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Criminal Procedure--Admission of Testimony Obtained in Violation of Miranda for Impeachment Purposes, Even Though Not Barred by the Federal Constitution, Infringes California Constitution's Right against Self-Incrimination

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RECENT DEVELOPMENTS

CRIMINAL PROCEDURE—ADMISSION OF TESTIMONY OBTAINED IN VIOLATION OF *Miranda* FOR IMPEACHMENT PURPOSES, EVEN THOUGH NOT BARRED BY THE FEDERAL CONSTITUTION, INFRINGES CALIFORNIA CONSTITUTION'S RIGHT AGAINST SELF-INCRIMINATION. *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

After a four month marital separation, Robert Disbrow confronted his wife at the home of Kathleen Pairis. During the argument that developed when he tried to remove his wife from the house, Disbrow shot and killed her and Pairis. Five days later, Disbrow was arrested and given the warnings required by *Miranda v. Arizona*.[1] Even though he initially said that he wished to say nothing until consulting his attorney, Disbrow later made inculpatory statements after being told they could not be used against him. When Disbrow testified at trial that the two women were shot in self-defense, his admissions were used to impeach his testimony and he was convicted. On appeal, he argued that the admission of these statements was reversible error because they were involuntary under the *Miranda* requirement that all questioning cease after a suspect indicates his desire to remain silent.[2] In *People v. Disbrow*,[3] the Supreme Court of California agreed with Disbrow's argument and reversed his conviction. In doing so it became one of the few

1. 384 U.S. 436 (1966).

2. Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes the privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Id. at 473-74 (footnote omitted).

3. 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

courts[4] to reject the rationale of *Harris v. New* York,[5] which many commentators[6] felt undermined the requirements of *Miranda.*

In *Harris*, the defendant, charged with two sales of narcotics, took the stand to deny the sale of one bag of heroin and to explain that a second bag contained only baking powder. Over objection, the state was permitted to impeach Harris with inculpatory statements he had made without the benefit of *Miranda* warnings.[7] The United States Supreme Court affirmed Harris's conviction, relying primarily on *Walder v. United States.*[8] In that case the Court held that evidence obtained through an illegal search and seizure was admissible to impeach Walder's testimony on direct examination concerning matters collateral to the crimes with which he was charged. Harris was impeached by statements "bearing more directly on the crimes charged" than those impeaching Walder, and exclusion from the state's case in chief was based on a violation of the fifth amendment, rather than the fourth amendment. Nevertheless, the Supreme Court concluded that there was no "difference in principle" between *Walder* and *Harris.*[9] Reasoning that

4. United States v. Jordan, 44 C.M.R. 44 (1971); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975). *Cf.* State v. Hass, 267 Ore. 489, 517 P.2d 671 (1973), *reversed sub nom.* Oregon v. Hass, 420 U.S. 714 (1975) (Oregon Supreme Court's reliance on independent state grounds unclear); Butler v. State, 493 S.W.2d 190 (Tex. Crim. App. 1973) (statutory bar of use of statements obtained in violation of *Miranda* for impeachment purposes valid).

5. 401 U.S. 222 (1971).

6. *See, e.g.,* Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198 (1971) [hereinafter cited as Dershowitz & Ely]; Comment, *The Impeachment Exception to the Constitutional Exclusionary Rules,* 73 COLUM. L. REV. 1476 (1973) [hereinafter cited as *Impeachment Exception*]; *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 38, 44-53 (1971) [hereinafter cited as *Supreme Court*]; 24 VAND. L. REV. 843 (1971).

7. In Johnson v. New Jersey, 384 U.S. 719 (1966), the Supreme Court held that *Miranda* requirements were applicable in cases like Harris's, in which the offending interrogation occurred before *Miranda* and the related trial followed the decision. *Supreme Court, supra* note 6, at 44 n.4.

8. 347 U.S. 62 (1954).

9. 401 U.S. at 225. In so holding, the Court ignored Agnello v. United States, 269 U.S. 20 (1925) (evidence seized in violation of the fourth amendment and directly related to the alleged crime held inadmissible to impeach statements elicited from the defendant on cross-examination).

Even assuming the *Walder* exception to *Agnello* was justified, extension of the exception to include fifth amendment violations was tenuous. First, an argument could be made that demonstrative evidence seized in violation of the fourth amendment is inherently more trustworthy than an admission obtained in violation of *Miranda,* and thus more readily justifies subordinating constitutional interests to those of truth determination. *See Impeachment Exception, supra* note 6, at 1482 n.48. Second, unlike the fourth amendment, the fifth amendment apparently requires that testimony obtained as a result of its violation be excluded at trial. *Compare* Miranda v. Arizona, 384 U.S. 436, 476-77 (1966) *with* Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring). *See also* Dershowitz & Ely, *supra* note 6, at 1214-15.

"[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent utterances,"[10] the Court upheld Harris's impeachment. The only limitation placed on the use of such statements was that the "trustworthiness of the evidence satisfy legal standards."[11]

The California Supreme Court adopted the *Harris* rationale in interpreting the California Constitution's right against self-incrimination[12] in *People v. Nudd.*[13] Consistent with the suggestions of several United States Supreme Court Justices,[14] the dissenting opinion, however, argued that the question presented should be evaluated apart from *Harris* on independent state grounds, allowing the state of California to require a stricter rule than the Supreme Court.[15] Agreeing that prevention of perjury was desirable, but fearful that criminal defendants would be deterred from taking the stand, the dissent argued that the introduction of statements procurred in violation of *Miranda* should not be allowed for any purpose.

Less than two years later, the dissent's reasoning in *Nudd* was adopted by a majority of the California Supreme Court in *Disbrow*, giving California defendants greater protection than required by the United States Supreme Court. While the *Nudd* court accepted *Harris* at face value, the *Disbrow* court critically approached the issue using a two-step analysis, first examining the authority relied on in *Harris* and, secondly, determining the desirability of a *Harris* result. Carefully reading *Harris* and *Walder*, the court rejected the "no difference in principle" view under which the United States Supreme Court had equated the use of evidence obtained in violation of the fourth amendment to impeach a defendant's testimony relating to collateral matters to evidence obtained in violation of the fifth amendment relating directly to the crime charged.

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10. 401 U.S. at 226.
11. *Id.* at 224.
12. CAL. CONST. art. 1, § 15.
13. 12 Cal. 3d 204, 524 P.2d 844, 115 Cal. Rptr. 372 (1974).
14. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting).
15. 12 Cal. 3d at 20, 524 P.2d at 848, 115 Cal. Rptr. at 376 ("[T]he California exclusionary rule was and is of wholly independent status, not subject to the shifting sands of federal court interpretations . . . .").

The Supreme Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . [Its] only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). *See generally* Cooper v. California, 386 U.S. 58, 62 (1967); C. WRIGHT, FEDERAL COURTS 542-48 (3rd ed. 1976).

The court also found that both the language and spirit of *Miranda* were at odds with the *Harris* rule. Even though dismissed as dictum in *Harris*, *Miranda* specifically contemplated and rejected the idea that illegally obtained statements could not be used for impeachment purposes.[16] Moreover, the court felt that *Miranda's* "principal objective," the establishment of "safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive influences, psychological or physical, had been employed to secure admissions or confessions"[17] was frustrated by *Harris*. By allowing the admission of confessions as long as they were not involuntary, *Harris* returned courts to an administratively unworkable standard, under which the totality of the circumstances in each case had to be evaluated.[18]

Having determined that *Harris* was unsupported by the authority relied on by the Supreme Court, the *Disbrow* majority gave three reasons why the decision was salutory, all of which were contested by the dissent. First, the majority argued that juries, even given a limiting instruction, would use the inculpatory statements as substantive evidence of guilt rather than merely as evidence of the defendant's credibility:

> To instruct a jury that they are not to consider expressions of complicity in the charged crime as evidence that the speaker in fact committed the charged crime, but only for the purpose of demonstrating that he was probably lying when he denied committing the charged crime, would be to require, in the words of Learned Hand, "a mental gymnastic which is beyond, not only [the jury's] power, but anybody's else."[19]

The dissent was unpersuaded by this reasoning and argued that the fear was speculative because no empirical evidence existed on the question.

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16. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in *any* manner; it does not distinguish degrees of incrimination. . . . [N]o distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory.". . . [S]tatements merely intended to be exculpatory by the defendant are often used *to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word* and may not be used without the full warnings and effective waiver required for any other statement.

384 U.S. at 476-77 (emphasis added).

17. 16 Cal. 3d at 111, 545 P.2d at 278, 127 Cal. Rptr. at 366, *quoting* People v. Fioritto, 68 Cal. 2d 714, 717, 441 P.2d 625, 626, 68 Cal. Rptr. 817, 818 (1968).

18. *Supreme Court, supra* note 6, at 52-53.

19. 16 Cal. 3d at 112, 545 P.2d at 279, 127 Cal. Rptr. at 367, *quoting* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (brackets in original).

The majority's next argument was that admissibility of statements such as those involved in *Disbrow* left police with little incentive to comply with *Miranda*'s requirements. Implicit in the court's reasoning was the assumption that *Harris* forces a defendant to make an unreasonable choice. If he chooses not to testify in his own behalf, a strategy likely to be more effective than any other, the state is given a real advantage. On the other hand, if the defendant does testify, his coerced confession will be heard by the jury.[20] The dissent responded that *Miranda* requirements would still be met because the state's primary motive was to gather evidence for use in its case in chief, which was still barred if *Miranda* were violated.

The last reason advanced was that by allowing such statements to be introduced, courts participated in illegal conduct: "Out of regard for its own dignity as an agency of justice and a custodian of liberty [courts] should not have a hand in such 'dirty business.'"[21] The dissent's reply was that by adopting a rule under which perjured testimony would not be exposed, courts engage in a dirtier business.

While most state courts have accepted the *Harris* rule,[22] only a fraction of those considering the issue have clearly rejected the argument that the relevant state constitution requires more stringent enforcement of *Miranda* than does the federal constitution.[23] In the majority of the cases accepting the *Harris* rationale, the case was uncritically accepted as controlling.[24] The reasoning of the *Disbrow* dissent was representative of courts that did consider the possibility of rejecting the *Harris* rationale on an independent state ground. Like the *Disbrow* dissent, those courts apparently followed *Harris* because they accepted the United States

20. 16 Cal. 3d at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367. *See* Harris v. New York, 401 U.S. 222 (1971) (Brennan, J., dissenting); Riddell v. Rhay, 404 U.S. 974 (1971) (Douglas, J., dissenting from denial of writ of certiorari); Commonwealth v. Woods, 455 Pa. 1, 7, 312 A.2d 357, 360 (Sup. Ct. 1973) (Roberts, J., concurring) (defendant's decision in *Harris* situation described as a "grisly Hobson's choice"); Dershowitz & Ely, *supra* note 6, at 1220-21. *Cf.* State v. Kish, 28 Utah 2d 430, 503 P.2d 1208 (1972) (defendant's challenge of *Harris* impeachment rejected because he was warned prior to trial that his statements given without *Miranda* warnings could be used to impeach his testimony).

21. 16 Cal. 3d at 113, 545 P.2d at 279, 127 Cal. Rptr. at 367.

22. *See, e.g.*, State v. Johnson, 109 Ariz. 70, 505 P.2d 241 (1973); Jorgenson v. People, 174 Colo. 144, 482 P.2d 962 (1971), *overruling* Velarde v. People, 171 Colo. 261, 466 P.2d 919 (1970).

23. *E.g.*, State v. Retherford, 270 So. 2d 363 (Fla. 1972); Commonwealth v. Harris, 364 Mass. 236, 303 N.E.2d 115 (1973); State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975).

24. *E.g.*, Riddell v. Rhay, 79 Wash. 2d 248, 484 P.2d 907, *cert. denied*, 404 U.S. 974 (1971).

Supreme Court's assertion that exclusion of prior testimony in a *Harris* situation is appropriate because "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[25] As a result, these courts found that adequate protection was provided by limiting instructions and the trial judge's authority under the rules of evidence to exclude testimony where its probative value is outweighed by the risk that it might mislead or unduly prejudice the jury.[26] Unlike the suggestion of the *Disbrow* dissent, no court has been persuaded by the argument that state courts should defer to the Supreme Court's interpretation of similar constitutional language because it "promotes uniformity and harmony in an area of the law which particularly and uniquely requires them."[27]

Disbrow, then, even though one of the few cases to reject the *Harris* rationale, also appears to be one of the few to consider independent state constitutional grounds. While in the minority, its retreat from *Nudd* and its critical examination of the *Harris* rationale may reflect a trend toward wider reappraisal of the implications of *Harris*.[28] If such reappraisal is occurring, *Disbrow's* use of the California Constitution[29] illustrates a means by which most state courts that have considered the problem, as well as those that have yet to face it, can safeguard the rights guaranteed criminal defendants by *Miranda*.[30]

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25. 401 U.S. at 325. *See, e.g.*, Commonwealth v. Harris, 364 Mass. 236, —, 303 N.E.2d 115, 117 (1973).

26. *E.g.*, State v. Miller, 67 N.J. 229, 337 A.2d 36, 39 (1975).

The results reached in these cases are tellingly susceptible to the criticism voiced in *Disbrow* that limiting instructions are ineffective to prevent misuse of the evidence offered for impeachment. *See, e.g.*, Criss v. State, 507 P.2d 935, 937 (Okla. Crim. App. 1973) ("[T]he statement was admitted for the purpose of impeaching defendant's denial that he had admitted committing the robbery involved.")

27. 16 Cal. 3d at 119, 545 P.2d at 284, 127 Cal. Rptr. at 372 (Richardson, J., dissenting). *But see* Butler v. State, 493 S.W.2d 190 (Tex. Crim. App. 1973) (Roberts, J., dissenting).

28. *See* People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545 (1974) (Goldenlush, J., dissenting); Johnson v. State, 258 Ind. 683, 284 N.E.2d 515 (1972) (DeBruler & Prentice, JJ., dissenting separately); Commonwealth v. Mahnke, — Mass. —, 335 N.E.2d 660, 690 (1975) (Kaplan & Hennessey, JJ., dissenting separately); State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975) (Pashman & Clifford, JJ., dissenting separately).

29. A stricter rule could also be justified under state constitutional provisions guaranteeing due process. *See* State v. Miller, 67 N.J. 229, —, 337 A.2d 36, 43-44 (1975) (Pashman, J., dissenting).

30. *See* Baxter v. Palmigiano, 425 U.S. 308, 338-39 (1976) (Brennan, J., dissenting).

HUSBAND AND WIFE—MARRIAGE OF MALE AND SURGICALLY REASSIGNED TRANSSEXUAL HELD VALID. *M.T. v. J.T.*, 140 N.J. Super. 77, 355 A.2d 204, *certification denied* 71 N.J. 345, 364 A.2d 1076 (1976).

M.T. v. J.T.[1] involved the ceremonial marriage of a postoperative male-to-female transsexual[2] to a male, desertion by the husband, and an ensuing suit for support by the wife. Defendant husband had known and lived with the plaintiff before her sex reassignment surgery, had consummated the marriage, and provided support for over two years before abandoning the home.[3]

The New Jersey Superior Court accepted the universal premise that a lawful marriage involved a union between persons of the opposite sex.[4] Thus, the issue before the court was "whether the marriage between a male and a post-operative transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman."[5] In upholding the validity of the marriage and granting the support requested, the court determined that human sexuality embraced gender as well as anatomy:[6] "[F]or marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards."[7]

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1. 140 N.J. Super. 77, 355 A.2d 204, *certification denied*, 71 N.J. 345, 364 A.2d 1076 (1976).

2. Plaintiff's expert medical doctor, a specialist in gender identity, defined a transsexual as:

> [A] person who discovers sometime, usually very early in life, that there is a great discrepancy between the physical genital anatomy and the person's sense of self-identity as a male or as a female. . . . [T]he transsexual is one who has a conflict between physical anatomy and psychological identity or psychological sex.

Id. at —, 355 A.2d at 205. A similar definition was given at the trial by a psychologist, who characterized a transsexual as "someone whose physical anatomy does not correspond to their [*sic*] sense of being, to their [*sic*] sense of gender." *Id.* at —, 355 A.2d at 206. See also Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282, 282-83 (1968).

3. 140 N.J. Super. at —, 355 A.2d at 205.

4. *Id.* at —, 355 A.2d at 207-08. See note 10 *infra* and accompanying text.

5. *Id.* at —, 355 A.2d at 208.

6. *See id.* at —, 355 A.2d at 209. Gender was defined as "one's self-image, the deep psychological or emotional sense of sexual identity and character." *Id.*

7. *Id.* The court distinguished two New York cases, B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974) and Anonymous v. Anonymous, 67 Misc. 2d 982,

In *Loving v. Virginia*,[8] the United States Supreme Court acknowledged that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . . Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[9] This "vital personal right," however, has been strictly limited to heterosexual relationships.[10] The problem faced by the New Jersey court was deciding on a standard to determine sex.

Two tests previously employed as a means for legally determining sex were considered and rejected by the court.[11] The English view, enunciated in *Corbett v. Corbett*,[12] holds that biological sex at the time of birth is, for purposes of marriage, the critical factor in ascertaining the sex of an individual.[13] In *Corbett*, which also involved the marriage of a surgically reassigned transsexual, the court enumerated four characteristics to be used in discovering a person's biological sex: "(i) Chromasomal factors, (ii) Gonadal factors (i.e. presence or absence of testes or ovaries), (iii) Genital factors (including internal sex organs), [and]

325 N.Y.S.2d 499 (Sup. Ct. 1971), which involved marriages by transsexuals. *See* 140 N.J. Super. at —, 355 A.2d at 209-10. B. v. B. involved a transsexual who was surgically reassigned as a male. The New York court found that the surgery was unsuccessful, since the transsexual had not received any male organs and was therefore incapable of sexual performance as a male. 78 Misc. 2d at —, 355 N.Y.S.2d at 717. This marriage could arguably have been annulled on the basis of impotence since plaintiff wife apparently lacked knowledge of defendant's condition at the time she consented to the marriage. *See* 78 Misc. 2d at —, 355 N.Y.S.2d at 713-14. See also note 18 *infra*. Finding no marriage in Anonymous v. Anonymous, the New York court noted that the parties had never lived together nor engaged in sexual intercourse. 67 Misc. 2d at —, 325 N.Y.S.2d at 500. It further appeared that sex reassignment surgery did not take place until after the "marriage." *See id.* Unlike the New York cases, the male-to-female reassignment surgery in *M.T.* produced a sterile female, capable of engaging in sexual intercourse in that role. *See* 140 N.J. Super. at —, 355 A.2d at 206. Furthermore, the reassignment occurred before the marriage and with defendant's knowledge. *Id.* at —, 355 A.2d at 205.

8. 388 U.S. 1 (1967).

9. *Id.* at 12 (citations omitted). *See also* Roe v. Wade, 410 U.S. 113, 152 (1973); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

10. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972); B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (Sup. Ct. 1974); Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (Sup. Ct. 1971); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974). Most state statutes, as the above cases illustrate, do not expressly require that the partners of a proposed union be of the opposite sex. Oklahoma, apparently in the minority, provides by statute that a marriage can only be entered into by persons of the opposite sex. See OKLA. STAT. tit. 43, § 3 (Supp. 1976).

11. See 140 N.J. Super. at —, 355 A.2d at 208-10.

12. [1970] 2 All E.R. 33 (P., P. Div'l Ct.).

13. *Id.* at 48-49.

(iv) Psychological factors."[14] When the first three factors concur, the sex of the individual is established under this test, notwithstanding the intervention of medical alterations.[15] Two New York birth certificate cases[16] offer an example of the second test. While also emphasizing a physical conceptualization of a person's sex, it is narrower than the *Corbett* standard in that the chromosomal characteristic of the human physiological makeup is the only relevant indicator of sex.[17]

Both tests leave the postoperative transsexual in a state of limbo; he is legally incapable of assuming a new sex role in marriage, although he can only engage in sexual intercourse in that role.[18] Furthermore,

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14. *Id.* at 44. Some of the expert witnesses in *Corbett* also urged that hormonal or secondary sexual characteristics be considered. *Id.*

15. *Id.* at 48. In *Corbett*, while the male-to-female sex reassignment took place before the marriage, the facts were complicated since the petitioner husband was apparently a transvestite and there was conflicting evidence as to whether the parties engaged in sexual relations. *See id.* at 34-40.

16. The court noted two New York cases, Hartin v. Director of Bureau of Records, 75 Misc. 2d 229, 347 N.Y.S.2d 515 (Sup. Ct. 1973) and Anonymous v. Weiner, 50 Misc. 2d 380, 270 N.Y.S.2d 319 (Sup. Ct. 1966), which upheld refusals to change the sex designation on the birth certificates of two transsexuals who had undergone sex reassignment surgery. See 140 N.J. Super. at —, 355 A.2d at 210.

17. The Board of Health of the City of New York, when confronted with the problem, sought assistance in formulating policy from the New York Academy of Medicine. A committee from the Academy concluded that

> 1. male-to-female transsexuals are still chromosomally males while ostensibly females;
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> 2. it is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation.
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> . . . .
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> . . . The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud.

Anonymous v. Weiner, 50 Misc. 2d 380, —, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966). See also Hartin v. Director of Bureau of Records, 75 Misc. 2d 229, —, 347 N.Y.S.2d 515, 517 (Sup. Ct. 1973). In reliance on these conclusions, *inter alia*, the Board of Health voted in 1965 not to allow a reassigned transsexual to change the sex designation on the birth certificate. Anonymous v. Weiner, 50 Misc. 2d at —, 270 N.Y.S.2d at 322; Hartin v. Director of Bureau of Records, 75 Misc. 2d at —, 347 N.Y.S.2d at 518.

In opposition to the approach taken by New York City, some states have statutorily authorized the change of sex on a transsexual's birth certificate after reassignment surgery has taken place. *See, e.g.*, ARIZ. REV. STAT. § 36-326(A)(4), (B) (Supp. 1976); ILL. ANN. STAT. ch. 111½, § 73-17(1)(d), (2)(a) (Smith-Hurd Supp. 1977); LA. REV. STAT. ANN. § 40:61 (Supp. 1977). *See generally*, Holloway, *Transsexuals—Their Legal Sex*, 40 U. COLO. L. REV. 282 (1968); Comment, *The Law and Transsexualism: A Faltering Response to A Conceptual Dilemma*, 7 CONN. L. REV. 288 (1975) [hereinafter cited as *The Law and Transsexualism*].

18. *See* notes 12-17 *supra* and accompanying text. In the reassigned sex, the male-to-female transsexual, while sterile, is still capable of engaging in sexual intercourse. Comment, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 970 (1971) [hereinafter cited as *Sex Reassignment*], citing W. MASTERS & V. JOHNSON, HUMAN SEXUAL RESPONSE 101-10 (1966); Comment, *Transsexuals in Limbo: The*

both tests neglect the medical and psychological realities involved in classifying the transsexual. While the psychological self concept and the various biological sex features are consistent in the normal person, divergence of these factors are associated with the transsexual.[19] The medical profession, in recognition of the difficulties sometimes encountered in sex classification, relies on several factors to discern sex. These include chromosomal makeup; gonadal structure; hormonal, internal, and external morphological structure; assignment at birth and psychosexual aspects.[20]

It should be noted, however, that a mechanical application of the preceding factors is as inadequate in determining the sex of an individual as the legal tests which have been applied. To illustrate, reliance on a simple majority of agreeing factors incorrectly assumes that each aspect of human sexuality is of equal significance.[21] Furthermore each factor, considered alone, does not solve the problems presented by persons with sexual abnormalities.[22]

In view of the difficulties in the use of previous legal and medical

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Search For a Legal Definition of Sex, 31 MD. L. REV. 236, 240 (1971) [hereinafter cited as *Transsexuals in Limbo*]. *Contra*, Corbett v. Corbett, [1970] 2 All E.R. 33, 49 (P., P. Div'l Ct.). Since sterility per se is generally not a basis for annulment, *see, e.g.*, T. v. M., 100 N.J. Super. 530, 242 A.2d 670 (1968); Lapides v. Lapides, 254 N.Y. 73, 171 N.E. 911 (1930); H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.12 (1968), the marriage of a reassigned male-to-female transsexual would be valid if the "new" sex was given legal recognition. However, since the two tests noted above would deny recognition of the sex harmonization of the transsexual, not only would the marriage be condemned on the basis that the parties were of the same sex, see note 10 *supra*, but possibly could be held invalid on the basis of impotence.

The female-to-male transsexual may pose a different problem. Only limited success has been achieved with the construction of male organs; recipients have been unable to engage in normal sexual relations. *Sex Reassignment, supra* at 970 n.39; *The Law and Transsexualism, supra* note 17, at 293. This inability may lead to annulment on the basis of impotence even if legal recognition is given to the reassigned sex. Thus, for the female-to-male transsexual who is impotent as well as sterile, M.T. v. J.T. can only provide a foundation for recognition of a new sexual identity; it may not protect his marriage from attack.

19. See notes 2, 17 *supra*.

20. *Sex Reassignment, supra* note 18, at 965, citing Moore, *Recent Developments Concerning the Criteria of Sex and Possible Legal Implications*, 31 MAN. B. NEWS 104, 104-10 (1959); *The Law and Transsexualism, supra* note 17, at 290-91, citing Money, *The Sex Chromatin and Psychosexual Differentiation*, in THE SEX CHROMATIN 434-35 (K. Moore ed. 1966).

21. *Sex Reassignment, supra* note 18, at 966.

22. *Id.* at 966-69. *See* Bowman & Engle, *Sex Offenses: The Medical and Legal Implications of Sex Variations*, 25 LAW & CONTEMP. PROB. 292 (1960). In M.T. v. J.T., it should be emphasized, the court focused on the converging of the psychological and medically altered physical aspects of sexual identity rather than concentrating on one to the exclusion of the other. *See* N.J. Super. at —, 355 A.2d at 209.

standards developed to measure and define human sexuality, *M.T. v. J.T.* takes an innovative, realistic, and humane approach to the sexual identity of transsexuals. While the court recognizes that an anatomical or physical test of sex is significant, and at times indispensable,[23] it also acknowledges that for purposes of marriage "sex in its biological sense should [not] be the exclusive standard."[24] Rather, human sexuality should be determined by the physical, psychological, and emotional outlook of the individual.[25] While the medically reassigned transsexual is sterile, she is functionally a member of her "new" sex, possessing the secondary characteristics of that sex.[26] Her anatomy conforms to her psychological self image and only by medical examination can the original anatomical sex be determined.[27]

M.T. v. J.T. recognizes the dilemma of the preoperative transsexual, whose anatomical and emotional characteristics are at odds, and sanctions the medical attempt to, if not cure the problem, at least provide a treatment. The New Jersey court's approach provides financial protection to the postoperative transsexual who marries, as well as furthering a sense of self satisfaction and well being.[28] While the question of sexual identity and marriage may be charged with emotion, there is no overriding societal interest which should operate to deny recognition of the harmonization of the transsexual's anatomical and psychological aspects of sexuality. As the court observed:

> If . . . sex reassignment surgery is successful and the post-operative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as a male or female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent that person's identification at least for purposes of marriage to the sex finally indicated. . . .
>
> . . . [S]uch an individual would have the capacity to enter into a valid marriage relationship with a person of the

23. 140 N.J. Super. at —, 355 A.2d at 208.
24. *Id.* at —, 355 A.2d at 209.
25. *Id.*
26. *Sex Reassignment, supra* note 18, at 970.
27. *Id.*
28. While the well-being of transsexuals is not the primary concern of the courts, it was a beneficial by-product of the M.T. v. J.T. decision. *See Transsexuals in Limbo, supra* note 18, at 239, citing Randell, *Preoperative and Postoperative Status of Male and Female Transsexuals*, in TRANSSEXUALISM AND SEX REASSIGNMENT 379 (R. Green & J. Money eds. 1969). Randell notes that postoperative transsexuals generally improve "in their adjustment to society and in their own feelings of well-being and satisfaction." *Id.*

> opposite sex. . . . In so ruling we do no more than give legal effect to a *fait accompli*, based upon medical judgment and action which are irreversible.[29]

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29. 140 N.J. Super. at —, 355 A.2d at 210-11. The court only identified the potential for fraud, noted in the birth certificate cases, note 17 *supra*, as a possible societal interest. *See id.* at —, 355 A.2d at 210. The court answered that interest by repeating the trial court's observation: "The transsexual is not committing a fraud upon the public. In actuality she is doing her utmost to remove any false facade." *Id. See also In re* Anonymous, 57 Misc. 2d 813, —, 293 N.Y.S.2d 834, 838 (Civ. Ct. 1968).

However, other interests of the state in the institution of marriage can be identified. In Skinner v. Oklahoma, 316 U.S. 535 (1942), marriage, as a "basic civil right," was linked to the propagation of society. *See id.* at 541. Since the surgically reassigned male-to-female transsexual is sterile, see note 18 *supra*, an argument could be made that her right of marriage is of less significance than that of the "normal" male-female union, thereby providing a basis for different treatment. *See* Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972). The public interest was also raised in Reynolds v. United States, 98 U.S. 145 (1878). There the Supreme Court held that the Mormon institution of polygamy could be constitutionally forbidden. Identifying the state interest, the Court declared:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. . . . [P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Id. at 165-66. *See* Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the . . . [state]"). Recognition of marriages of sterile reassigned transsexuals could possibly present the danger of creating a society incapable of perpetuating itself. While that danger may seem remote, procreation is nonetheless an interest that the public possesses in the institution of marriage. *See* Skinner v. Oklahoma, 316 U.S. 535 (1941).

The existence of the state's interest in marriage does not, however, demand a different result in the case. First of all, it has been noted that sterility alone does not affect the validity of a "normal" male-female marriage. See note 18 *supra*. Additionally, it would appear that the right of marriage has been separated from procreation. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). Finally, an argument can be made that the decision to harmonize the attributes of sexual identity, like other decisions affecting a person's bodily autonomy, is within the protection of privacy; therefore, the state's interest must be more compelling than the possibility of a barren society before the marriage of a transsexual can be invalidated. *See* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). *See also Transsexuals in Limbo, supra* note 18, at 244-47.