

Introduction to the Symposium, (De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law

Jane Allison Sitton

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INTRODUCTION

JANIE ALLISON SITTON*

This Symposium, *(De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law*, is the first of its kind devoted entirely to legal issues affecting the transgender¹ community. That a prominent law journal would devote its Symposium solely to transgender issues is noteworthy in and of itself. That a journal ostensibly about *women* and the law would do so is even more remarkable. That decision by the Editors of this Journal reflects an understanding of the extent to which the legal issues affecting women and transgendered persons—as well as gay, lesbian or bisexual individuals—are related.

Those connections have not always been fully recognized or appreciated. The concept of “gender” traditionally has been thought to describe two alternative sets of socially constructed behaviors and expectations (labeled “masculine” and “feminine”) attributed to and usually adopted by an individual based on his/her sex (either “male” or “female”), a status generally assigned at birth and viewed as being biologically determined.² “Gender identity” concerns a person’s self-identification as one (“man”) or the other (“woman”) of these two groups. Individuals assigned one gender by society but identifying as the other were labeled “transsexuals” or, later, “transgenderers.”³ The concept of “sexual orientation” was, and in the mainstream still is, anchored around the idea of sexual attraction: “homosexuals” are oriented or attracted to individuals of the same sex, while “heterosexuals”

* Trial Attorney, Civil Rights Division, United States Department of Justice. The views expressed in this Introduction are my own and do not necessarily represent those of the Justice Department. In 1999, I taught *Sexuality and the Law* as an Adjunct Professor of Law at the College of William and Mary. I wish to thank that school’s administration and faculty, as well as the Editors and Staff of this Journal, for organizing this Symposium and for their attention to transgender issues.

1. Here, I use the term “transgender” in its broadest sense to include all those who do not conform to traditional stereotypes of masculinity or femininity. By definition, then, the term includes intersexuals, who exhibit physical characteristics associated with both of the traditional sex categories.

2. See, e.g., Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1-2 (1995); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999).

3. See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 1 n.1, 3 n.b (1999). In addition to transsexuals, the category “transgender” includes “transvestites,” individuals “who derive[] pleasure from dressing in the garb of the ‘opposite’ sex.” *Id.* at 3 n.b.

prefer to have sexual relationships with members of the “opposite” sex. When recognized at all, “bisexuals” are those relatively unusual individuals who are attracted, or could be, to persons of “either” gender. Underlying each of the foregoing classifications is the traditional understanding of “sex” as a dimorphous and biologically determined characteristic of every human, which is either “male” or “female.” These two categories, generally considered mutually exclusive and all-encompassing, have been used to construct the others. Even “intersexual” persons—individuals who do not conform to “either” sex because they demonstrate physical characteristics of “both”⁴—are defined with reference to this binary scheme.

These relationships are what led this *Journal of Women and the Law* to focus on transgenderism and intersexuality. The Editors recognized a connection between the way the law treats, or should treat, transgenders, and the way the law affects, or should affect, women. As often happens, focusing on the marginal rather than the central group brings into focus more clearly the situation confronting both. In this case, it also reveals the fragility of these categories, leading inevitably to the conclusion that sex, gender, gender identity and sexual orientation are more fluid, both among and within individuals, than generally acknowledged.

Despite this inherent ambiguity, sex and gender—and their construction as rigid binaries—play a profound role in our society, one routinely underestimated and overlooked. This lack of awareness likely stems from the fact that the social constructions that operate most effectively frequently are the most invisible. Thus, the constructs of “man” and “woman,” and the “masculine” and “feminine” customs surrounding them, are so fundamental that their existence and influence often go unrecognized.

As one example of the centrality of gender binarism in our culture, when a baby is born, “Is it a boy or girl?” is typically the first question to arise. Despite longstanding medical evidence that many human beings biologically are neither, or both,⁵ the answer given to that question is rarely “I don’t know.” Nor is it: “Let’s wait and see how the child identifies.” Society’s adherence to gender binarism is further illustrated by our difficulty in even

4. *Id.*

5. See generally ALICE DOMURAT DREGER, *INTERSEX IN THE AGE OF ETHICS* (1999); SUZANNE J. KESSLER, *LESSONS FROM THE INTERSEXED* (1998). Recent medical literature estimates that between one and four percent of the population is intersexed. Greenberg, *supra* note 2, at 267-68.

conceptualizing another human being without ascribing a gender to that person. Likewise, because English has no gender-neutral pronoun to describe animate beings, we are virtually incapable of discussing another person without attributing a masculine or feminine gender. The object of discussion almost inevitably becomes “he” or “she,” neither (or both) of which may be descriptive. Even those individuals who arguably transgress gender norms the most—the transsexuals who consistently identify with and present a gender different than the one to which they were assigned—typically adhere to a traditional gender role, albeit not the one most consistent with their personal biology.⁶ With regard to sexual orientation, there is no category that suitably describes an orientation independent of binary gender categories.⁷ So-called “bisexuals,” the group that arguably discriminates on the basis of gender least, are labeled explicitly by referring to the two traditional sex categories.

Focusing on the legal issues affecting transgenders has the salutary effect of increasing awareness of the discrimination faced by members of that community. More fundamentally, such an approach advances our understanding of the profound role of gender and gender binarism in a way that considering women, or gender, alone would not. Transgenderism and intersexuality force us to rethink many of the basic assumptions and constructs on which our society and laws are based. That knowledge can then be used to enhance the ability of all people to express their gender and sexuality as they choose. Additionally, it can foster the development of a gender jurisprudence which recognizes that such expression comes not in one of two forms, but rather in a myriad of forms.

The articles that follow discuss various strategies for achieving that goal. They represent a thoughtful and provocative collection of ideas that begin to deconstruct gender binarism and move us toward a more inclusive and reflective gender jurisprudence. Jennifer Levi proposes a litigation strategy for securing trans rights based on the approach taken by Charles Hamilton Houston in his effort to achieve equal rights for African Americans. The Paisley Currah and Shannon Minter article discusses recent efforts to enact transgender-protective statutes in jurisdictions within the United States. The Anthony E.

6. “Drag queens,” male performers who dress and act as women, are a good example.

7. The more transgender-inclusive terms “pansexual” and “omnisexual,” which are used sometimes, are not tied to the gender binary. However, both adjectives imply to some extent that an individual is attracted to any and everyone, which likely is not the case, and that the person is “all-sexual,” or nothing apart from her/his sexual orientation.

Varona and Jeffrey Monks article explores the relationship between sexual orientation and gender identity and discusses how Title VII of the Civil Rights Act of 1964 can protect gay, lesbian, bisexual and transgendered persons from employment discrimination. Finally, Phyllis Randolph Frye recounts the battles waged by transgenders for legal and social equality, and the irrational and discriminatory responses of courts, legislatures and society at large to those efforts.

Each of these authors suggests ways for transgenders to navigate the caselaw and statutes that have developed in this area of gender and sexuality law. Additionally, they propose ways to further develop this jurisprudence and its guiding principles, all of which center on deconstructing the traditional sex/gender binary. Rigid adherence to that binary has facilitated the sex discrimination faced by women, and sometimes by men as well. Individually and collectively, the following articles demonstrate that adherence to the binary is indefensible, because it fails to account for the vast array of gender non-conforming people who do not consistently express either "masculinity" or "femininity" in the stereotypical way.

This Symposium represents a tremendous development in the law of sexuality, sexual orientation, gender and gender identity. It will foster dialogue with the transgender community and focus attention on the efforts of that community to achieve equal rights under the law. That endeavor is one in which all people, regardless of their gender or gender identity, have a considerable stake.