Transsexualism and the Law

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Transsexuals pose dilemmas for the law in (a) defining a male or a female; (b) deciding what partners are legally acceptable for marriage; (c) assessing the best interests of children after divorce; (d) interpreting employment discrimination based on gender or handicap; (e) permitting public cross dressing; (f) reviewing third-party reimbursement for medical procedures that may be deemed cosmetic or experimental; (g) determining eligibility for sports competition; (h) meeting military needs; and (i) determining socially and medically acceptable treatment in prison. Leading law cases are reviewed in each area, with commentary on relevant research findings.

Just as transsexualism presents unique challenges to behavioral and medical science, it also confronts the law with unusual dilemmas. Transsexualism invites definitions of what constitutes a man or a woman. It invokes family law issues of marriage and childrearing. It is a puzzle for professional sports. It engages laws written to protect against employment discrimination. It elicits issues of insurance reimbursement for medical procedures that may be considered experimental or cosmetic. It involves determinations of appropriate medical and social treatment in prison. It is yet another worry for the military.

Anonymity

Many transsexuals wish to maintain their privacy and not reveal their status publicly. However, when instituting a lawsuit to redress a grievance, transsexuals risk widespread disclosure. Thus courts have permitted them to sue using a John or Jane Doe fictitious name.

Name Change

Changing name to one characteristic of the other sex is a component of sex reassignment. American law is adapted from the English common law, which is law based on court opinions, not statutes. Under the common law a person can change name, providing that the change is not to perpetrate fraud. Thus in most states under the common law, a transsexual (or anyone else) usually can take a name characteristic of the other sex. Yet some states also provide a more formal name change through court order or statute. Then the change carries the additional weight of the state’s imprimatur.

In 1991, a New Jersey court ruled that a person can change name in accord with the common law tradition “whether or not he or she has undergone or intends to undergo a sex change...or simply wants to change from a tradi-
tional ‘male’ first name to one traditionally ‘female,’ or vice versa.”

By contrast, in New York, a male sought to change name under the state’s Civil Rights Law to “avoid embarrassing situations due to his sexual preference and physical well being.” (sic). No medical or psychiatric evaluations were presented. The court held that not enough information was provided to grant “an aura of propriety and official sanction” to the name change. Another New York court, also denying a statutory name change for a preoperative transsexual, was concerned about both the public interest and potential harm to the patient’s mental status. The decision to live as a female must be, for that court, “irreversible and completely permanent.”

Employment Discrimination

Employment of the preoperative transsexual in the new gender role could be considered an iatrogenic problem. Patient management guidelines call for employment in the aspired-for role as part of the “real-life test.” Yet employers may not hire a recognized transsexual or may terminate employment upon discovering the transsexual’s status. Are transsexuals protected under laws prohibiting discrimination based on gender? Are they protected under laws protecting the handicapped?

Several transsexuals attempted to harness Title VII of the federal Civil Rights Act, the antigender employment discrimination statute, for protection. One was Karen Ulane. Ulane had been a male pilot for Eastern Airlines for a decade, with an excellent record, before undergoing sex reassignment and attempting to return as a woman pilot. Eastern refused. As an expert witness in federal court for Ulane, I argued that she was a woman and because she was under considerably less stress after reassignment, she should perform flight duties even more effectively. Eastern’s psychiatrists argued that Ulane was an operated transvestite and not a true transsexual, thus posing a risk to airline passengers in consequence of an uncertain postoperative course.

In a fleeting victory, the lower court held that Ulane had been discriminated against in consequence of both being a woman (were she still a man she would be permitted to fly) and being a transsexual. Under either ruling, Title VII should protect. However, the Court of Appeals overruled, holding that Ulane was not discriminated against because she was a woman, but because she was a transsexual, and that Title VII protects men and women, but not transsexuals.

In 1993 an employment discrimination complaint was filed against the Boeing Company in an action that could be called “the fatal strand of pearls” case. The worker was hired as a male and six years later emerged as a transsexual living the real-life test. The employer banned the transsexual from using women’s restrooms or dressing in “feminine” attire until after reassignment. However, unisex clothing was permitted. The standard was whether “her dress would be likely to cause a complaint were (the transsexual) to use a men’s restroom.” Remarkably, unisex clothing included a
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(nonfrilly) “blouse, earrings, lipstick, foundation, and nylon stockings.” But, one day the employee wore a strand of pearls. This to Boeing was “excessively feminine.” The court held that transsexualism is not a handicap under Washington State law and that the discharge was not in consequence of gender dysphoria. The State Supreme Court held that Boeing had reasonably accommodated to their employee’s needs.8

Other federal laws do not help transsexuals, either. The Americans with Disabilities Act of 1990 specifically excludes transsexuals from protection against discrimination.9 The Federal Rehabilitation Act of 1973 could have protected transsexuals. “Transsexualism may constitute a mental disability within the meaning of the Rehabilitation Act of 1973, as amended.”10 The “Rehab Act” was amended, however, effective October 29, 1992, such that disability requiring rehabilitation does not include “…an individual on the basis of…sexual behavior disorders.”11

Marriage

For some transsexuals marriage is the ultimate personal proof of successful sex change. Can postoperative transsexuals marry? The answer hinges on whether the transsexual has changed sex legally. This because two persons of the same sex cannot marry.

In 1945, a Swiss court concluded that psychological sex was the criterion for determining sex of the postoperative transsexual.12 But a quarter of a century later, an English court disagreed. The husband of a postoperative transsexual who knew of his “bride’s” gender status prior to marriage sued for annulment contending that the “bride” was male. The judge, also a physician, held that the criteria for determining sex were the sex chromosomes, gonads, and genitalia at birth.13 Twenty years later, the European Court of Human Rights refused to order the British Government to alter the birth certificate of another postoperative transsexual, a woman who had appeared as a “James Bond girl” in the film, For Your Eyes Only. She had been denied a license to marry under British law.14

In the state of New Jersey, in 1976, the result differed. The highest court held that the marriage of a postoperative male-to-female transsexual was valid because that person was a female for the intent of marriage law.15 But not all states agree. Ohio does not permit postoperative transsexuals to marry in their new role. This is because that state does not permit a birth certificate change. In 1987, an Ohio court’s review of other states’ positions on birth certificate change reported that three allow the record to be changed outright—Arizona, Louisiana, and Illinois—and 12 allow a “change of sex designation” on the certificate.16

Parenting

Transsexuals may be parents. As such they may be involved in child custody or child visitation cases.

In 1981, as an expert witness in London’s High Court for a preoperative transsexual father fighting to continue visitation with his four-year-old daugh-
ter, I argued for continued contact in the new role. The girl was aware that this person currently dressing in women’s clothes was her father. The trial court ruled that the father could visit only when dressed as a man. This requirement was overturned by the Court of Appeal.\footnote{\textsuperscript{17}}

A striking case of transsexual parenthood and court deliberations in the U. S. is the 1973 Colorado case involving a female-to-male transsexual with four daughters. After divorce, she retained custody, lived with another female, and commenced male hormone treatment. Sex reassignment, legal sex change, and marriage as a man to a woman followed. The daughters’ father sued for child custody and won in trial court. However, the appellate court held that because no adverse effects on the children from their mother’s transsexualism had been demonstrated, their best interests were not compromised by remaining in that home. The court wrote, “The record contains no evidence that the environment of respondent has endangered the children’s physical health or impaired their emotional development. On the contrary, the evidence shows that the children were happy, healthy, well-adjusted children who were doing well in school and who were active in community activities.” The daughters wanted to remain with their sex reassigned mother.\footnote{\textsuperscript{18}} These daughters were included in my 1978 report of 16 children whose parents “changed sex,” in which none of the children experienced gender identity disorder.\footnote{\textsuperscript{19}}

Another transsexual parent was successful in Minnesota. After divorce the preoperative transsexual father and the mother held joint custody. Then the transsexual sued for sole custody. A psychiatric expert testified that the young boy was experiencing no sexual identity conflict. The court found the transsexual’s home to be more stable. Custody went to the transsexual.\footnote{\textsuperscript{20}}

A decision in Nevada went the other way. There the transsexual’s parental rights were terminated. The child, eight years of age at the start of proceedings, was described as experiencing psychological, social, and educational stress. The court held that the father’s parental rights were not terminated “merely because she is a transsexual.” Rather, the court recognized the effect of the situation on the child. This child expressed no interest in seeing her father.\footnote{\textsuperscript{21}}

\textbf{Medical Negligence}

Although physicians are concerned about negligence suits from transsexual patients, they are afforded some protection with malpractice insurance. But another financial hazard exists. One psychiatrist in New York discovered this when summoned before the administrative review board of his medical society for allegedly insufficient evaluations of preoperative transsexuals. His insurance would not pay for his attorney fees. The administrative board hearings were not considered a suit under terms of the policy.\footnote{\textsuperscript{22}}

\textbf{Prison Settings}

Transsexuals have been sent to prison for a variety of crimes including homicide and armed robbery. If preoperative,
at least genitally, should the prisoner be housed with persons of their birth sex or the aspired-for sex? If prisoners generally are vulnerable to sexual victimization, the prospect of abuse is magnified for those who more closely approximate the sex from which other prisoners are deprived. Further, there are issues of medical treatment—the continuation of hormonal therapy and possibly reconstructive surgery.

The Supreme Court has held that prisoners with a psychological or medical condition must get some treatment lest the Eighth Amendment to the Constitution be violated—the provision against cruel and unusual punishment. But just what that treatment is becomes problematic. The Supreme Court standard for an Eighth Amendment violation is “deliberate indifference to serious medical needs.” Based on current decisions, there is no constitutional right to receive estrogens, be transferred to a women’s prison, or receive sex-reassignment surgery, providing that some treatment is available.

Some prison treatments have been bizarre. One prisoner, denied estrogen, implemented partial castration. Prison surgeons completed removal of the testes. The prison then agreed to administer sex hormones. However, male hormones were given. This treatment was upheld as constitutional because there was not a total failure to provide medical attention.

On the other hand, a prison inmate stated a valid claim under the Eighth Amendment for indefinite confinement in administrative segregation, failure of protection against assaults, and being required to strip before guards and inmates. Another court ordered a prison to administer female hormones to a prisoner who had lived as a woman for four years prior to incarceration. Permitting the return of masculine physical characteristics (the prisoner’s testes were in place) constituted deliberate medical indifference.

In 1993, the U.S. Supreme Court granted certiorari in Farmer v. Brennan, No. 92-7247, where a male-to-female preoperative transsexual sued prison officials after being sexually assaulted in the male general section of a maximum security penitentiary. The court remanded the case to determine whether prison officials had subjective knowledge that the prisoner would be assaulted. Absent that, there would be no liability.

In prison, there is no right to cross dress. This is because “allowing an inmate to wear women’s garments and makeup in an all-male prison could provoke and/or promote homosexuality or assault.” Further, “a change in identity of a prisoner could facilitate escape.”

Insurance Reimbursement

Insurance or third-party coverage for sex-reassignment procedures has spawned a series of federal and state cases. Courts have ruled that medical programs cannot arbitrarily deny a physician’s reimbursement for transsexual surgery (for example, Pinneke v. Preissner, [1980]). “We find that a state plan absolutely excluding the only available treatment known at this stage of the art
for a particular condition must be considered an arbitrary denial of benefits. A review of follow-up reports of transsexual operations performed between 1979 and 1989 concluded that for 220 men transsexuals, 87 percent could be considered to have a “satisfactory” outcome and for 130 women transsexuals, 97 percent could be considered “satisfactory.” However, a court, after hearing testimony that the surgery was still “experimental,” held that “the state could reasonably determine that transsexual surgery is experimental,” and thus deny reimbursement. On the other hand, a New York court held that transsexual surgery is not excludable from insurance coverage as “cosmetic.”

Professional Sports

The transsexual as professional athlete seldom may occur, but one postoperative tennis player produced a celebrated case in New York. Nine years after the advent of sex chromosome testing to determine sex of athletes in Olympic competition, tennis star Rene Richards, formerly Richard Raskind, confronted the United States Tennis Association with a unique problem. Was she a man or woman player? Would permitting Richards to compete as a woman give her an unfair advantage owing to earlier androgenization as a male? The Tennis Association decreed that Richards was a male because her sex chromosomes were XY. This criterion is questionable. Would they have made the same determination were Richards a person with the androgen insensitivity syndrome (testicular feminization)? These women also have the XY configuration. A New York court overruled the Association’s decision as a violation of the state’s Human Rights Law. The only justification for using a sex determination test...“is to prevent fraud.” The undue physical advantage problem remains, however.

Military

The Air Force Reserves discharged a postoperative transsexual as psychologically unsuitable and physically unfit. The Court of Appeals supported the decision based on physical unfitness. The Air Force regulation requires discharge for medical defects that will significantly interfere with duty performance or station assignability. The regulation includes disqualification after bilateral gonadectomy, amputation of the penis, and change of sex.

A urologist testified that the potential long-term effects of sex-change surgery constitute medical risk, especially in remote (geographical) areas. The transsexual did not argue against the regulation generally, only that an individual soldier’s status should be considered. However, the urologist testified that potential problems can arise in any postoperative transsexual.

Conclusion

Transsexuals present an important research and clinical model for behavioral science. For those whose professional challenge is understanding typical sexual identity development, here is the extreme example of atypical development. Transsexuals also present important issues to the law. What is a male or a
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female? What is the essence of marriage? Is transsexual treatment established medical care? What is the extent of protection to be given those whose sexual identity is dramatically atypical whether in situations of civilian employment, the military, or in prison? Transsexuals pose great conundrums (to use English writer Jan Morris’ autobiographical term)\textsuperscript{37} that belie their relatively small number.

References
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