APPENDIX A

LEGAL RESPONSES TO TRANSSEXUALISM: SCIENTIFIC LOGIC VERSUS COMPASSIONATE FLEXIBILITY IN THE U.S. AND THE U.K.

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LEGAL RESPONSES TO TRANSSEXUALISM: SCIENTIFIC LOGIC VERSUS COMPASSIONATE FLEXIBILITY IN THE U.S. AND THE U.K.

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Legal Responses to Transsexualism: Scientific Logic Versus Compassionate Flexibility in the U.S. and the U.K.

Abstract

Transsexuals' legal problems may include validity of marriage and revision of official records of identity, such as birth certificates. The paper argues that compassionate, piecemeal legal accommodation to the situation of transsexuals deserves recognition as a sound legal policy to be followed by courts, legislatures and administrative bodies. This is contrasted with attempted scientific deductive logical approaches to legal problems in this area. Court cases and statutes from the U.S. and U.K. are discussed to illustrate points involved in the argument.

Introduction

Harry Benjamin and other physicians and health care personnel concerned with transsexualism have always been aware of the importance of legal issues. (Benjamin, 1966; Green, 1992; Green and Money, 1969; Hamburger, et al., 1953). Relevant legal literature pertinent to the United States and the United Kingdom is extensive. (Swartz, 1995b). This paper seeks not to recapitulate or update existing legal surveys, but rather to comment upon two of the competing legal approaches which one encounters in this area.

The specific legal focus here relates to decisions in the U.S. and U.K. concerning validity of legal marriage where one of the parties is a post-operative transsexual, and also has to do with statutes, regulations and decisions concerning revision of identity documents such as a birth certificate in cases where a transsexual individual has made, or is in the process of making, a

gender transition.

As in an earlier paper (Swartz, 1995b) we cite observations by Oliver Wendel Holmes, Jr., which have particular relevance to developing a fruitful understanding of American law. The passage also sets the stage for presenting a contrast, necessarily somewhat simplified for purposes of this brief presentation, between two different modes of thought pertinent to arriving at policy decisions concerning law and transsexualism. Our discussion may be found to have a bearing, also, on approaches to medico-legal issues more generally.

Holmes, later to become one of the most distinguished justices of the United States Supreme Court, says the following at the outset of The Common Law, in words probably familiar to every American law student.

> "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." (Holmes, 1881, p. 1)

People in the U.S. are inclined to believe that the law should change with the times, be up to date, should be practical and realistic. Nevertheless, it must be said that in the case of law pertaining directly or indirectly to sexuality, personal and social ambivalences, as well as a strong moralistic streak in American culture even to this day, tend to complicate and sometimes confound the usual American legal approach (Swartz, 1994).

American law tends to be pragmatic, not necessarily consistent or uniform, down to earth and practical in its emphasis. It tends to be piecemeal in its approach and cautious both in terms

of formulating broad abstractions and in relying heavily on the persuasive power of conclusions resting mainly on deductions drawn from abstractions.

Although he was speaking about a method in philosophy, much of what William James says about pragmatism sheds light on features often, although not always, found in American legal method. He refers to "The attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts." (James, 1907, pp. 54-55 [italics in original omitted]). He comments that "Pragmatism is uncomfortable away from facts" and asserts perhaps unfairly, "Rationalism is comfortable only in the presence of abstractions." (James, 1907, p. 67). Finally, for the moment, James speaks "about truths in the plural" and the fact that "Truth, for [the pragmatist], becomes a class-name for all sorts of definite working-values in experience." (James, 1907, pp. 67, 68).

Birth Certificates

Confronted in the mid-1960's with applications by transsexuals (mainly male-to-female) for change of sex on birth certificates, the Board of Health of the City of New York requested the opinion of the Committee on Public Health of the New York Academy of Medicine, as to whether such changes should be granted. The main conclusions approved by the Committee in October 4, 1965 (New York Academy of Medicine, etc., 1966, p. 724) were as follows:

> "1) Male-to-female transsexuals are still chromosomally males while ostensibly females.
> 2) It is questionable whether laws and records such as birth certificates should be changed and thereby used as a means to help psychologically ill persons in their social adaptation. The Committee is therefore opposed to a change of sex on birth certificates in transsexualism."

Relying on the above, the New York City Board of Health adopted a resolution that "the Health Code not be amended to provide for a change of sex on birth certificates in cases of transsexuals." The Board of Health also went on record as stating that

> "an individual born one sex cannot be changed for the reasons proposed by the request which was made to us. Sex can be changed where there is an error, of course, but not when there is a later attempt to change psychological orientation of the patient and including such surgery as goes with it [sic]."

The refusal of the Board to grant such requests was upheld in the case of Anonymous v. Weiner, 50 Misc. 2d 380, 270 N.Y.S. 2d 319 (Sup. Ct., N.Y. Co., 1966), which cited the material quoted above.

The Law Division of the American Medical Association published a strongly critical response to the Weiner case and New York's actions, noting that at that time ten states had permitted change of sex on the birth certificate of a transsexual who had undergone convertive surgery. The "Conclusion" of this response included the following language especially pertinent to our concerns here.

> "Cooperation between medicine and law in cases of intersexuality is necessary and important, but the law cannot accept classifications of sex that are inconsistent with the practical relationships of everyday life. On the other hand, the law must exhibit concern for all its citizens, even those who are transsexuals. In Anonymous v. Weiner, the Board of Health convinced itself that it was exhibiting such concern. There might be some doubt as to the sincerity of such concern, however, when the law requires one who, for valid physical, not merely psychiatric, reasons, feels obligated to live as a female (and has undergone convertive surgery to assist her) to present a birth certificate of a male when she wants to marry or qualify for social security or other government or insurance benefits." (Morse and Hall, 1968, p. 290 [italics added]).

The Documentation Law Project of ICTLEP is presently in the process of researching and discussing practical procedures for dealing with statutes and administrative regulations

concerning legal documents of special relevance to transsexuals, such as drivers' licenses, birth certificates, and passports. Detailed coverage has thus far included, inter alia, the U.S. federal government, California, Texas, New York, Oregon and Washington state. (International Conference, etc., 1993, 1994, 1995). Other literature, some of it now quite dated, includes several partial surveys of American states, including birth certificate provisions. (See Swartz, 1995b for references.) In the U.K., McMullan and Whittle, 1994, discuss these matters in practical detail.

Some American states have enacted statutes specifically providing for change of sex on birth certificates in cases of transsexual gender transition. See, e.g., Cal. Health and Safety Code §10475; La.R.S. 40:62; Or.Rev.Stat. §§432.290(5), 33.460, and Va. Code §32.1-269.E. Not all have done so. Some of the other states interpret their statutes as allowing for such record changes while others do not. The U.K. does not. (For references to legal literature, see Swartz, 1995b).

We should note that in a different problem situation involving requests for new or revised birth certificates, namely, in cases of legal adoption of a child, a positive legislative response has been much more likely to be forthcoming. Such new/revised birth certificates are often authorized. Of necessity these new/revised documents work to conceal the fact of parenthood by adoption unless extraordinary court ordered access to the original record is allowed, which is possible but unlikely. A misleading impression of biology, but not of the psychological and social connection between child and adoptive parent, is created. It is conceivable that this could lead to fraud or other harm, but on balance the cause is regarded as a worthy one. Many legislatures make a pragmatic, compassionate accommodation providing for such cases. See,

e.g., N.Y. Public Health Law §4138.

Validity of Marriage

a. Corbett

The Corbett case in the U.K. in 1970 has had an effect which lasts until this day. Corbett v. Corbett (otherwise Ashley), 2 W.L.R. 1306, 2 All E.R. 33 (P.D.A. 1970), [1971] P. 83. (For citations to related legal literature see Swartz, 1995b). The case illustrates for us an emphasis upon priority of abstract principles coupled with a logical-deductive approach. Corbett also points up a familiar confounding of medical concepts and terminology with legal policy questions, an intermingling which receives comment later in this paper. Interestingly, the case was decided by a judge who also had medical qualifications. This high publicity case involved the validity of the marriage of April Ashley, a post-operative male-to-female transsexual, registered at birth as male and raised as a male. The husband was Arthur Corbett, a wealthy male who prior to the marriage knew the facts of this gender transition. The marriage took place in Gibraltar in 1963. The couple were together after marriage for only 14 days, although their relationship before marriage had lasted about three years. Each sought a declaration of nullity of the marriage, but for different reasons. The request of Corbett was granted. An action for maintenance by Ashley in 1966 had led to the initiation of this petition, in 1967, by Corbett challenging the validity of the marriage. Dr. Burou, practicing in Casablanca, performed the sex-reassignment surgery in this case, including the partial removal and conversion of male genitalia so as to construct an artificial vagina. Dr. Burou declined to participate in this case in any way. Prior to surgery, Ashley had been taking female hormones

and living as a female. We omit from this discussion portions of the opinion ruling that the marriage had not, in law, involved a marital sexual consummation.

> After reviewing the evidence, Ormrod, J., proceeded in a strictly deductive manner.
>
> "It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed... . [April Ashley's] operation, therefore, cannot affect her true sex." ([1970] 2 All E.R. at 47)

Marriage "is essentially a relationship between man and woman... ." "The question...becomes what is meant by the word 'woman' in the context of a marriage." "Having regard to the essentially heterosexual character of...marriage, the criteria must...be biological." Only a biological female is "a person who is naturally capable of performing the essential role of a woman in a marriage." The law should adopt the medical criteria of sex at birth, namely, "the chromosomal, gonadal and genital tests, and if all three are congruent [at birth, as in this case], determine the sex for the purpose of marriage accordingly, and ignore any operative intervention." The court briefly referred to a number of logically puzzling inconsistencies which exist if gender and gender identity were taken into account. "The results would be nothing if not bizarre. ...Marriage is a relationship which depends on sex and not on gender." ([1970] 2 All E.R. at 48).

Let us restate the major premises in a brief set of sentences. Marriage is a relationship between a man and woman. Only a biological female has the natural capability to perform the essential role of a woman in marriage. Biological sex as a female is fixed by the time of birth, can usually be ascertained by medical inquiry in connection with birth registration, and cannot be changed.

Minor premise: The individual calling herself April Ashley was identified at birth, by genitals and gonads, as male, and more recently by chromosomal tests during the trial as male.

Conclusion. "My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been such since birth. It follows that the so-called marriage of 10th September 1963 is void." ([1970] 2 All E.R. at 49).

b. M.T. v. J.T.

We look, by way of contrast, at the case of M.T. v. J.T., 140 N.J.Super. 77, 355 Atl. 2d 204, cert. denied, 71 N.J. 345, 364 Atl. 2d 1076 (1976), a case decided by the Appellate Division of the Superior Court of New Jersey, which--as with Corbett--involved the validity of the marriage of a male and a post-operative male-to-female transsexual. Again, there was no fraud as between the parties, the male having cooperated with the female, the plaintiff here, in obtaining her sex reassignment surgery. This case arose in connection with a legal suit by the wife for support, following the couple's separation after two years of marriage.

Dr. Charles L. Ihlenfeld, a specialist in gender issues, had diagnosed the plaintiff as a transsexual, and had been her medical doctor prior to, during, and after her male-to-female sex reassignment therapy. He, as well as others, testified at the trial. The marital couple had known each other, and had lived together, prior to the wife's surgery. A year after her surgery they married in New York state, and then moved to New Jersey. They lived together as husband and wife for two years and had intercourse (penis in surgically constructed vagina) during that time. Thereafter, the husband left, stopped financial support, and the wife sued for support.

At the trial, in spite of the defendant husband's objection that there was no lawful

marriage, it was ruled that the plaintiff was a female and that defendant was her husband, and there being no fraud, the husband was ordered to pay $50 a week support. This result was affirmed in a unanimous decision by the three judges of the appellate court, in an opinion by Handler, J.A.D.

The court explicitly rejected the reasoning of the Corbett case. The opinion of the court built upon law review commentary (especially Smith, 1971), and adopted a functional approach to determining sex for purposes of legal marriage in cases involving transsexual gender dysphoria. Where a discordance develops between anatomical sex at birth and gender identity, and where that discordance is diagnosed as transsexualism by medical authority and is corrected by irreversible medical therapy including surgery, and where that corrective therapy brings with it sexual capacity to function for purposes of sexual intercourse in the new gender role, then anatomy and subjective gender identity have been harmonized in a way which the law will recognize for purposes of marriage.

The person with gender dysphoria is suffering. By taking actions which are irreversible, medical therapy has helped relieve that suffering, and has brought about a harmony of the physical and the psychological, which the law should recognize. "Such recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving societal interest, principle of public order or precept of morality." (355 Atl. 2d at 211).

Discussion

a. Multiple angles of vision; multiple partial truths

It has sometimes been assumed in the medical profession that medicine is based

upon science and that, when it comes to medico-legal matters, the law--through the actions of persons such as judges, legislators and administrative officials--should conform itself to the universal truths of science as these truths are articulated by physicians. As a lawyer who spent a number of the earlier years of his career focusing on problems of law and psychiatry, especially the defense of insanity (irresponsibility) in criminal law, in connection with the American Law Institute's Model Penal Code, I can well remember vigorous representations by distinguished psychiatrists to this effect.

Often included in that view of medico-legal matters is the belief that, in any domain covered by medical expertise, medical concepts and terminology should be given effect in deciding medico-legal issues. It is argued that this is what an enlightened respect for science requires. Thus the seemingly logical conclusion is drawn that words should not mean one thing in modern medicine but something different in contemporary law. If that incongruity were to occur then law would continue to be "a ass", as it was long ago said to be by one of Shakespeare's characters.

b. Medico-legal matters: "the fallacy of misplaced concreteness"

As said by Lon Fuller, "law is the enterprise of subjecting human conduct to the governance of rules." (Fuller, 1969, p. 106). Hence law is concerned with governance, dispute resolution, and legal justice. By way of contrast, medicine and natural science are not primarily concerned with governance. In the formulation, and in the revision, of medical and scientific terms and concepts it is not very likely that questions of legal dispute resolution have been considered; certainly they have not been given overriding importance. The angle of vision of medicine is different, and the objectives of medicine are quite properly different from those of

law.

In referring to the "fallacy of misplaced concreteness" the philosopher Alfred North Whitehead (Whitehead, 1925) called attention to the fact that our abstractions do not exhaust the richness of underlying reality. The fallacy consists in mistakenly assuming that any particular set of abstractions actually consists of, and exhausts, that reality and what can usefully or truthfully be said about it. Law deals, inter alia, with human meanings, especially their significance for legal governance, legal dispute resolution, and the achievement of justice under law in a free society. The meanings of such things as human anatomy, physiology, and psychosocial functioning, for purposes of particular kinds of legal governance and dispute resolution, are not necessarily the same as medical and scientific meanings and significances. Different angles of vision, taken with different purposes in mind, may lead to different pictures of reality and may thus lead to different conclusions.

c. Sex at birth: fact or prediction?

Phyllis Frye of the International Conference on Transgender Law and Employment Policy (ICTLEP) asserts that designation of sex on a birth certificate (usually done in the U.S. by a physician) does not involve merely a statement of observed medical fact, as is usually assumed. It is more accurately seen as involving an implicit prediction, usually correct, based upon observed medical fact. (See Frye, 1995). The observed medical fact concerns the structure of neonatal genitalia as falling within the range of typically male or typically female. The prediction--so often true that its contingent and probabilistic aspect has in the past not usually been recognized--is that, as this infant grows further into childhood and then into adulthood, there will be a congruence between the anatomical indicia of sex (male or female)

already noted, and an emerging subjective gender identity, yet to develop. One might therefore say, in cases of transsexual gender dysphoria, that in filling out an infant's birth certificate the physician made a mistake, a mistake in predicting the emerging congruence of psyche and soma. From this point of view revision of legal documents of the transsexual, such as a birth certificate, involves not a sex change but documentary correction of an error, an error in prediction. Ordinarily such predictions are so trustworthy that for practical purposes they can be regarded as statements of fact. It is only in unusual cases that such predictions turn out to be wrong, and then--it is argued--they should be corrected without any special need for apology.

From this different angle of vision the original record contains what is now revealed to be a non-negligent misstatement. Pragmatically interpreted, we are thus merely dealing with correction of a relatively uncommon type of official documentary error. This would seem, then, no longer to present a direct conflict with the highly conservative position stated in the Corbett case ([1970] 2 All E.R. at 47), and by others elsewhere, that "The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation."

Conclusion

We have seen a contrast in the Corbett and M.T. v. J.T. cases between syllogistic deduction and a pragmatic groping for solutions, a compassionate accommodation of legal policy to a novel, relatively uncommon problem. Moreover, the problem or dilemma involves a medical condition which is not the fault of the person involved. Can the law be adjusted to allow for a better possibility of human happiness in these relatively few, relatively well-defined

cases, without too greatly straining and impairing the effectiveness and credibility of general principles of social ordering in the very large number of cases not characterized by these anomalies?

To some observers it will seem that the purportedly logical conclusion involved in Corbett's syllogism is foretold, a priori, in the shaping of the major premise. "Natural sex" is defined in the major premise as something unchangeable. Problem solving by such a method becomes, unfortunately, not an affirmation of science but rather an unacknowledged tautology.

In the birth certificate situation the American Medical Association's Law Division comment (Morse and Hall, 1968) clearly points up factors pushing in the direction of a nuanced, flexible approach. Not all legislatures and courts will be persuaded. Nevertheless, they should at least recognize the legitimacy of a careful pragmatism, no more flying in the face of science than in the case of statutes authorizing new/revised birth certificates in cases of adoption. Such legislators and jurists may then be of a mind to give more serious consideration to applying to the legal problems of transsexuals a mode of thought openly involving a rich and more complex interplay between facts, principles, precedents, and humane, practical results.

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