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No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform

What pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.¹

INTRODUCTION: THE DUCKLING OFTEN HIDES BEHIND HIS WING

Goodwin v. United Kingdom² held that the United Kingdom’s refusal to allow transsexuals the right to change their official birth certificates and the right to obtain valid marriages was in violation of Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Decided by the European Court of Human Rights in July 2002, the case involved a male to female transsexual who sued the United Kingdom because of the government’s refusal to allow her to change her official birth certificate and to get legally married. Overturning years of prior transsexual civil rights case law, the Court reinterpreted Articles 8 and 12 in the light of present day conditions and held that the United Kingdom must establish procedures to correct those violations and must begin extending civil rights to transsexuals immediately.

The holding in Goodwin will definitely impact birth recordation and marriage procedures in the United Kingdom. More importantly, however, the Goodwin holding may usher in a new wave of sexual minority civil rights litigation in the United States. If so, domestic courts could consider Goodwin persuasive authority when deciding transsexual civil rights litigation in an effort to increase judicial globalization. They should do so because the European Court is an internationally well-respected tribunal that is dedicated to adjudicating human rights issues; it would be an appropriate authority for domestic courts to consider when deciding transsexual civil rights in the states. Transsexuals in the United States who wish to amend their birth certificates or get legally married should consider using the


Fourteenth Amendment as a basis for those rights. Finally, they should also consider basing their claims of rights on the opinions of Justice Goldberg in *Griswold v. Connecticut* and Justice Blackmun in *Bowers v. Hardwick* to argue that the Ninth Amendment guarantees to them the same rights guaranteed to their European brethren under Articles 8 and 12 of the Convention.

The recency and modernness of the *Goodwin* decision have brought transsexual civil rights into the public eye; therefore, the note suggests a couple of ideas based upon *Goodwin* that might make it easier for United States transsexuals to have the same civil rights as European transsexuals. Section I presents the facts of *Goodwin v. United Kingdom*. Section II examines the law that gave rise to the *Goodwin* decision, including Articles 8 and 12 of the Convention and prior European Court of Human Rights jurisprudence. Section III discusses the evolution in the judicial interpretation of the articles that enabled the Court to reach the *Goodwin* decision. Section IV speculates upon the implications this decision will have upon European law and administrative practices. Then, Section V brings *Goodwin* closer to home, analyzing its potential effects on domestic courts and on transsexual litigants fighting for human rights in the states.

A. Vocabulary

Before presenting *Goodwin v. United Kingdom*, it is necessary to define specific terms used to describe transsexuals and review the history of the condition. In a four year period beginning in 1987, Holly Devor, author of *Female to Male Transsexuals in Society*, met and personally interviewed forty-five female to male transsexuals. She developed a vocabulary of relevant terms used in association with transsexuals. Her definitions serve as the basis of the vocabulary used throughout this note.³ “Sex” refers to the physiological status of a person, whether defined by chromosomes, external genitalia, or hormones.⁴ “Gender” or “gender identity” refers to the social status of a person, such as man or woman.⁵ “Female to male transsexual” or “male to female transsexual” are phrases used to describe persons who have begun to identify themselves as transsexual or who are in the process of transforming their genders or sexes.⁶ Transsexuals could be described as having a gender identity that more closely matches the other physical sex and they often describe themselves as

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⁴ *Id.* at xxiv.
⁵ *Id.*
⁶ *Id.* at xxv.
feeling trapped in the body of the wrong sex. "Transgendered" is used to describe persons who have bodies of one sex, but who regard themselves as either partly or completely members of the opposite gender; however, they do not experience the desire to surgically alter their anatomy through sex reassignment.

B. History and Causes of Transgenderism/Transsexualism

It is estimated that one in 10,000–12,000 males and one in 30,000 females are transsexual. Evidence of transgenderism goes as far back as descriptions in classical Greek and Roman mythology. There are documented stories of women living as men in Medieval Europe, as well as in the Renaissance. The eighteenth and nineteenth centuries similarly featured women cross-dressing as men in order to obtain economic advantages that they could not achieve as women. The 1950's saw the beginning of systematic medical treatment for transsexuals, and the first gender clinics opened in the mid 1960's. In 1976, Renee Richards, a popular professional tennis player, announced the results of her successful gender reassignment surgery. By then, transsexualism was no longer seriously questioned as a medical condition. In 1979, it was dubbed "gender dysphoria" by the Harry Benjamin International Gender Dysphoria Association. Today the term preferred by professionals to describe the condition is "gender identity disorder."

The history of transgenderism/transsexualism is much clearer than its causes, for there is much debate among theorists as to whether the condition is psychologically or biologically based. On one hand, many believe that transsexualism is a reaction to anxieties about

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7. Id. at 7.
8. Id.
11. Id. at 19.
13. Carroll, Gilroy, Ryan, supra note 9. Although professionals have long used these terms to describe the condition, many in the transgender community have rejected the use of such terms because they feel as though the terms are dehumanizing.
one's gender role or that it is the result of over identification with the parent of the opposite sex. On the other hand, some theorists believe that transsexualism may have biological origins. Unfortunately, the question of whether or not transsexualism is genetically based has not been systematically investigated. Most of the biological theories focus on the influence of hormones on the endocrine and brain system. One such theory espoused by researchers in the Netherlands involves the hypothalamus, which is a dense collection of neurons located in the brain. This organ secretes hormones in response to stimuli that causes endocrine gland reactions. The proponents of this theory claim that the bed nucleus of the stria terminalis (BST) is larger in men than in women. These researchers assert that transsexuals are born with a BST size that does not correspond to their physical gender. They base their theory on the finding of female size BST's in male-to-female transsexuals. This theory implies that gender identity develops as a result of an interaction between the developing brain and sex hormones.

Transsexuals have a richly documented history and are the subject of extensive medical testing as well as psychiatric and sociological debate. However, an argument can be made that socially transsexuals are not accepted as a group. Around the world, most sexual minorities face such forms of persecution as unfair arrest, beatings, torture, rape, discrimination in the workplace, loss of employment, invasion of privacy, and in some countries, even execution. As a result of the ostracization they face, transsexuals can be compared to the main character in a well-known Hans Christian Andersen fairy tale. In The Ugly Duckling, an ugly duckling was hatched by a mother duck and reared among her other ducklings. As a result of his differences, the duckling was picked on and driven away from the rest of the flock. One day, he overheard a strange sound; children were admiring him. After he looked at his reflection in a pond, he realized that he had matured into a beautiful swan.

There are some similarities between transsexuals as a sexual minority group and the tale of the ugly duckling. Transsexuals are often misunderstood and driven away from mainstream society

15. Id. at 53.
16. Id. at 65.
17. Id. at 62.
18. Baird, supra note 9, at 17, 173. In Afghanistan, Iran, Saudi Arabia, Mauritania, Yemen, and Sudan, homosexuality is a capital offense.
19. This comparison is not meant to offend or belittle transsexuals. The tale was chosen not only because it is a well-known story, but also because of the surprising similarity is has to the social situation faced by transsexuals in society, at least in the author’s view.
because of their perceived differences. Just like the duckling was not considered ugly for long, though, society’s perception of transsexuals may be changing as well. If courts in the United States adopt the reasoning behind the Goodwin decision, there is evidence that a happy ending may finally be in store to end the transsexual community’s fight for civil rights recognition.

I. THE DUCKLING IS NO LONGER UGLY: Goodwin v. United Kingdom 21

Christine Goodwin was born a man. She was diagnosed a transsexual in the mid 1960s. Before her sex reassignment surgery, she married a woman and had four children. Although from that point on she dressed as a man for work, she dressed as a woman in her free time.22 In the mid 1980s, Goodwin started living as a woman in earnest. Beginning with regular psychiatric sessions, Goodwin began hormone therapy, grooming classes, voice training, and surgery to shorten her vocal chords. In 1990, the National Health Service in the United Kingdom provided and paid for Goodwin's gender reassignment surgery.23

Goodwin claimed that she experienced discrimination and a denial of rights almost immediately after the surgery. She attempted to file suit for sexual harassment she claimed to have experienced in the workplace, but she was denied her claim because she was still considered a man. She believed that as a result of her surgery, she was eventually dismissed from her old job. At her new place of employment, she was required to furnish her National Insurance number to her employer, but she knew that anyone who had access to the number could find out her previous sex. Concerned about the repercussions of such a disclosure, Goodwin applied to receive a new insurance number. Once her peers stopped speaking to her, she inferred that her employer had discovered the truth about her past.24

The DSS Contributions Agency informed Goodwin that her status as a postoperative female was not enough to entitle her to begin receiving her pension at the age of sixty as all other women could.25 Instead, she would have to continue contributing to the pension plan

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21. There is also a companion case to Goodwin, I v. UK, 2 F.C.R. 613 (2002), decided on the same day, July 11, 2002. This case similarly dealt with a male to female transsexual who appealed to the European Court of Human Rights for relief based on an alleged denial of Articles 8 and 12 of the Convention. The Court's decisions in the two cases are virtually identical.
23. Id.
24. Id. at 456.
25. Id. at 459. This is the organization that administers pension procedures in the United Kingdom.
as men do until the age of sixty-five because she was still considered a man by the Contributions Agency. Goodwin accepted this and worked out a deal with the Agency by which she paid her contributions directly to them. She paid this way because she was afraid of being singled out by her employers and co-workers. Her records still identified her as a man, but were now marked "sensitive." This designation meant that the files could only be accessed by a particular employee group. As a result, any dealings she undertook with the Agency required special appointments even for the simplest of concerns. Because of her status, Goodwin felt unable to partake in any of the benefits of life that required her to produce a birth certificate such as obtaining fuel allowances, mortgage refinancing, or loans. Goodwin was so afraid of the repercussions that she might face if her past was disclosed that she did not even report a theft of money to the authorities.

Goodwin became tired of dealing with what she considered to be inequitable treatment at the hands of the government. She decided to petition for a hearing before the European Court of Human Rights. She cited violations of The Charter of Fundamental Rights of the European Union for not being able to change her official gender on her birth certificate and for not being able to get legal recognition of her marriage. Specifically, she sought relief under Article 8 and Article 12 guaranteeing the right of respect for private life and the right to marry, respectively. She asserted that dynamic changes were taking place in the law with respect to transsexual rights in Europe and elsewhere and argued that transsexuals were gaining more social acceptance as was evidenced by the media coverage allotted to them. She prayed for pecuniary damages that totaled the pension she had been unable to claim since age sixty and the bus pass that she was unable to obtain as a result of not being eligible to draw her pension. She prayed for non pecuniary damages to compensate her for distress, anxiety, and humiliation.

The United Kingdom countered that no violation of Article 8 had occurred since no standard approach among the member states of the Union existed with respect to treatment of transsexuals. It further asserted that she suffered no practical disadvantage as the result of her treatment at the hands of the government. Further, notwithstanding the sensitive designation given her files, the government asserted that she was still able to obtain the documents she needed that identified her as a woman. It claimed that nothing could be done regarding her

26. Id. at 456.
27. Id.
29. Id. at 469.
pension because pension benefits were determined by a retiree's biological gender at birth. Finally, the United Kingdom argued that adequate protection was available to her for her sexual harassment claims. It argued that she could have instituted a criminal action for harassment and assault or could have brought an action under the Sex Discrimination Act of 1975. The European Court of Human Rights disagreed, however, and responded to Goodwin's claims by overturning fifty years of prior transsexual civil rights jurisprudence. The Court found that Goodwin had been denied her civil rights under Articles 8 and 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (The Convention).

PART II. THE PATH TO BEAUTY: INTERPRETATION OF ARTICLES 8 AND 12 AND PREVIOUS TRANSSEXUAL CIVIL RIGHTS JURISPRUDENCE

The European Convention for the Protection of Human Rights and Fundamental Freedoms was entered into force on September 3, 1953, by the member states of the Council of Europe. The Convention sets forth a catalogue of human rights and creates an intricate enforcement mechanism to permit individuals and groups to file complaints against their national government through the European Court of Human Rights. Two of those rights include the right of privacy and the right of marriage, which are enumerated in Articles 8 and 12 of the Convention. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home, and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and as necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30. Id. at 470.
31. Id. at 482.
34. van Dijk & van Hoof, supra note 32, at 19.
Article 12 provides that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

Prior to Goodwin, transsexuals brought suits claiming violations of Articles 8 and 12, but the European Court of Human Rights often did not find violations of the rights embodied in the articles because of the way that the articles had traditionally been interpreted. For example, Corbett v. Corbett was an early case that involved transsexual civil rights. Even though this case did not involve claimed violations of Articles 8 and 12 and was decided by the Probate, Divorce, and Admiralty Division of the United Kingdom, it is important because its reasoning was adopted by the European Court of Human Rights in subsequent cases. In Corbett, a postoperative male to female transsexual married her husband after having gender altering surgery. The husband, who had been aware of the surgery, eventually petitioned for divorce. He claimed that the marriage was null since its inception because his wife was biologically a man and that the marriage was never consummated because of his wife’s incapacity. The Probate, Divorce, and Admiralty Division reasoned that the main issue in the case centered on the determination of whether the wife was in fact a woman.

To determine if the wife would be considered female for the purpose of marriage, the court first held that it would not use the presence or absence of a penis to determine gender. Also, the court held that the biological sexual constitution of an individual was fixed at birth and could not be changed either by natural development of organs of the opposite sex or by surgical methods. It then relied upon the testimony of various doctors and experts to establish a four factor test consisting of chromosomal, gonadal, genital, and psychological attributes. Applying this test, the court found the chromosomal evidence classified the wife as a man because she had the requisite XY chromosomes. Based on gonadal evidence, the court found that the wife had been a man because she did have testicles. Next, the court looked at the genital evidence and also found that the wife had been a man due to the penis she had before its removal. Finally, the court studied psychological evidence and found that the wife had been properly classified a transsexual. Even though the court considered the four factored test, however, it decided that it

36. Id. at 285.
38. Id. at 85.
39. Id. at 104.
40. Id. at 100.
41. Id. at 104.
would only rely upon the chromosomal, gonadal, and genital attributes in order to determine the wife's sex for the purposes of marriage. Since those three tests revealed that the wife was a man, the court held that the wife was a biological male and hence the marriage was void since its inception.\footnote{42}{Id. at 106.}

After Corbett, transsexuals began to argue for civil rights in a different court under a new theory. Litigants decided to petition the European Court of Human Rights for relief by claiming their Article 8 and 12 rights had been violated. \textit{Rees v. United Kingdom}, one of the first such cases, was decided in 1986 and was brought by a female to male transsexual against the United Kingdom. The litigant claimed that the government's refusal to alter his birth certificate to reflect his postoperative status amounted to a denial of his civil rights under Articles 8 and 12.\footnote{43}{9 Eur. Ct. H.R. 56 (1987).} Although he was able to obtain a new passport and have all other official documents (e.g., driving license, car registration, national insurance card, medical card, and electoral poll) changed, he was not able to convince the Registrar General to alter the Register.\footnote{44}{Id. at 58.} Using the chromosomal, gonadal, and genital factors laid out in the Corbett case, the Registrar determined that the litigant was born a woman and hence his birth certificate would continue to reflect that he was a woman. Rees then petitioned the European Court of Human Rights for relief.

In determining if there was compliance with Article 8, the Court first reasoned that the essential purpose of the article was to protect individuals against arbitrary interference by the authorities. The Court noted that Article 8 imposed a positive obligation on the government to show respect for the private lives of its citizens.\footnote{45}{Id. at 60.} The essential issue in the case was whether the refusal to allow the litigant to alter his birth certificate was an interference with his private life and whether the government had a positive obligation to allow such an alteration. In order to decide this issue, it held that a fair balance between the rights of the individual and the general interests of the community had to be struck.\footnote{46}{Id. at 64.} In conducting this balancing test, the Court stated that the United Kingdom, while affording transsexuals the opportunity to change their names for various legal purposes, should not be required to introduce a new system for amending birth certificates. It felt that this would impose new duties on the government that were unnecessary, such as the development of a national system of birth registration amendment, the development of a method of keeping annotations private from third parties, and the
passing of extensive legislation to provide for all of the necessary recordation adjustments required. Therefore, the Court decided the United Kingdom’s positive obligations did not include the government having to establish a system that showed proof of current civil status.

The Court next turned to the alleged violation of Article 12. It said that the right to marry as guaranteed by Article 12 referred to the traditional definition of marriage, which was understood to occur between persons of opposite biological sex. The Court justified this interpretation by construing Article 12 to be a protection of marriage as the basis for family. Further, the Court held that the exercise of the right to marry as guaranteed by Article 12 was subject to the law of the United Kingdom, which did not recognize marriage between persons of the same biological sex. Therefore, the Court considered the litigant’s marriage to be invalid. Rees was unsuccessful in his attempt to prove governmental violations of Articles 8 and 12.

Rees ushered in a new era of litigation involving the extent of transsexual rights under Articles 8 and 12. In 1990, a male to female postoperative transsexual brought yet another suit against the United Kingdom, once again alleging a denial of her Article 8 and 12 rights. Cossey v. United Kingdom involved a litigant who alleged that the government violated her civil rights because it failed to grant her a new birth certificate and refused to allow her to legally marry a man. The European Court of Human Rights agreed to rehear the issue as an opportunity to ascertain whether it should adopt a different construction of Articles 8 and 12 as applied to transsexual civil rights.

The Court first interpreted Article 8 by referencing its decision in the Rees case. Finding the litigant’s situation here similar to the litigant in Rees, the Court determined Rees applied, and a novel issue was not before it. It did not find that the government’s refusal to provide Cossey with a new birth certificate constituted an interference with her private life. Recognizing that what she was actually arguing was that the government had a positive obligation to modify its existing birth registration system, the Court placed great weight on the fact that the existing system served as repository of historical data. As such, it held that the government had a valid concern in preventing the falsification of birth records to prevent persons with legitimate interests in such data from being misled. Under the facts presented,

47. Id. at 66.
48. Id.
50. Id.
52. Id. at 633.
53. Id. at 632.
the Court concluded that a new interpretation of Article 8 was not warranted and hence refused to alter its earlier interpretation of the article.

The Court’s interpretation of Article 12 mirrored its interpretation of Article 8, for once again the Rees decision was referenced.54 Although the Court stressed that Article 12 did not call for the exclusive use of a biological test to determine a person’s sex for the purpose of marriage, it claimed that there was no evidence of any general abandonment of the traditional concept of marriage. Although the Court recognized that some contracting states of the Council of Europe would recognize her right to validly marry a man, it did not consider itself open to take a new approach to the interpretation of Article 12. Holding that the law of the contracting state applied, the Court considered the criteria adopted by English law for marriage and found that the criteria conformed with the concept of marriage guaranteed by Article 12.55 Taking these determinations into account, the Court found that there was no United Kingdom violation of Article 12. Even after a rehearing on the issue, the Court was still unwilling to find that transsexuals were being denied their civil rights.

In B. v. France, the Court again decided to revisit the issue of transsexual civil rights under Articles 8 and 12; however, in B., it became clear that the Court’s interpretation of the articles would not be the same for each of the contracting states of the Convention.56 In B., the Court showed its willingness to adapt its interpretation of Articles 8 and 12 to the differences in the national laws of each of the contracting states. This willingness foreshadowed what was soon to become an entirely new approach to the judicial construction of those articles. The litigant was a male to female transsexual who sued the French government for its failure to recognize her postoperative gender. Like her predecessors, she claimed the French government violated Articles 8 and 12 of the Convention.57 She alleged that she was being denied civil rights because the number issued to her by the National Statistics and Economic Research Institute officially showed her as a man.58 Because of this, she claimed that simple everyday activities like paying a check, collecting a letter, cashing a postal order, or voting were hampered by the French government’s refusal to recognize her as a woman.

This time, the European Court of Human Rights was receptive to the litigant’s pleas. First, the Court considered its prior decision in

54. Id. at 641.
55. Id. at 642.
57. Id. at 12. B.’s Article 12 claims were dismissed by the European Court of Human Rights for failure to exhaust domestic remedies.
58. Id. at 13.
Rees to determine if an Article 8 violation had occurred. The litigant successfully persuaded the Court that its main objections to birth registration amendment as stated in Rees were not applicable to her case. The first main objection that the Rees court had—that it would be too much of a burden to require the United Kingdom to create and implement a system of birth registration amendment—was not applicable because unlike the system in the United Kingdom, the French registration system could amend birth status more easily. The French system already permitted annotations to be made to the civil status register and access to that information was strictly regulated; there would be no further burden placed on the French government if transsexuals were allowed to annotate the register to reflect their changed gender.59 Further, the Rees Court’s second objection to birth registration amendment—that transsexuals’ preexisting right to adopt a new name was sufficient because it could be used on most official documents—also did not apply to the litigant in B. because in France transsexuals were not as free to adopt a new forename.60 This inability made it much harder for transsexuals to convincingly live according to their postoperative genders. The litigant used the differences between the two nations’ practices to argue to the Court that the reasons for their former reticence to find a violation of Article 8 simply did not apply to her case.

Considering the strength of all of her arguments, the Court in B. acknowledged that the litigant was subject to more suffering during her daily life because all her official documents still identified her as a male, which forced her to reveal her past to third persons almost on a day-to-day basis.61 It held that she faced particularly trying ordeals as a result of the discrepancy created between her appearance as a female, but listed gender on identity papers as a male. The Court recognized that there were significant factual differences between its past jurisprudence and B. as a result of the contrasting ways that the United Kingdom and France handled birth registration amendments and changes of name for official purposes. Although it was not willing to overrule Rees or Cossey, it did hold that a fair balance between the interests of the individual and the state had not been attained; therefore, the Court found a violation of Article 8.62 Because the state refused to acknowledge a decisive component of the litigant’s gender identity and did not provide the

59. *Id.* The birth register was able to be updated to reflect acknowledgment of an illegitimate child, adoption, marriage, divorce, and death.
60. *Id.*
61. 16 Eur. Ct. H.R. at 32.
62. *Id.* at 2.
litigant with practical and effective protection of her private life, the Court required that the French government take positive steps to rectify the situation.63

III. FROM DUCKLING TO SWAN: REINTERPRETING ARTICLES 8 AND 12 IN GOODWIN V. UNITED KINGDOM

The European Court of Human Rights was not ready to construe Articles 8 and 12 so as to give them their full legal effect in its prior transsexual civil rights jurisprudence; but, in Goodwin v. United Kingdom, both Articles 8 and 12 were found to have been violated. The reason that the Court was finally willing to afford civil rights to transsexuals was because the judicial construction given to Articles 8 and 12 changed radically. Before completely reinterpreting the articles, the Goodwin Court reaffirmed its duty to maintain a dynamic and evolutive approach to the Convention and recognized that failure to do so would bar reform or improvement.64 It explicitly stated that the Convention was adopted primarily for the protection of human rights. As the premier authority on interpreting Convention articles, the Court recognized that it had a corresponding duty to regard changing social conditions and to respond to those conditions accordingly. Further, the Court emphasized that it was necessary for it to interpret the Convention in a manner so as to render the human rights protected by the articles practical and effective, not theoretical and illusory.65

A. Article 8 Analysis

The Goodwin Court first analyzed Article 8 in light of the obligations that the United Kingdom owed to its citizens. The Court's prior jurisprudence had consistently held that under United Kingdom law, the government had no positive obligation to change birth registrations to reflect the altered gender of transsexuals. The fact that the United Kingdom was not perceived as having a positive obligation to provide for a system of amendment was not considered as having an adverse effect on transsexuals nor was it considered a violation of transsexual's civil rights. The Court in Goodwin, however, reevaluated the United Kingdom's obligations to transsexuals in the light of present day conditions. The Court stated that the conflict that resulted between social reality and law invoked feelings of vulnerability, humiliation, and anxiety in transsexuals. It

63. Id. at 21.
65. Id.
considered Goodwin's personal situation as a transsexual and held that her position in society versus her status as conferred by law created stress and alienation that resulted in serious interference with her private life in violation of Article 8.

Second, the Court considered whether the United Kingdom's existing administrative procedures were in compliance with Article 8. It noted that although there was still no conclusive proof as to the cause of transsexualism, there was growing international recognition of the condition and treatment available for it. Medically, the United Kingdom's National Health Service would provide and pay for gender reassignment surgery. But legally, transsexuals were still not given full recognition because they could not officially change the gender on their birth certificates. In Goodwin, the Court emphasized the importance of coherence between a state's administrative and legal systems. It found dispositive the fact that the condition had become so accepted that the United Kingdom would pay for sex reassignment procedures, but would not afford the recipients of the operations protection at law. Coherence between the systems was not being achieved, contributing to a lack of compliance with Article 8. The Court held that Article 8 allowed transsexuals the right to officially modify their birth certificate genders in order to harmonize the administrative procedures that provided for treatment and surgery for transsexuals with their legal status.

The Court then discussed whether any European and international consensus existed regarding the application of Article 8 to civil rights treatment for the transsexual community. In Rees, before ultimately refusing to recognize a violation of Article 8, the Court gave great weight to the fact that little common ground existed between the member states on providing legal recognition to transsexuals following their gender reassignment. But, in Goodwin, the Court instead decided to observe the international trend in favor of increased social acceptance and legal recognition of transsexuals. It reasoned that, even though there was no uniformity among the member states about the extent of legal recognition for transsexuals, a lack of consensus could not serve as a basis for not extending civil rights to transsexuals. It acknowledged that it was up to each member state to decide how to secure Convention rights; however, it also reaffirmed the Court's duty to decide exactly what those rights were. Just because the United Kingdom did not have a method in law to recognize transsexual civil rights did not mean that those rights did not exist, nor did it mean that those rights were not protected because

66. Id. at 472.
67. Id. at 473.
68. Id. at 475.
there was no uniform legal theory among all the states of the Convention. The Goodwin Court stated that in the future, decisions interpreting Article 8 would attach less importance to the lack of consensus among the states since it was up to the contracting states to decide upon measures necessary to secure Convention rights within their jurisdiction anyway.69

The next factor the Court analyzed to interpret Article 8 was the historical nature of the birth register recordation system in the United Kingdom. In both Rees and Cossey, the Court stated that for purposes of birth registration, the historical nature of the system required that a person’s recorded gender be the one at the time of birth. In the United Kingdom, a birth certificate could be changed due to an error by the Registrar in recording a person’s original birth status; however, changing a transsexual’s official gender because of subsequent sex reassignment was not considered to be fixing a recording error. Instead, such a change constituted falsification of the public records that could detrimentally affect third persons relying on the register.70

After considering the stance that it had taken in the prior jurisprudence, the Goodwin Court looked to present day conditions and found that there was no evidence that third persons would be detrimentally affected if annotations were made to the birth register recordation system.71 Further, it stated that the birth records were already frequently being updated in several situations, including legitimizations and adoptions.72 Since some changes were already being made to the system, the Court reasoned that extending to transsexuals the right to change the register would not pose a threat of overturning the whole system, nor would it undermine the historic function of the register. The Court did note that some difficulties would arise in order to make the birth registration system more accommodating to transsexuals, but it stated that no concrete or substantial hardship to the public had been demonstrated in relation to the proposed changes.73 Therefore, the Court no longer saw a tremendous burden placed on the birth registration system if transsexuals were allowed the right to alter their original birth certificates. In order to strike a balance between the individual and the state, the Court now found that it was reasonable for society to tolerate certain inconveniences while adjustments were made to the birth register system so as to allow transsexual individuals the right to live in dignity in the sexual identity that they chose.74

69. Id.
72. Id. at 476.
73. Id. at 451.
74. Id. at 477.
The final factor considered by the Goodwin Court in its Article 8 interpretation was the biological criteria that had traditionally been used to determine the legal status of transsexuals for the purpose of birth registration. Past case law relied primarily on the chromosomal, genital, and gonadal tests as elaborated in Corbett to determine sex for the purposes of birth recordation. With respect to Article 8, the Goodwin Court recognized that the principal unchanging element of gender identity is chromosomal and that transsexuals could not acquire all the biological characteristics of their acquired sex; but, it also stated that chromosomal irregularities do occur that often result in people having to be assigned a gender on the basis of their individual circumstances rather than on the basis of their genetic makeup. As a result, the Court decided that the chromosomal element would no longer be relied upon as the sole basis for disallowing transsexuals the ability to modify the birth register.

B. Article 12 Analysis

The chromosomal, genital, and gonadal tests had traditionally been used by the courts to determine sex for the purpose of marriage. Earlier decisions consistently held that Article 12 referred to the definition of marriage as a basis for family between a man and a woman. For example, the Corbett Court had interpreted “marriage” under Article 12 to mean a relationship that depended upon biological sex, not gender. Further, the Court’s earlier decisions also interpreted the Article 12 right to marry as being subject to the law of the contracting state, which had the power to adopt biological criteria to determine a person’s sex for the purpose of marriage. Its older jurisprudence emphasized that United Kingdom law recognized marriage between persons of opposite sex as the basis for family. Following that line of reasoning, the Court had held that since transsexuals were not born their postoperative gender and were not capable of creating a family, they were not allowed to obtain a valid marriage under United Kingdom law.

The Goodwin Court drastically reinterpreted Article 12. It refused to only consider the biological factors when determining the extent of legal recognition due to transsexuals, reiterating the same conclusions

75. 1971 P. 83 at 106.
76. 35 Eur. Ct. H.R. 18 at 450. Gender would have to be assigned in the case of a person born with an intersexed condition where the biological criteria at birth were not congruent. Id. at 474.
77. Id. at 474.
78. Id. at 479.
79. 1971 P. 83 at 107.
cited for its refusal to solely consider biological factors in its earlier discussion of Article 8. The Court would not determine sex for the purposes of marriage based upon the biological criteria alone. Instead, the Court stated that determining sex for that purpose should depend on a multitude of factors that would be assessed at the time of the marriage. The Court then construed Articles 8 and 12 together to determine if the recordation of the birth sex of transsexuals on the birth record was a limitation on the very essence of their right to marry. It found that transsexuals' right to marry would be impaired if the sexes on their birth certificates remained as the ones that they were born. If the registration system remained unchanged, transsexuals would be free to marry a person of their former opposite sex, but not be free to marry a person whose sex was opposite to theirs after their sex reassignment surgery. Therefore, the Goodwin Court stated that the terms "man" and "woman" would no longer be defined based on biological criteria alone and that the inability of a couple to conceive a child did not automatically restrict their right to marry under Article 12.

Finally, the Court in Goodwin held that the exercise of the right to marry was subject to the laws of the United Kingdom. However, those laws could not restrict the right to marry to such an extent that the very essence of the right was impaired. In the case of transsexuals in the United Kingdom, the Court found that the very essence of their right to marry was impaired by the limitations placed upon them by the laws of the United Kingdom. The Court concluded its analysis of Article 12 by stating that there was no justification for the United Kingdom to bar transsexuals from enjoying the right to marry under any circumstances.

In holding that Goodwin did suffer violations under Articles 8 and 12, the Goodwin Court overturned fifty years of prior transsexual civil rights jurisprudence. In past cases involving the rights guaranteed by those articles, the European Court of Human Rights had held there was a margin of appreciation that allowed each state to maintain a different system of law without contravening the Convention. But in

81. Id. at 480. The other factors listed by the Court included the acceptance of the condition of gender identity disorder by the medical professions and health authorities within the contracting states, the provision of treatment including surgery to assimilate the individual as closely as possible with the gender they believe they should be, and the assumption by the transsexual of social role of their assigned gender.
82. Id. at 480.
83. 35 Eur. Ct. H.R. 18 at 479.
84. Id. at 481.
85. Id. at 483. Interestingly, the Court did not award Goodwin her claims for pecuniary or nonpecuniary damages, holding instead that the findings of the violations was sufficient just satisfaction.
Goodwin, the Court found that United Kingdom government officials could no longer claim that the matter fell within their margin. This was because even though there was a growing social acceptance of the condition and a growing recognition of the problems transsexuals faced, nothing had been done by the United Kingdom to alleviate those problems. Because the United Kingdom failed to legislate in that area, all the government was entitled to do was decide the right means to recognize the rights that the Court now held were protected by the Convention. Thus, the Goodwin ruling mandates that the United Kingdom adopt methods to enable transsexuals to modify their birth certificates and to be legally recognized in their marriages.

IV. LIVING AS A SWAN: IMPLICATIONS OF GOODWIN ON THE LAWS OF EUROPE AND THE UNITED STATES

A. Effects of Goodwin on European Law

Until the Goodwin decision, the United Kingdom lagged behind the rest of the member states by allowing private information, such as gender at birth, to be accessed by the public without a requirement of clear necessity. Goodwin holds that the United Kingdom must provide a discrete way for transsexuals to change their birth certificate records. Now the United Kingdom must determine the quickest and fairest way to implement Goodwin by establishing a mechanism for correcting the name and gender details of transsexuals on the official birth register. Since this ruling will also affect matrimonial documents, the United Kingdom will also have to decide upon a method that recognizes marriages between transsexuals as well.

Since the Goodwin reinterpretation of Article 8 allows transsexuals the right to change their birth certificates to reflect their postoperative status, major changes will have to be made to the existing birth recordation system in the United Kingdom. Registration of births in the United Kingdom is governed by the Births and Deaths Registration Act of 1953. The birth of every child is registered by the Registrar of Births and Deaths depending upon the location of the birth of the child. An entry is a record of facts at the time of the birth. Part of the entry requires that the sex of the child be recorded on the certificate but the criteria for determining the sex of the child is not provided for in the Act. Previously, sex was

86. Id.
88. Births and Deaths Registration Act, 1953, c. 20 § 1 (Eng.).
determined by biological criteria consisting of chromosomal, genital, and gonadal tests. The Act does provide that the Registrar may correct clerical or factual errors made on the certificate, and formerly, an amendment could be made only if the error occurred when the birth was registered. Changes in the initial entry were made in cases in which the apparent and genital sex were wrongly identified or where the biological criteria were in conflict. Because Goodwin guarantees to transsexuals the right to officially modify their birth certificates, provisions will have to be enacted in the United Kingdom to allow for a system of annotating or amending the birth register. What this implicitly recognizes is that the psychological test of gender, which was rejected by the courts for determining the legal status of transsexuals in *Corbett*, now has validity. That is important because in order for the United Kingdom to decide a transsexual’s gender for legal purposes, both his psychology and biology will have to be considered by the government when it makes a gender determination.

The Goodwin ruling that guarantees Article 12 rights to transsexuals will also have a dramatic effect upon marriages. Under the Matrimonial Clauses Act of 1973, any marriage in which the parties were not respectively male and female was void. *Corbett* held the test for determining sex for the purpose of marriage was based on the traditional definition of marriage as a basis for family between a man and a woman. Hence, transsexual marriages were not legally recognized because of the transsexual member’s incapacity to consummate the marriage during ordinary and complete sexual intercourse. The Goodwin decision no longer recognizes the aforementioned definition of marriage as the correct definition of marriage for the purposes of Article 12. Considering that transsexuals remain biologically the sex that they were born, the Goodwin holding radically departs from the traditional meaning of marriage recognized by the United Kingdom. Now the United Kingdom is faced with the task of determining a method that would allow for legal transsexual marriages.

B. Effect of Goodwin on United States Law?

Goodwin, a controversial matter decided by the European Court of Human Rights in July 2002, has placed the issue of transsexual civil rights in the international public eye. Because the European

90. Corbett, 1971 Probate Reports at 106.
91. Matrimonial Clauses Act, 1973, c. 18 (Eng).
92. 1971 P. 83 at 86.
94. One such method would be to amend the Marriage Act itself.
Court of Human Rights has recognized civil rights for transsexuals, it is inevitable that transsexuals in the United States will attempt to have similar civil rights recognized here. The following discussion represents only two suggestions that could enable transsexuals in the United States to have the same civil rights as those abroad. First, United States courts could become more global in their reasoning when deciding transsexual civil rights cases. The European Court of Human Rights is an internationally respected tribunal that was created to decide human rights issues; it could serve as a very informative role model for domestic court systems to learn from and imitate in the area of transsexual civil rights. Also, more United States judges should follow in the footsteps of some of their own brethren who are already beginning to look abroad to the decisions of foreign tribunals. In the spirit of judicial comity, domestic courts could consider Goodwin persuasive authority if and when they decide cases regarding transsexual civil rights.

Second, transsexuals in the United States could try to base their arguments for civil rights on state equal protection clauses as well as the Fourteenth and Ninth Amendments to the United States Constitution. A 2003 Massachusetts Supreme Court decision reveals that state courts might be willing to reinterpret the guarantees afforded by their respective constitutional equal protection clauses. A brief overview of the case law involving attempts by sexual minorities in the United States to have their marriages legally recognized reveals that in the past they were unsuccessful in basing their claims under a Fourteenth Amendment privacy theory. Recent United States Supreme Court case law, however, reveals that the courts are becoming more amenable to sexual minorities’ claims to civil rights under the Fourteenth Amendment. Finally, transsexuals should also consider urging the Ninth Amendment as an authority in support of legal recognition for a transsexual marriage.

1. For United States Courts to Consider: Judicial Globalization

Society becomes more global in scope each day. Communities around the world are intertwined both socially and financially largely because of the growth in technology. Similarly, courts are becoming linked on an international level as well through the process of judicial globalization. Judicial globalization is the interaction of judiciaries above, across, and below borders in which courts exchange ideas and cooperate in cases that involve national and international laws.95 As courts interact more and more over common issues, they can gain

95. Slaughter, supra note 33, at 1104.
much from sharing ideas and approaches to the resolution of cases. This is especially true in the area of civil rights, a topic that has become more prevalent in disputes brought before tribunals.

The European Court of Human Rights, a prestigious court that is internationally well-respected, is a prime example of judicial globalization in action. Because the European Court was specifically created to resolve human rights concerns, it is an authority in that area of the law. Therefore, United States courts should consider giving the European Court’s decisions some weight when it resolves civil rights issues here in the states. Further, over time civil rights protection has become a more litigated issue in the courts. Since the scope of civil rights should not be limited by nationality, United States courts could regard the Goodwin holding by the European Court of Human Rights as persuasive authority in an effort to become more judicially globalized and more in sync with the rest of the world with respect to transsexual civil rights.96

The European Court of Human Rights has controlling jurisdiction to specifically hear civil rights cases; therefore, it can be more progressive in its transsexual civil rights jurisprudence and other similar matters. The European Court in Goodwin reaffirmed its duty to maintain a dynamic and evolutive approach to the law and to see that the rights guaranteed by the Convention were afforded to all persons within the member states’ jurisdictions. By maintaining a dynamic approach to the law, the Court was able to adjust its prior transsexual civil rights rulings to account for changing social mores and values. It was probably easier for the European Court to accomplish that than it would have been for a United States court, because United States courts are not specifically dedicated to hearing matters that deal exclusively with human rights issues. For this reason, domestic courts of general jurisdiction should begin to consider the decisions of the European Court of Human Rights as persuasive authority because the European Court’s expertise is in deciding civil rights cases. This specialization forces it to devote most of its deliberation, study, and research to human rights concerns. Thus, there is no better role model than the European Court of Human Rights for United States Courts to follow when deciding future transsexual civil rights litigation.

Deference by domestic courts to foreign courts in resolving transnational disputes is nothing new. In fact, it is a well-known doctrine known as judicial comity.97 The decisions of the European Court are not formal authority outside of Europe. However, the decisions of the Court are afforded great weight worldwide as a result

96. Id. at 1109.
97. Id. at 1112–13.
of their legitimacy and care and because of the quality of the judges who make them. Some influential United States judges seem willing to lend authority to foreign court decisions. For example, some justices on the United States Supreme Court have begun to consider foreign and international law in their opinions—a practice strongly advocated by Justices O'Connor and Breyer. In the very recent case of Lawrence v. Texas, (discussed in more detail in the next section), the United States Supreme Court held unconstitutional a Texas statute making it a crime for two persons of the same sex to engage in sodomy while in the privacy of their home. The Court found that Fourteenth Amendment liberty encompasses homosexual privacy rights and that adverse precedent in Bowers v. Hardwick was overruled. In support of his argument to overrule Bowers, Justice Kennedy specifically relied upon the fact that the reasoning in Bowers had been rejected by the European Court of Human Rights in Dudgeon v. United Kingdom. In Printz v. United States, the United States Supreme Court held that a requirement of the federally enacted Brady Act, which required local civil servants to perform background checks on potential firearms purchasers, was unconstitutional. Justice Breyer's dissent suggested that the Court should consider the experience of foreign courts in resolving the issue. In Knight v. Florida's dissent, Breyer once again cited the jurisprudence of foreign courts to support his view that delays in administering the death penalty constituted inhumane treatment under the Eighth Amendment.

Lower federal courts have also considered international law in their writing judicial opinions. For example, Judge Calabresi of the Second Circuit has looked abroad to international decisions for the purposes of learning and cross-fertilization. In United States v. Then, the Second Circuit held that treating one gram of crack cocaine as the equivalent of 100 times as much powder cocaine when sentencing a minority defendant did not offend the Equal Protection Clause of the United States Constitution. In Judge Calabresi's concurrence, he advocated the German and Italian judicial practice of announcing in opinions when enacted laws were approaching unconstitutionality on equal protection grounds. He suggested that United States courts follow the same approach.

98. Id. at 1111.
103. Id. at 977, 117 S. Ct. at 2405 (Breyer, J., dissenting).
105. United States v. Then, 56 F.3d 464, 466 (2d Cir. 1995).
106. Id. at 468–69 (Calabresi, J., concurring).
United States courts should follow the examples of the modernized judges who already look to authority that has come from abroad in an effort to be more dynamic and evolutive. Because the European Court of Human Rights is internationally respected and well-versed in civil rights issues, it sets the perfect example for domestic courts to imitate. The decision in Goodwin just may usher in an era of transsexual civil rights litigation regarding birth registration amendment and marriage. When and if they decide those cases, United States courts could look to Goodwin as very persuasive authority in the spirit of judicial globalization. Thus, the European Court's decision in Goodwin could provide domestic courts with additional justification to hold that transsexuals here should have the same civil rights as those in Europe.

2. For Transsexual Litigants to Consider: Equal Protection, Privacy, and the Ninth Amendment

Transsexuals in the United States have not been afforded the right to change the gender on their birth certificates in all states nor have their marriages been legally recognized in all states. However, recent state court jurisprudence recognizing the rights of homosexuals to obtain civil marriages is encouraging. In addition, the Fourteenth Amendment, traditionally rejected as authority for civil rights for sexual minorities, has now become an attractive argument upon which transsexuals could base their claims due to recent United States Supreme Court jurisprudence. A final argument for the right to change a birth certificate and the right to get married might be based upon the Ninth Amendment. Judicial support exists for the proposition that the Ninth Amendment retains civil rights to sexual minorities.

Only about one-half of the state and territorial jurisdictions in the United States have statutes that explicitly provide ways for postoperative transsexuals to modify their birth certificates to reflect their new genders. In addition, state court jurisprudence that specifically involves transsexual marriages has historically been disappointing. In 1999, the Court of Appeals of Texas held in Littleton v. Prange that the marriage of a male to female transsexual to a biological man was not valid and thus the surviving spouse lacked standing to bring a claim under the state's death and survival statutes. Similarly, Estate of Gardiner, decided by the Supreme

Court of Kansas in March 2002, held that a postoperative male to female transsexual was not a woman within the meaning of Kansas' marriage statutes. It further held that a marriage between a postoperative male to female transsexual and a biological male was void as against public policy.  

Existing statutory law reflects that the majority of states permit marriages only between persons of the opposite sex. Similar to the issue of transsexual marriages, state court jurisprudence regarding homosexual marriages had also been disappointing until a 2003 Massachusetts Supreme Court decision. In 1993, the Hawaiian Supreme Court in Baehr v. Lewin announced that laws forbidding same sex marriage could only be constitutional if supported by a compelling state interest. On remand, the trial court held that the state failed to sustain its burden of proof and hence had to allow marriage between persons of the same sex. In response to the Hawaiian trial court decision, however, the Hawaiian people adopted a constitutional provision defining marriage as a relationship between one man and one woman. Moreover, in 1996, Congress passed the Defense of Marriage Act (DOMA), which provides that no state is required to give legal effect to any same-sex marriage performed under the laws of another state. The passage of DOMA was obviously a Congressional effort to preclude national recognition of same sex marriages; however, a recent Massachusetts Supreme Court case might finally provide transsexuals with some support for their civil rights claims to obtain valid legal marriages. 

Goodridge v. Department of Public Health involved seven same-sex couples desirous of obtaining legally recognized civil marriages

113. But also note that the Hawaiian legislature enacted legislation granting unmarried couples broad rights and privileges. Katherine Shaw Spaht, Family Law in Louisiana 20 (Louisiana Practice Series 2003).
114. 28 U.S.C. § 1738C (2002). Also relevant is the definition of marriage in the United States Code Annotated, 1 U.S.C.A. § 7 (2002). It reads as follows:

In determining the meaning of any Act of Congress, or of any ruling ... of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. (emphasis added).

It should be noted that a house bill was introduced in January 2001, which proposed to amend the meaning of marriage in § 7 by eliminating any federal policy on the definition. H.R. 270, 107th Cong. (2001). Representative Frank introduced the bill again on July 9, 2003 as H.R. 2677, 108th Cong. (2003).
under Massachusetts law. The couples expressed wishes to publicly commit to each other and to secure the legal protections and benefits afforded married couples and their children. All were denied marriage licenses by Massachusetts city clerks on the ground that Massachusetts does not recognize same-sex marriage. The couples then filed suit in Massachusetts Superior Court seeking a judgment recognizing that exclusion of same-sex couples from access to marriage licenses violated various Massachusetts constitutional provisions. The court found that the marriage exclusion did not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution but instead furthered the state’s interest in safeguarding the primary purpose of marriage, procreation. On appeal, the Massachusetts Supreme Court granted direct appellate review.

The Massachusetts Supreme Court held that government action barring same-sex couples from obtaining civil marriages violated the Massachusetts Constitution’s guarantee of equality. The court stated that the Massachusetts Constitution was more protective of individual liberties than that of the federal Constitution. Furthermore, the court held that the ability to obtain a legal marriage was a fundamental right. The state had the burden of proving that governmental action that barred the exercise of that right was a legitimate exercise of the state’s police power. The court found that the state did not meet this burden.

The Massachusetts Supreme Court noted that by denying same sex couples the right to marry, those couples were also being denied benefits accessible only by way of a marriage license. Those benefits touched upon rights relating to taxes, property, and survival actions. Additionally, the court found that the state’s asserted interest in the welfare of children was better served by allowing same sex couples to marry. Finally, the court rejected the state’s argument that restricting marriage to opposite sex couples was valid because only those couples could beget children and the state had a legitimate interest in providing an optimal setting for procreation. The Massachusetts Supreme Court held that because the statute deprived individuals of access to a fundamental right based solely on a single trait, sexual orientation, it violated the state constitutional guarantee of equal protection.

116. Id. at 950.
117. Id. at 951.
118. Id. at 948.
119. Id. at 955.
120. Id. at 959.
The Littleton and Gardiner decisions illustrate that domestic state courts have traditionally decided transsexual civil rights cases more narrowly than the European Court of Human Rights. But, the Massachusetts Supreme Court’s decision in Goodridge may provide a basis for transsexual couples to argue for the right to marry in states whose constitutions feature equal protection clauses that are similar to that of Massachusetts.

Historically, courts had not been receptive to sexual minority claims for civil rights based upon the United State Constitution. The fact that transsexual civil rights cases are not approached the same way by United States courts and the European Court could be because the United States Constitution does not have a counterpart to either Article 8 or 12 of the Convention. But, even though the United States Constitution does not expressly grant the rights of Articles 8 and 12, those rights have been recognized by the United States Supreme Court in the “right to privacy” cases.

In 1965, the United States Supreme Court began handing down a series of decisions that created a zone of constitutionally protected privacy. This zone of privacy was created as a result of the promise of liberty guaranteed by the Due Process Clause of the Fourteenth Amendment. The line of cases that started broadly construing Fourteenth Amendment liberty began with Griswold v. Connecticut, in which the Court held that married couples and their physicians were protected from prosecution for using or prescribing contraceptives. It held that Connecticut’s birth control law, which prevented anyone from using contraceptives, was unconstitutional because it intruded upon the right of marital privacy. Justice Douglas reasoned that the freedom of marital association was a protected privacy right that fell into the penumbra created by the Fourteenth Amendment and held that the law was unconstitutional because it operated directly on an intimate relation of husband and wife. Next, the protected privacy right to use contraceptives enumerated in Griswold was extended to unmarried couples in Eisenstadt v. Baird. In that case, a Massachusetts law made it a felony to distribute contraceptives to unmarried persons. Justice Brennan wrote that if the right to privacy were to mean anything,

121. The applicable portion of Section 1 of the Fourteenth Amendment to the United States Constitution states, “No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. Const. amend. XIV.
123. 381 U.S. at 485–86, 85 S. Ct. at 1682.
124. Id, 85 S. Ct. at 1682.
then it must extend to both married and single individuals to make
the decision of whether or not to conceive children, free from the
interference of the government. Justice Blackmun held that even though the Constitution did not expressly
grant a right of privacy, that right had been recognized in the
concept of liberty guaranteed by the Due Process Clause. But, only
personal rights that were deemed fundamental or implicit in the
concept of ordered liberty were included in the guarantee of privacy.
Blackmun found that a woman’s decision to terminate her
pregnancy was encompassed within the Fourteenth Amendment’s
concept of personal liberty.

Only very recently in Lawrence v. Texas has the United States Supreme Court interpreted the Fourteenth Amendment’s zone of privacy liberally with respect to sexual minorities. The Court’s pre-Lawrence jurisprudence was anything but favorable to homosexual Fourteenth Amendment privacy rights. Bowers v. Hardwick involved a litigant caught by police engaging in homosexual acts when authorities attempted to serve a traffic warrant on him at his home. The litigant argued that Georgia’s sodomy statute, which made homosexual acts between consenting men criminal, violated his right to privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment. The Court disagreed and held that the Constitution did not confer a right of privacy that extended to homosexual sodomy. In doing so, it overturned the appellate court’s ruling that the law violated the plaintiff’s fundamental rights based on the Due Process Clause of the Fourteenth Amendment and on the Ninth Amendment. Justice White based his decision on the fact that proscriptions against homosexual conduct had ancient roots and that a homosexual’s right to engage in sodomy was not implicit in the concept of liberty.

In June of 2003, the United States Supreme Court handed down the landmark decision of Lawrence v. Texas. In Lawrence, Houston police lawfully entered the home of the litigant in response

126. 405 U.S. at 453, 92 S. Ct. at 1038 (emphasis omitted).
129. 539 U.S. 558, 123 S. Ct. 2472. The Court has not addressed transsexual civil rights yet; however, an analogy can be drawn to the jurisprudence that it has handed down that has dealt with homosexuals.
131. 478 U.S. at 192, 106 S. Ct. at 2844.
132. Id., 106 S. Ct. at 2844.
133. 539 U.S. 558, 123 S. Ct. 2472.
to a reported weapons disturbance. They saw him and another adult male engaged in private, consensual sexual acts. Both men were arrested for violation of a Texas statute that made it a crime for two persons of the same sex to engage in sexual intercourse. At their criminal trial, both men alleged that the statute was a violation of the Equal Protection Clause of the Fourteenth Amendment and a similar provision of the Texas Constitution. The Harris County Criminal Court rejected their contentions and fined them $200 apiece. On appeal, (and in addition to their prior arguments), the litigants alleged that the statute was an infringement on their Fourteenth Amendment privacy rights. The Court of Appeals for the Texas Fourteenth District affirmed the criminal court relying upon the holding in *Bowers*. The United States Supreme Court granted certiorari.

In *Lawrence*, the United States Supreme Court explicitly overruled *Bowers v. Hardwick*. In response to the assertion that the law should be upheld because of the ancient roots of laws proscribing homosexual sodomy, Justice Kennedy discounted the facts traditionally used to advance that argument. Although sodomy laws did indeed have ancient roots, he noted that it was not until the last third of the 20th century that sodomy laws began to be specifically targeted against homosexuals. He cited additional evidence that showed that historically, laws prohibiting sodomy were not really enforced against consenting adults acting in private. Next, Kennedy noted that even before *Bowers*, society’s trends and traditions had changed in favor of an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. He recognized that the majority of states no longer criminalize private homosexual conduct. Finally, Kennedy noted that globally, the Court’s position in *Bowers* had not been followed, as evidenced by recent European Court of Human Rights decisions.

The Court decided that in order to determine the litigant’s rights under the Fourteenth Amendment, *Bowers* would have to be reexamined. It then recounted its prior Fourteenth Amendment right to privacy jurisprudence, including *Griswold, Eisenstadt*, and *Roe*. It found that the line of those decisions had consistently been chipping away at the validity of *Bowers* such that the rationale of *Bowers* no longer withstood careful analysis. The Court drew a parallel between the facts of *Bowers* and that of the instant case.

134. *Id.* at 2476.
135. *Id.*
136. *Id.* at 2484.
137. *Id.* at 2479.
138. *Id.* at 2483.
Kennedy stated that the Court’s assertion in *Bowers* that the Constitution did not confer a fundamental right upon homosexuals to engage in sodomy disclosed the Court’s failure to appreciate the extent of liberty at stake. He further stated that the issue in *Bowers* as well the one before it was not just whether certain individuals had a certain right to engage in sexual conduct. Instead, what was at stake were the penalties and purposes of the disputed law and the effect that those penalties and purposes had upon the most private of human conduct in the most private of places.\textsuperscript{140} Kennedy looked to the conduct affected by the Texas statute and found that the law attempted to control a personal relationship that was within the liberty of persons to choose. Furthermore, the Court held that the State could not demean the existence of homosexuals nor control their destiny by making their private sexual conduct a crime. Finally, the Court held that the guarantee of liberty under the Due Process Clause gives homosexuals the full right to engage in private consensual conduct free from governmental intervention.\textsuperscript{141}

The import of *Lawrence* is United States Supreme Court recognition of the privacy rights of homosexuals to engage in consensual sexual conduct. More than that, perhaps, the decision reveals the Court’s emerging awareness of the rights of sexual minorities in general. Transsexuals may find that an argument for the right to marry based upon the Fourteenth Amendment and its expansion through *Lawrence* to sexual minorities has a chance for success in the courts.

Sexual minorities should also consider bringing their claims under the Ninth Amendment, which states that “The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”\textsuperscript{142} That amendment retains rights to the people that have not been explicitly or implicitly granted to the state and federal governments. Advocates of the Bill of Rights included the Ninth Amendment to prevent any misapplication of the Constitution as a result of the enumeration of specific rights. Specifically enumerated federal rights, which are outside the scope of the Ninth Amendment, may arise due to limitations placed upon the granted powers. Also, enumerated rights may arise by a specification of rights, as in Article 1, Section 9, which provides for Congressional power to create lower courts.\textsuperscript{143} Enumerated rights set out in the amendments include the freedom of speech, religion, press,
assemblage, and petition. Specifically enumerated state rights, which are outside the scope of the Ninth Amendment, include freedom from bills of attainder, ex post facto laws, and laws impairing the obligation of contract.

The Ninth Amendment was drafted to negate the inference that the affirmance of certain rights might disparage others. Instead, the Ninth Amendment reserves what are known as "natural rights" to the people. The phrase "natural rights" has many definitions, but one view is that natural law refers to those rights that grow out of the nature of man and depend upon personality, as distinguished from those created by law. A second definition is that natural rights are those that are innate and come from the very laws of nature, such as life and liberty. Transsexuals could use the Ninth Amendment as authority for the argument that the amendment of birth certificates and the ability to get married are natural rights that they retain. Support for this view potentially arises from a combination of the opinions of two United States Supreme Court justices. The first is Justice Goldberg's concurrence in Griswold v. Connecticut, which elaborated upon the role of the Ninth Amendment in reinforcing the development of unenumerated rights in the Due Process Clauses of the Fifth and Fourteenth Amendments. The second is from the dissent articulated by Justice Blackmun in Bowers v. Hardwick, in which he disagreed with the majority's refusal to consider the Ninth Amendment as a source of homosexual civil rights.

Justice Goldberg relied upon the Ninth Amendment in his concurrence in Griswold v. Connecticut. He stated that the concept of liberty embraced the right of marital privacy even though that right was not explicitly referenced in the constitution. Goldberg concurred in the majority opinion, but he did not accept the view that due process incorporated the first eight amendments. Instead, Goldberg stated that the language and history of the Ninth Amendment embraced the right of marital privacy. He relied upon the beliefs of the framers of the Constitution that there were additional fundamental rights that existed alongside the specifically enumerated rights that should be protected from governmental infringement. He recognized that the Ninth Amendment was the work of James Madison, who drafted the amendment because he was afraid that since some rights were specifically enumerated in the constitution, those not singled out would by implication be insecure and assigned into the hands of the

144. U.S. Const. amend. I. Kelsey, supra note 143, at 95.
146. Kelsey, supra note 143, at 97.
147. Id.
148. See infra case presentation in Part IV.B.2.
government. Further, the inclusion of the Ninth Amendment was evidence that the first eight amendments did not exhaust all of the rights guaranteed to the people by the Constitution. Goldberg’s view was that the Ninth Amendment showed the intent of the framers to protect other fundamental personal rights even though they were not specifically listed in the first eight constitutional amendments. He argued that there was no need to resort to the Fourteenth Amendment Due Process Clause when the rights at issue were so inherent to the people that they were also automatically retained by the people, even in the absence of an explicit law that so provided.

Similarly, Justice Blackmun’s dissent in Bowers v. Hardwick was based on the Ninth Amendment. Transsexuals could use a combination of his dissent in Bowers with Goldberg’s concurrence in Griswold to obtain the same civil rights that European transsexuals enjoy. Blackmun claimed that the real issue in the case concerned the interest that individuals have in controlling the intimate nature of their relationships with others, a concern that was at the very heart of privacy. He began his dissent by noting that Bowers really was not about the right to engage in homosexual sodomy; rather, it was about the right most valued by civilized men—the right to be let alone. Further, he stated that the legislature’s moral judgments as expressed in the sodomy statute should not be determinative of whether the statute was an unconstitutional restriction on the right of privacy. Blackmun reasoned that individuals define themselves in significant ways through their sexual relationships and that in a nation as diverse as the United States, there could be many “right” ways of conducting those relationships. Further, he felt that much of the richness of a relationship comes from the individual right to choose its form and nature. Simply put, he stated that the Constitution gives to individuals the right to choose how to conduct their lives and that necessarily means that each person will make a different choice. Ultimately, he felt that the Georgia legislature could not deny to individuals the right to decide for themselves whether to engage in particular forms of private, consensual activity because that denial infringed their right of privacy.

But, Blackmun did not limit his dissent to his disagreement with the Court’s treatment of the plaintiff’s privacy argument. More importantly, he may have indirectly invited transsexuals to argue the

149. 381 U.S. at 489–90, 85 S. Ct. at 1684.
150. Id. at 492, 85 S. Ct. at 1686.
152. Id. at 199, 106 S. Ct. at 2848.
153. Id. at 205, 106 S. Ct. at 2851.
154. Id. at 199, 106 S. Ct. at 2848.
Ninth Amendment as a source of rights. After the Bowers majority noted that the sodomy law would not be invalidated under the Due Process Clause, it stated that it would not consider the Ninth Amendment argument because the plaintiff did not raise it in an attempt to defend the appellate court’s ruling. Blackmun disagreed with the Court’s refusal to consider whether the sodomy statute violated the Ninth Amendment. He stated that, even though the plaintiff had not used the Ninth Amendment as a defense on appeal, the plaintiff’s original petition for relief had invoked the Ninth Amendment. Blackmun also stressed that the Court was bound to affirm the appellate court’s ruling if there were any basis upon which the plaintiff was entitled to relief, not just those bases specifically raised by the plaintiff. He reasoned that, even though the plaintiff did not advance claims directly based on the Ninth Amendment, his complaint still should not have been dismissed if the provision could have entitled him to relief.

Goldberg’s concurrence in Griswold promotes the idea that the first eight amendments do not represent the only rights guaranteed to the people; rather, the Ninth Amendment serves as a protection for fundamental unenumerated rights as well, such as the right of married couples to use contraception. Blackmun’s dissent in Bowers advocates the idea that the Court should have considered whether or not the Georgia sodomy law was unconstitutional because it restricted a fundamental right to engage in private consensual activity retained by the people under the Ninth Amendment. Now that the issue of transsexual civil rights is timely due to Goodwin, transsexuals who wish to argue that laws that restrict their ability to amend their birth certificates or their ability to get married could claim that they are suffering a violation of their Ninth Amendment rights. This argument is especially relevant because there is no explicit or implicit constitutional grant given to the federal or state governments that allows them to deny these rights to transsexuals. Blackmun’s dissent seems to have opened the court room door just enough to suggest the possibility that at least one member of a very powerful tribunal would have been willing to entertain a Ninth Amendment argument in support of transsexual civil rights.

Goldberg’s concurrence in Griswold supports the argument that the Ninth Amendment serves as a repository of unenumerated rights, such as the right to legally bring one’s actual biological gender into conformity with one’s psychological gender identity on a birth certificate. Transsexuals could argue that the ability to change the gender on a birth certificate is a retained right because it deals directly

155. Id. at 201, 106 S. Ct. at 2849.
156. 478 U.S. at 202, 106 S. Ct. at 2849–50.
with the uniquely personal choice that an individual has to decide exactly who he is and how he wishes to be known. Further, Blackmun's dissent in *Bowers* suggests that the Ninth Amendment could be used as a basis for the argument that some individually private activity is constitutionally protected. He believed that the Constitution guarantees certain rights to all individuals and that each person should be free to determine how she will live her life. Transsexuals could argue that they should not be prevented from having their choice of gender legally recognized; instead, they should be able to express their fundamental selves by having their identities accurately reflected on their official birth records as part of their Ninth Amendment rights.

Once again basing an argument in part on Goldberg's concurrence in *Griswold*, transsexuals who litigate in United States courts in support of civil rights could also argue that the Ninth Amendment protects the ability to get married as another unenumerated right. And, citing Blackmun's dissent in *Bowers*, transsexuals could further assert that just as spouses of the opposite biological sex such as those in *Griswold* and as unmarried couples such as those in *Eisenstadt* have the right to be let alone, so does a transsexual couple that desires to be married. Transsexuals could argue that since all individuals are different, each individual will necessarily choose to engage in a different type of relationship. Some transsexuals desire the same rights as non-transsexuals, an example of which is the desire to find a partner in life to share in a meaningful relationship. As Blackmun suggested, intimate relationships are innate to individuals and are not really subject to state or federal governance. A law that effectively prohibits the formation of such relationships infringes upon a transsexual's right to engage in the basic alliances that biologically opposite sex couples may enjoy. In conclusion, a transsexual could argue that the ability to get married is grounded in a Ninth Amendment retained right to form an individual, personal, private bond. Similarly, transsexuals could assert that the ability to change their birth-certificate genders comprises the retained right to have their chosen true identities legally recognized. Thus, neither the right to change a birth certificate nor the right to get married should be restricted; rather, those rights are retained under the Ninth Amendment, and the decision to make them should be left up to the discretion of the individual.

V. CONCLUSION: BEAUTY IS IN THE EYE OF THE BEHOLDER...

*Goodwin v. United Kingdom* was decided by the European Court of Human Rights in July 2002, and it introduced a reinterpretation of the legal rights guaranteed to transsexuals by Articles 8 and 12 of the
European Convention for the Protection of Human Rights and Fundamental Freedoms. Those articles guarantee the right of respect for private life and the right of marriage, respectively. The European Court began deciding the extent of transsexual civil rights in cases such as Rees and Cossey but it did not find violations of Articles 8 and 12. In Goodwin v. United Kingdom, however, the European Court overturned the previous cases and held that Articles 8 and 12 allowed Christine Goodwin the right to change her birth certificate to reflect her postoperative status and the right to get legally married. In doing so, it drastically reinterpreted the United Kingdom’s obligations under Articles 8 and 12 and it reversed all of the prior reasoning that had prevented transsexuals from getting civil rights in the past.

Goodwin will definitely have an effect on United Kingdom administrative practices. The United Kingdom must provide ways to allow for birth registration amendment and marriage between transsexuals to comply with the Goodwin ruling. Goodwin could also have an effect on United States courts. Domestic court systems may experience a rise in sexual minority litigation as a result of the attention that Goodwin has received. If so, they should consider becoming more judicially globalized in their reasoning when deciding those cases and the civil rights at issue. The European Court of Human Rights would be an apt teacher in this area of the law because it is a tribunal dedicated to hearing human rights issues. Further, some influential United States judges, including United States Supreme Court justices, seem willing to lend an ear to foreign court opinions in an effort to learn from the experience and approaches those courts take in resolving disputes. In the spirit of judicial comity, domestic court systems should look upon Goodwin as persuasive authority when dealing with similar cases that arise in the states.

Finally, Goodwin could also be used by United States transsexuals seeking the same rights that United Kingdom transsexuals now have. Goodwin has brought the scope of transsexual civil rights into the public eye again, so there could be a change in thinking on the issue lurking on the horizon. The Massachusetts Supreme Court’s decision in Goodridge suggests that transsexuals could seek valid legal marriages by relying upon state court guarantees of equal protection in some cases. Similarly, the United States Supreme Court’s decision in Lawrence suggests that transsexuals could use the right to privacy under the Fourteenth Amendment as a justification for the right to marry. Alternatively, Justice Goldberg’s concurrence in Griswold and Justice Blackmun’s dissent in Bowers suggests a third theory for transsexuals to consider when bringing their claims of rights. The Ninth Amendment was included in the United States Constitution to
reserve to the people all rights not explicitly or implicitly granted to the government. Transsexuals could argue that the right to change their gender on their birth certificates and the right to get married are natural rights that are retained by them under the Ninth Amendment. Transsexuals may be more successful in using a Ninth Amendment argument to persuade the courts that their natural rights are being violated by statutes that will not allow them to change their official gender so as to recognize their true identity or by statutes that deny to them the ability to engage in the fundamental act of marriage.

Unlike their international brethren, domestic courts have been unwilling to extend civil rights recognition to transsexuals. *Goodwin* may usher in a new era of change, for the ugly duckling has been made a beautiful swan in Europe. Will United States courts continue to see an ugly duckling or a newly emerged swan? The answer to that depends upon whether domestic courts are ready to judicially recognize the beauty of laws that equally protect and indiscriminately apply to all individuals, regardless of their facade.

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