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Renaissance for the Transsexual: A New Birth Certificate

The twentieth century has seen tremendous advances in medicine. In many instances collaborative efforts with law are needed for the maximum implementation of these. Compulsory vaccination is an example, for the applicable public health statutes designed to eliminate smallpox required a United States Supreme Court decision to establish their validity.² The area of organ transplants with its attendant complicated problems concerning the moment of death, informed consent, and the right to the deceased's body is another medical field fraught with legal problems. The list is long. Added recently is concern over obtaining a new birth certificate for the transsexual who has undergone surgery to change or reassign his sex, a certificate which will reflect this change.

Transsexualism is a complicated disorder in which an individual anatomically of one sex firmly believes that he belongs to the other sex.³ It is different from hermaphroditism where an individual has physiological characteristics of both sexes, usually vestiges of organs of both.⁴ And it should be distinguished from transvestism in which the individual receives pleasure from dressing as a member of the opposite sex, although without any belief of belonging to that sex.⁵

Relatively few individuals suffer from transsexualism. But the Christine Jorgensen case which was given international publicity drew the attention of researchers to the field of sex reassignment surgery. Because of this notoriety, it would seem that the number of transsexuals has increased. This increase has been described as an "epidemic," the use of that term for these numbers reflecting the ambivalence of many writers and researchers about the disorder and its treatment by reassignment surgery.⁶

Transsexualism is not a new phenomenon; it has been recognized for centuries.⁷ The first known description is by Hippocrates.⁸ Institutionalized transsexuality is found among

Presented at the Sixth International Meeting of Forensic Sciences, Edinburgh, Scotland, 20-26 Sept. 1972. Received for publication 25 Sept. 1972; accepted for publication 4 Dec. 1972.

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² *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

³ Socarides, C. W., "Psychoanalytic Study of the Desire for Sexual Transformation: The Plaster-Of-Paris Man," *International Journal of Psychoanalysis*, Vol. 51, 1970, p. 341. "Transsexualism may be defined as a psychiatric syndrome characterized by: (1) An intense, insistent and overriding wish or desire for sexual transformation into a person of the opposite sex. . . ." (hereinafter cited as Socarides)

⁴ Dmowski, W. P. and Greenblatt, R. R., "Abnormal Sexual Differentiation," *American Family Physician*, Vol. 3, Feb. 1971, p. 80.

⁵ *Stedman's Medical Dictionary*, 22nd ed., Williams and Wilkins Co., Baltimore 1972.

⁶ Marcel, J. E. et Dubois, J. Cl., "Un Cas de Transsexualism Opéré de Long Date: Considérations Médicales, Biologiques et Juridiques," *Gynécologie Pratique*, Vol. 20, 1969, pp. 401-421.

⁷ de Savitsch, E., *Homosexuality, Transvestism and Change of Sex*, Charles C Thomas, Springfield, Ill., 1958, pp. 17-27, (hereinafter cited as de Savitsch).

⁸ Dubois, J. Cl., "Transsexualism et Anthropologie Culturelle," *Gynécologie Pratique* Vol. 20, 1969, p. 432.

North American Indians and in Siberia, Madagascar, and Polynesia.⁹ The possibility of attempting sexual transformation by surgery is at least fifty years old,¹⁰ and over the last twenty years several thousand of these operations have been performed throughout the world.¹¹ There are several research centers in the United States which perform the surgery. The Johns Hopkins' Gender Identity Clinic, for instance, which has stringent selection processes for its transsexual patients, changed the sex of twenty-four individuals in a two-year period.¹² The University of Minnesota Hospital altered the sex of twenty-five transsexual men.¹³ Although the publicity given the Jorgensen operation may have led to a recrudescence of the illness, the appearance of sufferers seeking the surgical "cure" has led to research into this problem and evaluation of surgical treatment.

The etiology of transsexualism is not certain. Wälinder gives the psychoanalytic explanation that it involves efforts to counteract castration anxiety.¹⁴ Other psychological explanations include parental rejection, that the child has been dressed in the clothes of the opposite sex, close visual contact with persons of the opposite sex, reversal in parental role, imprinting, and change in, or inappropriate body image.¹⁵ The idea of very early conditioning or a kind of imprinting has interested other students of these extreme abnormalities of gender.¹⁶ Of the possible organic causative factors Wälinder lists: genetic factors, hormones, and cerebral lesion.¹⁷ A recent commentator dismisses these individuals as aggressive sexual psychopaths who have a masochistic element in their desire for the mutilation of their physical sex structure.¹⁸ Even if the disorder is a particularly severe form of homosexuality, many reporters state that the transsexual abhors homosexual behavior and considers himself truly a member of the opposite sex.¹⁹ In any case, Dr. Harry Benjamin, a pioneer in the field, says that with the present state of knowledge no one can state with any assurance the cause of the disorder, although the earlier the symptoms manifest themselves the more severe they become later on.²⁰

"Authors with any experience of transvestism or transsexualism seem to be agreed that there is no way of getting at the underlying cause, especially in the case of transsexualism. . . ."²¹ Surgical sex reassignment seems the treatment of choice for those severe cases

⁹ *Ibid.* at 440.

¹⁰ Socarides. "The first report of a sex-change operation in the medical literature was . . . given by F. Abraham in 1931." Money, J., "Sex Reassignment," *International Journal of Psychiatry*, Vol. 9, 1970-71, p. 250, (hereinafter cited as Money).

¹¹ *U.S. News and World Report*, Vol. 61, Dec. 5, 1966, p. 13.

¹² Berg, R. H., "The Transsexuals, Male or Female," *Look*, Vol. 34, 27 Jan. 1970, p. 29.

¹³ *Ibid.*

¹⁴ Wälinder, J., *Transsexualism*, Scandinavian University Books, Goteberg, 1967, trans. by Helen Frey, p. 13, (hereinafter cited as Wälinder). See also Socarides at 341.

¹⁵ Wälinder at 14-15.

¹⁶ Stoller, R. J., "The transsexual boy: mother's feminized phallus," *British Journal of Medical Psychology*, Vol. 43, 1970, p. 127. See also Benjamin, J., *The Transsexual Phenomenon*, The Julian Press, New York, 1966, p. 75, (hereinafter cited as Benjamin).

¹⁷ Wälinder at 16-18. Dr. Harry Benjamin, who has done pioneer work in this area, suggested an endocrine disorder. See Benjamin p. 75.

¹⁸ Cappon, D. (Ed.), "Psychiatric Problems," *Postgraduate Medicine*, Vol. 48, Nov. 1970, pp. 287-288, (hereinafter cited as Cappon I).

¹⁹ See Jorgensen, C., *Christine Jorgensen, a personal autobiography*, P. S. Eriksson, New York, 1967, (hereinafter cited as Jorgensen) for a discussion of this from the patient's point of view. The use of the masculine pronoun is appropriate since the incidence of transsexualism is much greater among males. See de Savitsch, p. 86.

²⁰ Benjamin, J., "Should Surgery be Performed on Transsexuals?," *American Journal of Psychotherapy*, Vol. 25, 1971, p. 76. Wälinder confirms this. "The outlook seems to depend as a rule on the age of onset . . . the earlier the onset the worse the outlook." Wälinder at p. 23.

²¹ Wälinder p. 19. Money p. 259. "My main point is that, while I do not believe any form of psychotherapy, including psychoanalysis, can turn an adult transsexual into a masculine man, there is some relief from that grim prognosis when one treats very feminine boys." Stoller, R. J., "Psychotherapy of Extremely Feminine Boys," *International Journal of Psychiatry*, Vol. 9, 1970-71, p. 280.

whose miserable lives have not been improved by classical psychoanalysis, aversion therapy, or hypnotherapy. However, one reporter states flatly: "There is no clinical justification whatsoever for complying with this demand (that is, for surgery). . . . The proper treatment of a psychiatric condition is by psychologic means."²² This disagreement over cause and cure parallels disharmony in other areas, for instance, in considering the legal implications of transsexualism. It confuses those who must decide on the basis of some professional opinion, usually medical, whether legislation should be enacted to permit issuance of a new birth certificate to the transsexual following sex reassignment surgery, or, if indeed, the surgery should be outlawed.

Sexual Identity

The identity crisis is one of the major problems of the twentieth century. New nations are born; members of racial minorities search for meaning in their lives among their earliest cultural roots; the individual asks, "Who am I?" To complicate this crisis, some individuals are asking, "What am I?," and the law cannot answer. A search for sexual identity in the law may seem an anomaly, for this is a psychological problem, but one's identity is clearly of legal importance, so much so, that we take it for granted.

Legally a definition of male or female does not exist. The presumption that gender is so well understood as not to need defining does not survive examination. Gender is a neutral word at best. Definitions for male issue²³ or female child²⁴ exist in the particular context of succession or criminal law, but there are no generic terms stating the components of maleness or femaleness needed to solve this crisis of the fundamental legal nature of the individual. "The word 'identity' is not a word of art in the law. . . . Identity is defined as sameness of essential or generic character in different examples or instances; the limit approached by increasing similarity; sameness in all that constitutes the objective reality of a thing. With respect to a person, the most common means of identifying them is by name."²⁵ The reality of sexual identity is the object of this search; and with present trends toward ambiguous names and appearance, a name is little help.

Physical Tests for Sexuality

There are both physical and psychological components of sexuality. The medical profession considers the following factors relevant to the determination: (1) sex chromosome constitution; (2) gonadal sex; (3) sex hormone pattern; (4) internal sex organs other than the gonads (for example, uterus or sperm ducts); (5) genitalia; (6) secondary sex characteristics (for example, facial hair); (7) sex of rearing (usually the sex assigned at birth); and (8) assumed sex role or psychological sex.²⁶ One author has said flatly that the presence of a uterus and ovaries is a distinguishing characteristic of a female;²⁷ and another states that without menstruation, pregnancy, and lactation there is no womanhood,²⁸ surely harsh definitions for the barren woman or one who has had a hysterectomy.

²² Cappon I.

²³ *Pennington v. Pennington*, 17A. 329, 331, 70 Md. 418 (1889).

²⁴ *Commonwealth v. Kinner*, 9 A. 2d 177, 178, 137 Pa. Super. 256 (1939).

²⁵ *State v. Evjue*, 33 N.W. 2d 305, 309, 253 Wis. 146 (1948).

²⁶ Smith, D. K., "Transsexualism, Sex Reassignment Surgery, and the Law," *Cornell Law Review*, Vol. 59, 1971, p. 965, (hereinafter cited as Smith). This is an excellent discussion of the legality of sex reassignment surgery and the postoperative changes in civil status.

²⁷ de Savitsch, p. 54. "As far as any mammal is concerned the determining factor of a female is the presence of a uterus (the womb) and ovaries."

²⁸ Cappon I.

In one case requesting a change of name following a change of sex operation, the judge stated that the true sex of a person is usually determined by visual inspection.²⁹ With modern unisex costumes and coiffures, this is frequently impossible. Two other cases determined sex on the basis of the chromosome count,³⁰ decisions which place the androgen sensitive individual (one with male physical characteristics but a sensitivity to the male hormone which leads to a complete feminization) in limbo.³¹

Psychological Tests for Sexuality

"Psychologic sexuality has three main components: psychogender or sexual identification and gender role played individually and socially, sexual object or target, and sexual act. Psychogender is the most important aspect of psychosexuality. . . ."³² For the transsexual his psychogender does not fit the identity of the birth certificate. A simplistic test would determine sexual identity on the basis of present psychology and anatomy,³³ but the possibility of an individual's psychic state being in flux would mean that the sex designation of an individual could change without notice. Of course, if we say that a child is psychologically neutral at birth because his psychogender is dependent on so many factors, then the child should have the option of selecting his sex later, as some Christian denominations require a rational choice of "joining the church" or "confirming" vows made in infancy when the child is of an age presumably to make the choice.

Sex Determination on Birth Certification

With a psychological test unstable and a physical one impractical, we return to the problem of determining sexual identity legally. This is usually established by the designation on the birth certificate, customarily done after cursory examination of the physician, midwife, or other person in attendance at birth. In most states it is the primary obligation of such individuals to report births, and it follows that they make the sexual determination.³⁴ Examination of the external genitalia is not the only criteria for that determination,³⁵ but is the one commonly used; and once the determination is so made, a legal designation of sex has been made as well. The birth certificate, then, becomes a public document which "legally establishes an individual's identity and status. . . ."³⁶

²⁹ *In re Anonymous*, 64 Misc. 2d 309, 314 N.Y.S. 2d 668, 669 (1970). In this case Judge Evans compassionately permitted a change of name for a transsexual following surgery, although admonishing the applicant that the judge's order could not be used as evidence that his sex had in fact been changed.

³⁰ *Corbett v. Corbett*, [1970] A11 E R 33 and *Anonymous v. Weiner*, 50 Misc. 2d 380, 270 N.Y.S. 319 (1966). The latter case involved the use of a report from the New York Academy of Medicine which had studied the problem of sex designation of an operated transsexual and illustrates the problem which occurs with disagreement among physicians in these sensitive areas. See also Smith at p. 980, for a discussion of an Argentine case which reached the same conclusions.

³¹ *The Merck Manual*, 12th ed., Merck Sharp and Dohme Research Laboratories, 1972. See also discussion in Comment, "Transsexuals in Limbo: The Search for a Legal Definition of Sex," *Maryland Law Review*, Vol. 31, 1971, p. 240 (hereinafter cited as *Maryland Law Review*).

³² Cappon, D., "Psychiatric Problems," *Postgraduate Medicine*, Vol. 48, Oct. 1970, p. 294.

³³ *Maryland Law Review*, p. 254.

³⁴ See, for example, *Louisiana Revised Statutes* 40:304 (1950).

³⁵ Accard, J., Breton, J., Charbaut, J., Hinert, P., Philbert, M., Schaub, S., et Trosier, S., "Problèmes Médico-Légaux et Déontologiques de l'Hermaphroditisme et du Transsexualisme," *Médicale Légale Dommage Corporel*, Vol. 2, Oct.-Dec. 1969, pp. 342-352. "Les connaissances cliniques, biologiques et psychologiques actuelles est établissant que le sex genital externe n'est qu'une des composantes de la sexualité et la recours aux interventions chirurgicales et hormonales tendant établis une prevalence sexuelle ont des repercussions dans le domaine du droit. Le droit francais en effet ne prevail pas les cas d'intersexualité. Chaque individu etant declare a sa naissance «de sex masculin» ou «de sexe feminin»; as ailleurs la regle de l'indisponibilité (1) de l'état des personnes ne permet pas d'obtenis sur la seule volante de l'interese un changement de sexe a l'état civil." *Id.* p. 346.

³⁶ *Encyclopaedia Britannica*, Vol. 23, Vital Statistics, 1967.

STATE OF LOUISIANA
CERTIFICATE OF LIVE BIRTH Birth No. **117SAMPLE**

IMPORTANT—
Black Ink or Typewriter
Ribbon Mandatory By
State Law.

THIS CHILD (Type of print names. Do not use numerals for month of birth.)	1A. CHILD'S LAST NAME		1B. FIRST NAME		1C. SECOND NAME		2A. DATE OF BIRTH MONTH DAY YEAR								
	3. SEX—GIRL OR BOY?		4. THIS BIRTH Single <input type="checkbox"/> Twin <input type="checkbox"/> Triplet <input type="checkbox"/>		5. IF TWIN OR TRIPLET, WAS CHILD BORN 1st <input type="checkbox"/> 2d <input type="checkbox"/> 3d <input type="checkbox"/>		2B. HOUR OF BIRTH								
	6A. PLACE OF BIRTH (CITY, TOWN, OR LOCATION)						6B. PARISH OF BIRTH								
PLACE OF BIRTH	6C. NAME OF HOSPITAL OR INSTITUTION—(IF NOT IN HOSPITAL OR INSTITUTION GIVE STREET ADDRESS OR LOCATION)						6D. IS PLACE OF BIRTH INSIDE CITY LIMITS? Yes <input type="checkbox"/> No <input type="checkbox"/>								
USUAL RESIDENCE OF MOTHER (Where does mother live?)	7A. USUAL RESIDENCE OF MOTHER (CITY, TOWN OR LOCATION)			7B. PARISH		7C. STATE									
	7D. STREET ADDRESS—(IF RURAL INDICATE LOCATION)						7E. IS RESIDENCE INSIDE CITY LIMITS? Yes <input type="checkbox"/> No <input type="checkbox"/>								
FATHER OF CHILD	8A. FULL NAME OF FATHER			8B. STATE AND CITY OF BIRTH (IF NOT IN U.S.A. NAME COUNTRY)		8C. AGE (AT TIME OF THIS BIRTH)	8D. COLOR OR RACE OF FATHER								
MOTHER OF CHILD	9A. FULL MAIDEN NAME OF MOTHER			9B. STATE AND CITY OF BIRTH (IF NOT IN U.S.A. NAME COUNTRY)		9C. AGE (AT TIME OF THIS BIRTH)	9D. COLOR OR RACE OF MOTHER								
INFORMANT'S CERTIFICATION	I certify that the above stated information is true and correct to the best of my knowledge.		10. SIGNATURE OF PARENT OR OTHER INFORMANT Parent <input type="checkbox"/> Other <input type="checkbox"/>			11. DATE OF SIGNATURE									
	12. MOTHER'S MAILING ADDRESS														
ATTENDANT'S CERTIFICATION	I certify that I attended this birth and that the child was born alive on the date stated above.		13. SIGNATURE OF ATTENDANT			M.D. <input type="checkbox"/> Midwife <input type="checkbox"/> Other <input type="checkbox"/>	14. DATE OF SIGNATURE								
REGISTRAR'S CERTIFICATION	15. DATE ACCEPTED BY LOCAL REGISTRAR		16. SIGNATURE OF LOCAL REGISTRAR				17. DATE FILED BY STATE REGISTRAR								
CONFIDENTIAL INFORMATION FOR MEDICAL AND HEALTH USE ONLY (This Section MUST Be Filled Out For Each Birth)															
OTHER CHILDREN	PREVIOUS DELIVERIES TO MOTHER (DO NOT INCLUDE THIS BIRTH)														
	HOW MANY OTHER CHILDREN ARE NOW LIVING?				HOW MANY OTHER CHILDREN WERE BORN ALIVE, BUT ARE NOW DEAD?				HOW MANY FETAL DEATHS (FETUSES BORN DEAD) AT ANY TIME AFTER CONCEPTION?						
	15. MOTHER MARRIED? Yes <input type="checkbox"/> No <input type="checkbox"/>		WEIGHT OF CHILD lbs. oz.		DATE LAST NORMAL MENSTRUATION BEGAN MONTH DAY YEAR		MONTH OF PREGNANCY BEGAN FIRST SECOND THIRD ETC		PRENATAL VISITS TOTAL NUMBER (IF NONE SO STATE)						
	FATHER'S EDUCATION (GRADE HIGHEST GRADU) 0, 1, 2, 3, 4, ... or 8		ELEMENTARY 1, 2, 3, or 4		HIGH SCHOOL 1, 2, 3, 4, or 5		COLLEGE 1, 2, 3, 4, or 5		MOTHER'S EDUCATION (GRADE HIGHEST GRADU) 0, 1, 2, 3, 4, ... or 8		ELEMENTARY 1, 2, 3, or 4		HIGH SCHOOL 1, 2, 3, 4, or 5+		COLLEGE
BIRTH INJURIES TO CHILD (DESCRIBE OR WRITE "NONE")															
CONGENITAL MALFORMATIONS OR ANOMALIES OF CHILD (DESCRIBE OR WRITE "NONE")															

PHS 19 (REV. 1/69) Louisiana State Department of Health, Bureau of Vital Statistics

FIG. 1—A birth certificate from the Louisiana State Department of Health.

Legal Nature of the Birth Certificate

The birth certificate (Fig. 1) is a *prima facie* identity card in this bureaucratic age. It came into existence as communities grew and could no longer rely on the memory of individuals as to genealogy. This record keeping comes with a complex society where many are strangers to each other. Birth certificates have been in use for several hundred years and have been kept in Sweden in an unbroken line since 1741.³⁷ In the United States a state can require this document in the exercise of its police power as necessary to promote the public health and welfare.³⁸

As Proof of Status

The birth certificate is something more than a mere certification of birth since it has tremendous implications for legal status.³⁹ It is *prima facie* evidence of the facts there

³⁷ *Ibid.*

³⁸ *Steele v. Campbell*, 1138 Ind. App. 549, 82 N.E. 2d 274 (1948). "It has been held that statutes requiring the filing of births, deaths, and marriages are enacted by the states in exercise of the police power of the state to prevent the spread of contagious diseases, and generally to promote the public health and welfare; that within its legitimate objects and purposes such a record is proper evidence." *Id.* p. 275.

³⁹ "My birth certificate was a report of a happening some thirty-three years before. It was in no way a legal sex-determining document. If I'd gone through red tape of having it changed to read 'female,' I could simply have received a newer piece of paper and the original would not have been destroyed, but merely sealed in permanent files." Jorgensen, p. 290. However, Christine Jorgensen was refused a marriage license on the basis of that birth certificate. See also *Baker v. Nelson*, 191 N.W. 2d 185 (Minn., 1971) where the court refused to order the issuance of a marriage license to two male applicants, who were homosexuals. The problem is different, of course, but the designation on the birth certificate is determinative.

stated, although those facts are rebuttable. Some of the facts on the birth certificate are crucial. For instance, the designation on the birth certificate determines race.⁴⁰ When belonging to certain racial minorities carried serious legal disabilities in the United States, this was crucial. For instance, in a state which forbade miscegenous marriages, a husband attempted to annul his marriage when it was discovered that the racial designation on the wife's birth certificate differed from that on his.⁴¹ That legal disability has been removed since the prohibition of miscegenous marriages was banned by the United States Supreme Court.⁴² Presumably other legal disabilities flowing from the racial designation, such as inequality of education and job discrimination, have been removed by judgment of the courts and legislation as well.⁴³ Common sense requires recognition that designation of race on a birth certificate can still carry with it serious social disabilities.

The designation on the birth certificate determines parentage and legitimacy.⁴⁴ In this delicate area, of course, the birth certificate reverts to its status as only *prima facie* evidence which is subject to rebuttal.⁴⁵ But, in the absence of challenge, even absurd statements of parentage on the certificate will be accepted as proof.

The birth certificate is admissible as *prima facie* proof of age.⁴⁶ "Generally, the highest probative value will be accorded to a public record of birth . . . as evidence for age."⁴⁷ In the United States, the birth certificate is also primary evidence of citizenship or nationality.⁴⁸

In addition to these designations, the birth certificate makes a sexual one, which may not resolve the problem of sexual identity, but does have far-reaching implications. Although the birth certificate is infrequently requested by issuing authorities when individuals seek a marriage license, and then usually because it is suspected that the parties are underage, the

⁴⁰ Changing the designation is extremely difficult. See *State ex rel. Dupas v. City of New Orleans*, 240 La. 820, 125 So. 2d 375 (1960); *State ex rel. Treadaway v. Louisiana State Board of Health*, 221 La. 1048, 61 So. 2d 735 (1952). See also *State ex rel. Pritchard v. Louisiana State Board of Health*, 198 So. 2d 490 (La. 4th Cir. 1967) and discussion of this case by Pugh, G. W., *Work of Appellate Courts (Evidence)*, *Louisiana Law Review*, Vol. 29, 1969, pp. 310-313. See also Holloway, J. P., "Transsexuals—Their Legal Sex," *University of Colorado Law Review*, Vol. 40, 1968, p. 293, (hereinafter cited as Holloway) where he points out that the evidentiary value of the certificate in court is irrelevant since its primary use is to obtain marriage licenses, passports, driver's licenses, etc. That is exactly the point.

⁴¹ *Villa v. Lacoste*, 213 La. 654, 35 So. 2d 419 (1948). The court denied the petition, stating that the only color involved in the blood of the wife was Filipino, and the evidence was sufficient to overcome the *prima facie* case made by the designation on the birth certificate. One wonders if a compassionate judge was concerned about the legitimacy of innocent offspring of a marriage which had apparently lasted 7 years.

⁴² *Loving v. Virginia*, 388 U.S. 1 (1966).

⁴³ See *Brown v. Board of Education*, 349 U.S. 294 (1955), which spawned numerous cases dealing with equality of education. But see *Green v. City of New Orleans*, So. 2d 76 (La. App. 1956), where Negro parents attempted to adopt an illegitimate child, born of a white mother, and an unknown, presumably Negro father, but were prevented from doing so because the racial designation, "white," on the birth certificate. The child had negroid features and was shunned by whites.

⁴⁴ See for example, *Succession of Rockwood*, 231 La. 521, 91 So. 2d 799 (1956).

⁴⁵ See Pascal, R. A., "Work of the Louisiana Supreme Court of the 1958-1959 Term (Civil Code)," *Louisiana Law Review*, Vol. 2, 1959, p. 213. See also *Woodward v. U.S.*, 167 F. 2d 774 (Mo. 1948); *Dudley's Administrator Fidelity and Deposit Co. of Md.*, 240 S.W. 2d 76 (Ky. 195). See *Louisiana Revised Statutes*, Vol. 40, 1950, p. 159A; 32 *Corpus Juris Secundum Evidence* §638. Wigmore, J. H., *Evidence*, Vol. 4, Little Brown and Co., Boston, 1940. §1336 states that there is no preference over the official record of his birth over that of eyewitnesses, but points out the special testimonial rank given to official documentary statements in the continental legal tradition. "The effect of this is seen in a statutory rule preferring the official record of baptism or marriage on an issue of legitimacy."

⁴⁶ *State v. Dierlamm*, 189 La. 544, 189 So. 135 (1938). This was a trial for the crime of carnal knowledge, where the female's age is one element of the crime.

⁴⁷ *Code of Federal Regulations* 404.703 (1972). This relates to benefits under the Social Security Act.

⁴⁸ *Code of Federal Regulations* 51.43 (1972). This relates to proof of citizenship when applying for a passport.

sex listed on the birth certificate determines the right to marry the other applicant. Some states do not list a statutory requirement that marriage be between individuals of the opposite sex,⁴⁹ but a common law court recently, in an action by a homosexual for a marriage license, said that "the institution of marriage as a union of man and woman, uniquely involving the procreating and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interest for which petitioners contend."⁵⁰ On reflection, it is impossible to urge a contrary result; the judicial response would be that marriage between members of the same sex is against good morals. Civil law jurisdictions, which in the United States would be Louisiana and Puerto Rico, also apparently assume that spouses must be of different sexes. A treatise writer commenting on this states: "Besides the fact that each spouse must be personally fit to get married, it is also necessary that those who want to do so be of different sex."⁵¹ He adds that although the existence of one sex or the other is ordinarily certain "the officer of civil status has a juridical means of establishing its authenticity,"⁵²—the birth certificate. The operated transsexual contemplating marriage is understandably anxious to receive a birth certificate reflecting the change of sex, since the old one will be a barrier to marriage.⁵³ The former liberal policy of the Passport Office of issuing a new passport on receipt of medical proof of reassignment surgery is no longer followed, since "a transsexual will be issued a passport in his *legal name and identity*, either *that shown by his birth certificate* or by court decree."⁵⁴ In addition to those mentioned, the birth certificate results in other important consequences, for instance, women have lower insurance rates than men and receive Social Security benefits at an earlier age. Women are not subject to the draft.

As proof, the facts of the birth certificate are rebuttable evidence. Whether evidence is conclusive or *prima facie* frequently is of interest only to a lawyer in an adversary proceeding where he has a challenger to every element of proof. In the absence of challenge, the facts stand; and for the individual with confused sexual identity, a change of those facts to reflect psychological and social reality usually affects no one. Society is affected, because sexual identity should be certain in order to avoid deception and the consequent opportunities for fraud.⁵⁵ But changing the birth certificate to reflect the outward appearance would seem to prevent fraud rather than encourage it. In fact, there may be a strong argument that the change is compelled by some due process rights which an individual has in his status. When his gender role, which is not necessarily determined by anatomy at birth, does not agree with the gender listed on this most important document, denial of a change of the document may be arbitrary. Of course, one's parents may act as one's agents in making the sexual determination at birth, so we can argue that the transsexual has received fair treatment. However, he can later change his name, thus affecting his legal status, and is not bound to keep the one selected by those agents.

⁴⁹ See for example, *Louisiana Civil Code Article 86* (1870): "The law considers marriage in no other view than as a civil contract."

⁵⁰ *Baker v. Nelson*, 191 N.W. 2d 185, 186 (Miss. 1971). This was an attempt of male homosexuals to get a marriage license.

⁵¹ Planiol, M., *Treatise on the Civil Law*, 12th ed., Vol. 1, No. 713.1, 1939. Trans. by the Louisiana State Law Institute.

⁵² *Ibid.*

⁵³ See note 39.

⁵⁴ Quoted in Smith p. 1001. (Emphasis added.)

⁵⁵ See *Maryland Law Review* at p. 242 for a discussion of the problem of fraud. See Benjamin, p. 126 for mention of a marriage in which the husband did not know his wife was an operated transsexual. It seems unrealistic to suppose that a normal, heterosexual male would want an intimate relationship with a male who has become female through this surgery but this goes to the very nature of the transformation.

Three States Issue New Certificates

Three states, Arizona, Illinois, and Louisiana, now permit the issuance of a new birth certificate following a change of sex operation.⁵⁶ The procedures are similar to those followed in the case of adoption, with the old certificate sealed, and the new information, in this case a new sexual designation, placed in the appropriate slot as if the individual had been born of that sex. The Louisiana statute, which was enacted in 1968, requires that a suit be filed in the District Court having jurisdiction over the parish, that is, the county, in which the petitioner resides or in which the petitioner was born. The court requires such proof as it deems necessary of this change of sex, presumably an affidavit from a physician at the very least.⁵⁷ Louisiana thus permits the issuance of an entirely new birth certificate to the operated transsexual. This state's practice in other sensitive areas is to note changes and alterations by scratching out the incorrect information and making the correction, say of a change of race, on the face of the existing certificate.⁵⁸ The other two states, Arizona and Illinois, have similar procedures.

Physicians Role in Identity Search

An individual cannot announce his name, age, paternity, or nationality today and have his word accepted. Documents are necessary to prove our very existence. The birth certificate is one of the most important, and one for which dependency of law upon medicine is great. There are no reported cases in the United States of requests for change of sex designation on the birth certificate because of a mistake made at birth, although it seems taken for granted that it would be possible.⁵⁹ Possibly, when the physician reports the mistake soon after birth a new certificate is made. When the document does not contain an error made at birth, but, instead, a later change has made the data on the document erroneous, law must have the advice of the medical profession on these changes.

There is no law which prohibits a doctor from performing sex reassignment surgery with the informed consent of the patient.⁶⁰ Physicians are loath to operate on a married individual. However, there is apparently no risk of a suit for loss of consortium by the spouse since that action requires a negligent or intentional injury and the sex reassignment surgery cannot be considered either. Although the surgery probably will be rare, without the new birth certificate the surgery becomes experimental, in the sense of altering or reassigning gender, and a candidate for the surgery should be so informed.

One's legal name and identity "is that shown on his birth certificate,"⁶¹ so the "... unique advantage of securing a new birth certificate is that it is the only official document to date which is accepted as proof of gender."⁶² In the legal sense, sexual

⁵⁶ *Arizona Revised Statutes*, Vol. II, Title 36-326 (Supp. 1971-72); *Smith-Hurd Annotated*, ch. 111 1/2, pp. 73-17 (111. Supp. 1972); *Louisiana Revised Statutes* 40:336 (1950). See discussion of the statute and others in Holloway, p. 293.

⁵⁷ *Ibid.*

⁵⁸ Letter from Anthony Ciaccio, Director of the Louisiana Bureau of Vital Statistics, to the author, April 10, 1972.

⁵⁹ *Corbett v. Corbett*, [1970] A11 E R 33 and *Anonymous v. Weiner*, 50 Misc. 2d 380, 270 N.Y.S. 319 (1966). The latter case involved the use of a report from the New York Academy of Medicine, which had studied the problem of sex designation of an operated transsexual, and illustrates the problem which occurs with disagreement among physicians in these sensitive areas. "Sex can be changed where there is an error, of course, but not where there is a later attempt to change psychological orientation of the patient and including such surgery as goes with it." *Id.* p. 322.

⁶⁰ Sherwin, R. V., "The Legal Problems in Transvestism," *American Journal of Psychotherapy*, Vol. 8, April, 1954, pp. 243-244.

⁶¹ Smith p. 965. This is an excellent discussion of the legality of sex reassignment surgery and the post-operative changes in civil status.

⁶² *Legal Aspects of Transsexualism*, Erickson Educational Foundation, Baton Rouge, 1972, p. 7. This foundation sponsors research on the problem.

identity, then, is documentary. This is a non sequitur, but one which does not yield to proof in any other direction. The birth certificate is one's identity. The physician who alters sexual identity, using the high standards of preoperative testing of the Johns Hopkins' Gender Clinic,⁶³ should be able to assure his patient that a new birth certificate will follow; however, he cannot. If the physician does not measure up to those standards, denial of the certificate punishes the patient rather than the physician. As long as society tolerates the surgery, it should authorize the procedures which insure an uneventful convalescence and complete "recovery." Perhaps some kind of medical-legal council should be established to authorize such surgery, as is done in Denmark,⁶⁴ and to ease the transition by authorizing whatever legal changes are necessary, including obtaining a new birth certificate as well as drivers' licenses, passports, and other necessary documents.

Perhaps the law should not help psychologically ill persons adjust to society. That is an argument which can be made. Persons having undergone laryngectomies are not legally barred from speech therapy nor is an amputee barred from a prosthesis. These are mechanical aids rather than documentary ones, true, and involve no legal changes, but unless physicians are willing to push for a change of sex on the birth certificate, they are denying patients further aid on the road toward healthy social adjustment. Perhaps the medical profession alone should resolve the question of the legality of the surgery and the desirability of legal change of status following it, but legal identity which accurately reflects the social role of an individual concerns society as well. This is an area in which law and medicine should work together for a satisfactory solution to this vexing problem of identity.⁶⁵

Summary

A birth certificate is rebuttable proof of sexual identity although challenges to the gender shown there will be rare. Since it is the proof most commonly used in daily affairs, any change in the designated sex should be done most cautiously and for very sound reasons. Once the sex shown has been reassigned by surgery, the sexual designation on the birth certificate may be changed as well. Whether sex reassignment surgery is such sound reason for change is a question for medicine, law, and the general public; and one which should be finally settled before either more surgery or more legislative changes in the vital statistics laws occur.

⁶³ See Money, J.

⁶⁴ The Danish Medico-Legal Council passed on the Christine Jorgensen operation, see Jorgensen, p. 114. Simonsen, J., "Medical Malpractice," *Journal of Forensic Sciences*, Vol. 16, 1971, pp. 226-235, discusses the operation of the Council, which was established in 1909.

⁶⁵ See Lasswell, H. D. and Freedman, L. Z., "The Common Frontiers of Psychiatry and Law," *American Journal of Psychiatry*, Vol. 117, Dec. 1960, pp. 490-498, in which they discuss areas for joint research, such as motivation of litigants, the psychology of trials, and the identification of potential offenders.