Female by Operation of Law: Feminist Jurisprudence and the Legal Imposition of Sex

Matthew Gayle
FEMALE BY OPERATION OF LAW: FEMINIST JURISPRUDENCE AND THE LEGAL IMPOSITION OF SEX

INTRODUCTION

In 1949, Simone de Beauvoir shattered theories of sexual essentialism when she wrote, “one is not born, but rather becomes, a woman.” Since that time, feminist scholars and activists have generally differentiated between sex and gender, "with gender being to sex what masculine and feminine are to male and female." In other words, “[a]s most feminist theorists use the terminology, ‘sex’ refers to the anatomical and physiological distinctions between men and women; ‘gender,’ by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions.” The understanding of gender as culturally constituted represents an advance in feminist thinking over sexual essentialism, but this construction fails to question the origin of sexual categorization and the relationship that categorization has to the oft-referenced “anatomical and physiological distinctions” between those categorized as female and those categorized as male.

In America, as in nearly all other cultures, sexual categorization occurs under the auspices of the law. This categorization begins at birth, when each person is categorized as either male or female. Opportunities are limited, obligations are dictated, and every societal interaction operates through the context of that initial legally-mandated sexual categorization. This categorization as either male or female is generally accepted because it is understood

1. Sexual essentialism, as used here, refers to the belief that all female people are (or should be) naturally feminine, and all male people are (or should be) naturally masculine. See, e.g., SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHODOLOGICAL APPROACH 1 (1978).
4. Id. at 10.
5. Id.
9. See Grenfell, supra note 6, at 52.
as reflective of an external reality: we are male or we are female; legal categories of sex merely describe this understanding.10

THE MYTH OF BIOLOGICAL DIMORPHISM

The intelligibility of categorization as male or female is based upon several assumptions: that there are only two sexual categories, that the two categories are discrete and mutually exclusive, and that the difference between the two categories gives rise to meaning.11 Within the context of legal sexual categorization, the first two assumptions hold. There are only two legal sexual categories, and these categories are recognized through statutory and common law as discrete and mutually exclusive: a person may not be legally classified as both male and female or as neither.12 The final assumption, that sexual difference is meaningful, is much more contested.

Sexual categorization purports to divide human bodies into two groups and label individuals based upon membership to one group or another. The individual legal consequences of this division are not slight.13 Nevertheless, the determination of sex is arbitrary: possession of a penis (or an XY chromosome or testicles) is no more relevant to the legal consequences of maleness than is possession of a vagina (or an XX chromosome or ovaries).14 A penis has no inherent meaning; it is simply an organ. When an obstetrician, under auspice of state authority, identifies a newborn as possessing a penis and therefore labels the infant as “male,” the state, through

---

11. See Paisley Currah, The Other “Sex” in Lawrence v. Texas, 10 Cardozo Women’s L.J. 321, 323 (2004); see also Dunlap, supra note 8, at 1131.
12. Whether or not there should be more than two categories is outside the scope of this note. For an interesting discussion of this issue, see generally Dunlap, supra note 8. “Legal challenges to sex-based restrictions have not questioned the presumption that only two sexes exist. Instead, these challenges, while attacking the specific legal differentiations at issue in each case, have assumed and relied upon the correctness and accuracy of the two-sex presumption itself.” Id. at 1138 n.46.
13. See id. at 1131-39. In addition to the infinite social consequences, a person’s sex may legally determine how they may dress, where they attend school, what bathroom they may use, whom they may marry, whether they are subject to selective service in the armed forces, and whether they will be compelled to bear offspring they do not want. Id. This is important because “[w]hile interrogating the incoherence embedded in the state’s attempt to regulate the relationship between genitalia, gender identity, and gender expression, it is also vital that we not lose track of the material consequences of such regulation.” Paisley Currah, Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities, 48 Hastings L.J. 1363, 1367 (1997). See generally Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265 (1999).
14. See LORBER, supra note 10, at 38.
the obstetrician, imposes an external meaning of maleness upon the infant's body where no such meaning existed before.

In this way, the law "reinterprets physical features (in themselves as neutral as any others but marked by the social system) through the network of relationships in which they are perceived." All people are organized into one category or the other; people without a distinct penis or vagina are thrust into whichever category comes closest. Beyond the initial attribution of a sex, genitals (and chromosomes and gonads) are irrelevant to sex categories; what medical science has termed primary and secondary sex characteristics are actually neutral physical features that are rendered culturally meaningful only after a binary construction of sex is imposed upon them.

Professor Katherine Franke explains:

Indeed, it is almost ludicrous to maintain that sex discrimination, sexual identification, or sexual identity takes place on the level of biology or genitals. Yet the law continues to insist that they do and in so doing it continues to naturalize sexual dimorphism: the assumption that homo sapiens are divided into two natural kinds — male and female.

Based upon Franke's theory, we might reply to de Beauvoir that one is not born a woman, nor even born female; one is made a female (and consequently made a woman) through the operation of law.

DIFFERENCE AS JUSTIFICATION FOR SUBORDINATION

As mentioned above, this separation of people into two classes is premised upon the concept of difference: the belief that males and females are essentially and inexorably different and that this difference is itself meaningful. This difference does not exist, however, outside of a binary framework. The state does not respond to

16. See Suzanne J. Kessler, The Medical Construction of Gender: Case Management of Intersexed Infants, 16 SIGNS 3, 16, 18-19 (1990). Sex determination often depends upon the size of the penile/clitoral tissue regardless of the presence or absence of a vagina, the result being that only infants with fully developed penises are classified as male while all others are classified as female. SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 25-26 (1999); see also LORBER, supra note 10, at 38; Whittle, supra note 7, at 24.
17. Whittle, supra note 7, at 23.
19. Id.
20. See generally de BEAUVIOR, supra note 2.
pre-existing biological difference with sexual categorization; rather, it creates cultural difference by imposing sexual categorization onto otherwise meaningless physical traits. As one scholar argues, “there is no unambiguous sexual state of affairs outside of a discourse of power. A person’s sex becomes fixed by operation of a court order, not by virtue of an ambiguous natural order.” The sexual difference thus created becomes a basis for the hierarchical organization of society: the myth of legitimate sexual difference serves as justification for the wholesale subordination of the female.

All of society engages in this hegemonic attribution of meaning to meaningless bodies in the creation of sexed identities. The role of the law, however, in policing these identities is particularly striking, since it is through the law itself that individuals seek redress for discrimination on the basis of sex.

Attorneys and scholars have challenged the meanings of sexual categories imposed by law, expanding statutes such as Title VII, which prohibits employment “discrimination . . . on the basis of . . . sex,” to prohibit an increasingly broad range of disparate treatment. From initial cases of discrimination against women because they are women, feminist attorneys have expanded the purview of Title VII to include discrimination against men because they are men, same-sex discrimination against men and women, and discrimination against men and women because they do not meet their employer’s expectations based upon sex stereotypes. Some

21. Franke, supra note 18, at 52.
23. Hegemony is used here to refer to cultural or discursive power which is not unidirectional but coercive: power implicating the members of a given group in the propagation and perpetuation of their own oppression to the extent that they co-opt that power. See generally SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).
25. Id.
26. Although Title VII only applies to discrimination within the context of employment, it is used throughout this note as an example, partly because employment opportunity is an essential part of social equality, and partly because courts frequently cite Title VII jurisprudence as persuasive in the interpretation of other statutes referring to sex discrimination. See, e.g., Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000) (using Title VII to interpret the Equal Credit Opportunity Act); Schwenk v. Hartford, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (using Title VII as a guide to interpret the Gender Motivated Violence Act).
28. See, e.g., Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998) (“We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII.”).
appellate courts have also held that Title VII prohibits discrimination based upon the gender expression of transgender employees.\textsuperscript{30}

**STRATEGIES FOR CHANGE**

Each of these expansions of Title VII has been based upon a challenge to the meaning of the sexual categories imposed upon individuals by operation of law. Although protection has effectively expanded beyond merely the most egregious instances of disparate treatment based upon sex, women’s access to employment opportunities remains substantially limited.\textsuperscript{31} Arguably, this should not be surprising as “[a] built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference. Sex equality thus becomes a contradiction in terms, something of an oxymoron, which may suggest why we are having such a difficult time getting it.”\textsuperscript{32}

Through the arbitrary sexual classification of individuals and the creation of difference, the law continues to be complicit in the subordination of women. If attorneys wish to end this subordination, “[r]ather than challenging the [sexual] categories themselves, advocates . . . ought to have a long-term strategy of challenging the state’s prerogative to define those categories.”\textsuperscript{33} The remaining question is how to accomplish this.

In addressing this issue, this note focuses upon four primary areas: the policing of hierarchical boundaries by state actors, the separation of sex and gender within the law, sexual difference under Title VII, and the evolution of Title VII sex discrimination jurisprudence. The note will then discuss the continued subordination of women through the law of sexual differentiation and conclude with suggestions for possible feminist action.

**THE POLICING OF HIERARCHICAL BOUNDARIES**

The categorization of people is not limited to sex. As may be readily observed, people are also classified within American society

\textsuperscript{30} See, e.g., Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004); Rosa, 214 F.3d at 215-16; Schwenk, 204 F.3d at 1197.

\textsuperscript{31} Employment Standards Admin., Dep’t of Labor, Narrowing the Wage and Opportunity Gap for All Workers, http://www.dol.gov/esa/media/reports/ofccp/equal pay.htm (last visited Mar. 20, 2006) (“Despite great progress in education and work experience over the past several decades, women still do not earn the same pay as men. On average, women who work full-time earn only about 75 cents for every dollar that a man earns . . . .”).

\textsuperscript{32} MACKINNON, supra note 22, at 33.

\textsuperscript{33} Currah, supra note 13, at 1968.
based upon race, ethnicity, religion, and economic worth, among other things. The classifications within these categories are not mere taxonomic distinctions; they have great social consequence. In fact, the very purpose of the categorizations is difference: the creation of distinctions between groups that may be used to justify the subordination of one group to another. For example, racism would hardly have existed in America as it has without the persistent cultural belief that racial difference signifies an essential difference going beyond one's mere appearance. The existence and intelligibility of such categories within society requires that, as with sex, each person be readily classifiable within a particular category and be unable to move between different classifications. To return to the example of racism in America, racial prejudice against blacks would be clearly nonsensical if one could not differentiate blacks from whites, or if blacks could choose to become white.

SUMPTUARY LAWS, BLACK CODES, AND THE REQUIREMENT OF SEX DESIGNATION

This need for individual categorization has created, in both society and the law, an interest in policing the boundaries between identity categories. This anxiety with maintaining hierarchical order has been present throughout Western history. In medieval Europe, Elizabethan England, and colonial America, sumptuary laws—enforcing different dress codes for people of different economic classes—were intended to ensure clear class distinctions during times when economic change threatened to blur class lines. In other words, these dress code laws "sought to ensure social legibility and enforce social hierarchy." It is useful to begin this discussion with sumptuary laws; through these statutes, the law clearly sorts people by social class and then imposes restrictions and rights on people based upon that sorting. The artificiality of the categorization is perhaps most clear in the case of sumptuary laws. While most people recognize that

35. See, e.g., MARJORIE GARBER, VESTED INTERESTS: CROSS-DRESSING AND CULTURAL ANXIETY 25 (1992) (discussing this idea in the context of sumptuary laws).
36. See id. at 25-26 ("The ideal scenario — from the point of view of the regulators — was one in which a person's social station, social role, gender and other indicators of identity in the world could be read, without ambiguity or uncertainty."); Jennifer L. Levi, Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights, 7 WM. & MARY J. WOMEN & L. 5, 19 (2000).
37. GARBER, supra note 35, at 26; see also Levi, supra note 36, at 19.
class status is not an immutable characteristic, people, generally, and courts, particularly, ascribe to the view that race and sex are immutable characteristics. As a result, people who seem to cross between categories of race or sex produce an even greater anxiety than those crossing class categories under sumptuary laws.

The Black Codes, passed in a number of states following the ratification of the Thirteenth Amendment, ensured that "criminal laws were applied discriminatorily against blacks." Other discriminatory laws "included such punishments as lynching, castration, and beating for blacks who did not adhere to white-supremacist social norms." These laws were enacted in order to ensure that supposed differences between whites and blacks would remain legible even after slavery was abolished. Later, these "black codes became the framework for segregation statutes" that required separate public facilities for blacks and whites. Both black codes and social segregation laws were premised upon the belief that blacks were significantly different from whites, and that the difference was so crucial to social organization that it should be enforced by law. Following the Supreme Court's decision in Brown v. Board of Education in 1954, laws aiming to discriminate among people of different races were no longer supportable.

The same may not be said of laws distinguishing people on the basis of sex. Every state and territory of the United States requires sex categorization to be determined at birth and then recorded with an agency charged with the collection of vital statistics. This initial sex designation follows each individual throughout her or his life, stamped upon driver's licenses, passports, marriage certificates, and numerous other legal documents. As previously noted, this designation is not without consequence. Once set, an individual's sex designation may not be easily altered, and may not be altered at all in some jurisdictions.

39. U.S. Const. amend. XIII.
41. Id.
42. Id. at 148-49.
43. Id. at 149 (citing Paul Finkelman, Exploring Southern Legal History, 64 N.C. L. Rev. 77, 90 (1985)).
44. See Finkelman, supra note 43, at 90, 97-101 (discussing the segregation laws).
46. Id.
47. Grenfell, supra note 6, at 52.
48. Greenberg, supra note 13, at 308-17.
49. Id. (discussing New York, Ohio, and Oregon).
Sumptuary laws, black codes, and sex designation statutes all require that the distinctions between classifications be clear and intelligible. To the extent that members of opposing classes seem distinct, these laws may even seem justifiable. It is not always possible to easily classify people, however. To the extent that a person is not recognizable as a member of any race, or of either sex, it is hardly justifiable to impose upon the person race-specific or sex-specific restrictions or obligations. In order to preserve the artificial order created through race and sex, courts have been the arbiters of contested classifications.

### RACE DETERMINATION TRIALS

In the pre-Civil War South, one's race was almost always the difference between living as a free person and being enslaved. As Ariela J. Gross noted, "the possibility of ambiguity created by people of contested racial identity was a source of great anxiety to white Southerners, who expended a great deal of energy trying to foreclose the possibility of white slaves, ‘passing’ blacks, and the interracial sex that lay behind both." In her work, Professor Gross examines numerous trials in which the race of a particular person was an important issue before the court:

Trials . . . at which the central issue became the determination of a person's racial identity, were a regular occurrence in Southern county courts in the nineteenth century. While nineteenth-century white Southerners may have believed in a racial "essence" inhering in one's blood, there was no agreement about how to discover it.

In these trials, juries decided the question of race as a matter of fact. Generally, evidence of the person's racial ancestry was presented, if available. The evidence also generally included a complete inspection of the body of the person whose race was at issue, with reference to skin tone, hair texture, foot size, nose width,

50. Franke, supra note 18, at 2 (citing Jenness v. Fortson, 403 U.S. 431, 442 (1971)).
52. Id. at 111 (footnote omitted).
53. Id. at 111, 141-42.
54. See generally id. (noting throughout that the parties in one case focused on this factor during trial).
and lip shape. Where the physical features of a person did not clearly indicate one race or another and where racial ancestries were unavailable or unclear, as was often the case in matters that actually reached the trial level, juries were frequently instructed to determine race based upon the behavior of the person in question and whether it comported with stereotypes for one race or the other.

In these cases, race was an external categorization, not an immutable truth written upon the body of a particular person. As one scholar explains, "[r]ace is revealed as historically contingent, socially mediated systems of meaning that attach to elements of an individual's morphology and ancestry." To suggest that race is neither essential nor immutable is not to suggest that it is not real. Rather, as anybody who has been the victim of racial discrimination or stereotyping will attest, the effects of racial categorization are very real indeed. This categorization is, however, the result of a normative state interest in maintaining current social stratification rather than the result of any pre-determined social natural order. Importantly, although the state continues to engage in the categorization of people by race, the civil rights movement and the ever-growing presence of people of multiple racial ancestries have had the effect of limiting the legal imposition of a structure of difference upon racial identities. For example, racial difference is no longer recognized as an acceptable reason for disparate treatment in employment (i.e., race may never be a bona fide occupational qualification).

SEX DETERMINATION TRIALS

Although movements for women's rights have a long and impressive history within America, these movements have not been able to deconstruct the myth of sexual difference through people of indeterminate sex as has been partially done through people of "mixed" race. There are certainly individuals whose bodies do not fit the normative categorization of male or female, but, as has been noted, those people are nevertheless thrust into one category or another. Rather than consider the potential inadequacies of the categories themselves, medical science and the law uphold the concept of a binary sex system by arguing instead that the bodies of

55. Id. at 139.
56. See, e.g., id. at 111, 132, 137-38, 147-48.
57. Lopez, supra note 34, at 38-39.
59. See supra note 16 and accompanying text.
intersexed individuals are inadequate. Courts seem willing, in fact, to go to very great lengths to distinguish any individuals who seem to transgress sexual categorization as aberrations. This is nowhere more apparent than in the twentieth century sex determination cases of transgender litigants.

Sexual categorization has many important legal ramifications ranging from marriage to estate division to the enforcement of prohibitions against discrimination. In nearly all of these cases, the sexual categorization of the parties is assumed without question. For example, courts generally assume that a plaintiff alleging that she has been discriminated against because she is a woman is in fact legally female. This is not so in all cases. Professor Richard Storrow argues:

[T]he legal establishment . . . insists that sex is a simple matter of biology, anatomy, or chromosomes. Where these criteria point to different sexes [in the case of a transsexual litigant], the court hearing the matter chooses whichever criterion will most damage the viability of a transsexual's sex discrimination claim. . . . Ironically, however, this legal approach to sex discrimination is itself merely borrowed from medicine. In essence, then, in such cases the judiciary is . . . engaging in selective use of the criteria medicine deems relevant to the determination of sex.

60. See Whittle, supra note 7, at 24.
62. The term "transgender" is used throughout this note as an umbrella term to refer to people whose sex/gender identities do not adhere to a binary categorization system of male/female or masculine/feminine as determined by genitals, chromosomal constitution, or gonads — people whose identities defy the expectation that those labeled at birth as male will be masculine and men, and that those labeled at birth as female will be feminine and women. This includes, but is not limited to, male-to-female and female-to-male transsexuals, masculine women, feminine men, drag performers, cross-dressers, and gender ambiguous, gender variant, and self-identified transgender people. See Paisley Currah & Shannon Minter, Nat'l Gay & Lesbian Task Force, Transgender Equality: A Handbook for Activists and Policymakers 3-6 (2000), available at http://www.thetaskforce.org/downloads/transeq.pdf.
64. Storrow, supra note 61, at 126-27.
65. Id.
66. Id. at 127.
As several commentators have illustrated, there is no consistent legal standard for determining a person's sex once it is in dispute.\textsuperscript{67} Courts tend to recognize the same factors as worthy of consideration (genitals, gonads, chromosomal composition, ability to produce offspring, and overall physical appearance),\textsuperscript{68} but courts have not reached a consensus regarding how these factors should be weighed when they seem to point to multiple or different sex designations.\textsuperscript{69} Some courts eschew medical evidence altogether, referring instead to Judeo-Christian Creationism.\textsuperscript{70} Importantly, no courts have deferred to those with greatest knowledge of the matter: the transgender litigants themselves.\textsuperscript{71} Instead, courts have consistently maintained the right to designate a person as male or female, even over that person's objection, sometimes with quite unexpected results.\textsuperscript{72}

Unlike judicial race determination in the nineteenth century, determination of an individual's sex has not been reserved for juries as a question of fact; rather, American courts\textsuperscript{73} have determined sex categorization as a matter of law.\textsuperscript{74} This approach may be due in part to the fact that the elements of sexual categorization as described above are not generally in dispute in sex determination cases (i.e., both parties will generally stipulate to the genitals, gonads, etc., of the person in question).\textsuperscript{75} It also reveals, however, that


\textsuperscript{68} See, e.g., Whittle, supra note 7, at 23-24.

\textsuperscript{69} See, e.g., Nevins, supra note 67, at 397-98; see also Ulane v. Eastern Airlines, 742 F.2d 1081, 1084-85 (7th Cir. 1984); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 n.3-4 (9th Cir. 1977).

\textsuperscript{70} Sex is "immutably fixed by our Creator at birth." Littleton v. Prange, 9 S.W.3d 223, 224 (Tex. App. 1999).


\textsuperscript{72} See id. (discussing inadvertent allowance of same-sex marriage in Texas and Oregon through inconsistent sex-determination standards).

\textsuperscript{73} The American approach is not universal; in other countries, such as Australia, sex is considered an issue of fact to be determined by a fact finder rather than an issue of law. See Greenberg, supra note 13, at 270 n.20 (citing R. v. Cogley [1989] V.L.R. 823).

\textsuperscript{74} See Franke, supra note 18, at 98.

\textsuperscript{75} See, e.g., Phyllis Randolph Frye, The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts over What Clothing They Are
while sexual categories have great legal significance, the act of categorization is not merely reflective of the facts of an unambiguous physiology. Sexual categorization is a legal imposition of rights and responsibilities, for which physiological features serve as justification.

**PRODUCTIVE JUDICIAL LANGUAGE**

The result of determining an individual’s sex is not to ascertain the truth about an unclear state of affairs; it is to create that state of affairs through judicial fiat. In other words, in deciding that an individual is male or female, a judge does not review evidence of the body to determine where sex is written upon it or made clear. Rather, the judicial determination is what writes sex onto the body. The distinction that should be made here is between descriptive and productive language: judicial determination of sex (and race) operates through productive language. Professor Franke explains this phenomenon by describing the two types of judicial statements:

> When the court describes a state of affairs it has a responsibility to do so as accurately as possible, yet when the court pronounces a verdict or legal judgment we understand that action to be an externally sanctioned exercise of power. In the first case, the aspiration is that the judge’s words fit the world, whereas in the second case the world is changed to fit the judge’s words. In other words, the true conditions of a description are independent of the speech act itself, whereas a pronouncement of guilt is true “because I said so.”

Thus, a transgender litigant who is determined during the course of a legal proceeding to be male is legally male. This is particularly insidious because it is not acknowledged. Despite the fact that no standard has been developed for legally determining one’s sex and that it is possible for different courts to reach different conclusions regarding the legal sex of the same individual, each court couches

---

*Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 136 (2000) (illustrating that the parties agree that an individual has a vagina and XY chromosomes — the factual questions — and yet still disagree about the individual’s sex — the legal question).

76. Franke, *supra* note 18, at 51.
these decisions in the language of biological determinism, professing that it has merely determined what a given person’s sex already is.\textsuperscript{77} Transgender sex determination cases provide a particularly poignant example of the ways in which the law polices the borders of sexual categories, but other examples abound. Just as class distinctions have been enforced throughout much of Western history by sumptuary laws, sex distinctions have also been enforced by laws pertaining to acceptable dress for each sex.\textsuperscript{78} The number of such laws grew exponentially in America in the 1960s until nearly every major urban area had restrictions against individuals wearing clothing thought inappropriate for their sex.\textsuperscript{79} Thus, “[b]y establishing and enforcing appropriate sartorial norms, these laws [against cross-dressing] are designed to ensure social and sexual legibility within a language of difference . . . .”\textsuperscript{80} These laws still exist on the books of many municipalities, though they are not enforced.\textsuperscript{81} Their existence and former enforcement are strong examples of the ways in which the law abridges individual rights in order to ensure social intelligibility within a framework supporting oppression.

\textbf{THE SEPARATION OF SEX AND GENDER WITHIN THE LAW}

The use of “gender” as a term within the law that is distinct from “sex” is a relatively recent phenomenon. The fact that both terms have long been used within court decisions does not mean that courts viewed the terms as distinct.\textsuperscript{82} The employment law practiced by Ruth Bader Ginsburg prior to her Supreme Court appointment is “in large part responsible for the fact that the words ‘sex’ and ‘gender’ are now used interchangeably in the law . . . .”\textsuperscript{83} Ginsburg changed all references in her court briefs from “sex” to “gender” because she was concerned that, “[f]or impressionable minds, the word ‘sex’ may conjure up improper images . . . .”\textsuperscript{84} This

\begin{footnotesize}

\begin{enumerate}
  \item[77.] See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977).
  \item[78.] See Franke, \textit{supra} note 18, at 61.
  \item[79.] See, e.g., \textit{id}. at 61-69.
  \item[80.] \textit{Id}. at 61.
  \item[81.] See Franke, \textit{supra} note 18, at 60.
  \item[82.] Case, \textit{supra} note 3, at 10.
  \item[83.] \textit{Id}.
  \item[84.] \textit{Id}. (quoting Ruth Bader Ginsburg, \textit{Gender in the Supreme Court: The 1973 and 1974 Terms}, 1975 \textit{SUP. CT. REV.} 1, 1 n.1). Reportedly, Ginsburg switched terminology to avoid distracting Supreme Court justices while she was making oral arguments before the Court because they were the “impressionable minds” about whom she was concerned. \textit{See id}.
\end{enumerate}
\end{footnotesize}
soon widespread conflation of sex and gender as categories in litigation effaced any distinction between sex categorization and sex-differentiated behavior.85

Judges and legal scholars have more recently argued that it is inappropriate to use “sex” as synonymous with “gender” because, as Supreme Court Justice Antonin Scalia famously noted, “[t]he word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.”86 This has become the dominant understanding of sex and gender within American jurisprudence,87 and has been touted by some as a feminist advancement.88 Although this may represent a short term victory, the social categorization of “sex” is, in fact, still indistinct from “gender”: both refer to cultural expectations society and the law have about people, not to mere physiological features.

The effect of using two different terms within society and the law is merely to distinguish between those cultural expectations we legitimize (sex) and those we do not (gender). Instead of arguing that all females must be feminine, courts now view sex and gender as distinct, and understand that females need not be feminine. This shift prevents us from asking the more fundamental question: whether all people who have XX chromosomes, vaginas, and ovaries need be female. Presenting gender as socially constructed allows the continued assertion that sex is natural. This distinction is reflected in the law. For example, while Title VII jurisprudence has evolved to prohibit discrimination against female employees for failing to meet their employer’s stereotypical expectations about women,89 it does not prohibit discrimination against female employees whose employers justify disparate impact by pointing to normatively accepted differences between the sexes.90

87. Id. at 10.
88. Id. at 13-15.
SEXUAL DIFFERENCE UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits employers with fifteen or more employees from taking any employment action against an employee “because of such individual’s . . . sex.” Title VII was proposed in 1964 in response to demands for statutory protection against discrimination on the basis of race. “Sex” was added to the bill by a Southern Congress member in what has been described as a last minute attempt to block the bill’s passage. Because there was very little debate about the addition of “sex” to the bill, the lack of legislative history regarding congressional intent and the meaning of “sex” as used within Title VII is remarkable. In 1977, the Ninth Circuit held that Congress’s intent in including “sex” in Title VII was to “remedy the economic deprivation of women . . . .” One year later, the Fifth Circuit reasoned in Smith v. Liberty Mutual Insurance Co. that Congress had included sex “only to guarantee equal job opportunities for males and females.” The Seventh Circuit adopted the same reasoning in 1984, stating that the lack of evidence regarding any Congressional intent to adopt a broad understanding of sex compelled the court to interpret the term narrowly.

This narrow interpretation of “sex” has changed substantially in the four decades since Title VII’s passage. Amid varied and evolving interpretations of the meaning of “sex,” two things have remained unchanged. First, courts continue to hold that some disparate treatment on the basis of sex is permissible, with the

93. Id. at 1167. Arguably, “sex” was added not as an attempt to block the passage of Title VII, but as an attempt to preempt passage of the concurrently proposed Equal Rights Act, which would have provided far broader protections for women. See Franke, supra note 18, at 23-24.
94. See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3213-32 (Clifford L. Alexander ed., 1964) (demonstrating the very brief discussion in the House of the addition of “sex” under Title VII); see also Developments, supra note 92, at 1167 (noting that the addition of protection for sex-based discrimination “came without even a minimum of congressional investigation”).
95. Developments, supra note 92, at 1167; see also Holloway v. Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) (noting the “dearth of legislative history” regarding sex discrimination under Title VII).
96. Holloway, 566 F.2d at 552.
justification that women actually are different from men. Second, courts have not questioned the concept of sexual categorization itself.

In determining whether Title VII's prohibition against sex discrimination applies to a particular employment action, courts effectively draw a line between employer actions based on difference and those based on discrimination, with conduct on the “difference” side of the line permitted, while conduct on the “discrimination” side is proscribed. In other words, although employers may not generally discriminate against women in employment, they may do so if they can show that women are differently situated than men with respect to the primary responsibilities of the position in question; thus, sex may serve as a bona fide occupational qualification. In determining whether women are thus differently situated, courts have deferred to the subjective views of the employer that women would be unable to perform the essential functions of a particular job.

This is striking because race, unlike sex, may never be asserted as a bona fide occupational qualification. While both race and sex are considered to be immutable characteristics, courts have held that whites and minorities are similarly situated in all contexts under the law, whereas females and males are not.

It was this fact of sexual difference that justified less-than-heightened scrutiny for sex-based classifications. In other words, the Court built its sex-based equality

---

100. See Dunlap, supra note 8, at 1138 n.46.
101. See infra notes 103-09 and accompanying text.
[A] meat processing plant explicitly barred women from a number of departments, on the ground that the jobs there were too physically demanding for women. The court accepted this reasoning, even though the company produced no evidence other than the owner's subjective opinion that women were incapable of doing these jobs.

105. See, e.g., Dothard, 433 U.S. at 335-36 (citing violence within Alabama prisons and concern that female prison guards would be exposed to sex offenders and other inmates deprived of contact with women, the Supreme Court upheld as a bona fide occupational qualification Alabama's requirement that prison guards who have contact with prisoners be of the same sex as the prisoners). Notably, no amount of violence would support a finding that a same-race prison guard requirement was a bona fide occupational qualification (BFOQ). If minority prison guards were in particular danger within prisons, the state would be required to make the prisons safer, rather than simply exclude the minority guards.
FEMALE BY OPERATION OF LAW

jurisprudence on the presumption that, on a fundamental level, males and females are not similarly situated — they are in fact different kinds of beings.\textsuperscript{106}

The presumption of actual difference between men and women has served as justification for women's subordination through the law: "[i]n the name of avoiding 'the grossest discrimination,' that is, 'treating things that are different as though they are exactly alike,' sexual equality jurisprudence has uncritically accepted the validity of biological sexual differences."\textsuperscript{107}

This emphasis on difference has not changed throughout the evolution of Title VII jurisprudence, though the precise contents of that difference have changed. Courts originally interpreted Title VII to only protect women against blatant "women need not apply" employment discrimination.\textsuperscript{108} Since then, the interpretation of "sex" within Title VII has been expanded.

\textbf{THE EVOLUTION OF TITLE VII SEX DISCRIMINATION JURISPRUDENCE}

Fifteen years after the passage of Title VII, the Supreme Court held that Title VII's prohibition of sex discrimination extended to men as well as women.\textsuperscript{109} In \textit{Newport News Shipbuilding}, the Court reasoned that Title VII permits employers to disparately treat men and women only when that treatment is reflective of actual sexual difference and that men could be harmed by unwarranted disparate treatment just as women could be harmed.\textsuperscript{110} The Court did not explain, however, what would constitute actual sexual difference justifying disparate treatment.

It had been held by courts throughout much of this jurisprudence that sex-based discrimination, whether overt or based upon sex stereotypes, was the result of the discriminator's impermissible animus toward people of the discriminated-against sex.\textsuperscript{111} Thus, employers were able to defend charges of sex discrimination by

\textsuperscript{106} Franke, supra note 18, at 11.
\textsuperscript{107} Id. at 2 (quoting Jenness v. Fortson, 403 U.S. 431, 442 (1971)).
\textsuperscript{108} See, e.g., CHAMALLAS, supra note 38, at 48 (discussing Gedulig v. Aiello, 417 U.S. 484 (1974), in which the Court held that excluding pregnancy from a disability benefits program did not constitute sex discrimination).
\textsuperscript{110} Id. at 677-84.
showing that the discriminator was of the same sex as the person who suffered an adverse employment action.\textsuperscript{112}

Change came in 1998 when the Supreme Court decided \textit{Oncale v. Sundowner Offshore Services, Inc.}\textsuperscript{113} In that case, the plaintiff was a roustabout on an offshore oil rig that happened to employ only men.\textsuperscript{114} During the time he was employed, Oncale was subjected to repeated accusations of homosexuality, numerous sexual comments, several physical assaults, and threats of sexual violence from other members of the crew.\textsuperscript{115} After reporting this harassment to the company human resources director with the result that no action was taken,\textsuperscript{116} Oncale quit, asking that his pink slip reflect that he left for fear of sexual violence.\textsuperscript{117} The employer's primary defense in this case was that Oncale's claim was not actionable under Title VII because he had been harassed by other men, who presumably were not motivated by sex-based animus against males.\textsuperscript{118} The Court held that so long as the harassment had been "because of . . . sex,"\textsuperscript{119} it need not be motivated specifically by sexual desire.\textsuperscript{120} In so holding, the Court implicitly broadened the interpretation of "because of . . . sex"\textsuperscript{121} to include cases in which the victim's sex provided the means of the alleged discrimination or harassment, regardless of the motives of the discriminator.

Six years after \textit{Newport News Shipbuilding},\textsuperscript{122} in 1989, the Supreme Court addressed the issue of sex stereotyping under Title VII in \textit{Price Waterhouse v. Hopkins}.\textsuperscript{123} There, the Court held that in addition to discrimination against women because they are women and discrimination against men because they are men, Title VII's prohibition against sex discrimination also protects employees from discrimination because they fail to meet their employer's sex stereotype expectations for how a person of their sex should act.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{112} See generally id. (discussing how no justifiable reason exists for allowing harassment simply because the harasser is the same sex as the victim and overruling the lower court's acceptance of this previously successful defense).
\item \textsuperscript{113} 523 U.S. 75 (1998).
\item \textsuperscript{114} Id. at 77.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. In fact, the supervisor indicated that he, too, had been "picked on." Id.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. at 78-80.
\item \textsuperscript{120} \textit{Oncale v. Sundowner Offshore Services, Inc.}, 523 U.S. 75, 81 (1998).
\item \textsuperscript{122} 462 U.S. 669 (1983).
\item \textsuperscript{123} 490 U.S. 228 (1989).
\item \textsuperscript{124} Id. at 235, 251.
\end{itemize}
Ann Hopkins was an aggressively successful senior accounting associate at Price Waterhouse who had been nominated for partnership. When she was not selected for partnership, it was suggested that she act and dress more femininely and “take a course at charm school” to improve her chances. Price Waterhouse asserted that Hopkins had been denied partnership because she was abrasive and overly aggressive. In its holding, the Court responded by stating that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” Because of the precedent set in Newport New Shipbuilding, this prohibition against employment decisions based upon sex stereotyping applies to men as well as women.

The Sixth Circuit has recently used Price Waterhouse as a foundation for holding that Title VII prohibits discrimination against men or women because they do not meet their employer’s sex stereotype expectations, regardless of whether the stereotypes are based upon the employee’s actual or perceived sex. In Smith v. Salem, a firefighter with a long history of commendable service was suspended and harassed in an attempt by Salem city officials to force his resignation after learning that he planned to undergo sex reassignment procedures and begin living as a woman. Smith claimed discrimination on the basis of sex, alleging that he had been suspended because his gender presentation did not match his employer’s expectations of men. The trial court nevertheless held that Smith failed to state a claim of sex discrimination and that Title VII does not protect employees from discrimination on the basis of transgender status. In rejecting this argument, the Sixth Circuit stated that such an approach had been “eviscerated by Price Waterhouse.” Although this represents a substantial reinterpretation of “because of . . . sex,” the Sixth Circuit’s holding in this

125. Id. at 233.
126. Id. at 235.
127. Id.
128. Id. at 250.
130. 490 U.S. 228 (1989).
132. Masculine pronouns are used here in order to be consistent with the plaintiff’s own usage in his appellate briefs, although that usage may have been purely strategic. See id. at 567.
133. Id. at 568.
134. Id.
135. Id. at 571.
136. Id. at 573 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).
case is at odds with every other circuit that has addressed this issue within an employment discrimination context, as well as with other cases from the Sixth Circuit itself. The Supreme Court has not yet addressed this issue.

**THE CONTINUED SUBORDINATION OF WOMEN**

Each of these shifts in Title VII jurisprudence has extended further protections against sex-based discrimination in employment, but the societal effect of these changes is slight when compared to the discrimination and oppression still faced by women. This is due, at least in part, to the fact that prohibiting discrimination against a person because she is female does nothing to challenge the right of the state to impose femaleness upon that person: the prohibition takes the sex categorization as a given without analyzing the ways in which that categorization itself may be oppressive. Traditional feminist approaches to anti-discrimination litigation have not been, and will not be, sufficient to address the role the law itself plays in societal discrimination against women.

The role of the law in the subordination of women is not accidental or coincidental. The state's enforcement of arbitrary categorization on the basis of (generally distinguishable but irrelevant) physical features divides society into two classes of people: males and females. These two classes are not in parity. By categorizing some people as female, the law writes onto their bodies a centuries-old history of oppression and subjugation. Femaleness as a concept is understood in terms of that history, and, in turn, individuals categorized as female are read within the context of that history. Similarly, by categorizing some people as male, the law writes onto their bodies a centuries-old history of supremacy and power: because maleness is understood in terms of that history, individuals identified as male are also associated with it. The law legitimizes this conflation of history and identity by perpetuating essentialist understandings of

---


140. See Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2004).


142. Currah, supra note 13, at 1368.

143. See CATHARINE MACKINNON, Desire and Power, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW supra note 22, at 46, 51.


145. See id.
sex and deferring to supposed sexual difference as a defense to discriminatory actions.

This creates quite a dilemma for feminist activists and attorneys. It is impossible to oppose sex discrimination through statutes such as Title VII without appealing to the very foundation upon which the concept of sex discrimination is built. Nevertheless, to forego opposition to sex discrimination through Title VII (and similar statutes) would be the equivalent of foregoing all opposition to sex discrimination: there is little remedy outside of the law. This begs the question of how feminists can seek the expansion of protections under Title VII while simultaneously disclaiming reliance upon the premises of Title VII.

POSSIBILITIES FOR FEMINIST ACTION

One answer to this dilemma may be that instead of opposing sex discrimination directly, feminists should oppose the foundation of that discrimination: the authority of the state to enforce sexual categorization. Although working towards re-signification of what it means to be male or female may be a productive short term goal under Title VII, it still relies upon the premise that one can be either male or female. Rather, this note proposes that feminist activists should work towards the termination of state-enforced sexual categorization altogether. As Paisley Currah exhorted in an action plan for the civil rights of sexual minorities, “[r]ather than challenging the categories themselves, advocates of the rights of sexual minorities ought to have a long-term strategy of challenging the state’s prerogative to define those categories.” Or, in other words, feminists should engage themselves in the “radical project of replacing the state’s authority to define sex and gender . . . ” Unfortunately, Currah did not address what work that radical project would entail or how to approach the task.

In understanding the “state’s prerogative to define” sexual categories, it is instructive to look to the state’s designation of racial and socio-economic categories as well, as those categories are much more easily challenged than sex. As with race and class, a challenge to sex categorization must begin at those sites where the state enforces categorization. In the case of sex, the primary sites of this categorization and enforcement are mandatory sex designations on

146. Currah, supra note 13, at 1368.
147. Id. at 1364.
148. See generally id.
149. Id. at 1368.
birth certificates and laws prohibiting sex designation from being altered on birth certificates, sex determination trials in which myths of biological essentialism are used to justify unilateral judicial pronouncement of sex, and dress code laws where the social signifiers of sexual categorization are policed. The right of the state to police sexual categorization must be challenged at each of these sites if feminist activists are to disrupt the legal foundations of women's subordination.

This is not an argument for the abolition of sex. Rather, this is an argument for the removal of the state from the determination of sex. Subordination is implicit in the concept of sex only so long as sexual difference is treated as essential and meaningful. It is possible to assert that sexual difference is a social construction with no inherent meaning while acknowledging that sexual identities are rife with meaning. This distinction rests on the difference between biological and cultural meaning. If this distinction is difficult to imagine as pertains to sex, the example of race may be of use. Race differentiation may easily be understood as a meaningless biological distinction, but a very meaningful cultural distinction: being associated with a group that has endured a particular class history is meaningful in a way that skin tone and hair type are not. Similarly, being associated with femaleness is meaningful in a way that ovaries and XX chromosomes are not. The goal of feminist activism must then be to dismantle compulsory sex classification on the basis of gonads and chromosomes. This feminist vision provides room for those who would still label themselves as male or female in order to utilize the meanings that come with those labels, but the point is that they label themselves: they accept the classification of their own volition.

By successfully challenging the state’s authority to regulate sex on birth certificates, by judicial fiat, and through dress code laws, feminist activists may create a space for self-identification in terms of sex. A utopian end to this project would be a society in which sex is no longer listed on infants’ birth certificates, sex determination cases never reach trial because the determination is made based upon each individual’s preference, and sumptuary laws are voided. This extreme goal is probably unachievable and may actually bring its own negative consequences, but legal activism in the direction of that goal would be positive.

150. Grenfell, supra note 6, at 54 ("The ideal of eliminating difference imports the problem of encouraging assimilation.").
To the extent that such work would break apart the coherency of the concept of sex within the law and expose "male" and "female" as less than discrete or definite categories, it would serve as a means to a feminist end. To return to Title VII, in terms of employment prestige and compensation, the so-called "gap between the sexes" is only as wide as the gap between "male" and "female." Similarly, within Title VII litigation, the inability of judges to draw a line between men and women results in an inability to draw a line between difference and discrimination in weighing a plaintiff's claim. Within this model, any employment action that touches upon sex must be prohibited: a change that could produce, in and of itself, a sort of feminist utopia.

MATTHEW GAYLE*