Appendix 5
SECOND REPORT OF THE HEALTH LAW PROJECT

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TRANSSEXUAL AND TRANSGENDER HEALTH LAW

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EXECUTIVE SUMMARY

This Report addresses health law aspects of transsexualism. Health law concerns itself with the rights and obligations of persons and organizations involved in a medical treatment process. Transsexualism is a human condition in which persons try to express themselves to varying degrees in the opposite sexual identity to which they were labelled at birth and later in life by society. Medical treatment, such as hormones, psychological counseling and cosmetic surgery, is generally used by transsexuals to express themselves in the preferred sexual identity.

Today, there is a limited body of positive law governing the legal rights and obligations of transsexuals involved in medical treatment. However, a de facto legal regime of greater practical impact exists by virtue of (1) a diagnostic categorization of transsexualism by the psychiatric community, (2) a set of medical treatment standards developed by an association of some of the providers of medical services to transsexuals, and (3) certain court decisions which recognize various aspects of these diagnostic criteria and treatment guidelines.

The limited body of positive transsexual health law consists of specific national laws in Sweden, Germany, Italy, Turkey and the Netherlands, and a minor reference in U.S. federal disability law. Several U.S. states also have laws dealing with the personal identity rights and, in one case, anti-discrimination rights, of transsexuals. These latter laws do not really constitute "health law" because they do not deal with the rights and obligations involved in transsexual medical treatment.

The Report analyzes the body of health law for rationality, consistency and fairness. The Report concludes that the existing legal regime does not accurately reflect transsexualism, and does not fairly serve the needs of transsexuals. In particular, the existing legal regime fails to consider that transsexualism (1) is a cultural phenomena rather than a medical illness, (2) is expressed in a wide variety of ways ranging from a desire for no medical treatment, to hormonal treatment, to surgical treatment, and (3) is amenable to medical treatment without the intervention of mental health professionals.

Based on the analysis of deficiencies in the current largely ad hoc health law regime, this Report proposes a more progressive set of health law standards for the treatment of transsexuals. These Health Law Standards of Care for Transsexualism provide for (1) recognition of transsexual medical treatment as a subset

of cosmetic medical treatment without discrimination due to the sexual nature of transsexualism, (2) prescription access to sex hormones on demand so long as periodic blood tests indicate no undue medical consequences, and (3) mandatory collection and publication of statistics concerning the number of sex reassignment surgeries a doctor has performed and the incidence and nature of post-operative complications and complaints. Use of an informed consent form based on these Health Law Standards of Care will shield medical practitioners from any liability in the treatment of transsexuals except for normal liability for negligence.

The Report recognizes that categorization of transsexual medical treatment as cosmetic rather than medically necessary will result in a loss of medical insurance coverage for such treatment. However, the solution to this problem lies not in the false definition of transsexualism as a medical illness, but in working for recognition that society would obtain net benefits from requiring medical insurance coverage of cosmetic surgery.

I. WHAT IS TRANSSEXUALISM

There are many different definitions of transsexualism[1], reflecting the ambiguity and confusion over the definition of the underlying word "sex[2]." The medical and legal communities today largely define sex, the noun, as a categorization of people into males and females depending upon whether they have penises and vaginas, respectively[3]. Therefore, to these communities, transsexualism is the evident desire to change one's genitals to the other sex's genitals[4].

Socio-cultural experts tend to define sex as a categorization of people into males, females and androgynous sub-types depending upon their behaviors and personal identity beliefs[5]. Therefore, in socio-cultural terms, transsexualism is the process of changing from one set to another of sex-typed behaviors and beliefs[6].

All the definitions of transsexualism comprehend that a person's sex is an important part of their self-expression. Hence fundamentally, transsexualism is the process of changing one's expression of their sexual identity[7]. The self-expression may be exercised through speech, apparel, body language, sexual hormonalization, and various kinds of cosmetic surgery, including alteration of the genitals.

A. MEDICAL COMMUNITY VIEW

In seeking to better express their sexual identity, transsexuals have interacted since the 1960's with several kinds of health care professionals: psychologists, psychiatrists, endocrinologists and plastic surgeons. In order to encourage uniformity of a high level of care to transsexuals, the psychiatric and psychological communities have stated a professional consensus on what the transsexual condition is in their Diagnostic and Statistical Manual, Version IIIR[8], (hereinafter referred to as "DSM-IIIR"). A somewhat similar consensus is stated internationally in the World Health Organization's (WHO) International Classification of Diseases, 9th Edition[9] (hereinafter referred to as "ICD-9"). Since the DSM-IIIR and ICD-9 provide only diagnostic guidelines, not treatment recommendations, a group of transsexual health care providers developed a specific set treatment guidelines called the Standards of Care of the Harry S. Benjamin Gender Dysphoria Association, Inc.[10] (hereinafter referred to as the "Harry Benjamin Standards of Care."). These medical community views on the nature of transsexualism are the foundation of today's health law regime.

1. DSM-IIIR

The purpose of the DSM-IIIR is to provide a "common language of mental health clinicians and researchers for communicating about the disorders for which they have professional responsibility."[11] The DSM-IIIR defines a "mental disorder" as a:

> "clinically significant behavioral or psychological syndrome or pattern that occurs in a person and

> that is associated with present distress (a painful symptom) or disability (impairment in one or more important areas of functioning) or with a significantly increased risk of suffering, death, pain, disability, or an important loss of freedom."[12]

However, excluded from the definition of mental disorder are "deviant behavior, e.g., political, religious, or sexual" and "conflicts that are primarily between the individual and society," unless the deviance or conflict is a symptom of a "behavioral, psychological, or biological dysfunction in the person."[13]

The DSM-IIIR contains cautionary language that it provides only diagnostic criteria, not information regarding the causes of conditions, their management and treatment.[14] The DSM-IIIR further cautions that the diagnostic criteria may not be valid when applied to persons with different cultural values from those of the clinician[15], and that the definition of a diagnostic category of mental disorder "does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder or mental disability."[16]

The DSM-IIIR defines "transsexualism" as a disorder evidenced by:

> "a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty" coupled with a "persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex."[17]

Transsexualism is further defined as a kind of "gender identity disorder" in which the person with the condition "not only is uncomfortable with the assigned sex but has the sense of belonging to the opposite sex."[18]

The DSM-IIIR goes on to define gender identity and sex by stating:

> "[g]ender identity is the sense of knowing to which sex one belongs, that is, the awareness that 'I am a male,' or 'I am a female.' Gender identity is the private experience of gender role, and gender role is the public expression of gender identity. Gender role can be defined as everything that one says and does to indicate to others or to oneself the degree to which one is male or female."[19]

The DSM-IIIR notes that the transsexualism disorder should be "subdivided according to the history of sexual orientation, as asexual, homosexual (toward same sex), heterosexual (toward opposite sex) or unspecified."[20]

To summarize, the DSM-IIIR says that transsexualism may or may not be a "mental disorder" depending on the reason a person suffers distress due to the difference between their assigned sex and the sex they believe they are.[21] If the distress is because one's sexual appearance does not match their sexual identity, then that person is said to have a mental disorder of transsexualism.[22] However, if the distress is solely because the expression of one's sexual identity is in conflict with society's rules on sexual expression, then no mental disorder at all exists.[23] Finally, if a person desiring to change their sexual appearance to that of the other sex neither suffers mental distress nor risks injuring themself, then no mental disorder exists.[24]

2. ICD-9

The ICD-9 is similar to the DSM-IIIR, but it also covers an exhaustive list of non-mental health conditions. The ICD-9 defines transsexualism as "sexual deviation centered around fixed beliefs that the overt bodily sex is wrong. The resultant behavior is directed toward either changing the sexual organs by operation, or completely concealing the bodily sex by adopting both the dress and behavior of the opposite sex."[25]

The ICD-9 definition of transsexualism is considerably broader than that of the DSM-IIIR. It does not require a preoccupation with genital surgery, nor does it specify a minimum period of time for cross-sex desires

to exist. Although the ICD-9 lists transsexualism as a sexual deviation, it also implies that this categorization is not appropriate if the only reason for changing bodily sex is to achieve a state of normalcy.[26]

3. HARRY BENJAMIN STANDARDS OF CARE

The Harry Benjamin International Gender Dysphoria Association, Inc., publishes a periodically revised booklet called "Standards of Care: The Hormonal and Surgical Sex Reassignment of Gender Dysphoric Persons" (hereinafter referred to as the "Harry Benjamin Standards of Care.") This booklet adopts the DSM-IIIR's definition of transsexualism, but relies primarily on the term "gender dysphoria," defined as "that psychological state whereby a person demonstrates dissatisfaction with their sex of birth and the sex role, as socially defined, which applies to that sex, and who requests hormonal and surgical sex reassignment."[27] Only clinical behavioral scientists are qualified to make a diagnosis of transsexualism[28], and that diagnosis must be based on independent knowledge of the patient's transsexual nature for at least two years.[29]

Unlike the DSM-IIIR, the Harry Benjamin Standards of Care provide specific guidance to health care practitioners. It is "declared to be professionally improper to conduct, offer, administer or perform hormonal sex reassignment and/or surgical sex reassignment without careful evaluation of the patient's reasons for requesting such services and evaluation of the beliefs and attitudes upon which such reasons are based."[30] Only clinical behavioral scientists are deemed competent to make such evaluations, and neither hormonal nor surgical sex reassignment is permitted unless such behavioral scientists provide a firm written recommendation to such effect.[31] The clinical behavioral scientists must have known the patient in a psychotherapeutic relationship for at least three months prior to recommending hormones and at least six months prior to recommending surgery.[32] A second, doctoral level behavioral clinician must provide a written recommendation in order to obtain genital or breast modification surgery[33], and the patient must have lived at least one year full-time in the "social role of the genetically other sex."[34]

The Harry Benjamin Standards of Care also note that "[h]ormonal and surgical sex reassignment has been demonstrated to be a rehabilitative, or habilitative, experience for properly selected adult patients."[35] Warnings are also provided to not charge transsexual patients excessive fees[36] and to respect the patient's privacy[37].

In summary, the Harry Benjamin Standards of Care agrees with the DSM-IIIR's definition of transsexualism, but limits the class of persons that can make the diagnostic determination. The Harry Benjamin Standards of Care also endeavor to limit the freedom of patients and doctors to hormonally or surgically achieve expression of sexual identity. The limitation is accomplished by requiring written recommendations from one or more qualified mental health professionals. Scant advice, other than some time periods of psychotherapy and cross-living, is given with regard to the criteria for issuing a recommendation. Basically, the only guidance is "the clinical behavioral scientist's recommendation for hormonal and/or surgical sex reassignment should, in part, be based upon an evaluation of how well the patient fits the diagnostic criteria for transsexualism...."[38]

There is an interesting element of irrationality in how the DSM-IIIR is applied by the Harry Benjamin Standards of Care. A transsexual who is not suffering mental distress does not meet the DSM-IIIR's criteria for a diagnosis of transsexualism mental disorder.[39] According to the Harry Benjamin Standards of Care, such a well-adjusted person should not be referred for transsexual surgery because they do not meet the DSM-IIIR diagnosis. Since transsexuals must get a clinical behavioral scientist recommendation in order to express their sexual identity, the Harry Benjamin Standards of Care encourage transsexuals to present themselves as mentally distressed, whether or not this is true.[40]

The Harry Benjamin Standards of Care adopts just one small portion of the DSM-IIIR, and fails to include the discussions of just what constitutes a mental disorder in the first place. The Harry Benjamin Standards of Care fails to contemplate that there are transsexuals who desire hormonal or surgical sex reassignment but don't qualify as having a mental disorder. This is because they are at peace with their

timetable for gender transition or because their distress is a result of societal discrimination, not personal psychopathology.

B. SOCIO-CULTURAL VIEW

While the medical community believes that sex is either a male or female state, there is also a socio-cultural view that sees sex as a continuum of role possibilities.[41] In this view transsexuals are not merely persons who believe they were labelled the wrong sex, but instead are also persons who occupy a vast middle ground of different sex-types. From a socio-cultural perspective, transsexuals are not in any way medically ill or mentally disordered, but instead are part of the normal diversity of human sex-types.[42]

1. PERVASIVE INTERSEXUALITY

Geneticist Anne Fausto-Sterling has recently observed "that sex is a vast, infinitely malleable continuum that defies the constraints of even five categories."[43] Beside the typical male and female categories, she had also defined herm, ferm and merm as various types of genitally intersexed persons that occur in as many as four percent of all births.[44]

Recent scientific research indicates that sexual identity arises from brain cell patterns.[45] Hence it appears as if transsexualism is really a form of intersexuality in which the brain and body are wired for two different sexes. There is no sharp dividing line between a male brain and a female brain, but only a set of statistically significant aptitude differences among sexes in large populations.[46] Accordingly, Dr. Fausto-Sterling may well be correct in viewing sex as a "vast, infinitely malleable continuum."[47] People are born with many varying degrees of sexual brain patterns, sexual anatomy, and overlap between brain patterns and anatomy.

If intersexuality is as pervasive as Dr. Fausto-Sterling and others believe, then transsexualism simply describes people that want cosmetic surgery so that their outward appearance better matches their inner view of themself. Transsexualism is just part of normal human sexual diversity.

2. SEX IS A CULTURAL CONSTRUCT

Another socio-cultural view is that sex is not a biological reality so much as a cultural construct.[48] In this view, technology has eroded the biological reality of sex differences to the point that anyone can choose to be any sex they like. Even seeming paramount differences such as fathering children or nurturing infants can be assumed by any person with the assistance of technology such as artificial insemination and surrogate motherhood.[49] If sex is a cultural construct, then transsexualism is simply a typical lifestyle choice to change from one sub-culture to another.[50]

C. PROPOSED LEGAL DEFINITIONS

Faced with the wide array of definitions of sex, gender and transsexualism, this Report offers some standard definitions from the standpoint of utility under health law.

Sex: A person's *identity* along a continuum of role types with "male" and "female" at the polar extremes.

Role Type: A set of beliefs, behaviors and appearances.

Male: A role type which a particular culture associates with individuals anatomically structured for contributing reproductive cells to another person.

Female: A role type which a particular culture associates with individuals anatomically structured for receiving reproductive cells from another person.

Gender: The *characteristics* of a continuum of role types ranging from male to female, with such characteristics including behaviors and sexual anatomy, and being labelled as "masculine" and "feminine" at the polar extremes.

Transsexualism = Transgenderism: The condition of wanting to change one's gender to better match one's sex.

These revised legal definitions recognize the emerging scientific reality that sex is in the brain, not in the body.[51] Transsexuals do not really change their sex — they are born with that. Instead, transsexuals aim to change the erroneous sexual labels that were assigned to them at birth. The only way to change those labels is to change the basis upon which the labels were applied, namely, the outward expressions of sex. This means that to change a sexual label, one must change their gender — from behavior to anatomy — since gender is the outward expression of one's sexual identity. Hence, transsexualism is really a misnomer and transgenderism is a more scientifically accurate term.

Several decades ago, Dr. John Money of Johns Hopkins University coined the concept of "gender" as a person's sexual identity, and "gender role" as what a person does to act out their gender. In this case, the noted professor is not "on the money." Instead, "sex" is part of a person's identity — it is not some extrinsic factor resident in chromosomes, brain cell patterns or body anatomy. Gender is the outward expression of sex. Gender may be manifest in clothes, behavior or anatomy. Chromosomes may be XX, XY and numerous other variations, but they are not "sex." Chromosomes may direct reproductive anatomy, but reproductive anatomy is not sex. Voluntarily or involuntarily infertile people still have sex.

People may change their sex or change their gender or change both. But it is legally oppressive and reactionary to say that a person's sex is determined by chromosome counts or anatomy. A person's sex is determined by a person's will. All else is either gender or biology, not sex.

II. LEGAL GUIDELINES FOR TRANSSEXUAL HEALTH CARE

Transsexuals are persons that want to change the expression of their sexual identity to better conform to their inner view of themself. The only difference between transsexuals and persons that seek other types of cosmetic surgery is that transsexual surgery involves the sex organs in a way which challenges the religious-based morals of society. While law in a secular society should not discriminate against persons based on whether their private behavior offends other group's religious or quasi-religious beliefs[52], this section of the Report shows that such arbitrary discrimination is precisely the case today in transsexual health law.

This section of the Report first discusses the legal guidelines for transsexual health care that exist in positive law, which apply in only a few European countries. A brief discussion is also provided of statutory references to transsexualism that exist in the U.S. federal Americans with Disabilities Act, the personal identity laws of several states and in the anti-discrimination laws of Minnesota. Most of this section, however, focuses on the pervasive ad hoc legal regime consisting of the DSM-IIIR and the Harry Benjamin Standards of Care.

A. POSITIVE TRANSSEXUAL HEALTH LAW: EUROPE

Since 1972 Sweden has had a law dealing with transsexual medical treatment.[53] This law provides that "any person who since his youth has felt that he belongs to a sex other than that officially recorded for him in the parish register and who has acted in accordance with this conviction for a considerable period, and who must be assumed will continue living as if he were a member of this sex, may, after applying in person, be pronounced to belong to the other sex."[54] Applications must be made to the Swedish Social Welfare Board, which has the

sole authority, subject to review by the Administrative Court of Appeal, to authorize surgical alteration of the genitals from those of one sex to the other. Criminal sanctions are specified for the violation of this provision, or for the violation of the transsexual's confidentiality. Medical treatment for transsexuals other than genital surgery is not regulated.

No country other than Sweden and Italy specifically require governmental approval for a sex change operation. Germany[55], Italy[56], Turkey[57] and Holland[58] have laws which govern the conditions under which a person may change the gender of their name or their legal sex. Generally these laws are consistent in that a change in legal sex will be effected only (1) by a court, (2) for single people, (3) for people permanently incapable of reproduction, although in Turkey the single status occurs automatically upon legal sex change and in Italy the single status occurs only if one spouse sues for divorce.

In the case of Germany, the legal sex change will be effected only if the person "has undergone surgery changing external characteristics that achieves a clear approximation to the phenotype of the opposite sex."[59] In the case of Holland, the legal sex change will be effected only if the person's application is signed by at least two experts testifying to the certitude of the person's transsexual nature (i.e., actual sex reassignment surgery is not necessary).[60]

In none of the European laws is there any specification of the rights and obligations of transsexuals and health care organizations in the medical treatment process or hormonal and surgical sex reassignment.[61] However, Germany, Holland and Sweden do either explicitly or implicitly require a period of cross-gender living prior to authorizing a legal sex change. Also, given the legal regimes of all the mentioned countries except Italy and Turkey, it would appear unlikely that doctors would feel comfortable treating married transsexuals because at the end of the treatment process, no change of legal sex status would be possible unless the person was single.

B. POSITIVE LAW RELEVANT TO TRANSSEXUALS: THE U.S.

Transsexual health law in the United States is even sparser than in Europe. The only mention of transsexualism in federal law is its exclusion as a "medical disability" from the Americans with Disabilities Act.[62] Several states have statutory provisions permitting birth certificates to be amended upon the accomplishment of sex reassignment surgery, and two states forbid the amendment of birth certificates based on a sex change.[63] The most significant piece of legislation for American transsexuals applies only in Minnesota.[64] This statute forbids discrimination on the basis of "sexual orientation" in housing, employment, public services, education and business. "Sexual orientation" is defined as, inter alia, "having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[65] While this statute is very helpful to transsexuals in Minnesota, it does not directly bear on health law issues other than prohibiting transsexual discrimination in public health services.

U.S. courts have generally recognized the rights of transsexuals to obtain medical care in accordance with medical diagnoses and prescriptions.[66] In this way, the judiciary has crafted the DSM-IIIR in particular, and to a much lesser extent the Harry Benjamin Standards of Care, into a body of de facto U.S. health law.[67] It is to these medico-legal guidelines that we next turn.

C. DE FACTO TRANSSEXUAL HEALTH LAW: HORMONAL

The Harry Benjamin Standards of Care note that the "administration of androgens to females and of estrogens and/or progesterones to males may lead to mild or serious health-threatening complications."[68] Accordingly, it is specified that hormones be prescribed by a physician, that the transsexual patient be warned of the health consequences, and that the patient's blood chemistry be periodically monitored.[69] These are sensible provisions which would apply to any other medication with a similar potential for bodily change.

However, there is no logical basis for the further limitations on access to hormones that are imposed by the Harry Benjamin Standards of Care. These limitations include a requirement for a written

recommendation from a mental health professional based on three months of psychotherapy and an independently confirmed belief that the patient has wanted to change their sex for at least two years. The only reasoning given for these limitations is that hormonal sex reassignment "may have some irreversible effects."[70] However, other prescriptive cosmetic-effects drugs may have irreversible effects, and numerous life activities can have irreversible effects. Why are hormones singled out as requiring a psychiatric recommendation? Apparently it is only because hormones affect a person's sexual status in society, and a sexist society has difficulty with people that want to change their sexual status.[71]

Health law must concern itself with a consistent, rational and fair approach to medical treatment for transsexuals. The fact that the part of the body that the transsexual wants to change is sexual in nature must remain an irrelevant factor in a secular body of law. Accordingly, it is recommended that hormonal sex reassignment therapy be available on demand for healthy patients subject only to full disclosure of the prescriptive drug risks and periodic blood chemistry monitoring.

D. DE FACTO TRANSSEXUAL HEALTH LAW: SURGICAL

The Harry Benjamin Standards of Care prohibit sex reassignment surgery in the absence of two written recommendations from appropriate mental health professionals. The recommendations may only be issued if the patient has a diagnosed transsexualism mental disorder, has lived for at least a year in the opposite sex, and has already been under hormonal sex reassignment therapy. Of these limitations, only the requirement for preexisting hormonal sex reassignment enjoys a rational basis.

The requirement for recommendations from mental health professionals is sexist per se because such a recommendation is not required for any other kind of plastic surgery. For example, a person can change their nose, the shape of their torso, or their entire hairline without getting a psychiatrist's permission. Why does one need such permission for sex reassignment surgery? No reason is offered in the Harry Benjamin Standards of Care other than that such surgery "may be requested by persons experiencing short-termed delusions or beliefs which may later be changed and reversed."[72] However, this same point applies to many other kinds of cosmetic surgery and, for that matter, to all manner of risky activities in life. It appears that it is only because of society's difficulty in dealing with sexuality that a special discriminatory standard of care has been developed to limit access to cosmetic sex reassignment surgery.

There also appears to be little rationality to requiring a patient to live in the opposite sex role for a year as a condition of approval for sex reassignment surgery. First, there is ever growing disagreement and ambiguity in society over just what a sex role is, and whether there even are or should be different sex roles.[73] Unique feminine and masculine sex roles are fast disappearing in the military and civilian workforce, as well as in the social arena. Second, the effect on a person's life of coming out as a different sex is likely to far outweigh the effect on their life of sex reassignment surgery. Coming out is just as irreversible as sex reassignment surgery, but coming out is a lot more visible to the outside world. The Harry Benjamin Standards of Care show a lack of understanding of transsexual realities by positing a "one-year test" as a litmus test for access to sex reassignment surgery. Indeed, such a test often puts transsexuals in a cruel situation of being neither male nor female, having to look one sex and use the toilets of the other.[74]

The only sensible pre-requisite for sex reassignment surgery should be a one year prior period of hormone reassignment therapy. The reason for this is that the hormone reassignment therapy will help ensure the aesthetic success of the sex reassignment surgery.[75] A physician's record of hormone prescriptions and blood tests will provide the cosmetic surgeon with evidence that this requirement has been fulfilled.

III. IMPLICATIONS OF DE-MEDICALIZATION OF TRANSSEXUAL HEALTH CARE

The de-medicalization of transsexual health care proposed in this Report carries important implications for mental health professionals, for tort liability, and for medical insurance. Each of these implications are discussed below.

A. ROLE OF MENTAL HEALTH PROFESSIONALS

Mental health professionals in the transsexual field should concentrate on dealing with cases of mental distress, not on judging the "reality" of a person's sexual identity. Changing the outward expression of one's sexual identity can cause great stress and anguish. Psychotherapy may be helpful in alleviating this stress.

The stress of a transsexual can best be managed by first affirming the normalcy of wanting to express a different sexual identity. Once this is accomplished, the therapist can focus on helping the transsexual handle the reactions of others to his or her decision to change their social role and sexual appearance.

The DSM-IIIR contains a list of conditions which are not mental disorders but may appropriately be a focus of professional attention or treatment. These conditions are called "V Codes."[76] In a de-medicalized regime, transsexualism should be a "V Code."

B. TORT LIABILITY

The Harry Benjamin Standards of Care might conceivably have value to cosmetic surgeons as a prophylactic against tort liability from disgruntled patients.[77] However, experts believe a successful tort or criminal prosecution of a sex reassignment surgeon is highly unlikely absent egregious conduct.[78] Cosmetic surgeons will be fully immunized against tort liability for wrongfully changing someone's sex by a properly drawn up and executed informed consent and waiver. No psychiatric opinion is needed for legal security. Sample consent forms are included in the Health Law Standards of Care appended hereto.

C. MEDICAL INSURANCE

With transsexualism no longer a medical illness, there is no current prospect of medical insurance coverage for the costs of sex reassignment surgery. But very little sex reassignment surgery is covered by medical insurance today.[79] Also, it would be morally wrong to falsely label transsexualism as a medical illness in order to obtain insurance coverage.[80] The solution to the difficulty many transsexuals have in paying for sex reassignment surgery is to work to include all cosmetic surgery in the list of covered conditions for medical insurance.

CONCLUSION

Transsexualism is a normal part of human socio-biological diversity, stretching back thousands of years and spanning the globe.[81] Modern technology has now permitted transsexuals to express their sexual identity with great effectiveness, just as technology has permitted gifted artists and engineers to express their identities with unprecedented impact.[82]

The use of biotechnology to express sexual identity is a private matter with no harmful effects on other people.[83] Nevertheless a quasi-legal regime has evolved that unfairly impedes transsexual endeavors with a mental health yoke.[84] The only possible reason for this impedance is that transsexuals challenge deeply rooted sexist and heterosexist belief systems.[85] To protect the integrity of these patriarchal systems, while still dealing with the unending reality of transsexualism, society says the transsexual is "crazy", and sex changes will be allowed only as a"cure" for "mental disorders", not as an open expression of sexual identity.[86]

Following the lead of other oppressed minorities, transsexuals are moving from invisibility and shame to empowerment and pride.[87] Thus liberated from a mindset of disability, the Health Law Standards of Care proposed herein will further free transsexual expression from mental health professionals. As time goes on, ever growing numbers of transsexuals will help engender a revolution in human expression.[88] This revolution will achieve the freedom for people to navigate their entire personality, not just those roles which are permitted based on a label imposed at birth. The liberal achievement of this new level of wholeness and self-actualization is the ultimate goal of transsexual health law.

ENDNOTES

1. The term "transsexualism" was first used in Cauldwell, *Psychopathia Transsexualis*, 16 SEXOLOGY 274 (1949). *See, generally*, Comment, *Transsexuals in Limbo: The Search for a Legal Definition of Sex*, 31 MARYLAND L. REV. 236 (1971).

2. "The total physical and behavior differences, properties, and characteristics by which the male and female are distinguished; either of the two groups, male and female, into which organisms are divided, especially according to their distinct functions in the reproductive process; activities relating to or based on sexual attraction, sexual relations, or sexual reproduction; sexual intercourse." Living Webster Dictionary of the English Language 884 (1971).

3. Hence doctors specify the sex of newborns by inspecting their genitals and the legal system requires proof of conversion of a penis into a vagina before it will change a person's birth certificate from male to female. See, e.g., 410 ILL. COMP. STAT. ANN. 535/17 (1992) ("For a person born in this State, the State Registrar of Vital Records shall establish a new certificate of birth when he receives ... [a]n affidavit by a physician that he has performed an operation on a person, and that by reason of the operation the sex designation on such person's birth record should be changed.") ; N.J. STAT. 26:8-40.12 (1992) ("The State registrar shall issue an amended certificate of birth to a person born in this State who undergoes sex reassignment surgery and requests an amended certificate of birth which shows the sex and name of the person as it has been changed.")

The medical and legal communities also have more comprehensive (not genital-specific) means of defining sex. One leading sexologist lists seven variables which interact to produce the ultimate sex of a person: chromosomal, gonadal, hormonal, internal morphological, external morphological, legal assignment and subsequent socialization, and psychosexual identity. J. Money, *The Sex Chromatin and Psychosexual Differentiation,* in THE SEX CHROMATIN 434-35 (K. Moore, ed. 1966). A classic statement of the legal requirement for a confluence of several kinds of sex to determine a person's ultimate sex is: "Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual. . . ." In the Matter of Anonymous, 57 Misc. 2d 813, 815, 293 N.Y.S. 2d 834, 836 (1968).

Perhaps the wisest view on sex is that it cannot be so rigidly defined: "for the simple man in the street, there are only two sexes. A person is either male or female, Adam or Eve. The more sophisticated realize that every Adam contains elements of Eve and every Eve harbors traces of Adam, physically as well as psychologically." H. BENJAMIN, THE TRANSSEXUAL PHENOMENA 4 (1966). Virginia Woolf came to the same conclusion decades earlier: "Different though the sexes are, they intermix. In every human being a vacillation from one sex to the other takes place, and often it is only the clothes that keep the male or female likeness, while underneath the sex is the very opposite of what it is above." V. WOOLF, ORLANDO 189 (1928).

4. In contemporary usage, the term transsexualism is used as a name for the sex-reassignment method of rehabilitation, as well as for the syndrome treated by means of sex reassignment. The syndrome of transsexualism is ... becoming socially, economically, and hormonally rehabilitated in the role of the sex of reassignment, prior to the final and irrevocable step of surgery." J. MONEY, GAY, STRAIGHT AND IN BETWEEN 88 (1988).

5. *See, e.g.*, BODYGUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 2 (1991) ("distinctions between male and female bodies are mapped by cultural politics onto an only apparently clear biological foundation. As a consequence, sex/gender systems are always unstable socio-cultural constructions.")

6. *Id.* at 260.

7. R. Garet, *Self-Transformability*, 65 S. CAL. L. REV. 121, 126 (1991), analogizes transsexual expression to religious or economic expression by noting "transsexuals are no more unnatural than, say, converts or immigrants, and that sex-reassignment surgery is no more unnatural than celibacy or the practice of ritual circumcision."

8. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Third Edition — Revised) 1987 (hereinafter cited as "DSM-IIIR").

9. World Health Organization, THE INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES, INJURIES, AND

CAUSES OF DEATH (Ninth Revision) (1977) (hereinafter cited as "ICD-9").

10. Harry S. Benjamin International Gender Dysphoria Association, Inc., STANDARDS OF CARE (1990) (Available from HBIGDA, Inc., 1515 El Camino Real, Palo Alto, CA 94306).

11. DSM-IIIR, *supra* note 8 at xii.

12. *Id.* at 401.

13. *Id.* at xxii.

14. *Id.* at xxv.

15. *Id.* at xxvi. Transsexualism is well-known as a cross-cultural phenomena. It is not considered a psychological problem outside of Western medicine, and was not even considered a mental disorder in the West until the 1970s. *See, e.g.*, J. MONEY, *supra* note 4 at 89 ("[G]ender crosscoding and living as a woman has ancient history among the hijras of India. Partly a caste and partly a cult with their own presiding deity, the goddess Bahuchara Mata, the hijras are a community of people who, in the medical terminology of the West, would be called male-to-female transsexuals.") *See also*, L. Feinberg, TRANSGENDER LIBERATION 7-8 (1992) ("The high incidence of transgendered men and women in Native [American] societies on this continent was documented by colonialists who referred to them as berdache. ... Many berdache were tortured and burnt to death by their Christian conquerors. Other colonial armies sicked wild dogs on the berdache.")

After reviewing evidence of age-old transsexualism in Oman ("xanith"), Pakistan ("kushra"), Myanmar ("acaults"), China, Thailand, Singapore (highest statistical incidence of transsexualism in the world), Poland, Russia and Czechoslovakia, one expert in the field concluded: "Contrary to the belief of some that transsexualism and related gender transpositions are symptoms of a decadent, *fin-de-siecle,* Occidental culture, it is of note that these phenomena can be encountered in very diverse socio-cultural systems. ... This indicates that disturbance in gender identity/role development is a risk the human species is subject to, rather than that it is induced by a certain environment." R. Reid, *Psychiatric and Psychological Aspects of Transsexualism*, XXIIIrd Colloquy on European Law: TRANSSEXUALISM, MEDICINE AND THE LAW 14, 16 (Amsterdam, 1993).

16. DSM-IIIR, *supra* note 8 at xxix.

17. *Id.* at 74. A draft revision of the DSM-IIIR, called DSM-IV, deletes the term and condition "transsexualism" and partially replaces it with "gender identity disorder." For adults, the proposed DSM-IV classification of "gender identity disorder" is very similar to the DSM-IIIR definition of "transsexualism" except in two important respects. First, no specific time period, such as DSM-IIIR's "two years", is given for the duration of cross-gender desires in order to qualify under the diagnosis. Second, the proposed DSM-IV makes very explicit the implicit DSM-IIIR condition that a gender identity disorder exists only if there is "clinically significant distress or impairment in social, occupational or other important areas of functioning." American Psychiatric Association, DSM-IV DRAFT CRITERIA (Task Force on DSM-IV) O-9 (March 1, 1993).

Assuming the DSM-IV draft becomes official, a person identified as a "transsexual" can no longer be assumed *per se* to have a mental disorder. However, a person would be deemed to have a "gender identity mental disorder" if they meet all four of the following criteria: (A) a strong and persistent cross-gender identification (evidenced by a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or conviction that one has the typical feelings and reactions of the other sex), (B) a persistent sense of inappropriateness in the gender role of one's sex (evidenced by a preoccupation with getting rid of one's primary and secondary sex characteristics or a belief that one was born the wrong sex), (C) no physical intersexuality, and (D) clinically significant distress or impairment in social, occupational or other important areas of functioning due to gender identity. *Id.*

18. DSM-IIIR, *supra* note 8 at 71.

19. *Id.*

20. *Id.* at 75. The draft DSM-IV replaces this language with a subdivision of "sexually attracted to males, females, both or neither." DSM-IV, supra note 17. Transsexualism and erotic or affiliative orientation are wholly distinct aspects of

human neural development, with about 30% of male-to-female transsexuals expressing a preference for female partners and about 10% of female-to-male transsexuals expressing a preference for male partners. L. Gooren, *Biological Aspects of Transsexualism and their Relevance to its Legal Aspects* 12, XXIIIrd Colloquy on European Law, TRANSSEXUALISM, MEDICINE AND THE LAW (Amersterdam, 1993).

21. DSM-IIIR, *supra* note 8 at xxii.

22. *Id.* at 71.

23. *Id.* at xxii.

24. Draft DSM-IV, *supra* note 17 at O-9. The preoccupation of psychiatry with transsexuals appears to be an artifact of (1) surgeon's requirements for psychiatric referrals as an ostensible shield against tort or criminal liability, and (2) transsexuals presentations of themselves as highly distressed in order to get psychiatric referrals to surgeons. But as noted researcher Marie Mehl observed in 1986:

> "There is no mental or psychological test which successfully differentiates the transsexual from the so-called normal population. There is no more psychopathology in the transsexual population than in the population at large, although societal response to the transsexual does pose some insurmountable problems. The psychodynamic histories of transsexuals do not yield any consistent differentiation characteristics from the rest of the population."

Quoted in S. Stone, *The Empire Strikes Back: A Post-Transsexual Manifesto* 292 in BODYGUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY (J. Epstein and K. Straub, eds.) (1991).

25. DSM-IIIR, *supra* note 8 at 463.

26. *Id.* at 462.

27. Harry Benjamin Standards of Care, *supra* note 10 at para. 3.4.

28. *Id.* at para. 4.2.3.

29. *Id.* at para. 4.6.1.

30. *Id.* at para. 4.1.4.

31. *Id.* at para. 4.2.5.

32. *Id.* at para. 4.6.2 and 4.8.1.

33. *Id.* at para. 4.7.5.

34. *Id.* at para. 4.9.1.

35. *Id.* at para. 4.14.1. The most recent (1990) evaluation studies of post-operative transsexuals report that patient satisfaction for 87% of male-to-females and for 97% of female-to-males. A follow-up study of thousands of post-operative transsexuals found only 18 male-to-females and 5 female-to-males that regretted the procedures and returned to their original gender role. Reid, *supra* note 15 at 12-13.

36. Harry Benjamin Standards of Care, *supra* note 10 at para. 5.3.2.

37. *Id.* at para. 5.3.1.

38. *Id.* at para. 4.3.1.

39. See discussion at note 17, *supra*.

40. "It took a surprisingly long time — several years — for the [gender identity] researchers to realize that the reason the [transsexual] candidates' behavioral profiles matched Benjamin's [psychological profiles of transsexuals] so well was that the candidates, too, had read Benjamin's book, which was passed from hand to hand within the transsexual community, and they were only too happy to provide the behavior that led to acceptance for surgery." Stone, *supra* note 24 at 291.

41. See note 5 *supra*.

42. See note 15 *supra*.

43. Fausto-Sterling, *Are Five Sexes Not Enough?*, THE SCIENCES, March/April 1993 at 21.

44. *Id.*

45. R. Friedman and J. Downey, *Neurobiology and Sexual Orientation: Current Relationships*, 5 J. NEUROPSYCHIATRY 131 (1993); L. Gooren, supra note 20 at 18 ("The implication of the above scientific insight that the sexual differentiation of the brain occurs [hormonally] after birth is that assignment of a child to the male or female sex by the criterion of the external genitalia is an act of faith.")

46. "It is possible to be female and have some male mind attributes, and this simply depends on the presence or absence of the male hormone during certain stages of pregnancy." A. MOIR & D. JESSEL, BRAIN SEX 50 (1991).

47. Note 43, *supra*.

48. Note 5, *supra*.

49. "Despite the multiplicity of sex differences, those that are immutable and irreducible are few. They are specific to reproduction: men impregnate, and women menstruate, gestate, and lactate .... However, in the light of contemporary experimental obstetrics, being pregnant is no longer an absolutely immutable sex difference. [T]he hormones and stimuli required for normal fetal development are intrinsic and within the early embryo." J. MONEY, SEXOLOGY OF EROTIC ORIENTATION 54-55 (1988).

50. *See*, Report of the Health Law Committee, FIRST INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 18-20 (1992).

51. Note 45, *supra*.

52. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive or rights and the right most valued by civilized man." Stanley v. Georgia, 394 U.S. 557, 564 (1969), *quoting* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See also*, EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.") The European Court of Human Rights found that France had violated this article and interfered with the privacy of a transsexual when it failed to register her in her new sex. Case of B. v. France, 25 March 1992.

53. SFS 1972: 119, Act Concerning Pronouncement of Sexual Identity in Certain Cases.

54. Id. at Section 1.

55. BGB 1, Nr. 56, 1654-1658 (1980), Law on the Changing of Names and the Determination of Sex Membership.

56. Gazzetta Ufficiale N. 106, del 19 aprile 1982, p. 2879, Norme in materie di rettificazione di sesso.

57. Act of 11 Mai 1988, Resmi Gazete 12.5.1988, Nr. 19812, pp. 1-3.

58. Act of 24 April 1985, Staatsblad 1985, 243.

59. F. Pfafflin, *Psychiatric and Legal Implications of the New Law for Transsexuals in the Federal Republic of Germany*, 4 International Journal of Law and Psychiatry 191 (1981).

60. Note 58, *supra*.

61. *See generally*, excellent review in M. Will, *Legal Conditions of Sex Reassignment by Medical Intervention: Situation in Comparative Law, XXIIIrd Colloquy on European Law*, TRANSSEXUALISM, MEDICINE AND THE LAW (Amsterdam, 1993).

62. Americans with Disabilities Act, 42 USC 12211 (1992).

63. See note 3, supra Other states in addition to the referenced Illinois and New Jersey statutes with legislatively permitted sex change are Alabama, California, Hawaii, Maryland, North Carolina, Pennsylvania, Virginia and Texas. States that legislatively deny the right to a legal sex change are Ohio and Tennessee. ("The sex of an individual will not be changed on the original certificate of birth as a result of sex change surgery.") TENN. CODE. ANN. 68-3-203 (1992). No state prohibits the right of a doctor to perform or a patient to receive sex change surgery.

64. MINN. STAT. 363.01-23 (1992).

65. *Id.* at subdivision 45.

66. *See, e.g.*, Marty Phillips v. Michigan Department of Corrections, 731 F. Supp. 792, 798 (W.D. Mich. 1990) (court-ordered continued hormonalization of prisoner at his/her request per DSM-IIIR diagnosis of Gender Identity Disorder); Davidson v. Aetna Life & Casualty, 101 Misc. 2d 1, 420 N.Y.S. 2d 450 (1979) (court denied insurance company the right to consider sex reassignment surgery as part of a cosmetic surgery exclusion when a doctor had prescribed the surgery as medically necessary pursuant to a DSM diagnosis).

67. Doe v. Boeing, 121 Wash. 2d 8, 846 P. 2d 531 (1993) (referencing Harry Benjamin Standard of Care requiring cross living prior to sex reassignment, but not strictly imposing this standard on employer even though employee was diagnosed as transsexual).

68. Harry Benjamin Standards of Care, *supra* note 10 at para. 4.5.1.

69. *Id.* at para 4.5.3.

70. *Id.* at para. 4.4.2.

71. "Today, all gender education teaches that women are 'feminine,' men are 'masculine,' and an unfordable river rages between these banks. The reality is there is a whole range of ways for women and men to express themselves. Transgender is a very ancient form of human expression that pre-dates oppression. It was once regarded with honor. A glance at human history proves that when societies were not ruled by exploiting classes that rely on divide-and-conquer tactics, 'cross-gendered' youths, women and men on all continents were respected members of their communities." L. Feinberg, TRANSGENDER LIBERATION 7 (1992).

72. Harry Benjamin Standards of Care, *supra* note 10 at para. 4.1.1.

73. S. Law, *Homosexuality and the Social Meaning of Gende*r, 1988 WISC. L. REV. 187, 212 ("differences between men and women are social, rather than inherent and natural . . . .")

74. *See, e.g.*, Doe v. Boeing, 121 Wash. 2d 8 (1993) (transsexual employee required to cross-live as a woman prior to sex change surgery fired from job for looking too feminine in the male restroom employer required her to use).

75. "Hormones are indispensable tools for the induction and maintenance of the characteristics of the sex the transsexual reckons him/herself to belong to. They are relatively safe drugs in appropriate dosages." L. Gooren, *The*

Physician's Role in Relation to Transsexuals 8, XXIIIrd Colloquy on European Law, TRANSSEXUALISM, MEDICINE AND THE LAW (Amsterdam, 1993).

76. DSM-IIIR, *supra* note 8 at 359.

77. Harry Benjamin Standards of Care, *supra* note 10 at para. 1.

78. Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma* 7 CONN. L. REV. 288, 295 ("a successful prosecution against a physician for sex reassignment surgery is far-fetched, especially if the patient gives an informed consent to the operation.") Of course a surgeon would still be liable for ordinary negligence, notwithstanding the fact that the patient was transsexual. Suria v. Shiffman, 486 N.Y.S. 2d 724 (1985).

79. *But see* Davidson v. Aetna Life & Casualty, 101 Misc. 2d 1, 420 NYS 2d 450 (1979) (transsexual surgery must be covered under insurance policy which had blanket exception for cosmetic surgery).

80. However, when transsexualism causes medical illness, which is when it causes sufficient psychological distress to be a mental disorder, then it should qualify for insurance coverage as non-cosmetic surgery. A main thesis of this article, however, is that much if not most of transsexualism does not meet the standard of a mental disorder, and thus cannot be a medical illness.

81. "Thousands of artifacts have been unearthed dating back to 25,000 B.C. that prove these societies worshipped goddesses, not gods. Some of the deities were transgendered as were many of their shamans or religious representatives. ... An Egyptian sculpture of a bearded Queen Hat-shepsut dressed in the garb of pharaoh (1485 B.C.), for example, shows the persistence of popular folklore about the bearded woman as a sacred symbol of power and wisdom. A link between transvestism and religious practice is also found in ancient myths associated with Greek gods and heroes. The myth of Achilles notes that he lived and dressed as a woman at the court of Lycomedes in Scyros before he acquired his martial skills." Feinberg, *supra* note 71 at 8, 10.

82. While transsexuals have techno-evolved from cross-dressing to sex reassignment surgery, similar techno-evolutions are the movements in art from painting to motion pictures and in engineering from wooden bridges to space stations.

83. *See, e.g.*, Christian v. Randall, 33 Colo. App. 129, 516 P. 2d 132 (1973) (female-to-male transsexual permitted to retain custody of four children as court found no evidence that children are adversely affected by sex change of parent).

84. See discussion from notes 30-40 *supra*.

85. One of the earliest patriarchal societies were the Hebrews: "The woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment; for all that do so are abomination unto the Lord thy God." DEUTERONOMY 22:5. "The historical purpose of cross-dressing laws is to discriminate against women. What possible purpose for dressing the sexes differently if there is no underlying intention to treat them differently? Appearance discrimination extended to include gays and transgenders." C. Williams, *Criminal Law and Practice Report*, in FIRST INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY 284, 286 (1992).

86. Social non-conformists frequently get labelled as mentally disordered. Homosexuality was included in the DSM as a mental disorder until 1973. It was then conceded, in response to activist pressure, that gay men and lesbians have "no impairment in judgment, stability, reliability or general social or vocational capabilities." DSM-III 261, 283 (1980). Compare with the quotation at note 24, *supra*.

87. *Transgender People Coming Out*, San Francisco Chronicle, May 28, 1993 at p. A1 ("Even as transgender celebrities and characters are entering popular culture with increasing frequency, their everyday counterparts are coming out of the closet and demanding to be accepted on their own terms.") The Platform for the 1993 March on Washington, the largest gathering ever of sexual minorities, opened with the statement: "The Lesbian, Gay, Bisexual and Transgender movement recognizes that our quest for social justice fundamentally links us to the struggles against racism and sexism, class bias, economic injustice and religious intolerance. We must realize if one of us is oppressed we all are oppressed." The inclusion of "Transgender" in this rights movement was the result of vocal insistence on the part of a newly empowered transgender leadership. Author's interviews with Phyllis Randolph Frye and Leslie Feinberg, April 1993.

88. Estimates of the number of transsexuals worldwide vary greatly. The most conservative estimate, based on DSM-IIIR statistics, would be just over 100,000 persons. DSM-IIIR, *supra* note 8 at 75. Interestingly, however, "[t]here seems to be a relation between the openness, the level of acceptance by society of transsexualism and the prevalence of transsexualism." J. Doek, *General Report* 4, XXIIIrd Colloquy on European Law, TRANSSEXUALISM, MEDICINE AND THE LAW (Amsterdam 1993). A medium range estimate, based on the incidence of transsexualism in Singapore, which has a high level of acceptance for transsexuals, would be over 1,000,000 persons. *Id.* If one assumes that there are ten to one hundred times as many transsexuals that do not seek medical assistance for expression of their sexual identity as do desire such treatment, then there may be as many as 10,000,000 to 100,000,000 transsexuals worldwide. In some countries more of the transsexuals are female-to-male than male-to-female, but both varieties are always present. *Id.*