

Legal Aspects of Transsexualism

1990 Edition

Sr Mary Elizabeth, SSE

**Legal Aspects
of
Transsexualism**

Sr. Mary Elizabeth, SSE

Educational Resources Publication

International Foundation for Gender Education
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LEGAL ASPECTS OF TRANSSEXUALISM

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Sr. Mary Elizabeth, SSE

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DEDICATION

To Mom and Dad,

Harry Benjamin, M.D.,
Paul A. Walker, Ph.D.,
Zelda R. Suplee, and
Christine Jorgensen.

Parents,
and cherished friends.

Without their inspiration and help, this project would
have never been undertaken.

"Nothing is more inflexible than what has never been defined but has been taken for granted. With definitions one can argue, with assumptions one cannot. No one knows that better--or has learned this more painfully--than the transsexual."

J. Hoenig, M.D.¹

¹Hoenig, *The Legal Position of the Transsexual: Mostly Unsatisfactory Outside Sweden*, Can. Med. A. J., Feb. 5, 1977, at 319.

FOREWORD

Everyone who sets out on the arduous and uncertain journey toward sex change bumps into legal questions, usually by the bushel. And to many of these questions there are as yet no clear-cut answers, because the field is still new and the picture is constantly changing--not just from year to year but from week to week, as court cases and government decisions continue to build a body of precedent. The field is also very small, encompassing a minuscule segment of the population, so that few lawyers ever have reason to familiarize themselves with the complex legal problems that confront transsexuals. Where, then can you turn for guidance on this route?

There could be no happier answer to that question than the little book you are now holding in your hands, which has been thoroughly revised and updated almost to the moment of publication. Its author, Sr. Mary Elizabeth, is without doubt one of the nation's most knowledgeable experts on the subject. In this legal primer for transsexuals she has clarified and compressed an astonishing amount of helpful information. From A (for Armed Services) to V (for Vocational Rehabilitation), you will find precisely the directions you need for the dozens of situations you may face in your daily living--changing your name, coping with discrimination on the job, handling yourself during a police interrogation when you are cross-dressed, to mention a few.

As director of Confide, it has often been my privilege to work with Sr. Mary Elizabeth on projects concerning transsexuals. And I have been unfailingly impressed by the speed, energy and alloutness of her response to any appeal from a transsexual in distress. Certainly the cause of transsexualism has never had a more effective legal champion. Sr. Mary never hesitates to take on an employer, a jail, a court, a legislature or the federal government itself when she feels there is an injustice to be righted. And her zeal is backed up by an encyclopedic knowledge of case law that commands attention even in the halls of power.

This book is a distillation of that knowledge. It is a book of straight answers. Here you will learn what's legal, what's illegal and what

lies in the gray area between. Here you will find an abundance of tips and caveats to help you chart your way through the legal jungle, along with clear directions on how and where to obtain further specifics. It is a book I commend to you at every stage of your journey across the perilous chasm that separates the sexes.

Garrett Oppenheim, Ph.D., Director
CONFIDE--Personal Counseling Services, Inc.

INTRODUCTION

Descriptions from classical mythology, classical history, Renaissance and nineteenth-century history plus cultural anthropology point to the long-standing and widespread pervasiveness of the transsexual phenomenon.¹ These descriptions were generally hidden away in historical or scientific documents, unavailable and of little interest to the general public.

This situation changed in late-1952, however, when transsexual (sex reassignment) surgery burst publicly upon the world. On December 1, 1952, the New York Daily News carried the banner headline, "Ex-GI Becomes Blonde Beauty."² For the next few months transsexualism became a household topic as story after story was published. Eventually interest in the subject dwindled and one-time front page stories were lost within the inner pages of the tabloids.

Few articles appeared during the period 1954 to 1976. Those that did seldom rated front-page space. During the summer of 1976, however, the world of professional tennis was disrupted by the controversy surrounding a player who had undergone sex reassignment and subsequently desired to play professional tennis as a woman.³ The controversy once again sparked the nation's curiosity concerning transsexualism and, during the following months, numerous magazine articles, newspaper reports, and television programs dealt with the scientific phenomenon of a "female mind trapped in a male body" or vice versa.⁴

¹Green, R. and Money, J., Transsexualism and Sex Reassignment 13 (1966).

²"Ex-GI Becomes Blonde Beauty," New York Daily News, December 1, 1952, at pg. 1.

³Kennedy, "She'd Rather Switch--and Fight", Sports Illustrated, September 6, 1976, p.16.

⁴See, e.g., Burstein, "Dr. Money Explains the Why and How of People Who Want to Change Their Sex," People, September 20, 1976, at p.63; Greene, "What Makes A Person Want To Change Sexes," The National Observer, October 16, 1976, at p.1; Liddick, "Most Transsexuals Search for Happiness In Vain," The Pittsburgh Press, October 19, 1976, at p.13.

Interest in transsexualism would have dwindled once again, had it not been for a seemingly endless series of newsworthy stories involving transsexuals, such as "Transsexual Wars With The Army" and "Sex Changed Teacher Seeks Job Back."⁵ Further, the courts were suddenly alive with transsexual litigation; the common denominator in each being a persistent pattern of severe discrimination.

Systematic medical treatment of transsexualism was initiated in the early-fifties by Harry Benjamin, a prominent New York endocrinologist.⁶ The first gender clinics opened during the 1965-67 period at Johns Hopkins Medical Institutions, the University of Minnesota, and UCLA (University of California Los Angeles).

Professionals involved with these clinics realized early in their research that differential diagnosis would be difficult and controversial. Consequently, international symposiums were established to resolve many of the issues surrounding the treatment of transsexualism. International symposiums have since been conducted in London (1969), Denmark (1971), Yugoslavia (1973), Stanford (1975), Norfolk (1977), San Diego (1979), Tahoe (1981), Bordeaux, France (1983), Minneapolis (1985), and Amsterdam (1987).⁷

By 1976 it was clear that transsexualism was no longer seriously questioned as an accepted medical entity. And, in 1979, a professional subspecialty group (The Harry Benjamin International Gender Dysphoria Association) was formed during the Sixth International Interdisciplinary Symposium on Gender Dysphoria, with minimum standards subsequently being established for the treatment and care of gender dysphoria patients.

⁵Duke, "Transsexual Wars With The Army", Los Angeles Times, September 14, 1977, at C-1; "Sex Changed Teacher Seeks Job Back", Los Angeles Times, November 27, 1976.

⁶Benjamin, H. "Transvestism and Transsexualism," 7 International Journal of Sexology 12-14 (1953); The Transsexual Phenomenon, Julian Press (1966).

⁷Source: JANUS Information Facility, San Francisco, CA. JANUS closed in 1986.

Today, some 30-plus years since becoming front-page news, gender dysphoria syndrome⁸ is described thoroughly in the literature.⁹ The literature suggests that: (1) The causes remain unknown;¹⁰ (2) pre-surgical transsexuals as a group are among the most miserable of people,¹¹ often exhibiting extreme unhappiness which frequently brings them to the verge of suicide¹² or self-mutilation,¹³ and (3) a satisfactory outcome to sex reas-

⁸"Gender dysphoria syndrome is a descriptive term, encompassing selective clinical situations or a set of psychosocial symptoms and/or behaviors that have been reported by a group of deeply troubled often desperate patients seeking gender reorientation including surgical sex conversion." Fisk, N. "Gender Dysphoria Syndrome: The How, What and Why of a Disease," Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome, at 7 (1972).

⁹A recent keyword search of electronic databases available through DIALOG Information Services, produced in excess of 1,200 journal and news media citations on transsexualism.

¹⁰"From all available evidence in the field of psychology as well as physiology, I feel that no one is justified at this time in saying categorically that transsexuals are made, not born. The opposite may also be true. More than one cause can bring on--say--convulsions, and more than one cause is probably responsible for the transsexual syndrome." Benjamin, H., "Should Surgery Be Performed On Transsexuals?" 25 Am. J. Psychotherapy 74, 76 (1971).

¹¹Dr. Pauly is quoted as saying that "[t]he suffering of the transsexual is beyond belief." Leff, "Genes, Gender and Genital Reversal," Med. World News, April 18, 1977, at p.56; See, also, Baker, H.J. & Green, R. "Treatment of Transsexualism," Current Psychiatric Therapies, 88, 93 (1970); Mason, N. "The Transsexual Dilemma: Being A Transsexual," 6(2) Jn. Medical Ethics 85-9 (Jun. 1980); Money, J., DePriest, M., "Three Cases of Genital Self-Surgery and Their Relationship to Transsexualism," 12(4) Jn. Sex Research 283-94 (Nov. 1976); Money, J. "Genital Self-Surgery," 124(2) Jn. Urology 210 (Aug. 1980); see, also Note 13, infra.

¹²G.B. v. Lackner, (1978, 1st Dist.) 145 Cal. Rptr. 555, 557; Levine, S. B., "Suicide By A Transsexual (letter)," 13(3) Arch. Sex Behavior 287-9 (6/1984); Huxley, P. J., Kenna, J. C., Brandon, S., "Partnership in Transsexualism, Part I: Paired & Non-Paired Groups," 10(2) Arch. Sex Behavior 133-41 (4/1981); Danto, B. M., "Violent Sex and Suicide," 5(1-2) Mental Health Soc. 1-13 (1978); Herschkowitz, S., Dickes, R., "Suicide Attempts in a Female-to-Male Transsexual," 135 Am. J. Psychiatry 368-9 (3/1978).

¹³Block, N. L. and Tessler, A. N., "Transsexualism and Surgical Procedures," 131 Jn. of Surgery, Obstetrics and Gynecology 517 (2/1971); Kriger, M. J., McAninch, J. W., Weimer, S. R., "Self-Performed Bilateral Orchiectomy in Transsexuals," 43(7) Jn. Clin. Psychiatry 292-3 (1982); Lowy, F. H., Kolivakis, T. L., "Auto-Castration By A Male Transsexual," 16(5) Can. Psychiatric Assoc. Jn. 399-405 (10/1971). See, also, A confidential memorandum dated July 1, 1981, written by the Chief of Surgery at the Colorado State Hospital, Dr. T. J. Fogel, contains a concise history of plaintiff up to that date: "The patient has made six attempts to emasculate himself over a period of years On the 29th of June he incised and removed a portion of his scrotum, placed string and rubber bands about the spermatic cords bilaterally and this was found the next day and the constricting bands removed He stated categorically that he would not allow any treatment if it did not involve the removal of his testicles. He made this very clear. He was quite rational. He was seen by Dr. Huffaker, the Colorado State Hospital psychiatrist, who in a very clear evaluation (continued...)

signment surgery, in terms of improved social and emotional adjustment, is at least 10 times more likely than an unsatisfactory outcome in properly selected patients.¹⁴

The literature describes the problem of transsexualism as a disturbance of gender identity, where individuals experience a sense of incongruency between their psychological sex and their anatomic sex.¹⁵ Other disturbances described, but frequently confused with transsexualism, include homosexuality and transvestism.¹⁶ They are, however, actually distinct from it. Homosexuals, who are sexually attracted to members of their own sex, and transvestites, who occasionally dress in clothes of the opposite sex, experience conflicts which are only superficially similar to transsexualism. Unlike the transsexual, they do not desire to alter their anatomy.¹⁷ The transsexual, in sharp contrast, feels trapped in a body of the wrong sex and seeks release; either through skilled surgical intervention, or through what ever means—including suicide—available to effectively escape.¹⁸

¹³(...continued)

tion felt that he was sane in every regard and a true transsexual." Supre v. Ricketts, 596 F. Supp. 1532 (D. Colo. 1984), rev'd, 792 F.2d 958 (10th Cir. 1986)(Appeal was on awarding of attorney's fees and administration of hormones in the correctional environment).

¹⁴Pauly, I., "Outcome of Sex Reassignment Surgery for Transsexuals," 15(1) Aust. NZ Jn. of Psychiatry 45-51 (1981); Pauly, I., "The Current Status of the Change of Sex Operation," 147 Jn. Nervous & Mental Disease 460 (1968).

¹⁵Benjamin, H. and Ihlenfeld, C. L., "Transsexualism," 73 American Jn. of Nursing 457-461 (3/1973).

¹⁶"It has frequently been said here that the term 'transsexualism' has come to encompass a variety of conditions that under other circumstances might be labelled extremely effeminate homosexuality, transvestism (particularly conscience-ridden transvestism), schizoid or borderline personality disorder, polymorphous perverse psychopathy, as well as individuals who apparently have manifested cross-gender drives—the classical 'transsexual.' Other types of patients occasionally found among applicants for sex reassignment are obsessional neurotics with profound masochistic trends, notoriety seekers, vocationally motivated homosexual prostitutes, borderline patients, and the overtly psychotic." Meyer, J. K. "Some Thoughts On Nosology And Motivation Among Transsexuals," Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome, at 32 (1972).

¹⁷Frazier, S. H. and Carr, A. C. An Introduction to Psychopathology, New York: Jason Aronson (1974).

¹⁸Cites, supra, Notes 12-13.

The literature indicates a consistent trend towards rejection by both family and friends, harassment and/or discrimination¹⁹ in varying degrees by most of society, and more often than not, a refusal by many in the legal²⁰ and medical professions²¹ to render services; either by reason of questioning the validity of such a diagnosis, or perhaps fear of potential peer and/or community sanctions.²²

Additionally, it is clear from the literature that the causes of transsexualism are disputed among professionals; most of the controversy focusing on whether the etiology is psychogenic or organic.²³

¹⁹"While there are few people suffering with transsexualism, regular psychotherapy is not effective, and these patients are often hurt by other people . . ." Hynie, J. "Treatment of Transsexualism," Vol. 44, Abstract No. 16739: DIALOG 44-16739; Smith v. Liberty Mutual Insurance Co., 569 F. Supp. 1098 (D.C., Ga. 1975) aff'd Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978); Grossman v. Bernards Township, 316 A.2d 39 (1974), aff'd, 538 F.2d 319 (1975), cert. denied 429 U.S. 181 (1976); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Ca. 1975), aff'd without op. 570 F.2d 354 (9th Cir. 1977); Powell v. Reads, 436 F. Supp. 369 (D.C. Md. 1977); Holloway v. Arthur Anderson & Co., 556 F.2d 659 (9th Cir. 1977); Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145 (M.D. Fla. 1979); Sommers v. Budget Marketing, 667 F.2d 748 (8th Cir. 1980); Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (1983); Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Il. 1983), rev. 742 F.2d 1081 (7th Cir. 1984); cert. denied 53 U.S.L.W. 3730 (4/16/85), 105 S.Ct. 2023 (1985); Goerth, C. R., "Ulane Case Highlights Issues of Sex Discrimination Lawsuits," Occup. Health Safety 54-5 (May 1984).

²⁰"There are very few, if any, other attorneys in this community who would have undertaken this unusual representation . . ." Supre, supra, Note 13; "Few, if any, attorneys will accept transsexual cases . . ." Letter from Paul Hoffman, Legal Director, ACLU Foundation of Southern California, dated March, 1985.

²¹Green and Stoller, supra, Note 16; "The primary deterrent to physician involvement in the transsexual problem is a self-protective one, namely fear of censure and considerations regarding reputation." Hoopes, J. E., Knorr, N. J., and Wolf, S. R. "Transsexualism: Considerations Regarding Sexual Reassignment," 147(5) Jn. of Nerv. & Mental Disease 510, 512 (1968); Baker & Green, supra, Note 24, at 88-90.

²²" . . . could not the time and effort of such talented researchers be put to better use, to more legitimate challenges? If a glamorous challenge is insisted upon, we suggest that brain transplanting be preferred to castrating and altering 'sick' males." Letter from Nicole J. Michaud and Elliot Bold, G. F. Strong Laboratory for Medical Research, to the Editor, Am. Jn. Obstet. & Gynecol., 135(1) Am. Jn. Obstet. & Gynecol. 163 (9/1/1979).

²³Benjamin, supra, Notes 6, 15.

Money and Ehrhart suggest that a fetal metabolic or hormonal component may predispose a person toward gender confusion.²⁴ Block and Tessler discuss an endocrine theory which assumes that chromosomal sex and endocrine do not always correspond,²⁵ and Seyler and associates have demonstrated that the response of female transsexuals to diethylstilbestrol (DES) and luteinizing-releasing hormone (LRH) was intermediate between the female and male patterns, suggestive that a biological component is present.²⁶

Virtually countless theories abound, with research failing to wholly support any one position. The result is that most professionals accept the theory that best corresponds with their own personal background, education and clinical experience.²⁷

Adding to the controversy is a lack of standardized criteria to determine the presentation of *true* transsexualism; the diagnostic process being one of inference and the ruling out of other disorders. Definitive diagnostic tools such as standardized physical or psychological tests are simply non-existent.²⁸

On the other hand, there is considerable indication that experienced practitioners are finding methods to accurately differentiate primary

²⁴Money, J. and Erhardt, A., Man and Woman, Boy and Girl, Baltimore: Johns Hopkins University Press (1971); "From animal work it is evident that at least in some species there exists a period of behavioral sexual differentiation in response to male hormone exposure, well as a period of genital differentiation, and that these two critical time periods may be separate." Green, R., Sexual Identity Conflict in Children and Adults (1972) at 36 (Citing Whalen, Peck, and LoPiccolo, 1966).

²⁵Block and Tessler, *supra*, Note 13.

²⁶Seyler, E. L., Canalis, E., Spare, S. *et al.*, "Abnormal Gonadotropin Secretory Responses to LRH in Transsexual Women After Diethylstilbestrol Priming," Jn. Clin. Endocrinol. Metab. (In Press) (1978).

²⁷Hoenig, J., Kenna, J. C., and Youd, A., "Surgical Treatment for Transsexualism," 47 Acta Psy. Scandinavica, 106 (1971)(Citing five references).

²⁸"There are no mental nor psychological tests which successfully differentiate the transsexual from the so-called normal population." Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome, at 16 (1972).

from secondary transsexualism²⁹ and predict outcomes. Extensive patient histories, psychometric testing and psychiatric evaluations program during intake, mid-transition (*following initiation of hormone therapy and full-time living in the gender-role of reassignment*), and just prior to surgery are used to monitor patient progress and adjustment/suitability for sex reassignment surgery. Coupled with this evaluative process is the real-life test, extending from one- to two-years, supplemented by private or group therapy to resolve non-gender related emotional problems, etc. and develop realistic patient expectations *prior* to surgery.³⁰

Despite the controversy about transsexualism, the literature on the subject does reflect some recurrent themes. First, each individual's gender identity is well established by early childhood. Second, transsexualism usually manifests before puberty, and once the pattern is established, it is *highly* resistant, if not impossible, to change.³¹ Third, *true* transsexuals do not respond to psychotherapy, rejecting this mode of treatment because they see their problem as physical and the solution as surgical, not psychiatric.³² Consequently, therapy aimed at other than sex reassignment

²⁹"Primary transsexualism is demonstrated by a life-long fixed and consistent cross-gender identification, whereas secondary transsexualism is generally associated with self-stigmatized, ego-dystonic, homophobic homosexuals or guilt-ridden transvestites, seeing sex reassignment as the only solution to their dilemma. It is estimated that 30-35% of sex reassignment applicants are self-stigmatized, homophobic homosexuals or guilt-ridden transvestites." Pauly, I. "Gender identity disorders." In Farber, M. (ed.). Human Sexuality: Psychosexual Effects of Disease. Macmillan, New York, pp. 295-316 (1985); Pauly, I. and Edgerton, M.T. "The Gender Identity Movement: A Growing Surgical-Psychiatric Liaison," 15(4) Archives of Sexual Behavior 315 (1986).

³⁰The Gender Dysphoria Program of Orange County, Inc. located in San Juan Capistrano, California, has referred less than four per cent of their applicants for sex reassignment surgery; 96 per cent of the applicants making the decision not to have surgery, a clear indication of the value of private and group therapy to the decision making process. Interview with staff of the Gender Dysphoria Program of Orange County; "Surgery does not make a poor patient into a good one. Surgery should come at the end of the rehabilitative process..." Dushoff, I. M. "Economic, Psychologic and Social Rehabilitation of Male and Female Transsexuals Prior to Surgery," Proceedings of the Second Interdisciplinary Symposium on Gender Dysphoria Syndrome, at 199 (1972); Pauly, I., "Outcome of Sex Reassignment Surgery for Transsexuals," 15(1) Aust. & New Zealand Jn. of Psychiatry 45-51 (1981).

³¹Barlow, D. H., Abel, G. G., Blanchard, E. B., "Gender Identity Change in a Transsexual: An Exorcism," 6(5) Arch Sexual Behavior 387-95 (9/1977).

³²Money, J. and Erhardt, A., *supra* Note 24.

has consistently failed,³³ rendering self-castration or suicide a real risk.³⁴ Fourth, transsexuals suffer from a distinct gender disorder of unknown etiology that is capable of amelioration, if not cure,³⁵ uniquely through sex reassignment.³⁶ Fifth, as might be expected, surgical complications are more frequent when individual surgeons or surgical teams are making their initial attempts at vaginal construction. As experience of each group develops, the complications may be largely reduced or eliminated.³⁷ Sixth, sex reassignment, while often treated as cosmetic in the literature, has consistently been deemed non-cosmetic and, in the majority of cases, medically necessary by the courts.³⁸

³³Any discussion of the treatment of transsexualism and the current status of the change of sex operation must begin with one simple fact. Psychotherapy has not proved helpful in allowing the transsexual to accept that gender identity which is consistent with his genital anatomy." Pauly, L., "The Current Status of the Change of Sex Operation," 147 *Jn. Nervous & Mental Disease* 460, 465 (1968) (Citing 19 sources for the statement); This conclusion was recently confirmed by two psychiatrists who suggest, however, that conscientious psychotherapy may benefit the gender dysphoric who is not a true transsexual. Kirkpatrick & Friedmann, "Treatment of Requests for Sex-change Surgery with Psychotherapy," 133 *Am. Jn. Psychiatry* 1194 (1976).

³⁴Wein & Remmers, "Employment Protection and Gender Dysphoria Syndrome," 30/4 *Hastings Law Journal* 1075, n.8 at 1077 (1977) citing Laub, D. and Fisk, N. "A Rehabilitation Program for Gender Dysphoria Syndrome by Surgical Sex Change," 53 *Plast. Reconstr. Surg.* 388-403 (1974). See, also, Money and Schwartz, "Public Opinion and Social Issues in Transsexualism: A Case Study in Medical Sociology," in *Green and Money, Transsexualism & Sex Reassignment*, Baltimore: Johns Hopkins University Press (1969).

³⁵It is doubtful if cure is an appropriate word as few references be found to surgery being a cure. Benjamin's comment "Sex Change Surgery: The Great Debate," 3(11) *Sexual Medicine Today* 18, 19 (11/1979) is perhaps most descriptive and on point--i.e. "... surgery is not a cure for transsexualism. But no one ever claimed that it was, anymore than insulin is a cure for diabetes. What both accomplish is the preservation of the life of the patient. Otherwise, many of the people would commit suicide."

³⁶Wein & Remmers, *supra*, Note 33, at 1078-79 & nn. 10-13.

³⁷Edgerton, M. T., "The Surgical Treatment of Male Transsexuals," 1(2) *Clinics in Plastic Surgery* 285, 315 (4/1974).

³⁸"... clearly impossible to conclude that transsexual [is] cosmetic surgery, even using the definition relied on by the director . . .", *G. B. v. Lackner*, (1978 CA 1st Dist., Div. 3) 80 Cal. App. 3d 64, 145 Cal. Rptr. 555; "As we stated in *G. B. v. Lackner*: We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic." *J. D. v. Lackner*, (1978, CA 1st Dist., Div. 3) 80 Cal. App. 3d 90, 95, 145 Cal. Rptr. 570, 572; "... radical sex conversion surgery is the only medical treatment available to relieve or solve the problems of a true transsexual." *Pinneke v. Preisser*, 623 F.2d 546, 548 (8th Cir. 1980); "Cosmetic surgery is surgery which is deemed optional or elective The surgery which is lengthy, requires extensive modifications and realignment of the human body. It is requested (continued...)"

Despite the generally favorable non-cosmetic and medically necessary judicial decisions, the American judicial system has failed to keep pace with medical and scientific advances, particularly in the area of gender dysphoria syndrome and transsexualism. This failure is aptly demonstrated by a diversity of decisions, rendering the transsexual vulnerable to discrimination in a variety of socio-economic contexts, especially in the areas of civil rights and health care. This vulnerability was clearly described in a recent article by Tim Alger,³⁹ wherein it was stated that "[t]here [are few] provisions for transsexuals under the law. They're kind of left out there, hanging in space. Each time they go into court, depending on the empathy of the judge, it is unknown how they will be treated."

There can be little doubt about the complexity of the socio-legal problems surrounding the transsexual. The newness and limited size of this field makes research difficult. Furthermore, more often than not, the professional may find that once a body of information has been accumulated, it may well fail to provide an answer to the question which motivated the research. On the other hand, few fields of endeavor offer more challenge.

Lawyers, legislators, and judges need to better understand the human condition as it relates to gender dysphoria syndrome, in particular transsexualism. For only through this group of professionals can the advancement of equal rights and equal protection under color of law be attained.

Every member of society, regardless of race, national origin, religious belief, sex, sexual orientation, or sexual status (*transsexual, hermaphrodite, etc.*) should be entitled to be judged and to live under a

³⁸(...continued)

rarely, and done even more infrequently. It is performed to correct a psychological defect, and not to improve muscle tone or physical appearance. . . . While many seem appalled at such surgery, it nevertheless has demonstrated proven benefits for its recipients although psychological in nature From all of the above the court concludes that the treatment and surgery involved in the sex change operation of the plaintiff is of a medical nature and is feasible and required for the health and well-being of the plaintiff," *Victoria L. Davidson v. Aetna Life & Casualty Insurance Co.* 101 Misc.2d 1, 420 N.Y.S.2d 450 (Sup. Ct., 1979).

³⁹Tim Alger, "Adoption Case Raises Issue of Transsexuals Legal Rights," *Orange County Register*, 84 (February 2, 1983).

LEGAL ASPECTS OF TRANSEXUALISM

government of laws, free of prejudice and the weakness of a government of men or women acting without laws to regulate their treatment.

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ARMED SERVICES

Introduction

The United States military's long standing employment policy of discriminating against transsexual individuals is somewhat ironic insofar as the federal government is generally regarded as being in the fore-front of liberal, nondiscriminatory employment policies. Present military regulations, however, bar appointment, enlistment, and induction of those individuals who have undergone sex reassignment and disclosure of one's desire for sex reassignment can be grounds for immediate dismissal.

This discrimination has particularly far reaching effects because a transsexual person denied appointment, enlistment, or induction into, or dismissal from, the military for transsexualism can encounter severe problems in subsequently locating employment in the private sector. It has, in effect, the potential for fixing upon the transsexual "*an official defamation of character.*"¹

Additionally, it should be noted, that service members becoming romantically involved with transsexual individuals, are subject to potential dismissal. The effect of such a dismissal could, potentially, be no less damaging than a dismissal for transsexualism.

Appointment, Enlistment, and Induction

The specific disqualifying regulation, common to all service branches, which bars appointment, enlistment, and induction of those individuals who have undergone sex reassignment, reads:

¹This stigmatization was recognized by Chief Judge Bazelon in *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969) when he wrote: "[T]he dismissal imposes a 'badge of infamy' disqualifying the victim from any further Federal employment, damaging his prospects for private employment, and fixing upon him the stigma of an official defamation of character."

Section IX. GENITOURINARY SYSTEM

2.14 Genitalia

The causes for rejection for appointment, enlistment, and induction, are--

- a. Major abnormalities and defects of the genitalia such as a change of sex, a history thereof, or complications (adhesions, disfiguring scars, etc.) residual to surgical correction of these conditions.²

The Department of Defense's rationale in implementing this regulation is based upon the determination that *"enlistment of transsexuals would not be in the best interest of the individual or the military service. Transsexuals are not considered psychologically or sociologically suited for military service, and they require continuing sophisticated medical care because of the absence of organs and glands normally present in an individual at birth."*³

Discharge, Dismissal, Separation

There are no specific regulations that require the immediate discharge, dismissal, or separation of a service member seeking sex reassignment. The vagueness of military regulations utilized in separating service personnel, however, permits easy discharge, dismissal, or separation without cause, especially in the case of service personnel suffering from gender dysphoria syndrome--*i.e.* transsexualism--or sexually or romantically involved with a transsexual. Consequently, completion of the service contract, without disclosure of one's transsexual feelings, or feelings towards a transsexual, may gain the service member an honorable discharge assignment of an *"eligible for enlistment"* reenlistment code. An *"ineligible*

²Air Force: AR 40-501, Chapter 2, Section IX, paragraph 2-14s, AFR 160-43; Army: AR 40-501, Chapter 2, Section IX, paragraph 2-14s; Navy: BUMED Manual, Chapter 2, Section IX, paragraph 2-14s.

³Letter from Department of the Army to Joanna M. Clark, dated 21 Dec. 1978 (Copy on file with author).

for enlistment" reenlistment code can be just as damaging to the individual as a less than honorable discharge.

Boards for the Review of Discharges or Dismissals

The Servicemen's Readjustment Act of 1944, Section 301, as amended, now Title 10 United States Code, Section 1553, directs the Secretary of each military department and the United States Coast Guard, when it is not operating as a service of the Navy, to establish boards for the review of discharges and dismissals of military personnel.

These boards, operating under rules and regulations issued by the individual Secretaries, are authorized to review either on their own motion or upon request the type of nature of discharge or dismissal of former members of the service, *except* a discharge or dismissal by reason of the sentence of a general court martial. The scope of their [*the board*] review is to determine whether, under reasonable standards of Air Force, Army, Coast Guard, or Navy regulations and discipline, the type and nature of the discharge or dismissal should be *changed, corrected, or modified*; and if so, to decide what change, correction, or modification should be made.

The boards have no authority to revoke any discharge or dismissal, to reinstate any person in the military service subsequent to discharge or dismissal, or to recall any person to active duty. Neither do they have any authority to waive discharges to permit enlistment in any of the Armed Forces; to cancel enlistment contracts; to change, correct, or modify any document, *other than the discharge*, from or to physical disability; or to determine eligibility for veteran's benefits.

The boards may record a recommendation for reenlistment. This recommendation, however, is not binding and Secretarial approval of the board's decision will not constitute endorsement of its recommendation for reenlistment unless so stated by the Secretary.

Application for review of a discharge or dismissal must be made on DD Form 293, and must be submitted within 15 years of discharge or dismissal. Current editions of DD Form 293 may be obtained from the

Veterans Administration, or by writing the appropriate Board of Review of Discharge or Dismissal.⁴

Boards for the Correction of Military or Naval Records

Public Law 601, 79th Congress, Section 131, the Legislative Reorganization Act of 1946, provides that no private bill or resolution and no amendment to any bill or resolution, authorizing or directing the correction of military or naval records shall be received or considered in either the Senate or House of Representatives. Section 207 of this same Act, as amended (now Title 10, United States Code, Section 1552), however, authorized the correction of military and naval records through boards of civilians established by the Secretaries of each service branch.

The boards may correct any record of their respective service when it is necessary to correct an error or remove an injustice. Further, under this Act, the Secretary of the service branch is empowered to act on dishonorable discharges issued as a sentence of a general court martial.

Application for correction of a military or naval record must be submitted on DD Form 149 and must be submitted within three years of discovery of the error or injustice. Current editions of DD Form 149 may be obtained from the Veterans Administration, or by writing the appropriate Board for Correction of Military or Naval Records.⁵

⁴The addresses of the Review Boards are: Air Force - National Personnel Records Center (GSA), Military Personnel Records, 9700 Page Boulevard, St. Louis, MO 63132; Army: CO, USARCPAC, 9700 Page Boulevard, St. Louis, MO 63132; Coast Guard: Commandant (CED), U. S. Coast Guard Headquarters, Washington, D.C. 20591; Navy & Marine Corps: Navy Discharge Review Board, 801 No. Randolph Street, Arlington, VA 22203.

⁵The addresses of the Correction Boards are: Air Force - USAFMPC (AFPM DRA1B), Randolph AFB, TX 78148; Army - Army Board for Correction of Military Records, Department of the Army, Washington, D.C. 20310; Coast Guard - U. S. Coast Guard, ATTN: Senior Member, Board for Correction of Coast Guard Records, Washington, D.C. 20591; Navy & Marine Corps - Board for Correction of Naval Records, Department of the Navy, Washington, D.C. 20370.

Judicial Response

The medical and constitutional validity of AR 40-501, paragraph 2-14s, was first challenged in the Federal court system in 1978. The initial complaint, cited as Clark v. Brown, et. al.⁶ was filed in the U.S. District Court for the Central District of California. The plaintiff, a veteran of 17 years (as a male) U.S. Navy/U.S. Naval Reserve and 22 months (as a female) U.S. Army Reserve service, filed suit alleging a violation of her right to due process and equal protection. The suit was dismissed without prejudice and findings.

The plaintiff subsequently filed a series of *in pro per* administrative appeals with the Navy Discharge Review Board, the Board for Correction of Naval Records, the Merit System Protection Board, and the Army Board for Correction of Military Records. In mid-1981, the Army Board for Correction of Military Records ruled in favor of the plaintiff, finding that an injustice had occurred, that the plaintiff was entitled to credit for military time served and a honorable discharge. The Board refused to reinstate the plaintiff, however.

Following the Board's finding, in favor of the plaintiff, the ACLU Foundation of Southern California, filed a revised complaint with the U. S. Court of Claims. The revised complaint, cited as Clark v. United States,⁷ again challenged the medical and constitutional validity of the preceding regulation, as well as the constitutional validity of a Navy assigned RE-4 (Ineligible for Enlistment) reenlistment code. Prior to setting a date for hearing, however, the Army offered to settle and plaintiff accepted in order to get on with her life.

The second case to come before the courts involving appointment, enlistment, or induction, was Doe v. Alexander,⁸ Doe brought suit under civil rights statutes seeking damages and injunctive and declaratory relief with respect to the Army's enforcement of AR 40-501, paragraph 2-14s,

⁶Clark v. Brown, et al., No. 78-0663 RMT (KX)(C.D. CA, filed 17 Feb. 1978).

⁷Clark v. United States, No. 443-80C, United States Court of Claims (1980).

⁸Doe v. Alexander, 510 F.Supp. 900 (1981).

following rejection of her application for admission as an officer into the Army Reserve in 1976.

The court evaluated Doe's complaint under the *Mindes* test and found her claim to be non-reviewable, in that: 1) Plaintiff has no constitutional right to a commission in the Army Reserve; 2) Plaintiff's injury was speculative at best; and 3) The courts are peculiarly ill-equipped to develop judicial standards for passing on the validity of judgments concerning medical fitness for the military.

The third and final case involving a transsexual service member is Leyland v. Orr, et al.⁹ Leyland, a 15-year veteran of the U. S. Air Force/Air Force Reserve, made the promotion list to Lieutenant Colonel just prior to undergoing sex reassignment surgery. Following an Air Force Review Board hearing, Leyland was discharged from the service.

Leyland filed suit for mandatory, declaratory and injunctive relief, in the United States District Court for the Southern District of California, alleging the discharge was invalid in that: 1) The discharge hearings violated pertinent procedural military regulations; 2) The administrative review, including the Disposition Board, the recommendations, orders and discharge were arbitrary and capricious and unsupported by substantial evidence; 3) The proceedings violated plaintiff's constitutional right of privacy guaranteed by the First, Fourth, Fifth and Ninth Amendments to the Constitution; 4) The proceedings violated plaintiff's constitutional right of free speech and association guaranteed by the First Amendment to the Constitution; and 5) The proceedings violated plaintiff's constitutional right of substantive procedural due process guaranteed by the First Amendment to the Constitution.

The trial court found that the Air Force had acted in an arbitrary and capricious manner in handling the matter. The court failed to rule on what should be done, however, referring the matter back to the parties for resolution.

Leyland appealed to the Ninth Circuit Court of Appeals. The court ruled that discharge of a member of the USAF reserves on ground

⁹Leyland v. Orr, et al., 44 FEP 1636 (1987); 828 F2d 584 (1987).

of physical unfitness after sex reassignment surgery did not violate regulation requiring individual assessment of evaluatee's ability to perform before removal for medical reasons, *given expert testimony that sex reassignment invariably impairs ability to perform.*

A fourth case, Von Hoffburg v. Alexander,¹⁰ involved a non-transsexual service member and her marriage to a male-to-female transsexual. Plaintiff Marie Von Hoffburg was honorably discharged from the United States Army because of her alleged homosexual tendencies.

During pre-discharge procedures, the Army elimination board found that plaintiff's husband, Kristian Von Hoffburg, was a psychological female-to-male transsexual but biological female. The board further opined that the intent of AR 635-200 is to define the sex of a person in the biological sense. As such, the board recommended that the plaintiff be discharged from the service because of homosexual tendencies. Plaintiff was subsequently discharged.

Plaintiff filed suit just prior to her discharge, seeking a declaratory judgment, injunctive relief and monetary damages. The United States District Court for the Middle District of Alabama dismissed the complaint without prejudice because plaintiff had failed to exhaust her administrative remedies.

Upon appeal the 5th Circuit Court of Appeal held that: 1) The plaintiff must exhaust her administrative remedies prior to seeking judicial review of her honorable discharge from the Army; and 2) Plaintiff's claim for monetary damages cannot be satisfied by the available administrative remedies; she must resort to the courts for that form of relief. Finally, the Appellate Court remanded the case back to the district court with directions to vacate the order of dismissal of the claim for monetary damages, but hold the claim in abeyance pending the administrative resolution of plaintiff's remaining claims.

¹⁰Von Hoffburg v. Alexander, 615 F.2d 633 (1980).

Sex discrimination in employment may be either overt or covert. Overt discrimination exists where specific personnel policies deny equal employment opportunity basis on sex. Such policies may include establishment of different job qualifications for men and women performing identical or similar functions as other men or women, advertising job openings for men only or women only, or specific exclusion of transsexuals from employment opportunities.

Discrimination against transsexuals is generally, but not always, based on:

- Presence might have a potentially adverse affect on co-workers and customers.
- Disruption of office-routine because employees threaten to quit if transsexual allowed to use their restroom.

Title VII - Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,¹¹ prohibits discrimination in employment in Federal, State, and local government and in the private sector based on race, color, religion, sex, or national origin. Unfortunately, the majority of recent court decisions at both the District and Appellate Court levels have ruled that Title VII does *not* apply to transsexuals.

Examples of discrimination forbidden by Title VII include: maintenance of sex segregated classified advertising ("help wanted--male" and "help wanted--female"); establishment of different retirement ages for men and women (62 for women and 65 for men); maintenance of separate promotion ladders for men and women; or the refusal to treat pregnancy as a temporary disability. Discrimination based on "change of sex" rather than "sex" itself, is not covered by Title VII, however.

¹¹42 U.S.C. § 2000 et seq. (Supp. III, 1973).

Judicial Response

Current Title VII case law involving effeminate males and/or transsexuals includes: Smith v. Liberty Mutual Insurance Co.,¹² Voyles v. Ralph K. Davies Medical Center,¹³ Holloway v. Arthur B. Andersen & Co.,¹⁴ Powell v. Read's Inc.,¹⁵ Audra Sommers v. Budget Marketing,¹⁶ Sommers v. Iowa Civil Rights Commission,¹⁷ Kirkpatrick v. Seligman & Latz,¹⁸ Ulane v. Eastern Airlines,¹⁹ and Doe v. U. S. Postal Service.²⁰

In Smith²¹ the court held that Title VII did not forbid employment discrimination based on "affectional or sexual preference" of the job applicant, despite the fact that the plaintiff was not characterized as a homosexual person but "effeminate."

¹²Smith v. Liberty Mutual Insurance Co., 395 F. Supp. 1098 (ND Ga, 1975); 11 BNA FEP Cas 741, 10 CCH EPD P 10429, aff'd Smith v. Liberty Mutual Insurance Co., 569 F.2d 325 (CA5 Ga, 1978); 17 BNA FEP Cas 28, 16 CCH EPD P 8178. See also 42 ALRFed 189 Section 3; 12 ALRFed 15 Section 7; 12 ALR4th 1009 Section 1; 99 ALR3d 154; 78 ALR3d 19.

¹³Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (ND Ca, 1975) 11 BNA FEP Cas 1199, 11 CCH EPD P 10716, aff'd without opinion 570 F.2d 354 (CA9, 1978), 18 BNA FEP Cas 866, 16 CCH EPD P 8119.

¹⁴Holloway v. Arthur B. Andersen & Co., 556 F.2d 659 (CA9, 1977); 16 BNA FEP Cas 689, 15 CCH EPD P 8059. See, also, Grossman v. Bernards Township, 127 NJ Super 13; 316 A.2d 39 (1974), 9 BNA FEP Cas 1291, 7 CCH EPD P 9230; aff'd 538 F.2d 319 (1975), cert. denied 429 U.S. 181.

¹⁵Powell v. Read's, Inc., 436 F. Supp. 369 (D.Md. 1979), 15 BNA FEP Cas 1093, 16 CCH EPD P 8100. See, also, DeTore v. Local #245 of the Jersey City Public Employee's Union, 615 F.2d 980 (3rd Cir. 1980), aff'd or remand at 511 F. Supp. 171 (D. N.J., 1981); Terry v. Equal Employment Opportunity Commission, et al., 35 BNA FEP Cas 1395 (E.D. Wis. 1980).

¹⁶Audra Sommers v. Budget Marketing, Inc., 667 F.2d 748 (CA8, 1982).

¹⁷Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (1983).

¹⁸Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145 (MD Fl. 1979); 21 BNA FEP Cas 40, 22 CCH EPD P 30634, aff'd 636 F.2d 1047 (CA5 FL), 25 BNA FEP Cas 73, 25 CCH EPD P 31549.

¹⁹Karen Ulane v. Eastern Airlines, 581 F. Supp. 821 (ND Il, 1983), rev. 742 F.2d 1081 (7th Cir. 1984), cert. denied 53 USLW 3730 (4/16/85), 105 S.Ct. 2023 (1985).

²⁰Doe v. United States Postal Service, 37 BNA FEP Cas 1687 (1985).

²¹Supra Note 12.

The Voyles²² court expanded the non-applicability view to include both transsexuals and bisexuals. Voyles, a medical technician, was dismissed when she informed her employer that she intended to undergo sex reassignment from male-to-female. She was dismissed on the ground that such a change *might* have a potentially adverse effect on coworkers and patients. She sued under the Civil Rights Act of 1964 for injunctive and monetary relief on the grounds that the dismissal constituted sex discrimination under the Act. The District Court granted the defendant's motion to dismiss, stating that "[s]ituations involving transsexuals, homosexuals, or bisexuals were simply not considered [by Congress in passing the Act], and from this void the Court is not permitted to fashion its own judicial interdictions." The dismissal was upheld on appeal by plaintiff to the Ninth Circuit Court of Appeal.

The Court reached a similar decision in Holloway,²³ wherein plaintiff, employed as a multilith operator, was dismissed after having informed her supervisor that she was undergoing treatment in preparation for sex reassignment from male-to-female. The Court granted the employer's motion to dismiss the suit, ruling again that Title VII did not embrace transsexual discrimination. Again, the decision was affirmed on appeal. The Court did, however, go on to rule that "a transsexual who claimed discrimination because of his or sex, male or female, could state a cause of action under Title VII.

In Powell,²⁴ plaintiff was engaged in the required trial living venture prior to sex reassignment surgery. On her first day of employment as a waitress in a new job, plaintiff was dismissed by her supervisor who had been informed by a customer that plaintiff had been a man. The court followed the Voyles and Holloway decisions, stating that Title VII did *not* embrace sex reassignment.

²²Supra Note 13.

²³Supra Note 14.

²⁴Supra Note 15.

The Eight Circuit Court of Appeals followed the reasoning of previous courts in Sommers.²⁵ Miss Sommers was fired by her employer, Budget Marketing, after having told them she had the anatomy of a woman and working two days. The company said she was fired because its office routine was disrupted because female employees threatened to quit if Miss Sommers were allowed to use their restroom.

While the Court was not unmindful of the problem Sommers faces, they recognized the problem Budget faced in protecting the privacy interests of its female employees. An appropriate remedy was not immediately apparent to the Court. "*Should Budget allow Sommers to use the female restroom, the male restroom, or one for Sommer's own use?*" The issue before the court, unfortunately, was not whether such an accommodation could be reached but, rather, whether Congress intended Title VII of the Civil Rights Act to protect transsexuals from discrimination. The court held with the other Circuits that such discrimination is not within the ambit of the Act.

Sommers, having failed in the federal court system, next brought suit against the Iowa Civil Rights Commission.²⁶ The Iowa Supreme Court held, however, that an Iowa statute prohibiting discharge of an employee because of that employee's sex or disability did not proscribe employment discrimination based on transsexuality.

The Kirkpatrick²⁷ court found that a preoperative male-to-female transsexual terminated from employment for not dressing and acting as a man while at work, failed to state a cause of action under 42 U.S.C. § 1985(3). Under color of law, "*plaintiff must allege that defendants' refusal to allow her to continue work while dressing and acting as a woman denied her equal protection, or equal privileges and equal immunities, and where there was no allegation that any other employees who were biologically men, were protected, privileged, or immune so as to have a right to work while dressed and acting as women (or vice versa).*" Further, the court went on

²⁵ Supra Note 16.

²⁶ Supra Note 17.

²⁷ Supra Note 18.

to find that transsexuals "*are not (a) suspect class for purposes of equal protection analysis and (b) clearly there was rational basis for employer's requiring its employees who dealt with public to dress and act as persons of their biological sex since allowing employees to do otherwise would disturb customers and cause them to take their business elsewhere.*" The decision was affirmed, on appeal, by the Fifth Circuit.

What initially appeared to be a landmark decision occurred during the trial court phase of Ulane v. Eastern Airlines.²⁸ Ulane, an Eastern Airlines pilot, fired after undergoing sex reassignment surgery, was reinstated with back pay by U.S. District Judge John Grady, who found Eastern guilty of sex discrimination. Judge Grady ruled that Ulane was fired not because of any legitimate safety reasons, but because Eastern officials were concerned about the image of having a transsexual flying their planes. Grady attacked Eastern's "ostrich-like" motives, comparing the airline's position to that of opponents of civil-rights legislation. "*Ignorance, prejudice, discrimination and hatred have throughout history been justified by, 'I don't know. We can't take a chance,'*" he wrote. Grady ruled that Eastern's medical witnesses "*are in my view contemptuous of transsexuals, with an intolerance and prejudice that's culpable.*" He then went on to reject Eastern's claims that Ulane, as a transsexual, was not entitled to protection under the federal Title VII law prohibiting sex discrimination. The decision, however, was overturned by the Seventh Circuit, with the Supreme Court denying certiorari. In handing down its decision, the Seventh Circuit wrote: "*Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.*"

Current case law clearly indicates that transsexuals cannot bring suit under Title VII. However, a recent case involving the U.S. Postal Service, has opened the door to possible claims and protection under the Rehabilitation Act of 1973.

²⁸ Supra Note 19; Cotton, D. "*Ulane v. Eastern Airlines: Title VII and Transsexualism,*" 80 Northwestern Univ. L. Rev. 1037 (1986).

In Doe v. United States Postal Service,²⁹ the court found that Doe had: (1) failed to state a claim under Title VII, (2) succeeded in her claim based on denial of equal protection, since no court has held either that all governmental discrimination against transsexuals rationally based or that it is somehow outside the scope of equal protection, insofar as applicants for U. S. Government employment are entitled to protection against arbitrary or discriminatory treatment, (3) succeeded in her claim under the Rehabilitation Act of 1973, in that her transsexualism is an impairment that substantially limited at least her major life activity of working.

An uncited case--Jane Doe vs. Electro-Craft Corporation--claiming discrimination based on *mental* handicap has been reported up in the press. The dismissed transsexual initially charged sex discrimination and took her case before the New Hampshire Human Rights Commission. The commission ruled that the case did *not* fall within its jurisdiction, however. The plaintiff, referred to as *Jane Doe*, subsequently asked the State Supreme Court to rule that she was the victim of discrimination against the mentally handicapped.

The attorney of record for the plaintiff is Jonathan Meyer of Manchester, New Hampshire.

²⁹Supra Note 20.

In general there is no reason to believe that the transsexual will run afoul of the criminal law more often than anybody else, with two significant exceptions which apply to the preoperative transsexual whose anatomical sex is incongruous with the individual's psychological disposition and preferences. First, the transsexual may indeed have sexual contacts that will be regarded by unsympathetic police and prosecutors as homosexual. Second, the preoperative transsexual's more serious problem is with "cross-dressing"--i.e. wearing the clothes and generally presenting oneself to others as being of the "opposite" but desired sex.

Cross-dressing

It is impossible to determine how many locales still have laws on the books that could be construed to prohibit cross-dressing or "disguising" oneself as a member of the opposite sex.

Cross-dressing is a status offense, one which can be or is in practice enforced only against a specific group of people--i.e. individuals perceived as cross-dressers; transsexuals, transvestites, and female impersonators. These laws are seldom, if ever, enforced against females dressed as males.

Examples of how the courts have dealt with cross-dressing situations can be illustrated by City of Columbus v. Zanders,³⁰ City of Cincinnati v. Adams,³¹ People v. Simmons,³² City of Chicago v. Wallace Wilson,

³⁰City of Columbus v. Zanders, 266 N.E.2d 602, 25 Ohio Misc. 144, 54 Ohio Ops.2d 142 (1970).

³¹City of Cincinnati v. Adams, 330 N.E.2d 463, 42 Ohio Misc. 48, 71 Ohio Ops.2d 455 (1974).

³²People v. Simmons, 357 N.Y.S.2d 362, 79 Misc.2d 249 (1974).

et. al.,³³ Doe v. McConn (formerly reported as Jane Doe I et. al. v. The City of Houston, et. al.),³⁴ Columbus v. Rogers,³⁵ and D.C. and M.S. v. The City of St. Louis, Missouri.³⁶

The defendant in City of Columbus v. Zanders³⁷ was apprehended while wearing women's clothing and makeup, arrested, charged and tried under Section 2343.04 of the Columbus Municipal Code. The court, after receiving expert testimony that defendant was a true transsexual, dismissed the charge based on a finding that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental defect he lacks substantial capacity to appreciate the wrongness of his conduct or to conform to his conduct to the requirements of the law."

In City of Cincinnati v. Adams,³⁸ defendant was charged with a violation of a city ordinance prohibiting any person to "appear in a dress or costume not customarily worn by his or her sex, or in a disguise when such dress, apparel, or disguise is worn with the intent of committing any indecent or immoral act" Defendant, a male, was standing in a parking lot wearing a woman's wig, earrings and carrying a purse. The court struck down the ordinance on due process grounds, ruling that the law did not give the defendant fair notice of what was prohibited because of its vagueness and overbreadth. The court implied in its opinion that any ordinance prohibiting transvestism, unaccompanied by criminal activity or solicitation, would be unconstitutional.

³³The City of Chicago v. Wallace Wilson, et. al., 389 N.E.2d 522, 75 Ill.2d 525, 27 Ill. Dec. 458 (1978). See, also, 12 ALR4th 1242.

³⁴Doe v. McConn, 489 F. Supp. 76 (S.D. Tx, 1980).

³⁵Columbus v. Rogers, 324 N.E.2d 563, 41 Ohio St.2d 161, 70 Ohio Ops.2d 308 (1975).

³⁶D.C. and M.S. v. The City of St. Louis, Missouri, 795 F.2d 652 (8th Cir. 1986).

³⁷Supra Note 30.

³⁸Supra Note 31.

The defendant in People v. Simmons,³⁹ was dressed in female clothing and after soliciting another male for sex, stole some money from him. One charge against him was violation of a New York statute prohibiting criminal impersonation, defined as when one "impersonates another and does an act in such assumed character with intent to injure or defraud another." The court, after a lengthy discussion of definitions of the words used in the statute and other cases, concluded that the statute did not apply to this defendant because he was not impersonating another but was simply himself.

In City of Chicago v. Wallace Wilson, et al.,⁴⁰ defendants, two preoperative male-to-female transsexuals attired in female clothing, were arrested as they left a restaurant following an early Sunday morning breakfast. Convicted and fined, they appealed their case to the Illinois Supreme Court, which upheld the constitutionality of the ordinance but overturned the lower court's action, recognizing the need for cross-dressing of the preoperative transsexual undergoing treatment for eventual sex reassignment.

The court, in Doe v. McConn,⁴¹ declared a Houston, Texas, city ordinance making it illegal to appear in public areas "dressed with the designed intent to disguise his or her true sex as that of the opposite sex," unconstitutional as it was applied to preoperative transsexuals who cross dress in preparation for sex reassignment surgery. The court noted that an integral part of the presurgical process requires that a transsexual wear the clothing of the gender to which reassignment is sought throughout the preoperative stage, and that the ordinance in question, therefore, directly inhibited the treatment of the transsexual plaintiffs and their reassignment. The court noted that there was no exception or defense under the ordinance for transsexuals, including those under a doctor's care. The court also pointed out that the defendants, past and present city officials charged with the responsibility of enforcing the ordinance, had not

³⁹Supra Note 32.

⁴⁰Supra Note 33.

⁴¹Supra Note 34.

submitted evidence of a state interest in the enforcement of the ordinance.⁴²

In his four-page opinion, U.S. District Judge Norman W. Black described, at length, the transsexual syndrome and the generally agreed upon treatment program which a presurgical candidate must follow in order to receive sex reassignment surgery, stating "[t]ranssexualism is a rare syndrome of gender identity disturbance which appears to occur more frequently in male than in female subjects. The cause of the syndrome is unknown. Treatment of this condition in adults by psychotherapy alone has been futile. Administration of hormones of the opposite sex followed by sex-conversion operations has resulted in better emotional and social adjustment by the transsexual individual in the majority of cases. Prior to undergoing surgery, the patient is required to be seen by a team of specialist in physical and psychological medicine over an extended period of time, generally one to two years."⁴³

Judge Black continued his discussion of the treatment process, stating "To date, it is generally agreed that the common requirement of a preoperative period of six to twenty-four months of living and working in the gender role of choice provides the best index of judgment for eliminating non-transsexuals."⁴⁴

One of the reasons for the requirement that the preoperative transsexual live and work in the gender role of reassignment, is that this "real-life test" is presently the most relied upon index of how well the transsexual can adjust to the demands of everyday living in the gender of reassignment. It provides the individual, as well as the treatment team, with an accurate indication of the individual's ability to function in society as a member of the opposite sex. Also, as stated by the court in McConn, supra "[s]ince some patients presenting transsexual symptoms and desiring surgery may change their mind, a period of hormone therapy and of living in

⁴²"Wearing dress of opposite sex," 12 ALR4th 1249, 1251.

⁴³Supra Note 34.

⁴⁴In recent cases a trend seems to have developed in the use of the phrase "gender of choice". As noted in the text, the use of the word "choice" is wholly inaccurate. The true transsexual has not chosen to be transsexual--he or she just is.

the desired gender role is strongly indicated, so that those whose motives are confused or weak may discover this for themselves through direct experience."⁴⁵

In Columbus v. Rogers,⁴⁶ the same city ordinance as that in Zanders, supra, was held unconstitutionally vague on its face, on the grounds that it failed to give fair notice of the conduct forbidden by the ordinance and to provide guidelines to law enforcement officials charged with its enforcement. The court noted that modes of dress for both men and women are historically subject to changes in fashion, with clothing presently being sold for both sexes which was so similar in appearance that a person of ordinary intelligence might not be able to identify it as male or female dress. Moreover, said the court, it is not uncommon today for individuals to purposely, but innocently, wear apparel which is intended for wear by those of the opposite sex. The court stated that once it is recognized that present-day dress may not be capable of being characterized as being intended male or female wear by a person of ordinary intelligence, the constitutional defect in the ordinance becomes apparent. The defect, said the court, is that the terms of the ordinance, "dress not belonging to his or her sex," when considered in the light of contemporary dress habits, make it so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

The U.S. Court of Appeals in D.C. and M.S. v. City of St. Louis, Missouri,⁴⁷ ruled that the St. Louis ordinance which prohibited cross-dressing and "lewd and indecent" behavior was unconstitutional. The cross-dressing portion of the ordinance was used by police to harass transvestites and transsexuals.

The ordinance was enacted in 1870 and revised in 1949, and made it a misdemeanor to appear "in any public place in a state of nudity or in a dress not belonging to his/her sex or in indecent or lewd dress." The trial court found that the cross-dressing portion of the ordinance was unconsti-

⁴⁵Supra Note 34.

⁴⁶Supra Note 35.

⁴⁷Note 36, supra.

tutionally vague, but upheld the constitutionality of the lewd and indecent conduct portion of the ordinance.

Plaintiffs appealed to the Eighth Circuit U.S. Court of Appeals, which reversed the District Court's failure to find the lewd and indecent conduct portion of the ordinance unconstitutionally vague, and its failure to award both plaintiffs at least nominal damages.⁴⁸

A note of caution is warranted in conclusion. The preoperative transsexual who is presently, or is considering, wearing the clothing normally associated with the individual's gender of reassignment should be cautioned to give some thought to the activities the person will be involved in while dressed as a member of the gender of reassignment. If the transsexual is an individual who may be involved in illegal activities such as prostitution, etc., he or she should be aware that to do so while so dressed exposes one to the possibility, more likely probability, of verbal and physical assaults by either arresting officers, jail staff, or other inmates. In many states it is commonplace for judges and their staffs, as well as juries, to be unsympathetic to the plight of the preoperative transsexual who may make a living from such activities.

To cross-dress without running afoul of the law involves avoiding compromising situations, securing proper identification and authorization, and learning to dress appropriately. The latter is most important: *if you are going to cross-dress, don't be obvious about it.*

Finally, a letter from the attending physician attesting to the fact that the individual is being treated transsexualism and that cross-dressing is a required part of therapy should be carried at all times while cross-dressed. While such a letter has proven useful in helping some individuals to avoid embarrassing situations, it is not a guarantee of immunity from arrest. It is not a replacement for common sense.

Imprisonment

There are few alternatives for transsexuals who find themselves incarcerated. The right to treatment in the area of mental health has

⁴⁸Windy City Times, August 28, 1986.

been given such unconstitutional underpinning that during an involuntary civil commitment the right requires adequate treatment or release.⁴⁹ Prison officials are charged with the protection and safety of the inmates in their care and with seeing to the inmate's physical and mental health.⁵⁰ Thus, the preoperative transsexual, who has been receiving medical treatment for his or her transsexualism prior to incarceration, may have grounds for continued treatment. On the other hand, the individual who has not been diagnosed and treated for their transsexualism prior to incarceration is at the mercy of prison authorities and associated medical personnel as to whether he or she will have an opportunity to be diagnosed and treated.

Prisoners are normally admitted to prison facilities in accordance with their physical anatomy at the time of incarceration. Thus, the untreated preoperative male-to-female is assigned to the men's facility, and the untreated preoperative female-to-male is assigned to the women's facility.

The decision of which facility to assign a preoperative transsexual in mid-transition is complicated. There are few administrative decisions or case law to rely on. Common sense, however, should tell the transsexual facing incarceration that it is impossible to undergo hormone therapy and visibly feminize or masculinize one's body while institutionalized without problems. The physical changes associated with hormonal sex reassignment have caused serious problems in relations with both prison staff and other inmates.⁵¹

⁴⁹Rouse v. Cameron, 373 F.2d 451 (1966); Jackson v. Indiana, 406 U.S. 715 (1972); and Donaldson v. O'Conner, 439 F.2d 507 (1974), cert. granted 95 S.Ct. 171 (1974).

⁵⁰Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976); Ruiz v. Estella, 503 F. Supp. 1265 (S.D. Tx. 1980), aff'd in part, modified in part, rev'd on other grounds 679 F.2d 115 (5th Cir. 1982).

⁵¹"The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma," 7 Conn. Law Rev. 288, 298 n.35 (1975). See, also, People v. Steadman, 3 Ill.App.3d 1047, 280 N.E.2d 17 (1972); State v. Cherry, 381 A.2d 49 (Sup. Ct. N.J., 1977); State v. Thomas, 618 P.2d 459 (Ct. App. Ore., 1980); Scribner v. Sparks, SA-84-DA792 (W.D. Tx. 1980); People v. Ellington, No. CR-82-51985-FY (Cir. Ct. Mich. 1982); Mostyn v. Carlson, 82-1108 RAR (E.D. Ca. 1983); and Supre v. Ricketts, 596 F. Supp. 1532 (D. Colo. 1984), rev'd 792 F.2d 958 (10th Cir. 1986)(Appeal was on awarding of attorney's fees and administration of hormones in the correctional environment).

The news media has carried a number of articles concerning preoperative transsexuals incarcerated at mid-transition. Each of these stories has detailed sexual abuse, beatings by both inmates and prison guards, extended solitary confinements. For example, in Farmer,⁵² district Judge William Nealon dismissed a transsexual inmates civil rights suit against the Federal Bureau of Prisons because it lacked merit.

The inmate, identified only as Farmer, a diagnosed transsexual serving a sentence for theft and forgery, claimed FCI Lewisburg officials were deliberately indifferent to [her] serious medical condition by refusing to continue [her] estrogen treatment, subjected [her] to cruel and unusual punishment and violated [her] rights to due process and equal protection by isolating [her] in administrative detention during [her] Lewisburg stay.

In denying Farmer the medication Premarin, a brand of conjugated estrogens, based on informed medical opinion and not an indifference to [her] medical needs, Judge Nealon stated the court would not second-guess three doctors who agreed the proper treatment for people "who feel that nature has assigned them the wrong sexual characteristics remains firmly in the providence of psychotherapy, not in hormonal or surgical manipulation."

On the other hand, the Supreme Court has refused to review a ruling by the 7th U.S. Circuit Court of Appeals, which ordered a lower court to take up Lavarita Meriwether's suit⁵³ against Indiana prison officials.

Meriwether, 28, a preoperative transsexual, alleged in her complaint, filed in 1983, that she has been denied all treatment, including estrogen therapy for her gender dysphoria, that she has been the victim of violence and sexual assault while housed in the general prison population, and that she had been segregated for up to five months while being sexually and emotionally abused by guards.

⁵²UPI Wireservice, DIALOG.

⁵³Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987), cert. denied 108 S.Ct. 311 (1987)(the opinion of the District Court is unpublished). See, also, Carelli, Richard, AP, Dateline: Washington (November 2, 1987).

U. S. District Judge James E. Noland threw out Meriwether's suit, ruling that no "serious" medical need was involved. His decision was reversed and the suit reinstated by the 7th U. S. Circuit Court of Appeals. The Appellate Court, in sending the case back for further review, found evidence of deliberate indifference to the medical needs of Meriwether, and that she has a right to some kind of medical treatment, but stressed "it might not take the form of estrogen therapy."

Under similar circumstances, U.S. District Judge Raul Ramirez, granted a preliminary injunction to Anna Marie Mostyn,⁵⁴ a preoperative transsexual, stating that "although prison officials classified her as a man, because the sex change has not been completed, evidence is overwhelming in every respect that Mostyn has predominantly female characteristics and is a true transsexual."

Judge Ramirez ordered that she be kept out of the general male population of any prison, and that medical treatment be continued because the inmate "could have severe psychological effects" if they were stopped. He refused, however, to grant her request to be allowed to wear feminine clothing and cosmetics while in prison.

The course of action, therefore, for the preoperative transsexual undergoing treatment should be quite obvious--avoid compromising situations which could lead to incarceration.

⁵⁴Mostyn v. Norman Carlson, Civil Case CV-1108RAR, Eastern Dist. California (1983). See, also, UPI Dateline: Sacramento (April 15, 1983).

Child Custody

In child custody cases involving a gender conflicted parent one hesitates to predict what action the courts will take. As Jan Elliot⁵⁵ points out, "[t]here are few published court opinions dealing with cross dressers . . . [and] in general the opinions present a 'mixed bag.'"

The traditional legal standard for dealing with children is to place the welfare of the child in a predominant position. While the relevant factors are relatively comprehensible in the ordinary custody proceeding, a case involving a gender-conflicted parent presents a unique situation, the threshold question being whether the gender-conflicted are by definition unfit parents.

In In re Tenure Hearing of Grossman,⁵⁶ the trial court held and the Court of Appeals affirmed that the mere presence of a transsexual teacher whose sex reassignment was known to the children caused the likelihood of psychological damage to the children sufficient to justify her dismissal.

On the other hand, the Colorado Appellate Court ordered that custody remain with the natural "mother" (now a male) in Christian v. Randall.⁵⁷ The court found that "[t]he record contained no evidence that the environment of the respondent's home in Colorado endangered the children's physical health or impaired their emotional development."

In 1987, a Minnesota appellate court reasoning that the best interests of the child would be so served sustained the grant of sole

⁵⁵Jan Elliot, "Questions of Law," 4(6) Alpha Zeta & A Rose News 4 (May 15, 1988).

⁵⁶Paula M. Grossman v. School District of the Township of Bernards, Somerset County, New Jersey, 316 A.2d 39 (1974); aff'd. 538 F.2d 319 (1975); cert. denied 429 U.S. 181 (1976).

⁵⁷Christian v. Randall, 516 P.2d (1973).

custody of a daughter to her "transvestite" father. Important to the decision were the facts that the father did *not* cross dress at home; would tell his daughter about his cross dressing at an appropriate time with the help of a therapist; and, perhaps critically, that the child had been abused while in the mother's custody.⁵⁸ Finally, in 1988, custody was given to a transsexual parent, In Re Custody of T. J.,⁵⁹ who had determined for the present to *maintain his male identity* and not cross dress, even though his son knew of his father's gender conflict.

The controversy continues, however. In In Re Clark,⁶⁰ an Orange County Superior Court judge approved an adult adoption of a 25 year-old prison inmate. A week later, the judge changed his mind and rescinded the adoption decree, having belatedly discovered that both parties were labelled as transsexuals. The presiding judge ignored the fact that the adoptive parent was: (1) now legally female and had been for the past 12 years, and (2) a highly respected member of the local community with considerable community support for her action. The judge's position was that the adoption was *not* in the public interest.

Parental rights became a major issue in the case of Daly v. Daly,⁶¹ when the respondent mother petitioned the trial court to terminate appellant's parental rights. The trial court terminated appellant's parental rights and Appellant appealed.

The court reviewed jurisdictional grounds for termination of parental rights under Nevada statute NRS 128.105. Expert witnesses examined the child and testified that there was a serious risk of emotional or mental injury to the child if she were allowed to be in her father's presence. Further, the child stated to the court that it would be disturb-

⁵⁸In Re Welfare of N.H., 412 N.W.2d 389 (Minn. Ct. App. 1987).

⁵⁹In Re Custody of T. J., 1988 Minn. App. LEXIS 144 (unpublished February 9, 1988).

⁶⁰In Re the Adoption Matter of Anna Marie Mostyn, Orange County Superior Court, No. _____, January 11, 1983.

⁶¹Suzanne Lindley Daly, formerly known as Tim Daly, Appellant, v. Nan Toews Daly, Respondent, 102 Nev. Advance Opinion 20 (March 6, 1986).

ing to visit with her father and made it graphically clear that she didn't want to see him again.

Based on the above the trial court found the requisite jurisdictional grounds existed to terminate parental rights.

On the other hand, in In re Mackenzie,⁶² the Arizona Supreme Court has ruled that the defendant's crossdressing and preoperative transsexual lifestyle were not an issue significant enough to cancel either custody or visitation.

Whether the gender-conflicted are *per se* unfit school teachers and/or parents is clearly unresolved scientifically and judicially at this time. Preliminary psychiatric data, however, indicates that as parents, the gender-conflicted *do not* adversely affect their own children's sexual identity. Richard Green, of the State University of New York at Stony Brook, having studied 16 children of gender-conflicted parents over a two year period stated that "[at] this stage I tentatively suggest that children being raised by transsexuals ... do not differ appreciably from children raised in more conventional settings"⁶³

Divorce

Individuals who have entered into marriage and are later diagnosed as gender-conflicted should seek legal assistance if they decide to pursue sex reassignment surgery. This is especially important when children are involved, should the transsexual parent desire to maintain custody and/or visitation.

With the exception of perhaps the Randall, In Re Welfare of N. H. and In Re Custody of T. J. cases, discussed in the preceding section, parental custody and/or visitation rights have generally been denied the gender-conflicted parent; the Daly decision being typical of the many uncited custody/visitation rights battles.

⁶²Letter from Cindy Mackenzie to ALPHA ZETA & A ROSE NEWS, 4(9) Alpha Zeta & A Rose News 4 (October 15, 1988).

⁶³Green, R. "Sexual Identity of 37 Children Raised By 28 Homosexual or Transsexual Parents," American Journal of Psychiatry 692-697 (June, 1978).

Divorce is traumatic enough on children. The situation is complicated even further when one parent is sufficiently gender-conflicted to seek sex reassignment, and the other parent is hostile, seeking to deny parental rights to the other altogether. The real losers are the children of such a union/custody and visitation rights battle.

Love sometimes means letting go . . . particularly when the long-term emotional health of the children are at stake. The gender-conflicted parent, faced with a hostile spouse in a divorce action, should consider very carefully the long-term effects on their children of a prolonged custody battle.

Finally, it should be noted that few physicians will provide hormone therapy, and even fewer surgeons will perform sex reassignment surgery prior to a divorce action being completed because of the threat of a malpractice suit by the gender-conflicted's spouse.⁶⁴

Marriage

Marriages between gender-conflicted and non-gender-conflicted fall into three categories: (1) Marriages between two persons of the same sex (preoperative marriage); (2) Marriages between a person of one sex and a person of the opposite sex who was formerly of the same sex (postoperative marriage); and (3) marriages between two persons of the opposite sex, one of whom subsequently became a member of the same sex.

Preoperative Marriage: Marriage contracted by *preoperative* gender-conflicted individuals are clearly considered invalid: the law making no provision for a marriage between persons of the same sex. The reported cases have unanimously rejected claims by parties involved in same sex marriages.

In Baker v. Nelson,⁶⁵ the Minnesota Supreme Court denied efforts by two males to obtain a marriage license, reasoning in part that "[t]he

⁶⁴Burnell v. Roy J. Catazone, No. 184985 (Superior Court, County of Orange, California, filed July 21, 1971).

⁶⁵Baker v. Nelson, 191 N.W.2d 191 (1971).

institution of marriage as a union of man and woman, uniquely involving procreation and rearing of children within a family, is as old as the book of Genesis." Further, the Court ruled that such denial did not violate the plaintiffs' First amendment right to freedom of religion, their Eighth amendment right not to be cruelly and unusually punished, their Ninth amendment right to privacy, nor their Fourteenth amendment right to equal protection and due process. The same issues were subsequently raised and rejected by other courts in Jones v. Hallihan⁶⁶ and Singer v. Hara.⁶⁷

In Anonymous v. Anonymous,⁶⁸ a marriage contract was entered into by two males, one of whom thought the other was female. Upon attempting to consummate the marriage, the unsuspecting male discovered the true sex of the other. Shortly thereafter he was transferred overseas. In the meantime, the second male underwent sex reassignment. The first male sued for a declaration as to the status of the marriage. The New York Supreme Court declared that the marriage ceremony had not in fact created a valid marriage, noting that "[w]hat happened to the [second male] after the marriage ceremony is irrelevant, since the parties never lived together."

Postoperative Marriage: The issue of whether a marriage is legal when one of the parties has changed his or her when one of the parties has changed his or her sex before the marriage ceremony appears to present more of a problem for the courts. The validity of a *postoperative* marriage hinges on many factors, as do all marriages; for example, fraud and absence of consummation.

Early case law (pre-1975) clearly considered all transsexual marriages to be invalid. In Francis B. v. Mark B.,⁶⁹ the husband had undergone operations for mastectomy and hysterectomy, and was undergoing hormonal therapy at the time of the marriage. During attempted consum-

⁶⁶Jones v. Hallihan, 501 S.W.2d 588, 63 ALR3d 1195 (Ky. 1973).

⁶⁷Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

⁶⁸Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971).

⁶⁹Francis B. v. Mark B., 355 N.Y.S.2d 712 (Sup. Ct. 1974).

mation the wife discovered that the husband was without a penis and could not perform sexually. The wife brought suit for an annulment on the ground that the husband was a female, wherein the husband brought a cross-suit for divorce. The court ruled that the husband could not succeed on a suit for divorce because there had been no valid marriage to begin with. "While the inability to consummate the marriage would have been enough to justify the annulment, the defendant was in fact a woman," thus invalidating the marriage.

On the other hand, in *M. T. v. J. T.*,⁷⁰ the New Jersey Appellate Division unanimously declared in 1976 that an individual who changes sex through surgery is entitled to all the legal rights enjoyed by others of the same sex, including marriage. The court rejected previous decisions in this country and abroad, in which a person's sex was determined solely by his or her chromosomes or designated sex at birth. The court ruled that "[i]f the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche, or psychological sex, then identity must be governed by the congruence of these standards." Therefore, at least in New Jersey, a marriage between a *postoperative* transsexual and a person of the opposite sex is valid as long as the transsexual tells the partner in advance about his or her sex reassignment.

The controversy continues, however. In *In re Ladrach*,⁷¹ reported upon by Jan Elliot,⁷² a *postoperative* male-to-female transsexual sought to marry a genetic male. Noting [incorrectly⁷³] that only Arizona, Louisiana, and Illinois statutorily permit changing sex on a birth certificate, although another twelve permit such change without statute, the court held that it could not alter the birth certificate of the transsexual without statutory authority and accordingly the transsexual could not lawfully marry a man.

⁷⁰*M. T. v. J. T.*, 355 A.2d 204 (Super. Ct. 1976); "M. T. v. J. T.: An Enlightened Perspective on Transsexualism," 6 *Cap. Univ. Law Rev.* 403 (1978); See, also, Watson, C. "Transsexual Marriages: Are They Valid Under California Law?" 16 *Southwestern Univ. L. Rev.* 505 (1986).

⁷¹*In re Ladrach*, 32 Ohio Misc.2d 6 (1987).

⁷²Note 1, *supra*, at p.4.

⁷³Arizona, California, Illinois, Iowa, Louisiana, Michigan, North Carolina, and Oregon have enacted legislation to permit the issuance of corrected birth certificates to postsurgical men and women.

Introduction

During the late 1970's private health plans became more generous of providing coverage for preoperative evaluation, sex reassignment surgery, related therapies and hospital costs: (1) the establishment of multi-disciplinary gender programs, (2) the work of dedicated professionals, such as Harry Benjamin, M.D., Paul Walker, Ph.D., Alice Webb, M.S.W., and Donald Laub, M.D., (3) the establishment of minimum "standards of care" by the Harry Benjamin International Gender Dysphoria Association,⁷⁴ and (4) a number of "positive" judicial decisions,⁷⁵ ruling sex reassignment as non-cosmetic and medically necessary in properly selected patients.

Although Federal Employee Health Benefit Plans began excluding benefits for sex reassignment as early as 1974,⁷⁶ it was not until August 1979, following publication of the Meyer/Reter⁷⁷ study, with subsequent worldwide press coverage, that exclusion clauses began to appear on a widespread basis in privately issued insurance policies. The Meyer/Reter

⁷⁴HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASS'N, Attn: Judy Vanmassdam, Executive Director, 900 Welch Road, Suite 402, Palo Alto, CA 94304.

⁷⁵*Doe v. Department of Public Welfare*, 257 N.W.2d 816 (Minn. 1977) ("Total exclusion of sex reassignment surgery from eligibility in the medical assistance program's Physician's Handbook was void under Federal law."); *Rush v. Parham*, 440 F. Supp. 383 (N.D. Ga., 1977), rem'd 625 F.2d 1150 (5th Cir. 1980), reh. den. 632 F.2d 894 (5th Cir. 1981), rev'd. 565 F. Supp. 856 (N.D. Ga. 1983); *G. B. v. Lackner*, (1978) 80 Cal.App.3d 64, 145 Cal.Rptr. 555 and *J. D. v. Lackner*, (1978) 80 Cal.App.3d 90, 145 Cal.Rptr. 570 (Sex reassignment is *not* cosmetic surgery.).

⁷⁶"The general intent of FEHB plans is to cover only those services that are medically necessary for the diagnosis or treatment of illness or injury. Our decision--and that of our carriers--was that sex reassignment surgery does not fall within that intent in the sense that, rather than treating gender dysphoria, it simply renders it non-existent. For essentially the same reason, FEHB plans would not pay benefits for a face lift prescribed as treatment of psychological problems caused by aging... Since about 1974, our plans have specifically excluded services related to sex transformation...." Letter from Assistant Director for Insurance Programs, Office of Personnel Management, United States of America, dated November 15, 1979.

⁷⁷Meyer, J. K., M.D. and Reter, D. J. "Sex Reassignment: Follow-Up," 36 *Arch. Gen. Psychiatry* 1010 (August 1979).

study was published shortly after the Health Care Financing Administration (HCFA) financed study,⁷⁸ which was published without news media commentary or notice.

Following these events the race to publish studies critical of sex reassignment was on, with the National Center for Health Care Technology (NCHCT), and the office of Health, Research, Statistics and Technology (HRST) and Public Health Service (PHS), financing studies⁷⁹ which they have relied on heavily to instruct federal agencies that federal funds are not to be used to fund or pay for sex reassignment surgery.⁸⁰

More recently a Federal District Court in Atlanta, Georgia, issued a ruling in the case of Rush v. Johnson,⁸¹ finding that transsexual surgery was experimental in nature and that Georgia's prohibition of said services to transsexual applicants was rationally related to a legitimate governmental interest in protecting the public health. The court also found that the state's determinations that sex reassignment surgery was not generally accepted by the professional medical community as a proven and effective treatment and that there was no authority of evidence that the surgery is safe and effective were reasonable. The decision effectively confirmed the position taken by HCFA in 1981.

Much publicized and often quoted, the Meyer/Reter study was the turning point, despite critical reviews^{82,83} and a general lack of acceptance

⁷⁸LeRoy, A. and Morse, M. "Development of an Information Data Base on Transsexual Surgery, Final Report (April 30, 1979)(HCFA Contract #500-78-0068).

⁷⁹Paper prepared for the National Center for Health Care Technology on the "Social and Ethical Aspects of Transsexual Surgery" (6/80); HRST-PHS Assessment Report, Vol. 1, No. 4 (1981).

⁸⁰HCFA Transmittal 883, dated October, 1981, "Although transsexual surgery has been performed for at least 50 years, it is still considered experimental because of the lack of long-term, properly designed studies of the outcome of the procedures demonstrating their efficacy. Moreover, there is a high rate of serious complications [associated] with the surgery," HCFA Publ. 14-3, Sec. 35-61.

⁸¹565 F. Supp. 856 (N.D. Ga., 1983). See, also, Note 2, *supra*.

⁸²In Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Il., 1983), Judge Grady wrote: "Even Dr. Meyer, who has a jaundiced view of reassignment surgery, says that on the average the worst that can happen is that there is no improvement. It does not make them any better, it does not make them any worse. He tends to ignore the substantial body of medical literature which supports the proposition that sex reassignment surgery
(continued...)"

within the professional community.⁸⁴ The study has, however, been a rallying point for many private individuals (both professional and non-professional),⁸⁵ bureaucrats,⁸⁶ and government entities⁸⁷ seeking to end or severely limit sex reassignment surgery in the United States.

The trend today is towards a full denial of benefits related to transsexual surgery. A trend that is most unfortunate considering: The prevalence of the phenomenon,⁸⁸ the mental anguish characteristically

⁸²(...continued)

has on the whole been successful in alleviating the anxieties that the depressions that transsexuals without the surgery frequently have. Perhaps ignore is the wrong word. He simply disagrees with the conclusions of these other experts in the field."

⁸³Fleming, M.; Steinman, C.; Bocknek, G., "Methodological Problems in Assessing Sex-reassignment Surgery: A Reply to Meyer and Reter," 9(5) Arch. Sex Behav. 451 (1980).

⁸⁴"Sex-Change Surgery: The Great Debate," 3(11) Sexual Medicine Today 18 (11/1979).

⁸⁵Raymond, J. The Transsexual Empire: The Making of the She-Male. Beacon Press (1979); "Raymond has criss-crossed America, ensuring through non-medical testimony that insurance companies provide no medical coverage to transsexuals." Fisher, Lia. "What Sex Am I," The Philadelphia Inquirer (5/9/85); Twardy, S., J.D., "Medico-Legal Aspects of Transsexualism," 26 Medical Trial Technique Quarterly 249 (1980); Lothstein, L. M. Female to Male Transsexualism: Historical, Clinical, and Theoretical Issues, Boston: Routledge & Kegan (1983); Edgerton, M. T., "The Role of Surgery in the Treatment of Transsexualism," 13(6) Ann. Plastic Surgery 473-81 (12/1984) (The author concludes that further study of surgical treatment is justified, but that it should be limited to established multidisciplinary teams working in academic settings.).

⁸⁶Rep. William L. Clay, D-Mo., in a letter to Thomas R. Sehr, Director of Health and Hospitals (St. Louis, MO), asked, "I would like to know what is the relationship between 'sex operations' and adequate, quality, health care for our indigents. . . ." Sehr agreed with Clay that the hospital should not be providing such services. UPI (DIALOG 0039402)(June 23, 1983).

⁸⁷HCFA, NCHCT and Public Health Service, *supra*, Notes 5, 6, 7.

⁸⁸Reports on the prevalence of male transsexualism have ranged from 1 in 25,000 to 1 in 100,000, and female transsexualism 1 in 103,000 to 1 in 400,000. The DSM-III-R, current edition, states a ratio of 1 in 30,000 for males, and 1 in 100,000 for females.

suffered by the transsexual,⁸⁹ and the vulnerability of this group to abuse⁹⁰

⁸⁹Dr. Pauly is quoted as saying that "[t]he suffering of the transsexual is beyond belief," Leff, "Genes, Gender and Genital Reversal," *Med. World News*, April 18, 1977 at p.56. See, also, *Supre v. Ricketts*, et al., Civ. Action 82-K-24, *Slip Opinion* (November 13, 1984); Money, J. "Genital Self-Surgery," *Jn. Urology* 210 (Aug. 1980).

⁹⁰LeRoy & Morse, *supra* Note 5, at p.20; Compare, also, Lothstein, L. M., "Sex Reassignment Surgery: Historical, Bioethical, and Theoretical Issues," 139(4) *Am. Jn. Psychiatry* 417 (4/1982); "I am writing to express my personal and professional concern for the treatment shown by your nursing and medical staff, including physicians, to a friend who recently was a surgical patient in your Kaiser Anaheim hospital facility.

My friend and business colleague, Ms. [name withheld] underwent cholecystectomy on an emergency basis on October 23, 1985. Prior to that she had suffered painful symptoms from gallbladder disease (stones) for nearly seven months, while undergoing an extensive series of tests as an outpatient at the same facility. The stones were "missed" by the radiologist and medical staff who reviewed initial Xrays and ultra-sound scan of the gallbladder, resulting in her going through several more months of intermittent episodes of pain related to the gallbladder problems. Ms. [name withheld] was concurrently suffering from an esophageal ulcer, which complicated the lack of correct diagnosis.

Finally, after many delays in the form of endless visits for scheduling for further tests and evaluation, a second gallbladder scan in October revealed evidence of stones. Subsequently, there continued to be delays in scheduling for further tests and presurgical interviews.

After an episode of severe pain on October 22, 1985, [name withheld] was taken in for emergency surgery on the 23rd. During surgery a stone was found lodged in a duct, a potentially serious problem, possibly one that could have been avoided by correct diagnosis treatment when her symptoms first appeared.

Nevertheless, all throughout the seven months preceding surgery, Ms. [name withheld] continued to have faith in Kaiser physicians and staff, and suffered without complaint her ongoing pain and the failure to diagnosis her condition correctly.

When giving her past medical history to the surgeon evaluating her prior to cholecystectomy, she disclosed the fact that 10 years ago she had undergone surgical procedures for sex reassignment from male to female, a factor she felt significant to reveal to facilitate her medical care. Apparently, that physician wrote the information in her medical chart and from there the private information she disclosed was read by various hospital personnel who had difficulty with accepting her past medical experiences. At that point, some of the staff members reacted in an unethical, illegal, immoral and totally unprofessional manner, not only in their reactions to [name withheld] personally, but in passing around that private information to each other. Nurses, physicians and other staff members referred to Ms. [name withheld] as "Mr." [name withheld], and used masculine pronouns, such as "he" and "him", when referring to her. Some visitors to her room became uncomfortable, aware of being scrutinized by the staff, as if they too were curiosities. Ms. [name withheld], already feeling vulnerable from the usual patient experience of being stripped of personal identity, and vulnerable from the effects of chronic pain and pre- and postoperative medications, was very sensitive to the lack of professionalism, and was very upset at the staff's use of incorrect pronouns. She made efforts to be a cooperative patient and attempted briefly to educate some of the nursing staff regarding her sex-reassignment. This resulted in no apparent change in behavior or interaction, and left her feeling depressed and anxious.

I visited Ms. [name withheld] two days after surgery. I had already been informed of the situation by some of her friends who had visited her earlier. During the visit, I confirmed with Ms. [name withheld] that indeed, she was upset by the staff's behavior toward her. Apparently, she had not complained to anyone on staff, not wishing to cause trouble for personnel and being somewhat apprehensive that her complaints might lead to further deterioration in her postoperative care which was already substandard.

On admission from the E.R., Ms. [name withheld] was assigned to a room on the pediatrics floor and told it was the only available bed. During my visit to her, it was evident to me immediately that the bed

(continued...)

and discrimination.⁹¹

Judicial Response

A search for cases involving transsexuals and health insurance related issues was conducted in May, 1988, utilizing both LEXIS and WESTLAW. The search produced less than a dozen cases despite the fact there are clear indications that more have come to trial. The majority are either settled out of court or never go beyond the trial court level.

One fact became increasingly clear during the above case search; that is the inability of the American judicial system to keep pace with

⁹⁰(...continued)
was much too short and did not allow her to fully extend her legs. The mattress, in fact, was only six feet long. I went to the floor supervisor and explained that this was causing Ms. [withheld] some physical discomfort. The supervisor then phoned somewhere to check on the availability of longer beds, after which she told me there were no larger beds available in the entire hospital. If that is so, it's absolutely ridiculous, considering that many men and women today are well over six feet tall. Anyhow, I was able to get a nurse to help me position pillows at the head of the bed and assist Ms. [name withheld] to a fully reclining position, making her much more comfortable.

I then approached the floor supervisor again, to appraise her of the situation regarding staff behavior toward Ms. [name withheld]. As she responded to my inquiry, it was clearly evident that she was aware such behavior had taken place. Worse yet, nothing had been done to put a halt to it! She asked if I'd like to speak to the staff supervisor, who just at that moment appeared on the scene. Again, I explained the situation to the staff supervisor, and again it was evident she was aware of the situation, but had, until then, not attempted any resolution. She admitted that the floor was understaffed and there had not been good continuity of nursing care. She agreed the staff behavior toward Ms. [name withheld] was deplorable and promised to meet with nursing staff the next morning to improve the situation.

Interestingly, while standing at the nursing station talking with the staff supervisor, I found the nurses' call board in plain view. What struck me, considering the uncomfortable situation regarding Ms. [name withheld], was the fact that all the room numbers listed on the board had a nurse's name card assigned to them, except Ms. [name withheld]'s room. One blank spot on the entire board. It only made me wonder more about the lack of proper nursing care she was getting. . . .

Ms. [name withheld] has been a friend for the past 10 years. She had sex reassignment surgery in 1975 and has successfully lived as a woman since. She looks and behaves socially as a woman. She is not some bizarre creature. She is a respected business woman and much-loved person in her community. . . ." Letter to the Senior Administrator, Kaiser Canyon General Hospital, Anaheim, CA, from Jude Patton, P.A.-C, MFCC, dated January 6, 1986).

⁹¹*Smith v. Liberty Mutual Insurance Co.*, 395 F. Supp. 1098 (D.C. Ga., 1975), *aff'd Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir., 1978); *Grossman v. Bernards Township*, 316 A.2d 39 (1974), *aff'd* 538 F.2d 319 (1975), *cert. denied*, 429 U.S. 181 (1976); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Ca., 1975), *aff'd* without op. 570 F.2d 354 (9th Cir. 1977); *Holloway v. Arthur Anderson & Co.*, 556 F.2d 659 (9th Cir. 1977); *Kirkpatrick v. Seligman & Latz, Inc.*, 475 F. Supp. 145 (M.D. Fla., 1979), *aff'd* 636 F.2d 1047 (5th Cir. 1979); *Sommers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1980); *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (1983); *Ulane v. Eastern Airlines*, 581 F. Supp. 821 (N.D. IL, 1983), *rev.* 742 F.2d 1081 (7th Cir. 1984); *cert. denied* 53 U.S.L.W. 3730 (4/16/85).

scientific and medical advances of the past 30+ years. The judicial decisions rendered by the courts represent a broad-spectrum of societal concerns--i.e. Change of name, correction of birth certificates,⁹² criminal issues, civil rights,⁹³ marriage,⁹⁴ and health insurance.⁹⁵ These decisions have been, in general, nothing more than a succession of confused and inconsistent legal pronouncements as the system attempts to reconcile medical and biological facts with legal and social concepts of sex and gender. The system's diverse opinions are aptly illustrated in Richards v. United States Tennis Ass'n⁹⁶ and Ulane v. Eastern Airlines⁹⁷.

The first medical necessity case to come before the court was Denise R. v. Lavine.⁹⁸ Denise R., a male-to-female transsexual, having lived fully as a female for 18 years, was denied medical assistance for sex reassignment surgery by the New York City and State Department of Social Services. Neither the City or the State questioned the diagnosis,

⁹²Anonymous v. Weiner, 270 N.Y.S.2d 319 (1966); In re Anonymous, 293 N.Y.S.2d 834 (1968); In re Anonymous, 314 N.Y.S.2d 688 (1970); Hartin v. Director of Bureau of Records, 347 N.Y.S.2d 515 (1973); Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975); In the Matter of Fernandez, ___ N.Y.S.2d ___ (1976); Anonymous v. Mellon, 398 N.Y.S.2d 99 (Sup. Ct. 1977); K. v. Department of Human Resources, 560 P.2d 1070 (1978).

⁹³Citations, *supra* Note 18. See also, Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987), cert. denied 108 S. Ct. 311 (1987) (The opinion of the District Court is unpublished); Supre v. Ricketts, 596 F. Supp. 1532 (D. Colo. 1984), rev'd. 792 F.2d 958 (10th Cir. 1986); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986) (Denial of male inmate's requests for transfer to a women's facility and for administration of hormones are rationally based and not unconstitutional).

⁹⁴Frances B. v. Mark B., 78 Misc.2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974); M. T. v. J. T., 140 N.J. Super. 77, 355 A.2d 204 (Super. Ct. 1976); In re Ladrach, 32 Ohio Misc.2d 6 (1987).

⁹⁵Citations, *supra* Note 2.

⁹⁶Richards v. United States Tennis Ass'n, 93 Misc.2d 713, 400 N.Y.S.2d 267 (1977) ("When an individual such as plaintiff, a successful physician, a husband and father, finds it necessary for his own mental sanity to undergo sex reassignment, the unfounded fears and misconceptions of defendants must give way to the overwhelming evidence that this person is now female.").

⁹⁷Ulane v. Airlines, 742 F.2d 1081, 1087 (7th Cir. 1984) ("Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.").

⁹⁸Denise R. v. Lavine, 47 App.Div.2d 747, 364 N.Y.S.2d 557 (Sup. Ct. 1975), rev'd sub nom., In the Matter of Denise R., 39 N.Y.S.2d 275, 383 N.Y.S.2d 568, 347 N.E.2d 893, 383 (1976).

but determined that there was insufficient evidence to find medical necessity.

The New York Appellate Court ruled in favor of plaintiff, holding the state commissioner's denial of services as arbitrary and capricious. On appeal, the Court of Appeals reversed the appellate court decision, concluding that "[w]here an administrator adopts one of several conflicting opinions," the court could not "assume the role of either social agency or legislative body."⁹⁹

On facts similar to those in Denise R. Doe, an adult male-to-female transsexual, appealed from a decision by the Minnesota State Welfare Department denying medical assistance benefits for sex reassignment surgery. The trial court affirmed the Welfare Department's decision; however, on appeal, the Minnesota Supreme Court reversed the decision.¹⁰⁰ The Supreme Court held that: "(1) The total exclusion of transsexual surgery from eligibility for medical assistance payments was void; (2) The standard of medical necessity requiring applicant for benefits to prove by conclusive evidence that requested medical treatment will eliminate disability and render applicant self-supporting was invalid; and (3) The Welfare Department's determination to deny medical assistance benefits was arbitrary and unreasonable."¹⁰¹

Verna Pinneke¹⁰² successfully filed suit in the U.S. District Court for the Northern District of Iowa, in 1977. The court ordered state and local officials to reimburse Pinneke for her medical expenses, and awarded \$500 in punitive damages as compensation for mental anguish and suffering. The State of Iowa and local officials appealed.

The Eighth Circuit Court of Appeals affirmed the trial court's decision, holding that: "(1) Iowa's denial constituted an arbitrary denial of

⁹⁹Wein, S. & Remmers, C. "Employment Protection and Gender Dysphoria: Legal Definition of Unequal Treatment on the Basis of Sex and Disability," 30/4 Hastings Law Journal 1075, 1080, nn.67-76 (1979).

¹⁰⁰Jane DOE v. State of Minnesota, Department of Public Welfare, 257 N.W.2d 816 (1977).

¹⁰¹*Id.*, at 27.

¹⁰²Verna Pinneke v. Victor Preisser, et al., 623 F.2d 546 (1980).

benefits based solely on diagnosis, type of illness or condition, and (2) Iowa's policy of denying Medicaid benefits for sex reassignment surgery was not consistent with the objectives of the Medicaid statute."¹⁰³

The medical necessity and cosmetic surgery issues first came before the California courts in 1978. G. B. v. Lackner¹⁰⁴ and J. D. v. Lackner¹⁰⁵ involved claimants applying for sex reassignment surgery under the state's MediCal medical assistance program. The Director of Health Services [Lackner] denied benefits in both cases on the ground that "the proposed surgery was to be performed solely for cosmetic purposes and was therefore not covered under the MediCal program." The trial court entered judgment, in both cases, for defendant Lackner. The claimants appealed and the Court of Appeal, First District, reversed and remanded with instructions to the trial court to issue a Writ of Mandate.

Both Lackner decisions treated transsexualism as an illness and recognized the medical necessity and reasonableness of the surgery for the plaintiffs. In regards to the cosmetic surgery issue, the language of the J. D. decision is most noteworthy--"As stated in G. B. v. Lackner: We do not believe, by the wildest stretch of the imagination, that such surgery can reasonably and logically be characterized as cosmetic."

Recently a Federal District Court in Atlanta, Georgia, issued a ruling in the case of Rush v. Johnson.¹⁰⁶ This case actually began in 1976-77 as Rush v. Parham,¹⁰⁷ with the federal district court ruling that state officials had to pay for the requested surgery, and the state appealing the decision. The U.S. Court of Appeals for the Fifth Circuit held that 1) The state should have been permitted to show at trial that the Georgia Department of Medical Assistance had a ban against making payments for

¹⁰³Id. at pg. 546.

¹⁰⁴G. B. v. Lackner, (1978 CA 1st Dist., Div. 3) 80 Cal.App.3d 64, 145 Cal.Rptr 555.

¹⁰⁵J. D. v. Lackner, (1978 CA 1st Dist., Div. 3) 80 Cal.App.3d 90, 145 Cal.Rptr 570.

¹⁰⁶565 F. Supp. 856 (N.D. Ga., June 9, 1983); *supra* Note 2.

¹⁰⁷440 F. Supp. 383 (N.D. Ga., Aug. 2, 1977).

experimental treatments because treatment is not medically necessary, and 2) that transsexual surgery is such a treatment.

Richard C. Freeman, the District Court Judge who issued the court's ruling on June 9, 1983, and who also issued the court's prior ruling in 1977, began by briefly describing the history of the case and the prior district and appellate court rulings and the nature of the court's *present* proceedings as directed by the Fifth Circuit.

Using the somewhat limited guidelines established by the Court of Appeals, the district judge made a lengthy set of findings of fact and conclusions of law, concluding that: (1) Transsexual surgery was experimental in nature and that Georgia's prohibition of said services to transsexual applicants was rationally related to a legitimate governmental interest in protecting the public health, and (2) the state's determinations that sex reassignment surgery was not generally accepted by the professional medical community as a proven and effective treatment and that there was no authority of evidence that the surgery is safe and effective were reasonable.

The first cited case involving a private health carrier was decided by the New York Supreme Court in 1979. The Davidson¹⁰⁸ facts were again similar to preceding cases and were not in dispute. Davidson's insurance carrier, Aetna Life Insurance Company, refused to bear the cost of medical expenses, alleging: (1) Gender dysphoria is not an injury, (2) Transsexual surgery is cosmetic in nature, and (3) Surgical intervention is not necessary and unreasonable. The court found in favor of Davidson, finding the surgery "cannot be considered to be of a strictly cosmetic nature," and that the "sex change operation of the plaintiff is of a medical nature and is feasible and required for the health and well-being of the plaintiff."

A single arbitration case was found utilizing DIALOG. The case involved an employee of Ohio Steel Tube Co. and a member of Steelworkers, Local 3057.¹⁰⁹ The arbitrator found the employee who had

¹⁰⁸Victoria L. Davidson v. Aetna Life & Casualty Insurance Co., 101 Misc. 2d 1, 420 N.Y.S.2d 450 (Sup. Ct. 1979).

¹⁰⁹Ohio Steel Tube Co. and Steelworkers, Local 3057, Case No. 1028510, 70 LA 899.

transsexual surgery in addition to hormonal treatment and counseling to be *ill* and entitled to insurance benefits under the contract's program of insurance benefits.

Overall the court's position continues to be one of indecision as it grapples with the issues. While the majority of decisions involving the extending of health care benefits to transsexuals have been in favor of the plaintiff, the Rush decision sets a precedence that is sure to be relied upon by other jurisdictions, just as the Lackner and Davidson decisions have been relied upon.

Public Agency/Private Companies Response

CHAMPUS: The Civilian Health and Medical Program of the Uniform Services (CHAMPUS) is a medical benefits program provided by the Federal government to help pay for civilian medical care rendered to spouses and children of active duty uniformed services personnel, to retired spouses and children, and to spouses and children of deceased active duty personnel.

With one exception, medical benefits for military dependents are not available for any medical service or supply directly or indirectly related to sex reassignment (transsexualism or hermaphroditism), including psychotherapy, prescription drugs and medicines, and surgery. The one exception is for otherwise covered services and supplies in connection with surgery performed on a child less than ten years old to correct sex gender confusion (ambiguous genitalia).

MEDICARE: There has been a great deal of misunderstanding about Medicare's payment policy for sex reassignment surgery because of certain erroneous and misleading newspaper reports that received widespread publicity during late 1978 and early 1979, alleging that Medicare had decided to cover sex reassignment.

The Health Care Financing Administration (HCFA) clarified Medicare's position in 1983 with the issuance of HCFA Transmittal No. 833, declaring sex reassignment surgery to be experimental in nature. Consequently, Medicare *does not* provide benefits for sex reassignment surgery and related therapies.

PRIVATE COMPANIES: A survey of private health plans in mid-1985, resulted in the following list of companies providing health coverage for sex reassignment and related therapies:

Connecticut General	Prudential
John Hancock Company	The Equitable
Massachusetts Mutual Life	The Hartford
Metropolitan Life*	The Travelers
Northwest National Life	

*Two policies have appeared in recent months with specific exclusions relating to intersex and/or transsexual surgery.

The key issues in obtaining benefits from those companies providing coverage (the above list is by no means complete) for sex reassignment surgery and related therapies will be the lack of pre-existing condition and adequate documentation that the patient has been diagnosed in accordance with the minimum "*standards of care*" established by the Harry Benjamin International Gender Dysphoria Association, thus establishing that the requested procedures are medically necessary.

A total exclusion trend has begun to emerge in recent months involving individual, small group, and insurance trust policies. The rationale for this total exclusion policy is provided in a recent letter by Mutual of Omaha:

The specific medical reasons as to our decision to deny applications from gender-conflicted individuals is that this situation requires intensive, often multiple procedures and continuing long-term maintenance observation involving multiple systems as well as many bio-psycho-social aspects of care. Also, any exclusion rider would not be broad enough to adequately encompass this form of care.

This new policy has yet to be challenged in the courts.

IDENTITY & IDENTIFICATION

Birth Certificate

A new (or failing that, an amended) birth certificate, registering the postsurgical patient's new name and sex can be a convenience in several situations, inasmuch as the record tends to grow in importance as the individual gets older. The birth certificate may be required by statutes for some purposes--i.e. passports, security clearances, evidence of citizenship, proof of age for life insurance and social security, selective service registration, inheritance and genealogical purposes, for many professional licenses, and so on.

The degree of success an application for a new birth certificate will have depends entirely upon the policies or laws of the state or province in which the individual was born. A number of states and Canadian provinces have enacted new statutes in this matter, and there are now bills pending in several others, thanks to the efforts of a few gender-conflicted individuals no longer willing to have their rights trampled on.

New or amended birth certificates can, on occasion, be obtained elsewhere through administrative changes. In some cases postsurgical individuals have had to resort to litigation, but the outcome in these cases has seldom been favorable, however.

The following cases involving a request for change name and/or sex have come before the bar--Anonymous v. Weiner,¹¹⁰ In re Anonymous,¹¹¹ In re Anonymous,¹¹² Hartin v. Director of Bureau of Records,¹¹³

¹¹⁰Anonymous v. Weiner, 270 N.Y.S.2d 319 (1966).

¹¹¹In re Anonymous, 293 N.Y.S.2d 834 (1968).

¹¹²314 N.Y.S.2d 688 (1970).

¹¹³Hartin v. Director of Bureau of Records, 347 N.Y.S.2d 515 (1973).

Darnell v. Lloyd,¹¹⁴ In the Matter of Fernandez,¹¹⁵ Anonymous v. Mellon,¹¹⁶ and K. v. Department of Human Resources.¹¹⁷ Internationally, a single case involving an English female-to-male (Mark Rees) has been heard before the Court of Human Rights.

In Anonymous v. Weiner,¹¹⁸ a postsurgical woman requested the Director of the New York City Board of Health to change the sex designation on her birth certificate from male-to-female. The Board of Health referred the matter to the New York Academy of Medicine which issued a report advising against the requested change. The Board followed the Academy's recommendation and refused to allow any alteration of the birth record.

Petitioner unsuccessfully sought judicial relief. The trial court upheld the Board's decision stating that "it had no authority to substitute its views for those of the Board responsible for administering the statute, unless the director had been arbitrary or capricious in his actions." The court did not expressly hold that sex designation on a birth certificate could not be altered; however, it did commend the Academy and the Board of Health, thereby implying approval of the decision.

In the first In re Anonymous,¹¹⁹ the petitioner requested a change of name from an "obvious male name to an obviously female name." The court noted that at common law, one could adopt any name one wished, absent fraud or the interference with others. In discussing the New York Academy of Medicine recommendation relied upon in Weiner, the court said that "[t]his court is in complete disagreement with the conclusion reached by the learned committee. A male transsexual who submits to sex-reassignment is anatomically and psychologically female in fact. This in-

¹¹⁴Darnell v. Lloyd, 395 F. Supp. 1210 (D. Conn. 1975).

¹¹⁵In the Matter of Fernandez, __ N.Y.S.2d __ (1976).

¹¹⁶Anonymous v. Mellon, 398 N.Y.S.2d 99 (Sup. Ct. 1977).

¹¹⁷K. v. Department of Human Resources, 560 P.2d 1070.

¹¹⁸Note 107, *supra*.

¹¹⁹Note 108, *supra*.

dividual dresses, acts, and comports himself as a member of the opposite sex.... 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 classify this individual as a 'male' when in fact, as aforesaid, the individual comports himself as a 'female.'" The court ordered the change of name and a copy of its order be appended to the petitioner's birth certificate.

In the second In re Anonymous¹²⁰ case, the issues involved were the petitioner's right to change both name and sex on her birth certificate. The court relied on the previous Anonymous case, but was quick to point out some difficulties with the petitioner's request for relief: "retirement at the age of 62, instead of 65 under the rules and regulations of the Social Security Administration, improved ratings for life insurance purposes, the automatic right of exclusion from jury duty, possible marital benefits and rights of inheritance which differ, in some states and nations, according to the sex of the person." The court granted the request for a change of name on the birth certificate but refused to allow the order to be used as evidence that the petitioner's sex had in fact been changed.

Hartin v. Director of Bureau of Records,¹²¹ differed somewhat from the preceding cases in that the Bureau had agreed to change the petitioner's first name and issue a new birth certificate. Nonetheless, the petitioner sought a judgement directing the Bureau of Records and Statistics of the New York City Department of Health to furnish a new birth certificate designating petitioner a female. The Supreme Court, Special Term, held the Department's rules relating to the issuance of a new birth certificate for a transsexual to have a rational basis, and the Department, in implementing those rules, did not act arbitrarily, capriciously or otherwise in an illegal manner in issuing a new certificate changing only the first name of petitioner and omitting any designation of sex. The petition was therefore denied.

¹²⁰Note 112, *supra*.

¹²¹Note 113, *supra*.

In In the Matter of Fernandez,¹²² the court was asked to issue an order changing an alleged transsexual's name from *Linda* to *Michael*. The court ruled that "asking court approval for a change of name from one commonly denoting a female to that of one commonly associated with a male, is a request for a judicial determination of the sex of the petitioner." In denying the petitioner's request, the court once again relied on the New York Academy of Medicine study which regards transsexuals as *psychologically ill and transsexualism as a questionable phenomenon*.

Darnell v. Lloyd¹²³ is the first case which appears inclined to change sex designation on a birth certificate. In Darnell, the federal district court held that the Connecticut Commissioner of Health must show a substantial state interest to justify his policy of refusing to change birth certificates to reflect one's current sexual status following sex reassignment. The plaintiff's complaint alleged that the Commissioner violated her rights to equal protection in that he had granted other requests for birth certificate changes. The court denied the Commissioner of Health's motion for summary judgment, which claimed that the complaint had not stated a cause of action. The dispute was finally settled by an agreement to adopt a new procedure by which postsurgical men and women could obtain a change on their birth certificate to reflect their new sex.

In Anonymous v. Mellon,¹²⁴ the court again denied the petitioner's request for a change of name and sex on the birth certificate. The court ruled that judicial intervention would amount to substitution of the court's view for those of the responsible administrative body.

The final U.S. case to date is K. v. Department of Human Resources.¹²⁵ In K, the court ruled that the matter at hand was of no judicial importance, directing the determination of the operative transsexual's sex be decided by the legislature as "a matter of public policy." The

¹²²Note 114, *supra*.

¹²³Note 114, *supra*.

¹²⁴Note 116, *supra*.

¹²⁵Note 117, *supra*.

Oregon legislature subsequently enacted legislation permitting change of name and sex on the birth record.

Internationally, the World Court of Human Rights in Strasbourg, heard the petition of Mark Rees, an English postsurgical male on October 17, 1986. The decision was a major setback for the European/English gender-conflicted community. The court held that there was no violation of human rights, either with regard to a postsurgical male or females right to have a new birth certificate issued or their ability to marry.¹²⁶

The preceding decisions have undoubtedly caused considerable grief for postsurgical men and women everywhere. However, at the same time, this judicial passivism coupled with a few men and women's unwillingness to accept *no* for an answer, has generated some legislative response and it would appear that new social policy is slowly taking shape.¹²⁷

Driver's Licenses

Policies regarding change of sex designation on driver's licenses for *pre-* and *postoperative* men and women vary considerably between the states. It is therefore advisable to contact the appropriate Department of Motor Vehicles for specific information before submitting a request.

The California Department of Motor Vehicles utilizes a special form (DL-348), which must be filled in and signed by the medical doctor (M.D.) responsible for treatment/monitoring of the patient.

¹²⁶Burgess, David, "The Mark Rees Case from a Legal Perspective," 2(15) SHAFT Newsletter 16 (June/July 1986); Comment, "Eurocourt Rejects TS Case," 2(18) SHAFT Newsletter 2-3 (Dec. 1986/Jan. 1987).

¹²⁷Karen Ulane v. Eastern Airlines, 581 F. Supp. 821 (N.D. Ill., 1983).

Education Records (G.E.D., Military, Job Corps)

A growing number of educational institutions have changed both name and sex designation on the records of students, and on the transcripts of former students, after receiving proof of sex reassignment surgery. Direct negotiation has been successful occasionally, however, the assistance of an attorney or social worker is recommended to insure a receptive hearing while, at the same time, maintaining privacy.

General Education Development (GED) test scores earned during military or Job Corps service are available various sources depending upon the date and place the individual took the test. In requesting test scores, etc., be sure to include the following information: complete name, service number, branch of service, dates of active service (years) and place where tested (military base, unit, etc.). The various addresses and applicable dates are as follows:

GED tests taken on or prior to May 31, 1974, write to:

DANTES
P.O. Box 2879
Princeton, NJ 08541

GED tests taken overseas after May 31, 1974, write to:

GED Testing Service
One Dupont Circle
Washington, DC 20036

GED tests taken within the United States after May 31, 1974, write to:

Department of Education
State in which test was taken.

GED tests taken through the Job Corps, write to:

Manpower Administration
601 D Street, N.W.
Washington, D.C. 20013

College Level Examination Program (CLEP) and the DANTES Subject Standard Tests after May 31, 1974, write to:

DANTES
P.O. Box 2819
Princeton, NJ 08541

Income Taxes

The Social Security Administration notifies the Internal Revenue Service (IRS) automatically whenever a change of name occurs on their records.

When filing tax returns for the first time in the new gender, it is suggested that the change be indicated as follows:

Male-to-female: Jane Smith (formerly John Smith)
Female-to-male: John Smith (formerly Jane Smith)

Military Records

The Secretary of a military department acting through a Board of Correction of Military Records, has authority to correct any military record when he considers it necessary to correct an error or remove an injustice.

Generally, a request for correction must be filed by the veteran, survivor or legal representative within three years after discovery of the alleged error or injustice; however, the Board may excuse failure to file within the prescribed time if it finds it would be in the interest of justice to do so.

Only the U.S. Navy has cooperated in correcting name and sex on DD-214Ns and DD-256Ns. The official position of the Army Board for Correction of Military Records and other branches of the military, being:

"The Board for Correction of Military Records is of the opinion that the military record should show the true facts of military service and that a post-service sex reassignment is not a basis to alter the official military records to show a different

name and sex. Such a change could be considered a falsification of the records and could conceivably lead to confusion and other administrative problems."

For detailed information pertaining to the correction of military records the applicant should contact the branch of service in which service was performed.

Name Change

At common law one may generally assume any name he or she wishes in the absence of interference with the rights of others or an intent to defraud in anyway. Examples of such proscribed fraud would be an attempt to avoid criminal prosecution, defeat creditors, or claim inheritance.

There are two legally acceptable methods to change one's name: 1) by *usage* or *common-law*, and (2) by *court petition/order*.

The usage or common-law privilege of changing one's name at will, in the absence of fraudulent intent-i.e. avoiding criminal prosecution, defeating creditors, or claiming an inheritance, has not been abrogated by present-day name change statutes.

Statutes for effecting a court ordered change of name vary from jurisdiction to jurisdiction and are generally of two types. The first type of statute requires a petition to be based on good and sufficient reason for the name change and allows the court to determine in its discretion the sufficiency of the reasons set forth to support the application. Under this form of statute, the burden of proof rests with the petitioner to prove that there is more than just a whim or personal desire to assume another name. The second type of statute permits the court to grant the petition unless the court determines that there is a good and sufficient reason to deny the change of name. Under this form of statute, the burden of proof rests with either the court or interested third parties to prove that there exists a lawful objection which overrides the petitioner's right to a change of name.¹²⁸ Consequently, while most individuals are fully capable of

¹²⁸Annotation re Change of Name," 79 ALR3d 562.

representing themselves in change of name proceedings before a court, it is recommended that the services of a qualified attorney be sought when seeking a court ordered change of name.

Usage or Common-law method: A name change by the usage or common-law method is accomplished by simply using a new name in all aspects of the individual's personal, social, and business life. No court action is necessary; the key requirement being consistency. In other words, the individual must use the new name with everyone, all of the time. The only restriction being that the individual concerned *must be* 18-years of age or older.

Although it is not necessary to go through any formal procedure to change an individual's name by the usage or common-law method, it sometimes helps to have a written statement to show people who "have a need" to see it in writing.

Court Petition Method: A change of name by court petition is generally accomplished by preparing an "Order to Show Cause," a "Petition for Change of Name," and a "Court Order," and submitting them to the Clerk of the Court of jurisdiction. The "Order to Show Cause" is published in a local newspaper stating that the individual concerned is changing his name. Then, a month or so later, the individual appears briefly before a judge who signs the court order granting the change.

Because of societal attitudes towards individuals undergoing or having undergone sex reassignment, certain modifications have been suggested that should be made to the *Petition for Change of Name* and *Court Order*, which are not normally found in the approved forms books, and for which there may be no statutory authority. Consequently, a second "*Court Order*" should be prepared *without* the suggested changes to prevent having to make a second appearance if the judge refuses to sign the *modified* order.

Occupational Licenses

Licensed members of the various trades, such as electricians, dieticians, and/or beauticians, etc., should apply directly to the appropriate

state office to obtain a corrected occupational license. This applies also to members of the professions which require licensing, such as teachers, engineers, and psychologists, etc. However, since some officials are not likely to be well-informed about transsexualism, and may tend to overreact if taken by surprise by such a request, it is advisable in most cases to handle the request through an attorney.

School boards, in particular, as two recent highly publicized cases¹²⁹ have shown, tend to regard returning postsurgical men or women teachers with honest, if misinformed, concern about endangerment of the morals of their students. As such, it is always advisable to approach school boards through a skilled legal intermediary.

Passports

The policies of the U.S. Department of State's Passport Agency have varied greatly over the years; consequently, it is advisable to contact the nearest regional office prior to submitting a request. Information may be obtained by writing:

U.S. Department of State Passport Office
1425 "K" Street, N.W., Room 300
Washington, D.C. 20524

or contacting one of the regional offices, located in Boston, Chicago, Honolulu, Los Angeles, New Orleans, New York City, Philadelphia, San Francisco, Seattle, or Miami.

Current policy is as follows:¹³⁰

¹²⁹Grossman v. Bernards Township Board of Education, 316 A.2d 39 (1974), aff'd 538 F.2d 319 (1975), cert. denied 429 U.S. 181 (1976); "Sex-changed Teacher Seeks Job Back," Los Angeles Times, Nov. 27, 1976.

¹³⁰Letter from Department of State, dated August 18, 1978, addressed to Joanna M. Clark, Director, Legal Research Project. Contents of letter reconfirmed via letter (April 22, 1983), via telephone conversation with Mr. V. Moore, Officer in Charge, Los Angeles U.S. Passport Office (1987); and via letter from W. B. Wharton, Director, Office of Citizenship Appeals and Legal Assistance, U.S. Department of State, Passport Legal Division, Washington, D.C. 20524 (1989).

Change of Name. When an applicant has changed his or her name via *court order* method, the passport will be issued in that name if the applicant presents the order changing his or her name.

When an applicant has changed his or her name via the *usage* or *common law* method, a passport will be issued in the assumed name *only* when the applicant submits the following:

- a. Affidavits executed by two or more persons attesting that they have known the applicant by both names and that the applicant has used the assumed name exclusively for at least the past five (5) years;
- b. Documentary evidence such as school records, military records, employment records, tax records, or other public records; and
- c. Identification in the assumed name.¹³¹

Change of Sex. The sex designation on the passport may be changed from that indicated on the birth record provided the applicant submits a doctor's letter which states that the applicant is a:

- a. Postsurgical male or female, or
- b. A preoperative transsexual who is in the final stages of treatment prior to surgical reassignment.

If the applicant is postsurgical, a full validity passport will be issued. If the applicant is preoperative, a passport valid for not more than one year will be issued. Unless a preoperative applicant shows extenuating circumstances, a passport will not be extended until the applicant submits a doctor's letter stating that the surgery has been performed. The reason for this, as stated above, is that a preoperative applicant *must be* in

¹³¹Compare with 22 CFR Ch. 1(4-1-88) §§ 51.23-24.

LEGAL ASPECTS OF TRANSEXUALISM

the final stages of treatment prior to surgery before a passport will be issued with the new sex designation thereon.¹³²

¹³²The postsurgical male or female should be aware that a passport will often satisfy a prospective employer in need of a birth certificate for verification of citizenship and/or age, when the individual's home state will not issue a new birth certificate.

OTHER MATTERS

Bequests

The pre- or postoperative transsexual may be faced with problems involving the descent and distribution of property. Although this problem has not yet been presented to the courts, situations can nonetheless be envisioned in which bequeathed property could be withheld, thus forcing the transsexual to seek judicial relief.

In making a bequest to a transsexual, the testator should indicate the devisee clearly and by name. If a parent's will reads "to my son John," where John is now Jane, the inheritance would not be impeded. However, if the will reads "to my youngest son," or "to all my nephews" with no name given, the determination may very well go against Jane. The safest construction would be "to my daughter Jane Smith, formerly John Smith."

For a detailed discussion of estate planning involving transsexuals, see "Transsexuals in Limbo: The Search for a Legal Definition of Sex," 31 Maryland Law Review 236 (1971), and "The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma," 7 Connecticut Law Review 288 (1977). These legal comments can generally be found at your local law library.

Social Security Survivor's Benefits

Section 216(h) of the Social Security Act contains the rules which the Social Security Administration applies in determining family relationships in regard to entitlement to Title II (SSA) benefits. If the relationship of a spouse is involved, the Social Security Administration applies the laws of the appropriate state to determine whether there was a valid marriage, or alternatively, applies the laws of the appropriate state to determine whether the spouse would be considered such for purposes of the distribution of intestate personal property. Thus, if the transsexual were able to contract a valid marriage under state law, that marriage

LEGAL ASPECTS OF TRANSEXUALISM

would be recognized and accepted for purposes of entitlement to Social Security under Title II of the Act.¹³³

Prior to the 1972 Amendments to the Social Security Act, there were different methods of computing retirement insurance benefits for men and woman. The 1972 Amendments, however, made the method of calculating the benefit rate the same for both men and women.¹³⁴

¹³³Letter from the San Francisco office of H.H.S., to Joanna M. Clark, dated September 22, 1978.

¹³⁴*Ibid.*

VETERANS BENEFITS

Eligibility

All Veterans Administration benefits (with the exception of insurance and certain medical benefits) payable to veterans or their dependents, require that the particular period of service upon which entitlement is based be terminated under conditions other than dishonorable. Honorable and general discharges qualify the veteran as eligible for benefits. Undesirable and bad conduct discharges may or may not qualify depending upon a special determination, made by the facts of each case, as to whether the veteran was separated from the service under "dishonorable conditions" or "other than dishonorable conditions."

Veterans in prison and parolees may still be entitled to certain Veterans Administration benefits. For further information one should contact the nearest Veterans Administration Regional Office (listed in the white pages of most telephone directories).

A change of sex will *not* disqualify a veteran from receiving Veterans Administration benefits. The Veterans Administration will change both name and sex on official records following a legal name change and completion of sex reassignment surgery.

Veterans Administration Fact Sheet

The Veterans Administration publishes an annual handbook titled "Federal Benefits for Veterans and Dependents." It is available through local Veterans Administration Regional Offices or from the Superintendent of Documents.

Handbook for Veterans Benefits

For those individuals requiring more detailed information, the Veterans Administration also publishes its "Handbook for Veterans Benefits Counselors." It is available from the Superintendent of Documents.

VOCATIONAL REHABILITATION

The problem of discrimination in the employment of physically or mentally impaired individuals has been well documented¹³⁵ at both the state and federal level. Title V of the Rehabilitation Act of 1973¹³⁶ represented a remedial attack on this deficiency in our civil rights laws by Congress.

The term "handicapped" was defined, for all sections of the Rehabilitation Act of 1973, as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services."¹³⁷

The definition proved troublesome to the Rehabilitation Services Administration, however, because of the restrictive nature of part B--i.e. "*can reasonably be expected to benefit . . .*" when applied to rehabilitation services.

The intent of Congress had not been to limit the protected class in any way, but to "*prevent discrimination against all handicapped individuals, regardless of need for, or ability to benefit from, vocational rehabilitation services.*" To ensure that the original intent of the Act was carried out, Congress expanded the definition of handicapped individual in 1974 to mean one "*who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.*"¹³⁸

According to Wein and Remmers:

¹³⁵Richard, Triandis & Patterson, "Indices of Employer Prejudice Toward Disabled Applicants," 47 *J. Applied Psychology* 52 (1963); Note, "Equal Employment and the Disabled: A Proposal," 10 *Colum. J.L. & Soc. Prob.* 457 (1974).

¹³⁶Pub. L. No. 93-112, 87 Stat. 355 (1973)(codified at 29 U.S.C. §§ 701-794 (1976)); 29 U.S.C. §§ 790-794 (1976).

¹³⁷The Rehabilitation Act of 1973, Pub. L. No. 93-112, §7(6), 87 Stat. 355 (1973).

¹³⁸Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617 (1974), Pub. L. No. 93-651, 89 Stat. 2-3 (1974)(codified at 29 U.S.C. § 706(6)(1976).

Transsexual persons potentially meet this definition of handicapped in all three categories. Under category A, United States Civil Service Commission regulations have characterized "physical or mental impairment" as, *inter alia* "(1) any psychological disorder or condition [or] cosmetic disfigurement . . . affecting one or more of the following body systems: Neurological; musculoskeletal; . . . reproductive; . . . genito-urinary; . . . skin; and endocrine; or (2) any mental or psychological disorder; such as . . . emotional or mental illness . . ." . . . current medical knowledge suggests that gender dysphoria encompasses most, if not all, of these characteristics. To isolate the dominant element, whether physiological or psychological is unnecessary. The transsexual individual may also meet the criteria of category B, which includes a person who has a record of an impairment. Such a person either has a history of, or has been misclassified as having, an impairment that substantially limits one or more major life activities. In other words, an individual may be completely recovered from an impairment, yet still be handicapped. This category was "included because the attitude of employers, supervisors, and coworkers toward that previous impairment may result in an individual experiencing difficulty in securing, retaining, or advancing in employment."¹³⁹

In July of 1978, Dr. Sterling B. Brinkley, M.D., Chairperson of the Rehabilitation Services Administration's Ad Hoc Committee on Transsexualism, confirmed that the committee had found that, "*within the meaning of 29 U.S.C. § 706(6), transsexuals did have a physical or mental disability which could, in individual cases, constitute a substantial handicap to employability.*"¹⁴⁰ Armed with this information, the ACLU of Southern California's Transsexual Rights Committee, sought the availability of rehabilitation services for transsexuals. On January 31, 1981, the Rehabilitation Services Administration issued Program Instruction RSA-PI-81-3, declaring transsexuals to meet the definition of "handicapped" under certain conditions. The program instruction authorized the use of federal funds for electrolysis, speech therapy and other services designed to make the transsexual "passible" in their gender of reassignment.

¹³⁹Wein & Remmers, "Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability," 30/4 *Hastings Law Journal* 1075, at 1119-20 (1979) (Footnotes omitted).

¹⁴⁰*Supra*, Note 139, nn. 19, 87-88.

The first case to come before the courts claiming discrimination on the bases of handicap was *Doe v. United States Postal Service*.¹⁴¹ The *Doe* court found, as previously discussed, that plaintiff had: (1) failed to state a claim under Title VII, (2) succeeded in her claim based on denial of equal protection, since no court has held either that all governmental discrimination against transsexuals is rationally based or that it is somehow outside the scope of equal protection, insofar as applicants for U.S. Government employment are entitled to protection against arbitrary or discriminatory treatment, and (3) succeeded in her claim under the Rehabilitation Act of 1973, as amended, in that her transsexualism had proven to be an impairment that substantially limited at least her major life activity of working.

A second case,¹⁴² involving a transvestite, is of interest because of Congressional reaction to it.

On September 13, 1988, the 100th Congress enacted Public Law 100-430, otherwise known as the "*Fair Housing Amendments Act of 1988.*" The Act contained an amendment by Senator Jesse Helms, which has been codified as 42 U.S.C. § 3602. The text of section 3602, reads:

For the purposes of this Act as well as chapter 16 of title 29 of the United States Code, neither the term "individual with handicaps" nor the term "handicap" shall apply to an individual solely because that individual is a transvestite.

On September 8, 1988, the United States Senate passed Senate Bill S.933--"Americans with Disabilities Act of 1989. Attached to the bill, however, is an amendment (No. 722) by the Republican Senator from Colorado, William Armstrong, which, if enacted into law, will exclude homosexuals, bisexuals, transvestites, transsexuals, child molesters, compulsive gamblers, drug addicts, and kleptomaniacs from protection under the Act.

¹⁴¹*Supra*, Note 29.

¹⁴²*Blackwell vs. United States Dept. of the Treasury*, 656 F.Supp. 713 (D.D.C., 1986); See, Elliot, J. "Questions of Law: Congress Rules TVs Not Handicapped," 4(10) *Alpha Zeta & A Rose News* 1 (9/15/88), for a detailed discussion of this case.

APPENDICES

APPENDIX A: POLICIES

APPENDIX A

BIRTH CERTIFICATE POLICIES

LEGAL ASPECTS OF TRANSEXUALISM

Alabama

Cannot alter existing certificates.

Bureau of Vital Statistics
State Department of
Public Health
Montgomery, AL 36130

Arizona

Issues new certificates.

Vital Records Section
Arizona Department of
Health Services
P.O. Box 3887
Phoenix, AZ 85030

Arkansas

Issues new certificates.

Division of Vital Records
Department of Public Health
4815 West Markham St.
Little Rock, AR 72205

California

Issues new certificates.

State Registrar of Vital
Statistics
Department of Health Services
410 "N" Street
Sacramento, CA 95814-4381

Colorado

Issues new certificates.

Vital records Section
Colorado Department of Health
4210 East 11th Avenue
Denver, CO 80220

Connecticut

Amends certificates.

Department of Health Services
Vital Records Section
150 Washington St.
Hartford, CT 06106

Delaware

Issues new certificates.

Office of Vital Statistics
P.O. Box 637
Dover, DE 19903

Florida

Cannot alter certificates.

Department of Health and
Rehabilitative Services
Office of Vital Statistics
P.O. Box 210
Jacksonville, FL 32231

APPENDIX A - STATE BIRTH CERTIFICATE POLICIES

Georgia

Issues new certificates.

Georgia Department of
Human Resources
Vital Records, Room 217-H
47 Trinity Avenue, S.W.
Atlanta, GA 30334

Hawaii

Issues new certificates.

Research and Statistics Office
Hawaii Department of Health
P.O. Box 3378
Honolulu, HI 96801

Idaho

Cannot alter certificates.

Bureau of Vital Statistics
Department of Health & Welfare
Statehouse
Boise, ID 83720

Illinois

Issues new certificates.

Office of Vital Records
Department of Public Health
605 West Jefferson St.
Springfield, IL 62702

Indiana

Amends certificates.

Indiana Board of Health
1330 West Michigan St.
P.O. Box 1964
Indianapolis, IN 46206

Iowa

Issues new certificates.

Department of Health
Special Services Unit
Vital Records Section
Lucas State Office Bldg.
Des Moines, IA 50319

Kansas

Issues new certificates.

Office of Vital Statistics
Department of Health and
Environment
Forbes Field, Bldg. 740
Topeka, KS 66620

Louisiana

Issues new certificates.

Division of Vital Records
Office of Preventative &
Public Health Services
P.O. Box 60630
New Orleans, LA 70160

LEGAL ASPECTS OF TRANSEXUALISM

Massachusetts

Amends certificates.

Records in Massachusetts must be corrected in City or Town where birth occurred.

Michigan

Issues new certificates.

State Registrar for Health
Statistics
Department of Public Health
3500 North Logan St.
Lansing, MI 48914

Minnesota

Amends certificates.

Department of Health
Vital Statistics Section
717 Delaware St., S.E.
Minneapolis, MN 55440

Mississippi

Amends certificates.

Vital Records
State Board of Health
P.O. Box 1700
Jackson, MS 39205

Missouri

Amends certificates.

Department of Health
Vital Records Bureau
P.O. Box 570
Jefferson City, MO 65102

Montana

Amends certificates

Department of Health and
Environmental Sciences
Bureau of Records & Statistics
Cogswell Bldg., Rm. C-118
Helena, MT 59620

Nebraska

Amends certificates.

Bureau of Vital Statistics
Department of Health
P.O. Box 95007
Lincoln, NE 68509

Nevada

Issues new certificates.

Division of Health and
Vital Statistics
Capitol Complex
Carson City, NV 89710

APPENDIX A - STATE BIRTH CERTIFICATE POLICIES

New Hampshire

Issues new certificates.

Bureau of Vital Records and
Vital Statistics
Department of Health & Human
Services, Division of Public
Health Services
Health & Welfare Bldg.
6 Hazen Drive
Concord, NH 03301-6527

New Jersey

Issues new certificates.

Department of Health
Bureau of Vital Statistics
CN360
Trenton, NJ 08625

New Mexico

Amends certificates.

Vital Statistics Bureau
New Mexico Health Services
P.O. Box 968
Santa Fe, NM 87504-0968

New York

Issues new certificates.

New York Health Department
Vital Records Section
2nd Fl., ESP Corning Tower
Albany, NY 12237

New York City

Issues new certificate
without sex designation.

Bureau of Vital Records
Department of Health
125 Worth Street
New York, NY 10013

North Carolina

Issues new certificates.

Department of Human Resources
Division of Health Services
Vital Records Branch
P.O. Box 2091
Raleigh, NC 27602

North Dakota

Issues new certificates.

Division of Vital Records
Department of Health
Capitol Bldg., Judicial Wing
Bismark, ND 58505

Ohio

Cannot alter certificate.

Division of Vital Statistics
Department of Health
65 S. Front St., G-20
Columbus, OH 43266-0333

LEGAL ASPECTS OF TRANSEXUALISM

Oregon

Issues new certificates.

Oregon State Health Division
Vital Statistics Section
P.O. Box 116
Portland, OR 97207

Pennsylvania

Amends certificates.

Division of Vital Records
Department of Health
P.O. Box 1528
New Castle, PA 16103

Rhode Island

Amends certificates.

Division of Vital Statistics
Department of Health
75 Davis St., Rm. 101
Providence, RI 02908

South Carolina

Amends certificates.

Office of Vital Records
Department of Health and
Environmental Control
2600 Bull Street
Columbia, SC 29201

South Dakota

Amends certificates.

Department of Health
Center for Health Policy and
Statistics
523 East Capitol
Pierre, SD 57501-3182

Tennessee

Enacted specific legislation prohibiting
the altering of an individual's certifi-
cate following sex reassignment surg-
ery.

Texas

Amends certificates.

Bureau of Vital Statistics
Department of Health
1100 West 49th Street
Austin, TX 78756-3191

Utah

Amends certificates.

Department of Health
Bureau of Vital Records
288 North 1460 West
P.O. Box 16700
Salt Lake City, UT 84116

APPENDIX A - STATE BIRTH CERTIFICATE POLICIES

Vermont

Issues new or amends certificate,
depending on the Order of the
Court.

Department of Health
60 Main St.
P.O. Box 70
Burlington, VT 05402

Virginia

Issues new certificates.

Division of Vital Records
Department of Health
P.O. Box 1000
Richmond, VA 23208-1000

Washington

Amends certificates.

Vital Records
LB11
P.O. Box 9709
Olympia, WA 98504

Wisconsin

Issues new certificates.

Center for Health Statistics
Vital Statistics Section
P.O. Box 309
Madison, WI 53701-0309

Wyoming

Issues new certificates.

Vital Records Services
Division of Health and
Medical Services
Hathaway Building
Cheyenne, WY 82002

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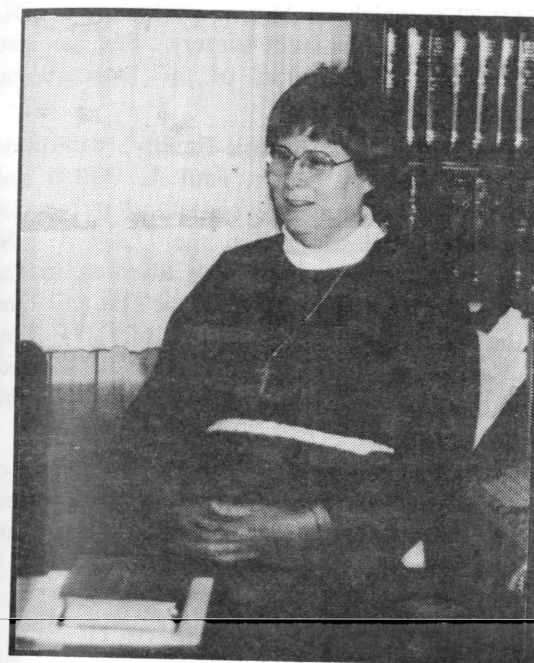
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By Rupert Raj

SR. MARY ELIZABETH, SSE

Formerly known as Joanna Michelle Clark, Sr. Mary Elizabeth is the author of Legal Aspects of Transsexualism - a land mark contribution to the gender community -and over two dozen articles on the subject. Likened to St. Francis and Helen Keller and dubbed the indisputable

"champion in the fight for the rights of the gender-conflicted", she is a graduate of the University of the State of New York, co-founder and Director of Administrative Services of the Gender Dysphoria Program of Orange County, and Executive Director of J2CP Information Services.



Sr. Mary Elizabeth was born in Pontiac, Michigan and traveled extensively with her parents during her grade school years. She joined the U.S. Navy in 1957 and was promoted rapidly through the ranks, achieving Chief Petty Officer status in 1965. During her military career she was stationed in Bermuda, Memphis, and Hawaii, with deployments to Alaska, Okinawa, and Vietnam. She left the Navy in 1974 to follow a new career path. In 1976 she enlisted in the U. S. Army Reserve, beginning as

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a clerk-typist and Personnel Staff/NCO. Her potential was recognized, however, and she was rapidly promoted to the equivalent of deputy commander of her battalion.

In 1976 she joined Renaissance: Gender Identity Services, heading up their Legal Research Division through 1980. The same year she helped to found the Gender Dysphoria Program of Orange County, Inc. and she has been heavily involved in helping the gender-conflicted community since. She served as founding Chairperson of the American Civil Liberties Union's Transsexual Rights Committee from 1980 to 1983, and she was responsible for the enactment of California's transgender birth certification legislation and the defeat of SB-2200, which would have prohibited MEDICAL funds from being used for sex reassignment surgery. She has also served as a member of the Board of Directors of the International Foundation for Gender Education (1987-88).

In 1986 she took over the JANUS Information Facility's worldwide information referral service at the request of Dr. Paul A. Walker and today, J2CP Information Services is the leading information/referral service for gender dysphorics and helping professionals in the U.S. A 1986 nominee for "Who's Who in American Woman," she is listed as Joanna Clark in the 16th edition of "Who's Who in California," the 21st and 22nd editions of "Who's Who in the West," and the first edition of "2,000 Most Notable Woman in America," as well as International Leaders in Achievement. In 1987 she became an Honorary Life Member of the Metamorphosis Foundation.

In December 1987 she co-founded the Sisters of St. Elizabeth of Hungary, and at a candlelight service at St. Clement's By-the-Sea Episcopal Church in San Clemente, California, Sr. Mary Elizabeth took the veil and vows of poverty, chastity, and obedience.

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