

Sex, Marriage, Medicine, and Law: “What Hope of Harmony?”

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I. INTRODUCTION: “WHICH WAY DO YOU JUDGE”?¹

J’Noel Gardiner was born a male and subsequently underwent sex reassignment surgeries and hormone replacement therapy to resolve her gender dysphoria (her belief that she was a female in a body that was anatomically male).² Once the surgeries were complete and J’Noel was, in the words of her surgeon, “a functioning, anatomical female,”³ a Wisconsin court (on J’Noel’s petition) ordered the Wisconsin state registrar to change the name on her birth certificate from Jay Ball to “J’Noel Ball” and the designation of sex on the birth certificate from male to female. In addition, “her driver’s license, passport, . . . health documents . . . [and] records at two universities [were] changed to reflect her new sex designation.”⁴ Nearly four years after the surgeries, J’Noel – now living and teaching in Kansas – met and married Kansas businessman Marshall Gardiner, who died intestate less than a year later.⁵ Marshall’s son, Joe, petitioned for letters of administration naming himself as Marshall’s sole heir and denying that J’Noel was Marshall’s surviving spouse on the ground that their marriage violated Kansas’ opposite-sex marriage rule.⁶

On these simple and uncontested facts, the Kansas Supreme Court in *In re Estate of Gardiner*⁷ was faced with the straightforward issue of whether a post-surgical male-to-female transsexual should be regarded as male or female for purposes of Kansas’ opposite-sex marriage rule.⁸ Neither simple nor straightforward, however, is the su-

* Associate Professor, Southern Methodist University Dedman School of Law. The issue addressed in this Essay strikes me as Shakespearean in its texture and scope. Gender changes, family battles, and nothing less than the search for what it means to be human all find resonance in the work of the Bard. See, e.g., HAROLD BLOOM, SHAKESPEARE: THE INVENTION OF THE HUMAN 2 (1998) (“What Shakespeare invents are ways of representing human changes, alterations not only caused by flaws and by decay but effected by the will as well.”). I therefore offer no apology, and no further explanation, for the use of Shakespeare’s language as benchmarks throughout this piece, beginning with the title. See WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 2, sc. 1. I thank Leslie Washington, Class of 2004, for her able research assistance and my Family Law students for our discussions of these issues.

1. WILLIAM SHAKESPEARE, CORIOLANUS act 2, sc. 3.

2. See *In re Estate of Gardiner*, 22 P.3d 1086, 1091-92 (Kan. Ct. App. 2001), *rev’d*, 42 P.3d 120 (Kan. 2002).

3. *Id.* at 1092.

4. See *id.*

5. See *id.* at 1090, 1092.

6. *Id.* at 1090.

7. 42 P.3d 120.

8. In addition to her argument that she should be regarded as a female under Kansas law and thus Marshall’s surviving spouse, J’Noel argued that the Kansas courts were required to accord full faith and credit to the amended Wisconsin birth certificate, see *Gardiner*, 22 P.3d at 1107, but the trial court ruled that it need not give the birth certificate any legal effect in Kansas

preme court's conclusion that a person's sex is established and fixed at birth, not at the time of his or her marriage, and that the controlling factors in determining an individual's sex are anatomical and genetic.⁹

This opinion holds a mirror to society's occasional unease over advances in medical knowledge and techniques that challenge settled beliefs and accepted legal norms. That unease, and the court's apparent nostalgia for a simpler era, probably had more to do with the outcome of this case than the legal principles actually invoked by the court. As a result, the supreme court's opinion is an instructive case study in the techniques of judicial avoidance and the perpetuation of medico-legal dissonance.

II. MEDICO-LEGAL DISSONANCE AND JUDICIAL STYLE:

“‘TIS DESTINY UNSHUNNABLE, LIKE DEATH”¹⁰

The bedrock assumption that underlies the supreme court's entire opinion is that a person's sex, like death, is fixed in meaning and in fact, unavoidable and unalterable. It may be useful, therefore, first to consider briefly recent developments in our medical and legal understandings of death as a model for dealing with medico-legal dissonance.

A. “*I know when one is dead*”¹¹

Once upon a time, death was a reasonably straightforward proposition. A person could be either dead or alive, but a person could not be both dead and alive, or neither dead nor alive. The absence of respirations and a pulse – unless promptly restored – signaled the demise of the individual.

In response to the development of medical technology that could sustain breathing (and therefore circulation) indefinitely, this binary simplicity eventually gave way to a more complex conception of death. Over time, every state (and the District of Columbia) has accepted the idea that even a person with a pulse could be dead as long as all brain functions have irreversibly stopped.¹²

and both appellate courts affirmed. See *Gardiner*, 42 P.3d at 137; 22 P.3d at 1109. Additional issues (equal protection, fraud, and waiver) addressed by the court of appeals were not before the supreme court and were not considered.

9. *Gardiner*, 42 P.3d at 135-36.

10. WILLIAM SHAKESPEARE, *OTHELLO, THE MOOR OF VENICE* act 3, sc. 3.

11. For most of human history, few would have quarreled with Lear: “I know when one is dead, and when one lives; She's dead as earth.” WILLIAM SHAKESPEARE, *THE TRAGEDY OF KING LEAR* act 5, sc. 3.

12. See ALAN MEISEL, 1 *THE RIGHT TO DIE* 625-27 (2d ed. 1995) (listing all jurisdictions and their adopting statutes and judicial opinions).

Despite the universal adoption of “whole brain death” as at least one criterion for determining when death has occurred,¹³ there continues to be confusion over the concept of death and the application of that concept in individual cases. It is possible (though unwise) to talk of a patient who is “medically dead” or “legally dead” as if these were different states than being “really dead.”¹⁴ Family members are occasionally asked to consent to the withdrawal of life-sustaining treatment from their brain-dead kin. Whether or not they were asked to consent, some surrogate decision makers will attempt to refuse consent to the withdrawal of a ventilator. The popular confusion and mistrust of this “new way to be dead” is alternately reflected in, and fueled by, medical thrillers and news reporters who frequently report that life-support was removed from patients who were declared brain dead hours or days before.

The confusion stems from more than sloppy thinking or speaking. “Brain death” is a genuinely challenging concept. Even health care professionals in the organ-transplantation field have demonstrated a lack of understanding and acceptance of neurological criteria for the determination of death.¹⁵ It is therefore not surprising that at the same time distinguished ethicists were calling for the adoption of neocortical death rather than whole-brain death as the basis for determining when death occurs,¹⁶ two states gave their citizens the right to opt out of the neurological criteria altogether.¹⁷ Additionally, the American Medical Association (AMA) stumbled badly on this issue.¹⁸

Despite some false starts and occasional detours, however, the transition from cardiopulmonary criteria to neurological criteria for determining death is largely complete and mostly successful. Part of the reason for that success is the congruence that has been achieved between medical and legal standards. Statutory concepts such as “medically dead” and “legally dead” have given way to “dead,” with-

13. A majority of states have retained the traditional cardiopulmonary criteria for determining death even after adopting the whole-brain formulation. *See id.* at 625.

14. *See, e.g.,* Alexandra K. Glazier, “The Brain Dead Patient Was Kept Alive” and Other Disturbing Misconceptions: A Call for Amendments to the Uniform Anatomical Gift Act, 9 KAN. J.L. & PUB. POL’Y 640, 640-41 (2000) (describing various types of confusion that flow from “[d]iffering understandings of death, both medico-legal and philosophical, as well as differing methods for determining whether someone is dead”).

15. MEISEL, *supra* note 12, at 627 (citing Stuart J. Youngner et al., “Brain Death” and Organ Retrieval, 261 JAMA 2205 (1989)).

16. *See, e.g.,* Robert M. Veatch, *The Impending Collapse of the Whole-Brain Definition of Death*, 23 HASTINGS CENTER REP., July-Aug. 1993, at 18, 18.

17. *See* N.J. STAT. ANN. § 26:6A-5 (1996); N.Y. Dep’t of Health Regulation, N.Y. COMP. CODES R. & REGS. tit. 10, § 400.16(e)(3) (2002).

18. In 1995, the AMA’s Council on Ethical and Judicial Affairs issued an opinion that would have allowed anencephalic newborns (born with no functioning cerebral hemispheres but with some or all of their brain-stem functions intact) to be organ donors even though still alive pursuant to current criteria for the determination of death. In response to strong criticism from AMA members themselves, the Council withdrew its opinion almost immediately. *See* BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW & ETHICS* 213-17 (4th ed. 2001).

out modification or qualification. A patient is no longer “considered dead”; the patient “is dead.” The transition came about because of a partnership of sorts between the medical and legal professions, each of which brought something of value to the project. The interdependence of law and medicine in this realm may provide a model for dealing with medicine’s future challenges to established legal concepts. Perhaps sexual identity will be next.

B. “*The error of our eye directs our mind*”¹⁹

Like death, the concept of sexual identity has undergone a scientific and social transformation, with emerging medical understandings challenging long-held and familiar beliefs about the criteria by which society should establish an individual’s sex.²⁰ As the court of appeals’ opinion in *Gardiner* recognized, the determination of an individual’s sex is a multifactorial process. Relying principally upon Professor Julie Greenberg’s path-breaking article,²¹ the court recited eight criteria that determine sex:

1. Genetic or chromosomal sex – XY or XX;
2. Gonadal sex (reproductive sex glands) – testes or ovaries;
3. Internal morphologic sex (determined after three months gestation) – seminal vesicles/prostate [sic] or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia) – penis/scrotum or clitoris/labia;
5. Hormonal sex – androgens or estrogens;
6. Phenotypic sex (secondary sexual features) – facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.²²

The most observable of these indicia – genitalia and secondary sexual characteristics – thus are only two of many factors that are relevant to the determination of sex. As the most observable, however, they may also be the most misleading. As Professor Greenberg observed:

For most people, these [eight] factors are all congruent, and one’s status as a man or woman is uncontroversial. For intersexuals, some of these factors may be incongruent, or an ambiguity within a factor may exist.

The assumption is that there are two separate roads, one leading from XY chromosomes at conception to manhood, the other

19. WILLIAM SHAKESPEARE, *TROILUS AND CRESSIDA* act 5, sc. 2.

20. Professor Laqueur has argued that shifts in social and political attitudes actually preceded eighteenth century science’s “discovery” of the sexes. See THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 149-63 (1990).

21. Julie A. Greenburg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

22. See *In re Estate of Gardiner*, 22 P.3d 1086, 1094 (Kan. Ct. App. 2001) (quoting Greenberg, *supra* note 21, at 278) (alteration in original).

from XX chromosomes at conception to womanhood. The fact is that there are not two roads, but one road with a number of forks that turn in the male or female direction. Most of us turn in the same direction at each fork.²³

Intersexual conditions, which result from an errant fork somewhere in the process of sexual differentiation, range across a spectrum of truly impressive variation. As Professor Greenberg describes them, the variations are of two basic types: ambiguity within one of the eight factors that contribute to an individual's sex²⁴ and ambiguity among the factors.²⁵ The court of appeals' opinion included a detailed review of the various intersexed conditions, concluding with Professor Greenberg's observation that various studies and reports of intersexuality

have forced the medical and psychiatric communities to question their long-held beliefs about sex and sexual identity. Just as current scientific studies have caused the scientific communities to question their beliefs about sex and sexual identity, the legal community must question its long-held assumptions about the legal definitions of sex, gender, male, and female.²⁶

Whether one agrees or disagrees with the court of appeals' conclusion, it rose to the challenge and confronted the dissonances created by scientific developments and traditional legal norms. By contrast, the supreme court's opinion in *Gardiner* shows a court in full retreat from scientific learning. As such, the opinion is a model of how not to deal with medico-legal issues when old legal paradigms are challenged by new scientific learning.

C. "What means this silence?"²⁷

The most direct way to deal with the medico-legal dissonances created by science is to ignore the science. Thus, in contrast to the detailed technical discussion of intersexuality in the court of appeals' opinion, the supreme court consulted a medical dictionary for a definition of "transsexual,"²⁸ but largely ignored the medical and psychiatric understandings of gender dysphoria. The court sampled judicial discussions of intersexuality, noting some with approval and distinguishing or dismissing others, but the exercise was essentially nonfactual,

23. *Id.* at 1094 (quoting Greenberg, *supra* note 21, at 278-79).

24. Single-factor ambiguities include chromosomal ambiguity (variation from the traditional XX and XY patterns); gonadal ambiguity; incongruous or ambiguous external morphology, internal morphology, hormonal sex, and phenotypic sex; disjunctions between the sex assigned at birth and the gender by which the individual is raised; and sexual identity. *See id.* at 1095 (quoting Greenberg, *supra* note 21, at 281-82).

25. Multi-factor ambiguities occur when some factors are clearly male and others are clearly female. "Incongruity among factors can result from a number of disorders and circumstances including: a. Chromosomal sex disorders; b. Gonadal sex disorders; c. Internal organ anomalies; d. External organ anomalies; e. Hormonal disorders; f. Gender identity disorders; and g. Surgical creation of an intersexed condition." *See id.* at 1096 (quoting Greenberg, *supra* note 21, at 283).

26. *Id.* at 1100 (quoting Greenberg, *supra* note 21, at 282).

27. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE SIXTH* act 2, sc. 4.

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

lining up of nonbinding precedents and rationales without coming to grips with the fact that the familiar meaning of “sex” is under challenge by scientific and medical progress.

If the central issue in a case was whether a person were dead or alive at a relevant moment in time, it would be intolerable to maintain separate criteria for “medical death” and “legal death” and to decide the issue of death according to the latter rather than the former. Clinical physicians, pathologists, hospital administrators, emergency medical technicians, the police, prosecutors, clergy, funeral directors, and life insurance companies – not to mention family members and patients themselves – all have their own reasons to want an answer to the question and are ill-served by inconsistent answers from different authorities, legal and medical.

Similarly, as the case law in this field amply illustrates, there are many reasons to determine a person’s sex, and the answer

can . . . have a wide variety of collateral consequences. It may affect or determine, for example, the validity of a marriage [and therefore such issues of bigamy, right to maintenance and support, and ability to inherit or to maintain a wrongful death action as a surviving spouse], whether a birth certificate may be amended, entitlement to pension or insurance rights that distinguish by gender, whether distinctions in employment are, as to a particular individual, permissible or unlawful, application of the law of rape or other offenses in which gender may be an element or issue, medical treatment and housing assignment upon incarceration or other institutional confinement, entitlement to participate in certain amateur or professional sports, . . . housing and work assignments available for persons in military service [and] various estate and trust issues, . . . for example, whether a male to female transsexual would still qualify for a legacy to the testator’s “son.”²⁹

By turning a blind eye to the emerging medical understanding of intersexuality, the supreme court missed an opportunity to move the law in a humane direction that takes better account of human experience than the binary-at-birth notion of sex we have inherited from earlier times.

D. “Wrest once the law to your authority”³⁰

As previously noted, the supreme court resolved the issue in *Gardiner* by stacking up precedents from other jurisdictions and choosing legal interpretations that made the most sense to the court. This is entirely consistent with another of the court’s fundamental disagreements with the court of appeals.

29. *In re Heilig*, 816 A.2d 68, 85 n.9 (Md. 2003) (citations omitted).

30. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

When the lower court remanded the case to the trial court, it provided the following instructions:

We conclude that a trial court must consider and decide whether an individual was male or female at the time the individual's marriage license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth.

The court may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision.

Aside from chromosomes, we adopt the criteria set forth by Professor Greenberg. On remand, the trial court is directed to consider [Professor Greenberg's] factors in addition to chromosome makeup The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.³¹

Based upon these instructions, the supreme court concluded that the court of appeals had erroneously treated the question of J'Noel's sex as raising questions of fact that needed to be resolved after a hearing. In the supreme court's view, however, the issue in *Gardiner* raised a question of pure law: When the Kansas legislature provided that "[t]he marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex,"³² what did it mean by the words "sex," "male," and "female"?³³

One reading of the supreme court's opinion is that *once the court decided the legal issue in this case*, there were no disputed factual issues left to decide. That is, because the legislature's use of the words "sex," "male," and "female" excludes transsexuals and refers solely to an individual's genetic sex and genitalia at birth,³⁴ there was no need for a hearing to settle that issue of fact because the record amply supported the fact that J'Noel was born with male chromosomes and genitalia.

In the same paragraph, however, the supreme court made this somewhat broader assertion:

We disagree with the decision reached by the Court of Appeals. We view the issue in this appeal to be one of law and not fact. The resolution of this issue involves the interpretation of K.S.A. 2001 Supp. 23-101. The interpretation of a statute is a question of law, and this court has unlimited appellate review.³⁵

Along the same line, the supreme court had earlier written that "the essential difference between the line of cases . . . that would invalidate

31. *Gardiner*, 22 P.3d at 1110.

32. KAN. STAT. ANN. § 23-101 (1995 & Supp. 2001).

33. *See Gardiner*, 42 P.3d at 135.

34. *See id.* On its face, this is a puzzling statement. If transsexuals are neither male nor female and have no sex for purposes of Kansas' opposite-sex rule, does that mean J'Noel may not lawfully marry a woman or a man? The court concluded it does not: "J'Noel remains a transsexual, and a male for purposes of marriage." *Id.* at 137.

35. *Id.* at 135.

the Gardiner marriage[,] and the line of cases . . . that would validate it[,] is that the former treats a person's sex as matter of law and the latter treats a person's sex as a matter of fact."³⁶ This is the language appellate courts use to take issues away from juries and assign them to trial judges in the first instance. Then, once an issue is described as "legal" and is wrested from the jury, appellate judges can control the development of the law around that issue through de novo review. In *Gardiner*, however, the supreme court seems to have had a different purpose in mind: to wrest the statutory-interpretation issue from the realm of science and medicine and maintain judicial hegemony over the issue of determining an individual's sex. Thus, the supreme court quoted approvingly from a Seventh Circuit opinion in which that court rejected the assertion that Title VII of the Civil Rights Act protects transsexuals from discrimination in the workplace: "We do not believe that the interpretation of the word 'sex' as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court."³⁷ Of course, the debate over whether an issue is a question of law or question of fact does not need to be framed or resolved in terms of "control," and the use of expert witnesses (subject to appropriate judicial control) is not incompatible with the court's ultimate obligation to decide questions of law.

There is also a certain circularity in the supreme court's logic at this point. Why is the question of J'Noel's sex a question of law? Because there is nothing for the jury to decide. And why is there nothing for the jury to decide? Because J'Noel's sex was immutably fixed at birth and could not be changed through surgery and hormone therapy.³⁸ On that basis, then, the court concluded that it had the power and duty to decide J'Noel's sex as a matter of law and came to the altogether unsurprising conclusion, in light of its premises, that J'Noel's sex was fixed at birth and could not be changed through surgery or hormone therapy.

E. "[U]nderstand a plain man in his plain meaning"³⁹

The supreme court further insulated its decision from scientific and medical reality by concluding that "sex," "male," and "female" are "[w]ords in common usage [that] are to be given their natural and

36. *Id.* at 132-33.

37. *Id.* at 136 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984)).

38. *Id.* at 133. The language in the text is a close paraphrase of language the supreme court quoted, seemingly with approval, from *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999): "[C]an a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? . . . [O]nce a man, always a man. . . . There are some things we cannot will into being. They just are." *Id.* at 224, 227, 231.

39. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 5.

ordinary meaning.”⁴⁰ This is a perfectly serviceable canon of statutory construction, but like all canons it should be treated as a rule of thumb, not an inflexible rule. In particular, its invocation in *Gardiner* assumes the answer to the very question the court had to decide: whether the “ordinary meanings” of the words “sex,” “male,” and “female” have changed or should be altered to reflect new understandings of the terms in light of medical progress.

The weakness in the supreme court’s approach is revealed by its attempt to discern the plain and ordinary meaning of the statutory terms. The court recited definitions from a dictionary published in 1970 that reiterates the binary idea of sex as either male or female – which is entirely consistent with J’Noel’s claim that as a post-surgical transsexual she is a female, not some third sex outside the dictionary definition – and did not address the question of immutability at all.⁴¹

The court noted that Kansas’ marriage statute does not mention intersexed conditions and the legislative history is silent about them as well. From this silence, the court inferred that the legislature intended to exclude post-surgical transsexuals from the marriage statute.⁴² The supreme court’s reasoning here is subject to at least two criticisms. First, if the legislature believed, either at the time it enacted its marriage statute or today, that post-surgical transsexuals are male or female by virtue of the reconciliation of sex factors, there would be no need to provide separately for transsexuals in the law. Thus, legislative silence in this case could logically be interpreted to mean that there is no gap in the statute and post-surgical transsexuals are covered. If a canon is needed to support this conclusion, this one would do nicely: “Statutes framed in general terms apply to new cases that arise . . . and which come within their general scope and policy. [L]egislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons . . . within their general purview and scope.”⁴³ Viewed in this manner, giving legal status to J’Noel’s sex change would even be supported by the court’s own “plain meaning” canon.

Second, courts are asked to fill gaps in statutes all the time. When they demur, they will say (as the supreme court did in *Gardiner*⁴⁴) that it is not their job to make law, only to enforce the law as the legislature has enacted it. When courts accept the invitation to fill

40. The court concluded, “The plain, ordinary meaning of ‘persons of the opposite sex’ contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria.” *Gardiner*, 42 P.3d at 135.

41. *See id.*

42. *See id.* at 136 (“We view the legislative silence to indicate that transsexuals are not included.”).

43. *Commonwealth v. Maxwell*, 114 A. 825, 829 (Pa. 1921).

44. *See Gardiner*, 42 P.3d at 135-36.

a statutory gap, it is usually to bring the language of the law into conformity with what the legislature apparently intended, or would have intended if they had thought of the problem in the first place. For most courts, therefore, the difficult question is not whether they should ever accept the invitation to fill a statutory gap, but when to accept the invitation and when to decline it.

Obvious sources of guidance for such decisions are social norms and understandings. Social norms and understandings draw on all kinds of knowledge and experience, including medical and scientific, but the supreme court blocked those sources of information by declaring the issue in *Gardiner* to be one of law and therefore not susceptible to expert "control." Failure to consider seriously the medical and scientific understandings of sex, in turn, blinded the court to other sources of social norms and understandings, leaving the court with little upon which to base its judgment other than its own preconceptions and sexual stereotypes.⁴⁵

F. "[T]he lottery of my destiny [b]ars me the right of voluntary choosing"⁴⁶

Both the Kansas Supreme Court's opinion in *Gardiner* and the Texas Court of Appeals' opinion in *Littleton v. Prange*,⁴⁷ upon which the supreme court so heavily relies, conclude that sex is genetic, fixed at birth, and immutable. This conclusion seems to embrace a version of genetic determinism that might have been difficult to sustain had the court been open to evolving medical (and social) understandings of sex.

Stephen Jay Gould once offered a description of what genetic determinists believe: "If we are programmed to be what we are, then these traits are ineluctable. We may, at best, channel them, but we

45. It is worth noting the variety and number of sources of meaning that are missing from the court's opinion. There is no mention of § 21(d) of the U.S. Department of Health and Human Service's MODEL STATE VITAL STATISTICS ACT & REGULATIONS (1992 rev.) ("Upon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation."), or of the twenty-two states (and the District of Columbia) that have enacted this provision or one very much like it. See *In re Heilig*, 816 A.2d 68, 83-84 (Md. 2003). The *Heilig* opinion describes other legal developments, as well, in the United States and elsewhere, that receive little or no attention in the supreme court's opinion in *Gardiner*. These include the Social Security Administration's willingness to change their records after sex-change surgery, the Bureau of Prison's practice of housing post-surgical transsexuals with inmates of their acquired gender, and the State Department's reported practice of altering the designation of sex on the passports of post-surgical transsexuals. See *id.* at 86.

46. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 2, sc. 1. It is important to be clear about the concept of "choice" in the context of sexual identity. There is virtually no sense in which a transsexual "chooses" to be male or female, other than when an individual chooses surgery or hormone therapy to achieve greater coherence and consistency among the factors that determine sex.

47. 9 S.W.3d 223 (Tex. App. 1999).

cannot change them either by will, education, or culture.”⁴⁸ On this view, at the moment of conception the genetic lottery determines all – eye color, internal and external anatomy, and sex itself – and it is the genetic lottery that fixes the individual’s sexual destiny at conception. Both courts certainly viewed the concepts of “male,” “female,” and “sex” as having a genetic basis, but what of the fact that there is probably a genetic basis for most intersexual conditions, as well? Logically, if genetics is the sole basis for the determination of sex, it should not be ignored when the lottery produces gender dysphoria. Put otherwise, genetics alone cannot explain why genetics is irrelevant when the person whose sex is in question is a transsexual. The explanation may be a “normality bias in legal decision making,”⁴⁹ or it may be something else, including religious bias,⁵⁰ but it is not genetics, which is all the *Gardiner* and *Littleton* courts offered to justify their rulings. Finally, genetic determinism does not explain why characteristics that have genetic origins cannot be changed through non-genetic alteration, nor does it explain why those alterations should be ignored.

III. CONCLUSION: “I HOPE IT IS NO DISHONEST DESIRE TO DESIRE TO BE A WOMAN OF THE WORLD”⁵¹

One of the ironies of the Kansas Supreme Court’s decision in *Gardiner* is that it sought a result that would promote the legislative policy favoring opposite-sex marriages.⁵² In fact, the decision may undermine that policy more than if the court had recognized J’Noel Gardiner as female. For example, a year after the Texas court’s decision in *Littleton*, a lesbian couple was married in Bexar County, a result that could only have occurred after *Littleton* settled the question of sex in Texas and led to the conclusion that one of the couple – a male-to-female transsexual – was genetically male and therefore a member of the opposite sex.⁵³

Is this an example of the law of unintended consequences? It would appear so. But it is that law, not the law that limits marriage to opposite-sex couples, to which the supreme court might have been more attentive. The best protection against errant legal doctrines and

48. See Daniel C. Dennett, *The Mythical Threat of Genetic Determinism*, CHRON. HIGHER EDUC., Jan. 31, 2003, at B7.

49. See Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 583 (2003). The authors posit that jurors and judges alike have a deep-rooted preference for the familiar and the “normal,” and that this preference plays out in their legal decision making, including an “aversion to what is unusual.” *Id.* at 638-40.

50. *Cf. Littleton*, 9 S.W.3d at 224 (phrasing the legal question as whether “a person’s gender [is] immutably fixed by our Creator at birth”).

51. WILLIAM SHAKESPEARE, AS YOU LIKE IT act 5, sc. 3.

52. See *In re Estate of Gardiner*, 42 P.3d 120, 136 (2002).

53. See Adolfo Pesquera, *Lesbian Couple Get License to Wed: Transsexual Ruling Clears the Way*, SAN ANTONIO EXPRESS-NEWS, Sept. 7, 2000, at 1B.

untoward outcomes is a judicial mind-set that is open to sources of information outside the law itself. Social norms and understandings, after all, are shaped by experiences and information of all kinds, and a legal system that insists on an insular approach to complex social phenomena risks irrelevance or worse – a system of rules that is at war with the experiences and understandings of society.