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COMMENT

TRANSSEXUALISM, SEX REASSIGNMENT SURGERY, AND THE LAW

Transsexualism,\(^1\) hermaphroditism,\(^2\) and transvestism\(^3\) have oc-

\(^1\) A transsexual is an individual anatomically of one sex who firmly believes he belongs
to the other sex. This belief is so strong that the transsexual is obsessed with the desire
to have his body, appearance, and social status altered to conform to that of his “rightful”
gender. TRANSSEXUALISM AND SEX REASSIGNMENT 487 (R. Green & J. Money eds. 1969) (Glos-
sary) [hereinafter cited as GREEN & MONEY]; Bowman & Engle, Sex Offenses: The Medical
[hereinafter cited as Bowman & Engle].

Preference for the social role of the biologically opposite sex begins early in life for
the transsexual. Two-thirds of a group of transsexuals studied felt as though they belonged
to the other sex by the age of five. This was confirmed by independent interviews with
their parents. Pauly, The Current Status of the Change of Sex Operation, 147 J. NERVOUS
& MENTAL DISEASE 460, 463 (1968). The cross-gender identification strengthens with time,
and after puberty the members of this group unanimously believed that they belonged
to the other sex, wanted to be accepted by society as members of the other sex, and desper-
ately desired a sex change operation. Id. The strength of this desire was frequently mani-
fested by acts of genital self-mutilation.

Transsexuals are not homosexual. They consider themselves to be members of the
opposite sex cursed with the wrong sexual apparatus. They desire the removal of this
apparatus and further surgical assistance in order that they may enter into normal,
heterosexual relationships. On the contrary, a homosexual enjoys and uses his genitalia
with members of his own anatomical sex. Id. In addition, the transsexual syndrome begins
long before the individual is aware of what homosexuality or genital sexuality is. Id.

Medical science has not found any organic cause or cure (other than sex reassignment
surgery and hormone therapy) for transsexualism (id. at 462) nor has psychotherapy been
successful in altering the transsexual's identification with the other sex or his desire for
surgical change. “Numerous attempts at therapy, including intensive psychoanalysis, hyp-
nosis, aversion deconditioning, chemotherapy, and behavior therapy have been generally
unsuccessful . . . .” Id. at 465 (footnotes omitted). See Gelder & Marks, Aversion Treatment
in Transvestism and Transsexualism, in GREEN & MONEY 383, 383-413.

\(^2\) Hermaphroditism, sometimes called intersex, is “a congenital condition of ambiguity
of the reproductive structures so that the sex of the individual is not clearly defined as
exclusively male or exclusively female . . . .” GREEN & MONEY 480 (Glossary). See Bowman
& Engle 294-95. There are other sexual anomalies that are also generally classified as cases
of intersex: pseudohermaphroditism (a condition in which the individual has the external
genitals and physical characteristics of one sex but the gonads of the other—termed testicu-
lar feminization when it occurs in a male); Klinefelter's syndrome (a sterile male having
47 rather than the usual 46 chromosomes—an XXX chromosome pattern instead of the
usual XY male pattern); Turner's syndrome (a sterile female lacking a chromosome—
exhibiting an XO pattern as opposed to the usual female XX chromosome pattern);
and the metafemale (a female having an extra X chromosome—an XXX pattern). GREEN &
MONEY 485 (Glossary); Bowman & Engle 295-99.

\(^3\) Transvestism is the act of dressing in the clothing of the opposite sex. It is usually
attributed to a psychological compulsion and is often practiced for the individual's general
sexual stimulation or to assist in the achievement of orgasm. GREEN & MONEY 487 (Glossary);
Bowman & Engle 305.
curred in all societies since antiquity. Perhaps in response to these infrequent aberrations, or possibly as an instinctive social ordering, most cultures have regulated social conduct in such a way as to protect the supposedly unique role of each of the “two” sexes. Thus an early Judaic code of sexual morality forbade the wearing of clothing of the opposite sex. Joan of Arc was adjudged a heretic in part because her transvestism was found to violate spiritual law.

The cultural, religious, and moral assumption that man can be classified into two clearly identifiable and distinct sexes quite naturally became embedded in the law despite its inaccuracy. Recent medical advances into the physiological and psychological nature of Transsexuals dress in the clothing of the anatomically opposite sex and in this limited sense are transvestites. However, cross-dressing is designed to put the transsexual at ease, not for sexual arousal, and should not be classified as transvestism. Pauly, supra note 1, at 463. Many courts have used the two terms interchangeably, and the precise condition under discussion appears only from an examination of the facts.

4 See E. de Savitsch, Homosexuality, Transvestism and Change of Sex 17-27 (1958); Green, Mythological, Historical, and Cross-Cultural Aspects of Transsexualism, in Green & Money 13, 15-22.

5 Exact figures regarding the incidence of transsexualism are lacking. Dr. Harry Benjamin, a noted authority in this field, estimates there may be as many as 10,000 transsexuals in the United States. Benjamin, Introduction to Green & Money 1, 9-10. Another expert has estimated the incidence to be 1:100,000 for males, 1:400,000 for females. Pauly, supra note 1, at 462. Dr. Jan Wallinder estimated the ratio in Sweden to be 1:37,000 for males and 1:103,000 for females. Pauly, Adult Manifestations of Male Transsexualism, in Green & Money 37, 57. Dr. Leo Wollman set the level at 100,000 cases of transsexualism including the more common transvestism. Letter from Dr. Leo Wollman to the Cornell Law Review, Jan. 26, 1971.

6 The authorities are in dispute as to the number of surgical reassignments that have been performed. Compare Note, Sex-Change Operations and the Law, 87 S. Am. L.J. 239, 241 (1970) (1,000 operations), with N.Y. Times, Nov. 21, 1966, at 32, col. 1 (2,000 operations). The Gender Identity Clinic of the Johns Hopkins University Hospital has received over 2,000 requests for sex change surgery. Pauly, supra at 56.


8 Bowman & Engle, supra note 6, at 584.

9 Id.
human sexuality, however, challenge this legal assumption and raise important questions in both civil and criminal arenas.

I

What Is Sex?

It is probably impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities, not medical niceties, and most people are clearly male or clearly female. In light of present medical knowledge, however, it is improper for the law to continue to rely on outward appearances for the determination of an individual's sex, considering that determination's important legal implications. A careful analysis must be made of the parameters of human sexuality. The object of such an analysis would be to arrive at an administrable and equitable legal standard by which to test a person's sex while preserving the traditional sexual dichotomy.

The medical profession considers the following factors relevant:

1. sex chromosome constitution;
2. gonadal sex;
3. sex hormone pattern;
4. internal sex organs other than the gonads (e.g., a uterus or sperm ducts);
5. genitalia;
6. secondary sex characteristics (e.g., facial hair);
7. sex of rearing (usually the sex assigned at birth); and
8. assumed sex role, or psychological sex.

Any or all of these criteria could be used to test the sex of the average person. Naturally they would all be in accord. A true transsexual, however, would register one sex on
all scales but the psychological (and possibly the sex of rearing). A hermaphrodite would present an ambiguous pattern of sexual identity under these factors.

Which factor or combination of factors should be legally controlling? Clearly all cannot be required to coincide, as hermaphrodites would necessarily remain unclassified. A simple majority of agreeing factors is an inaccurate test since it incorrectly assumes each factor is of equal significance. Unfortunately this is the law as applied to hermaphrodites, although the rule has been subjected to severe criticism.

Likewise, a chromosomal test would fail as applied to those afflicted, for example, with Klinefelter's syndrome. In addition,

[t]he "chromosomal sex" is merely of abstract, scientific and theoretical interest in the case of transsexuals. Nobody can see an XX or XY constellation.

To insist that a person must live and be legally classified in accordance with his or her chromosomal sex violates common sense as well as humanity. It reduces science to a mere technicality and an absurd one at that.

With the same justification, one may insist that Rembrandt's works are not paintings, but pieces of canvas covered with paint. Accurate but asinine.

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16 It is not unknown for parents eagerly desiring a boy to raise a girl in the opposite sex and vice versa. Such behavior could naturally lead to severe psychological dislocation in the child's later life.

17 So too would pseudohermaphrodites and those suffering Klinefelter's, Turner's, or the metafemale syndromes. See note 2 supra.

Dr. Moore has "plotted" some of these sexual abnormalities in a useful and convenient fashion. Moore I, at 111-13.


19 The rule was formulated in a less sophisticated time and is attributed to Lord Coke. Taylor's Principles and Practice of Medical Jurisprudence 273 (3d ed. T. Stevenson 1883); Eberle, Rechtsfragen bei Transsexualismus, 91 Deutsche Medizinische Wochenschrift 1988 (1966); Stutte, supra note 18.

This issue has been litigated in modern times in an unreported case in Scotland. Meyers, Problems of Sex Determination and Alteration, 36 MEDICO-LEGAL J. 174, 177-78 (1968) [hereinafter cited as Meyers]. Medical evidence indicated the individual had the female chromosome pattern (XX), both testicular and ovarian tissue, functional male genitalia (although predominantly female in appearance), and generally a male psychological inclination. Id. at 177. The judge ruled that the male characteristics prevailed and adjudged the individual a legal male. Id. at 178. The judge rejected the suggestion that the hermaphrodite be allowed to choose the sex he preferred. Id. at 177.

20 Stutte, supra note 18. Even in 1883 it was recognized that "it must not be supposed that the decision is so easy as Coke's doctrine would imply." Taylor's Principles and Practice of Medical Jurisprudence, supra note 19.

21 See note 2 supra.

A gonadal standard is inadequate because it leaves the true hermaphrodite, who has the gonads of both sexes, unclassified. The same would be true of the person who suffers gonadal agenesis, lacking the gonads of either sex. Like the chromosomal standard, the character of the gonads is largely irrelevant as a determinant of social behavior. Similar objections apply to the use of internal sex organs other than the gonads as a single determinant.

Sexual hormone balance is not a reliable indicator of sex. It can be varied by the administration of drugs and is drastically affected by castration. Both procedures are inherent in the surgical sex reassignment process. A change in hormonal levels also produces gradual changes in secondary sex characteristics.

The perfunctory standard used for legal classification is the genital sex of the individual. Doctors examine a newborn's external genitalia and make the fateful determination that appears on official birth records. Nevertheless a genital criterion is inadequate. Genital abnormalities are relatively frequent and occasionally no normal genitalia are present.

The sex of rearing, often but not always determined by the sex declared at birth based on an examination of the genitalia, is a more useful criterion. It conforms to social reality in that the individual has been trained in one sex and hopefully has adapted to that sex role vis-à-vis society. Likewise, society has accepted the individual in that sex role. The sex of rearing might be very relevant in the de-

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23 Bartholomew 88.
24 Id.
25 Holloway, Transsexuals—Their Legal Sex, 40 U. COLO. L. REV. 282, 286 (1968) [hereinafter cited as Holloway].

One case has arisen regarding the possible liability of a doctor or hospital for an incorrect determination of sex at birth. Kaufman v. Israel Zion Hosp., 183 Misc. 714, 51 N.Y.S.2d 412 (Sup. Ct. 1944). The physician in Kaufman incorrectly informed the parents of a newborn infant that their child was a female. Several days later the parents were informed of the error. The parents sued for the mental anguish they suffered due to this misinformation and because they felt the child given to them was somehow not really theirs. Justice Daly, following a traditional approach, ruled there was no cause of action for negligently induced mental suffering in the absence of accompanying physical injury. Id. at 715, 51 N.Y.S.2d at 413.

Although the rule stated in Kaufman is still the law, there is a trend toward allowing recovery at least where there is clear and convincing proof of genuine mental suffering. See W. Prosser, HANDBOOK OF THE LAW OF TORTS § 55 (3d ed. 1964). Because of the damaging psychological effect an incorrect diagnosis of sex could have on a child, assuming the error remains undiscovered for a long period of time, the law may impose liability in cases such as Kaufman.

26 Bartholomew 88.
27 See note 16 supra.
28 Holloway 286.
termination of the sex of a hermaphrodite, simply because his biological sex ambiguity could be resolved by his development and social adjustment in one sex. But the sex of rearing fails completely in the case of transsexuals, most of whom are reared in their anatomical sex.

A requirement that all the parameters of sex agree is unrealistic and the "majority" rule is unsound in theory. Any single criterion of sex fails either for incompleteness or because it does not provide a socially useful standard—or both. There is an additional reason for legal rejection of technical criteria.

The nature of a lawyer's training . . . renders him one of the least probable people to be of any assistance whatever in matters which are properly the concern of specialist medical and scientific study. This . . . is the more so when they concern complex personality and emotional problems, and perhaps physical disorders. The lawyer is educated to a strictly deterministic concept of human behaviour . . . . You will often see the spectacle of an uninformed tribunal attempting to arbitrate on the accuracy of specialist evidence.

Courts simply are not qualified to weigh complex, confusing, and possibly contradictory medical data. Furthermore a decision based on technical information incorrectly assessed runs the risk of "wreck[ing] everything that a doctor is trying to do for his patient."

The remaining determinant of sex considered medically relevant is the individual's assumed sex role or psychological sex. A court is

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29 Eberle, supra note 19, at 1989.
30 See notes 15-17 and accompanying text supra.
31 See notes 18-20 and accompanying text supra.
32 See text accompanying notes 20-29 supra. See also Bartholomew.

A recent work purports to establish a system for the legal determination of sex. 1 TAYLOR'S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE 119 (12th ed. K. Simpson 1965). Simpson categorizes the secondary sex characteristics as "presumptive" evidence of sex. External sexual structures such as breasts and the genitalia are said to be "highly probable evidence" of an individual's sex. Chromosomal sex and the internal sex organs are considered "certain" determinants of sex. Such a system is probably adequate in the average case or for the sexual identification of a corpse, for which it may have been intended. But as applied to the transsexual or hermaphrodite, Simpson's system is clearly inadequate. See notes 21-29 and accompanying text supra.

34 Id.
35 The significance to be given to psychological factors in determining sex is still being debated in medical circles. However, it has long been considered to be a factor in the sex determination process.

The existence of persons who have this distorted subjective perception of their sexual identity [transsexuals] offers an opportunity to study the whole problem of how human beings normally get their sense of being a male or a female.
likely to shy away from such a standard because it is necessarily subjective. Still, the psychological sex of an individual should be the single most important standard used to judge his legal sex.38

The law is concerned with man's relations with other men and with society as a whole. Because society considers them crucial, factors other than a person's psychological sex cannot be ignored. In fact, they must be held to be controlling if overwhelmingly contrary to the assumed sex role. Thus, a preoperative transsexual would have to be classified according to his anatomical sex. Society would consider a fully anatomical male to be male regardless of a convincing feminine appearance or the individual's inner beliefs. Society has a rightful, dominant interest in seeing that the female impersonator is legally considered just that—regardless of motive. The dangers inherent in

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This sense of being either male or female is not a simple function of some biological, endocrine, or other factor, but is, on the contrary, a complex psychobiological product.

Marsh & Worden, Psychological Factors in Men Seeking Sex Transformation, 157 J.A.M.A. 1292 (1955) (emphasis added). See also Bartholomew; Moore I; Moore II. That it "is the key to the transsexual theory . . . is partly but not fully accepted by the medical profession at the present time; it should be fully accepted within the next five years." Letter from Dr. Donald Laub, supra note 14. "There seems to be a growing body of opinion that a more important criterion is psychological orientation, especially where this is the dominant factor." Strauss, Transsexualism and the Law, 3 Comp. & Int'l L.J.S. Africa 948, 957 (1970) [hereinafter cited as Strauss].

It has been assumed that the legal sexual dichotomy should be preserved. See text accompanying note 11 supra. Implicit in this is the further assumption that once sex is legally determined for one purpose, that determination is controlling for all purposes. Respectable authority exists for a contrary, ad hoc, functional approach.

It is clear . . . that sexual differentiation is a relative rather than an absolute matter and as any classification of mankind, for legal purposes, into but two sexual categories must, therefore, be a purely arbitrary classification it seems to follow that any attempt to define sex for legal purposes must take into account the specific purpose for which the classification is required, for it does not follow that what is a suitable criterion for one purpose will necessarily be suitable for another purpose.

Bartholomew 97.

Indeed we would go so far as to claim that there is no such thing as "legal sex;" for legal purposes sex can only be defined in relation to each of the problems in which sexual differentiation becomes relevant—it cannot be defined in vacuo.


Such an ad hoc approach is untenable. First, it is illogical, although logic should be the servant and not the master of the law. Of far greater importance is the detrimental effect such schizophrenic legal treatment would have on the stability of already troubled individuals such as transsexuals. How could any individual hope to find a meaningful, well-adjusted existence if his sexual status were at the mercy of conflicting legal determinations at every turn? Consistent legal recognition of sex is imperative in order to facilitate medical treatment of transsexuals. See note 242 and accompanying text infra.
having a procreatively functional male classified as a female are apparent.

This is not the case after sex reassignment\textsuperscript{37} surgery has been performed. The individual\textsuperscript{38} procreatively is no longer of his original sex; he is sterile. Functionally he is a member of the "new" sex, capable of coition and often of achieving orgasm.\textsuperscript{39} Likewise, his secondary sex characteristics are those of the "new" sex. His anatomy now conforms to his psychological self-image; only by medical examination or chromosome tests may his "original" sex be determined.

The psychological test is appealing because it is at once practical, realistic, and humane. In cases of doubtful biological sex identity such as hermaphroditism, the test can be used to resolve the ambiguity. The decision arrived at by the patient,\textsuperscript{40} his doctor, family, and friends as to which sex the hermaphrodite is better suited should be accepted and given legal effect by the courts. For transsexuals a psychological test legally recognizes what the individual has thought himself to be all along, a conception to which his anatomy now conforms. The requirement of completed reassignment surgery protects the public against pos-

\textsuperscript{37} The term "reassignment" is technically preferable to "conversion" or "change." Psychologically, reassignment surgery does not alter a transsexual's sex. Biologically his chromosomal sex cannot be changed. Some doctors, opting for a biological definition of sex, insist that postoperative transsexuals "will remain castrated males [or females] and they will not be made into [biological] women [or men]." J. Randell, Indications for Sex Reassignment Surgery, July 26, 1969 (unpublished paper presented at the First International Symposium on Gender Identity, London, on file at the Cornell Law Review).

The surgical operation in the case of a male to female transsexual involves the removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery. It is supplemented by hormone treatments that facilitate the change in secondary sex characteristics. See generally Jones, Operative Treatment of the Male Transsexual, in GREEN & MONEY 313, 313-22; Hoopes, Operative Treatment of the Female Transsexual, in GREEN & MONEY 335, 335-52. For a discussion of preoperative procedures, see text accompanying notes 51-61 infra.

\textsuperscript{38} For convenience most of this discussion will deal with male to female surgery because it is more frequently performed than the female to male reassignment. The medical terminology favors calling a male to female patient a male transsexual because of his origin, and a female to male patient a female transsexual.

\textsuperscript{39} W. Masters & V. Johnson, Human Sexual Response 101-10 (1966). The artificial penis created for a female transsexual is generally not sexually operative. See generally Hoopes, supra note 37, at 341-42; Pauly, supra note 1, at 465.

\textsuperscript{40} This raises the interesting problem of the age at which a hermaphrodite should be allowed to select his own sex. Stutte notes that German law allows a child whose parents belong to different religions to choose the faith he will follow at the age of 12. Stutte, supra note 18, at 243. Since the condition of many hermaphrodites is discovered at puberty, when as "females" they fail to menstruate or as "males" they commence the female cycle, it is reasonable that the age of 12 or 13 could be determinative at least where competent medical opinion concurs in the adolescent's choice. In such a case court approval might be sought before sex clarification surgery is undertaken in order to protect both the surgeon and the interests of the child.
sible fraud and acknowledges that an irreversible medical decision has been made affirming the patient's psychological sex choice.

[The medical profession] should be as conservative as possible in consenting to an irrevocable “conversion operation,” but after it has been done and we are dealing with a fait accompli, it should be made as easy as possible for the patient to succeed in his or her new life. And the legal recognition of this new life is a very essential part indeed.

Common sense dictates a recognition of a psycho-social criterion for sex determination, at least after surgical intervention.

The essential thing is going to be to show the courts photographs of the individuals and say “if we are to say, for whatever reason, that this individual has to be called a male, how do we explain this?”

As judges pride themselves on common sense above all things, I do not think that it is impossible that this situation could not be provided for in terms of case law. . . . [I]f one says to the judges “well, for medical reasons we’ve got to this point, now are we to insist any longer that this individual should be registered as a male?” I think the judges would exercise common sense and say “no, there must clearly be a recorded change. . . .” [I]f the doctor certifies that this change has taken place, it should be recognized as a matter of law.

The converted transsexual should not be denied the inner tranquility and normality of existence to which all are entitled.

What does it comfort any of us to insist that an individual shall be a man, when for all the purposes of ordinary life that individual can only be, and be recognised, as a woman? What pride can there be for a law which vetoes the attitudes dictated by ordinary humanity?

As early as 1945 a Swiss court examined these issues and concluded that psychological sex had to be accepted as the legal standard when accompanied by surgical physical reassignment.

Now that the patient’s psychic association with the female sex is strongly supported by anatomical changes it appears to us impossible to go back. It would therefore be advisable to recognize le-

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41 Text accompanying notes 36-37 supra.
42 Letter from Dr. Harry Benjamin, supra note 22. See also notes 194-265 and accompanying text infra.
43 Green, supra note 33; accord, Holloway 294-95; Meyers 186.
45 In re Leber (Neuchâtel Cantonal Ct., July 2, 1945). The decision is reprinted in full in E. de Savitsch, supra note 4, at 96-107.
gally a state which the law did not prevent from coming into existence.\textsuperscript{46}

The rationale of this decision is admirable considering that little was known about transsexualism at the time.

This aversion [to male clothing, genitalia, \textit{etc.}] may even lead to self-mutilation . . . or to castration . . . . It is clear that it is not an ordinary vice which can lead to such extremes and that the subject must be driven to them by inner forces beyond his control.

This inclines us to attribute to the psychic element, in the determination of sex, an importance at least equal to that of the physical element . . . . In granting him the civic status of a woman we are satisfying the most profound desire of his being while consolidating his psychic and moral equilibrium; at the same time we are facilitating his social adaptation by permitting him to lead a more normal type of life than heretofore. The personal interest which urges him to ask for a change of civic status is thus not opposed to the interests of public order and morality—quite the contrary.\textsuperscript{47}

Ultimately it is not for the law to decide the sex of an individual.\textsuperscript{48} The law must accept medical decisions in this area and give them the legal effect that is in the best interests of the individual and society.\textsuperscript{49} What those best interests are is difficult to determine, especially since the issues are clouded by conventional morality and religion. However, provided the psychological choice of the individual is medically sound, not mere whim or caprice, and irreversible surgery has been performed, society has no right to prevent the transsexual from achieving personal happiness.

\textbf{II}

\textbf{SEX REASSIGNMENT SURGERY—SHOULD IT BE LEGAL?}

It would be incongruous for the law to accept the psychological standard of sex determination yet hold reassignment surgery to be il-

\textsuperscript{46} E. de Savitsch, \textit{supra} note 4, at 100, \textit{quoting} Dr. Riggenbach, Medical Director of the Hospital of Préfargier, Switzerland.

\textsuperscript{47} Id. at 104-05.

\textsuperscript{48} Strauss 356. \textit{See also} note 49 and accompanying text \textit{infra}.

\textsuperscript{49} Strauss 356.

Even the advocates of the functional, ad hoc, approach to the legal determination of sex agree that primary responsibility rests with the medical profession.

The law must largely depend on and follow the lead and guidance of medicine, but in the last resort the law has to be satisfied that the particular medical classification is consonant with the legal principles applicable in each case for the law cannot adopt definitions and classifications, however academically flawless, if they are out of line with the practical relationships of everyday life.

Edwards, \textit{supra} note 36, at 127. The "practical relationships of everyday life" require the psychological element of sex to be given the utmost recognition. \textit{See} text accompanying notes 38-44 \textit{supra}. 
legal. For a transsexual, legal acceptance of such a standard is meaningless without corrective surgery. Assuming that the operation should be legal, however, it is still necessary for the law carefully to regulate the circumstances under which it may be permissibly performed. This is so because the medical profession is not in complete agreement on the wisdom of reassignment surgery and because such surgery has drastic consequences on the patient's life and anatomy. The case for the operation's legality is strengthened if those performing the surgery exercise cautious self-regulation.

There are presently twelve research and treatment teams aiding the transsexual in the United States and Canada. The procedures that these medical facilities have designed for their own and their patients' protection may be relevant in the development of legal safeguards. The process adopted at the Gender Identity Clinic of the Johns Hopkins Hospital is typical. A potential patient is first extensively tested, interviewed, and evaluated by a team that includes a psychiatrist, a psychologist, and a surgeon. Only when this evaluation indicates that the individual is in all likelihood a true transsexual and is physically and mentally suited to treatment does he proceed to the second step. This involves even more extensive psychiatric testing. Hormonal therapy is undertaken to alter the secondary sex characteristics and further tests of a physiological nature are conducted. If the Clinic staff concludes that the patient is psychologically and physically ready, the sex reassignment surgery is performed. Postoperative follow-up is aimed at the total assimilation of the individual into society in the new sex role; the patient is required to live near the hospital to facilitate follow-up procedures.

At the University of Minnesota the transsexual is required to be twenty-one years of age or older (for consent purposes) and unmarried. In addition, he is required to retain independent counsel to dis-

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60 See text accompanying notes 62-67 infra.
61 Erickson Educational Foundation Newsletter, Fall 1970, at 2.
62 None of these institutions has undertaken surgery without extensive consultation with counsel. Money & Schwartz, Public Opinion and Social Issues in Transsexualism: A Case Study in Medical Sociology, in GREEN & MONEY 253, 254, 257; Letter from Dr. Donald W. Hastings, University of Minnesota Medical School, to the Cornell Law Review, Jan. 12, 1971; Letter from Dr. Jon K. Meyer, Director, Gender Identity Clinic, Johns Hopkins Hospital, to the Cornell Law Review, Dec. 18, 1970.
64 Hastings, supra note 53, at 248-49.
cuss the effect of the required consent papers and ensure that the patient is adequately informed about the surgery.\textsuperscript{55} The attorney witnesses the patient's signature to the consent form\textsuperscript{56} and stands ready to assist in postoperative legal procedures to effect a change in civil status. Johns Hopkins requires the patient to secure a consent to the operation from the next of kin. This requirement ensures against the giving of erroneous personal and social history by the prospective patient, safeguards against malpractice charges by the next of kin, and guarantees at least minimal family acceptance of the procedure, facilitating postoperative rehabilitation.\textsuperscript{57}

A most important consideration is the length of time the patient is observed prior to surgery. Dr. John Randell of the Charing Cross Hospital in London requires his patients to live in the new sex role for at least six and preferably twelve months prior to surgery.\textsuperscript{58} His reason for this is simple: he does not consider the surgery justified unless there is an "unequivocal demonstration that they are markedly better adjusted in the role they desire than the role they have left."\textsuperscript{59} The University of Minnesota likewise requires an adjustment period of at least six months.\textsuperscript{60}

The procedures followed, only summarized here, are designed to ensure (1) that the patient is a transsexual; (2) that recourse to surgery is the only beneficial treatment available; (3) that the patient is completely aware of the possibilities and limitations inherent in the surgery; (4) that he is capable of giving a valid and informed consent to the surgery; and (5) that the surgery is almost certain to improve the patient's physical and emotional condition. The entire approach is summarized by Dr. Randell: "It's up to you to prove that you are a suitable candidate for surgery."\textsuperscript{61} Only after that has been demonstrated, within the limits of medical certainty, is the operation performed. Such procedures clearly warrant judicial approval.

Despite the rigor of the preoperative procedures the medical profession as a whole does not seem to condone such surgery. In discussing the results of a study published in 1966,\textsuperscript{62} Dr. Ira Pauly stated that

\textsuperscript{55} Letter from Dr. Donald W. Hastings, supra note 52.
\textsuperscript{56} Id.
\textsuperscript{57} Money, Sex Reassignment, 9 INT'L J. PSYCHIATRY 249, 258 (1970).
\textsuperscript{58} J. Randell, supra note 37. See Hellier, The Sex Changes, San Francisco Chronicle, Jan. 17, 1971, § 2F, at 8, cols. 3-5.
\textsuperscript{59} J. Randell, supra note 37.
\textsuperscript{60} Hastings, supra note 53, at 250.
\textsuperscript{61} J. Randell, supra note 37.
\textsuperscript{62} Pauly, supra note 1, at 468-67, citing Green, MacAndrew & Stoller, Attitudes Toward Sex Transformation Procedures, 15 ARCHIVES GENERAL PSYCHIATRY 178-82 (1966).
neither a majority of the psychiatrists nor the general practitioners surveyed would approve of the operation after being presented with a case history of a transsexual. Noting that only one of every four of these physicians was of the opinion that surgery would be detrimental to the transsexual, Dr. Pauly speculated that other factors influenced the decisions. "It appears that the primary deterrent is a practical, self-protective one, wherein the physician is reluctant to jeopardize his hard-earned reputation." He justified this conclusion on the basis of the answers by these same doctors regarding a legal change of sex after surgery had been performed: seventy-five percent recommended a "legal change of sex"; eighty percent favored legal permission to be identified and marry in the new sex role; and fifty percent would even allow the converted transsexual to adopt a child. 

Pauly administered an abbreviated edition of this same questionnaire two years later and found much more favorable attitudes. He concluded that "it is . . . possible that this represents a real trend in the last few years toward more acceptance of the transsexual's problem, related to the influence of the numerous publications and presentations . . . from the institutions [performing the surgery] . . ." It would seem reasonable that the thorough pre- and postoperative procedures followed, coupled with the legitimacy of the institutions involved in sex reassignment surgery, will eventually lead to greater acceptance on the part of the medical community.

Surprisingly, clergymen have been more willing to condone sex reassignment surgery than have men of medicine. A survey of thirteen area clergymen conducted by the Baltimore Sun resulted in statements approving the surgery by all but an official of the Catholic Church who refused to comment. The Catholic Church, however, has given its approval to at least one operation on the ground that "this opera-

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63 Pauly, supra note 1, at 467.
64 Id.
65 Id. at 468. Sixty-five percent of those in Pauly's sample favored the operation under the following circumstances: (1) the transsexual requested surgery; (2) a favorable case history; (3) a psychiatrist's evaluation concluded that the transsexual was neither psychotic nor severely mentally ill; (4) the patient still desired surgery after two years of unsuccessful psychotherapy; and (5) a psychiatrist concurred that the operation was warranted. Id. at 467.
66 Id. at 468.
67 Id.; Sherwin, Legal Aspects of Male Transsexualism, in Green & Money 417, 421. It should be noted that part of the apprehension expressed by doctors may stem from the unclear legal status of the operation. Green, Attitudes Toward Transsexualism and Sex-Reassignment Procedures, in Green & Money 235, 239. See text accompanying notes 98-172 infra.
68 Green, supra note 67, at 240.
tion is necessary for the mental and emotional health of a transsexual and as such is required for him to live a normal life.”69 The Church issued a new certificate of baptism in this case.70 In addition, a Presbyterian minister has undergone the surgery and has been granted a new birth certificate in Iowa.71 Recently several Lutheran ministers in Texas agreed that the transsexual’s choice to undergo surgery is a moral one.72 Although these examples indicate a favorable religious attitude toward sex change surgery,73 religious opinion is not unanimous on the subject.74

The law cannot be guided solely by the presence or absence of stringent medical testing and clinical procedures, or even by overwhelming medical or religious approval. For example, it is extremely doubtful that a doctor should be free from criminal or civil liability for removing an individual’s healthy arm, regardless of how badly the individual wants it off or whether its removal is unobjectionable to either doctors or men of the cloth. Its removal must be shown to be of substantial therapeutic value before it should be legally allowed.75

Dr. Pauly has analyzed the postoperative results of surgery performed on 121 male transsexuals discussed in the medical literature. He concluded:

[I]t would appear that a satisfactory outcome to the sex reassignment surgery, in terms of improved social and emotional adjustment, is at least 10 times more likely than an unsatisfactory outcome. There is no claim that the transsexual is free from emotional conflict either before or after the procedure, but in the majority of instances he is markedly improved.76

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69 Confidential Correspondence from the Transsexual Involved to the Author, Dec. 28, 1970.
70 Id.
72 Letter from Dr. Deborah A. Majeau-Chargois, Director of Research, Erickson Educational Foundation, Baton Rouge, La., to the Cornell Law Review, Dec. 29, 1970.
73 A further example is the sermon-dialogue between the Rev. William Glenesk and Dr. Leo Wollman that took place during the regular worship services at the Spencer Memorial Church (Presbyterian), Brooklyn Heights, N.Y., June 21, 1970. Discussing transsexualism and reassignment surgery, Rev. Glenesk cited the Biblical reference: “Ye shall be born again.” Erickson Educational Foundation Newsletter, supra note 51, at 1.
74 A study done for the 1970 General Convention of the Episcopal Church also favorably discussed sex reassignment surgery. Id.
75 In principle it would seem as though any drastic operation of a non-therapeutic nature is unlawful, unless a legally justifiable purpose is sought to be attained by it (e.g. a cosmetic improvement which will not substantially endanger the life or health of the patient, or the removal of tissue or an organ from a healthy person for the purpose of transplantation upon a diseased person). Strauss 349.
76 Pauly, supra note 1, at 465.
Dr. Randell made similar findings with his British patients.77

[Postoperative results . . . indicate that the majority of males and females undergoing operation for sex reassignment are subjectively and objectively improved both in their adjustment to their environment and in their own feelings of well-being and satisfaction in their gender role.78

Dr. John Money of the Gender Identity Clinic at Johns Hopkins has studied twenty-four cases from his files in an effort to determine objectively the results of the operation in social terms.79 The criteria used were the patient's expressed satisfaction with the surgery, employment results, police records, psychiatric records, and sexual relationships. He found that all of the male transsexuals (seventeen) were "unequivocally sure they had done for themselves the right thing."80 Only one of the seven females was dissatisfied,81 and part of her surgery (phalloplasty82) had failed. Occupational status improved in twelve cases and remained the same in the others.83 Although six of the group had been arrested prior to conversion surgery,84 only two were rearrested.85 Dr. Money found it significant that

[No] patients acquired a police record for the first time following reassignment. The majority . . . melted into law-abiding obscurity. . . . The cost to society for policing and jailing transsexuals did not increase. . . . [T]he cost to society for policing and jailing transsexuals did not increase. . . . [T]he more likely decreased.86

None of the twenty-four studied needed psychotherapeutic help for the first time after surgery. Half of the patients had never needed or received psychiatric treatment and ten of the remaining twelve were able to discontinue therapy after the reassignment.87 The results re-

77 Randell based his conclusions on 35 cases. Randell, Preoperative and Postoperative Status of Male and Female Transsexuals, in Green & Money 355, 379.
78 Id.
80 Id. at 84.
81 Id. at 85.
82 Phalloplasty is the surgical construction of an artificial penis.
83 Money & Ehrhardt, supra note 79, at 80-81.
84 Id. at 82. The arrests stemmed from charges of cross-dressing and impersonation, soliciting, and in two cases, "robbing pickups of their wallets." Id. All those who had been arrested were males. Id. at 83.
85 Id. at 82. The two who had been charged with robbery were rearrested for soliciting. Id.
86 Id. The character of offenses for which a transsexual is likely to be arrested prior to surgery, as suggested by the list in note 84 supra, indicates that arrests after surgery should decrease because of the superior ability of the transsexual to remain undetected in the new sex role. For a discussion of transsexualism and the criminal law, see text accompanying notes 173-93 infra.
87 Money & Ehrhardt, supra note 79, at 83-84.
Regarding sexual liaisons indicated a tendency towards stability of sexual partnerships. It would be hazardous for a layman to accept these studies as conclusively establishing the therapeutic value of the operation, but the statements of these doctors, active and expert in this field, should at least place a heavy burden of proof on one who argues that the surgery is not therapeutic. Perhaps in the language of the law it could be said that these reports create a strong but rebuttable presumption that the operation is highly beneficial for the patient, and to some degree for society.

Similarly, the observance of cautious preoperative procedures creates a strong presumption that the operation was performed for a therapeutic purpose. The results of reassignment surgery are too severe and permanent to allow its unfettered use. If the surgery is legal, however, only the doctor who cannot demonstrate that his preoperative testing and evaluation measured up to the Johns Hopkins or Minnesota standards should be answerable in either criminal or civil proceedings.

The preoperative selection and testing procedures certainly conform to the highest standards of medical professional responsibility. A jurist should feel secure in the knowledge that such drastic surgery is available only to those who have been cautiously adjudged to warrant it by competent specialists. Although approval of such surgery by the medical community as a whole has not yet been firmly established, the trend of opinion is in its favor. Likewise, any moral opposition to such surgery, if such is the proper concern of the law, is undercut by instances of acceptance of reassignment operations by

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88 Id. at 84.
89 Cf. text accompanying note 33 supra.
90 See text accompanying notes 52-61 supra.
91 See text accompanying notes 52-61 supra.
92 See text accompanying notes 62-64 supra.
93 See text accompanying notes 65-67 supra.
94 Strong arguments can be made that the law should be amoral. Thus, the famous Wolfenden Committee, commenting on the role of the law regarding homosexuality and prostitution, formulated the following as its guide for legal involvement in sexual matters:

In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others . . .

. . . It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behavior, further than is necessary to carry out the purposes we have outlined.

organized religion as necessary for the health and happiness of the transsexual.\textsuperscript{95} There is every reason to believe the surgery is of substantial therapeutic value to the patient, and the elimination of his suffering and deviant behavior benefits society as well.\textsuperscript{96} Such evidence compels the conclusion that sex reassignment surgery should be legally permissible.\textsuperscript{97}

### III

**Is Sex Reassignment Surgery Legal?**

One impediment for a transsexual seeking surgery is the fear of the medical community that the operation is of dubious legality.\textsuperscript{98} Although there is some conflict among jurisdictions, this fear is not universally justified.

#### A. Argentina

This issue was presented in Argentina in the case of *Ricardo San Martin*.\textsuperscript{99} The defendant was a surgeon who operated on one Fabregas, removing his penis and testes, leaving a "pseudo-vulva." The court found that the patient was a homosexual who did not have feminine characteristics. His mental age was found to be that of a twelve-year-old and on this basis his consent to the surgery was negated.\textsuperscript{100}

\textsuperscript{95} See text accompanying notes 68-74 supra.


\textsuperscript{97} Meyers 176-77, 186; Strauss 351. But see text accompanying notes 98-105, 145-47 & 152-56 infra.

\textsuperscript{98} Doctors are equally afraid of possible civil liability for malpractice or battery. A surgeon transforming a married individual runs the risk of a suit by the patient's spouse for loss of consortium. Green, supra note 33.


\textsuperscript{100} 123 La Ley at 613. The court also negated the patient's consent because there was evidence of wrongful intent on the part of the doctor. Although Dr. San Martin alleged that he operated because of cancer of the patient's penis, it was found by the court that Fabregas had not requested a chemical examination beforehand. The doctor had not
The San Martin court adopted a chromosomal criterion for sex determination: "He was a man and would continue to be so until the day he dies. No female chromatin bodies were found in his cellular nuclei." In addition, the court suggested that sex is determined by the ability to procreate.

The action of the accused absolutely defies a truth of nature. He knew he could not change a man into a woman. However, he attempted to fool nature. However far medicine advances, it can never violate the secrets of creation (procreation and death). Such a contention, if serious, would deny either masculinity or femininity to anyone who happens to be sterile.

This decision, as it relates to the consent of a mental incompetent, is justifiable. However, the underlying moralism that pervades the opinion casts some doubt on the validity of the factual findings. The court found the doctor's actions morally repugnant.

The nature of the crime must also be considered because the act per se constitutes a grievous assault on the man in his capacity as a man, and in more general terms, an absolute disregard for the social [natural] law—the one above all the norms of [positive] law and morality—: the preservation of the species.

Mankind would subsist although every man in this world were to have his arms cut off, were to lose his property, his honor and his fatherland. However, if an act such as this were allowed to go unpunished—if it were not severely punished—a gap would be opened into which the whole human race could fall.

Nevertheless the conviction was affirmed by the appellate court. This court also adopted a chromosomal test for sex, although it discussed the patient's psychological needs and found they did not justify such surgery.

Fábregas could not be somatically changed into a woman; the difference between the body and mind could not be remedied by these means. Although it could be held that if it were psychologically possible to give relief to the anguish of Fábregas, such a limited and incomplete solution could not justify the irremediable corporal harm caused, apart from the moral and social implications.

preserved the allegedly diseased penis nor had he prescribed postoperative treatment. This, coupled with the plastic creation of a vagina, indicated the surgery had not been performed because of cancer. Id. at 612.

101 Id.
102 Id. at 613.
103 Id.
104 Id.
105 Id.
The high court seemed to rest its decision regarding consent on sexual grounds rather than the low mental age of the patient.

[The consent was invalidated by the mental incompetence of the victim whose sexual craving distorted the real scope and significance of the operation, even supposing the best results.]

Three years later the case of Francisco Defazio came before the Argentine court. Dr. Defazio had been charged with three counts of aggravated assault stemming from sex change surgery. The first patient, one M. Vega, was classified a pseudohermaphrodite. One of his testes was totally atrophied and the other partially. The forensic physicians testified that this had resulted from deliberate chemical castration brought on by the prolonged administration of female hormones. Chromosomally and genitally Vega was a male, but he had a female psyche and a feminine hormonal balance. The court, noting that no useful organs were removed and that the operation was not injurious to the patient, held that the surgery was legal since it was intended to adapt the patient to his psychological sex.

The second charge was based on surgery performed on L. Vega, the first patient’s brother. L. Vega was chromosomally male and had normal external male genitalia, although there was some evidence of deterioration. Dr. Defazio contended that there was ovotestis in the patient and that he should be classed as a case of intersex. Since L. Vega’s behavior was that of a female, as were his secondary sex characteristics, it was argued that the operation merely oriented him “biopsychosexo-socially.”

P. Rojo, the third patient, had decidedly feminine secondary sex characteristics and had shown signs of femininity since childhood.

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106 Id. (emphasis added).
108 138 La Ley at 606. As is common in these cases this is probably a misnomer. The reader should compare the definition of pseudohermaphrodite, supra note 2, with the medical evidence presented regarding M. Vega’s physique.
109 138 La Ley at 607. It was not shown that Dr. Defazio had been connected with the administration of these hormones. Id.
110 Id. at 606.
111 Id. This could have been caused by the administration of female hormones.
112 Id. at 607.
113 Id. at 608. This could have been due to the administration of estrogen.
114 Ovotestis is an “abnormally developed sex gland of which the cell structure partially resembles an ovary and partially a testis.” Green & Money 483 (Glossary).
115 See note 2 supra.
116 138 La Ley at 608.
117 Id. at 609.
Hormone tests indicated elements of both sexes, but Rojo did have external male genitalia, normal in appearance. During surgery Dr. Defazio's diagnosis of hermaphroditism was confirmed when he found both a testicular formation and an ovary present.

The appellate court reversed the convictions in both the Rojo and L. Vega cases. There had been no proof of negligence (culpa) nor any showing of an intention to cause bodily harm (dolus). Even if it were assumed that the doctor's decision to operate was wrong, he could not be held criminally liable for an error made after careful study and diagnosis, provided he honestly felt the surgery was warranted. The court was sensitive to the difficult medical considerations involved in these cases and refused to convict where there was conflicting medical opinion. Judge Esteves, concurring, stated that a court should consider recent medical developments regarding intersexuals and noted that the influence of both sexes in every individual is a biological fact.

Of course Defazio does not overrule San Martin if that case is considered to hold only that informed consent from a mentally competent adult is a prerequisite to sex conversion surgery. San Martin, however, seems to go far beyond such a narrow ruling. It is possible that the courts of Argentina have adopted a distinction between surgery upon hermaphrodites that "clarifies" their sex and reassignment surgery for transsexuals that "contradicts" their anatomical sex.

Some commentators suggest that a distinction should be drawn between the hermaphrodite or intersex who is in need of anatomical cure (a change to match genetic sex) and the transvestite and other such sex deviates who presumably are anatomically normal, but in need of psychological cure to bring their mental state into harmony with their physique (a "cosmetic" change to satisfy psyche). Under such a classification, the transsexual would be in the latter class. The proponents of such a distinction suggest surgery as proper in the first instance only to repair or change

118 Id. There was evidence of ovotestis as well.
119 Id.
120 Id. at 605.
121 Id. at 610.
122 Id.
123 Id.
124 Id. at 611-12.
125 See text accompanying notes 99-105 supra.
126 At least one member of the Argentinian court, Judge Esteves, apparently would not make such a differentiation. He mentioned, with favor, the Belgian case of In re Fardeau, which approved surgery upon a transsexual. 138 La Ley at 613. This case is discussed in the text accompanying notes 131-36 infra.
the individual's sex organs for his benefit and so as to achieve his "rightful" sex.

The motivation for drawing such a distinction undoubtedly stems from the belief that a person's anatomy may be altered surgically, where it includes contradictory sexual elements, to align it with "proper," genetic or chromosomal sex, but not where the psychosexual orientation of the individual—not his anatomy—is the only element inconsistent with genetic sex. The assumption behind this distinction may be that all persons are immutably either male or female (though in weaker or stronger degree) and while this fact may be "clarified" by surgery (intersexuality), it should not and cannot be "rebutted" by surgery (transsexuality).127

The validity and usefulness of this distinction, however, are open to question. Once again the issue is what determines a person's "rightful" sex. If physical incongruities such as those present in a hermaphrodite are sufficient to justify corrective surgery, so too should the psychological incongruity of a transsexual, provided the doctor has carefully determined in both cases that surgery is needed and likely to benefit the patient. The presence of physical abnormalities does offer the law an ascertainable guide for determining when the surgery may be performed. But this does not preclude surgery based on psychological grounds; rather, it merely places a greater burden on the doctor to show that the psychological evidence was decisive.128 Even in the case of a hermaphrodite, the surgery will not necessarily align the patient's psyche with his chromosomal or genital sex.129 The Argentinian court approved the operations performed on the Vega brothers in spite of their chromosomal maleness. Of course, the court noted that no useful organs had been removed in these operations. But from a pragmatic viewpoint, a transsexual's genitals are not useful because they are not of the sex with which he identifies. He wishes to exchange sexual apparatus useless to him for artificial genitalia that will be useful in his new sex role.130 A distinction between surgery justified by physical abnormality and surgery justified by psycho-sexual conflict should not be drawn.

A conclusive statement of Argentinian law on this issue must await further clarification. It is clear that the surgery is permissible if physi-

127 Meyers 184-85 (footnotes omitted). See also Bartholomew 111-12.

128 See generally text accompanying notes 35-44 & 51-61 supra.

129 In Germany, where surgery to reassign a transsexual is illegal, the operation is permissible for hermaphrodites. The psychological criterion may control the outcome of this surgery even if it conflicts with other sex factors. See Eberle, supra note 19, at 199.

130 H. Benjamin, THE TRANSSEXUAL PHENOMENON 112 (1966) [hereinafter cited as Benjamin].
cal abnormalities are present. The Defazio decision does mark a trend away from the harsh dicta of the San Martin case, indicating that the courts of Argentina may approve reassignment surgery if performed for valid reasons and with the patient’s informed consent.

B. Belgium

In the 1969 case of In re Fardeau, the defendant doctors were charged following the death of a transsexual caused by blood clotting after reassignment surgery. The patient had male genitals but the secondary sex characteristics of a woman. His behavior was distinctively feminine and he wore female clothing. The patient had contended he was not homosexual but female, and sought surgery to bring his body into line with his beliefs. Prior to surgery the transsexual had been thoroughly examined by a panel of physicians. There was evidence of smallness or malformation of the testes, and excessive female hormones were present.

The prosecution alleged that there could not have been a valid consent on the part of the patient and that the surgery had been performed only to pacify the patient, not to cure him. The doctors contended the surgery had been performed to restore the patient’s psychic balance and to facilitate his social adjustment. In a lengthy opinion, the court accepted the doctors’ positions. Taking notice of the conflicting medical opinion regarding sex reassignment surgery, the court concluded it should not decide which was the more proper view where there was no question about the expertise and integrity of opinion on both sides. The court noted that an exhaustive psychiatric examination of a prospective patient would be desirable because “the highly exceptional and irreversible nature of the operation and its repercussions upon the entire future of the patient render it imperative that recourse should not be had to such an operation without as complete an examination as is possible.” Although the doctors had not performed such a psychiatric evaluation in this case, the court said it undoubtedly would not have led to a different diagnosis. The court also held that since the patient was intelligent and well-balanced his consent could not be negated solely because of his sexual abnormality.

133 Id. at 636.
134 Id. at 640.
135 Id. at 636.
136 Id. at 642.
The Fardeau case is evidence of the legality of sex reassignment surgery in Belgium when there has been an informed consent and adequate preoperative medical evaluation.

C. Canada

Although there are no Canadian cases in point, it has been suggested that reassignment surgery would be legal under section forty-five of the Canadian Criminal Code, provided it could be shown that the transsexual was in severe mental distress and would benefit from the surgery.

D. Denmark

Denmark has codified the requirements for castration surgery. Permission to perform a castration may be granted by the Danish Ministry of Justice after the Medico-Legal Council of Denmark has approved the request. The request will be granted if it appears that the individual's sexual instincts make him liable to commit crime or, relative to transsexualism, if his sexual inclinations cause him appreciable mental anguish and injure his standing in society.

The patient must be psychically normal, twenty-one years of age, and request the surgery himself. A petition must be filed by the patient's doctor giving the reasons for the surgery and indicating that the patient has been informed of the probable consequences. Further surgery, such as the creation of an artificial vagina, requires no permission.

This was the procedure followed in the now famous case of Christine (George) Jorgensen. The surgery, however, will not now be performed on a foreigner if he is not a domiciliary of Denmark.

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137 Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if
(a) the operation is performed with reasonable care and skill, and
(b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.

CAN. CRIM. CODE § 45 (Martin 1970).

138 Edwards, supra note 36, at 125-26; Meyers 181.

139 2 LOVSAMLING 1534, § 2 (7th ed. M. Karnov 1966) (Denmark); Stürup, Legal Problems Related to Transsexualism and Sex Reassignment in Denmark, in GREEN & MONEY 453, 456.

140 For a description of the Medico-Legal Council, see Gormsen, Some Aspects of Forensic Medicine in Scandanavia, 2 MEDICINE, SCIENCE & LAW 274, 280-81 (1961). Requests for castration and sterilization constituted about 10% of the matters dealt with by the Council in 1960. Id. at 281.

141 Stürup, supra note 139.

142 Id.

143 Id. at 455 n.l.

144 Id. at 456.
E. Germany

The first known sex conversion surgery was performed in Germany in 1931.\textsuperscript{145} Nevertheless, it is considered to be illegal there,\textsuperscript{146} although no cases directly in point have been found. The German courts have refused to allow any postoperative changes in legal status.\textsuperscript{147}

F. Great Britain

No cases squarely resolving the issue of the legality of reassignment surgery have arisen in Great Britain. Judge Ormrod of the Probate, Divorce, and Admiralty Division, observed in dictum in \textit{Corbett v. Corbett (otherwise Ashley)}:\textsuperscript{148}

There is obviously room for differences of opinion on the ethical aspects of such operations but, if they are undertaken for genuine therapeutic purposes, it is a matter for the decision of the patient and the doctors concerned in his case. The passing of section 1 of the Sexual Offences Act, 1967, seems to have removed any legal objections which there might have been to such procedures.\textsuperscript{149}

An administrative decision favoring the legality of the surgery apparently has been made, since the operation may now be paid for by Britain's National Health Insurance plan.\textsuperscript{150} Opinion prior to these rulings generally was that the legality of the surgery was questionable at best.\textsuperscript{151}

\begin{footnotes}
\item[145] Pauly, \textit{supra} note 1, at 460.
\item[146] Eberle, \textit{supra} note 19, at 1989, citing StGB § 226(a) (C.H. Beck 1965).
\item[147] See text accompanying notes 203-08 \textit{infra}.
\item[148] [1970] 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A.). The \textit{Corbett} case is discussed in the text accompanying notes 271-87 \textit{infra}.
\item[149] Id. at 1318, 2 All E.R. at 43 (dictum). Section one of the Sexual Offences Act provides:

Notwithstanding any statutory or common law provision ... a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.

Sexual Offences Act 1967, c. 60, § 1(1).

It is not clear what relationship exists between the legalization of homosexual conduct and reassignment surgery. In light of his conclusion that April Ashley was still biologically a male, it can be assumed that Judge Ormrod would consider intercourse using the artificial vagina to be "homosexual" conduct. Absent § 1 a judge might consider the surgery illegal because it facilitates "homosexual" conduct. However transsexuals are not homosexual (\textit{see note 1 supra}) and vaginal intercourse hardly fits the usual description of a homosexual act.

\item[150] Hellier, \textit{supra} note 58.
\item[151] James, \textit{Legal Issues of Transsexualism in England}, in \textit{Green & Money} 441, 451 (only legal if full consent obtained and for proven therapeutic purpose); Lukianowicz, \textit{Survey of Various Aspects of Transvestism in the Light of Our Present Knowledge}, 128
\end{footnotes}
G. Holland

Sex reassignment surgery was the subject of an official Dutch commission of inquiry in 1965. The commission concluded:

There are insufficient grounds for treating transsexualism surgically in the sense of sex transformation. Where this is nevertheless undertaken, it must be realised that each operation is attended by a great and uncertain risk, not only in the somatic sense but also, and in particular, in the psychological sense, and there is no certainty whatsoever about its effect.

Although the commission admitted there was a lack of empirical data on the entire subject, it nevertheless concluded that the results of plastic surgery were almost always disappointing and that, although the patient's condition may improve in the short run, depression would eventually reappear in many cases. The commission noted that surgery brought no satisfaction to several patients and questioned whether sustained psychotherapy might not have brought an improvement, avoiding permanent physical alteration. The belief of a transsexual that he is of the other sex was called a "delusion"; surgery could at best only perpetuate the delusion.

The conclusions reached in this study are six years old and of doubtful validity today. In the interim this report no doubt has had a "chilling effect" on those who otherwise would have performed the surgery. The surgery is legal in Holland, regardless of the commission's findings, as Holland has a voluntary castration law similar to Denmark's.


1 The report of this commission was unavailable. Reliance is placed on a summary provided by Professor Strauss.

163 Strauss 350.

164 Id.

165 Id.

166 Id. Professor Strauss uses the word "cure" rather than "perpetuate." In the context of his summary "perpetuation" of the delusion seems more appropriate. Cf. note 241 infra.

167 The commission's report preceded most of the advances made in this field. For example, the Gender Identity Clinic at Johns Hopkins was not formed until 1966. Johns Hopkins University, supra note 53, at 267. Dr. Benjamin's landmark book The Transsexual Phenomenon appeared at the same time. See generally text accompanying notes 51-97 supra.

It should also be noted that the commission relied extensively on the existing medical literature and the testimony of two Dutch specialists, Dr. C.V. Emde Boas and Dr. H. Musaph, both of Amsterdam. No transsexuals testified of their experiences after surgical reassignment. Letter from S.A. Strauss, Professor of Law, University of South Africa at Pretoria, to the Cornell Law Review, Feb. 18, 1971.

168 Letter from Prof. S.A. Strauss, supra note 157.

169 Meyers 179; see text accompanying notes 139-42 supra.
H. Switzerland

In the Swiss case of In re Leber, the court briefly mentioned that the operation was legal if performed for a therapeutic purpose.

I. United States

No reported cases have been found in the United States on this question. In an unreported case, Judge James K. Cullen of Baltimore issued a court order allowing the surgery to be performed on a seventeen-year-old boy. This boy had first been referred to Johns Hopkins for unusual sexual behavior in school. In 1961 he was arrested for being drunk; at that time he was using lipstick. Later he was apprehended for stealing women’s clothing and a purse. In 1964, the boy was again arrested, this time for stealing $800 worth of women’s wigs. He was diagnosed a transsexual and requested the surgery himself. Judge Cullen issued his order at the urging of the boy’s probation officer.

Louisiana and Illinois have provided for birth record changes for those who have undergone sex reassignment surgery. It is very unlikely that these states’ legislatures would enact such a provision if they considered the surgery itself illegal.

Mayhem statutes are generally considered to present problems for American surgeons wishing to perform sex reassignment surgery. The original mayhem statutes enacted in England were designed to prevent men from dismembering themselves or others so that they would be unable to fight in the service of the Crown. A specific intent to maim or disfigure was required; well-considered surgery would lack such intent. Consent is not a defense to a charge of

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160 Neuchâtel Cantonal Ct., July 2, 1945 reprinted in E. de Savitsch, supra note 4, at 96-107. See notes 45-47 and accompanying text supra.

161 E. de Savitsch, supra note 4, at 103.

162 It has been reported, however, that several physicians have been threatened with prosecution in connection with sex transformation surgery. Ficarra, Sex Problems in Law, 3 LEX & SCIENTIA 228, 229 (1966).

163 Money & Schwartz, supra note 52, at 254.

164 Id. at 254 n.1. The operation was never performed. Id.


167 Holloway 287; Money & Schwartz, supra note 52, at 257-58; Letter from Dr. Donald W. Hastings, supra note 52; Letter from Dr. Jon K. Meyer, supra note 52.

168 4 W. BLACKSTONE, COMMENTARIES *205; Holloway 284 n.17.

169 See, e.g., People v. Bryan, 190 Cal. App. 2d 781, 787, 12 Cal. Rptr. 361, 364 (1961); Holloway 284 n.17.

170 Holloway 284 n.17.
mayhem, since such acts are considered to be gross breaches of the peace to which one cannot consent.\textsuperscript{171} Proof of informed consent, however, would negate an implication of malicious intent on the part of the doctor.

Caution dictates that counsel be consulted before reassignment surgery is performed. Mayhem statutes vary considerably from state to state and often cover castration.\textsuperscript{172} The existence of a mayhem statute should not be considered an absolute bar to the operation, but it would be advisable to consult with the local district attorney or seek an advisory opinion of the state attorney general before performing sex reassignment surgery.

The cases do not establish any definite trend toward either legal acceptance or rejection of sex reassignment operations. The humane legislative position of the Scandinavian countries should receive recognition in American courts, as should the well-considered and recent decision in Belgium.

\section*{IV
TRANSSEXUALS AND THE CRIMINAL LAW}

Even before the question of the legality of the surgery arises, the individual transsexual must confront the criminal law. As with any other group, most transsexuals do not run afoul of the law. Others, encountering criminal problems unrelated to their condition, find such problems compounded when their sexual status is learned.\textsuperscript{173} But inherent in the transsexual syndrome are behavior patterns\textsuperscript{174} that are likely to bring the individual into contact with the police.\textsuperscript{175}

\textsuperscript{172} See, e.g., Kitchens v. State, 80 Ga. 810, 7 S.E. 209 (1888).
\textsuperscript{173} See, e.g., Redmount, \textit{A Case of a Female Transvestite with Marital and Criminal Complications}, 14 J. Clinical & Experimental Psychopathology 95 (1953).
\textsuperscript{174} Criminal problems arise from conduct such as wearing the clothing of the "opposite" sex prior to surgery, having sexual relationships with members of the "same" sex, and so forth.
\textsuperscript{175} Only one authority has suggested that trausexualism in any way causes the commission of other criminal acts. Hoenig, Kenna & Youd, \textit{Social and Economic Aspects of Transsexualism}, 117 British J. Psychiatry 163, 168 (1970). Forty-seven percent of the patients studied had displayed antisocial behavior of some kind; 42\% had actual criminal records. Of these, 15\% had been charged with sex related offenses, another 15\% with sex offenses as well as others, and 12\% had been charged with non-sex related offenses only. \textit{Id.} These statistics led the authors to conclude "that transsexualists are very largely an 'out' group, who feel inclined to act irresponsibly not only in the area where their psychosexual abnormalities could be seen as the prime motive but also in other respects." \textit{Id.}
\textsuperscript{176} [T]he big trouble is, and this may perhaps be a slightly artificial distinction,
The greatest single problem is that of cross-dressing. Laws in at least eleven states could be used to prosecute transsexuals who cross-dress prior to surgery. One such law was originally enacted over 100 years ago to deter farmers who had been attacking officers enforcing unpopular rent laws. The statute accordingly made it illegal to appear publicly with the face painted or to be otherwise disguised in such a way as to prevent identification. Such a law is clearly subject to abuse by an unsympathetic or uninformed policeman or tribunal. An even greater problem arises from the multitude of local ordinances that regulate public conduct.

Since these laws are not likely to be repealed or amended to suit the few transsexuals they may affect, the emphasis must be on methods to prevent contact with the law. Practical advice comes from Dr. Jon Meyer of Johns Hopkins: "[T]he most obvious guideline is that if you are going to cross-dress, don't be obvious about it."

Another preventive measure is the carrying of a card or letter from the transsexual's doctor describing the individual's condition and stating that the dress is required for proper treatment. Such a permit has been issued to a preoperative patient by the Pennsylvania Bureau of Special Health Services. The Erickson Educational Foundation may have something to fear from the administrators of the law [if not the law itself], and [he] must be aware that he is particularly susceptible to suspicion from the police, and that actions which in a heterosexual may be utterly inconsequential may render a transsexual suspect.

Green, supra note 33 (emphasis added).


178 Sherwin, supra note 67, at 418.

179 In New York a vagrant was formerly defined as "[a] person who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure." N.Y. CODE CRIM. PROC. § 887(7) (McKinney 1958). N.Y. PENAL LAW § 240.35(4) (McKinney 1967) holds a person guilty of loitering when he, [b]eing masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment . . . .


180 Erickson Educational Foundation, supra note 176. Holloway notes that the City and County of Denver, Colorado, for example, has an ordinance that deals with public dress. Holloway 283 n.7.

181 Letter from Dr. Jon K. Meyer, supra note 52.

182 Erickson Educational Foundation Newsletter, supra note 51, at 1.
dation, an organization concerned with transsexual research, also issues such identification cards.\textsuperscript{183} Police in Hamburg, Germany, upon a doctor’s certification, issue special cards to transvestites. These cards do not give permission to cross-dress but as a practical matter make the transsexual relatively immune from arrest.\textsuperscript{184} A similar procedure is followed in Denmark, where permits allow the transsexual to use toilets of the sex in which he is dressed.\textsuperscript{185} It is not known whether an identifying card or letter will successfully immunize a transsexual from arrest in the United States, but it should at least rebut any presumption that the cross-dressing was being done with an intent to defraud or foment disorder.\textsuperscript{186}

The laws proscribing homosexual relations\textsuperscript{187} are another possible source of arrest. Only a German case has been found in which transsexualism was discussed in relation to homosexual conduct.\textsuperscript{188} The petitioner was a well-known male prostitute who wished to avoid prosecution by being legally recognized as a female.\textsuperscript{189} Consistent with other German cases regarding transsexualism,\textsuperscript{190} his request was denied.

There is likely to be no postoperative difficulty. It is hard to imagine an American court ruling that vaginal intercourse is a homosexual act, even if the vagina has been constructed by plastic surgery.\textsuperscript{191} Prior to surgery there is no such vaginal opening, and

\textsuperscript{183} Id. at 3.
\textsuperscript{184} Benjamin 140; Meyers 180.
\textsuperscript{185} Stirrup, supra note 139, at 457.
\textsuperscript{186} Erickson Educational Foundation, supra note 176.
\textsuperscript{187} See, e.g., N.Y. Penal Law § 150.38 (McKinney 1967) (encompassing buggery or sodomy).
\textsuperscript{188} Meyers 180.
\textsuperscript{189} Id.
\textsuperscript{190} See text accompanying notes 203-08 infra.
\textsuperscript{191} Compare Corbett v. Corbett (otherwise Ashley), [1970] 2 W.L.R. 1306, 1326, 2 All E.R. 33, 49 (P.D.A.), where Judge Ormrod states:

I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity . . . can possibly be described . . . as "ordinary and complete intercourse" or as "vera copula—of the natural sort of coitus." In my judgment it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it and anal or intra-crural intercourse is, in my judgment to be measured in centimetres.

This statement, Judge Ormrod admitted, was contrary to the dictum of the Court of Appeal in the 1962 case of S. v. S., [1963] P. 162, [1962] 3 All E.R. 55 (C.A.). In that case the husband sought an annulment on the ground that his wife had a malformed vagina that prevented sexual intercourse. The husband alleged that even if a plastic operation enabled consummation of the marriage true coitus would still not be achieved because the vagina would be artificial. The Court of Appeal stated that an artificial vagina could not be regarded as essentially different from the enlargement of an incipient one. In both circum-
intercourse must be conducted *per anum* or *per os* if at all. Although in such a case there has been a technical violation of the sodomy statute,192 proof of transsexualism should at least mitigate the punishment given by the court. The act was objectively homosexual but subjectively—in the transsexual’s mind—it was heterosexual.193

V

**Postoperative Change of Civil Status**

Avoiding criminal prosecution and successfully completing surgical reassignment mark the beginning, not the end, of the transsexual’s encounters with the legal system. His name is inappropriate and must be changed; his birth certificate states the wrong sex; his passport has the wrong picture and name on it; his Social Security card must be changed so that he may secure employment in the new sex. If formerly a male, he has that ever-present reminder of his former sex, the Selective Service registration card. Whether the postoperative transsexual can successfully alter his civil status, especially his birth records, depends on which criterion of sex determination the law will follow.

A. *Birth Records—Foreign Jurisdictions*

The question of transsexual birth record changes does not appear to have been litigated in England.194 The 1948 edition of *Taylor’s Principles and Practice of Medical Jurisprudence*195 stated that re-registration of birth information may be made by a statutory declaration. The procedure to be followed was outlined:

Application for the re-registration of the birth should be made to the Registrar-General accompanied by the particulars of the case by the medical practitioner who has examined the child. If this is satisfactory the Registrar would be instructed to re-register the birth on the information of one of the parents or

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192 Such statutes are aimed at homosexuals, and transsexuals are not homosexual. See note 1 supra.

193 A similar situation is present in cases of shoplifting where the transsexual may take clothing (usually undergarments) of the other sex because it is embarrassing to purchase them while dressed in the clothing of his anatomical sex. The law has been violated, but a compassionate judge should not treat the transsexual as he would an ordinary thief who acts for economic gain.

194 Green, *supra* note 33.

other informant qualified under the Births and Deaths Registration Acts. Should there be no qualified informant available, then the original entry would be corrected on the authority of a statutory declaration, made by two persons cognisant of the facts, one of whom would be the medical practitioner.\textsuperscript{108}

There appears to be no authority for these assertions,\textsuperscript{197} and they were dropped in a later edition.\textsuperscript{198} Changes by marginal correction, however, have been allowed in Britain,\textsuperscript{199} apparently at the request of a doctor who declares there was a mistake in the initial registration.\textsuperscript{200} Since a genital examination at birth is the criterion used for sex registration, such a declaration is probably incorrect in the case of a transsexual. The "mistake" appears only later, when transsexualism becomes apparent.

In a reported Scottish case, \textit{In re "X,"}\textsuperscript{201} a request for a change of birth certificate and name was denied. The sheriff adopted a chromosomal test of sex.

The doctors are careful to stress that this is not a case of hermaphroditism [sic], but is a genuine case of the very rare condition of transsexualism and that the changes which have taken place are irreversible. For the present purpose I, of course, accept that diagnosis. It is, however, stated that skin and blood tests still show X's basic sex to be male and that the changes have not yet reached the deepest level of sex determination. It seems to me accordingly that while X could be described as an abnormal male, it would not be possible to describe him as a female.\textsuperscript{202}

In Germany sex is determined by the external genitalia. German courts have held that the loss of the genitals, by surgery or by accident, does not change a person's true sex.\textsuperscript{203} The change in secondary sex characteristics brought on by hormone treatment is not considered to indicate a change of sex because it is dependent upon the constant administration of drugs. The surgically created and functional vagina is classified as being feminine in appearance only. Sex reassignment surgery itself is illegal in Germany.\textsuperscript{204} Because it does not recognize sex change; German law of course does not permit birth certificate changes.

\textsuperscript{106} Id. at 118.
\textsuperscript{107} Bartholomew 99.
\textsuperscript{108} See \textit{TAYLOR'S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE}, \textit{supra} note 32.
\textsuperscript{109} See Bartholomew 99.
\textsuperscript{200} See \textit{TAYLOR'S PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE}, \textit{supra} note 32.
\textsuperscript{202} Id. at 205-06, [1957] Scots L.T.R. at 62.
\textsuperscript{203} See Eberle, \textit{supra} note 19.
\textsuperscript{204} See note 146 and accompanying text \textit{supra}.
This attitude has been reaffirmed in Germany as recently as 1969.\textsuperscript{205} The applicant was a boy who had undergone sex reassignment surgery and wished his birth certificate changed accordingly. The Oberlandesgericht of Frankfurt held it could not order the alteration of a birth certificate that correctly stated the boy's sex at birth.\textsuperscript{206} Examining physicians from the Institute for Sexual Research at the University of Hamburg termed the boy's condition transvestism, defining transvestism as "an abnormal development of an individual's personality which first manifests itself psychologically and later involves a physical identification, either as a result of hormone treatments or an operation."\textsuperscript{207} The court, however, did not rule out the possibility that such petitions might be granted in the future if medical advances could show there had been more than a change in appearances.

Although . . . there is the theoretical possibility that hormonal and genetical factors may be involved in the causation of such a situation, they are not yet identifiable according to scientific knowledge presently available. . . . As long as medical science does not provide a generally acceptable explanation of the origins and the conditions of transvestism, such a person cannot be legally classified as a member of the opposite sex after an operation has changed his appearance.\textsuperscript{208}

This court's willingness to reconsider its ruling is indicative of the impact medical advances in this area are likely to have on the law.

Other countries have been more liberal in allowing a new birth certificate to be issued. It has been allowed in South Africa,\textsuperscript{209} Switzerland,\textsuperscript{210} and in some cases, in Sweden.\textsuperscript{211} A recent Italian case held that a transsexual's birth records should be changed to reflect his new sex. The individual had at one time been a lieutenant in the Italian army.\textsuperscript{212}

B. Birth Records—The United States

Fifteen states have permitted a postoperative change of sex designation on birth records.\textsuperscript{213} Only two of these—Illinois and Louisiana

\footnotesize{
\begin{itemize}
  \item \textsuperscript{205} Judgment of Feb. 14, 1969, 22 NJW 1576 (OLG, Frankfurt). For an English discussion of this case, see Note, supra note 5, at 239.
  \item \textsuperscript{206} 22 NJW at 1576.
  \item \textsuperscript{207} Id. at 1577.
  \item \textsuperscript{208} Id. at 1576.
  \item \textsuperscript{209} Note, supra note 5, at 240.
  \item \textsuperscript{210} E. de Savitsch, supra note 4, at 101-02; Meyers 180-81.
  \item \textsuperscript{211} Wållinder, Medicolegal Aspects of Transsexualism in Sweden, in Green & Money 461, 463-64.
  \item \textsuperscript{212} Erickson Educational Foundation Newsletter, Spring 1971, at 2.
  \item \textsuperscript{213} Alabama, California, Hawaii, Illinois, Louisiana, Maryland, New Jersey, North
\end{itemize}
}
—have specifically provided by statute for a change following surgery, however. 214

Illinois requires simply “[a]n affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person’s birth record should be changed.” 215 After the new certificate has been issued, the original is sealed and available only upon court order. 216 The Louisiana statute is considerably more complex. It provides that:

Any person born in Louisiana who, after having been diagnosed as a transsexual or as a pseudo hermaphrodite, has sustained sex reassignment or corrective surgery which has changed the anatomical structure of the sex of the individual to that of a sex other than that which appears on the original birth certificate of the individual, may petition a court of competent jurisdiction . . . to obtain a new certificate of birth. 217

Since reassignment surgery alters only the genitalia, and the breasts in case of a female transsexual, the “anatomical structures” referred to in the act must be the genitalia, although such a term could also encompass the secondary sex characteristics changed by hormone treatment. The Louisiana legislature has also set a greater requirement of proof than has Illinois.

The court shall require such proof as it deems necessary to be convinced that the petitioner was properly diagnosed as a transsexual or pseudo hermaphrodite, that sex reassignment or corrective surgery has been properly performed upon the petitioner, and that as a result of such surgery and subsequent medical treatment the anatomical structure of the sex of the petitioner has been changed to a sex other than that which is stated on the original birth certificate of the petitioner. If the court shall find that the evidence sustains the required proof, the court shall render a judgment ordering the issuance of a new birth certificate . . . 218

The original certificate is available only to the transsexual, and then only by court order. 219

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216 Id. §§ 73-17(2)(a), (4).
218 Id. § 40:336(C).
219 Id. § 40:336(D).
The Louisiana law has been applied in one unreported case, *State ex rel. A.D.M. v. New Orleans.* The city attorney of New Orleans alleged

that it is not within the power of the City of New Orleans, or its various departments to change the sex of a human being whether in fact or by birth or other certificate . . . [and that] it is not within the power of any Court nor any other human being to change the sex of any other human being. The legislature had ruled otherwise, however, and the court agreed.

The Louisiana statute is superior to that of Illinois. It clearly prevents the possibility of fraud inherent in the simple requirement of an affidavit. It ensures the validity of public records by requiring proof of surgical change, and it reduces the likelihood of a later reversal on the part of the transsexual by demanding proof of a correct diagnosis of his condition. Against these positive factors must be weighed the cost of the litigation involved and the inevitable notice it will receive in the press. There can be little solace for the transsexual who legally acquires a new sex only to confront unwanted publicity that may drive him from the community in which he wishes to live. A wise revision of the act might make the judicial proceedings private or prevent the use of the petitioner's name, as is done in many states with juvenile offenders and rape victims.

Statutes governing birth record changes in the remaining states can be classified into three general categories: those that do not specifically allow or prohibit corrections, changes, alterations, or amendments to birth certificates; those that permit only "corrections"; and those that allow "alteration" or "amendment." In the "correction" states changes are allowed only where it is shown that there was an error in the original registration. This usually precludes registration of a change by surgery since the registration was technically "correct" at birth. In these states birth certificates supposedly attest only to the sex at birth, although as a practical matter such an interpretation is grossly unrealistic. The "alteration" or "amendment" statute seems to give the agency charged with public record-keeping greater latitude in allowing a change based on future events.

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220 No. 477-263 (Orleans Civ. Dist. Ct., Oct. 29, 1968). The author wishes to thank the transsexual involved for furnishing copies of the documents relating to this case.


222 Holloway 288-89.

223 See text accompanying note 200 supra.

224 See *Sherwin,* supra note 67, at 423.

Regardless of the particular statutory provisions involved, an informed and sympathetic administrative agency can be of great help in securing a new certificate. Minnesota is a good example. Its statutes provide that

[a] birth certificate of a person born in this state . . . may be . . . amended . . . upon submitting such proof as shall be required by the [State Board of Health] . . .

. . . Certificates . . . which have been altered after being filed with the state registrar shall contain . . . the date of the alteration and be marked . . . "altered."

. . . All alterations made on birth . . . records shall be in red ink.

. . . A summary statement of the evidence submitted in support of the acceptance for . . . alteration shall be endorsed on the certificate.228

These provisions must be compared with the established practice of the Board of Health in cases referred by the University of Minnesota surgical team.

[S]ubsequent to legal change of name [by court order], the [transsexual's] attorney petitions the State Board of Health for a changed birth certificate. For patients born in Minnesota we have an arrangement with the State Board of Health wherein a new birth certificate is issued under the new name. It has upon it a code number which indicates that a previous birth certificate exists. The original birth certificate, however, is available only upon court order.227

Such an "arrangement" is clearly not within the purview of the statute.

Not all administrative agencies have been so sympathetic. In 1965 a request for a new birth certificate was made by a postoperative transsexual to the Director of the Bureau of Records and Statistics of the Board of Health of the City of New York. The Board consulted the New York Academy of Medicine, which in turn gathered a group of gynecologists, endocrinologists, cytogeneticists, psychiatrists, and a lawyer to study the problem.228 This committee concluded that

1. male-to-female transsexuals are still chromosomally males while ostensibly females;
2. it is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.

227 Letter from Dr. Donald W. Hastings, supra note 52.
228 Anonymous v. Weiner, 50 Misc. 2d 380, 382, 270 N.Y.S.2d 319, 321 (Sup. Ct. 1966). The agency had previously granted these requests. Id. at 385, 270 N.Y.S.2d at 324.
The Committee is therefore opposed to a change of sex on birth certificates in transsexualism.

... The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud.229

The agency, following the recommendation of the Academy's committee, denied the application. A suit was brought by the transsexual for a court order requiring the agency to change her sex designation, name, and to issue a new certificate. Justice Sarafite, in Anonymous v. Weiner,230 denied the request. Viewing the problem as one of administrative law, he found that the respondent agency had not acted in an "arbitrary, capricious or otherwise illegal manner"231 in denying the request.232 On the contrary, he believed the Board's actions represented "adherence to the highest standards of the administrative process."233

The decision in Weiner is unimpeachable administrative law, but the report of the New York Academy of Medicine, upon which the Board's action was based, is not equally immune.234 Another New York judge has already severely criticized the report in In re Anonymous.235 Dealing first with the question of fraud, Judge Pecora made a realistic appraisal of the transsexual's postoperative status.

A male transsexual who submits to a sex-reassignment is anatomically and psychologically a female in fact. This individual dresses, acts, and comports himself as a member of the opposite sex. The applicant appeared before this court and, were it not for the fact that petitioner's background was known to the court, the court would have found it impossible to distinguish this person from any other female. It would seem to this court that the probability of so-called fraud, if any, exists to a much greater extent when the birth certificate is permitted, without annotations of any type, to

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229 Id. at 382-83, 270 N.Y.S.2d at 322.
231 Id. at 384, 270 N.Y.S.2d at 323.
232 It should be noted that New York is a "correction of error" jurisdiction. See id. at 383-84, 270 N.Y.S.2d at 322-23.
233 Id. at 382, 270 N.Y.S.2d at 321.
234 It would be improper for the Board to continue to rely on the Academy's report, now six years old, in an area where medical opinion is rapidly changing. If such reliance persists, another court might well find that a refusal to reconsider the questions involved is itself arbitrary or capricious action.
classify this individual as a "male" when, in fact, as aforesaid, the individual comports himself as a "female."\footnote{Id. at 817, 293 N.Y.S.2d at 838.}

At least one other New York judge has agreed with Judge Pecora that fraud is unlikely to result in these cases.\footnote{See In re Anonymous, 64 Misc. 2d 309, 314 N.Y.S.2d 668 (N.Y. City Civ. Ct. 1970).} Judge Pecora also concluded that the chromosomal test adopted by the Academy report was unrealistic\footnote{See text accompanying notes 17-24 & 44 supra.} and inhumane.

\[S\]hould the question of a person's identity be limited by the results of mere histological section or biochemical analysis, with a complete disregard for the human brain, the organ responsible for most functions and reactions, many so exquisite in nature, including sex orientation? I think not.\footnote{57 Misc. 2d at 817, 293 N.Y.S.2d at 838.}

Other criticisms of the Academy report remain. A chromosomal standard leaves some people unclassifiable, and it ignores the other determinants of sex.\footnote{See text accompanying notes 17-24 supra.} The Academy report also stated that the law should not help psychologically "ill" persons adjust to society. The medical evidence is that most transsexuals are not "ill" but are normal in all respects other than their gender identity,\footnote{The argument that sex-reassignment surgery is collaboration with psychosis falters on two grounds. Currently available psychiatric interview and psychologic test data indicate that the person requesting sex reassignment rarely is psychotic by the standard diagnostic criteria. Furthermore, there is no body of evidence from other psychiatric conditions, which demonstrates that fulfilling a patient's delusion or ostensible delusion results in psychiatric improvement rather than an extension of the delusional system and further decompensation. Postoperative data on transsexuals indicate that such an adverse result is rare. Green, Conclusion to GREEN & MONEY 467, 471.} and surgery renders them normal in that area as well. Even assuming they are "ill," however, the law should not decline to help them find a place in society. Medical evidence strongly suggests that legal recognition of the sex change greatly enhances the transsexual's adjustment.\footnote{Pauly, supra note 1, at 465; Letter from Dr. Harry Benjamin, supra note 22; Letter from Dr. Donald R. Laub, supra note 14; Letter from Dr. Leo Wollman, supra note 5.} Before surgery the transsexual's mind does not conform to his body's sex, and confusion and depression result. If after the surgery—when his body and mind agree—society refuses to recognize his status, there has been little improvement for him.\footnote{See generally text accompanying notes 14-97 supra.}

After an eloquent discussion of the problem,\footnote{57 Misc. 2d at 815, 293 N.Y.S.2d at 836-37.} Judge Pecora
proposed a simple rule that clearly adopts the enlightened psychological test of legal sex.\textsuperscript{245}

Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made only in those cases where physiological orientation is complete.\textsuperscript{246}

Accordingly, Judge Pecora permitted the petitioner in \textit{In re Anonymous} to change her name and directed the Board of Health to attach a copy of the court's order to the petitioner's birth certificate.\textsuperscript{247}

The compelling logic and humanity of Judge Pecora's decision would require a change of sex on the certificate itself or, preferably, the issuance of a new one. Such relief was beyond the power of the court,\textsuperscript{248} however, and in any event it would have run counter to \textit{Weiner}.\textsuperscript{249} The inadequacy of the relief granted is apparent since this petitioner must go through life with a female psyche, anatomy, and name, but a contrary and embarrassing official document.\textsuperscript{250} Other countries and states have seen the need for legal recognition of sex reassignment either by statute, judicial ruling, or administrative action. New York should follow suit.

\textbf{C. Other Changes of Legal Identity}

Armed with a new birth certificate, the transsexual can perform most other documentary changes of identity with relative ease. Even without such help some changes are possible. Absent fraud one can change his name at will under the common law. Two New York cases\textsuperscript{251} indicate that the courts will not invoke the unlikely possibility of fraud to deny name changes to postoperative transsexuals.\textsuperscript{252}

\begin{itemize}
\item \textsuperscript{245} See text accompanying notes 35-49 supra.
\item \textsuperscript{246} 57 Misc. 2d at 816, 293 N.Y.S.2d at 837.
\item \textsuperscript{247} Id. at 817, 293 N.Y.S.2d at 838.
\item \textsuperscript{248} Id. at 813-14, 293 N.Y.S.2d at 835.
\item \textsuperscript{249} See text accompanying notes 228-33 supra.
\item \textsuperscript{250} See Morse & Hall, supra note 234, at 290; Sherwin, supra note 67, at 423-24.
\item \textsuperscript{252} Until recently, this was so in California for \textit{preoperative} as well as \textit{postoperative} transsexuals. Each case was decided on its own merits, at the discretion of the judge who
\end{itemize}
The Passport Office of the Department of State would, until recently, issue a new passport on receipt of the original passport, new photographs, and medical proof that reassignment surgery had been performed. The proof had to be such that the Passport Office could conclude that the anatomical structure (i.e., the genitalia) of the transsexual had been changed to that other than what was indicated on the original passport.\textsuperscript{253} If the surgery had been performed in a foreign country, a United States Consulate or Embassy could issue a new passport if the same proof was supplied.\textsuperscript{254}

This liberal policy, however, is no longer followed. The Passport Office has advised:

The policy adopted by this Office is that a transsexual will be issued a passport in his legal name and identity, either that shown by his birth certificate or by court decree. It would make no difference if the transsexual had been previously issued a passport in another sexual identity.\textsuperscript{255}

Stating that it was not “unmindful of the delicately personal and emotional problems involved,” the Passport Office nevertheless reasoned that it could not “administratively make a determination of identity involving medical factors beyond its competency.”\textsuperscript{256} Instead, the Office will rely on the sex and name stated on the applicant’s birth certificate, leaving changes in identity to the agency that issued the certificate or to the courts. No reasons were offered for this abrupt reversal in policy.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{253} Erickson Educational Foundation, supra note 176, at 6.
\item \textsuperscript{254} Id. at 5. Confidential Correspondence from the Passport Office to a Transsexual (copy supplied through the courtesy of the National Transsexual Counseling Unit, San Francisco, California), Dec. 16, 1970 (on file at the Cornell Law Review).
\item \textsuperscript{255} Letter from Robert D. Johnson, Deputy Director of the Passport Office of the Department of State, to the Cornell Law Review, March 4, 1971.
\item \textsuperscript{256} Id.
\end{enumerate}
\end{footnotesize}
Selective Service regulations\textsuperscript{257} provide for the cancellation of the records of a registrant only upon the authorization of the Director of Selective Service. One case of cancellation is known,\textsuperscript{258} but the Selective Service System has not yet ruled on the medical proof required.\textsuperscript{259} Since transsexuals would be unfit for military service in any event because of the surgery and their condition, it is unlikely that proof greater than a medical affidavit will be required.

Social Security records can be changed with ease. Regulations exist for a change of name,\textsuperscript{260} and the Social Security Administration has a simple form for this purpose. It has been suggested that a brief explanation of the reasons for the change should be attached to this form to avoid unnecessary confusion or an investigation when benefits are later requested.\textsuperscript{261} A doctor's affidavit might better serve this purpose. This procedure is deceptively simple, however. The total amount of available benefits varies with different cut-off ages: sixty-two for women and sixty-five for men.\textsuperscript{262} The agency relies on the information of record as to a claimant's sex, and no problem arises in the usual case. For the transsexual who has changed the name appearing on his records, however, a conflict is apparent and the agency has advised that "a legal opinion as to its resolution would be required."\textsuperscript{263}

An even greater problem arises if the male-to-female transsexual subsequently marries and claims any of the various wife's or widow's benefits available through Social Security. The relevant section of the Social Security Act\textsuperscript{264} provides that benefits may be paid only if the marriage was valid under the laws of the state in which the insured was living at the time the spouse's application is filed, or if the spouse would be entitled to participate in the distribution of the insured's intestate property under state law. Since no state law exists regarding the validity of a transsexual marriage, such an application would only invite litigation.

Generally, the various administrative agencies have been sym-
pathetic to the problems of the transsexual, and assistance has been
given within the scope of existing rules and policies. With such coopera-
tion a postoperative transsexual can successfully start a new life in the
new sex role. The status changes indicated here are but a few of those
required,\textsuperscript{265} but they suggest that the procedures involved are not insurmountable.

VI

THE VALIDITY OF POSTOPERATIVE TRANSSEXUAL MARRIAGES

The right to marry is one of the fundamental civil rights of man.\textsuperscript{266} The desire of a postoperative\textsuperscript{267} transsexual to exercise that right is perfectly natural, and many have in fact married in the new sex.\textsuperscript{268} Since marriage is, by definition, a relationship between people of

\textsuperscript{265} Another example is that of the driver’s license, where problems arise primarily
before surgery. California allows a new license to be issued to a \textit{preoperative} transsexual
when the application includes a letter from a physician describing the individual as a
"female for all intents and purposes, despite being organically a male." Erickson Educa-
tional Foundation, \textit{supra} note 176, at 5. Pennsylvania has recently issued a new license with
only initials being used, avoiding the question of sex completely. Erickson Educational
Foundation Newsletter, \textit{supra} note 51, at 1. The importance of a new driver’s license is
apparent when one considers the length of time surgical teams require transsexuals to live
in the new sex role before surgery is performed. Text accompanying notes 58-60 \textit{supra}.

A Georgia transsexual allegedly encountered job discrimination after reassignment
surgery. Confidential Correspondence from the Transsexual Involved to the Author, Jan.
25, 1971. The Equal Employment Opportunity Commission offered its assistance if the
problem should arise again. Such help could well lead to litigation over the transsexual’s
legal sex. A suit is pending in California in which a transsexual claims sex discrimination.
Erickson Educational Foundation, \textit{supra} note 176, at 8.

\textsuperscript{266} Loving \textit{v.} Virginia, 388 U.S. 1, 12 (1966); Skinner \textit{v.} Oklahoma, 316 U.S. 535, 541
(1941). The institution of marriage is protected by the fourteenth amendment to the
Constitution (Meyer \textit{v.} Nebraska, 262 U.S. 390, 399 (1923)), and possibly by the ninth
amendment (Griswold \textit{v.} Connecticut, 381 U.S. 479, 496 (Goldberg, J., concurring)). \textit{See also}
Maynard \textit{v.} Hill, 125 U.S. 190 (1888).

The right to marry is one of the fundamental rights listed in both Article 16 of the
1948-49}, at 536 (1950)), and Article 12 of the European Convention on Human Rights
(\textit{European Convention on Human Rights, Collected Texts} 6 (5th ed. 1966)).

\textsuperscript{267} This discussion is limited to postoperative marriages. Before surgery the trans-
sexual is clearly of one sex by anatomical criteria, and a marriage with another person of
the same anatomical sex would generally be considered a homosexual relationship. Al-
though the preoperative transsexual, because of his cross-gender identification, would
consider the relationship heterosexual, society most likely would not.

\textsuperscript{268} If the transsexual has been able to secure a new birth certificate, a marriage license
may be easily procured. If not, the marriage most likely will take place in a state that does
not require such a certificate. \textit{See, e.g.,} FLA. STAT. ANN. \textsection 741.051 (1964). \textit{See also} Bowman
& Engle 308; Money & Schwartz, \textit{supra} note 52, at 261.
opposite sexes, the law will be required to pass on the transsexual's legal sex in order to ascertain the validity of these marriages.

This question has been litigated in England in a recent case, *Corbett v. Corbett (otherwise Ashley)*. The transsexual involved, George Jamieson, had been registered at birth as a male and reared as such. At the age of twenty-five, he underwent sex reassignment surgery that included the creation of an artificial vagina. The name April Ashley was adopted after the operation. Arthur Corbett, April's husband, was a transvestite who had experienced sexual relations

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269 An example of the inadequacy of such a definition, if sex is determined only with reference to anatomical factors, is given by Stutte. He describes a case known to him of a marriage between a male and a person with an XO chromosome pattern, no gonads, and a female psyche. Gender identity aside, such a person is biologically neuter and is either capable of marrying either a man or a woman, or is incapable of marrying at all. Stutte, supra note 18, at 241-42.

270 The validity of a transsexual marriage also hinges on other factors, as do all marriages; for example, fraud and absence of consummation. Without full disclosure of the transsexual's history and surgery to the prospective spouse, the marriage would probably be voidable for fraud. See, e.g., Potter v. Potter, 27 App. Div. 2d 634, 275 N.Y.S.2d 499 (4th Dep't 1966) (marriage annulled because husband had failed to disclose his affliction with voyeurism (Peeping Tom syndrome)); N.Y. Dom. Rel. Law § 140(e) (McKinney 1964).

The transsexual must also be physically capable of consummating the marriage. See, e.g., N.Y. Dom. Rel. Law § 140(d) (McKinney 1964). Since the artificial penis constructed for a female transsexual is usually not sexually functional (see Hoopes, supra note 37, at 341-43), this would preclude the possibility of a female transsexual's marriage as a man. Ordinary legal rules regarding consummation, however, should not apply here. Marriages between elderly persons are not condemned by the laws of any state or by society, even though the couple may not contemplate sexual intercourse or even be capable of it. The same rationale that allows to older persons companionship and love in a marital setting should allow them to the transsexual. Since it is assumed that the spouse has been fully informed of the surgery and its obvious limitation regarding sexual activity, the marriage should not be held voidable for inability to consummate, especially if it appears that this is being used by a spouse to nullify a marriage unsatisfactory for other reasons. Divorce procedures should be used in such cases. Problems such as these should not arise for male-to-female transsexuals, as an artificial vagina, if constructed, renders the transsexual capable of intercourse. But see note 191 supra.


272 The story of George's life is typical of many transsexuals. At the age of 16 he joined the Merchant Navy, in which he remained until he attempted suicide a year later. The psychiatrist to whom he was referred reported in 1953 that "[t]his boy is a constitutional homosexual who says he wants to become a woman." Id. at 1310, 2 All E.R. at 36. In 1956 George joined a troupe of female impersonators performing at a night club in Paris; by that time he had already commenced the regular taking of the female hormone estrogen. His reassignment surgery was performed in 1950 in Casablanca.

273 Arthur arranged to meet April through a transvestite friend with the motive of learning more about how she had made herself so convincingly feminine. However, he testified that he soon became attracted to her as a man to a woman, although there was also evidence that he often was jealous of her success in the female role—a role he had not been able to attain with any success in his periods of transvestism. Id. at 1311-12, 2 All E.R. at 37-28.
short of anal intercourse with numerous men.\textsuperscript{274}

Both parties sought an annulment on the ground of incapacity or willful refusal to consummate the marriage. Arthur alleged the additional ground that the marriage was between two males and therefore void. It was this latter issue that was of primary interest to the court.\textsuperscript{275} Expert medical testimony was presented by both sides regarding the various factors of sex determination and the relevance of these factors to the case. Judge Ormrod found that:

The respondent has been shown to have XY chromosomes and therefore to be of male chromosomal sex; to have had testicles prior to the operation and therefore to be of male gonadal sex; to have had male external genitalia without any evidence of internal or external female sex organs and, therefore, to be of male genital sex; and psychologically to be a transsexual. . . . Socially, by which I mean the manner in which the respondent is living in the community, she is living as, and passing as a woman, more or less successfully. Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator. The evidence of the medical inspectors . . . is that the body in its post-operative condition looks more like a female than a male as a result of very skilful surgery. Professor Dewhurst, after this examination, put his opinion in these words; "the pastiche of feminity [sic] was convincing." That, in my judgment, is an accurate description of the respondent.\textsuperscript{276}

Judge Ormrod, who is also a medical doctor,\textsuperscript{277} reasoned that since marriage is "essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman."\textsuperscript{278} More specifically he chose to determine what is meant by the word "woman" in the context of a marriage.\textsuperscript{279} His conclusion in this regard was disturbingly simplistic.

\textsuperscript{274} Id. at 1311, 2 All E.R. at 37.
\textsuperscript{275} Judge Ormrod did state that he was prepared to hold in the alternative that April had been physically incapable of consummating the marriage. See note 191 supra.
\textsuperscript{276} [1970] 2 W.L.R. at 1322-23, 2 All E.R. at 46-47.
\textsuperscript{278} [1970] 2 W.L.R. at 1324, 2 All E.R. at 48.
\textsuperscript{279} The judge specifically allowed the possibility of April Ashley's sex being classified differently for different purposes. He stated that this would be illogical only "if marriage were substantially similar in character to national insurance and other social situations, but the differences are obviously fundamental. These submissions, in effect, confuse sex with gender." Id. at 1325, 2 All E.R. at 49. Cf. note 36 supra.
Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia, cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.\footnote{280}

Conspicuously absent from the opinion is a description of the “essential role of a woman in marriage.” Without such a description one can only speculate why only a person with certain biological attributes can fulfill it or why a person without those attributes cannot. If by this phrase Judge Ormrod meant the ability to procreate, he would void innumerable marriages throughout the world. If he meant the ability to have sexual intercourse as a woman he ignored the uncontroverted evidence of his own court medical examiners, who reported “there is no impediment on ’her part’ to sexual intercourse.”\footnote{281} In addition, April Ashley had testified to successful sexual relations with at least one man prior to the marriage.\footnote{282} If he meant the ability to look and act like a woman he rebutted his own admission that April’s “outward appearance . . . was convincingly feminine.” Calling her an “accomplished female impersonator” does not detract from her conceded ability to appear feminine.

The only clue Judge Ormrod gave to his meaning is his statement:

It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex.\footnote{283}

“True” sex is biologically determined at or before birth—perhaps at the instant of conception. A person who is “naturally capable of performing the essential role of a woman in marriage” is one who has

\footnotetext{280}{[1970] 2 W.L.R. at 1324-25, 2 All E.R. at 48 (emphasis added).}
\footnotetext{281}{Id. at 1315, 2 All E.R. at 41.}
\footnotetext{282}{Id. at 1311, 2 All E.R. at 37.}
\footnotetext{283}{Id. at 1323, 2 All E.R. at 47 (emphasis added). Dr. Benjamin has suggested that sex in the chromosomal sense is fixed at conception. \textit{Benjamin} 46-47.}
certain biological traits—coincidentally those that are determined at or before birth. Accordingly, whether a person can be a woman for the purposes of marriage is determined at or before birth. The “essential role of a woman in marriage” under this view is simply being a woman from conception or birth.

Such a fatalistic approach ignores the subtle but nevertheless real effects of human social and physical development. It excludes the essence of human existence: the ability to affect one’s own destiny. It reduces life to a collection of mere physical events. Nevertheless, such an approach inexorably comes from the apparent meaning of the judge’s words. Such few words perhaps do not deserve such severe criticism, but the fact that the Corbett case stands as the sole precedent for courts throughout the world to follow in a novel and controversial area requires that it withstand the strictest scrutiny.

Corbett will of course be distinguishable from future cases that may arise. This case involved not just a transsexual marriage but a relationship with a rather odd man of varied sexual inclinations: heterosexual, homosexual, and transvestite. A relationship with a more stable partner would have the aura of legitimacy lacking in Corbett. No complete sexual relations actually took place between the parties on any view of the evidence. This was not a long term or ongoing relationship that was declared void; the parties had lived together only fourteen days. In addition, exhaustive preoperative evaluation and diagnosis was lacking in Corbett. The court had a freer hand in deciding the wisdom of recognizing the surgery, since the medical profession had not played as full a role as it would in transsexual operations in the United States.

Eventually this issue will be faced by a court in this country or elsewhere. The standard that Judge Ormrod suggested, absent the element of biological determinism, is sound. The marriage should be valid if the transsexual is found capable of fulfilling the essential marriage role of the sex he or she has assumed. Such a role should be

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285 Id.
286 Id. See also id. at 1318, 2 All E.R. at 38.
287 During their three-year courtship no sexual intimacies took place other than kissing and what the judge characterized as “very mild petting.” Id. at 1312, 2 All E.R. at 38. After the wedding ceremony, Arthur made sexual advances, which were rejected because April complained of abscesses in her vagina. Evidence regarding later sexual activity was in direct conflict. Arthur maintained that his wife continued to complain of the abscesses while April contended Arthur had achieved full penetration on several occasions but had withdrawn without ejaculation, bursting into tears. Id. at 1314, 2 All E.R. at 39.
288 See notes 51-61 and accompanying text supra.
considered a composite of factors ranging from those incapable of
definition, such as the ability to love and understand another, to those
more concrete, such as the ability to engage in sexual intercourse. The
validity of a transsexual marriage cannot be determined by specific
rules without sacrificing the human compassion so essential to justice.
A marriage, transsexual or otherwise, should not be declared to have
legally never existed unless it is apparent that the marriage never
existed in the minds of the parties themselves.\textsuperscript{289}

If it is held that a transsexual marriage is not void as a matter
of law, there is the further problem of the transsexual who is already
married when the operation is performed. This problem is alleviated
somewhat because many doctors consider prior marriage in the original
sex role to be an indication that the individual is not a true trans-
sexual.\textsuperscript{290} Some surgical teams refuse to operate on a married indi-
vidual.\textsuperscript{291} Nevertheless, some married transsexuals have undergone
surgery abroad and have continued to live with their original wives
as “sisters.”\textsuperscript{292} Consistency would require a holding that such a mar-
riage has become void as between two women. It does not seem wise,
however, to declare a marriage void that was valid at its inception
and may have produced children. Divorce would seem a better pro-
cedure, although it may be difficult to establish one of the traditional
grounds. For example, an English court in Dolling \textit{v.} Dolling\textsuperscript{293}
held that a husband’s change of sex did not amount to cruelty in law. If
annulment is inappropriate in such a case, a liberal construction of the
grounds for divorce is required.\textsuperscript{294}

\textbf{CONCLUSION}

The medical and legal issues presented by the sex reassignment
operation are many and difficult. Future judicial response hopefully

\textsuperscript{289} Such a theory is consistent with existing law, as illustrated by the following. A
requirement of absence from fraud or duress ensures that both parties fully intended to
become married. The consummation requirement suggests that the law needs proof that
both parties could and did give of themselves emotionally and physically to establish their
relationship. One cannot marry while still married to another because it is felt that the
relationship of a married couple is such that it requires the severance of any bonds that
might interfere.

\textsuperscript{290} Hastings, \textit{supra} note 53, at 249; J. Randell, \textit{supra} note 37.

\textsuperscript{291} Hastings, \textit{supra} note 53, at 249.

\textsuperscript{292} Toronto Daily Star, July 13, 1968, at 13, col. 1.

\textsuperscript{293} Unreported, 1958, \textit{discussed in} Bartholomew 83.

\textsuperscript{294} The parties, of course, can “arrange” their divorce on the grounds of desertion
(see N.Y. Times, Oct. 8, 1970, at 62, cols. 4-8) or in other such uncontested actions.
will be liberal and understanding. The guidepost of legal decision-
making in this area should always be what is in the best interests of
the transsexual, for those interests and the interests of society are
not in conflict.

_Douglas K. Smith*_

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