3-1-1978

Transsexuals in Search of Legal Acceptance: The Constitutionality of the Chromosome Test

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TRANSSEXUALS IN SEARCH OF LEGAL ACCEPTANCE: THE CONSTITUTIONALITY OF THE CHROMOSOME TEST

An exceedingly important objective of transsexuals who have undergone a sex-change operation is to be legally accepted as members of the sex they purport to be. The greatest obstacle to their legal acceptance is the chromosome test, a test which determines that transsexuals are members of the sex to which they belonged at birth. This Comment sets a factual background of transsexualism and sex determination and then discusses the constitutionality of the use of the chromosome test to determine a transsexual's sex.

A transsexual is a person who believes that he is a member of the opposite sex and attempts to become a member of that sex. Perhaps the most significant legal aspect of transsexualism is that after undergoing sex reassignment surgery, a transsexual usually seeks

* The author wishes to thank Professor Paul Wohlmut of the University of San Diego School of Law and Dr. Renee Richards for their invaluable help.
1. The use of he when referring to a transsexual will denote both the male transsexual (born female, male after surgery) and the female transsexual (born male, female after surgery). The word transsexual will denote a post-operative transsexual.
2. Money, Sex Reassignment, 9 Int'l J. Psych. 249, 251 (1970-71). Harry Benjamin is considered one of the true pioneers in the field of transsexualism. He coined the phrase "transsexual." His work, H. Benjamin, The Transsexual Phenomenon (1966) [hereinafter cited as H. Benjamin] is one of the leading publications in this area. Other influential researchers and their works are R. Green, Sexual Identity Conflict in Children and Adults (1974); J. Money & A. Erhardt, Man and Woman and Boy and Girl (1972); R. Stoller, Sex and Gender (1968); R. Stoller, The Transsexual Experiment (1973); Transsexualism and Sex Reassignment (R. Green & J. Money eds. 1969); Transsexualism and Sex Reassignment is hereinafter cited as Green & Money. See generally Comment, The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma, 7 Conn. L. Rev. 288 (1975); Comment, Transsexualism, Sex Reassignment Surgery, and the Law, 56 Cornell L. Rev. 963 (1971); Note, Transsexual in Limbo: Search for a Legal Definition of Sex, 31 Md. L. Rev. 236 (1971). These Notes and Comments discuss transsexualism in general and identify the various areas in which the transsexual has had and may have difficulty with the law. For a more detailed discussion of transsexualism, see notes 14-37 and accompanying text infra.
3. Sex reassignment surgery is the surgical procedure whereby a person who is anatomically one sex is given the anatomical features of the opposite sex.
legal acceptance as a member of his new sex. For example, a transsexual may seek to have his name and sex designation changed on public documents such as his birth certificate, or he may contract a purported marriage with a member of the opposite sex.

A number of recent cases involve transsexuals' quest for legal acceptance of their new sex in the marriage and public documents.

It is also commonly referred to as a sex change operation. For an explanation of the surgical procedure, see Hoopes, *Operative Treatment of the Female Transsexual*, in Green & Money, *supra* note 2, at 313-22; Jones, *Operative Treatment of the Male Transsexual*, in id., at 335-52.

4. Throughout this Comment, original sex will refer to the sex that the transsexual was born a member of, while new sex will refer to the sex of the transsexual after sex reassignment surgery. It will be argued below that the transsexual's "sex" changes when he undergoes the proper sex reassignment procedures. Thus, the term new sex is utilized to emphasize that the transsexual's sex after surgery is the opposite of that before surgery.

5. The transsexual has always believed himself to be a member of the opposite sex. Pauly, *Adult Manifestations of Female Transsexualism*, in Green & Money, *supra* note 2, at 86. Following surgery, the transsexual has the physical appearance of his new sex and wants to be treated in society as a member of that sex.

6. After sex reassignment surgery, the transsexual invariably changes his name to one more common to his new sex.

7. The highly publicized Renee Richards controversy is yet another example of a transsexual in search of legal acceptance. Dr. Richards, a female transsexual, has been seeking the right to participate in women's professional tennis. Originally Dr. Richards had no intention of playing professional women's tennis. Dr. Richards underwent sex reassignment surgery in August, 1975, and had her public documents changed to conform to her new name (she was formerly Richard Raskind) and her new sex. After winning a tennis tournament in La Jolla, California, on July 10, 1976, it became known that she was a transsexual. This created quite a controversy. Some people felt that she had an unfair advantage over other women because she had been born a man. Dr. Richards began to receive hundreds of letters from transsexuals, many of them desperate, seeking help. After giving the matter a great deal of thought, she realized that she had an opportunity to help other transsexuals. She gave up her practice as an ophthalmologist and attempted to play professional women's tennis. The Women's Tennis Association and United States Tennis Association would not allow her to play in women's professional tournaments which they operated, on the ground that she was not a woman. They required Renee to pass the chromosome test (see note 9 infra) before she could participate. Finally in August, 1977, after a long and frustrating struggle, Dr. Richards took her case to court where it was ruled that she must be allowed to play in the United States Open Tennis Tournament. Richards v. United States Tennis Ass'n, No. 14643/77 (N.Y. County Sup. Ct. Aug. 25, 1977). Dr. Richards is now participating in the women's professional tennis tour.

Although a controversy over sex in the sports context is far less likely to occur than a dispute as to acceptance of sex in the marriage or birth certificate contexts, it is nevertheless significant. The Renee Richards controversy symbolizes the ultimate goal of the transsexual, total acceptance in society as a member of her new sex. Dr. Richards has repeatedly emphasized that what she is fighting for is the right of a transsexual to be legally accepted as her new sex in any situation. Interview with Renee Richards in La Costa, California (Oct. 15, 1976).
contexts.\footnote{8} Denial of a transsexual's membership in his new sex has always been based on a finding that because of his chromosome pattern,\footnote{9} he should be legally classified as a member of his original sex. In these cases, however, the transsexual did not argue that his constitutional rights were violated by the use of the chromosome test.\footnote{10} The constitutional argument is an important one because if classification by chromosomes is declared unconstitutional when applied by the state to the transsexual, then the transsexual would gain an important victory in his quest for legal acceptance as a member of his new sex.

This Comment will address the question whether basing a person's legal rights on the results of the chromosome test\footnote{11} is an unconstitutional violation of a transsexual's right to equal protection.\footnote{12} The

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\item[(9)] Chromosome patterns are often used to determine sex because males have an XY chromosome pattern while females have an XX chromosome pattern. The chromosomal sex is determined at the moment of conception, when fertilization takes place. If the father's sperm cell carries a Y chromosome when it enters the mother's egg, the fetus usually develops as a male. If the father's sperm cell carries an X chromosome, then the fetus will usually develop as a female. The mother's egg cell almost always carries an X chromosome. H. Benjamin, supra note 2, at 5.
\item[(10)] In this Comment, a determination of sex by chromosome pattern will be scrutinized. It does not matter whether the state in fact administers the chromosome test so long as it determines sex on the basis of chromosomes.\footnote{10}
\item[(11)] This question applies also to any other test which considers only biological criteria of sex. See note 9 supra.
\item[(12)] This Comment will assume that state action exists in the marriage and birth certificate contexts. State action can be very present in the sports context as well. The first tournament Dr. Richards won was played on public tennis
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constitutionality of the chromosome test will be examined in the marriage and birth certificate contexts.  

**TRANSSEXUALISM AND SEX DETERMINATION**

Before analyzing the constitutional rights of the transsexual, a factual background of transsexualism and sex determination must be set forth. Until recently, when the transsexual phenomenon first raised the question of what determines a person's sex, it was simply assumed by most people that a person is born either male or female. In truth, however, there are many variables or criteria of sex that cause a person to become one sex or the other. John Money lists seven. The first five criteria of sex are biological or physiological while the last two are psychological. The five biological factors include the chromosome pattern, the presence of ovaries or testes, hormonal differences, the internal organs of reproduction, and the external sex organs. The two psychological factors are the sex that the individual is assigned at birth and psychosexual or gender identity.

In the great majority of people, these various criteria of sex are in harmony. A normal person's sex could accurately be determined by focusing on any of the indicators of sex. Thus, for the average person, an XX chromosome pattern will signify that the person is a female. However, in some individuals, the various criteria of sex are in conflict and the courts must decide which is correct. The marriage and birth certificate contexts are focused on, it is hoped that the arguments urged here would apply in any situation in which the state has classified on the basis of sex and then used the chromosome test to define sex. The birth certificate context was chosen as an area of focus because it is consistently the first and most important document the transsexual seeks to have changed. However, this analysis could be applied to other public documents amendments, such as drivers' licenses and social security cards.

Several interesting questions not analyzed here arise in the sports context, as exemplified by the Renee Richards controversy. One of these is whether a female transsexual has an unfair athletic advantage over other females by virtue of being born a male. Renee Richards argues fervently that any advantage she may have had is lost after undergoing the sex reassignment surgery and procedures because she now has female hormones (for the most part) rather than the male hormone androgen. It is androgen that accounts for the greater strength in men. Interview with Renee Richards in La Costa, California (Oct. 15, 1976).

13. Money, *The Sex Chromatin and psychosexual Differentiation*, in THE SEX CHROMATIN (K. Moore ed. 1966). Other experts in this area have concluded that there are even more than seven variables which determine sex. See H. Benjamin, supra note 2, at 5-9 (nine variables); D. Federman, *Abnormal Sexual Development* 194 (1967) (nine variables).


15. H. Benjamin, supra note 2, at 10.

16. The word *normal* represents a statistically normal person.

17. As to how common anomalies of sexual differentiation are in the general population, there are an estimated 10,000 transsexuals in the United States. H.
not in harmony. For example, a person with an XX chromosome pattern, who is normally female, may have one or more criteria of sex that are characteristically male. Using only one sex criterion as determinant of such a person's overall sex may be misleading and erroneous.

An example of a person exhibiting dissonance among his various criteria of sex is the condition known as androgen insensitivity or testicular feminization. In this biological anomaly of sexual differentiation a person is born with the traditionally male XY chromosome pattern. However, in such a person the cells of the body do not respond to the male hormone androgen. The cells of the body do respond, however, to the hormone estrogen, which, although produced in everyone, is ordinarily associated with females. As a result, the other criteria of sex of such a person will develop as female. Thus, the androgen insensitive person has a vagina, appears externally to be female, is raised as a female, and believes herself to be a female. There are numerous other examples of biological anomalies of sexual differentiation in which the various criteria of sex are in dissonance.

Transsexualism is another example of a person exhibiting dissonance among his various kinds of sex. However, transsexualism is a psychological anomaly of sexual differentiation. The transsexual typically is morphologically and physiologically normal. However, he harbors, with constant and persistent conviction, the desire to be—

Benjamin, supra note 1, at 12. One in 5,000 persons surviving birth have Turner's Syndrome, three in 1,400 males have Klinefelter's Syndrome, and one in 45,000 males have XX chromosomes. Polani, Errors of Sex Determinance and Sex Chromosome Anomalies, in Gender Differences: Their Ontogeny and Significance (C. Dunsted and D. Taylor eds. 1972).


come a member of the opposite sex, and he progressively takes steps to become and live in society as a member of the opposite sex. The pre-operative transsexual’s psychosexual sex or gender identity is “at war” with his other criteria of sex. The cause of this condition is unknown.

Because most people’s criteria of sex are in harmony, it is difficult for them to understand and empathize with the transsexual’s dilemma. Nevertheless, it is important for society and the legal system to recognize that the transsexual who undergoes the proper sex reassignment procedures should be regarded as a person with a genuine conviction that he is of the opposite sex. Six facts substantiate this proposition.

First, the number of transsexuals is not insignificant. One estimate is that there are 10,000 transsexuals in the United States, including both pre-operative and post-operative transsexuals.

Second, experts in transsexualism have concluded in every reported case that treatment in the sense of trying to cure transsexuals of their conviction that they are members of the opposite sex is futile.

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21. Money, Sex Reassignment, 9 INT’L J. PSYCH. 249, 251 (1970-71). Money, in his definition, says that the transsexual desires and takes steps to live in the opposite sex role. However, Money’s definition is not broad enough. The transsexual seeks more than to live the role of the opposite sex, he seeks to become a member of the opposite sex.

22. H. BENJAMIN, supra note 2, at 71-82; R. GREEN, SEXUAL IDENTITY CONFLICT IN CHILDREN AND ADULTS, 36-48 (1974); Cravitz, Treatment of the Transsexual and Medicolegal Issues, 7 FORENSIC SCI. 1, 4 (1976). Transsexualism has been variously attributed to both biological and environmental factors.

23. There is a need to establish the credibility of the transsexual’s condition. Most people do not take the transsexual’s condition seriously. It has been this writer’s experience that with the exception of those who are familiar with transsexualism, most people regard the transsexual as a “freak” and tend to joke about his condition.

Homosexuals have also been the recipients of scorn and ridicule in the past. However, as the homosexual predilection has become increasingly publicized and understood, it has been taken more seriously, with the result that pleas for more humane treatment of homosexuals have been made. See Note, The Avowed Lesbian Mother and Her Right to Child Custody: A Constitutional Challenge that Can no Longer be Denied, 12 SAN DIEGO L. REV. 799, 814-15 (1975). It is important for the transsexual that a parallel development occur in the case of transsexualism.

24. Wall St. J., Jan. 28, 1977, at 1, col. 1. There are about three to four times more female transsexuals than male transsexuals. Pauly, Adult Manifestations of Female Transsexualism, in Green & Money, supra note 2, at 85. In its first three years of operation, the Johns Hopkins Gender Identity Clinic received 1,500 applications for sex reassignment surgery. Money, Sex Reassignment, 9 INT’L J. PSYCH. 249, 266 (1970-71).

25. H. BENJAMIN, supra note 2, at 14. “Psychotherapy with the aim of curing transsexualism . . . is a useless undertaking with present available methods. The mind of the transsexual cannot be changed in its false gender orientation. All attempts to this effect have failed.” Id. at 91. See also Montague, Transsexualism, 2 UROLOGY 1, 5 (1973).
There is general agreement that the only successful way to treat a pre-operative transsexual is to perform sex reassignment surgery. As a whole, transsexuals have been better adjusted after their sex reassignment surgery than before. These facts lend force to the argument that the transsexual should be regarded as having a valid conviction that he is a member of his new sex.

Third, most transsexuals report that they have had the conviction of being the other sex as long as they can remember. This fact gives more credibility to the transsexual as someone with a valid conviction rather than a condition that initially manifested itself at all ages.

Fourth, the sex reassignment procedure that a transsexual normally undergoes is extensive. Proper treatment of a transsexual who wishes to change sex consists of three phases. In phase one, after determining that his patient is a genuine transsexual, the doctor will administer hormones of the desired gender to the transsexual. The transsexual will cross-dress and attempt to "pass" in society as a member of his new sex. The goal of phase one is to test the ability of the transsexual to adjust to the demands of his new sex role. This phase usually lasts for at least one year. If the transsexual responds favorably to phase one, then the phase two sex change operation is performed. Finally, in phase three, the transsexual maintains his new


27. H. BENJAMIN, supra note 2, at 126. Benjamin points out that transsexuals are not free from emotional and psychological problems as a result of sex reassignment procedures, but they do appear to be better off after the procedures than before. Accord, Pomeroy, Transsexualism and Sexuality: Sexual Behavior of Pre- and Post-operative Male Transsexuals, in Green & Money, supra note 2, at 186; Randell, Pre-operative and Post-operative Status of Male and Female Transsexuals, in Green & Money, supra note 2, at 380-81.

28. Pauly, Adult Manifestations of Female Transsexualism, in Green & Money, supra note 2, at 86.

29. Crovitz, Treatment of the Transsexual and Medicolegal Issues, 1 FORENSIC SCI. 1, 2 (1976). See also H. BENJAMIN, supra note 2, at 92.

30. The potential transsexual is thoroughly evaluated before treatment in order to insure that he is truly a transsexual and that sex reassignment surgery is the best course for him. Crovitz, Treatment of the Transsexual and Medicolegal Issues, 1 FORENSIC SCI. 1, 2 (1976).

31. Id. The importance of this stage is illustrated by the fact that at the Gender Dysphona Clinic at Stanford University, only 25% of those who begin the program receive the operation. Many potential transsexuals drop out upon discovering they are not truly transsexuals or because the clinic does not believe surgery is in their best interest. Id.
sex status for life. The treatment team assesses his adjustment for years to come and possibly for the remainder of his life. Thus, a transsexual is not someone who simply undergoes sex reassignment surgery. To qualify as a transsexual, the individual not only must have had a constant and persistent conviction that he is a member of the opposite sex, but he also must have undergone the procedures set forth above.\textsuperscript{32}

Fifth, the post-operative transsexual appears, behaves and functions in society as a member of his new sex. Particularly important in the marriage context is the transsexual's ability to perform sexually. "Post-operatively, transsexuals are able to have satisfactory sexual relations as members of their newly reassigned sex."\textsuperscript{33} However, both the male and female transsexual are permanently sterile after the sex change operation.\textsuperscript{34}

Finally, the dichotomy between male and female is not absolute. In fact, there is a spectrum of sexuality ranging from predominantly male to predominantly female.\textsuperscript{35} For example, although estrogen is commonly associated with the development of female sexual characteristics, males also produce a small amount of estrogen in their bodies. For this reason a male who is not able to respond to the male hormone androgen will develop as female.\textsuperscript{36} One commentator explains that "it can well be said that, actually, we are all 'intersexes,' anatomically, as well as endocrinologically. But we are male or female in the anatomical or endocrinological sense, according to the predominant structures or hormones."\textsuperscript{37} Once it is understood that every person is to some degree part of both sexes, it is clear that a person's gender identity may be discordant with his biological criteria of sex.

The court should seriously consider these six facts about transsexuals. It must understand the legitimacy of the transsexual's conviction that he is a member of the opposite sex when adjudicating his legal rights.

\textsuperscript{32} These procedures cost approximately $8,000 for a female transsexual at the Stanford University Gender Dysphona Clinic. \textit{Id.}

\textsuperscript{33} J. Money, \textit{Sex Errors of the Body} 87 (1968). For the female transsexual, sexual relations continue to be pleasurable, and the transsexual maintains the capacity to reach sexual climax. The constructed vagina is basically the same as a natural vagina in size, capacity, and sensitivity. In the male transsexual, there is some difficulty constructing a functioning penis. The constructed penis cannot become erect and needs to rest on some form of support to ensure penetration into his partner's vagina. Nevertheless, the female to male transsexual is also capable of orgasm. \textit{Id.} at 87-88.

\textsuperscript{34} Green & Money, \textit{supra} note 2, at 284.

\textsuperscript{35} Kennedy, \textit{Transsexualism and Single Sex Marriage}, 2 ANGLO-AM. L. Rev. 112, 113-14 n.9 (1973).

\textsuperscript{36} \textit{See text} accompanying note 18 \textit{supra}.

\textsuperscript{37} H. Benjamin, \textit{supra} note 2, at 8.
EQUAL PROTECTION OF THE LAW

A Suggested Approach

In the usual equal protection case, once the state has created a classification scheme, it is clear to which category a person belongs. By contrast, when applying to a transsexual a law which classifies by sex, the state must at the outset determine the category of sex to which the transsexual belongs. The following paradigm is offered as an approach to solve the problems this unusual situation creates.

There are two levels of classification created by the state when it uses the chromosome test to determine a transsexual’s sex. At level one, people are classified by and treated differently on the basis of their sex. When the chromosome test is used to determine the sex of a transsexual, a second level of classification is created. At level two, people are classified by and treated differently on the basis of their chromosomes.

These two levels of classification are integrally related. The state, by defining sex according to chromosomes, is treating the two levels as one. However, chromosomes should not be regarded as determinative of a person’s sex. Therefore, the two levels of classification, sex and chromosomes, should be analyzed separately.

A transsexual can assert an equal protection violation at both levels. At level one the transsexual’s claim is that the state cannot treat men and women differently in a given situation. For example, level one equal protection challenges have been made, although unsuccessfully, in the marriage context, where homosexuals claim that restricting marriage to members of the opposite sex denies them equal protection of the law.

38. For example, in Mathews v. Lucas, 427 U.S. 495 (1976), the classification was based on illegitimacy. The category is clear: either a person is legitimate or illegitimate.

39. It must be emphasized that chromosome-based discrimination is not the same as sex-based discrimination. Because of this difference, cases on sex discrimination need not be controlling when analyzing chromosome discrimination. Thus, for example, the fact that sex has not been held a suspect classification should not preclude a finding that chromosome makeup is a suspect classification.

If a transsexual was successful at level one, there would be no need to examine a level two equal protection claim. However, if it were found that the state could discriminate on the basis of sex, the transsexual may still make a level two equal protection challenge. The level two claim is that the chromosome test categorizes the transsexual improperly and is therefore a violation of equal protection of the law.

Although a successful equal protection challenge at level one will resolve the problem for the transsexual in a given context, an analysis of the merits of level one challenges is beyond the scope of this Comment. Usually the transsexual whose rights are abridged by the chromosome test is not questioning the right of the state to classify by sex. Rather, he is seeking recognition as a member of his new sex. Therefore, in examining the level two equal protection challenge, this Comment will assume that the state may validly classify by sex in the two contexts discussed.

**Standard of Review of the Chromosome Test**

In determining whether laws or state activities violate the equal protection clause of the fourteenth amendment, the United States Supreme Court applies different standards of review.

**The Strict Scrutiny Standard**

The most demanding standard of review applied by the Court in equal protection cases is known as the strict scrutiny test. This test is

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41. Level one equal protection challenges have been made in the marriage and sports contexts. In the marriage context, homosexuals seeking to marry have argued that the denial of a marriage is an equal protection violation. These claims have so far been unsuccessful. James v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974). In the sports setting, females at the high school and college level have argued that depriving them of the right to participate in boys' sports competition denies them the right to equal protection of the law. Some of these cases have met with success. E.g., Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975), Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

The potential significance of the adoption of the proposed equal rights amendment, which would prohibit discrimination on the basis of sex, occurs at level one. The equal rights amendment would undoubtedly give sex a suspect status. It would then become very difficult for a state to justify a sex classification under strict scrutiny. Two examples of this in the sports context are Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975), and Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). Both Pennsylvania and Washington had adopted their own equal rights amendment. In these cases, it was held that the state could not prohibit participation in the contact sport of football on the basis of sex. Thus, the importance of the equal rights amendment in the courts' decisions to invalidate the sex-based classifications involved is apparent.

42. "No state shall... deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, § 1.
applied when state laws or activities operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights.\textsuperscript{43} A classification will survive strict scrutiny only where it is necessary to promote a compelling state interest.\textsuperscript{44}

The chromosome test appears to interfere with a potentially fundamental right to marry.\textsuperscript{45} In \textit{Loving v. Virginia}, the Supreme Court expressed the view that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."\textsuperscript{46} In another context, the Court

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  \item \textsuperscript{43} San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).
  \item \textsuperscript{44} Dunn v. Blumstein, 405 U.S. 330, 336 (1972).
  \item \textsuperscript{45} Arguably, the Supreme Court has recognized the right to marry as fundamental. In \textit{Loving v. Virginia}, 388 U.S. 1 (1967), the Court struck down a statute that made marriage between a black person and a white person illegal. The Court applied strict scrutiny to the statute on the ground that it was based on the suspect classification of race. Therefore, the Court's view on the right to marry, stated in the text accompanying note 46 \textit{infra}, is dicta.
  \item In \textit{Skinner v. Oklahoma ex rel. Williamson}, 316 U.S. 535, 541 (1942), the Court stated that "marriage and procreation are fundamental to the very existence and survival of the race." The Court in \textit{Skinner} struck down a law which allowed habitual criminals to be sterilized. Strict scrutiny was applied here for the reason that the law interfered with the fundamental interest of procreation. Therefore, the Court's view of marriage in \textit{Skinner} is also dicta.
  \item In \textit{Boddie v. Connecticut}, 401 U.S. 371, 376 (1971), the Court said that "marriage involves interests of basic importance in our society." In \textit{Boddie}, a law requiring a filing fee of $45 in order to commence divorce proceedings was held unconstitutional. It prevented the appellants from commencing divorce proceedings because they were indigent and could not afford the filing fees. The Court decided the case on the ground that the law denied appellants due process by denying them access to the courts. Therefore, once again, the Court's view on the right to marry appears to be dicta.
  \item As demonstrated above, the Court has never held the right to marry, standing alone, to be fundamental. The right to marry recognized by the Court has been combined with another right that the Court gives constitutional protection. Nevertheless, the Court appears to be sensitive to any infringement with the right to marry. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974). Even if the Court did not hold the right to marry standing alone to be fundamental, it should tie it to other bases of discrimination in the case of transsexuals, as it did in \textit{Loving, Skinner} and \textit{Boddie}.
  \item The right to marry, discussed in this Comment, encompasses not only the situation where a transsexual seeks to enter a marriage but also the question of the validity of an existing marriage involving a transsexual.
  \item 388 U.S. 1, 12 (1967). An additional fundamental right abridged by the chromosome test is that of a transsexual to be legally recognized as a member of his new sex. This right arguably should be regarded as a fundamental right of privacy under the due process clause of the fourteenth amendment. It involves the decision to live and function in society as a member of his new sex. This
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held that "marriage and procreation are fundamental to the very existence and survival of the race."\textsuperscript{47} For this reason, strict scrutiny should be applied to the chromosome classification in the marriage setting.

The chromosome classification also requires strict scrutiny if it is held to be a suspect classification.\textsuperscript{48} In \textit{Mathews v. Lucas},\textsuperscript{49} the Court established three criteria for determining whether a classification is suspect: that the basis of the discrimination have a pervasive and severe history of discrimination;\textsuperscript{50} that it is determined by causes not within the control of the individual;\textsuperscript{51} and that it bear no relation to ability to perform or contribute to society.\textsuperscript{52}

Technically, the transsexual has not experienced a pervasive history of discrimination in the sense of suffering many years of mistreatment. However, this is most likely because sex reassignment surgery has been performed in this country only in the last ten years.\textsuperscript{53} Many transsexuals whose conditions have become known, however, have been discriminated against.\textsuperscript{54} The persistent pattern of

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\item \textsuperscript{47} Skinner v. Oklahoma \textit{ex rel.} Williamson, 316 U.S. 535, 541 (1942).
\item \textsuperscript{48} That the Supreme Court has never held sex to be a suspect classification should not preclude the Court from finding the chromosome classification to be suspect. The Supreme Court has held classifications based on race, McLaughlin \textit{v.} Florida, 379 U.S. 184 (1964), national ancestry and ethnic origin, Korematsu \textit{v.} United States, 323 U.S. 214 (1944); Hirabayashi \textit{v.} United States, 320 U.S. 81 (1943), and alienage, Graham \textit{v.} Richardson, 403 U.S. 365 (1971), to be suspect.
\item \textsuperscript{49} 427 U.S. 495 (1976). The basis of discrimination in \textit{Mathews} was illegitimacy.
\item \textsuperscript{50} Id. at 506.
\item \textsuperscript{51} Id. at 505.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} The first sex reassignment operations were performed in this country at Johns Hopkins Hospital in 1966. \textit{Wall St. J.}, Jan. 28, 1977, at 1, col. 1.
\item \textsuperscript{54} An example is Steve Dain, a female to male transsexual living in Emeryville, Ca. As a female, known as Doris Richards, she worked as a girl's physical education teacher at Emery High School. She took a sick leave and later returned as a man, having undergone sex reassignment surgery. Dain was suspended from his job on October 14, 1976, on grounds of immoral conduct and unfitness. The Dain story illustrates that the transsexual may experience not only a loss of employment but also ridicule. Dain has been the butt of many jokes about his condition. \textit{Los Angeles Times}, Nov. 27, 1976, \textit{\$} D, at 1. Angela Giveins, a female transsexual, was made to undress before male deputies following an arrest, given male clothes, and referred to as an "it." \textit{San Diego Evening Tribune}, Oct. 15, 1976, \textit{\$} B, at 4, col. 5. For other examples of discrimination against transsexuals, see id., Sept. 2, 1976, \textit{\$} E, at 1, col. 1. (transsexual denied hormone tablets after arrested); id., July 9, 1976, \textit{\$} B, at 9, col. 2. (female transsexual suspended from truck driver job for refusing to wear men's work clothing); id., Oct. 24, 1976, \textit{\$} A, at 26, col. 5 (pre-operative woman transsexual fired from job after
\end{itemize}
severe discrimination against transsexuals, during the period in which they have become conspicuous, should be sufficient to satisfy the first criterion of suspectness.

The second Mathews criterion is also satisfied. The chromosome pattern of an individual is determined by causes not within the control of the individual. The chromosome pattern of a transsexual is a result of the type of chromosome that the father’s sperm cell carried when it entered the mother’s egg cell at the moment of conception.55

Finally, the type of chromosomes a person possesses has no relation to ability to perform or contribute to society. Chromosomes are only one variable that contribute to determining a person’s sex. Therefore, chromosomes have even less relation to ability to perform or contribute to society than does sex.57

The Intermediate Standard

If the Court does not accept chromosome-based classification as abridging a fundamental right or as suspect, then it would invoke minimal scrutiny.58 However, while the United States Supreme Court in some cases claims to be using the rational relationship test, it is actually applying a more demanding level of scrutiny.59 In his dissenting opinion in San Antonio Independent School District v. Rodriguez,60 Justice Marshall analyzed various cases in which the Court

telling employer of plans to have sex reassignment surgery); id., Aug. 18, 1971, § B, at 6, col. 5 (Paula Grossman, elementary school music teacher, dismissed because a transsexual).

55. See note 9 supra. It could be argued that the transsexual suffers discrimination after sex reassignment surgery, and having the surgery is something the transsexual has control over. But in reality it is the condition of transsexualism that is beyond the control of the transsexual. The transsexual has no more control over being a transsexual than does a black person over being black. Having sex reassignment surgery is simply a natural step the transsexual undergoes in order to bring harmony between his gender and anatomy. It would be grossly unfair to the transsexual to conclude that the basis of the transsexual’s discrimination is under his control because he could elect not to have sex reassignment surgery.

56. The use of chromosomes here refers to sex chromosomes.

57. In Frontiero v. Richardson, 411 U.S. 677, 686 (1973), a plurality of four justices concluded that sex has no relation to ability to perform or contribute to society.

58. See note 69 and accompanying text infra.


60. 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting). Justice Marshall has expressed his dislike of the two-tier approach to equal protection analysis. He claims that many cases do not properly come under either the rational relation
purported to apply minimal scrutiny but in reality applied a higher level of scrutiny.61 Two factors are prevalent: the individual interest affected by the classification scheme is fairly basic and the basis of classification is invidious.62

The two factors Justice Marshall identified are actually the same two factors involved in the Court’s decision to apply the strict scrutiny test. The difference between the use of these factors in the two instances is one of degree. Thus, although the individual right abridged by the state may not be a fundamental right, it may be a basic individual right.63 According to Justice Marshall, in a case involving such a right, the Supreme Court should apply more than minimal scrutiny.64 Similarly, in cases where a classification has not been considered suspect but nevertheless involves an invidious basis for discrimination, the Court should apply more than minimal scrutiny.65

The Court should apply an intermediate standard of review rather than minimal scrutiny66 in a case challenging the chromosome test on equal protection grounds. Even if the Court does not find the right to marry or the right to be legally recognized as a member of the new sex to be fundamental, these rights should be regarded as basic and personal to the transsexual.67 Also, even if the Court rejects the claim that a chromosome based classification is a suspect classification, chromosomes are an invidious basis for discrimination.68

or strict scrutiny test. He advocates the use of an intermediate level of scrutiny known as the sliding scale approach. Under this approach, “concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interest in support of the classification.” Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).


62. "It seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification.” San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting).

63. An example of such a right is “the intimate, familial relationship between a child and his own mother.” Levy v. Louisiana, 391 U.S. 68, 71 (1968). Although this right is of great importance to the individual, it has nevertheless not been considered fundamental by the Supreme Court. Id.


66. See note 69 and accompanying text infra.

67. See notes 45 & 46 and accompanying text supra.

68. The chromosome classification is invidious for the same reasons that it should be regarded suspect. See text accompanying notes 45-57 supra.
The Minimal Scrutiny Standard

The most lenient standard of review is known as the rational relation test, or minimal scrutiny. Under this test, the classification will be sustained if it "is rationally related to a legitimate governmental interest." It will be shown that the chromosome test in the marriage and birth certificate contexts is unconstitutional under the minimal scrutiny standard of review; and, because it fails to pass even this lenient test, it must surely be found unconstitutional under either strict or intermediate scrutiny.

Marriage

After a transsexual marries, the transsexual's purported spouse may claim that the existing marriage is void because it is composed of two people of the same sex. In this situation, is there a rational relation between the use of the chromosome test and the state's interests in using the chromosome test?

The rationality of the chromosome test in light of five state interests in the chromosome test will be examined here. The five state

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An example of this intermediate standard of review is the recent Supreme Court sex discrimination case, Craig v. Boren, 429 U.S. 190 (1976). The Court stated that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” at 197. At least for sex discrimination cases, this test appears to indicate an intermediate standard of review. Justice Powell, in a concurring opinion, states that,

[a]s has been true of Reed and its progeny, our decision today will be viewed by some as a “middle-tier” approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential “rational basis” standard of review normally applied takes on a sharper focus when we address a gender-based classification. at 210 n.* (Powell, J., concurring). This observation is further evidence that the Court does utilize an intermediate standard of review. Because of the close relationship between sex discrimination and chromosome discrimination, the Court might be inclined to apply an intermediate standard of review to chromosome discrimination.


71. Another possible situation in which the chromosome test could be applied in the marriage context would involve a transsexual who seeks to marry but is denied the right because according to his chromosome pattern he is of the same sex as his proposed spouse. There are no cases involving this fact situation because usually the transsexual is able to marry without the state learning of his condition.
interests are the state's interest in opposite sex marriage; the ability to consummate the marriage; discouraging homosexual conduct; procreation; and administrative convenience.72

The Rationality of the Chromosome Test in Light of the State Interest in Opposite Sex Marriage

The state has an interest in opposite sex marriage in the sense that no state has sanctioned marriage between members of the same sex.73 Given this state interest, the chromosome test is used in the marriage context to determine the transsexual's sex so that it can be determined whether the transsexual is of the opposite sex of his purported spouse. The rationality of the chromosome test in the situation can thus be reduced to this question: does the chromosome test rationally determine a transsexual's sex in the marriage context?

Two cases have addressed the question of how to determine whether a transsexual is a female for the purpose of marriage. In Corbett v. Corbett (Ashley),74 an English case, the husband of a female transsexual sought to have their purported marriage declared null and void. The husband had known that his wife-to-be was a transsexual at the time of their marriage. The court examined a wealth of medical information concerning transsexualism and sex determination. The test used by the court to determine sex in the context of marriage was the chromosome test.75 It is not clear why the court found that the chromosome test was the proper test of sex. The court simply stated that only a biological female "is naturally capable of performing the essential role of a woman in marriage."76 The only definition of the essential role of a woman in marriage was the "capacity for natural heterosexual intercourse."77

72. The equal protection challenge in the marriage context has not been made. Most of the state interests examined here are those expressed in cases in which persons of the same sex seek legal sanction of their marriage. These are the level one state interests. The level two interests in the chromosome test will be for the most part the same as the level one state interests in segregating by sex. The only state interest that applies to level two alone is administrative convenience. It will be seen that most of the state interests are based on the assumption that the transsexual is a member of his original sex. Because a transsexual should not be regarded as a member of his original sex, these state interests readily break down.

73. While most statutes are silent as to whether marriage must consist of individuals of the opposite sex, the courts have consistently interpreted statutes as including that individuals be of the opposite sex as a requirement of marriage. Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).


75. The court considered not only chromosomes as determinative of sex but also considered other biological criteria, such as gonads and genitalia. Id. at 48.

76. Id.

77. Id.
In *M.T. v. J.T.*, a case with facts similar to *Corbett*, the New Jersey Supreme Court addressed the question of "how to tell the sex of a person for marital purposes." In *M.T.*, the husband of a female transsexual refused to pay support and maintenance payments to his wife on the ground that she was a man and that their marriage was therefore void. The court here, as in *Corbett*, examined medical information regarding transsexualism and sex determination. The court in *M.T.*, however, rejected the *Corbett* court’s use of the chromosome test:

Against the backdrop of the evidence in the present record we must disagree with the conclusion reached in *Corbett* that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard.80

The court instead used anatomy and gender as the criteria for determination of sex.81 Anatomical sex is a function of the genitalia of an individual,82 while an individual’s gender is “one’s self-image, the deep psychological or emotional sense of sexual identity and character."83 The court explained that when a transsexual’s anatomy and gender are in harmony, then these two criteria of sex should determine the transsexual’s overall sex. Where, however, there is disharmony between a person’s anatomy and gender identity, as in the case of a pre-operative transsexual, then the person’s anatomy should be the controlling factor.84

In resolving the question of sex determination,85 the anatomical and gender test adopted in *M.T.* is eminently preferable to the chromosome test adopted in *Corbett*. As the *M.T.* court recognized, there are several criteria which may be relevant to determining the sex of an individual.86 When there is a disharmony between the various criteria of sex, it becomes necessary to decide which criteria of sex should be determinative of a person’s sex. The condition of

79. Id. at 78, 355 A.2d at 205.
80. Id. at 86, 355 A.2d at 209.
81. Id. at 87, 355 A.2d at 209.
82. Id. at 86, 355 A.2d at 208.
83. Id. at 86, 355 A.2d at 209.
84. Id. at 86-87, 355 A.2d at 209.
85. Although in both cases the transsexual was a post-operative female, it appears that the test of sex adopted by these two courts would apply as well to a post-operative male.
86. See text accompanying note 14 supra.
androgen insensitivity exemplifies that the criteria of anatomy and
gender should be controlling. The androgen insensitive female phys-
ically appears to be a female and believes herself to be a female.
However, the chromosomal sex of this person is male. It is doubtful
that any doctor or layperson would classify the androgen insensitive
female as a male. Because of a biological inability to react to the
hormone androgen, this person's chromosomal sex is in disharmony
with her other criteria of sex. In such a person, it is irrational to
determine her sex by the chromosome test.

Although transsexualism involves a psychological anomaly of sex-
dual differentiation while androgen insensitivity is biological, the
same criteria of sex should be applied to both. The female transsex-
ual, like the androgen insensitive female, has always believed herself
to be female and, following surgery, appears to be female. The only
difference between the two anomalies is that the transsexual origin-
ally appeared to be male. This should not prejudice the conclusion
that the female transsexual is a member of the female sex. The
transsexual's condition, though psychological, nevertheless consists
of a genuine conviction that he is a member of the opposite sex. Her
dissonance is no less real or genuine than that of the androgen
insensitive person.

The anomalies of androgen insensitivity and transsexualism illus-
trate that gender and anatomy are the most desirable determinants of
sex. They further illustrate that chromosome pattern does not cor-
correctly indicate the sex of individuals, such as transsexuals who have
disharmony among their various criteria of sex. There is no rational
relation between the chromosome test and the state interest in oppo-
site sex marriage because the chromosome test will not rationally
determine whether the transsexual is of the opposite sex of his pur-
ported spouse.

The Rationality of the Chromosome Test in Light of the
State Interest in the Ability to Consumate the Marriage

A second state interest in the chromosome test is the capacity of the
individual for sexual intercourse. Most states have laws which allow
for annulment if one of the parties is incapable of consummating the
marriage and the other spouse did not know of the sexual incapacity
at the time of marriage. The requirement of knowledge of the

87. See text accompanying note 18 supra.
88. The argument that these two anomalies should be treated identically was
made in Note, Transsexual in Limbo: Search for a Legal Definition of Sex, 31
89. See notes 23-37 and accompanying text supra.
90. See Del. Code tit. 13, § 1551 (1953). However, in California, the statute is
silent as to whether the non-incapacitated spouse need know about the incapaci-
incapacity is significant. Although ability to consummate is fundamental to marriage, when a person knows about his partner's incapacity yet is willing to marry that person, then the state will recognize the marriage as valid. Thus, a person who is incapable of consummation due to illness or accident is nevertheless given the state's sanction of marriage, so long as his prospective spouse is aware of his disability. The state has no interest in not recognizing a marriage between two people of the opposite sex who willingly marry despite the sexual incapacity of one of the partners. Therefore, the state's interest in the capability of consummation has no application to the transsexual marriage in which the transsexual has informed his future spouse of his condition. 91

The Rationality of the Chromosome Test in Light of the State Interest in Discouraging Homosexual Conduct

A third state interest in the use of the chromosome test in the marriage context is to discourage homosexual conduct. There are two reasons why this state interest is not legitimate. First, the transsexual should be regarded as a member of his new sex. 92 Therefore, a marriage between a transsexual and a member of his original sex is heterosexual rather than homosexual. 93 Second, even if the relationship at the time of marriage, Cal. Civ. Code § 4425 (West 1970). It would appear that in California, a marriage could be annulled even if both partners were aware of the sexual incapacity at the time of marriage. This fact would leave a sexually incapacitated spouse in a precarious position because the non-incapacitated partner could void the marriage at any time.

In a jurisdiction such as California, the sexual capacity of the transsexual becomes significant in terms of whether the marriage is valid. Although the prevailing medical view, and the view taken in M.T., 9 is that a female transsexual can function satisfactorily sexually, the male transsexual is impotent. See M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (1976), and note 33 supra. It would seem, therefore, that in a jurisdiction with a California-type statute, the male transsexual marriage might be annulled at any time.

91. The discussion here assumes that the transsexual's condition is known to his spouse. If the transsexual's condition was not known to his spouse at the time of marriage, then questions of fraud and sexual incapacity would arise.

92. It appears that the Corbett and M.T. courts may have considered the incapacity of the individual for sexual intercourse to be a criterion of sex. If they did, this was improper. Sexual capacity should be and is considered in determining whether a marriage is valid. However, if sexual capacity is used as a test of sex for marital purposes, then a man who is made impotent by an accident would no longer be a man for the purpose of marriage. This is clearly an unacceptable result.

93. The transsexual, whether pre-operative or post-operative, does not consider himself homosexual. Regardless of what sex others consider him to be, he
ship is regarded as homosexual, there is no evidence that prohibiting
the marriage will discourage the purportedly homosexual conduct.
The transsexual, if not allowed to marry, would undoubtedly con-
tinue his relationship even though the state will not give legal sanc-
tion to it.

The Rationality of the Chromosome Test in Light of the
State Interest in Procreation

A fourth state interest in the chromosome test in the marriage
context is procreation. Traditionally, procreation and the rearing of
children is a product of the institution of marriage. However, it does
not follow that two persons of the opposite sex who cannot procre-
ate\(^4\) should not be allowed to enter a valid marriage.\(^5\) Clearly, this
proposition is not the state of the law. Inability to procreate is not a
ground for annulment.\(^6\) This fact is true even where one spouse did
not know of the other spouse’s sterility at the time of marriage.\(^7\)
Thus, the state has no interest in not allowing a transsexual to marry
because the transsexual cannot bear children. It is irrational for the
state to do so in the case of the transsexual when it does not deny the
right to marry to other persons who are unable or unwilling to
procreate.

The Rationality of the Chromosome Test in Light of the
State Interest in Administrative Convenience

A final state interest in the chromosome test is its administrative
convenience. The chromosome test\(^8\) is considered a fairly simple
procedure from a medical viewpoint. However, the proposed gender-
anatomy test is not significantly more difficult to administer. A
transsexual’s anatomy can be quickly checked by simple observa-
tion.\(^9\) As to gender, the transsexual could simply obtain a certificate

\(^{4}\) The transsexual is sterile. Green & Money, supra note 2, at 284.
\(^{5}\) This discussion assumes that a transsexual is of the opposite sex of his
spouse.
\(^{6}\) If the begetting of children were the chief end of marriage, it should
follow that our public policy would favor annulling marriage in sterility
cases where the fact of sterility is unknown to the parties at the time of
the marriage. But no statute in this state permits annulment in such
cases.

\(^{7}\) Id. Consummation, discussed in the text accompanying notes 90 & 91
supra, refers to the ability to engage in sexual intercourse. Sterility refers to the
inability to produce offspring. Id.
\(^{8}\) See note 9 supra.
\(^{9}\) Where a dispute over a transsexual’s sex arises in a judicial proceeding, as
in the M.T. situation, the court could appoint a doctor to examine the transsexu-
al’s anatomy to determine if it is consistent with the transsexual’s sex. If an
from his doctor or from the gender identity clinic which treated him stating the transsexual's gender. Yet, even if the chromosome test is found to be the most administratively convenient test of sex, the Supreme Court has said that "although efficacious administration of governmental programs is not without some importance, the 'Constitution recognizes higher values than speed and efficiency.'"  

The chromosome test cannot withstand the rational relation test in light of any of the five state interests examined. A fortiori, it can withstand neither the strict scrutiny standard of review nor an intermediate standard of review. The chromosome test is an unconstitutional denial of a transsexual's right to equal protection of the law when applied to the transsexual in order to determine his sex for the purpose of marriage.

**Birth Certificate**

There have been a few cases in which a transsexual has sought a birth certificate amendment. None has involved an equal prote...
tion challenge to the denial of the birth certificate amendment based on the chromosome test. As a result, no court has examined the state interests in denying the amendment. Nevertheless, in Anonymous v. Weiner, three state interests in not allowing the birth certificate amendment were set forth. These three interests will be considered as possible state interests in the chromosome test in the birth certificate context. A fourth state interest, not considered in Weiner, will also be examined.

The Rationality of the Chromosome Test in Light of the State Interest in Accuracy of Public Records

One state interest in applying the chromosome test in the birth certificate context is the state's obligation to insure the accuracy of public records. This interest assumes that chromosomes determine the sex of a transsexual. The court in Weiner reasoned that because the transsexual is a member of his original sex, as evidenced by the chromosome test, it would be inaccurate to designate him by his new sex on his birth certificate. However, according to the more rational gender-anatomy test of sex, the transsexual ought to be regarded as a member of his new sex. When the transsexual uses his birth certificate in society, such use will be inconsistent with the transsexual's sex if it designates him as his original sex. Because the chromosome test will require an inaccurate designation of the transsexual's sex on his birth certificate, there is no rational relation between the chromosome test and the state interest in the accuracy of public records.

The Rationality of the Chromosome Test in Light of the State Interest in Preventing Fraud

A second state interest is the protection against fraud. This...
interest also assumes that chromosomes determine a transsexual's sex. The theory here is that the transsexual is misrepresenting himself if his birth certificate designates him as his new sex. Once again, however, the transsexual should be regarded as a member of his new sex according to the more rational gender-anatomy test of sex. Therefore, it is not a fraud for a transsexual's birth certificate to represent him as a member of his new sex. As a later decision criticizing Weiner noted, it is a greater fraud for a transsexual to have his original sex on his birth certificate than to have his new sex on it.110

The Rationality of the Chromosome Test in Light of the State Interest in Using Public Records to Aid the Psychologically Ill

The third state interest set forth in Weiner is the need to prevent laws and records, such as birth certificates, from being used "as a means to help psychologically ill persons in their social adaptation."111 This state interest was based on the conclusion of the New York Academy of Medicine. The Academy had been requested by the board of health to make a report on the advisability of a birth certificate amendment in the case of a transsexual.112 This line of reasoning shows a blatant misunderstanding of transsexualism. Most experts in transsexualism agree that the only treatment that can substantially help the transsexual is sex reassignment surgery and the proper accompanying procedures.113 Once the state recognizes the necessity and validity of the sex reassignment procedure, it follows that the state has no interest in forbidding the transsexual to use the law to help the transsexual to fully effectuate his sex reassignment.

The Rationality of the Chromosome Test in Light of the State Interest in the Birth Certificate Reflecting Facts at the Time of Birth

A final state interest in not allowing a transsexual to amend the sex designation on his birth certificate was expressed by the dissent in a recent case which, unlike Weiner, allowed the transsexual to have his

112. The committee examining the question consisted of gynecologists, endocrinologists, cytogeneticists, a psychiatrist and an attorney. Id.
birth certificate amended. The dissent argued that the birth certificate is to be a record of certain facts about an individual at the time of birth. According to this view, even if the state were to recognize that the legal sex of a transsexual has changed since birth, the birth certificate should not be amended because the designation of the transsexual as his original sex would in that case be accurate as of the time of his birth. This view ignores the many other instances in which a birth certificate amendment is allowed even though the amended birth certificate no longer conforms to the individual's status at the time of birth. Most states have statutes allowing for a birth certificate amendment to reflect that an individual has been adopted, legitimated, or that his parents' name has been changed.

It would appear, therefore, that the state interest in birth certificates is not in recording facts as of the time of birth, but instead in recording facts as they presently exist.

Thus, there is no rational relation between the chromosome test and any of the four state interests in using it in the birth certificate context. It follows that the chromosome test could not survive the strict or intermediate standards of scrutiny in this context. Therefore, it is a violation of a transsexual's constitutional right to equal protection of the laws to deny him a sex designation amendment on his birth certificate on the basis of the chromosome test.

A Possible Alternative

If the Court does not accept the argument that the chromosome classification is unconstitutional, it is still possible to minimize the damage that results from its use. There is an unfortunate but inevitable result when the chromosome test is utilized. The result is that the overall sex of the transsexual is adjudicated. For example, in the marriage context, the state holds that only a female can marry a male. This is the level one classification. At level two, the state holds that only persons with XX chromosomes are female, so that an XY female transsexual is not a female and cannot marry a male. This adjudication of the transsexual's overall sex should be avoided.

The solution is to merge the two levels of classification into one in those situations in which the state wishes to discriminate on the basis of chromosomes. Thus, the law in the marriage context would state that only chromosomal females can marry chromosomal males.

result would be the same for the female transsexual in the sense that she would still be prohibited from marrying a male. However, at least the law would not be determining the overall sex of the transsexual. It would instead be adjudicating only the chromosomal sex of the transsexual. This adjudication would imply a recognition that of the many criteria that determine sex, only one is chromosomes.

**CONCLUSION**

In both the marriage and birth certificate contexts, using the chromosome test to determine a transsexual’s sex violates his right to equal protection of the law. There is no rational relation between the chromosome test and any state interest in these two contexts.

The courts should therefore reject the chromosome test and instead adopt the gender-anatomy test of sex. The latter test is a fair test of sex for those persons whose criteria of sex are in disharmony, because it is based on the two criteria of sex that are most relevant to a determination of a person’s overall sex.

If courts are unwilling to hold the chromosome test unconstitutional, then they should merge the two levels of classification, sex and chromosomes, into one level, chromosomes. In this way the law would not determine the overall sex of the transsexual, and would recognize that chromosome pattern is only one of many criteria that determine a person’s sex.

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