a deliberate litigation campaign that has resulted in a growing pattern of serious judicial developments"[202] Often, the same-sex-positive rulings that have emerged are derided as creation by "judicial fiat."[203]

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[196] *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).
[197] *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).
[198] *Goodridge v. Dept. of Pub. Health*, 322, 798 N.E.2d 941 (2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (2004).
[199] *Kerrigan v. Commissioner of Pub. Health*, 957 A.2d 407 (Conn. 2008).
[200] 2000 VT. LAWS Ch. 91, 2006 N.J. LAWS Ch. 103; and 2007 N.H. LAWS Ch. 58.
[201] Some, of course, have observed that it is actually the religionist right that, in general, is now relying on the courts in an "attempt to win judicially what it hasn't been able to achieve legislatively." Josh Benson, *The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1100 (2008) (quoting Sam Rosenfeld, *Disorder in the Court*, AMERICAN PROSPECT, July 2005 at 24).
[202] Lynn D. Wardle, *Federal Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. 439, 453 (2006)
[203] Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 16 (2003). See also George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 446-47 (2004); Stanley Kurtz, *Point of No Return - Marriage Needs a Man and a Woman. And, an Amendment*, NATIONALREVIEW.COM, Aug. 3, 2001, *available at* http://www.nationalreview.com/contributors/kurtz080301.shtml (last visited Jan. 3, 2009); Wendy Herdlein, *Something Old, Something New: Does the Massachusetts Constitution Provide for Same-Sex "Marriage*," 12 B.U. PUB. INT. L.J. 137, 179 (2002); Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children*, 32 DAYTON L. REV. 361, 364-65 (2007) (footnotes omitted).

Criticizing William F. Buckley's disdain for a federal anti-same-sex marriage amendment, Dwight Duncan felt that leaving the matter in the hands of the full faith and credit clause – and the courts that would interpret it - essentially "would allow Massachusetts or New Jersey to implement homosexual marriage by judicial fiat.… [W]e have a national culture that cannot long abide two fundamentally differing conceptions of marriage."[204] Setting aside the fact that 'national culture' long tolerated two fundamentally different race-based standards for marriage, what does it say about the entire matter when anti-same-sex marriage commentators – two decades after M.T. v. J.T. – kept referring to same-sex marriage as something that did not exist?

> Same-sex marriage has been unanimously and consistently rejected by the laws of *every state* in this country. Even when a state's marriage statute does not expressly confine marriage to one man and one woman, the courts have consistently held that same-sex marriages are not permitted. Indeed, at present "same sex marriage is allowed in no country or state in the world."
>
> In short, under the law as it stands today, homosexual marriage is an oxymoron. *It simply does not exist*, because the legal definition of marriage "is that it is a union of a man and a woman. Therefore the union of man and man or of woman and woman cannot be a marriage." This is true even when state marriage laws do not use gender-specific terms such as "husband" and "wife" – any argument for interpreting these laws to permit same-sex marriage is dispatched by the definitional approach.
>
> Despite this strong worldwide consensus supporting the heterosexual norm in marriage, influential elites in affluent western nations recently have provoked a "clamor for same-sex marriage."
>
> [A] lawsuit recently brought by same-sex couples in Hawaii now threatens to impose a paradigm shift by judicial fiat. [205]

The 1996 federal DOMA, to which the federal anti-same-sex marriage amendment proposals would have given constitutional weight, carries legislative history which reflects that Richard Duncan's analysis, reading as if transsexuals – and, perhaps more importantly, transsexual law – did not exist.[206] The first state court to give itself the

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[204] Dwight G. Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL'Y 543, 564 (2004) (quoting William F. Buckley, Jr., *The Constitutional Defense*, NATIONALREVIEW.COM, Aug. 11, 2003, *available at* www.nationalreview.corn/buckley/buckley081103b.asp)

[205] Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 ND J. L. ETHICS & PUB POL'Y 587, 589-90 (1996) (footnotes omitted) (emphasis added).

[206] *Id.* at 589. This is despite one portion of the passage being a citation to an article by Professor Eskridge which leads off with an example of a Native American marital arrangement which could be regarded as transsexual in nature and which, while not dealing with modern transsexual law, contains other clear

opportunity to use DOMA against a transsexual acted as if Hawaii's 1990s *Baehr* litigation and marriages legal per New Jersey's 1976 *M.T. v. J.T.* were its co-equal targets.[207] A handful of federal administrative panels, however, actually have analyzed DOMA's legislative history and have come to the remarkable conclusion that since DOMA targeted a type of marriage that its authors understood to then not yet be recognized *anywhere* as legal, then it could not possibly be targeting marriages that at least New Jersey had been recognizing for two decades.[208]

Now, contrast that with Charles Russo's 2007 assessment of the push for same-sex marriage.

> As reflected in litigation in Massachusetts and New Jersey, the inability of its advocates to rely on political, rather than judicial, activism is clear in the fact that through mid-2006, at least 45 states restricted marriage to a relationship between one man and one woman. Massachusetts is the only jurisdiction to recognize same-sex marriage, albeit via judicial fiat, coupled with subsequent legislative refusal to act on a proposed constitutional amendment, and in New Jersey, appointed judges stopped just short of a similar dictate in ordering elected legislators to re-write the state's marriage laws within 180 days to either legalize same-sex marriage or approve of civil unions that bestow all of the rights and benefits of marriage between heterosexuals on homosexual couples. Of the states that rejected calls to treat same-sex living arrangements as marriages, 19 adopted constitutional amendments while the remaining 26 enacted statutes restricting marriage to one man and one woman.[209]

And a substantial portion of those also have statutes recognizing transsexualism – California being but one. Those statutes came via "political, rather than judicial, activism," political activism that transsexuals initiated and succeeded at. One of the others was apparently a response to an unfavorable judicial outcome and another was in response to (or perhaps in spite of) judicial action.

Post-1977 Legislation

The California birth certificate bill contained nothing specific about marriage.[210] According to the Legislative Counsel's Digest, the bill "would authorize a procedure for establishment of a new birth certificate for a person who has had his or her sexual

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invocations of the relationship of transsexualism to same-sex marriage. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

[207] *Littleton*, 9 S.W.3d at 226.

[208] *In re Lovo-Lara*, 23 I&N Dec. 746, 750-51 (BIA 2005); *In re Widener*, No. A95 347 685 (BIA Sept. 21, 2004).

[209] Charles J. Russo, *Same-Sex Marriage and Public School Curricula: Preserving Parental Rights to Direct the Education of Their Children*, 32 DAYTON L. REV. 361, 364-65 (2007) (footnotes omitted).

[210] 898 So. 2d 419 (La. Ct. App. 2004).

characteristics altered surgically to those of the opposite sex."[211] The legislature placed *no* limitation on "characteristics." In short, that official statement of legislative intent, leaves no room for the type of conclusion arrived at in Louisiana by Judge Kuhn in *Pierre v. Pierre*, an intent to deny transsexuals the ability to marry post-transition

1977 A.B. 385 became law, was in force at the time of Proposition 22, was in force at the time of Proposition 8, and is still in force today.[212] Two post-1977 efforts to expand the law to benefit California residents who were born elsewhere passed both houses of the legislature only to be vetoed by Gov. Gray Davis.

> Existing law provides that whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for the person reflecting the change of gender and any change of name. Existing law requires that a petition for the issuance of a new birth certificate in those cases be filed with the superior court of the county where the petitioner resides.
>
> This bill would permit these petitions also to be filed in the county where the petitioner was born. The bill would also establish a procedure, including the imposition of a fee, for the issuance of a certificate of change of sex to California residents who do not have a California birth certificate.[213]

Davis's veto – and accompanying message was as confusing as it was bewildering.[214]

> This bill is unnecessary since a court order for a name change based on a change of sex is already available to the public, and a driver's license or U.S. passport is obtainable without a certificate of change of sex.
>
> Finally, it is unreasonable to require a person to go through an unnecessary court proceeding for a certificate that will not provide them with any more benefits than a court order already provides.[215]

The following year, he vetoed another expansion bill, one that sought only to make the court process for those transsexuals born in California a bit more accessible: allowing petitions for such changes to be heard in the county of birth as well as the county of

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[211] *Legislative Counsel's Digest*, 1977 CAL. LAWS Ch. 1086.
[212] My research indicates that the only effort to negatively impact the law was one of the *other* – failed – efforts to put an anti-same-sex marriage initiative on the California ballot in 2008. *See supra* Part II, B, 2.
[213] 2000 CAL. A.B. 1851 (Enrolled), Legislative Counsel's Digest, *available at* http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1851-1900/ab_1851_bill_20000831_enrolled.html.
[214] Boyce Hinman, Response to A.B. 1851, Lambda Letters, Press Release dated Aug. 20, 2000, *available at* http://www.lamdaletters.org (last visited Jan. 30, 2009).
[215] 2000 Cal. A.B. 1851, Veto Message, *available at* http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1851-1900/ab_1851_vt_20000918.html.

residence.[216] Davis offered no actual reason for vetoing this bill, merely stating, "I find no compelling reason to expand existing law and therefore cannot sign this measure."[217]

Sadly, the confusing actions of Gov. Davis are in line with the track record on substantive expansion or modification of existing transsexual birth certificate statutes, which is spotty at best. In fact, the California attempts constitute most of that record. More recently, an attempt to bring the Illinois statute in line with the reality of transsexuals venturing outside of the United States for their surgeries was met with derision.[218]

Far more encouraging is the record of reactions to court decisions. Though Texas, Kansas and Florida have not statutorily overruled their respective anti-recognition rulings, it should not be forgotten that several states' adoption of the Model State Vital Statistics Act – and its transsexual provisions – appear to have been spurred by informal administrative rulings[219] or trial court decisions[220] in favor of transsexuals even in the absence of explicit statutory language. And New Jersey effectively codified the identity aspect of 1976's *M.T. v. J.T.*[221] As counsel in Gov. Kean's office summarized:

> Presently, the practice of issuing a new or amended birth certificate for persons who undergo sex reassignment surgery is not permitted under the provisions of N.J.S.A. 26:8-54. Existing law requires that when changes are made to certificates of birth, the certificate shall show both the information as originally given and the information as corrected. The result of this requirement is that under the heading "sex" the certificate may read "female, corrected from male."[222]

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[216] 2001 Cal. A.B. 194 (Enrolled), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0151-0200/ab_194_bill_20010719_enrolled.html.
[217] 2001 Cal. A.B. 194, Veto Message, *available at* http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0151-0200/ab_194_vt_20010806.html.
[218] Christopher Wills, *Lawmakers Mock Sex Change Bill*, THE PANTAGRAPH, April 19, 2007, *available at* http://www.pantagraph.com/articles/2007/04/19/news/doc462624bd1ccf3348725446.prt (last visited Jan. 28, 2009).
[219] For example, see *Untitled Bill Analysis Document*, at 5, Dated Oct. 14, 1980, Bruce King (2nd Term) Papers, Coll. 1982-023, Box 47, file 910, New Mexico State Archives, Santa Fe, New Mexico; *Analysis by the Legislative Reference Bureau* at 3, 1985 Wis. A.B. 427. *Hearing Before the Nebraska Legislature, Committee on Health and Human Services*, 93rd Leg., 2nd Sess., transcript at 70 (Jan. 26, 1994) (testimony of Judy Vidlak).
[220] Rose, *Renaissance*, *supra* note 37 at 130-31.
[221] *M.T. v. J.T.*, despite speaking positively to the validity of heterosexual transsexual marriages in New Jersey, actually said nothing about how the inherent transition recognition aspect of the decision would or should be reflected more generally in New Jersey law – and even left the impression that transition might be recognized for marriage but not for other purposes. 355 A.2d at 208-09 (citing Douglas Smith, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963, 992-1002 (1971)).
[222] W. Cary Edwards, et. al., to Gov. Thomas H. Kean, Executive Office Inter-Communication dated Nov. 5, 1984, Gov. Thomas H. Kean – Counsel's Office: Bill Files for the 1984-1985 Legislative Session, S54CO002, Box 31, File S.1386, New Jersey State Archives, Trenton, N.J.

The 1984 bill appears to have been spurred by a New Jersey-born transsexual woman who was then living in Washington, D.C. She was credited with securing several letters in support of the bill from experts in the field, including Angelo Tornabene of the Labyrinth Foundation, who wrote:

> [T]he true transsexuals we have seen in all cases approved for reassignment, present as goal oriented and achieving, stable members of their communities and for the most part, very involved in their communities via a staunch family life. They are hard workers and most are educated at the Master's level. They do not seek to defraud and want to make sure that their families are covered in such areas as insurance and social security at the time of the husbands'/fathers' death. While the only group we are involved with are female to male transsexuals, I have met many male to female transsexuals, who also have such high standards. Marriage is not legal unless the birth certificate reads male for our patients and female for the other group. [223]

Psychologist Paul Walker asserted:

> The sex reassigned person is psychologically and socially a member of the "new" sex and are so recognized medically.
>
> It is therefore logical, I believe, for the law to recognize the medical status of the sex reassigned person and to legally define such people as members of the "new" sex. [224]

At the height of Reagan-era conservatism – and well after the damage was done by Janice Raymond and her cohorts – the New Jersey Legislature passed the bill overwhelmingly (27-6 in the Senate on July 30; 44-8 in the House on October 22[225]) and Republican Gov. Thomas Kean signed it on November 19.

Earlier, but still after the double-backlash to transsexualism, Oregon's Legislature responded to a negative ruling[226] when a transsexual woman approached her legislator and requested help in securing a change to the law.[227] In this instance, the legislator was Representative Mae Yih, who was "not regarded as one of the House's most progressive

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[223] Angelo Tornabene to Charles Karkut, State Registrar of Vital Statistics, March 30, 1984, Gov. Thomas H. Kean – Counsel's Office: Bill Files for the 1984-1985 Legislative Session, S54CO002, Box 31, File S.1386, New Jersey State Archives, Trenton, N.J.
[224] Paul A. Walker to Sen. John H. Ewing, April 24, 1984, Gov. Thomas H. Kean – Counsel's Office: Bill Files for the 1984-1985 Legislative Session, S54CO002, Box 31, File S.1386, New Jersey State Archives, Trenton, N.J.
[225] Edwards to Kean, *supra* note 222.
[226] *K. v. Health Div*., 560 P.2d 1070 (Ore. 1977).
[227] Foster Church, *History of Bill Shows How it Works*, THE OREGONIAN, June 14, 1981 at B4.

members."[228] Yih told a House Judiciary subcommittee that her constituent "indicated that the bill is needed to provide for a change in an individual's birth certificate when a court order is issued, just as we allow a change of names for children with adopted parents."[229] The woman who had requested the bill testified, but did not mention marriage specifically as one of the contexts in which a conformed birth certificate would be critical, instead mentioning passports and general matters of privacy.[230] In response to a question Rep. Peter Courtney as to what all was actually in the bill, Yih said, "This bill would allow for a change of the legal sex of the person."[231]

As was the case in Louisiana in 1968,[232] there was some politically incorrect humor – even among those who voted for the bill.[233] An item that appeared in the Portland *Oregonian* explaining the mechanics of the bill observed:

> The Oregon Legislature has rejected other proposals in what might be termed the broad continuum of issues concerning sexual identity, gay rights legislation being the most noteworthy. But the philosophy behind HB 3098 – that sexual identity is to some extent fluid and can be as much psychological as physical – is at least as radical as any of those proposals.[234]

Several sexual orientation civil rights bills were introduced in the 1981 Oregon legislative session – but none received any serious consideration.[235] Both houses, though, passed the transsexual birth certificate bill overwhelmingly.[236]

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[228] *Id.* Democrat Yih later moved to the Senate and, after her retirement in 2002, Sen. Tony Corcoran remarked that he was "pretty happy with the solidarity in our caucus, especially now that Mae Yih is gone." Tony Corcoran, *Salva Vida; We Can Use a Life Saver as the New Year Begins*, EUGENE WEEKLY, Jan. 2, 2003 at 6. In 1993, with Democrats holding a 16-14 majority, she held up the process of electing a Senate president for a week, refusing to be the sixteenth – and necessary – vote to elect a Democratic president unless the party chose her as its candidate. Ultimately, she settled for the President Pro Tempore position, but not until she had been derided as a "celebration of mediocrity." Dan Hortsch and Cathy Kiyomura, *Senate Demos Finally End Deadlock*, THE OREGONIAN, Jan. 16, 1993 at A01; Steve Dunn, *Why Legislate When You Can Waste Time?*, THE OREGONIAN, Jan. 14, 1993 at C11. Perhaps of most relevance is her consistent opposition to same-sex marriage. 1997 Or. S.B. 577; Jeff Wright, *Anti-Gay Bill Passes Oregon Senate*, REGISTER-GUARD (EUGENE, ORE.), May 24, 1997 (*archived at,* http://www.glinn.com/news/05013197.htm (last visited Feb. 8, 2009)).

[229] *House Judiciary Subcommittee No. 3 Hearing on H.B. 3098*, Oregon Legislature, April 13, 1981, Tape 251 (copy of audio tape on file with author) (statement of Rep. Mae Yih).

[230] *Id.*

[231] *Id.* (statement of Rep. Mae Yih).

[232] Rose, *The Proof is in the History*, *supra* note 150 at 410.

[233] Sen. Jack Ripper gave an "unusually high-pitched 'aye.'" *Senate Approves Sex Change Bill*, THE OREGONIAN, June 10, 1981 at C2.

[234] Church, *supra* note 227 at B4.

[235] 1981 ORE. H.B. 2669; 1981 ORE. H.B. 2703; 1981 ORE. H.B. 2704.

[236] The House passed it 45-10 on April 30. 1981 OREGON HOUSE J. HJ-68. The Senate passed it 27-2 on June 9. 1981 OREGON SENATE J. SJ-117.

Ultimately, this differs little from the California story. As Sister Mary Elizabeth recalls:

> Jude Patton and I attended a support group one night up in L.A. There were about 15 in attendance and most of them were complaining about their inability to change their BC's because of the law. I raised my voice and said "Well, then, change the law." Most thought I was crazy.
>
> On the drive home I discussed it with Jude. I was just out of the military, had never voted, but I had registered as Joanna for the first time. The next morning while getting ready for work, I mentioned it to my dad, who had been a city councilman back in Michigan. He said "Don't waste your time, no one will support it." I told him I was going to try.[237]

She did try – and she, along with other California transsexuals (and attorneys who had experienced frustration in representing transsexuals in the absence of trans-specific law), engaged the political process, found champions in the Legislature and ultimately succeeded in inserting positive recognition of transsexualism into California statutory law.

Post-Proposition 22 Analysis

A LEXIS law review search for the ten years preceding Proposition 8 on the term "Proposition 22" yielded 130 hits; a search for articles that contained that term as well as either of the three trans-related terms "transgender!", "transsexual!" or "sex change" winnowed that to 45 hits.[238] An examination of the rather peripheral nature of the trans presence in some of those articles further illuminates how far removed transsexuals' rights are from Proposition 22 (and, in turn, from Proposition 8.)

One of the hits was an earlier article of mine – but one in which I make the same argument that I am making herein, that California, at the time of that 2001 article about a Kansas transsexual marriage case, had

> had at least four bites at the antitranssexual marriage apple, three of which came via legislation, the [then-]most recent opportunity being the enactment of California's DOMA via citizen initiative – perhaps better known as Proposition 22, but officially titled on the ballot as "Limit on Marriages." Homophobic as it obviously is, the law simply did not address – positively or negatively – the scenario of a marriage between a post-transition transsexual and a non-transsexual person of her now-opposite sex. Moreover, neither did any of the arguments for or against

[237] Sister Mary Elizabeth, e-mail to author, April 14, 2008.
[238] LEXIS searches in 'US Law Reviews and Journals, Combined', re-run for confirmation on March 13, 2009.

> Proposition 22 which appeared on the California Secretary of State's website prior to the election.[239]

In short, that article did not try to link transsexual marriage to same-sex marriage; it tried to de-link it.[240]

A 2004 *Margins* article by Liz Seaton contains two occurrences each of "Proposition 22" and "transgender" and none of the two transition-specific terms.[241] The first instance of "transgender" comes in a footnote to a sentence referring to the "anti-*gay*" groups that filed court papers in attempting to stop any weddings from occurring as a result of the 2004 license-issuances.[242] More specifically, the footnote provided her definition:

> "Anti-gay" describes people who invest considerable time, energy, and resources to oppose equality under the law for gay, lesbian, bisexual and *transgender* people at every level. For example, Campaign for California Families, Traditional Values Coalition, and Maryland Family Values Alliance oppose not only marriage for same-sex couples, but all forms of legal equality, such as domestic partnership benefits, same-sex parental rights and employment anti-discrimination legislation.[243]

Arguably the substance of Seaton's characterization of those organizations is accurate. The problem is with the double-edged nature of the first sentence – of her definition of "anti-*gay*." It is both erasive – in that it allows her to avoid, both where she actually might intend to do so and where it might actually be proper, further use of any trans-specific category or even 'LGBT' – and it is inaccurately inclusive in that it brings transgender into a discussion that it actually is not a part of, thereby allowing careless

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[239] Katrina C. Rose, *Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality*, 70 UMKC L. REV. 257, 281-82 (2001) (footnotes omitted). In another article turned up by the search, Natalie Michalek pointed out that Prop 22 contained no definitions for "man" and "woman." Natalie Brown Michalek, Littleton v. Prange: *How Voiding Transsexual Marriage Affects the Fundamental Right of Marriage*, 52 BAYLOR L. REV. 727, 739 note 83 (2000). Ultimately, she seemed simply to be seeking clarification:

> The next time this issue arises, and it will, courts should consider defining male and female with criteria other than chromosomes. The legislature as well could include a definition section for the terms "man" and "woman," or simply clarify how sex is to be determined. Finally, any such definition should include a reference to sex determination for intersexed individuals, for it might well apply to the very people who draft its terms. *Id*. at 752.

[240] In addition to pointing out how civil unions, then the rage *du jour*, not only were of no help to transsexuals such as J'Noel Gardiner but could actually be harmful were a heterosexual couple – one half of which was transsexual – to pessimistically opt for the same-sex-only civil union and then the state unexpectedly judicially recognize change of sex. California, of course, was *not* the focus of that article.

[241] Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MARGINS 127 (2004).

[242] *Id.* at 129 (emphasis added).

[243] *Id.* at 129 fn. 11 (emphasis added).

analysts to make (and perpetuate) the assumption that transgender actually is a subset of same-sex *marriage*.[244]

Seaton's only other usage of the word "transgender" comes in a footnote description of the Canadian organization EGALE as "a national organization working towards the advancement of equality and justice for gay, lesbian, bisexual and transgender people and their families."[245] Some have questioned EGALE's commitment to trans issues[246] – and even more have done so regarding Seaton's employer at the time of the *Margins* article, the Human Rights Campaign, as well as her previous employer, the Maryland organization Free State Justice Campaign (FSJC.)[247] In 2004, HRC was picketed twice by trans activists because of the organization's refusal to treat transgender people equally politically.[248] And, while Seaton was head of FSJC, trans activists pointed to her as being personally responsible[249] for an amendment to 1999 Maryland sexual

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[244] If anything, the transgender-centric position would be that it is the other way around – that marriage between two members of the same sex is inherently a form of gender transgression.

[245] Seaton, *supra* note 241 at 133 note 33 (emphasis added).

[246] Dan Irving has critiqued EGALE's "assimilations strategy."

> Efforts made mainly by white professional gay and lesbian activists to emphasize the many similarities between homosexuals and heterosexuals leads to the exclusion of trans people. Trans people, especially those who appear gender variant, are inevitably marginalized from efforts to gain reforms for gays and lesbians due to the strategical approach stressing sameness.

Dan Irving, *Contested Terrain of a Barely Scratched Surface: Exploring the Formation of Alliances Between Trans Activists and Labor, Feminist and Gay and Lesbian Organizing* (Ph.D. diss., York University 2005), 223.

[247] Referred to by some trans activists as 'Free State Just Us.'

[248] The protest in the spring of 2004 was captured in the documentary *Citizen Lobbyist*. CITIZEN LOBBYIST (Timothy Watts, dir. 2005). A subsequent protest yielded a commitment from HRC – subsequently reneged upon – to support federal employment discrimination legislation only if it is trans-inclusive. *Compare* Adrian Brune, *HRC Vows no ENDA if no Trans Protection - Dramatic Policy Shift Follows Protests, Lobbying Effort*, WASHINGTON BLADE, Aug. 13, 2004, *available at* http://www.washingtonblade.com/2004/8-13/news/national/enda.cfm (last visited Dec. 16, 2008); *with* Autumn Sandeen, *The HRC's Bad ENDA Behavior – and a Cover-Up?*, PAM'S HOUSE BLEND, Nov. 5, 2007, *available at* http://www.pamshouseblend.com/ showDiary.do?diaryId=3509 (last visited Jan. 30, 2009).

[249] After the bill passed in committee – with the trans-inclusion language removed – Seaton said she was "thrilled." Matthew Mosk and Thomas W. Waldron, *Narrow Approval for Gay Rights Bill*, BALTIMORE SUN, March 20, 1999 at 1A. According to a press release from the Maryland trans organization Its Time, Maryland!:

> The bill originally contained fully inclusive language that would have provided protection to all gender variant people in Maryland. During hearings for the bill, Liz Seaton, Executive Director of the Free State Justice Campaign (FSJC), was asked by a committee member if her organization would continue to support the bill without the new inclusive language. According to an eyewitness, Seaton chose not to express her organization's unequivocal commitment toward the new language. The House Judiciary Committee apparently took her answer as a go-ahead to adopt "compromise" language, stripping the section of the bill protecting visibly gender variant people.

Its Time, Maryland!, *Maryland Anti-Discrimination Bill Drops Protection for Gender Variant Behavior*, Press Release dated March 25, 1999, *archived at,* http://www.ifge.org/news/1999/mar/nws99mar27.htm#story4 (last visited Dec. 16, 2008).

orientation bill that removed trans people from the bill's definition of sexual orientation.[250]

The same issue of *Margins* contains an article with the same number of references to Proposition 22 and even fewer references to anything trans-related – and, arguably, that single reference overstates the connection to trans issues.[251] It is an extremely indirect reference to a 1978 article by Richard Green entitled "Sexual Identity of 37 Children Raised by Homosexual or *Transsexual* Parents."[252] However, it comes to the Gallagher-Baker article from a reference, in the *Dean v. District of Columbia* dissenting opinion of Judge John M. Ferren, to a 1985 law review article that in turn referenced Green in a footnote string cite.[253]

Many wrote primarily of Proposition 22 and only spoke of trans-anything in generically-inclusive terms when referring to those presumed to have been fighting against the initiative.[254] Others took broad, radical positions – and in doing so scooped up all trans people. Summer L. Nastich boldly declared:

> Admittedly, suggesting the "abolition of marriage as a legal category and with it any privilege based on sexual affiliation," will likely "be viewed as quite radical." Abolishing marriage, however, is a meritorious means to a just end. Viewed in light of the struggle for the equal rights of gay, lesbian, bisexual and transgendered ("GLBT") individuals, abolition of the legal institution of marriage equalizes these members of society in ways that same-sex marriages and "civil unions" will not.[255]

Nastich did write of the "transsexual curveball," pausing briefly to note *In re Ladrach* and *Littleton v. Prange*. Of the latter, Nastich opined that it:

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[250] 1999 MD. H.B. 315, amend. 232304/1.
[251] Maggie Gallagher and Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS, 161 (2004).
[252] 135 AM. J. PSYCHIATRY 692 (1978) (emphasis added).
[253] Gallagher and Baker, *supra* note 251 at 167 n. 30 (*citing Dean v. District of Columbia*, 653 A.2d 307, 353 n. 59 (D.C. 1995) (Ferren, J., dissenting) (quoting Steve Susoeff, *Comment, Assessing Children's Best Interests When a Parent Is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. Rev. 852, 882 n. 192 (1985) (citing Green, *supra* note 252))).
[254] Toni Broaddus, *Vote No If You Believe in Marriage: Lessons from the No On Knight/No On Proposition 22 Campaign*, 15 BERKELEY WOMEN'S L.J. 1 (2000) (used "transgender" and "LGBT," but nothing specifically referring to those who legally transition); Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76 (2000) (two instances of "Proposition 22" appearing in a single footnote, apart from a footnote containing eight instances of "transsexuals," not in the context of marriage but of a quoted discussion of the place of transsexuals in feminism) (quoting Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 35-38 (1995)).
[255] Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. J. 114 (2003) (quoting MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 228-30 (1995)) (footnotes omitted)

> may raise more questions than it answers. The court identified one such question, "When is a man a man, and when is a woman a woman?" As this question remains unanswered, perhaps unanswerable, using gender to define marriage does little to advance our understanding of what "marriage" actually means. [256]

The problem with Nastich's radical analysis is that the *Littleton* court in 1999 *did* answer that – however wrongly and however lacking in posture to reach the issue – for transsexuals in (parts of) Texas. The increased use of marriage as a civil rights yardstick for gays and lesbians is, practically speaking, what allowed that 2-1 majority of one of Texas' fourteen appellate courts to throw transsexuals not a curveball, but a diseased spitball.

Pre-Proposition 8 Analysis

Post-*Goodridge*

Even when not tied to a specific anti-same-sex marriage law, analysis focusing on specific pro-same-sex marriage developments also have improperly ensnared transsexual law, issues – and authors. Here, I am going to focus on one particularly egregious example of blurring the issues – one in which I am personally involved above and beyond the fact that I am a transsexual woman. It involves some of my previous writing.

Following Massachusetts' recognition of same-sex marriage, in an article in the *BYU Journal of Public Law*,[257] Professor Lynn Wardle sought to show that the Vermont decision[258] preceding it which had spurred that state's legislature to come up with the concept of "civil unions,"[259] had not been sufficiently analyzed. My concern here is not whether Wardle was right or wrong but, instead, one *aspect* of Wardle's article – that which looks at *how* the *Baker* decision appears in legal scholarship.

> While most law review writing about recent cases focuses on understanding, explaining and either criticizing or supporting the legal analysis of the court, a different pattern characterizes most of the law review writing about *Baker*. Virtually all of the legal writing about Baker focuses on the result, and largely ignores the legal analysis. The legal literature supportive of *Baker* tends to be celebratory rather than analytical.[260]

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[256] Nastich, *supra* note 255 at 114 (quoting *Littleton v. Prange*, 9 SW 3d 223 (Tex. App. – San Antonio 1999 pet. denied)).
[257] Lynn D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 BYU J. PUB. L. 309 (2004).
[258] 744 A.2d 864 (Vt. 1999).
[259] 15 VT. STAT. ANN. § 1202 (2) (2004).
[260] Wardle, *Curious Case, supra* note 257 at 323.

I actually could see the utility of Wardle's point – if, in fact, *all* of the articles that he and his compiler, Justin W. Starr,[261] 'analyzed' actually had some more-than-remote connection to *Baker*, such as purporting to actually deal with *that case* and *that issue* (same-sex marriage) as opposed to *other cases* and *other issues*, such as the one most prevalent in my writing: *trans*sexual marriage.[262]

> [Starr] examined a total of 266 law review articles to determine how they treated the Vermont Supreme Court's decision in Baker v. Vermont. The articles were selected by "Keycite"-ing Baker v. State using Westlaw and limiting the references to law review articles. This was done for the last time in the first week of September, 2003. The articles listed as positive either explicitly praised the decision, or made arguments supportive of or in sympathy with those made in Baker. For example, *if the article was arguing in favor of same-sex marriage and cited to Baker, regardless of the exact proposition which Baker is cited for, it was counted as positive*. The articles were classified solely upon their internal content, and some articles were listed as neutral even though other writings of the article author suggested that the author had a positive or negative view of Baker.[263]

The numbers aren't as troublesome as the *parameters*, which yield an egregiously flawed construct. And, the picture that emerges is more than a little deceptive. Wardle states:

> There is very little use or critical discussion of the legal analysis in either the cases [that have cited *Baker*] or the commentary, and no court has followed its reasoning. These clues suggest that the legal analysis in *Baker* may be less than impressive.[264]

This is a perilous leap of logic. And his classification of three articles that I wrote and published between 1999 and 2004 – two of which Wardle counted as "positive" toward *Baker*, with the third characterized as asserting that it *did not go far enough* – fails to make the leap successfully.[265]

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[261] *Id.* at 353, Appendix A.
[262] *See generally*, Lawrence Morahan, *Transgender Case Focuses on How Sex Is Determined*, CNSNEWS, July 24, 2003, *available at*: http://www.cnsnews.com/Culture/Archive/200307/ CUL20030724a.html (last visited Dec. 21, 2004); *and* Louis P. Sheldon, *Transgendered 'Father' Loses Custody Case In Florida*, TRADITIONAL VALUES COALITION, July 27, 2004, *available at*: http://www.traditionalvalues.org/modules.php?sid=1769 (last visited Dec. 21, 2004).
[263] Wardle, *Curious Case, supra* note 257 at 353, at Appendix A.
[264] *Id.* at 311.
[265] I will make no attempt here to look at any of the articles appearing in that table other than my own. Hopefully, others will look at how their work appears in that classification scheme and respond appropriately.

My article on *Littleton v. Prange*,[266] is the closest that I have come to being *specifically* pro-same-sex marriage in a law review article.[267] Still, the portion of *The Transsexual and the Damage Done* which *can* be classified as actually *advocating* for same-sex marriage is *not* pro-*Baker v. State* or even pro-same-sex-marriage *per se* as much as it is *anti-DOMA*. [268]

There *is* a difference.

More critically, the only reason that I had cause (or even ability) to cite *Baker* at all is that the Vermont Supreme Court handed down its decision just as I was finishing the article.[269] In light of the Littleton majority's conversion of a transsexual marriage into a same-sex marriage via judicial legislation, it was, in my view, proper to mention what was then the biggest development to date in litigation that *actually* involved same-sex couples.[270] Even at that, my mention of *Baker* hardly fits into Wardle's "fete, celebrate, and lionize" generalization.[271] As for "made arguments supportive of or in sympathy with" *Baker*, or "supporting, lauding or endorsing the result,"[272] these are certainly closer to being accurate. Nevertheless, the article does not support Wardle's thesis. [273]

The appearance in Wardle's 'analysis' of my 2002 article about two *name*-change cases ultimately ruled upon by the Ohio Supreme Court[274] is even more suspicious. Neither of the two cases I focused on involved *anyone* actually seeking to get married

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[266] 9 S.W.3d 223 (Tex. App. – San Antonio 1999, pet. denied), *cert. denied*, 531 U.S. 872 (2000).
[267] Rose, *The Transsexual and the Damage Done*, *supra* note 22 at 57.
[268] Make no mistake, however; I do not believe that there is anything in the United States Constitution – the supreme law of the land, U.S. Const., art. VI, cl. 2 - that gives *any* government *any* authority to inflict any religio-favoritism upon the entirety of the populace, and this limitation most decidedly acts against certain (even a vast majority of) religions' dogmatic notions of which two consenting adult human beings can and cannot construct a protective familial apparatus and demand government recognition of it on par with the familial apparatuses designated as normative by a thin (or even the vast) majority of the nation's religions or even a thin (or even the vast) majority of its citizenry.
[269] *Littleton* was issued on October 27, 1999; *Baker* on December 20, 1999.
The Transsexual and the Damage Done was an amalgamation of two existing papers (one purely on transsexualism and the law and one on the constitutionality of the federal DOMA) along with a section specifically dealing with *Littleton*. Although I had been working on a combined version of the two existing papers for some time, sadly, *Littleton* provided me with the perfect 'bridge' between the two topics.
[270] *See generally* John Gallagher, *Marriage Separate but Equal*, THE ADVOCATE, Feb. 1, 2000 at 28.
[271] Wardle, *Curious Case*, *supra* note 257 at 324.
[272] *Id.* at 309.
[273] I do wonder whether Wardle actually would prefer that all legal scholars include a full, article-length analysis of every case that they cite. I would hope not. Many of my footnotes are horrendously long as things stand already. *See generally* Rose, *Sign of a Wave?, supra* note 239 at 257-58 n. 2. I am certain that topics beyond transsexual marital rights might generate the need to cite *Baker v. State* purely in passing. Not being a Vermont attorney (and, in fact, only having ever visited the state once - in 1994, during Howard Dean's tenure as governor but several years before the *Baker* litigation began), I'll leave those multitudinous possibilities to those who deal with all aspects of Vermont law more often that I do or likely ever will.
[274] Though only after much religionistic chicanery at the trial court and intermediate appellate levels. Rose, *Three Names, supra* note 28.

and only one involved a couple at all – a lesbian couple seeking court approval of a surname-in-common.[275] The other case involved a transsexual woman seeking court approval of a change to a presumptively-female name.[276]

And I mentioned *Baker* twice in that *70 page* article.

The first of the two was simply a footnote to an incredibly brief one-paragraph mini-history of same-sex marriage litigation – from Minnesota's 1971 *Baker v. Nelson*[277] through the then-recently-filed *Lewis v. Harris*[278] – a history of which I would hope that even Wardle would agree that the Vermont *Baker* was (and is) a part.[279] The second was merely a reiteration of my suspicion that the then-impending *Baker v. State* decision may have had some influence on the Texas Fourth Court of Appeals' decision in *Littleton*.[280]

If the criticism had been that I may have been a bit too cynical or even conspiratorial in my analysis, then I might not have standing to complain. But do either of these references amount to feting *Baker*?

Or celebrating *Baker*?

Or lionizing *Baker*?

Hardly.

Even further removed from reality, however, was Wardle's characterization of my article on the 2001 *Gardiner* intermediate appellate decision[281] as being "Positive, But Not Far Enough." *Sign of a Wave?* was about yet another case in which a court engaged in judicial activism of the variety about which conservatives rarely seem to have a problem. In *Gardiner*, a Kansas probate court (and, ultimately, the Kansas Supreme Court, subsequent to my article), judicially legislated anti-transsexual intent into existing anti-same-sex marriage statutes so as to classify heterosexual transsexual marriages as same-sex relationships, strangers to marital law.[282] As noted earlier, that article was not about same-sex marriage in any other context *and it was certainly not about Baker v. State* at all![283]

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[275] *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002).
[276] *In re Maloney*, 774 N.E.2d 239 (Ohio 2002).
[277] 191 N.W.2d 185 (Minn. 1971), *appeal dism'd*, 409 U.S. 810 (1972).
[278] Eventually leading to a *Baker v. State*-esque decision from the New Jersey Supreme Court. 908 A.2d 196 (N.J. 2006).
[279] Rose, *Three Names*, *supra* note 28 at 98, note 44.
[280] *Id.* at 149, note 277.
[281] 22 P.3d 1086 (Kan. App. 2001).
[282] That court being the Leavenworth County Probate Court; my article was about the well-reasoned opinion from the Kansas Court of Appeals that overturned the probate court – which, unfortunately, was itself subsequently overturned by the Kansas Supreme Court. 42 P.3d 120 (Kan. 2002), *cert. denied*, 537 U.S. 825 (2002).
[283] And, the article offers some solid legislative history (from California rather than Kansas) showing that prohibitions against same-sex marriage, irrespective of their constitutionality, by their own operational

How does *Baker* appear?[284] I criticize the post-*Baker* activities of the Vermont Legislature – and I criticize those legislators *not* for not creating same-sex marriage but, rather, for offering *no* statutory guidance whatsoever as to whether Vermont, in its Civil Union era, would consider heterosexual couples involving a transsexual be opposite-sex or same-sex. Could this legitimately be classified as criticizing *Vermont* for not going far enough? Yes, but not about same-sex marriage or whether *Baker v. State* 'went far enough.' After all, *Baker* did not involve any transsexuals. For, as later was the case in Massachusetts, California and Connecticut where mandates for same-sex marriage contained no inherent mandate (or even dicta) regarding post-transition sex status for transsexuals, a marriage-mandate outcome in *Baker* would not have clarified anything for individual Vermont transsexuals regarding their sex status.

> And the following is what I actually *did* say in that article regarding *Baker*. Although one of Vermont's supreme court justices did support the granting of full marriage rights to same-sex couples, the majority punted the issue to the legislature which, rather than allow same-sex marriage, created the 'civil union.'[285]

This is a statement of fact regarding *Baker* and the subsequent Vermont Civil Union statute, nothing more. I went on to look at why the existence of civil unions for same-sex couples would not prevent transsexuals from having to deal with a *Littleton*-esque anti-transsexual decision in Vermont ("reverse-*Littleton*" I dubbed it[286]). However, I did eventually again refer to *Baker* itself:

> Civil unions were not created as simply an alternative to marriage available to all couples. Rather, they were created to be the same-sex counterpart to marriage. In *Baker v. Vermont*, a majority of the Vermont Supreme Court refused to rule that marriage itself must be made available to same sex couples, only the benefits thereof. Although the legislature had the opportunity to make marriage available to all couples, it did not do so. It created a same-sex alternative that, as marriage is only available to opposite-sex couples, is only available to same-sex couples.
>
> > For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria: (1) Not be a party to another civil union

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terms are simply not aimed at heterosexual marriages involving transsexuals. Rose, *Sign of a Wave?*, *supra* note 239 at 280-83.

[284] In addition to one similar to the brief historical passage in the Ohio name change article; this one being an even quicker – roughly one sentence in length – jump between the 1971 and 1999 decisions that each is often simply referred to as *Baker*. *Id.* at 274 (2001).

[285] *Id*. at 291-92 (citations omitted).

[286] *Id*. at 291; *see also* Melissa Aubin, *Defying Classification: Intestacy Issues for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155, 1178 (2003).

> or a marriage. (2) Be *of the same sex* and therefore excluded from the marriage laws of this state.
>
> If a post-operative male-to-female transsexual does not know her legal sex standing under Vermont law, how can she and a nontranssexual partner know what version of marriage, be it real marriage or "civil union," they may use to avail themselves of the legal benefits of a state-sanctioned relationship? They simply can't.[287]

Here again I merely stated the unquestionable fact of what the *Baker* decision did – and there is no further in-depth analysis of *Baker v. State* for a reason: It was *not* the *Baker v. State* decision that I was criticizing.

I was criticizing the Vermont Legislature (over the law it created in response to *Baker*), and the entrenched permanent activist class in the gay rights industry, which helped shepherd the civil union bill through, while not only shunting transgender concerns to second (or third or lower) class priority, but also not caring about the collateral effects on transsexuals of what gays do for themselves.[288] Not until 2007 did the state rectify its gay-only civil rights law to include trans people,[289] and even in 2009, as political energy in the state turns to full same-sex marriage rights, [290] transsexuals still do not know if the state actually will recognize who they are as individual human beings. Full marriage equality might eliminate the specter of "reverse-Littleton," but it would not eliminate the possibility of being arrested (or at least officially harassed) for using the 'wrong' restroom.

LGBT rights opponents – particularly those in its anti-gay-marriage industry division – are addicted to deceptive 'data.'[291] During the Congressional debates on the

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[287] *Id.* at 292-93 (citations omitted) (all italics are as they appear in the UMKC article).
[288] *Id.* at 294, note 248; *See also* Rose, *The Proof is in the History*, *supra* note 150 at 447-59. I must note that during the legislative battle that followed *Baker*, I contacted some of those activists who were involved in lobbying for the legislative solution to *Baker*, imploring them to take into account the plight of transsexuals in a two-regime system – and one suggestion was to push for "full marital rights," but *also* for a transsexual birth certificate statute. The response was that

> With the passage of marriage instead of pseudo-marriage, the trans part of the gay community in Vermont would have the same rights as anyone regardless of their sexual orientation.

E-mail from Bobbi Whitacre to author, Jan. 9, 2000. Even then, however, uncertainty would remain as to whether the federal government would view a heterosexual transsexual Vermont marriage as opposite-sex or same-sex – an uncertainty which remains even under Vermont's dichotomous marriage-civil union regime.
[289] 2007 VT. LAWS Ch. 41; *see also* 2006 VT. H.B. 865.
[290] Louis Porter, *Vt. House to Introduce Same-Sex Marriage Bill*, RUTLAND HERALD, Feb. 6, 2009, *available at* http://www.rutlandherald.com/article/20090206/NEWS04/902060326/1004/NEWS03 (last visited Feb. 9, 2009).
[291] The most ridiculous of which, by far, is the completely disproved notion that homosexuals can be 'cured'. *See* WAYNE R. BESEN, ANYTHING BUT STRAIGHT (2003); Laura Douglas-Brown, *Ex-Gay Leader Experiences 'Moral Fall' - Johnston Allegedly Had Sex With Men Without Disclosing He Has HIV*, SOUTHERN VOICE, Aug. 1, 2003, *available at* http://www.sovo.com/2003/8-1/news/breaking/ exgay.cfm;

Federal Marriage Amendment[292] and the so-called Marriage Protection Act,[293] I lost track of the number of invocations of studies allegedly proving that the existence of gay marriage has had a calamitous effect on Scandinavia.[294]

Doubtlessly, Wardle's analysis of what he sees as a lack of analysis in and of *Baker v. State* will worm its way into future debates on either the FMA or the MPA, or both.[295] Those of us who write on the topic cannot tolerate having our scholarship misrepresented – by the left *or* the right, by the gay or the straight. And those whose individual legal identities hang in the balance any time that the issue of same-sex marriage works its way into court deserve not to have their lives subject to erasure by conflation.

Pre-*Marriage Cases*

Out of 44 briefs submitted to the California Supreme Court in the *Marriage Cases* supporting same-sex marriage,[296] only nine contained anything remotely related to any transgender concept. In four of these, the only appearance is the use of "transgender" or "GLBT" (or some variant) in the name or description of the function of the organization submitting the brief.[297] Together, the other five cite a total of four trans cases. The

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and Katrina C. Rose, *What Part of a 92 1/2% Failure Rate Doesn't America Understand?*, TEXAS TRIANGLE, April 28, 2000.

[292] 2004 S.J. Res. 30, 108th Cong, 2nd Sess. (March 22, 2004); 2004 S.J. Res. 40, 108th Cong, 2nd Sess. (July 7, 2004).

[293] 2003 H.R. 3313, 108th Cong. 1st Sess. (Oct. 16, 2003).

[294] Sen. Wayne Allard, the lead sponsor of the FMA, Sen. Rick Santorum, a co-sponsor, and Sen. John Cornyn, who as a member of the Texas Supreme Court upheld the anti-gay statute eventually overturned in *Lawrence v. Texas*, 539 U.S. 558 (2003), (see *State v. Morales*, 869 S.W.2d 941 (Tex. 1994)), all attempted to link an inordinate rise in out-of-wedlock births in Scandinavia to same-sex marriage. CONG. REC., 108th Cong., 2nd Sess. at S8003 (July 13, 2004) (Sen. Allard including in the record Stanley Kurtz, *The End of Marriage in Scandinavia: The "Conservative Case" for Same-Sex Marriage Collapses*, WEEKLY STANDARD, Feb. 2, 2004); *Id*. at S7980-81 (Sen. Santorum, speaking of out of wedlock births in Sweden); *Id*. at S7921-22 (July 12, 2004) (Sen. Cornyn, speaking of Norway and Denmark). Allard, now out of the Senate, should be presumed to have known the difference between same-sex marriage and opposite-sex marriage involving a transsexual. As a Colorado state senator in 1984, he was the lead sponsor of the bill that contained the language that became that state's transsexual birth certificate statute. Rose, *Renaissance*, *supra* note 37 at 115.

[295] He is certainly not absent from briefs in the California same-sex marriage litigation. *See generally*, Brief Amici Curae of Douglas W. Kmiec, et. al., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

[296] Although I have elsewhere in this article quoted from briefs in the *Strauss v. Horton* challenge to Proposition 8, here I am limiting the analysis to briefs leading to the May 15, 2008 *Marriage Cases* decision. There, the issue was who can marry. In *Strauss*, the core issue actually is California's initiative framework. *See* Michael Foust, *Ken Starr Gives Prop 8 Argument Preview*, BAPTIST PRESS, Feb. 10, 2009, *available at* http://www.bpnews.net/bpnews.asp?id=29845&ref=BPNews-RSSFeed0210 (last visited Feb. 13, 2009).

[297] Amicus Brief of Anti-Defamation League, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Amicus Brief of GLAD, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Amicus Brief of NGLTF Foundation at 1, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Amicus Brief of BALIF at 4, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). Notably, in the Unitarian Universalist Amicus, co-amicus MCC is listed as being "the largest Christian denomination ministering primarily to lesbians and gays, among others," but there is no specific mention of

Professors of International Law cited the European Court of Human Rights' decision in *Goodwin v. United Kingdom,*[298] and this was only for the general principle that an inability to conceive a child should not be a bar to marriage; the citation mentions nothing about transsexuals.[299] Three party briefs and the MALDEF amicus brief cite *Hernandez-Montiel v. INS*, [300] a 2000 immigration law decision – all for the proposition that "sexual orientation" is an "immutable trait," but only one, the opening brief of the City and County of San Francisco, adding "sexual identity"[301] to that. And it is that one brief that contains the two references – both to non-marital civil rights cases. The *Schwenk v. Hartford*[302] prison case appears for the notion that gender can be a pertinent motivating factor (though, despite the plaintiff in *Schwenk* being a transsexual, nothing about this is mentioned.) The reference to *Smith v. City of Salem*[303] is to federal circuits' interpreting *Price Waterhouse v. Hopkins*[304] to prohibit gender stereotyping "regardless of whether the victim is gay or straight."

Of 26 *Marriage Cases* briefs *opposing* same-sex marriage, only four contained anything remotely related to any transgender concept. One amicus brief cites four European Court decisions for the proposition that that court "has repeatedly held that 'the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex,'" but the phrase "biological sex" therein is the only hint that those decisions might possibly be about transsexuals; neither "transsexual" nor "sex change" appear.[305] An amicus brief from the Knights of Columbus and an answer brief from the Attorney General both refer to *Hernandez-Montiel* on essentially the same terms as the pro-same-sex marriage briefs that referred to it – except in that they distinguish it.[306] Only in the answer brief from the Campaign for California Families (CCF) do any

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trans-anything. Brief Amici Curae of the Unitarian Universalist Association of Congregations at xv, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999). The Bar Association of San Francisco's brief mentions that the organization has worked to eliminate discrimination based on sexual orientation, but there is no mention of gender identity. Additionally, the brief mentions that many of its members are gay or lesbian, but there is nothing about trans-anything. Brief of the Bar Association of San Francisco as Amicus Curae at 1-2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

[298] App. No. 28957/95 (Eur. Ct. H.R. 2002).

[299] Brief of Professors of International Law at 21, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999)

[300] 225 F.3d 1084 (9th Cir. 2000).

[301] Brief of Mexican American Legal Defense Fund, et. al., at 22, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Respondents' Opening Brief on the Merits at 38, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Opening Brief on the Merits of Gregory Clinton, et. al., at 30, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); City and County of San Francisco's Opening Brief on the Merits, et. al., at 67-68, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

[302] 204 F. 3d 1187 (9th Cir. 2000).

[303] 378 F.3d 566 (6th Cir. 2004).

[304] 490 U.S. 228 (1989).

[305] Brief Amici Curae of James Q. Wilson, et. al., at 16-17, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (citing *K.B. v. National Health Service Pensions Agency* (10 June 2003) Case No. C-117/01, 2003 ECJ CELEX LEXIS 650; *Rees v. United Kingdom* (1987) 9 E.H.R.R. 56; *Cossey v. United Kingdom* (1991) 13 E.H.R.R. 622; and *Sheffield and Horsham v. United Kingdom* (1999) 27 E.H.R.R. 163).

[306] Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits at 37, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); Brief Amicus Curae of the Knights of Columbus at 23, 28, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

of the true transsexual marriage decisions appear:[307] *Gardiner*, *Ladrach*, *Kantaras*, *Littleton*, *M.T.* and one of the New York *Anonymous* opinions.[308] Yet, even here, the references border on the absurd.

Those six opinions appear only in a single footnote – and there they are interspersed among actual same-sex marriage cases – with CCF asserting that all of the opinions together are "examples of state and federal court cases that have upheld marriage as the union of one man and one woman against claims that same-sex couples are being denied certain rights." Of course, the inclusion of *M.T. v. J.T.* is an egregious misrepresentation. While the New Jersey Appellate Division did indeed hold that marriage is between a man and a woman, it recognized change of sex *within that construct*. According to CCF however, *M.T.* held that a "male transsexual who underwent sex-reassignment surgery may *not* be considered female for marital purposes."[309] Notably, the only quote from *Ladrach* was "There is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male-to-female transsexual person and a male person."[310] Absent was any mention of the dicta surmising that a state transsexual birth certificate statute would implicitly create such authority.[311]

None of CCF's transsexual marriage cases actually involved parties making "claims that same-sex couples are being denied certain rights," *unless*, of course, the asserter considers heterosexual couples that include a transsexual half *to be* same-sex couples.

Unquestionably, California has a transsexual birth certificate statute.

But could it be worth no more than same-sex marriage advocates in 2004 asserted California's anti-same-sex marriage laws to be worth?

And who gets to decide?

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[307] Answer Brief of Campaign for California Families on the Merits at 51-53, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).
[308] *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (1971).
[309] *Id*. at 52-53, note 39 (emphasis added).
[310] *Id*.
[311] *Ladrach*, 513 N.E.2d at 831.

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Twain Derailment: If Gavin Newsom is a Hero, Then What is the Westminster School Board?[312]

2008 vs. 1998

> *A civil rights movement has to be about making a case for equality to the public and the courts. When we look for shortcuts that hide our real agenda, we're too clever for our own good.* [313]
>
> *Throughout this campaign, we have once again hid the face of same-sex couples and given a free pass to those in the middle of the electorate who are uncomfortable with gay relationships. Instead of challenging that atavistic premise, we have nodded our collective heads and said something on the order of "Hey, we understand that gay couples make you a little queasy, but for God's sake don't write us out of the constitution."*[314]

The first of the above statements could have been written about the effort to defeat Proposition 8, an effort heavily criticized for not being visibly gay enough. Both statements did appear in gay newspapers – but almost a decade apart. The first came weeks before Hawaii's 1998 vote to make its constitution compatible with its statutory ban on same-sex marriage. The second came less than a month before California's vote on Proposition 8. Strategic uneasiness was not the only constant over the course of that decade.

As the California Supreme Court was preparing to hear the challenge to Proposition 8, the managers of the anti-Proposition 8 campaign and other community leaders held an 'Equality Summit.' Those members of the community who attended were described by Autumn Sandeen as "a pretty angry crowd. They aren't happy about how the Prop 8 campaign was run at all."[315] In fact, the anger appeared, to a degree, to unite the gay left and the gay right.[316]

The summit consisted of larger plenary sessions such as "Looking Backward and Forward," "Race, Religion and the LGBT Movement" and "What's Next?" as well as more targeted breakout panels – including a trans-specific one. According to Sandeen,

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[312] I here refer back to the hope expressed in the title of my article on the Ohio name change cases. Rose, *Three Names in Ohio*, *supra* note 28.
[313] *Stealth Strategy – Effort to Beat Hawaii Referendum isn't How to Win*, HOUSTON VOICE, Sept. 18, 1998.
[314] Ann Rostow, *Why Are We LOSING Marriage in California?*, SAN FRANCISCO BAY TIMES, Oct. 16, 2008, *available at* http://www.sfbaytimes.com/article_p.php?article_id=9221 (last visited Oct. 18, 2008).
[315] Autumn Sandeen, *Angry Crowd At The Equality Summit*, PAM'S HOUSE BLEND, Jan. 24, 2009, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=9193 (last visited Jan. 25, 2009).
[316] GayPatriotWest, *Live-Blogging the "Equality Summit,"* GAY PATRIOT, Jan. 24, 2009, *available at* http://www.gaypatriot.net/2009/01/24/live-blogging-the-equality-summit/ (last visited Jan. 26, 2009) ("Right now, we're hearing from people involved in the 'No on 8' campaign and once again, I find myself allied with some of the far left.").

though "hundreds" attended the summit only eight people attended that breakout session.[317] Interestingly, of the breakout "networking & strategy sessions by interest/constituency," only that one, held in "a tiny room in the corner"[318] consisted of a constituency that has the potential to be substantively impacted by something like Proposition 8 in a unique way.[319]

> [M]essaging on marriage equality, directed at those external to the lesbian, gay, bisexual and transgender community, often only highlights the most mainstream of gay and lesbian couples and families. Tight messaging often leaves bisexual and trans people our of the discussion. Many of us in the trans community question whether today's tight messaging that leaves out trans people is tomorrow's context for bigotry against trans people by gay and lesbian people. [320]

The thorny nature of trans people's place in this issue can be evidenced from the varied responses to Sandeen's reporting. While some from outside the trans community appeared to echo this concern,[321] some within the trans community were of the opinion that "If same-sex marriage was allowed, there would be no issues on whom I was in a relationship with, how our genitalia appeared or what letter was typed on our birth certificates."[322]

> Does same-sex marriage solve every problem?
>
> Can same-sex marriage *litigation* solve every problem?

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[317] Autumn Sandeen, *Thoughts On The Equality Summit's Transgender Breakout Session*, PAM'S HOUSE BLEND, Jan. 24, 2009, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=9195 (last visited Jan. 25, 2009).

[318] Queequeg, *Equality Summit or: GayCon 2009*, LA METBLOGS, Jan. 26, 2009, *available at* http://la.metblogs.com/ 2009/01/26/equality-summit-or-gaycon-2009/ (last visited Jan. 26, 2009) ("trannies are the black sheep of the LGBTI family").

[319] The other breakout sessions were: African-American, Asian & Pacific Islander, Earned & Paid Media, Faith Communities, Families, Government/Elected Officials/Legislative Advocates, Grassroots Community Organizing, Labor, Latino, Legal, Netroots, Transgender, and Youth. *Equality Summit*, EQUALITY CALIFORNIA, *available at* http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026385. This is not to dismiss concerns of racial, ethnic and religious groups (or of labor and youth), but neither adherence to a particular faith nor having a particular racial and/or ethnic identity (whether self-identified or imposed by law) will have a bearing on whether one can marry under an opposite-sex-only marriage regime.

[320] Autumn Sandeen, *Thoughts On The Equality Summit's Transgender Breakout Session*, PAM'S HOUSE BLEND, Jan. 24, 2009, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=9195 (last visited Jan. 25, 2009).

[321] Maura Hennessey, Comment to, Autumn Sandeen, *Thoughts On The Equality Summit's Transgender Breakout Session*, PAM'S HOUSE BLEND, Jan. 24, 2009, *available at* http://www.pamshouseblend.com/showDiary.do?diaryId=9195 (last visited Jan. 25, 2009) ("It would not appear, based upon the attendance of the breakout session, that their issues were of concern to the larger community.").

[322] Denabeth, *comment to*, Sandeen, *Thoughts*, *supra* note 321.

Does same-sex marriage litigation create precedent for same-sex marriage? Or does it just create new problems?

Law? What Law?

Scant weeks before Gavin Newsom set the wheels in motion for same-sex marriages in San Francisco during what has come to be called the "winter of love," [323] personnel with the Westminster School District in Orange County determined that the district's anti-discrimination policy was not in compliance with a 2000 law mandating that coverage, for students and staff, include "gender," expansively defined to encompass gender noncomformity and transgender people.[324] Three of the five members of the school board, Judy Ahrens, Helena Rutkowski and Blossie Marquez-Woodcock, decided to take a stand against the state standard, defiantly refusing to modify the district's policy to comply with it.[325] Their inaction made the district the only one in the state that did not comply with the 2000 law.[326]

Ahrens, Rutkowski and Marquez-Woodcock maintained this position even after being informed that noncompliance might cost the district $40 million in state funding.[327] Ahrens made no secret of what was driving her policy stance. Describing herself as a devout Christian, she declared, "Everyone always wants to fix things tomorrow. Well, I'm saying the time is ripe now. I might take a lot of heat for it today, but the rewards are going to be great in heaven." [328] Marquez-Woodcock said that she could not, "with a clear conscience … vote for this trash." [329]

Los Angeles Times columnist Dana Parsons drew a comparison between the situation and what was then the one-year-old war in Iraq.

> How many times have U.S. officials referred to the "rule of law" being our goal in Iraq, even as its citizens squabble over centuries-old religious and cultural differences? Before we insist on the rule of law in Baghdad, how about Westminster?

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[323] Heather Tirado Gilligan, *Lyon recalls 'Winter of Love,'* BAY AREA REPORTER, Feb. 12, 2009, *available at* http://www.ebar.com/news/article.php?sec=news&article=3712 (last visited March 13, 2009).
[324] *Christian Trustees Reject Law on Defining Gender - Risk Losing Millions in Funds for Stand Against Anti-Discrimination Rule*, WORLD NET DAILY, March 16, 2004, *available at* http://www.wnd.com/index.php?pageId=23756 (last visited March 17, 2004).
[325] *Id.*
[326] Iris Yokoi, *Gender Dispute Threatens Funding in Westminster*, ORANGE COUNTY REGISTER, March 14, 2004 at 2.
[327] Joel Rubin, *Board Digs in on Gender*, L.A. TIMES, April 2, 2004, *available at* http://www.latimes.com/news/local/la-me-gender2apr02,1,5073867.story (last visited April 2, 2004).
[328] *Christian Trustees*, *supra* note 324.
[329] *Id.* (ellipsis in original).

> The three board members forming the majority have made it clear they don't like new wording in state law that expands antidiscrimination protection to people with gender-identity issues. Even though a duly elected Legislature approved the language and the governor signed it into law, that's not good enough for the board majority.[330]

Parsons, though, was defending process more than policy.

> The majority has said it acted on conscience, refusing to betray deeply rooted philosophical or religious convictions.
>
> *Excellent motive, wrong conclusion*. For public servants, a true act of conscience would be to say that supporting a state law that violated religious beliefs required them to resign their positions.[331]

The *Orange County Register* seemed more clearly to relish the possibility of the dispute eventually getting into court so that the state law could be challenged and, perhaps, done away with. Nevertheless, the paper's editorial page intoned:

> With all due respect, we find numerous laws, including those that dictate personal behavior that does no harm to anybody but the person engaging in it, morally offensive. But we advocate changing rather than breaking those misconceived laws.[332]

Donna Scott, a Westminster parent, asked, "How dare you use my child as a human shield for your discrimination, your fear, your hatred[?]" She also declared, "As elected public officials, you should live up to your moral obligation to obey the law."[333] Another parent, Veronica Thompson remarked, "These three women have been holding this district hostage for several weeks now because they don't want to follow the law," further openly pondering how the three could "make up their own interpretation of the law and expect the state to let them do that."[334]

The state considered taking control of the district, but some maneuvering by the district's attorney staved off that effort as well as the potential loss of state funding.[335] Still, some parents initiated a recall effort.[336] Ahrens and Marquez were targeted, while

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[330] Dana Parsons, *Learning to Practice What We Preach*, L.A. TIMES, April 4, 2004, *available at* http://www.latimes.com/news/local/la-me-parsons4apr04,1,3602261.column (last visited April 5, 2004).
[331] *Id.* (emphasis added).
[332] *The Larger Issues in the Westminster Case*, ORANGE COUNTY REGISTER, March 29, 2004.
[333] Fermin Leal, *Crowd Fails to Sway Board on 'Gender' Law – Westminster Schools Will Continue to Defy the State, Risking the Loss of Funds*, ORANGE COUNTY REGISTER, April 2, 2004 at 1.
[334] Fermin Leal, *A New 'Gender' Comes into Play – Westminster School Board Adopts its Own Definition, Which Differs from State's*, ORANGE COUNTY REGISTER, April 13, 2004 at 1.
[335] *Solving a Gender Issue*, ORANGE COUNTY REGISTER, April 26, 2004.
[336] Fermin Leal, *Gender Issue Brings Recall Action – Some Parents Want to Oust Westminster Board Majority; Lawmaker to Pursue State Takeover*, ORANGE COUNTY REGISTER, April 3, 2004 at 1.

Rutkowski was up for re-election in November. She had previously enjoyed the support of the teachers' unions but, during the discord over the gender provision, she decried the union as a "communist group" that is "against any mention of God," costing her that support.[337] The recall failed, but Rutkowski was defeated, and the new board majority moved away from the gender issue.[338]

And all was well?

Presumably all became well with the Westminster School District.[339] But the fervor that Newsom began nearly a year earlier with his unilateral disregard for California's marriage laws continued, ebbing and flowing during the litigation that seemingly culminated with the *Marriage Cases* decision in May 2008, but reigniting during the subsequent campaign against Proposition 8 and the fight thereafter to undo the initiative. Apart from the political questions of whether the Mormon church violated tax law via its participation in the Proposition 8 campaign and whether the opponents of Proposition 8 ran a competent campaign, and apart from the legal question of whether the initiative was just an amendment to, or amounted to a revision of, the California Constitution, a more difficult – and apparently heretofore unasked – question remains. What difference was there between the actions of the City and County of San Francisco and the actions of the Westminster School Board?

Each entity – the former embodied by Mayor Newsom and the latter embodied by the school board majority – decided to ignore a disliked state statute. Newsom immediately ascended to hero status – among those who agreed with him,[340] remaining so even after later inadvertently providing the pro-Proposition 8 campaign some of its prime commercial fodder.[341] The same was true for Ahrens, Rutkowski and Marquez.[342] One action was widely viewed as pro-gay, lauded on its fifth anniversary.[343] The other was viewed as anti-transgender – and is all but forgotten.

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[337] Joel Rubin, *Trustee's Stance on Gender Law Targets Her for Ouster*, L.A. TIMES, Oct. 26, 2004, *available at* http://www.latimes.com/news/local/la-me-westminster26oct26,1,2876931.story?coll=la-headlinescalifornia (last visited Oct. 26, 2004).

[338] Fermin Leal, *Contreras Victory Helps Shift Westminster Board – New Member Boosts District Majority who Want Focus on Schools, not Gender*, ORANGE COUNTY REGISTER, Nov. 4, 2004 at Elect 13.

[339] At least on the gender front. Race later became a flash point, with Marquez and Ahrens being on different sides of a controversial non-hire of a Vietnamese-American superintendent. *Westminster School Board Retracts Hiring*, ASIANWEEK, June 9, 2006 at 20.

[340] Rone Tempest, *S.F.'s Hero of the Moment*, L.A. TIMES, Feb. 16, 2004 at B1.

[341] Jonathan Darman, *Hoping That Left is Right*, NEWSWEEK, Jan. 26, 2009; Chris Johnson, *An Interview with Gavin Newsom – San Fran Mayor Talks Prop 8, Gubernatorial Hopes*, WASHINGTON BLADE, Nov. 28, 2008, *available at* http://www.washblade.com/2008/11-28/news/national/13649.cfm (last visited Jan. 17, 2009). As a member of the Board of Supervisors, Newsom supported adding transition-related healthcare to the benefits package for San Francisco city employees. Rachel Gordon, *Vote to Add Sex Change Benefit is Delayed – S.F. Supervisors to See Bill Again Next Week*, SAN FRANCISCO CHRONICLE, April 24, 2001 at A13; Rachel Gordon, *S.F. to Finance Staff Sex-Changes – Milestone Act Narrowly OKd by Supervisors*, SAN FRANCISCO CHRONICLE, May 1, 2001 at A1.

[342] Leal, *Crowd Fails to Sway*, *supra* note 333 at 1.

[343] *Five Years Ago, Same-Sex Marriages United the City*, BAY AREA REPORTER, Feb. 12, 2009.

Same-sex marriage still matters.

Perhaps trans rights never did.

From Law to Politics, But Not Yet Back Again

The fight for inclusion in gay rights legislation such as ENDA has generated a great degree of heated discussion – public and private, online and off – and likely will again with Barney Frank's enlistment of a trans apologist for the inevitable ENDA fight in the 111th Congress.[344] But the fight, on the trans side at least, stems from having been forcibly removed from our own movement before the 'history' of state-level civil rights laws began. The fight is as much to reclaim our history as it is to take our rightful place in positive, practical law. Yes, the ENDA discussions and even arguments can be heated – but, I assert, they are generally rational. Those opposed to trans-inclusion simply do not like being confronted with a trans-positive interpretation of the history that has allowed them to attain the position of political superiority over trans people and trans issues.

Many – perhaps even most – of the arguments by the 'incrementalists' are disingenuous or even blatantly dishonest. They are cold, calculated – and, despite protestations to the contrary, bigoted against the legitimacy of trans economic existence (if not trans existence overall.) But lies are not inherently irrational. Dishonest, yes; but, not necessarily irrational.

The quest for same-sex marriage, however, seems to have inspired a degree of irrationality heretofore unseen in the LGB(T) rights movement. Pushing marriage primacy during the 2008 primary season, former *Washington Blade* editor Chris Crain refers to emphasis on ENDA and hate crimes legislation as merely "schtick," claiming that "the divisive battle over transgender inclusion made clear that workplace rights have lost their appeal as the easiest form of gay civil rights to enact."[345] In the aftermath of the 2004 presidential election – which coincided with eleven states enacting anti-same-sex marriage amendments, Freedom to Marry's Evan Wolfson insisted that "What we saw on November 2nd was no 'backlash.'"[346]

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[344] Anne Stockwell, *Frank's New Face*, THE ADVOCATE, March 2009 at 13.

[345] *Compare* Chris Crain, *With Dennis Gone, Dems Disappointing?*, CITIZEN CRAIN, Jan. 25, 2008, *available at* http://citizenchris.typepad.com/citizenchris/2008/01/with-dennis-gon.html (HRC "resources would be better spent pressing the candidates for specifics on their gay rights commitments, especially in the area of relationship recognition") (last visited Feb. 13, 2009); *with* Rose, *Where the Rubber Left the Road*, *supra* note 24.

[346] Evan Wolfson, *What Do the Election Results Mean for the Movement Toward Marriage Equality?*, FREEDOM TO MARRY, Nov. 3, 2004, *available at* http://www.freedomtomarry.org/evan_wolfson/by/what_do_the_2004_election_results_mean.php (last visited Feb. 13, 2009). "I do not want to be read as being oblivious to, or purposely ignoring, the fact that some who are afforded the opportunity to speak on trans issues show the same degree of willingness to disregard clear and present danger of backlash. Of 'pregnant man' Thomas Beatie, Dean Spade expressed an unwillingness to believe that Beatie's sex could be questioned or that his marriage to a non-trans woman could be challenged. Amazingly, he went so far as to opine that he could not "imagine there will be

Infamously, Rep. Barney Frank declared in 2007 that trans rights supporters lived in Oz for questioning his ultimately unverifiable claim that trans-inclusion in ENDA lacked sufficient support[347] – during a congressional session in which there was almost no chance that any version of ENDA would make it through the Senate (and even less chance that one would be signed by the religionist-leaning president.) The degree to which the progression of 'gay rights' may have been manipulated by those with an interest in keeping trans issues out of the equation and the degree to which those gays and lesbians whose claims of having educated Congress on trans issues over the preceding decade may have been dubious never factored into what became official discourse on the matter. How the LGB(T) community got to where it was in October 2007 became irrelevant; the role of a decades-long, transphobic gay hegemony in creating whatever unacceptability there actually might have been among heterosexual politicos for trans-inclusivity remained unanalyzed.

One of the plaintiffs – in a different decade admittedly – in the D.C. same-sex marriage case opined in response to "some gay legal beagles" who thought the case unwise:

> Criticism leveled against us by our brethren in the legal profession go something like this: Whether we win or lose, we did the wrong thing by filing this suit. If we lose, they say we will set a bad precedent. This is patently absurd: *How much worse can it get?*[348]

When that question receives any consideration at all, the question of how much worse it can get for transsexuals is not a component.

For transsexuals, it can get worse via a backlash that produces constitutional amendments that not only enshrine that status quo but also impede – or eliminate – domestic partner benefits and other legally cognizable incidents of same-sex relationships.[349] And it can get worse via a backlash that produces a court decision, statute or constitutional amendment that is broad enough to wipe out recognition of change of sex – for marriage or for any purpose.[350]

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negative legal consequences for [the Beaties] personally." Jen Christensen, *Trans Positions*, THE ADVOCATE, April 23, 2008 (paraphrasing in original).

[347] 142 CONG. REC., H11388 (daily ed. Oct. 9, 2007) (statement of Rep. Frank).

[348] Craig R. Dean, *Gay Marriage: Lead, Follow, or Get Out of the Way*, NEW YORK NATIVE, Aug. 26, 1991 at 22, 25 (emphasis added). His case ended unsuccessfully. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). In contrast, in the aftermath of the 1977 Miami ordinance repeal, some were cognizant of how an anti-gay backlash can spread beyond gay concerns. Arlie Scott of NOW remarked of the Bryant forces' attacks on gays, "They attack them first, get them first…Its not very far from that to attacking abortion." Diane Wang, *No More Miamis! Winning Allies for Gay Rights*, *in* GAY LIBERATION TODAY at 9 (1977).

[349] *See, Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524 (Mich. 2008).

[350] For example, J'Noel Gardiner fell victim to Kansas statutes from backlashes to two distinct eras of same-sex marriage pushes. *Gardiner,* 42 P.3d at 135-36; 1980 KAN. LAWS Ch. 106 (this passage followed

Even if one could conclusively prove that trans-inclusion would kill ENDA however, gays, lesbians and bisexuals would be in no worse of a position after the failure of such a bill than they would have been before its failure (or even introduction.)[351] The initial resultant DOMAs and DOMA amendments give the impression that the same was true for same-sex marriage litigation – but then the DOMA amendments began to include language that would prohibit things that could exist outside of man-woman marriage, such as civil unions and even domestic partner benefits; [352] an interpretation of Michigan's did indeed take away existing benefits. [353] Both represent a change for the worse for targeted groups (or groups that judges decide after-the-fact were targeted.) But only one of the groups stands to lose long-existing rights – as individual human beings, irrespective of whether they are even in a relationship. [354]

Until there are 'sexual orientation markers' or 'marital status markers' on drivers licenses, no gay man or lesbian (whether partnered or not) will have to fear being pulled over – either whilst driving or upon entering a restroom – in Kansas based solely on that state's anti-same-sex marriage law. However, because of how Kansas marriage was used against transsexual marriage *and* identity, all transsexuals (whether partnered or not) run the risk of being de-transitioned *as individuals* whenever – and wherever – they might happen to interact with Kansas legal machinations.

Am I adopting the "What the hell are those silly asses trying to do?" attitude embodied by a 1970 'closet vs. activist' cartoon in *The Advocate*?[355] No. Am I asserting that the desire for marital rights by gays and lesbians is wrong or irrational *in any way*? No. Am I denying the fundamental truth in the following passage from a 2009 *Bay Area Reporter* editorial?

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attempts throughout the 1970s); 1996 KAN. LAWS Ch. 142 (response to Hawaii); *See also* Julie Wright, *Kansas Reaffirms Ban on Same-Sex Marriages*, WICHITA EAGLE, April 12, 1996 at 11A.

[351] I do not include trans people here, because there actually is a track record of trans people actually being worse off after failure of federal gay rights proposals – with courts bizarrely interpreting the failure of a sexual orientation bill that would not have included trans people in it even if it had passed as intent by Congress not to include 'change of sex' within the ambit of 'sex' in federal sex discrimination legislation. *For example*, see *Holloway v. Arthur Andersen and Co*., 566 F.2d 659, 662 (9th Cir. 1977).

[352] Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, *domestic partnership*, or other similar same-sex relationship shall not be valid or recognized in Nebraska. NEB. CONST. Art. 1, § 29 (2001) (Initiative 416 as enacted) (emphasis added).

[353] *Nat'l Pride at Work, Inc. v. Governor of Mich*., 748 N.W.2d 524 (Mich. 2008).

[354] This is not to say that advocates of same-sex marriage do not frame the issue as an individual right – the right "to join in marriage with the person of one's choice." *See* Brief of Amicus Curiae Freedom to Marry in Support of Plaintiffs-Appellees at 12, *Varnum v. Brien,* 763 N.W.2d 862 (Iowa, filed March 27, 2008) (No. 07-1499) (quoting *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948)). While I do not take issue with that as it is framed, it nevertheless stands in contrast to a transsexual's interest in sex-definitional autonomy which, though a precursor to that transsexual's ability to marry, is purely an *individual* right. The right of marriage (whether same-sex or opposite-sex; interracial or intraracial), even when framed as the right to marry a person of one's choice, is one that cannot actually be exercised without a second person's participation.

[355] THE ADVOCATE, Oct. 28-Nov. 10, 1970 at 20.

> [C]ivil unions are not marriage, but the mere fact that political leaders are now embracing them is a testament to how far the community has come.[356]

No. Of course, Wolfson also noted in 2004 that progress was occurring.[357] And it was, in the form of Vermont and Massachusetts. But there *also* was a backlash – state-by-state, statute-by-statute, constitution-by-constitution.[358]

Yet, opposite is not necessarily inverse.

Responding to a litany of permutations posed by a post-*Littleton v. Prange* marriage in Texas between a transsexual woman and a non-transsexual woman, Paul Varnell opined:

> None of these would ever arise as problems if states were willing to legally recognize same-sex marriages or, as David Boaz advocates at the Independent Gay Forum, if governments got out of the marriage business entirely and simply certified any two people's partnership contracts.[359]

But, even if it deconstructs gender to either the degree that Wolfson envisioned or the degree that more radical scholars who have appropriated the trans banner envision, it will not – and cannot by itself – afford individual legal recognition to a person who moves from one far end of the sex scale to the other – something that, while unquestionably important at the altar, can be equally important at the toilet. But, where the quest for same-sex marriage goes awry, that individual recognition can become more difficult. Where the backlash to same-sex marriage has cost transsexuals their legal identities, merely establishing same-sex marital rights will not undo that erasure.[360]

As Rosalind Petchesky noted two decades ago, "Reproduction affects women as women; it transcends class divisions and penetrates everything – work, political and community involvements, sexuality, creativity, dreams."[361] Same-sex marriage does not affect gays and lesbians as gay and lesbian *individuals*; it affects them *as couples* – and for those who are *not* coupled, even if it may be a symbolic issue (and legitimately so), it is not a substantive one. This will, of course, tempt some to view transsexuals' marital

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[356] *Five Years*, *supra* note 343.
[357] Wolfson, *What Do the Election Results Mean*, *supra* note 346.
[358] Wolfson was, however, willing to use the word "backlash" at the height of the Hawaii fervor. Evan Wolfson, *...Domestically Attached*, THE ADVOCATE, Oct. 14, 1997 at 77; Evan Wolfson, *How to Win the Freedom to Marry*, HARVARD GAY & LESBIAN REV., Fall 1997 at 29, 30. Of course, of battles in state legislatures over same-sex marriage, he proudly proclaimed that "throughout 1996 and 1997, we have won more of those battles than we have lost." *Id*. at 30. By 2004, that trend clearly changed – despite the Massachusetts victory.
[359] Paul Varnell, *Same-Sex Marriage Sort Of*, CHICAGO FREE PRESS, Sept. 6, 2000.
[360] *See* Rose, *Where the Rubber Left the Road*, *supra* note 24 (Forthcoming 2009).
[361] Rosalind Pollack Petchesky, ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY AND REPRODUCTIVE FREEDOM (1990 edition), 5.

rights similarly – however, such a comparison would be inaccurate, or at least dangerously incomplete.

Where the backlash to same-sex marriage has bulldozed transsexuals' marital rights, the bulldozed right was not solely the right to marry; it was the right to *be*, something of continuing relevance to a transsexual irrespective of the transsexual's marital status or intent ever to marry at all. If same-sex marriage suddenly became legal, the surviving victims[362] of infamous anti-transsexual marriage decisions would become able to marry members of what they view as the opposite sex and have those marriages recognized by law.

> Christie Lee Littleton could marry a man – in Texas.
> J'Noel Gardiner could marry a man – in Kansas.
> Jacob Nash could marry a woman – in Ohio.
> Michael Kantaras could marry a woman – in Florida.

However, Littleton and Gardiner would be doing so as men; Nash and Kantaras as women.

At least in the eyes of the law.

I am not a transsexual separatist,[363] but I also do not believe that salvation lies in a brand of radical gender-queer theory that, in terms of dismissiveness of transsexual legitimacy, is barely distinguishable from Janice Raymond's exterminationist orthodoxy. I appreciate Terry Kogan's observation that transsexual and intersex cases illustrate the "foolishness in looking to a person's sex as a criterion for marriage" and even agree with his assertion that they "offer insights into why society should extend marriage rights to same-sex couples."[364] It is, however, not simply intransigent jurists who refuse to let one build on the other; for many years, the movement that could have benefited wanted no part of the people who succeeded before them. As Wolfson noted in 1997:

> Because our struggle to win the freedom to marry so centrally challenges the gender stereotyping and sex roles that it is our opponents' prime agenda to maintain, feminist organizations and leaders have been strong supporters of our case and call to arms.[365]

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[362] Elaine Ladrach died in 1988, a few months after the Stark County Ohio Probate Court decision by which she is remembered was issued. Eric Resnick, *'I Swear I am not Transsexual' – Clark County Requires Marrying Couples to Take This Oath*, GAY PEOPLE'S CHRONICLE, Jan. 12, 2007, *available at* http://www.gaypeopleschronicle.com/stories07/january/0112072.htm (last visited Feb. 13, 2009).

[363] This is yet another term that is plagued by an imprecise definition. My definition is one who not only rejects the umbrella term 'transgender,' but also adheres rigidly to the standards of transsexuality that were presumed in decades past (particularly surgery, at least a clear intent to undergo surgery if not having already undergone it) and disassociates from not only the gay community but also from the broader transgender community.

[364] Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371 (2004).

[365] Wolfson, *How to Win*, *supra* note 356 at 30.

He does not mention transsexuals – yet, it is we who have paid the price for what that movement has decided that it wants. The backlash to same-sex marriage – that backlash whose existence some refuse to acknowledge – did not simply cost Littleton, Gardiner, Nash and Kantaras their marriages. Nor did it simply cost them their marriages *and* the most important component of their legal identities. It cost all transsexuals in (and, if they haven't already secured post-transition documentation, transsexuals *born in*) those jurisdictions the most important component of their legal identities.

Dean v. District of Columbia did not do so in D.C. – though it could have (in spite of Craig Dean's question-cum-assumption.)[366] *Lewis v. Harris* did not do so in New Jersey – though it conceivably could have done so irrespective of how that case concluded.[367] Likewise, the *Marriage Cases* did not do so in California – though it conceivably could have done so no matter how the case concluded.[368] But the *Marriage Cases* decision was followed by Proposition 8. The initiative did not contain chromosome-based definitions of "man" and "woman," but courts have rarely missed the opportunity to judicially legislate such definitions. Whether California's courts will acknowledge statutory law and both the intersections and disjunctures of LGB history and T history – thereby resisting the temptation to do for the christianists what the christianists could have done but did not do – will remain an open question. Ultimately, I hope that this article will demonstrate that, even if Proposition 8 stands, when a transsexual marriage case eventually comes to court via honest litigation or when a conservative opportunist counterpart to Gavin Newsom decides to unilaterally disregard California's pro-transsexual law, courts should respect the reality of transsexual legal history, and not the dubious rhetoric of an exceedingly amorphous tradition of religio-political convenience.

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[366] 1981 D.C. LAWS Ch. 4-34.

[367] Transition is recognized in both statutory and mid-level appellate case law in New Jersey. N.J. Stat. § 26:8-40.12 (2008); *M.T. v. J.T.*, 355 A.2d at 204. The Supreme Court in *Lewis v. Harris* could have been particularly regressive, ruling against the same-sex plaintiffs in a way that mandated so-called traditional gender roles to an extent that overruled *M.T.* Yet, it also could have opened up marriage with a ruling that completely wiped out *M.T.* for all purposes. Moreover, there certainly was no guarantee that rectification of the state's gay-only rights law would take place alongside establishment of civil unions in New Jersey; the temporal gap in Vermont ended up being seven years. Nat'l Gay and Lesbian Task Force, *Years Passed Between Sexual Orientation and Gender Identity/Expression, Transgender Civil Rights Project*, July 2007 Update, *available at,* http://www.thetaskforce.org/downloads/reports/fact_sheets/years_passed_gie_so_7_07.pdf (last visited March 13, 2009).

[368] Despite Hew Jersey's history of transition recognition, N.J. STAT. § 26:8-40.12 (2008); and *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super App. Div. 1976); some of the opponents of same-sex marriage actually cited M.T. for their side. *See* Brief and Appendix of Defendants-Respondents at 19-28, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super App. Div. 2005) (No. A-2244-03T5). Moreover, the dissent in the *Lewis v. Harris*, while recognizing that M.T. had recognized a transsexual woman's transition, did not seem to view the decision highly. *Lewis v. Harris*, 875 A.2d. 259 (N.J. Super App. Div. 2005). Conceivably, a harsh anti-same-sex marriage decision from the supreme court could have viewed *M.T.* as a fluke and 'clarified' it out of existence, while a pro-same-sex-marriage decision could have clarified it into irrelevance.

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Conclusion

These 48 People are Newlyweds – But they could all be single come November 4.[369]

As previously noted, in 1979 the city of Los Angeles enacted a gay rights ordinance – an ordinance that was trans-inclusive. Though often ignored in discussions of the progression of LGB(T) rights legislation, this means that, at the height of trans-misogyny (and transphobia in general) within the nascent gay rights movement, the largest jurisdiction covered by gay rights legislation was covered by a trans-*inclusive* one. This would change in 1982 when the first statewide gay rights bill to become law was gay-only – and the pendulum would not come close to swinging back for two decades.

In terms of gay rights, transsexuals were not part of what transpired during that period – and the presence of a FTM as lead counsel in the *Marriage Cases* does not change that history; nor does it affect whatever the balance may actually be in 2009. Some transsexuals currently do not want to be connected to the gay rights movement – though many do. [370] The same was true for what Susan Stryker has called those "difficult decades," when the combination of gay male anti-femininity and radical lesbian transphobia led transsexuals to be outcasts not simply as against the conservative gay activism hegemony but also as against the more radical genderqueer proliferation. In 2009, members of that portion of the LGBT continuum who have secured a positive foothold in the laws of more – and a more diverse group of – states than pure gay rights laws can ever hope to are the least likely to be seen 'at the table.'

Even at *their own* table.

The author of the passage at the beginning of this article appears to presume that trans restroom usage was illegal in California prior to May 15, 2008, and that the decision in the *Marriage Cases* opened the door to such usage – literally. If there is no right to self-determination "retained by the people"[371] – or at least transsexual people – and if state action was necessary to open the door, that action came from the California Legislature – and it came in 1977, at the same time that that legislative body erected the first specific statutory barrier to same-sex marriage in the state. If, however, it was the *Marriage Cases* that opened said door, then Proposition 8 must have closed it.

But Proposition 8's brevity was matched by its clarity,[372] was it not?

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[369] THE ADVOCATE, Nov. 4, 2008 (cover).
[370] 2008 will forever be linked with a real presidential candidate's success. But, I ask the reader to recall a line from a fake (near-) President – Tom Dobbs, as played by Robin Williams in *Man of the Year*. In response to a potential scandal, he remarked "I did not have sex with that woman. I *wanted* to." MAN OF THE YEAR (Universal 2006) (emphasis in original).
[371] U.S. Const., amend. IX.
[372] Intervener's Opposition Brief at 37, *Strauss v. Horton,* 207 P.3d 48 (No. S168047) (Cal. brief filed Dec. 19, 2008).

And it was only about marriage, was it not?

And it was only about limiting marriage to unions of one man and one woman, was it not?

It was *not* about defining who is a man and who is a woman.

A sad reality is that, in all likelihood, had the opponents of same-sex marriage slipped sex-definition language into their 2008 initiative, the campaign against Proposition 8 would have been no more organized and no more successful – and no more likely to have presented the issue to the electorate with the words and images of those who would have been directly affected – and certainly not those transsexuals and intersexed people who would have been affected.

The e-mail from HRC's Joe Solmonese, also mentioned earlier in this article, was not an isolated event. The February 2009 issue of *The Advocate* featured a full-page ad by his organization, containing essentially the same sentiment as the e-mail – but also containing wording even more dangerously overbroad and inaccurate, now extending the sentiment presumably to the anti-adoption amendment approved by the voters of Arkansas.

> On November 4, our country and our community were forever changed. We elected a promising pro-equality President and a supportive Congress, but *four* states voted to make their LGB*T* neighbors second-class citizens.[373]

Beyond the class hyperbole,[374] again one sees the reckless nature of the inclusion of the 'T.' The critical portion of the Arkansas initiative read:

> (a) A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage which is valid under the constitution and laws of this state.
>
> (b) The prohibition of this section applies equally to cohabiting opposite-sex and same-sex individuals.[375]

Make no mistake: I disagree with the amendment as a whole and I certainly refuse to let the equal-application language of subsection (b) persuade me that the amendment was authored with *anything* in mind other than christianist-laden animus against gays and lesbians.

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[373] THE ADVOCATE, Feb. 2009 at 14 (HRC ad: Hope Will Never be Silent) (emphasis added).
[374] Even Proposition 8 did not repeal any anti-discrimination laws, which neither Arizona nor Florida nor Arkansas had to begin with, at least at the state level.
[375] 2008 Arkansas Proposed Initiative Act No. 1, § 1.

The emphasis on "anything" serves two purposes, however.

Even if the amendment's authors possessed hate in their hearts for transsexuals, nothing in the amendment's language can be read honestly to negate any trans-related right. An unmarried transsexual who is not cohabiting would be as able to adopt a child as the transsexual would have been able to prior to the amendment; the single transsexual's legal sex status is irrelevant to the amendment's language. A transsexual who is cohabiting outside of marriage would not be able to adopt a child even though, prior to the amendment, the transsexual would have been able to do so – but, again, the single transsexual's legal sex status is irrelevant to the operation of the amendment.

A transsexual who is cohabiting in a relationship, the heterosexuality of which would be a prerequisite under the amendment to adopting a child, still lost nothing directly related to trans-status as a result of the 2008 amendment. If the relationship in question is asserted to be a legal, heterosexual marriage – a la *M.T. v. J.T.* – then, if the marriage is valid pursuant to the man-woman definition of marriage inserted into the state's constitution in 2004, which it should be given that by that point the state had been recognizing gender transition for over twenty years,[376] then there would be no justification for viewing it as a relationship "outside of a marriage" for purposes of the adoption amendment.

No justification – perhaps except for characterizations of it as LGB*T*.

Much of this article was written after Prop 8's passage and prior to the oral arguments in *Strauss v. Horton*[377] and a decision in that case may well emerge from the California Supreme Court before this article sees publication. Irrespective of what emerges from that judicial challenge to Proposition 8, the contextual relationship between transsexuals and same-sex marriage deserves greater understanding. If Proposition 8 stands, then all in California need to be introduced to the historical divide between transsexuals and homosexuals – which more conservative gays and lesbians continue to use to justify present-day exclusion of trans people and trans issues – has substantive positive legal value for transsexuals. If Proposition 8 falls, that historical divide still deserves illumination in anticipation of the inevitable transsexual marriage cases that will materialize in Oregon, [378] Arizona, [379] Utah, [380] Colorado, [381] Nebraska, [382] Louisiana, [383] Arkansas, [384] Missouri, [385] Kentucky, [386] Alabama, [387] Georgia[388] and Virginia[389] – each of

[376] 1981 ARK. LAWS Ch. 120.
[377] Some final edits were made in the days immediately after the arguments.
[378] 1981 ORE. LAWS Ch. 221; O.R. CONST. art. XV, § 5a (2007).
[379] 1967 ARIZ. LAWS Ch. 77; A.Z. CONST. art. 30, § 1 (2008).
[380] 1981 UTAH LAWS Ch. 126; U.T. CONST. art. 1, § 29.
[381] 1984 COLO. LAWS Ch. 206; C.O. CONST. art. 2, § 31 (2008).
[382] 1994 NEB. L.B. 886; N.E. CONST. art. 1, § 29.
[383] 1968 LA. ACTS Ch. 611; L.A. CONST. art. 12, § 15 (2008).
[384] 1981 ARK. LAWS Ch. 120; A.R. CONST. Amend. 83, § 1 (2008).
[385] 1984 MO. S.B. 574; M.O. CONST. art. 1 § 33.

which recognizes change of sex via statute but has eliminated same-sex marriage via constitutional amendment. If, as many predict, the middle ground of upholding both Prop 8 *and* the May-November 'interim marriages,' then the question of not just transsexual marriages but of transsexuals themselves will remain – even though it shouldn't. There should be no question that Prop 8 did not touch transsexuals – either as individuals or as spouses in post-transition heterosexual marriages.

Yet, doubtlessly, the question will be raised. And when it is, context needs to be understood in order to persuade courts to look beyond theoretical vagaries[390] that, however passionately they may be worshipped by LGBT academics and younger LGBT people, are unlikely to carry the day on their own in any court. However much that such a dichotomous concept may be distasteful to gender/queer theorists,[391] one's legal status – as male or female – is currently still significant for purposes of the law. Foucault asked, "Do we *truly* need a *true* sex?"[392] In any jurisdiction that limits marriage to two people of the opposite sex and segregates restrooms by sex, one is essentially forced into needing at least a *legal* sex – and that legal sex matters. To be granted a marriage license, a couple must apply to the state, [393] not to Kate Bornstein or to the spirit of Michel Foucault.

The German philosopher Hans-Georg Gadamer observed, "Things that change force themselves on our attention far more than those that remain the same." [394] While same-sex marriage in the 21st century clearly falls under the former, *both* poles of Gadamer's observation actually encompass transsexuality. Christine Jorgensen's media presence in the 1950s embodies the former,[395] yet a half-century later, the multi-state body of law recognizing transition (in a manner that Jorgensen's home state would not do

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[386] 1990 KY. LAWS Ch. 369; K.Y. CONST. § 233A.
[387] 1992 ALA. LAWS Ch. 607; A.L. CONST. art. I, § 36.03 (2008).
[388] 1982 GA. LAWS Ch. 1216; G.A. Const. art. 1, § 4, ¶ I (2008).
[389] 1979 VA. LAWS Ch. 711; V.A. CONST. art. 1 § 15-A.
[390] As one example, see Jessica R. Beever, *Straight But Not Narrow: Implications of the Federal Same-Sex marriage Amendment*, 73 UMKC L. REV. 841 (2005).
[391] Ethan Jacobs, *Trans Conference Debates Merits of Anti-Discrimination Laws*, BAY WINDOWS, March 6, 2008, *available at* http://www.baywindows.com/index.php?ch=news&sc=glbt&sc3=&id=71234&pf=1 (last visited Feb. 26, 2009).
[392] Michel Foucault, *Introduction*, in HERCULINE BARBIN, BEING THE RECENTLY DISCOVERED MEMOIRS OF A NINETEENTH-CENTURY FRENCH HERMAPHRODITE (1980), vii.
[393] Usually through its local subdivisions.
[394] Hans-Georg Gadamer, *Introduction*, in TRUTH AND METHOD (2nd revised ed. 1989, 2004; trans. Joel Weinsheimer and Donald G. Harswal), xxii.
[395] Stryker even goes so far as asserting that, at least for a brief historical moment, Jorgensen was not simply the world's most famous transsexual, but the world's most famous *person.* Susan Stryker, *Introduction*, in CHRISTINE JORGENSEN, A PERSONAL BIOGRAPHY (2000 edition).

for her[396]) embodies the latter. Where such statutes exist, without substantive exception[397] they have remained the same.

> An observer of one of the post-Prop 8 forums in California remarked: The battle for marriage equality will require a new kind of thinking; it will also require each and every person who cares about gay and lesbian civil rights to do something about it. The problem is that nobody knows just what that 'something' is yet.[398]

One aspect of that "new kind of thinking" should include recognition of the collateral impact of same-sex marriage litigation on those beyond the borders of the litigation itself – particularly transsexuals. Pessimistically however, I do not see those who have come to view same-sex marriage as a panacea as being willing or able to do so. Nevertheless, I must hold out hope that those whose to whom the responsibility of interpreting transsexuals' rights in the shadow of an anti-same-sex marriage constitutional amendment will, when necessary, be able to tell the difference between a transsexual and a homosexual, between transsexual history and gay history, and between the definition of sex and the definition of marriage – and, most importantly, that they will be willing to *acknowledge* those differences.

[396] Oddly, she was uneasy about using the birth certificate as the vehicle for such recognition, remarking that her birth certificate "was a report of a happening some thirty-three years before." CHRISTINE JORGENSEN, A PERSONAL BIOGRAPHY (1967), 262.
[397] The current litigation involving the Illinois statute involves *not* the meaning of a post-transition certificate, but whether or not a physician not licensed in the United States can offer proof of surgical transition. See *Kirk v. Arnold* (Ill. Cir. Ct. Cook Co. filed Jan. 28, 2009).
[398] Japhy Grant, *More Questions Than Answers at Gay Marriage Equality Summit*, QUEERTY, Jan. 26, 2009, *available at* http://www.queerty.com/more-questions-than-answers-at-gay-marriage-equality-summit-20090126/ (last visited Jan. 26, 2009).