

See No [Tranie] / Hear No [Tranie] / Speak No [Tranie]: An Overview of the Lessons and Applications of Transgender Caselaw

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I. Introduction

The legal system is weaving an ever more complicated web of restraint around sex/gender/desire politics. Try as it might, the American mainstream has failed—in its utter confusion—to eradicate the contradictions and loopholes of these restraints. Unfortunately, the gay and lesbian movement has failed to utilize the opportunities created by this confusion in the mainstream in order to gain the equal protections the movement has long sought. As is typical, our political practice has not caught up with our academic theory. Queer theorists have been stressing the central importance of transgender persons for nearly two decades, yet the mainstream has failed to coherently engage their issues and the movement has failed to consistently support their issues.

Part II of this paper discusses how the problem is our seeming inability to locate a universally acceptable interpretation of just what “transgender” is. The details and diversity among pre- and post-operative transsexuals is not the same as intersexual individuals, who are not exactly like hermaphrodites, who are not the same as transvestites or cross-dressers. Moreover, the medicalized treatment of transgender persons enables two distinct methods of the exclusionary politics of the mainstream: the psychologically bankrupt notion of “gender identity disorder” and the surprisingly unabashed essentialism of the “deviance” of transgender persons. The gay/lesbian/bisexual (GLB) movement caters to the mainstream politics of exclusion with two strategies of its own: silencing transgender persons to distance “normal” gays and lesbians from the “deviant” identities that might jeopardize their chances for assimilation, and a paranoid, fundamentalist accusation of transgender persons’ intent to co-opt particularly lesbian and feminist political agendas. This political controversy highlights the critical importance of opening a space with transgender persons—what queer theorists have been saying for years.

Part III of this paper argues that now is an opportune moment to transform theory into practice because the legal system's attempts to ignore or constrain transgender persons are beginning to collapse. At the legislative level, two major issues are emerging via the Defense of Marriage Act (DOMA) and the Employment Non-Discrimination Act (ENDA). Both the mainstream and the movement have asked the courts to secure their positions on issues of equality. The mainstream asks for restraint, and the movement asks for recognition. The courts are having trouble negotiating between these positions, and as a result, there is a growing sense that equal protection may be inevitable in some form. Three court cases specifically involving the transgendered—*Littleton v. Prange*, *Price Waterhouse v. Hopkins*, and *Schwenk v. Hartford*—have been largely ignored by the movement as a means for cracking the arguments against equal protection wide open. More in-depth exploration of the details, ruling, criticisms and libratory potential of these three cases is long overdue.

Part IV of this paper argues that the federal laws are antiquated, while the state laws are contradictory where they are not ambiguous. Politics is moving too slowly, as is always the case, and a more complete understanding of these three cases will illuminate the broader picture of queer political objectives today. The rhetorical disputes of the courts and the movement's activists point to a larger dispute about identity assumptions themselves. Examining these objectives will provoke three unavoidable conclusions: First, everyone must continue to defy exclusionary politics no matter what side of the equal protection debate from which it comes. Second, incrementalist approaches to protection will hinder the cause because the strategy is necessarily reinforces a politics of exclusion. Finally, it is time for the mainstream and the movement to revive the politics of inclusivity from its abyss of accusations of extremism and nihilism.

II. See No [Tranie]

A. Basics of Definitional Confusion

The issue of legal protection is always a matter of definitions. Regarding transgendered persons, the courts are particularly confused. This is easily evidenced by the widespread dispute over whether or not transgendered persons are covered under existing legal protections and, if not, what additional rhetoric would be necessary to secure those protections. Given the conflicting opinions of the courts, it is appropriate to begin by discussing some basics of the identities of transgendered persons.

The transgendered are often also known as transsexuals. While in some cases accurate, this label tends to adhere to an unproblematic notion of the correlation between sex and gender that will be discussed later.¹ This paper will not employ the term transsexual, in an effort to avoid the conflation of legal interpretations of "sex" versus "gender." There are three kinds of transgendered persons. First, there are post-operative persons who have undergone various stages of genital surgery known as sex reassignment surgery (SRS) to alter their gender physically.² Post-operatives are either male-to-female (MTF) or female-to-male (FTM). Second, there are pre-operatives who have yet to undergo SRS. This group is said to be in transition, which involves beginning to live the life of one's new gender.³ The transition before

surgery also involves hormone therapy.⁴ Third, there are non-operatives who live the life of their chosen gender without intention of having surgery.⁵ Sometimes non-operatives also employ hormone therapy.⁶ There is a further segment of the transgender population with a different view of identity, namely, that transgendered simply means transgressively gendered and thus may incorporate everyone.⁷ The implications of this position will be explored later. In terms of the legal status quo, the above understanding of what it means to be transgendered is sufficient.

The group commonly conflated with the transgendered is transvestites, or cross-dressers.⁸ Transvestites have much in common with transgendered persons in terms of their outward appearance. However, the internal distinction is a crucial one. Transgendered persons emotionally, mentally, and/or psychologically identify as the “opposite sex,” and this is central to their dispute over protections.⁹ Courts often default to arguments which appeal to fears of the stereotypical “man in a dress” that actually sound more like they would address transvestites than transgendered persons.¹⁰

It is also essential to discuss certain groups rarely associated with the transgendered, but that are impacted significantly by transgender caselaw. The first of these groups is intersexuals. There are three types of intersexuals. First, there are those people whose chromosomes either do not correspond to their outward gender appearance or cause some blending of gender in their outward appearance.¹¹ Contrary to popular knowledge, there are actually at least nine known sets of chromosome patterns. There are the “normal” pairs XX for female and XY for male, but there are also XXX, XXY, XXXY, XYY, XYYY, XYYY and XO.¹² Additionally, there are some partial Y’s that appear more like X’s such that their genetic label is somewhat difficult to determine.¹³ Second, there are hormonally intersexed persons such as males with “abnormally” high levels of estrogen.¹⁴ Third, there are anatomical or genital intersexuals, a group commonly referred to as hermaphrodites, where the person has physical attributes that deny easy classification as male or female.¹⁵ Genital intersexuality is still widely considered an undesirable condition which doctors too frequently assume the authority to correct at birth.¹⁶ While there are no comprehensive studies on the prevalence of intersexuality, it is commonly estimated that one in every four hundred persons is intersexual.¹⁷

There is a final group substantially affected by transgender caselaw. Much of the argumentation in the courts concerns the presence or absence of genitalia or gendered internal organs and hormones, and there are many people, who the courts would consider “otherwise normal,” who are affected by such legal justifications. This group may include women who have had hysterectomies or mastectomies, men who have had orchiectomies or their prostate removed, women who undergo hormone therapy for menopause, or men who medicate for erectile dysfunction.¹⁸

Taken together, even the narrowest interpretation of what it means to be transgendered can be seen to include or implicate a significant number of people. This is one reason why the legislative and litigative decisions concerning transgendered persons should be of concern to everyone. The arguments of exclusionary politics in the status quo have a much broader range of impact than proponents of such strategies in the mainstream and in the queer movement seem to acknowledge. Many justifications for means of exclusion may end up excluding “some of their own.”

B. The Mainstream's Exclusionary Politics

Despite its serious lack of understanding, the mainstream of American political culture continues to express irrational fear and hatred toward transgendered persons. There are two major strategies the mainstream employs in its politics of exclusion.

First, transgendered persons are labeled as mentally ill. In order to undergo SRS, the transgendered must first jump through a series of psychiatric hoops to be classified as "gender dysphoric."¹⁹ Gender Identity Disorder (GID) is the American Psychiatric Association's substitute for the denial of homosexuality as a disease.²⁰ The trouble is that the transgendered have come to depend on the GID diagnosis, even as it does harm, because it enables them to undergo SRS.²¹ However, the bunk science of GID has substantial consequences for younger people who are not in a position to request SRS. Students or children are sometimes diagnosed with GID and, without their consent, receive medical and psychological treatment to prevent them from developing transgendered or homosexual tendencies. Additionally, there is the more general problem of medicalizing and treating as diseased a condition of being which, for the transgendered, is quite "natural" and "normal."²²

The second strategy the mainstream uses to exclude transgendered persons is essentialism of the meaning of deviance, and conflation of different segments of the queer movement.²³ Stereotypes abound: all transvestites are transgendered, all transgendered persons are homosexual, all transgendered persons were victims of sexual abuse during their youth, all transgendered persons are conspiring to obliterate traditional family values, all transgendered person are flamboyant and loud, and the list goes on. The queer movement is familiar with this strategy, because it often complains of undue media focus on groups like the North American Man-Boy Love Association (NAMBLA) marching in pride parades.²⁴ It is worthwhile to note that the movement similarly complains that drag queens marching in these parades also receive too much attention.²⁵ This attention is a symptom of the fact that the mainstream views the GLB community and the transgendered community as one and the same. Rather than coalescing with the transgendered community, however, the movement asks the drag queens to quiet down.

C. The Movement's Exclusionary Politics

The movement maintains two of its own strategies of exclusion. In response to the mainstream's essentialism of deviance, the movement erases those identities that give it a bad name.²⁶ The transgendered community is silenced in the name of GLB community assimilation on an all too frequent basis.²⁷ In this way, the movement adheres to the same unproblematic notions of normalcy constructed by the mainstream.²⁸ These standards, typified by "the problem of the man in a dress" highlighted earlier, never fail to exclude the transgendered.

A second strategy for exclusion is the promotion of fears that transgendered persons will co-opt the movement. In particular, some lesbian feminists claim that MTF's harbor all the tendencies of hegemonic masculinity and the fact that they are contained within the body of a newly made woman does not alter how their minds have been trained.²⁹ FTM's are also attacked

because they are perceived as sell-outs, or as having penis envy.³⁰ These haughty accusations of their impure intentions alienate the transgendered from GLB activist communities.

Given their exclusion from the mainstream and the GLB movement, it would seem that transgendered persons have no place of appeal for securing legal protections. This is not entirely accurate, however, as there is one segment of society that is very interested in the issues surrounding transgendered identity and is frequently supportive of a politics of inclusivity.

D. Theory as Praxis

Queer theory has become an increasingly popular lens of cultural critique and political thought over the past two decades. Queer theorists are particularly interested in transgendered persons because they bear two fundamental markers of the postmodern politics of identity: fluidity and intersectionality. It is the fluidity of transgendered persons that the mainstream reacts to as deviant.³¹ Their ability to defy rigid categories and roles is part of what academicians find so liberatory about the transgendered.³² It is the intersectionality, or multidimensionality, of transgendered persons that the movement often finds too hard to handle.³³ Their ability to represent how facets of identity and oppression, including but certainly not limited to gender and sexuality, interact to form a larger network of human relations is what makes them particularly interesting to academic analyses of identity.³⁴ Transgendered persons are the culminating point for identity studies in many ways.

As is typical, academic theorists are making faster progress toward inclusivity than the political practitioners that act as their conservative counterparts. The ability of judges and legislators to perceive the damage they do to these newly theorized political subjectivities in the name of maintenance of the status quo had proved substantially lacking. Similarly, the ability of the movement to act on its ostensible goal of complete inclusivity and liberation has proved insufficient. Clearly, the difficulty will be to turn queer theory into queer reality. What is needed now is a survey of where and how the state has failed transgendered persons, and an examination of inconsistencies in the failure that will make legal protections more possible.

III. Hear No [Tranie]

A. The General Centrality of Gender in Law

The importance of gender to the law cannot be overstated. In addition to the huge body of legislation that literally addresses issues of gender, there are the quiet assumptions about gender in an even greater body of legislation. Everything from obvious law governing women's right to vote to subtle employment of masculine pronouns as neutral makes a statement and begs a question about the state's constructions of gender.³⁵

The consideration of transgendered persons is where these unproblematized assumptions become painfully obvious. One major example of the total, yet perhaps inadvertent, failure to acknowledge the transgendered on the part of the mainstream is the federal Defense of Marriage

Act (DOMA). Presumed by most to be “a piece of election year gay-baiting,”³⁶ DOMA has much broader ramifications because it grants states the right to ignore same-sex marriages performed in other states’ jurisdictions.³⁷ DOMA presumes that same-sex marriages all involve gays or lesbians. Transgendered or intersexed individuals marry all the time, of course, and DOMA has either accidentally or quite sneakily given states the right to not recognize these marriages as well.³⁸

While the intent of this mainstream legislation seems vague, there are more blatant attempts at exclusion of transgendered persons on the part of the movement. The majority of the movement’s legislative focus, in recent years, has been directed at the proposed Employment Non-Discrimination Act (ENDA). The text of this act, which seeks to protect GLB people from employment discrimination, does not include protections for gender identity or the transgendered.³⁹ The Human Rights Campaign, originally responsible for drafting ENDA, specifically supported the exclusion because the narrow, piecemeal legislation is arguably more likely to pass.⁴⁰ The somewhat more liberal National Gay and Lesbian Task Force has conditionally supported transgender inclusion in the proposed legislation,⁴¹ but no version of the bill with such an inclusion had received enough sponsorship to bring it to the floor of Congress for a vote.⁴² The fight over gender identity inclusion in ENDA is symbolic of the movement’s larger debate over whether it should adopt pragmatic, piecemeal strategies or radical, liberatory strategies. Unfortunately, transgendered identity issues seem to fall by the wayside even where more radical voices in support of ENDA are concerned.

B. Specific Caselaw

The exclusion of the transgendered in legislation seems consistent on all sides. Caselaw concerning transgendered persons, on the other hand, is not nearly so easy to decipher. Contradictory precedents and haphazard, vague justifications are rampant in cases that seem to protect the transgendered as well as those that seem to exclude them. In fact, often it is not even clear whether a specific court ruling is an instance of protection or exclusion. The following section will examine just three of these cases to highlight the confused nature of status quo caselaw and locate some starting points for pursuing more coherent protections for the transgendered, gender identity, and the GLB movement.

1. *Littleton v. Prange*

Christie Lee Littleton was born a male in San Antonio, Texas.⁴³ Her birth certificate listed her as male.⁴⁴ By 1980 she had completed her MTF transition, including sex reassignment surgery.⁴⁵ The state of Texas issued her an identification card that listed her as female,⁴⁶ but she did not alter her birth certificate to also read female.⁴⁷ In the early 1990s, while in Kentucky she married Jonathan Mark Littleton.⁴⁸ He knew of her past and was not bothered by it,⁴⁹ and they were married in Kentucky using the Texas identification that listed Christie Lee as female.⁵⁰ Their Kentucky marriage license listed her as the bride.⁵¹ At the time of the marriage, Littleton had been living her life as a vaginaed person for almost a decade. This was a heterosexual, man-woman, opposite-sex marriage. The Littletons moved back to San Antonio where they lived happily married and filed joint tax returns. At one point, the Texas Attorney General got Christie Lee, as Mark’s spouse, to pay his child support from a previous marriage when Mark could not

afford to do so. After Mark's death in 1996, there were allegations of medical malpractice. To avoid payment on the claim, the doctor's insurance company utilized Christie Lee's male birth certificate to demonstrate the marriage was same-sex and therefore illegitimate.⁵² The trial court ruled against Littleton, and the Fourth Court of Appeals also ruled against Littleton.⁵³

The ruling of Justice Hardberger, of the Fourth Court, contains many conflicting elements worthy of consideration. First, the decision argues that definition of sex is a question for the legislature and not the court.⁵⁴ Hardberger's initial deference to the legislature concedes that some states do indeed recognize the marital rights of post-operatives.⁵⁵ What his deference fails to do is address whether Texas would consider the recognitions made by those other states as valid.⁵⁶ Following this statement, the Littleton court proceeded to make law by abandoning genitalia, in favor of chromosomes, as the standard for definition of sex.⁵⁷ The court presumed that because Littleton's birth certificate listed her as male, her chromosome pattern was necessarily XY.⁵⁸ As explained earlier, this is not always the case. The court's desire for some immutable standard for the definition of sex and the resultant privileging of biological gender over psychological gender displays significant disregard for evolutions in medical sciences as well as evolutions in the legal classifications of GID.⁵⁹ Second, Hardberger justifies his decision, almost in passing, via the federal DOMA, which he claims prohibits same-sex marriage.⁶⁰ To begin with, DOMA only defers the question of recognition of same-sex marriage by the states.⁶¹ Texas has no version of DOMA, or any other applicable law, which prevents recognition of such a marriage.⁶² Additionally, DOMA was passed several months after the death of Littleton's husband, and such a retroactive application is clearly unconstitutional.⁶³

This is by no means an exhaustive list of criticisms of the Littleton court, and criticism is also directed at Littleton's decision to file suit to begin with. Some argue that Littleton should not have gone to court, because her birth certificate listed her as male.⁶⁴ Though she later changed it to female, almost two years after her husband's death, the Fourth Court ruled that this was irrelevant to the fact that her birth certificate at the time of the marriage listed her as male.⁶⁵ As a result of the timing of the amendment to her birth certificate, Littleton was doomed to lose her wrongful death suit from the beginning, though perhaps for less convoluted and contradictory reasons than those provided by Justice Hardberger.

Christie Lee did a lot of things right, but nevertheless she was not the perfect test case. The Littleton court's ruling is considered by most to be a major loss for transgendered protections. However, the case is not without some redeeming value. First, the ignorant and vague manner in which Hardberger cites the federal DOMA should serve as a wake-up call to the GLB movement that transgendered persons are also significantly implicated by legislation that targets sexual orientation. Second, the ease with which the Fourth Court made new law concerning the definition of sex should be ample warning to the mainstream that all people have a stake in the precedents set by transgender caselaw. Third, and perhaps most importantly, the decision may actually permit some same-sex marriages. The logic of the Littleton court that rendered Christie Lee legally male means that she, a person with a vagina, would only be allowed to marry someone legally of the "opposite" sex, someone legally female, with a vagina.⁶⁶ If genital sex is irrelevant to the validity of a marriage in San Antonio, Texas, this increases the legitimacy of some same-sex marriages, for example between two lesbians one of whom is transgendered or intersexed.⁶⁷

2. *Price Waterhouse v. Hopkins*

Ann Hopkins is not a transgendered person, but her case is foundational for any discussion of caselaw concerning gender identity. When Hopkins was passed over for a promotion and the partnership was given to a more effeminate woman, she sued for employment discrimination under the protected Title VII category of sex.⁶⁸ The Supreme Court found in favor of Hopkins, explaining that an essential part of the reason Hopkins was not promoted was that she was a woman, or, more specifically, a woman who didn't act like one.⁶⁹ By interpreting Title VII as more than discrimination based on sex to include discrimination based on sex stereotyping of what is masculine or feminine, this decision established that Title VII protects gender.⁷⁰ The Supreme Court set a precedent for interpreting sex to include some notions of gender identity.

This decision has several problematic results for transgendered and GLB persons. First, Hopkins did not have to demonstrate that the characteristics her coworkers perceived as masculine were immutable.⁷¹ The common argument in the case of sexual orientation and gender identity caselaws alike is that the characteristics that resulted in discrimination were fixed and unchangeable; discrimination law generally only protects categories considered immutable because those categories are not the "fault" of the person who falls under them.⁷² If Hopkins had argued that her dress, hair, or makeup were immutable, then it would have closed the loophole which prevents widespread application of the *Price Waterhouse* decision for GLBT persons.⁷³ Second, Hopkins is a heterosexual female.⁷⁴ It is not difficult to predict what the likelihood of a similar ruling by the court would be if she were transgendered or a lesbian. There have been no federal court rulings that apply Title VII protection of sex to transgendered persons, even though transgendered persons regularly face such discrimination.⁷⁵ Similarly, the typical result of suits by GLB persons under Title VII sex protection has been the ruling that discrimination was based on the unprotected category of sexual orientation, and not on sex itself.⁷⁶ Third, the view that the *Price Waterhouse* decision means gender identity is already protected under existing language is somewhat dangerous.⁷⁷ *Price Waterhouse* is a case involving Title VII only. It does not extend the larger network of equal protections to gender identity and, in fact, to date there is no suit by a GLBT person that successfully argues for the applicability of this decision to those who are discriminated against for their gender identity.⁷⁸

Some argue that the possibility of protecting gender identity through already existing categories is the biggest reason why *Price Waterhouse* is a victory.⁷⁹ The existing categories debate will be addressed in more depth later. There are, however, other aspects of the case that have redeeming value. *Price Waterhouse* may enable the transgendered to seek protection on the basis of sex rather than gender identity in the short term. Transgendered persons could claim that they were discriminated against based on their sex reassignment.⁸⁰ Essentially, this would draw an analogy to other already protected statuses.⁸¹ For example, one cannot be discriminated against for being Jewish or being Christian, or for converting from Judaism to Christianity. Similarly, one cannot be discriminated against for being male or being female, and hence also cannot be discriminated against for converting from male to female, or vice versa.

3. *Schwenk v. Hartford*

Crystal Marie Schwenk was a pre-operative MTF at the time of her incarceration in the Washington State Penitentiary, an all-male facility, in 1993.⁸² The following year, after her transfer to another ward of the prison, Schwenk was the subject of sustained, long-term harassment by Robert Mitchell, a guard, that eventually escalated to attempted rape.⁸³ Schwenk filed a complaint with the prison administration and eventually filed suit in federal court, where it was argued that the sexual assault violated her Eighth Amendment rights.⁸⁴ The complaint was subsequently amended to include a claim under the Gender-Motivated Violence Act (GMVA), which was a part of the no longer existing Violence Against Women Act (VAWA).⁸⁵ Mitchell's attorneys argued for dismissal based on his qualified immunity as a guard of the prison.⁸⁶ The Ninth Circuit court dismissed Schwenk's Eighth Amendment claim but considered the GMVA claim.⁸⁷ Eventually, Judge Reinhardt ruled against Crystal Marie Schwenk in an unusual way. The vagueness of VAWA as a whole was under attack at the time, and Judge Reinhardt drew an analogy to Title VII caselaw in order to define gender. According to Reinhardt, because *Price Waterhouse* protected a woman who didn't act like one, it set a new precedent for the Title VII protection of transgendered persons under the existing category of sex.⁸⁸ He said that the GMVA was similar to Title VII because it protects discrimination based on gender as well as sex,⁸⁹ and found against Schwenk only because the GMVA itself was too incoherent, though the violence she encountered was indeed based on the fact that she was transgendered, or, more specifically, a man who failed to act like one.⁹⁰

There is not much major criticism surrounding the *Schwenk* decision, except for the fact that it leads to some of the applications of *Price Waterhouse* which are discussed above, such as the narrow possibility of protecting gender identity through the existing category of sex. The defense made by Robert Mitchell, however, is worthy of note because it includes some very repugnant aspects that future litigants may face. First, Mitchell's attorneys argued that his acts qualified at worst as same-sex sexual harassment and not as assault or attempted rape, and that his acts were not a crime of violence.⁹¹ Second, they claimed that an assault where the victim is transgendered is not an assault motivated by that victim's gender.⁹² Third, they argued that GMVA covered neither men nor transgendered persons, and that Schwenk was not a woman.⁹³ Fourth, they argued that prison guards could be held liable for failure to act to prevent prisoner-to-prisoner violence, but that guards have qualified immunity for their own acts of violence against prisoners.⁹⁴ Fortunately, these outlandish claims were not well received by the Schwenk court, but that does not mean they may not pop up again more seriously elsewhere.

The *Schwenk* decision is advantageous in several ways. First, it followed Supreme Court precedent set up by *Price Waterhouse* that several other courts had ignored.⁹⁵ Second, it did not rule based on Schwenk's status as transgendered, but rather on her gender identity as a man who didn't act like one.⁹⁶ Third, the ruling incidentally set a precedent for determination of future transgendered Title VII claims by drawing an analogy between Title VII and the now defunct GMVA.⁹⁷ In this way, it may be precisely the bridge needed as a wedge issue for future protections.

Though *Schwenk* seems to have gotten the transgendered a foot in the door, courts have ignored the *Price Waterhouse* ruling before and may do so again.⁹⁸ The tangled web of transgender caselaw thus far renders such a rollback from current gains distinctly possible.

C. The Big Precedent Picture

1. Status Quo Law

At the top level of protections for the transgendered, federal law is wholly antiquated. There are no federal protections whatsoever. Though some say gender is at least partially protected under the current category of sex,⁹⁹ those instances almost never involve GLBT persons and in some cases specifically exclude them.¹⁰⁰ Piecemeal gains by the movement notwithstanding, the ongoing conservative climate in Washington sends the consistent message that protections for the transgendered are not forthcoming. There has yet to be an adequate test case in a federal court capable of pushing a litigative remedy to legislative hostility.

At the state level, contradicting laws and legal precedents make some leeway for protections when viewed in light of federal inadequacy, but are somewhat disheartening as well. The unpredictable way in which the courts apply or ignore precedent results in diffuse, localized remedies for particular cases. Lack of coordination between states and localities in writing legislation results in the same kind of uncertain future for protections that state courts do provide. Often, mere location is the major basis for determining one's protected status. To return momentarily to specific caselaw, the Littleton Petition for Writ of Certiorari sums up the problem nicely: "Taking the situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas, is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is a female and a widow; upon traveling to Kentucky she is female and a widow; but upon entering Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travels take her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male."¹⁰¹

The status quo is demonstrably ill equipped to protect transgendered persons with any consistency on any level. What remain to be addressed, then, are directions to go in the future.

2. Future Law

The dispute over identity protections always returns to the question of definitions, and so analysis of future protections is largely a dispute over rhetoric. The fight to control meaning of terms occurs in two places: the legislation itself and the media spin on that legislation.

The question of media interpretation is most fatal for efforts to increase or extend legal protections.¹⁰² If the GLB movement is unpopular, transgendered issues are more unpopular still.¹⁰³ The common argument between conservative media and groups seeking protection is in the rhetoric of special treatment versus equal protection.¹⁰⁴ In the case of the transgendered, the

rhetoric of special treatment is particularly damaging because of arguments that the transgendered are protected under the existing category of sex. Though it is obviously essential that we not abandon equal protection either as rhetoric or strategy, perhaps a more effective way to combat the somewhat unique threat special treatment rhetoric poses for the transgendered would be to construe equal protection as “assured protection.” The movement ought to be more adamant about its slogan: “equal rights are not special rights.” Where protections have been successfully won by the transgendered, those victories are small and unpredictable. The rhetoric of “assuring protection,” or perhaps of “explicit protection,” seems more defensible in a ten second sound-bite fed to a hostile public than the rhetoric of equal protection, because it highlights the problematic nature of the status quo’s spotty protections.

The question of drafting legislation is also critical, and the dispute over various rhetorical strategies to employ in this arena is as controversial as media issues. First, there is the existing protected category of “sex.”¹⁰⁵ This should be explicitly defined to *include* gender identity. Second, there is the category of “gender identity,” which always includes the transgendered, usually explicitly. Third, there is the category of “sexual orientation,” which frequently excludes the transgendered but may not be so exclusive, depending on subsequent definitions of “sex” and “sexual.” Fourth, there is the explicit use of a “transgendered” category. Fifth, there are issues of when and where to add the rhetoric of “real or perceived.” In an ideal world, all of this language would be found in federal legislation. However, nearly all groups deny the feasibility, and even sometimes the desirability, of any attempt to draft a single piece of legislation that would contain them all. The relative merits of each rhetorical strategy often interlock, and all depend primarily on who has what priority. I will argue that both the mainstream and the movement should make transgendered protections a priority, and that successful legislation must include “gender identity” in addition to “real or perceived sexual orientation.” The existing language of sex cannot successfully maintain protections for the transgendered,¹⁰⁶ and these protections cannot be deferred in the name of greater GLB movement gains any longer.¹⁰⁷

IV. Speak No [Tranie]

A. Defying Exclusionary Politics

The crimes committed against transgendered persons are undeniable. Increasing numbers of cases filed on behalf of the transgendered demonstrate the need for widespread and consistent legal protections. Existing caselaw should serve first, as a call for mobilization on the issue, and second, as a starting point for increasing protections themselves. Regarding the application of current caselaw for future protections, there are several good options available. First, future transgendered litigants should argue for the courts to follow the precedent set by *Price Waterhouse* as a short term protective solution until legislative measures succeed. Second, the GLB movement should align itself more closely with the transgendered in order to utilize the confusion of transgender caselaw as a wedge issue to work toward gaining the right to same-sex marriage, the right to be butch or effeminate in the workplace, and other freedoms the movement has long sought. Third, caselaw should provide foundational evidence for the inclusion of the terms “gender identity” and “real or perceived sexual orientation” in state and local laws over the miserable failure of the existing federal category of “sex.” Those drafting new protective

legislation ought to carefully examine existing caselaw for the most inclusive, most secure definitions of terms: “real or perceived gender identity and/or sexual orientation.”

B. The Critique of Incrementalism

The constant debate raging in the GLB movement is between the strategy of racial, libiratory inclusivity on the one hand and the strategy of practical, piecemeal assimilation on the other hand.¹⁰⁸ The process of securing equal protections for the transgendered is by no means exempt from this battle. One of the major ways this argument manifests itself toward the transgendered is in the question of incrementalism, where some argue that slow and steady added protections will be the easiest to acquire, while others argue that this step-by-step approach comes at the significant cost of further exclusion.

Defenders of the incremental approach primarily advocate two things. First, in the litigative forum, we should begin filing non-controversial, clear cases and build up to more important cases by using the foundational caselaw in such a way that the precedent in favor of protecting the transgendered becomes undeniable.¹⁰⁹ Non-controversial cases do not involve discussing who used which bathroom or the larger social fears of the man-in-a-dress scenarios.¹¹⁰ They would instead involve circumstances like those of *Price Waterhouse*, except that the plaintiff would be a transgendered person, arguing that gender identity and sexual orientation are immutable characteristics requiring explicit protection. Second, in the legislative forum we should begin by securing protections for “sexual orientation” and use existing “sex” protection until such time that protection for the transgendered becomes somewhat more socially acceptable.¹¹¹

There are major objections to the incrementalist approach. First, such a strategy is self-defeating.¹¹² In the litigative forum, courts may ignore the precedents set by smaller, narrower cases. Historically, this is true even of larger victories like *Price Waterhouse*.¹¹³ Incrementalism most likely will continue the status quo trend of unpredictability and contradictory rulings. In the legislative forum, seeking more narrow protections is dangerous first, because the conservative mainstream often uses its piecemeal concessions to defend against the need for major protections later,¹¹⁴ and second, because precision and clarity in legislation may be mutually exclusive.¹¹⁵ Definition of all persons who fall into a protected category is always impossible because new scenarios and identities invariably arise,¹¹⁶ and this makes “sinister interpretations” of these categories always possible whereby the intended persons will not receive protection at all.¹¹⁷ Second, incrementalism becomes counter-productive.¹¹⁸ This argument is perhaps best illustrated by a realistic example: suppose sexual orientation becomes a protected status before gender identity does. If an employer does not hire a woman because she is a lesbian, that employer could easily defend that the woman was not hired because she was too butch, in other words, because of her gender identity.¹¹⁹ Those in the movement who would push for sexual orientation protections without protections for gender identity are shooting their cause in the foot, because one protected status will not succeed without the other.

C. Reviving Inclusivity from the Abyss of Extremism

The incrementalists argue that a radical push for inclusivity will be spun by the opposition as extremist, unreasonable politics. Historically, this objection is not without some merit. The move for increased protections for the GLBT community cannot succeed without some significant cultural transformations. However, this does not mean legislative and litigative strategies should be abandoned for the arduous and often overwhelming project of raising social consciousness. Potentially, the best way to rehabilitate the goal of total inclusivity is to use legal remedies to bring the issue to the mainstream in ways it cannot ignore. The battle for social acceptance will be fought in public restrooms where the mainstream encounters transgendered persons. In order for this negotiation for acceptance to take place, the transgendered must first have a protected right to enter that restroom and engage in that negotiation.

The questions of methodology may be a lot of talk about whether or not the chicken comes before the egg. However, there are two basic lessons we can take away from transgender caselaw that seem undeniable. First, the mainstream simply must increase protections for transgendered persons. Second, the GLB movement will not find itself better off until it increases support for transgendered issues.

Endnotes

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- ¹ Darren Rosenblum. "Trapped" in Sing Sing: Transgendered Prisoners Caught in the Gender Binarism. 6 *Michigan Journal of Gender and Law* 499. 2000.
 - ² 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 and Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* 1. 1999/2000: 15.
 - ³ Op cit.
 - ⁴ Rosenblum.
 - ⁵ Ibid.
 - ⁶ Ibid.
 - ⁷ Kate Bornstein. *Gender Outlaw*. New York: Vintage Books. 1994.
 - ⁸ Rose, 1999/2000, 17.
 - ⁹ Paisley Currah, and Shannon Minter. "Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People." 7 *William and Mary Journal of Women and the Law* 37. 2000: 44.
 - ¹⁰ Rosenblum.
 - ¹¹ Rose, 1999/2000, 10.
 - ¹² Op cit.
 - ¹³ Op cit.
 - ¹⁴ Rose, 1999/2000, 11.
 - ¹⁵ Ibid, 17.
 - ¹⁶ Ann Fausto-Sterling. "How Many Sexes Are There?" *New York Times* OP-ED page. 3-12-93.
 - ¹⁷ Phyllis Randolph Frye and Alyson Dodi Meiselman. "Same Sex Marriages Have Existed Legally in the United States for a Long Time Now." 64 *Albany Law Review* 1031. 2001: 1054.
 - ¹⁸ Ibid, 1055.
 - ¹⁹ Bornstein, 15.
 - ²⁰ Paisley Currah. "Queer Theory, Lesbian and Gay Rights, and Transsexual Marriages." *Sexual Identities, Queer Politics*. Editor Blaisus, Mark. Princeton: Princeton University Press. 2001: 184.
 - ²¹ Rosenblum.
 - ²² Ibid.

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- ²³ Shane Phelan. *Sexual Strangers*. Philadelphia: Temple University Press. 2001: 119.
- ²⁴ Urvashi Vaid. *Virtual Equality*. New York: Anchor Books. 1995: 324.
- ²⁵ Ibid, 38.
- ²⁶ Op cit.
- ²⁷ Phelan, 104.
- ²⁸ Ibid, 87.
- ²⁹ Janice G. Raymond. *The Transsexual Empire*. Boston: Beacon Press. 1979.
- ³⁰ Ibid.
- ³¹ Bornstein, 52.
- ³² Op cit.
- ³³ Cathy J. Cohen. "Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?" *Sexual Identities, Queer Politics*. Editor Blaisus, Mark. Princeton: Princeton University Press. 2001: 200-227.
- ³⁴ Ibid.
- ³⁵ Dale Spender. *Man Made Language*. London: Routledge & Kegan Paul. 1980.
- ³⁶ Rose, 1999/2000, 91.
- ³⁷ Op cit.
- ³⁸ Op cit.
- ³⁹ Chai R. Feldblum. "Reaching Goals: Choosing Strategies and Issues for the Advancement of Gay People, Trans People, Woman: Is it All About Gender?" *17 New York Law School Journal of Human Rights* 623. 2000: 667.
- ⁴⁰ Katrina C. Rose. "When Is An Attempted Rape Not An Attempted Rape? When The Victim Is A Transsexual." *9 American University Journal of Gender, Social Policy and the Law* 505. 2001: 521.
- ⁴¹ Feldblum, 637.
- ⁴² Ibid, 638.
- ⁴³ Frye and Meiselman, 1047.
- ⁴⁴ Op cit.
- ⁴⁵ Ibid, 1048.
- ⁴⁶ Ibid.
- ⁴⁷ Rose, 1999/2000, 73.
- ⁴⁸ Frye and Meiselman, 1048.
- ⁴⁹ Op cit.
- ⁵⁰ Op cit.
- ⁵¹ Op cit.
- ⁵² Op cit.
- ⁵³ Op cit.
- ⁵⁴ Rose, 1999/2000, 77.
- ⁵⁵ Ibid, 94.
- ⁵⁶ Op cit.
- ⁵⁷ Frye and Meiselman, 1050.
- ⁵⁸ Ibid, 1052.
- ⁵⁹ Op cit.
- ⁶⁰ Rose, 1999/2000, 91.
- ⁶¹ Ibid, 99.
- ⁶² Ibid, 90.
- ⁶³ Frye and Meiselman, 1053.
- ⁶⁴ Rose, 1999/2000, 74.
- ⁶⁵ Ibid, 73.
- ⁶⁶ Frye and Meiselman, 1053.
- ⁶⁷ Ibid, 1033.
- ⁶⁸ Marvin Dunson III. "Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law." *22 Berkeley Journal of Employment and Labor Law* 465. 2001: 475.
- ⁶⁹ Ibid, 476.
- ⁷⁰ Op cit.
- ⁷¹ Feldblum, 675.
- ⁷² Ibid, 676.
- ⁷³ Op cit.

- ⁷⁴ Ibid, 675.
⁷⁵ Ibid, 676.
⁷⁶ Ibid, 678.
⁷⁷ Ibid, 679.
⁷⁸ Op cit.
⁷⁹ Dunson III, 477.
⁸⁰ Rose, 2001, 518.
⁸¹ Op cit.
⁸² Ibid, 512.
⁸³ Ibid, 513.
⁸⁴ Ibid, 514.
⁸⁵ Op cit.
⁸⁶ Ibid, 515.
⁸⁷ Op cit.
⁸⁸ Ibid, 519.
⁸⁹ Ibid, 518.
⁹⁰ Taylor Flynn. "Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality." 101 *Columbia Law Review* 392. 2001: 400.
⁹¹ Rose, 2001, 536.
⁹² Ibid, 537.
⁹³ Op cit.
⁹⁴ Ibid, 536.
⁹⁵ Flynn, 400.
⁹⁶ Ibid, 401.
⁹⁷ Op cit.
⁹⁸ Rose, 2001, 522.
⁹⁹ Jennifer L. Levi. "Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights." 7 *William and Mary Journal of Women and the Law* 5. 2000: 25.
¹⁰⁰ Frye and Meiselman, 1042.
¹⁰¹ Feldblum, 676.
¹⁰² Vaid, 24.
¹⁰³ Phelan, 117.
¹⁰⁴ Vaid, 331.
¹⁰⁵ Levi, 25.
¹⁰⁶ Feldblum, 679.
¹⁰⁷ Phelan, 94.
¹⁰⁸ Vaid, 204.
¹⁰⁹ Levi, 13.
¹¹⁰ Ibid, 14.
¹¹¹ James M. Donovan. "Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy." 38 *California Western Law Review* 1. 2001: 19.
¹¹² Ibid, 20.
¹¹³ Rose, 2001, 522.
¹¹⁴ Vaid, 3.
¹¹⁵ Donovan, 21.
¹¹⁶ Ibid, 28.
¹¹⁷ Ibid, 30.
¹¹⁸ Op cit.
¹¹⁹ Feldblum, 674.

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