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Meredith Gould

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SEX, GENDER, AND THE NEED FOR LEGAL CLARITY: THE CASE OF TRANSSEXUALISM

MEREDITH GOULD*

INTRODUCTION

Societies have historically created institutions to organize and control all aspects of human relationships; this is a substantive concern of social theory. The modern legal system exemplifies one institutionalized means of social control that emerged as religion, myth, and ritual life lost significance in the face of growing secularization.[1] Grounded in the Judeo-Christian ethic, the law is a contemporary moral code, circumscribing acceptable behavior and social participation for human actors in a given society; a code not infrequently based on assumptions about the impact of sex status upon personality and sociality.[2]

In general, persons seem to be either female or male, and are assumed to be so without much concern. The law treats this biological dichotomy as a behavioral imperative by collapsing and confusing sex, a biological condition, with gender, its socio-cultural manifestation. Consequently, femaleness and maleness are viewed as characteristics indistinguishable from masculine and feminine role performance. Legal codes are constructed to regulate both sexual behavior and social performances as if sex status had intrinsic and immutable social meaning. That the law does effect significant policy regarding the management of individuals based on sex, and the implicit gender assumptions of a sexist society[3] should concern legal

*Thomas A. Edison College of New Jersey; B.A. Queens College, C.U.N.Y., 1975; M.A. New York University, 1978. The critical support and encouragement of Giles R. Scofield is gratefully acknowledged. The substantive and editorial assistance of Sylvia Law and Edwin M. Schur is also noted.

1. The documentation and analysis of this process was a substantive task of the major social theorists. *See, e.g.*, E. DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (1965); E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1933); M. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1958); M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947). For commentaries on the above, *see* A. GIDDONS, CAPITALISM AND MODERN SOCIAL THEORY (1971).

2. W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION (1973) (Chapter 4 in particular); Gould, *Statutory Oppression: An Overview of Legalized Homophobia*, in GAY MEN: THE SOCIOLOGY OF MALE HOMOSEXUALITY 51 (E. Levine ed. 1979).

3. J. MITCHELL, WOMEN'S ESTATE 64-65 (1974).

scholars. Certainly the presence and impact of gender assumptions on such things as inheritance,[4] tax and employment benefits,[5] child custody,[6] alimony[7] and the like are legal concerns perhaps intensified, but not originating in the contemporary women's movement.

Transsexuals are persons who seek to alter their sex by hormonal and surgical means because of a deep psychosocial identification with what is considered an inappropriate gender for that sex. Since 1966, when the Johns Hopkins Hospital and the University of Minnesota started providing the sex reassignment surgery previously unobtainable in the United States, courts have confronted a steadily growing number of cases concerning unusual changes in vital records, "false" arrests for transvestism, and other legal issues seemingly endemic to transsexualism.[8] In both their pre-operative and post-operative states, transsexuals merit study on at least two accounts. First, transsexuals have an ambiguous social and legal status. It will be noted in this paper, as it is elsewhere,[9] that courts have been unable to satisfactorily deal with transsexuals in an even-handed manner. Second, and perhaps more important, the ambiguity transsexualism[10] represents challenges fundamental assumptions

4. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

5. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973).

6. *See, e.g.*, Hamett v. Hamett, 46 Ala. App. 206, 239 So. 2d 778 (Civ. App. 1970); Shaw v. Shaw, 249 Ark. 835, 462 S.W.2d 222 (1971); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949).

7. *See, e.g.*, In re Marriage of Dennis, 35 Cal. App. 3d 279, 110 Cal. Rptr. 619 (1973); Glover v. Glover, 64 Misc. 2d 374, 314 N.Y.S.2d 873 (Fam. Ct. 1976).

8. Browell, *M.T. v. J.T.: An Enlightened Perspective on Transsexualism*, 6 CAP. U.L. REV. 403 (1977); Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1967-68); Matto, *The Transsexual in Society*, CRIMINOLOGY, May, 1972, at 85; Smith, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963 (1971); Wetherbee, *Transsexuals: Rights Under and Problems With the Law*, 3 SEXUAL L. REP. 1 (1977); Note, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MD. L. REV. 236 (1971) [hereinafter cited as *Transsexuals in Limbo*]; Comment, *Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test*, 15 SAN DIEGO L. REV. 331 (1978).

9. *Id.*

10. It is important to note that this refers to the transsexual phenomenon, not individual transsexual behavior. The distinction is important since transsexuals desire most of all to be normally integrated into middle class society. Their stereotypical femininity highlights the ideal type of American womanhood. Transsexuals have also been criticized as the "Uncle Toms" of the sexual liberation movement because of their lack of militancy. Not all researchers share this opinion. For discussions of both views, *compare* Kando, *Males, Females, and Transsexuals: A Comparative Study of Sexual Conservatism*, 1 J. HOMOSEXUALITY 45 (1974), *with* Feinbloom, Fleming, Kijewski, Schulter, Babcock, Freedman, Norton & Ross; *Lesbian/Feminist Orientation Among Male-to-Female Transsexuals*, 2 J. HOMOSEXUALITY 59 (1974) [hereinafter cited as Feinbloom, *et al.*].

underlying sex and gender based classifications in the law and society as well, insofar as law is constructed by and reflexive of society.

To date, the legal problems of transsexuals have been addressed in scattered journal notes and comments limited exclusively to their particular concerns.[11] This paper takes a somewhat different approach. The legal problems of transsexuals are viewed here as signifiers of more general considerations. The task here is an exposition of the transsexual phenomenon as it relates to issues of sex and gender in the law, to demonstrate how legal remedies for this special group illustrates the legal reification of inequalities suffered by women and sexual minorities.

UNTANGLING SEX AND GENDER

The Supreme Court has traditionally dealt with sex and gender by either failing to distinguish between the biological and the social, thereby treating them as interchangeable, or by deferring altogether to social stereotypes of behavior. This is particularly evident in older cases involving occupational discrimination against women. These offer abundant examples of custom legislatively transformed into statute. When challenged, statutes arbitrarily limiting female participation in the labor force, were upheld by courts. Never addressed was the question why women *qua* women should receive disparate treatment—apart from an anachronistic, paternalistic concern for women in society.[12]

A classic case from the late 1800's, *Bradwell v. Illinois*,[13] concerned the right of married women to be licensed for practice by the Illinois bar. While ostensibly focusing on the privileges and immunities clause of the 14th Amendment, and whether occupational choice constituted one such civil right, the concurring opinion by Justice Bradley specifically addressed the propriety of certain occupational pursuits for "women as citizens."[14] Noting the lack of legal existence for married women, this opinion illustrates the ideological power of social stereotyping:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . .

11. *See* note 8 *supra*.
12. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908).
13. 83 U.S. (16 Wall.) 130 (1872).
14. *Id.* at 140.

> . . . .
> The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[15]

Little more than half a century later, *Goesaert v. Cleary*[16] challenged a Michigan statute distinguishing between women bartenders and women mixing drinks in bars owned by their male relatives. Here the Court accepted the premise that Michigan's interest was protective insofar as "ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid,"[17] and rejected the political economic plausibility that the "real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling."[18] Justice Frankfurter disavowed the impact of changing social norms by declaring: "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards."[19] Both *Bradwell* and *Goesaert* reflect a social climate Justice Brennan later characterized as one of "romantic paternalism,"[20] and illustrate the remarkable durability of underlying social and moral assumptions about women.

Recent opinions identify and maintain physical characteristics as those traits that set women apart from men. Sex is seen as an immutable characteristic which, like race, is determined solely by the accident of birth.[21] Yet unlike race, sex is not considered a suspect classification[22] even though sex discrimination imposes special disabilities upon members of a particular sex because of their "special physical organization."[23] Because cultural myths about gender behavior are indeed sex specific, laws that perpetuate assumptions about women or men[24] are, under this test, subject to constitutional attack.[25]

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15. *Id.* at 141-42.
16. 355 U.S. 464 (1948).
17. *Id.* at 466.
18. *Id.* at 467.
19. *Id.* at 466.
20. Frontiero v. Richardson, 411 U.S. 677, 684 (1973).
21. *Id.* at 686.
22. *See* B. BABCOCK, A. FREEMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 87 (1975) [hereinafter cited as B. BABCOCK, *et al.*].
23. Muller v. Oregon, 208 U.S. 412, 419 n.1 (1908).
24. *See* Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385, *cert. denied*, 404 U.S. 950 (1971).
25. *See, e.g.*, City of Los Angeles v. Manhart, 435 U.S. 702 (1977); Craig v.

Yet even the Court's reliance on a strict physiological approach has been inconsistent. Beginning with *Geduldig v. Aiello*,[26] the Court announced that pregnancy, a temporary physical condition applicable only to women, is not sex specific. The Court reversed one case, dealing with mandatory pregnancy leaves, which reasoned that distinctions based on pregnancy do not discriminate on the basis of sex because pregnancy does not, in physiological terms, place women in direct competition with men.[27] Yet in *Geduldig*, the Court held that such a distinction can only differentiate between women who are pregnant, and non-pregnant persons; in this latter class are included both women and men.[28] If the Court's reasoning is as purely physiological as its sex standard suggests, the distinction is disturbingly imprecise. A physiological distinction would have to separate women who can become pregnant from those persons who cannot; men cannot, and some women, because of certain gynecological conditions, also cannot.[29] Not all women, however, who are not pregnant cannot become pregnant; they may choose to remain childless, regardless of their procreative ability and despite the sanctification of motherhood in American society. *Geduldig* and its successors indicate that within a class based on sex, there are differences that are not sex specific. Consequently, individuals within the designated class may avoid physiological generalizations while remaining prey to social expectations.

In *City of Los Angeles v. Manhart*,[30] on the other hand, the basis for declaring unconstitutional an unequal pension payment program was the recognition that the program rationale, *i.e.*, women as a class outlive men, does not apply equally to all women. Some women do not live longer than men or even other women who have shorter life expectancies. This suggests that a permissible class might well consist of women who choose to live longer than men. The Court in *Manhart* does not make clear that its reasoning is based on whether a person is physically able to opt out of an otherwise sex-specific class.

The Court uses the terms "sex" and "gender" interchangeably to describe physical characteristics. Moreover, court decisions are

Boren, 429 U.S. 190 (1976); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

26. 417 U.S. 484 (1974).

27. Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973), *rev'd*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

28. 417 U.S. at 496 n.20. *See also* General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

29. This distinction is suggested in note 5 of Stevens' dissent to General Electric Co. v. Gilbert, 429 U.S. 125, 161-62 (1976).

30. 435 U.S. 702 (1977).

often based on distinctions other than those that are purely physical. This interchangeability obscures the criteria which actually underlie distinctions the Court seeks to make within the class of women, or between women and men.

The Court's apparently inconsistent treatment of "sex" discrimination cases, which appalls commentators,[31] highlights the concern generated by its equally inconsistent terminology. The biological aspects of existence are not absolute determinates of social behavior; to assume such a blend only furthers the current confusion in the courts.[32] The terms "sex" and "gender" denote distinct meanings in the social sciences. Despite a legal tradition of autonomous reality, these distinctions must be addressed by the Court.

THE SOCIAL SCIENCE APPROACH

In advanced, post-industrial societies, sex, gender, and sexuality are usually and erroneously treated as synchronic features of identity. While there is a high degree of overlap between sex status, gender role, and sexual orientation, these elements are not necessarily congruent and have varied considerably transhistorically and cross-culturally.[33] That these features are inelegantly, and for the most part inaccurately lumped together, obscures meaningful distinctions which, if clarified, would elucidate the social participation of women and men in society. This point is of critical concern to sociologists committed to delineating the processes by which individuals gain a sense of self, organize their social behavior, and participate in social institutions.[34]

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31. Zeitlin & Lee, *Women and the Law*, in 1971-72 ANN. SURVEY AM. L. 189; Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974).

32. It is important not to reduce the argument to one of lexicography. The issue is one of maintaining a consistent use of particular terms which have gained a degree of validity in the literature of professions relied upon by courts and legislatures. Concepts and referents must be clearly, consistently distinguished. For further discussion of this, *see* Gould and Kern-Daniels, *Toward a Sociological Theory of Gender and Sex*, 12 AM. SOCIOLOGIST 182 (1977).

33. *See, e.g.*, M. MEAD, SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES (1939); R. REITER, TOWARD AN ANTHROPOLOGY OF WOMEN (1975); WOMEN, CULTURE AND SOCIETY (M. Rosaldo and L. Lamphere eds. 1956).

34. *See, e.g.*, Gould and Kern-Daniels, *supra* note 32; Lopata and Thorn, *On the Term "Sex Roles,"* 3 SIGNS 718 (1978); Thorne, *Is Our Field Misnamed? Toward a Rethinking of the Concept of "Sex Roles,"* ASA SECTION ON SEX ROLES NEWSLETTER, Summer, 1976; Tresemer, *Assumptions Made About Gender Roles* in ANOTHER VOICE 308 (1975).

The legal inconsistencies outlined in the previous section, and the focus of this paper, transsexuals, exemplify the consequences of imprecision. The transsexual phenomenon in particular only begins to make sense when a clear distinction is drawn between sex and gender. An explication of the conceptual difference between sex and gender is thus important.

Sex Status

At birth, individuals are assigned a sex status that, for most, remains constant throughout adult life. This assignment is based on *prima facie* evidence, a quick and cursory assessment of visible genitalia. Everyone, except hermaphrodites,[35] is designated female or male. Physiological sex is, however, more complicated than external sex characteristics. More rigorous standards for assessment have been suggested by Money and other psycho-endocrinologists[36] who maintain sex is based on the interface of at least eight variables that more accurately determine maleness and femaleness. These variables include:

1. *Sex Chromosomes:* The arrangement of X and Y chromosomes;
2. *Gonads:* Ovaries and testes;
3. *Hormonal Composition:* The amounts of progesterone, estrogen, and testosterone;
4. *Internal Sex Organs* (other than gonads): *E.g.*, the uterus, the vas deferens;
5. *External Genitalia:* Clitoris and penis;
6. *Secondary Sex Characteristics:* Body and facial hair patterns;
7. *Sex of Rearing:* Girl or boy;
8. *Core Gender Identity:* Femininity or masculinity.

This list is not necessarily complete, nor does maleness or femaleness depend upon a total complementarity of the variables. The isolation of any one medically-based criterion[37] is insufficient to

35. Hermaphrodites and pseudo-hermaphrodites are, respectively, individuals in which either both male and female gonads are present, or the gonads are of one sex or the other but contradicted by the external genitalia of the opposite sex.

36. C. HUTT, MALES AND FEMALES (1972); E. MACCOBY, THE DEVELOPMENT OF SEX DIFFERENCES (1966); J. MONEY & A. ERHARDT, MAN AND WOMAN, BOY AND GIRL (1972); R. STOLLER, SEX AND GENDER (1968); TRANSSEXUALISM AND SEX REASSIGNMENT (R. Green & J. Money eds. 1969).

37. Note neither "sex of rearing" nor "core gender identity" are medically based. For a full discussion of this with regard to legal implications, *see* Smith, *supra* note 8, at 965.

determine sex. Individuals are finally considered either female or male according to the congruence between external genitalia, secondary sex characteristics and core gender identity.

Gender Role

As is the case with any other status, sex bears societal prescriptions for social behavior; sociologists call this behavior a gender role.[38] Dimensions of masculinity and femininity are socially, culturally, and psychologically produced sets of characteristics; behavior deemed the social property of females and males. These characteristics are "fixed" only insofar as society can control the establishment and perpetuation of such definitions through informal and formal sanctions. Social standards for femininity and masculinity will alter as cultural determinants shift.

The confusion of sex status with social role is clearly illustrated by parenting in the United States.[39] Women are the only sex biologically capable of childbearing. Both women and men are capable of child rearing, although this has evolved into a primarily female, hence, feminine, task.[40] The historical emergence of the assumed blend of biological and social motherhood constitutes an entire body of scholarship that cannot be recapitulated here.[41] For now it is sufficient to note that in contemporary American society, affective and expressive functions[42] are relegated to women because of their capacity for, if not actual involvement in, reproduction. While all societies develop some notion of what comprises sex appropriate behavior, sex related role expectations differ according to the political economy and cultural context. Thus what constitutes "masculinity" in one epoch might well constitute "femininity" in another.

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38. *See* note 34, *supra* and accompanying text. *See also* L. DUBERMAN, GENDER AND SEX IN SOCIETY (1975); A. OAKLEY, SEX, GENDER AND SOCIETY (1975).

39. *See* table in Gould & Kern-Daniels, *supra* note 32, at 184.

40. This has been rechallenged by sociobiologists. For a representative discussion of this position regarding women's biological superiority at motherhood, *see* Rossi, *A Biosocial Perspective on Parenting*, DAEDALUS, Spring, 1977, at 1.

41. An explanation of this has engaged social theorists of every persuasion from structural functionalists to orthodox Marxists. For a general sense of the scope of such scholarship, *see* N. GLASER & H. WAEHRER, WOMEN IN A MAN MADE WORLD (2d ed. 1977); A. JAGGER & P. STRUHL, FEMINIST FRAMEWORKS (1978).

42. These are terms popularized by functional theorists. *See* Komarousky, *Cultural Contradictions and Sex Roles*, 52 AM. J. SOC. 184 (1946); Parsons, *Age and Sex in the Social Structure of the United States* 7 AM. SOC. REV. 604 (1942).

In a patriarchal,[43] sexist society, power is controlled by men, and women are considered biologically and socially inferior. This rigid social order is reflected in sex specific rules for gender behavior. Gender expectations in contemporary American society include an implicit value assumption: whatever males do is "masculine," normal, and therefore good, whatever women do is "feminine" and intrinsically inferior.[44] Masculinity and femininity share an uneasy relationship and are seen as antagonistic, yet complementary, irreconcilable opposites.

Already it is possible to see that what are considered sex based classifications at law cannot be viewed simply as regulation by biomedical definition. The issue is significantly complicated by the fact that societies develop and inculcate patterns of behavior in their members. Considering the sociological distinction between sex and gender may clarify constitutional questions emerging in sex discrimination cases. Cases such as *Bradwell* and *Goesaert*[45] are instances of *gender* discrimination since they are based on socially produced notions of what men and women can or should do. Women and men are, in these cases, excluded from occupational participation because job related tasks require a dimunition or abandonment of "femininity" or "masculinity." They require behavior that is "inappropriate." Cases such as *Geduldig*[46] are, in fact, examples of *sex* discrimination. They are based on the only sex specific characteristic that could possibly delimit social participation[47]—reproductive functions. Separating gender assumptions from sex role constraints requires a strict scrutiny of the relationship between a physical condition, albeit temporary, and the ability to competently perform any given social task.[48] For example, excluding

43. Patriarchy here is defined as "a set of social relations which has a material base and in which there are hierarchical relations between men, and solidarity among them, which enable them to control women. Patriarchy is thus the system of male oppression of women." Hartman, *Capitalism, Patriarchy, and Job Segregation by Sex*, 1 SIGNS no. 3, pt. 2, at 138 n.1 (1976). For theories of patriarchy, *see* K. MILLETT, SEXUAL POLITICS (1969); E. ZARETSKY, CAPITALISM, THE FAMILY AND PERSONAL LIFE (1973).

44. Broverman, Broverman, Clarkson, Rosenkrantz & Vogel, *Sex-Role Stereotypes and Clinical Judgments of Mental Health*, 34 J. CONSULTING & CLINICAL PSYCH. 1 (1970); Horner, *Fail: Bright Women*, PSYCH. TODAY, November, 1969, at 36.

45. *See also* Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385, *cert. denied*, 404 U.S. 950 (1971).

46. *See also* General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

47. *See* B. BABCOCK, *et al.*, *supra* note 22, at 241.

48. These are examples of restrained or passive standards of review. The "rational relation" test is thoroughly discussed in B. BABCOCK *et al.*, *supra* note 22, at 71.

It is suggested that the recognition of such sets of characteristics would have

pregnant women from teaching because of their condition is both gender and sex discrimination. It is discrimination based on sex because only women become pregnant. It is also gender discrimination because it is based on social custom precluding women from participation, or even visibility, during pregnancy.[49] This is invidious discrimination.

A social science approach acknowledges the interaction between society and the individual. In this paradigm, sex is viewed as salient only insofar as societies create and maintain definitions for that status. Such a heavy reliance on the fluctuations of human perception is, however, in opposition to the establishment of consistent and durable legal principles. Yet the law's need for set behavioral rules necessarily flounders when faced with variations of gender related behavior where, in fact, it is futile to establish a "norm."

For many, the social reality of gender is ontologically intolerable; some of these people may consider themselves transsexual. By having the somatic status of one sex and the psychosocial identity of the other, transsexuals demonstrate the clash between social, medical, and legal realities. Without exception, considerations that first bring transsexuals to the courts whether for changes in vital records, unreasonable searches for transvestism, or issues in family law, necessitate a consistent definition of sex that can be distinguished from gender. The law has failed to develop such a definition.

In this context, courts must rely on the expertise of others, for at its base, sex determination is an extra-legal matter, becoming legal only under certain conditions. Transsexualism is one such condition. In most cases,[50] courts take a conservative stance toward sex, favoring what they suppose to be coherent medical distinctions and a unanimity of opinion. The courts' reliance *solely* on medical knowledge might be considered at best myopic. Medical opinion is not entirely reliable when held up to other measures of social reality, particularly with regard to sex. As one commentator has noted:

> The more one surveys the literature, the more it becomes apparent that the medical profession, and par-

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an impact in case where a "bona fide occupational qualification" is applied and where a court primarily avoids sex issues, relying instead on gender based tests. *See* Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559, 561 (S.D. Fla. 1970). *See also* B. BABCOCK, *et al.*, *supra* note 22, at 230.

49. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

50. *See* notes 110, 111, 124 and 129 *infra* and accompanying text.

> ticularly psychiatry, has not so much *found* norms *in* nature as it has *imposed* theological ideals *on* nature: God created them male and female; male and female created He them. The profession's task, like that of a priesthood, is to preserve inviolate this divinely ordained dichotomy between the sexes. Not only is a chasm fixed between the two, so that none may cross from one side to the other, but every blurring of the line must also be stamped out.[51]

The following section deals specifically with transsexuals, human casualties of the sex and gender imbroglio.

TRANSSEXUALS, GENDER IDENTITY AND DYSPHORIA

The formation of gender identity[52] is a complex phenomenon about which much has been written and more needs to be known.[53] As one component of self, gender identity emerges out of social interaction on an interpersonal and institutional level. It is thought to be fixed at a very early age, previous to the acquisition of language.[54] In a gender-rigid, sexist society, self-identity is inimically bound with sex considerations. To maintain, however, that gender identity is simply the identifiable components of masculinity or femininity, without examining the social context for the emergence and definition of those components, is inherently tautological, perpetuating and making static the possible range of human options and alternatives to sex related behavior.

In becoming socialized, one learns sex appropriate rules or norms for behavior. When those rules are in transition, lack clear delineation, or actively defy the social life experience of the human actor, that person may suffer "gender dysphoria." Gender dysphoria, then, is dissatisfaction with one's socially assigned gender role. This is most frequently experienced by women facing conflicting expectations about their social participation.[55] Recent literature also focuses on the changing male role and the dysphoria men feel because of the constraints of masculinity.[56]

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51. *See* W. BARNETT, *supra* note 2, at 246 n.68.

52. *Sexual* identity may refer to one's sense of femaleness or maleness, but is most generally used to describe a person's sexual orientation or erotic object choice.

53. *See* note 36 *supra*.

54. *See* note 36 *supra*.

55. Raymond, *Transsexualism: The Ultimate Homage to Sex-Role Power*, 3 CHRYSALIS 11 (1977).

56. *See, e.g.*, M. FASTEAU, THE MALE MACHINE (1975); THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE (D. David & R. Brannon eds. 1976); MEN AND MASCULINITY (J. Pleck & J. Sawyer eds. 1974).

Selective reinforcement for gender specific behavior occurs in childhood when all individuals learn societal norms. This process somehow fails for transsexuals who, despite all modal gender reinforcement, assert a core gender identity of the opposite sex. The incidence and prevalence of transsexuals is not as rare as has been previously thought or noted.[57] Transsexuals are anatomically, chromosomally, and hormonally of one sex, but have the psychosocial or gender identity of the opposite. They are neither homosexual[58] nor transvestic[59] and express their dilemma as one of being "trapped in the wrong body." Transsexuals comprise a complex population, including persons of all races, ethnic groups, ages, and socio-economic statuses.[60]

The first task in any sex reassignment program[61] is the identification of the actual transsexual from those "merely" suffering gender dysphoria. That most transsexuals attempt self-castration or suicide when medical intervention is unobtainable provides compelling evidence of the seriousness of their predicament. Transsexuals are distinguished by their absolute, unshakeable core gender identity which remains firmly established despite conventional psychiatric or psychoanalytic intervention. This understandably baffles medical practitioners. It is important to note, however, that this "mistaken identity" can only occur in a society where gender and sex are absolutely merged; a society allowing so little flexibility of expression, that one can indeed suffer extreme psychic distress at being of one sex and the "opposite" gender.[62] Be that as it may, transsexuals have real legal needs that are not being addressed by the courts. This is in part because of the legal system's fundamental inability to develop any consistent guidelines about sex.

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57. As of 1969, the number of transsexuals in the United States did not exceed 10,000. TRANSSEXUALISM AND SEX REASSIGNMENT, *supra* note 36, at 10 (Introduction by Green & Money).

58. The work of Feinbloom *et al.*, *supra* note 10, suggests this might be an incorrect assumption: "Biological women and male-to-female transsexuals present a similarly vast range of sexual orientation and life-style choices; different choices are valid for different people." *Id.* at 69.

59. D. FEINBLOOM, TRANSVESTITES AND TRANSSEXUALS (1976).

60. *Id. See also* Simpson, *Sex Change Clinics Provide New Identities for Troubled Patients*, Wall St. J., January 28, 1977, at 1, col. 1.

61. Sex reassignment programs such as those at Johns Hopkins typically involve a four step process of screening, evaluation, treatment and patient follow-up. For a detailed description of each step, *see* Holloway, *supra* note 8, at 285.

62. *See* Raymond, *supra* note 55.

TRANSSEXUALS AND THE LAWS

Legal predicaments faced by transsexuals typically involve cross-dressing, a pre-operative requisite, and vital record alteration, a post-operative necessity.[63] Such confrontations with the law are not exclusively limited to transsexuals. In fact, the statutes considered here pre-date the known existence of transsexuals.[64] The discrepancies that emerge when these laws are enforced against transsexuals reveal their implicit gender assumptions.

Cross-Dressing

Pre-operative transsexuals, as the term suggests, are persons awaiting sex reassignment surgery. Reassignment programs require pre-ops to "cross live" as members of their desired post-operative sex for up to two years prior to surgery. Because cross-dressing is fundamental to treatment, pre-operatives live in fear and danger of arrest and conviction for transvestism. During this period, both male to reconstructed females and female to reconstructed males[65] additionally undergo hormonal treatment, psychotherapy, and psycho-social adjustment training.[66] This treatment phase also includes minor surgery in the form of cosmetic changes in facial structure, radical electrolysis, and silicone implants, procedures not uncommonly sought by medical consumers. Many transsexuals remain

63. Transsexuals also face legal problems when they marry, problems not unlike those of homosexuals. *See, e.g.*, Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971); B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974). They also face potential employment discrimination. *See* Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975). Legal issues in this paper are narrowed to focus on cross-dressing and changes in vital records to illustrate the law's confusion of sex and gender.

64. *See* People v. Archibald, 58 Misc. 2d 862, 296 N.Y.S.2d 834 (1968), *aff'd per curiam*, 27 N.Y.2d 504, 312 N.Y.S.2d 678 (1970); In re Anonymous, 57 Misc. 2d 813, 293 N.Y.S.2d 834 (Civ. Ct. N.Y. 1968).

65. The majority of individuals seeking this type of surgical intervention are male.

This language (e.g., male to reconstructed female) is derived from Raymond's discussion of the phenomenon. In a note to her article, she explains: [w]hile transsexuals are *masculine* or *feminine*, they are not fundamentally male or female. As I shall attempt to demonstrate, transsexuals undergo superficial, stereotypical, and artifactual changes which reinforce socially constructed roles and identities." Raymond, *supra* Note 55, at 11.

66. Psycho-social adjustment training has been criticized by many, especially feminists, for its blatant intention to inculcate stereotypical attitudes and roles in pre-operative transsexuals. During this phase, male to reconstructed females learn to become "feminine" by learning makeup, grooming, etiquette skills as well as vocational skills such as typing, shorthand, etc.

in limbo, one step ahead of even the pre-operative stage because of a somatic unsuitability precluding successful post-surgical adjustment. Others undergo hormonal and related treatment only to remain at that stage, because they cannot afford the costly and painful surgical process. During the pre-operative stage transsexuals are most vulnerable and usually first confront the legal system.

While all transsexuals necessarily undergo periods of transvestism,[67] not all transvestites are transsexuals; there is an important qualitative difference between the two populations.[68] Transvestites are primarily heterosexual men who dress in women's clothing, or what is termed "drag," for erotic stimulation.[69] While there exists a portion of the homosexual subculture also engaging in cross-dressing,[70] this group does so only to burlesque female roles. In subcultural terms, drag is a form of "camp." Neither drag queens nor true transvestites cross-dress out of an intense desire to be female. Homosexuals are men seeking out emotional and erotic attachment with other men. Transvestites cross-dress in a very circumscribed way for sexual gratification.[71]

Transsexuals are usually confused with homosexuals and transvestites because of what appear to be behavioral similarities. Closer examination reveals the transsexual motivation for cross-dressing is radically different; it is a striving toward ontological order. For the transsexual trying desperately to bring psychosocial identity into alignment with physical reality, successful cross-dressing is an important goal. Accordingly, transsexual cross-dressing is viewed by sex reassignment coordinators as an appropriate adjustment phase for those awaiting final surgery. Since cross-dressing is also considered an extreme violation of social mores as well as a legal infraction, it is not a therapeutic program entered into, or even devised lightly. Transvestism is prohibited by law in the majority of states.[72] Hence, in order to become unob-

67. The term "transvestism" itself was coined only in 1910 by Mangus Hirshfeld, a leader of the German Homosexual Rights Movement at the turn of the century. *See* Bullough, *Transvestites in the Middle Ages*, 79 AM. J. SOC. 1381 (1974).

68. The popular misconceptions are clearly mapped in D. FEINBLOOM, *supra* note 59.

69. "Drag" can be either partial or full. A transvestite might gain erotic satisfaction from wearing only women's undergarments. Others might need to dress and pass on the streets as a woman for satisfaction.

70. E. NEWTON, MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA (1972).

71. D. FEINBLOOM, *supra* note 59; Levine, *Dressing-up in Limbo*, NEW TIMES, August 7, 1978, at 51.

72. *See* Smith, *supra* note 8, at 989; *Transsexuals in Limbo*, *supra* note 8, at 251.

trusively "normal," transsexuals are required by the medical establishment to actively engage in criminal activity.

Statutes pertaining to transvestism in the United States have both religious and secular origins. The older and more familiar prohibition against cross-dressing appears in Deuteronomy and is part of a Judeo-Christian ethical heritage of carefully preserved sex distinctions: "No woman shall wear an article of man's clothing, nor shall a man put on a woman's dress; for those who do these things are abominable to the Lord your God."[73]

Despite these Biblical origins, social historians note that female transvestism was neither infrequent nor harshly condemned during the Middle Ages. Male cross-dressers were, in comparison, highly stigmatized and hence rare in number. This suggests that the social hostility toward cross-dressing had more to do with status gains and loss than religious heresy or psychopathology. Bullough, writing on the transvestic saints in the Middle Ages, explains:

> A female who secretly wore men's clothes was not considered abnormal. That a female might desire to be a male, in fact, seemed to be a healthy desire, a normal longing not unlike the desire of a peasant to become a noble. This did not mean that either women or peasants were allowed to cross the status lines in great numbers but that the desire to do so was accepted as a norm. Though men might dress as women at carnivals, and the lord might mix with peasants at various festivals, the status loss in any real change along these lines was so threatening that anything more than play acting was forbidden.[74]

The modern secular origins are exemplified by the now superseded New York State Code of Criminal Procedure Section 887(7). The statute prohibiting transvestism, or female impersonation, originated in part as a reaction to Anti-Rent Riots waged by

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73. *Deuteronomy* 22:5 (New English).

74. Bullough, *supra* note 67, at 1392. This viewpoint seems to be challenged by the example of Jeanne d'Arc, one transvestic saint who was convicted and executed as much for her male garb as her supposedly heretical visions. This is explained by Bullough: "Quite obviously, for a woman to assume a male guise to become more holy was permitted, but to compete with men on masculine grounds such as warfare was simply not permitted. Such competition represented not a gain in the status of women but a loss of status for men, since a mere woman could succeed at what they regarded as strictly male tasks." *Id.* at 1892.

Hudson Valley farmers. Citing the legislative history of this provision, Markowitz, dissenting in *People v. Archibald*,[75] reports:

> The rioting had reached such intensity that a state of insurrection had been declared. This particular statute was addressed to a specific group of insurrectionists who, while disguised as "Indians", murdered law enforcement officers attempting to serve writs upon the farmers. The "Indians" were in fact farmers, who as part of their costumes, wore women's calico dresses to further conceal their identities. The only connection this section has with men attired in female clothing was the fact that the attire was used in furtherance of a scheme of murder and insurrection.[76]

There are no laws specifically prohibiting transsexual transvestism. When transsexuals are arrested, it is under the aegis of state and municipal laws commonly used to adjudicate those engaging in vagrancy and prostitution; cross-dressing *per se* is seen as an ancillary offense. Most cases involving cross-dressing typically have little to do with transsexualism or even true transvestism. Nevertheless, they serve as precedent to bolster court opinion in cases that do involve transsexuals. The courts must deal with transsexual transvestism differently to deal with it meaningfully. In the end, however, the constitutional issues are the same.

In *People v. Archibald*[77] the defendant was apprehended wearing a white evening gown, high heels, a blond wig, women's lingerie, and makeup while waiting for a subway. He admitted that "the only reason he was dressed in women's clothing was to attend a masquerade party where he had been drinking; that he had never been arrested; that he was gainfully employed; that he had visible means of support; and that he did not make a habit of dressing in female attire."[78] As the dissent pointed out, these circumstances excluded him from the statutory guidelines. However, since the statutory guidelines did not clearly include intent to commit an illegal act as a consideration, the court rejected defense counsel reasoning on those grounds, as well as the subsequent constitutional argument that arrest represented an unreasonable and arbitrary exercise of police power because of the statute's vagueness.[79] The defendant was con-

75. 58 Misc. 2d 862, 296 N.Y.S.2d 834 (1968).
76. *Id.* at 864, 296 N.Y.S.2d at 837.
77. *Id.*
78. *Id.* at 865, 296 N.Y.S.2d at 838.
79. *Id.* at 863-64, 296 N.Y.S.2d at 836-37.

victed under New York State vagrancy laws prohibiting female impersonation. The dissent by Justice Markowitz makes this case particularly noteworthy. It documents legislative history to validate the defense position that "no 'reasonable relationship,' no 'fair, just or reasonable connection,' no rational nexus [existed] between the public good and the conduct here involved."[80]

Although the decision does note the punishable act was "obviously not directed at the state of 'feeling compelled' [toward female impersonation],"[81] this case did not address transsexuals specifically. When faced with such a "complusion," courts have had to alter considerably their approach to cross-dressing. In *City of Columbus v. Zanders*[82] the defendant, a transsexual, was arrested under an ordinance which read: "No person shall appear upon any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress."[83]

This case represents a classic example of the constitutional issues the defense must argue. In *Zanders*, the defense argued the ordinance violated the right of expression guaranteed by the First Amendment; the right of privacy guaranteed by the Fourth Amendment; deprived the defendant of due process guaranteed by the Fifth Amendment, and constituted cruel and unusual punishment contrary to the Eighth Amendment through the due process clause of the Fourteenth Amendment.[84] Here the court appropriately examined the rational relationship between the section under question and the "health, safety, morals or general welfare of the public."[85] Having done so, the court upheld the constitutionality of the code, maintaining a rational relationship did exist:

> There are numerous subjects who would want to change their sex identity in order to perpetuate crimes of homicide, rape, robbery, assault, etc. We hold, therefore, that Section 2343.04 of the Columbus City Code has a real and substantial relation to the public safety and is therefore constitutional and a valid exercise of police power.[86]

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80. *Id.* at 866, 296 N.Y.S.2d at 839.
81. *Id.* at 864, 296 N.Y.S.2d at 837.
82. 25 Ohio Misc. 144, 266 N.E.2d 602 (1970).
83. COLUMBUS MUNICIPAL CODE § 2343.04.
84. 25 Ohio Misc. at 146, 266 N.E.2d at 604.
85. *Id.* at 147, 266 N.E.2d at 604.
86. *Id.* at 147, 266 N.E.2d at 604.

The court in *Zanders* did, however, develop a "mental fitness" test to account for transsexuals. The court relied heavily on psychiatric testimony from the defendant's doctor, as well as important articles and statements about transsexualism. Included in the text of the opinion is a long citation from Dr. Harry Benjamin, a noted expert in the field, explaining:

> The legal motive is strong in all transsexuals. They want a change of their legal status. Red tape is their worst enemy. Their constant fear of discovery, arrest, and prosecution makes life miserable for them before the operation, and even afterwards they have to fight for the necessary legal changes. . . .
>
> . . . .
>
> *This type of law, unfortunately, allows no application of common sense—only a literal interpretation of a statute that was formulated without knowledge of this particular subject.*[87]

The court developed and adopted the medical model of illness as the legal standard. Thus, since transsexualism involves a "mental defect" not practically controllable, the defendant was absolved of criminal responsibility and the case was dismissed.

In *People v. Simmons*,[88] a case concerning cross-dressing after the repeal of Section 887(7) of the New York State Code of Criminal Procedure, the court used this opportunity to define transvestism, transsexualism, and ancillary acts of cross-dressing. After reviewing relevant cases, the court rejected, as insufficient, evidence presented to charge criminal impersonation and concluded the statute was inapplicable—the defendant was only dressed in "different" clothes.

Finally, criminal intent and First Amendment rights were reexamined in *City of Cincinnati v. Adams*,[89] another case involving a transvestite arrested under a city ordinance prohibiting one to "appear in dress or costume not customarily worn by his or her sex . . . with intent to commit an indecent or immoral act."[90]

While rejecting the first amendment argument for cross-dressing as protected conduct, and upholding previous decisions pro-

87. *Id.* at 149, 266 N.E.2d at 605 (emphasis in original).
88. 79 Misc. 2d 249, 357 N.Y.S.2d 362 (Crim. Ct. N.Y. 1974).
89. 42 Ohio Misc. 48, 330 N.E.2d 463 (1974).
90. *Id.* at 48-49, 330 N.E.2d at 463.

hibiting such behavior when clearly associated with criminality, this case was dismissed on the grounds that the ordinance was violative of the defendant's due process rights. Here the court invoked the void-for-vagueness doctrine, a principle holding that legal standards are inadequate if they fail "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the state. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."[91] Here the court referred to the amorphic notion of "appropriate apparel" in light of an increasing indistinguishability between male and female fashion.

Courts have noted the importance of clarifying the contradiction between statutory purpose and judicial application in cross-dressing arrests involving transsexuals. It is obviously difficult to insist that transsexualism is a form of female impersonation when the opposite sex is simply not being "impersonated". Transsexuals are the sex they say they are. To date, transsexual cross-dressing is acknowledged and exonerated at law by applying a medical model of illness.

Adopting a medical model has, however, serious and severe limitations because it shifts the locus of responsibility from society to the individual.[92] The clothing one wears is a manifestation of gender. As long as transsexuals, and other individuals who do not conform to traditional gender prescriptions, are seen as "sick" or "mentally deficient" such rigidities will endure.

The Markowitz dissent in *Archibald*[93] is important because it acknowledges, as early as 1969, changing social norms particularly with regard to physical adornment. Referring to the notion of female impersonation in the vagrancy statutes, Markowitz argued:

> If appellant's conviction was correct, then circus clowns, strangely attired 'hippies', flowing-haired 'yippies' and every person who would indulge in the Halloween tradition of 'Trick or Treat' *ipso facto* may be targets for criminal sanctions as vagrants. Today women are wearing

91. *Id.* at 51, 330 N.E.2d at 465.

92. The medical model has been thoroughly critiqued in the sociological literature. *See* T. SZASZ, THE MYTH OF MENTAL HEALTH. *See also* I. GOFFMAN, ASYLUMS (1971); R. LEITER, IN THE NAME OF MENTAL HEALTH (1969); P. MANNING & M. ZUCKER, THE SOCIOLOGY OF MENTAL HEALTH AND ILLNESS (1976); T. SCHEFF, BEING MENTALLY ILL (1966).

93. 58 Misc. 2d at 864, 296 N.Y.S.2d at 837.

> their hair increasingly shorter, and men are wearing their hair increasingly longer. Facial makeup, hair dyeing and cosmetic treatment are no longer the exclusive province of women. Men's and women's clothing styles are becoming increasingly similar. Thus, carrying the majority view to its logical conclusion, a young man or woman could possibly be convicted under this section as a vagrant merely for venturing into the street in his or her normal attire, which is otherwise acceptable in society today.[94]

Similarly in *Adams*, Judge Gorman considered the issue of dress codes and noted the issue was not exclusive to the public sector, reasoning:

> It [prohibitions against dress] goes so far as to bring under suspect the woman who wears one of her husband's old shirts to paint lawn furniture, the trick or treater, the guests at a masquerade party, or the entertainer. Such a standard is purely objective and materially fluctuates from person to person. Additionally, the element of an intent to commit an 'indecent' or 'immoral' act, while so dressed, represents an unascertainable standard.[95]

Acquitting transsexuals of transvestism solely on mental health grounds may be expeditious, but is shortsighted. Statutes prohibiting cross-dressing represent instances of gender discrimination aimed primarily at men. American women currently enjoy enormous latitude in their public attire. Much of the clothing manufactured for women is indistinguishable from that designed for men. Men, however, cannot claim the same range of flexibility. Men in contemporary society may indeed wear limited amounts of jewelry, use perfume, and may crimp or dye their hair—things traditionally considered the fashion perogative of women. Yet men cannot, for example, wear cotton sundresses during summer heatwaves. Interestingly enough, it is virtually impossible to think of an example of inappropriate clothing for men which is not, at the same time, the most gender specific, stereotypical clothing for women. It is hardly surprising that the clothing considered taboo for men is limited almost exclusively to skirts, dresses, gowns, and underwear. It is not coincidental that this clothing is criticized by feminists because it restricts physical movement and most certainly reifies gender stereotypes about women as fragile, dainty, and childlike.

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94. *Id.* at 865-66, 296 N.Y.S.2d at 838-39.
95. 42 Ohio Misc. at 51, 330 N.E.2d at 466.

In sum, a review of the cases relevant to cross-dressing reveals a willingness by the courts to alter such statutes to account for "odd" populations, but an unwillingness to declare unconstitutional the gender discrimination that inheres in such laws.

Vital Records

Once physiology is aligned with gender identity, post-operative transsexuals are, for all practical purposes, "women" and "men." This now irreversible status[96] marks the final and most critical stage of transsexual psychosocial development: the creation of an integrated individual. Success or failure at this point is measured by the degree to which the post-operative transsexual blends inconspicuously into society.[97] Quite simply, the post-op must create a consistent autobiography. Legal assistance is required to eliminate discrepancies from vital records which, if revealed, would smash the desired "presentation of self."[98] Legal entanglements now concern name and sex alterations on birth certificates; here the socio-legal contradictions of sex and gender become most evident.

A name change is a relatively common and simple procedure. Individuals can and do petition the courts to alter both given names and surnames they considered embarrassing, ridiculous or cumbersome. Courts enjoy wide discretion in this area and have been known to deny petitions on virtually any grounds. Such denials are only occasionally overturned on review.[99]

Litigation in this area has been pursued primarily by women who often suffer as a consequence of judicial whim.[100] Gender issues are revealed when courts deny a woman's petition to replace her married name with her birth-given one. The Lucy Stone League,

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96. In fact, there is very limited reversibility at the pre-operative stage. Even post-operative transsexuals can receive hormonal replacement therapy, etc. However, the radical surgery (*e.g.*, double mastectomy, hysterectomy, castration) cannot be reversed. Only three of 160 Stanford patients—men prior to surgery—changed their minds. One reported a religious revelation, one complained that his social life suffered, and the third said he had difficulty finding work as a woman that was well paid. These "men" must now cross-dress as men. Wall St. J., Jan. 28, 1977, at 21, col. 2.

97. *Transsexuals in Limbo, supra* note 8, at 253.

98. E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); H . GARFINKEL, *Passing and the Managed Achievement of Sex Status in an Intersexed Person*, in STUDIES IN ETHNOMETHODOLOGY 116 (1967).

99. *See* B. BABCOCK, *et al.*, *supra* note 22, at 579, for a full discussion, citing other works and cases.

100. *See generally* CENTER FOR A WOMAN'S OWN NAME BOOKLET FOR WOMEN WHO WISH TO DETERMINE THEIR OWN NAMES AFTER MARRIAGE (1974).

formed in 1921, fought for and won the legal right of women to retain birth-given names on government documents by emphasizing the notions of identity and individuality.[101] The emphasis on individuality appeals to an important facet of American bourgeois ideology, and this feminist struggle received wide public support at the time. A *New York World* editorial in August 1924, typified public sentiment:

> [N]o wife wishes to feel that she must wear her husband's name like the silver dollar or a serf if she is to obtain the recognition of the Federal Government. A woman is as much an individual after she marries as before. She should have the right to sign herself as she pleases, whether on private notes or payrolls. It is none of the Government's proper business how she signs herself so long as she is identified.[102]

Today only Hawaii requires women to adopt their husband's names upon marriage,[103] although women may petition for subsequent name changes. The social sentiments which move judges to deny such changes are even more sharply revealed by their response to women petitioning to neutralize or matrilinealize surnames containing patrilineal prefixes or suffixes.[104] These petitions are often regarded as "nonsense"[105] and granted only after a ritual degradation ceremony[106] is performed by the presiding judge.

Female post-ops with "male" names present obvious incongruities and courts are forced to recognize and deal with them seriously. There is little contest here over the issue of identity. Relying on "common sense," courts have granted name changes to transsexuals. In *In re Anonymous*,[107] decided in 1968, the New York City Civil Court went beyond the administrative issues raised in the earlier case of *Anonymous v. Weiner*.[108] The court reaffirmed that "an individual may assume any name, absent of fraud or an interference with the rights of others . . . ."[109] In this case the court confronted the large ramifications of such petitions by transsexuals,

101. *Id.*
102. *Id.* at 20.
103. *Id.* at 7.
104. Such as: O'Neill or Henderson.
105. *Id.* at 39.
106. *See* Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956).
107. 57 Misc. 2d 813, 293 N.Y.S.2d 834 (Civ. Ct. N.Y. 1968).
108. 50 Misc. 2d 380, 270 N.Y.S.2d 319 (Sup. Ct. 1969).
109. 57 Misc. 2d at 814, 293 N.Y.S.2d at 835.

admitting that "any difficulty presented herein is not so much in the nature of the problem itself, but in trying to apply, perhaps inadequately, static rules of law to situations such as that presented herein, which perhaps merit such rules and/or progressive legislation."[110] In his opinion, Judge Pecora specifically addressed the fundamental issues of status and identity with remarkable medico-legal thoroughness. The *Weiner* chromosome based test was expressly discarded. Instead, social reality featured heavily in the court's standard:

> Where there is a disharmony between the physiological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individuals should be made to conform to the harmonized status of the individual, and, if such conformity requires changes of a statistical nature, then such changes should be made. Of course, such changes should be made only in those cases where physiological orientation is complete.[111]

Until recently, most courts have not been favorably inclined to extend Pecora's reasoned combination of psychological gender and anatomical sex as the standard for considering alterations of sex status on birth certificates. Until 1971, such requests in New York State were, for example, considered against a rigid medical standard and summarily dismissed.

Prior to the development of sex reassignment surgery, alterations in the designated sex status on birth certificates were limited to "obvious" errors.[112] In most instances, these are clarified and corrected by hospital personnel without judicial intervention. Cases necessitating judicial intervention for birth certificate changes have generally concerned age[113] or race.[114] Several states[115] presently acknowledge the transsexual phenomenon and outline specific pro-

110. *Id.* at 814, 293 N.Y.S.2d at 836.

111. *Id.* at 816, 293 N.Y.S.2d at 837.

112. Examples include the case of a hermaphrodite infant or the extreme instance of an error during circumcision. Decisions about the subsequent sex are made by hospital personnel, either with or without parental knowledge or consent.

113. *See* B. BABCOCK, *et al.*, *supra* note 22, at 579, for relevant cases.

114. *Id.*

115. Alabama, California, Hawaii, Illinois, Louisiana, Maryland, New Jersey, North Carolina, Pennsylvania, Virginia, Tennessee, Texas, Iowa, Colorado, and Minnesota. *See* Smith, *supra* note 8, at 994 n.213.

cedures to change, correct, alter, or amend birth certificates. In lieu of special consideration, transsexuals may attempt birth certificate changes in other states under either "correction" or "alteration" statutes of vital statistics laws. Neither of these provide a totally satisfactory solution for transsexuals.

A correction statute is unsatisfactory because the transsexual must prove his/her original sex determination was incorrect when sex was correctly designated at birth. The reliance here on medical criteria is inappropriate since it fails to account for gender. Transsexualism involves extreme core gender dysphoria and, since the law fails to make a distinction between sex and gender, there are practicably no means by which a transsexual can make an adequate case for correction. Sole reliance on specific medical criteria is inadequate; social psychological criteria must be considered.

Statutes allowing alterations are also inadequate. Here the act of alteration itself alerts any observer to change. This obviously undermines the transsexual's need to create a unified past and it becomes just as important to litigate the manner of alteration.[116]

During the mid-60s, when transsexuals first petitioned the courts, no such provisions for transsexuals existed *per se*. It is useful to this discussion of sex and gender to review those cases and the rationale supporting the perfunctory denial of such requests.

The first significant case concerning correction, *Anonymous v. Weiner*,[117] came before the New York State Supreme Court in 1966. The petitioner had already changed her name to reflect her female role and was living as a woman. The court denied her application for a change in sex status on her birth certificate. Although there already existed precedent for such change, the court upheld a New York City Department of Health resolution to deny such further amendments. The Board of Health was commended by the court for having consulted the New York Academy of Medicine for recommendations on the matter. The Academy had convened a committee of medical, psychiatric, and legal specialists at the Board's request and subsequently recommended a chromosomal standard be adopted to determine legal sex. Although the committee had convened to consider specifically legal and presumably psychosocial needs of transsexuals, it rejected the aspect of psychological relief and found

116. *See* Smith, *supra* note 8, at 996, for an extensive discussion of "correction" and "alteration" statutes.

117. 50 Misc. 2d 380, 383, 270 N.Y.S.2d 319 (Sup. Ct. 1969).

that "the desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."[118] Relying on these findings, the Board of Health in 1965 resolved that petitions for sex changes on birth certificates would not be granted.

However, the real issue in *Weiner*—whether or not to grant social psychological relief to transsexuals by legal remedy—was subordinated by the court to jurisdictional policy considerations. The case was in fact decided on an administrative point, that the Board's jurisdiction and discretion would not be usurped by the court. The decision has been severely criticized,[119] and justifiably so, for the court's reluctance to deal meaningfully with transsexualism.

Nevertheless, the chromosomal standard adhered to in *Weiner*, as narrow and technically inaccurate[120] as it was, remained fundamentally unchallenged until 1971 when the Board of Health amended the New York City Health Code to add: "A new birth certificate shall be filed when . . . the name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery."[121]

Two years later, *Hartin v. Director of Bureau of Records*[122] involved a post-operative transsexual seeking a change of sex on her birth certificate. The Bureau issued a new certificate, changing the name and omitting entirely the sex status alteration. This, the petitioner charged, was an arbitrary and capricious abuse of discretion. Here the court again refused to overstep jurisdictional boundaries and deferred to the "expertise" of the Board which had, since the *Weiner* decision, amended the health code to accommodate transsexuals. Nevertheless, Board minutes revealed that the amendment was unanimously adopted to reissue certificates without including sex designations[123] at all because

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118. *Id.*

119. *See* Smith, *supra* note 8, at 998 n.234, for reference to this literature.

120. For a full discussion of the inaccuracies of a chromosomal standard, *see* Holloway, *supra* note 8, at 286; Smith, *supra* note 8, at 965; *Transsexuals in Limbo*, *supra* note 8, at 237.

121. N.Y. CITY HEALTH CODE § 207.05(a)(5).

122. 75 Misc. 2d 229, 347 N.Y.S.2d 515 (Sup. Ct. 1971).

123. The text of this case demonstrates the imprecision with which the law treats sex and gender. After referring repeatedly to "sex designations" the opinion then states: "If the Board has seen fit to issue a birth certificate for a transsexual, without disclosure of *gender*, such a determination is indeed well supported." *Id.* at 232, 347 N.Y.S.2d at 519 (emphasis added).

> the board was of the opinion that surgery for the transsexual is an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality. In the words of one of the medical members of the board: 'I would think that it would be unsound, if, in fact, there were encouragement to the broader use of this means of resolving a person's unhappy mental state.'[124]

Hartin's petition was denied and dismissed.

In perhaps the most significant case of this sort, *Darnell v. Lloyd*,[125] a post-operative transsexual, under Section 1983 of the Civil Rights Act, raised a constitutional equal protection claim when the Connecticut Comissioner of Health refused to change the sex designation on her birth certificate. When the state moved to dismiss, alleging the absence of any constitutional claim, the district court denied the motion, ruling instead that a cause of action did exist. The exact circumstances of the case, and of the plaintiff's post-operative sex status, are not clearly discernible from the decision itself. It is clear, however, that the court would not defer to the Health Commissioner's "expertise" in this matter, and would consider seriously the alleged violation of the equal protection clause. Noting that charges of "underinclusiveness" like those alleged in Darnell's complaint are not favored by the courts, the judge indicated that "fundamental interests at stake" dictated otherwise in this case:

> Darnell claims that a birth certificate is a government-issued identification card that has a significant impact on many phases of one's life. For instance, she claims that she will be unable to obtain a license to marry a man unless she can produce a birth certificate proclaiming her a female. The humiliation of carrying a passport declaring one to be of the other than his or her apparent sex is easily imagined. It may be that none of the consequences directly implicates one of the traditional 'fundamental interests' . . . but this litany . . . suggests that the Commissioner must show some substantial state interest in his policy of

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124. *Id.* This is not unlike the feminist analysis proposed by Raymond, *supra* note 55.

125. 395 F. Supp. 1210 (D. Conn. 1975).

> refusing to change birth certificates to reflect current sexual status unless that status also obtained at birth.[126]

Sex is a status appearing on birth certificates; important legal documents serving to confirm existence and identity in this complex, bureaucratized society. Birth certificates are used to obtain jobs, social security, passports, insurance, and marriage licenses.[127] The exclusion of sex on this document was important enough to persuade the district court in *Darnell* to consider the possibility of an equal protection violation because of its absence. If it can be demonstrated that the absence of such a designation has discriminatory impact, then it would seem the reverse is also true: sex is an important status which affects employment, insurance, marriage, and so forth. While *Darnell* remains unresolved to date,[128] it offers the first indication that a court might finally consider the fundamental socio-legal issue raised by transsexualism: whether legal sex should be determined at all.

SUMMARY AND CONCLUSIONS

The reassignment surgery sought by transsexuals is a surgical solution to a social problem, one of sex status reified as gender. While it is both possible and important to separate sex from gender, the cases, comments, notes and articles about transsexuals fail to do so and focus almost entirely on creating a legal standard for sex. The establishment of any legal standard necessitates a critical examination of its underlying assumptions before it is incorporated into the judicial process. This the law has not done. Courts continue to make decisions based on socially produced, sex related behavior, or gender. It is generally agreed that its inevitable clash with social reality renders a medical standard for sex inappropriate. Commentators have proposed a social psychological standard that accounts for self concept as well as anatomy. While this seems a necessary and humanitarian legal solution for transsexuals, it is as seriously flawed as the medical model is for adjudicating the problems of cross-dressers. This standard in fact perpetuates those gender dimensions pervading legal notions of sex. It is unlikely the courts

126. *Id.* at 1314. The court documented the tangential interests of marriage, traveling, privacy and identification with extensive case citations, which have been omitted.

127. *See* Smith, *supra* note 8, at 1000; *Transsexuals in Limbo*, *supra* note 8, at 243, for discussion of the legal impact of birth certificates.

128. This case was later settled out of court.

would knowingly articulate a standard based on gender. Because of the cultural and historical variability of gender, acknowledging and accounting for it would devastate all principles of equal protection. The courts have, nevertheless, devised and relied upon a gender based legal standard for sex to account for special cases such as transsexuals. Until sex or gender is determined to be a legitimate legal concern in the first place, discrimination against both women and men will persist; the law remaining at best, inadequate.

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