

# HITTING BELOW THE BELT: SEX-PLOITIVE IDEOLOGY & THE DISAGGREGATION OF SEX AND GENDER

"Ideas have consequences."<sup>1</sup>

## I. INTRODUCTION

The definition of sex,<sup>2</sup> taken for granted for so long,<sup>3</sup> has recently become hotly debated. For decades, advocates of change have been like a voice crying in the wilderness.<sup>4</sup> Impatient with the legislative process, they have taken the issue to court<sup>5</sup> and found a sympathetic ear. The debate has begun to steamroll due to the advent of conflicting case law regarding the legal sex of post-operative transsexuals.<sup>6</sup>

So is the law finally starting to catch up to the scholarship?<sup>7</sup> And, while the move from sex to gender represents a sea change in the legal

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<sup>1</sup> RICHARD M. WEAVER, *IDEAS HAVE CONSEQUENCES* (1948).

<sup>2</sup> Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 982-83 (1992).

In accordance with modern usage, the term *gender* carries with it the implication that we are exploring the relationship between males and females as a social phenomenon, and not as a biological one. The term *sex*, therefore, is reserved to deal with those aspects of anatomy, physiology, and reproduction that are explicit to sexual distinctions between persons.

*Id.*

<sup>3</sup> Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 2008 (1995) [hereinafter *Drag*].

<sup>4</sup> See, e.g., Douglas K. Smith, Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 CORNELL L. REV. 963 (1971).

<sup>5</sup> Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box by Closing the Door on Transsexuals*, 9 LAW & SEX 1, 134 (2000) (expressing deep concern about the majoritarian process involved in legislating public policy). See also Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges - Does the Constitution Require States to Grant a Right to Do the Impossible?* 12 BYU J. PUB. L. 309, 309-10 (1998).

<sup>6</sup> *Compare* Corbett v. Corbett, 1971 P. 105 (Eng. C.A.) (holding that, for the purposes of marriage, a post-operative transsexual's sex is biologically determined at birth), *In re Ladrach*, 32 Ohio Misc. 2d 6 (1987) (holding that a post-operative male may not marry another male), *and* Littleton v. Prange, 9 S.W.3d. 223 (Tex. App. 1999) (holding that the sex of a post-operative male transsexual is determined at birth), *with* M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding that a post-operative transsexual's legal sex, for the purpose of marriage, is determined after surgery), *and* Vecchione v. Vecchione, Civ. No. 96D003769 (Cal. App. Dep't. Sup. Ct. 1997), *reported in* L.A. DAILY J., Nov. 26, 1997, at 1 (holding also that a post-operative transsexual's legal sex, for the purpose of marriage, is determined after surgery).

<sup>7</sup> See *M.T.*, 355 A.2d at 210 (relying extensively on law review articles and expert testimony to the exclusion of precedent or the law itself).

landscape,<sup>8</sup> why have so many judges refused to take the plunge? Finally, is there any rationale - beyond tradition, ignorance or downright obstinance<sup>9</sup> - why a thinking individual could believe that sex, for the purposes of law, should not be subjective but objectively defined?<sup>10</sup>

The answer to all these questions depends on worldview.<sup>11</sup>

A worldview is a system of beliefs through which one views the world.<sup>12</sup> It is both an "explanation and interpretation of the world" and an "application of this view to life."<sup>13</sup> A person's worldview profoundly affects his or her outlook on law and society.<sup>14</sup> Therefore, one would expect that "[l]egal reasoning will . . . follow philosophical inclinations."<sup>15</sup>

The debate regarding the legal definition of sex is, at its core, ontological.<sup>16</sup> It cuts right to the quick of one's assumptions about the nature of man and the law.<sup>17</sup> If, for example, sex is a biological accident<sup>18</sup> and there are no inherent biological differences between men and

<sup>8</sup> Carl Pearlston, Commentary, *It's No Longer Just About Sex*, L.A. TIMES, July 18, 2000, at B9.

<sup>9</sup> Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis in the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1131 (1979). "[T]he presumption that two, and only two, distinct and immutable sexes exist amounts to a questionable premise, if not to an ignorant prejudice." *Id.* (footnotes omitted).

<sup>10</sup> See Mary Coombs, *Sexual Disorientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 227-28 (1998) (characterizing such a traditional viewpoint as rationally untenable and corresponding academic literature as "thin, fragmentary, and generally under-theorized").

<sup>11</sup> A worldview is "a set of presuppositions (assumptions which maybe true, partially true or entirely false) which we hold (consciously or subconsciously, consistently or inconsistently) about the basic makeup of our world." JAMES W. SIRE, *THE UNIVERSE NEXT DOOR* 16 (3d ed. 1997).

<sup>12</sup> DALE O'LEARY, *GENDER: THE DECONSTRUCTION OF WOMEN, ANALYSIS OF THE GENDER PERSPECTIVE IN PREPARATION FOR THE FOURTH WORLD CONFERENCE ON WOMEN IN BEIJING, CHINA* 7 (1995).

<sup>13</sup> "[I]t is both your view of the world and your view for the world. Your basic answers to the ultimate questions of life determine your preferences, priorities and actions." E-mail from Dr. William E. Brown, President, Bryan College, to David Lee Mundy, Student, Regent School of Law (Dec. 13, 2000) (on file with author).

<sup>14</sup> THOMAS SOWELL, *THE VISION OF THE ANOINTED* 106 (1995); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995).

<sup>15</sup> Sekulow & Tuskey, *supra* note 5, at 314; DAVID W. MEYERS, *THE HUMAN BODY AND THE LAW* 234 (2d ed. 1990) (noting how the personal beliefs of judges have affected transsexual marriage cases).

<sup>16</sup> Franke, *supra* note 14, at 5 (stating the debate fundamentally concerns the "metaphysics of sexual difference"); see also Sekulow & Tuskey, *supra* note 5, at 314 ("[T]he issues . . . are as much ontological as legal.")

<sup>17</sup> SOWELL, *supra* note 14, at 104-05; see also ROBERT H. KNIGHT, *THE AGE OF CONSENT* xv (1988); Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage?* 22 J. CONTEMP. L. 51, 57 (1996).

<sup>18</sup> MARTINE ROTHBLATT, *THE APARTHEID OF SEX* 25 (1995).

women, then the idea of sex itself must be a social creation arbitrarily or capriciously constructed.<sup>19</sup> Conversely, if gender differences reflect a natural order that is, at least in part, biological, then differentiation based on our design is not inherently irrational or oppressive; rather, it is possible that men and women can be different and complementary without being necessarily unequal.<sup>20</sup>

The definition of sex is a divisive issue, not only because of the personal presumptions involved, but also because of its effect on the law.<sup>21</sup> Sex is relevant in some cases, wholly irrelevant in others, but in a few instances is entirely dispositive.<sup>22</sup> Hence, the re-definition of sex from an objective biological basis to subjective gender identity could have serious ramifications on society and the law.<sup>23</sup>

This article, therefore, discusses the motivation behind the subjectivization of sex and its logical effect on society and the law.

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<sup>19</sup> JUDITH BUTLER, *GENDER TROUBLE: THE SUBVERSION OF IDENTITY* 7 (1990); Terry S. Kogan, *Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"*, 48 HASTINGS L.J. 1223, 1249 (1997).

<sup>20</sup> O'LEARY, *supra* note 12, at 17; see also ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 199 (1996).

<sup>21</sup> Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995); see, e.g., Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 269 (1999) (giving the usual list of legal areas affected by the definition of sex including marriage, official documents, sex discrimination, and gender-based claims to equal protection).

<sup>22</sup> *Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.). As the *Corbett* court explains:

Over a very large area the law is indifferent to sex. It is irrelevant to most of the relationships which give rise to contractual or tortious rights and obligations, and to the greater part of the criminal law. . . . It is not an essential determinant of the relationship in these cases because there is nothing to prevent the parties to a contract of insurance or a pension scheme from agreeing that the person concerned should be treated as a man or as a woman, as the case may be. . . . On the other hand sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of a man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of the opposite sex. There are some other relationships such as adultery, rape and gross indecency in which, by definition, the sex of the participants is an essential determinant.

*Id.* at 105-06.

<sup>23</sup> Kohm, *supra* note 17, at 72 (claiming that all areas of the law will be affected directly or indirectly through the subjectivization of sex). See also Epstein, *supra* note 2, at 982 ("The clear implication, therefore, is that once we shift from sex, which is not arbitrary, to gender, which may be, we have strengthened the case for thinking gender differences irrelevant in all social contexts.").

Further, it discusses why the law has continually insisted that sex matters.<sup>24</sup> Finally, this article will explore evidence for why a thinking person could rationally conclude that sex should be objectively defined. Therefore, Part Two will address the gender perspective, why it is a worldview, and what its view of the world looks like. Part Three will address the deconstruction of the traditional objective, biological classification of sex and the implications of its deconstruction on the law. Part Four will examine biological differences, whether they exist and whether they matter. Finally, Part Five will examine the ultimate impact of the disaggregation of sex and gender on society and the law and, consequently, why the law as a whole and the judiciary in particular should be reticent to adopt subjective standards for defining sex.

## II. IT'S ALL A MATTER OF (GENDER) PERSPECTIVE<sup>25</sup>

### A. Gender Perspective as a Worldview

In the words of Catharine Mackinnon, "Gender . . . is lived as ontology, not as epistemology."<sup>26</sup> The gender perspective, therefore, can be referred to as a "gender lens," a belief system through which one

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<sup>24</sup> MEYERS, *supra* note 15, at 225 (recognizing that courts continue to apply biological standards, preferring to leave social policy to the legislatures).

<sup>25</sup> For the purposes of this article, the Gender Perspective includes but is not limited to the views of gender feminists and queer and transsexual theorists. This approach was adopted for two reasons. First, these theories share common roots. Most "have evolved from or remain linked to academic feminism." Jerry Z. Muller, *Coming Out Ahead: The Homosexual Moment in the Academy*, 35 FIRST THINGS Aug.-Sept. 1993, at 17, available at <http://www.firstthings.com/ftissues/ft9308/articles/muller.html>. Undeniably, differences and disagreements exist among them, but the tone is more of a healthy dialogue. Compare, e.g., Coombs, *supra* note 10, at 238 n.95 (critiquing transsexual reinforcement of gender stereotypes), with Rose, *supra* note 5, at 50 (rebutting feminist critique of transsexuals), and Drag, *supra* note 3, at 1975 (criticizing feminist use of identity politics when the true goal is to disrupt gender). See also Paisley Currah, *Continuing the Civil Rights Struggle: Ends & Means: Defending Genders: Sex and Gender Non-conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1383 (1997) (critiquing queer theorists for reliance on immutability of sex in equality arguments to the detriment of transsexuals). Secondly, these disciplines were grouped together for the purposes of this article because of their commonalities. See KNIGHT, *supra* note 17, at xiv (sharing a mutual hostility toward the traditional Judeo-Christian worldview); Kogan, *supra* note 19, at 1224, 1241 (sharing a mutual goal of disaggregating sex from gender); Muller, *supra* (sharing a mutual belief that there are no inherent differences between men and women). See also Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 9 (1995).

<sup>26</sup> CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 237 (1989). Judith Butler, however, argues that there is no ontology of gender because gender is politic. BUTLER, *supra* note 19, at 148. This, too, however, is a worldview statement.

views the world.<sup>27</sup> In other words, "The gender perspective . . . is a comprehensive world view which sees every relationship or activity in which human beings engage as socially constructed."<sup>28</sup> The gender perspective is a comprehensive and coherent system that "can explain everything from advertising to religion."<sup>29</sup> It requires a paradigm shift from the social indoctrination of the binary view of sex.<sup>30</sup> Consequently, it assumes that sex is an accident both of birth and, perhaps, the universe.<sup>31</sup> Therefore, any biological differences must actually be attributable to social construction<sup>32</sup> or behavioral performance.<sup>33</sup>

The gender perspective as a worldview recruits proselytes and persecutes nonbelievers. It seeks to enlighten the benighted by unmasking the oppressive hegemony<sup>34</sup> and to enlist them in the power struggle against the hetero-patriarchy.<sup>35</sup> Their attack is ontologically based.<sup>36</sup> Their war is against the hegemonic heterosexual (male) oppressors;<sup>37</sup> it is a struggle for control of institutional influence and the power to define truth.<sup>38</sup> The gender perspective has been particularly successful at gaining influence in the academy,<sup>39</sup> thereby acquiring the power to brand anyone who disagrees with their ideology as homophobic<sup>40</sup> or irrational.<sup>41</sup> This taboo in academia against criticizing

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<sup>27</sup> O'LEARY, *supra* note 12, at 7.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> BORK, *supra* note 20, at 196 (citing Carol Iannone, *The Feminist Confusion, in* SECOND THOUGHTS: FORMER RADICALS LOOK BACK AT THE SIXTIES 149 (Peter Collier & David Horowitz eds., 1989)).

<sup>30</sup> ROTHBLATT, *supra* note 18, at 102.

<sup>31</sup> *Id.* at 25. *See also* Butler, *supra* note 19, at 7.

<sup>32</sup> *E.g.*, Franke, *supra* note 14, at 99.

<sup>33</sup> BUTLER, *supra* note 19, at 24.

<sup>34</sup> Hegemonic has been defined as, "[I]deas or concepts which are universally accepted as natural but which Gender Feminists believe are actually socially constructed." O'LEARY, *supra* note 12, at 6.

<sup>35</sup> CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN 23 (2d ed. 1995).

<sup>36</sup> Coombs, *supra* note 10, at 228 (stating that the opposition's worldview is key to attacking the "political and psychological biases that form the basis of popular legislative opposition.").

<sup>37</sup> SOMMERS, *supra* note 35, at 24 (contrasting the new gender feminists with the old equality feminists).

<sup>38</sup> Muller, *supra* note 25, at 23-24.

<sup>39</sup> Kohm, *supra* note 17, at 51.

<sup>40</sup> Muller, *supra* note 25, at 19-20. For example, arguments made in support of "traditional Western notions about the correct relation between anatomy and gender identity" are "homophobic and transphobic." Currah, *supra* note 25, at 1377, 1380.

<sup>41</sup> Coombs, *supra* note 10, at 228. Coombs then proceeds to criticize the "simplistic opinion[s]" of respected scholars including Richard Posner, John Finnis, Robert George, Gerald Bailey, Lynn Wardle, and Robert Knight. *Id.* at 228-36 (claiming that such

the gender perspective<sup>42</sup> has been referred to as "liberal hegemony."<sup>43</sup> Furthermore, constructive dialogue with the gender perspective is often difficult as it is an intellectually closed system.<sup>44</sup> Contradicting evidence is viewed as further proof of a massive patriarchal conspiracy.<sup>45</sup> Similarly, the failure of a majority of women<sup>46</sup> to adopt the gender perspective is attributed to self-deception or societal coercion.<sup>47</sup> Therefore, arguing that women freely choose gendered activities prompts an attack on free will.<sup>48</sup> Similarly, arguing that gender may have a natural component prompts an attack on nature.<sup>49</sup>

### B. How the Gender Perspective Views the World <sup>50</sup>

Viewing the world through the gender perspective, not only is gender<sup>51</sup> either socially constructed or performed, but, ultimately, sex itself is a construct.<sup>52</sup> Some gender theorists hold that gender is not biologically attributable but socially constructed.<sup>53</sup> Others claim that neither sex nor gender are constructed; rather, they are merely mimicked or performed.<sup>54</sup> As Judith Butler argues, "[G]ender is performatively produced and compelled by the regulatory practices of gender coherence."<sup>55</sup> The impersonation of a man or woman, then, is not

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arguments - for opposite-sex marriage - are ultimately biased on account of rampant homophobia).

<sup>42</sup> Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 20 (1996).

<sup>43</sup> Coombs, *supra* note 10, at 227.

<sup>44</sup> O'LEARY, *supra* note 12, at 11.

<sup>45</sup> *Id.*

<sup>46</sup> See Ecumenical Coalition of Women and Society, *Women of Renewal: A Statement*, FIRST THINGS, Feb. 1998, at 36, available at <http://www.firstthings.com/ftissues/ft9802/articles/documentation.html> (last visited Oct. 10, 2001) (reprinting A Christian Women's Declaration). "[W]e affirm that sexuality is rooted in the biological designation of the two sexes - male and female." *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *Id.* at 10.

<sup>49</sup> *Id.* See discussion *infra* Part III.

<sup>50</sup> For purposes of persuasion, this section is written predominantly from the gender perspective; hence, certain affirmative statements are not representative of the author's view of sex and gender. See discussion *infra* Part IV.

<sup>51</sup> Gender relates to the roles - masculine and feminine - traditionally attached to biological sex. Pearlston, *supra* note 8, at B9.

<sup>52</sup> Kogan, *supra* note 19, at 1248-49. "Contemporary critical gender theory has moved beyond the early feminist critique of the construction of gender to a realization that the dimorphic paradigm of sex itself is socially constructed." *Id.*

<sup>53</sup> O'LEARY, *supra* note 12, at 5 (quoting former U.S. Congresswoman Bella Abzug's address to the United Nations Preparatory Committee).

<sup>54</sup> BUTLER, *supra* note 19, at 24.

<sup>55</sup> *Id.*

an imitation of a "heterosexual 'original,'" because the original is merely a performance.<sup>56</sup> Eventually, both the construction and performance arguments arrive at the same conclusion - sex follows from gender.<sup>57</sup> Therefore, the gender perspective does not recognize any inherent differences between men and women.

In fact, alleged differences between men and women are seen as inherently suspect.<sup>58</sup> Differences between the sexes are viewed, certainly not as the effects of biological distinctions, but as the application of cultural gender norms.<sup>59</sup> "Our pre-given dimorphic concepts of gender lead to the *discovery of facts* that differentiate the sexes."<sup>60</sup> Biological differences, then, are only meaningful when viewed from the gender perspective.<sup>61</sup> Therefore, "[t]he significance attached to these differences is social, cultural, and alterable."<sup>62</sup> Since society is ultimately responsible for attaching meaning to sex differences,<sup>63</sup> sex is political.<sup>64</sup> And the politic of sex is inherently unequal.<sup>65</sup>

The gender perspective asserts that biological differentiation leads to social inequality and oppression because of how those differences are socially constructed.<sup>66</sup> First, distinctions or classifications made on the basis of biological sex are necessarily arbitrary.<sup>67</sup> Further, from a classic Marxist view, "difference is always unequal and unequal is always oppressive."<sup>68</sup> Therefore, scientific research into biological differences between men and women is discouraged<sup>69</sup> as are sports that differentiate

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<sup>56</sup> *Drag, supra* note 3, at 1989.

<sup>57</sup> *E.g., Franke, supra* note 14, at 2. Or as Franke put it, "[S]ex bears an epiphenomenal relationship to gender." *Id.* See also Leslie Pearlman, Comment, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 *BUFF. L. REV.* 835, 837 n.7 (1995) (representing the constructionist argument).

<sup>58</sup> Meredith Gould, *Sex, Gender, and the Need for Legal Clarity: The Case of Transsexualism*, 13 *VAL. U. L. REV.* 423, 431 (1979).

<sup>59</sup> See Franke, *supra* note 14, at 25.

<sup>60</sup> *Id.* at 39 (emphasis added).

<sup>61</sup> *Id.* at 98.

<sup>62</sup> RICHARD A. POSNER, *SEX AND REASON* 23 (1992) (reiterating Michel Foucault's view of sex as a social construct).

<sup>63</sup> Franke, *supra* note 14, at 71 (citing JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 122-23 (1985)).

<sup>64</sup> POSNER, *supra* note 62, at 24 (applying feminist line of reasoning).

<sup>65</sup> O'LEARY, *supra* note 12, at 8.

<sup>66</sup> Pearlman, *supra* note 57, at 837 n.11 (citing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 108-16 (1988)).

<sup>67</sup> POSNER, *supra* note 62, at 24.

<sup>68</sup> O'LEARY, *supra* note 12, at 14. See also ROTHBLATT, *supra* note 18, at 21 (arguing from a Marxist class ideology whereby differences and distinctions are inherently evil because they presuppose inequality).

<sup>69</sup> O'LEARY, *supra* note 12, at 12 (citing Sharon Begley, *Gray Matters*, *NEWSWEEK*, Mar. 27, 1995, at 51).

between the sexes.<sup>70</sup> Also, public restrooms, the ultimate manifestation of culturally imposed gender differences,<sup>71</sup> must be "desegregated."<sup>72</sup> Concurrently, for reasons both practical and political, boys must be taught to sit down to pee.<sup>73</sup> Ultimately, the key to creating a classless society is to "separate biological 'sex' from socially constructed 'gender.'"<sup>74</sup> The law, however, is seen as part of the patriarchal power system that produces gender.<sup>75</sup>

According to the gender perspective, the law socially constructs and perpetuates sex differences.<sup>76</sup> Society uses the law to enforce proper gender roles.<sup>77</sup> Admittedly, the binary nature of the law lends itself to categories.<sup>78</sup> By categorizing according to 'natural' sex differences, however, "the law sustains compulsive heterosexuality."<sup>79</sup> This legal disingenuousness is said to perpetuate patriarchy at the expense of equality and non-discrimination.<sup>80</sup> Thus, the apparent inevitability of binary sex is really the product and construct of a coercive legal system.<sup>81</sup> Seen from the gender perspective, the law is in serious need of deconstruction.<sup>82</sup>

### III. DECONSTRUCTING THE LAW - A "HOW-TO" GUIDE

Sex differentiation, according to the gender perspective, is always arbitrary and capricious.<sup>83</sup> However, the law has traditionally recognized

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<sup>70</sup> ROTHBLATT, *supra* note 18, at 75 (saying in regard to sports, "separate is never equal," and that women and men could compete together were the sports based on different factors).

<sup>71</sup> Franke, *supra* note 14, at 82.

<sup>72</sup> ROTHBLATT, *supra* note 18, at 92.

<sup>73</sup> *Id.* at 93 ("Stand-up urination for people with penises is a way to say that males are different (and better) in a patriarchal society.").

<sup>74</sup> O'LEARY, *supra* note 12, at 9.

<sup>75</sup> WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 264-65 (1997) (citing MICHEL FOUCAULT, *HISTORY OF SEXUALITY: AN INTRODUCTION* 90 (1976)).

<sup>76</sup> See O'LEARY, *supra* note 12, at 10.

<sup>77</sup> Gould, *supra* note 58, at 431. "[S]ex based classifications at law cannot be viewed simply as regulation by bio-medical definitions." *Id.*

<sup>78</sup> The Hon. Sir Roger Ormrod, *The Medico-Legal Aspects of Sex Determination*, 40 *MEDICO-LEGAL J.* 78, 78 (1972). Consequently, Ormond also wrote the *Corbett* opinion. *Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.).

<sup>79</sup> *Drag*, *supra* note 3, at 1978.

<sup>80</sup> Valdes, *supra* note 25, at 27, 32-33.

<sup>81</sup> *Drag*, *supra* note 3, at 1994.

<sup>82</sup> *E.g.*, Valdes, *supra* note 25.

<sup>83</sup> ROTHBLATT, *supra* note 18, at 21.



sex differences, especially in those areas where they are dispositive.<sup>84</sup> Further, the law has recognized the State's authority to determine a person's sex.<sup>85</sup> The gender perspective, therefore, must deconstruct the law.<sup>86</sup>

The strategy, then, is not to debate the truth of the binary male/female standard but to change the truth by repeatedly characterizing it as arbitrary while cementing a power base within the legal institution from which to pronounce new truth.<sup>87</sup> Further, constitutional claims are raised regarding the violation of fundamental rights and protections<sup>88</sup> (including personal freedom and equality)<sup>89</sup> in the hope of obtaining a favorable national ruling. This campaign against the State's authority to define sex<sup>90</sup> has one goal: ending "the judicial power of the state to enforce any particular definition of sex, gender identity, and sexual orientation."<sup>91</sup> The numerous strategies employed to this end by advocates of the gender perspective read like a veritable "how-to" book for legal deconstruction.<sup>92</sup>

#### A. *How to Use Ambiguities*

Two primary strategies are used to demonstrate the arbitrary nature of the male/female dichotomy: making gender trouble and juxtaposing sex determinants.

##### 1. Making Gender Trouble

[M]aking gender trouble means denaturalizing gender roles - revealing their constructedness and pointing out their contingency. The point is not to find a perspective that transcends the gendered identity constructed by the law and other institutions, for no such perspective

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<sup>84</sup> "The Supreme Court has never hesitated to recognize sex-based differences, particularly in cases involving physiology, marriage, childbirth, and sexuality." Wardle, *supra* note 42, at 84 (quoting *Torres v. Wis. Dep't of Health & Soc. Servs.*, 859 F.2d 1523, 1527-28 (7th Cir. 1988) (citing *Michael M. v. Superior Ct.*, 450 U.S. 464, 469 (1981))).

<sup>85</sup> Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman?* 52 FLA. L. REV. 745, 757 (2000). "Legally, every adult is either male or female." Suzanne Miller, *When Sexual Development Goes Awry*, WORLD & I, Sept. 2000, at 148, 154.

<sup>86</sup> Greenberg, *supra* note 21, at 293.

<sup>87</sup> See Muller, *supra* note 25, at 23-24.

<sup>88</sup> Greenberg, *supra* note 21, at 292.

<sup>89</sup> Dunlap, *supra* note 9, at 1139.

<sup>90</sup> See Coombs, *supra* note 10, at 262.

<sup>91</sup> Currah, *supra* note 25, at 1363.

<sup>92</sup> Deconstruction has been defined as, "[T]he work of exposing hegemonic ideas and language so that people will recognize that their perceptions of reality are socially constructed." O'LEARY, *supra* note 12, at 6.

is possible. Revealing the artificiality of gender roles is itself strategic.

Pointing out contingencies multiplies gender possibilities.<sup>93</sup>

Gender trouble is premised on the Marcusean presumption that, in order to overthrow a corrupt civilization, all sexual deviance should be encouraged as revolutionary.<sup>94</sup> Hence the efforts of crossdressers and transsexuals to parody the sexes are encouraged because they weaken the hegemonic claim of normative gender identity and expand the range of gender possibilities.<sup>95</sup> Every time genders are bent, more institutional power can be grasped.<sup>96</sup> However, while advocating gender trouble as an end to itself - as gender performance - proponents fail to address why the law should abandon heterosex performance. If all gender is performance then what makes one routine any better than another?<sup>97</sup>

## 2. Juxtaposing Sex Determinants

Advocates of the gender perspective are quick to point out that the law has yet to define sex,<sup>98</sup> and are even quicker to offer suggestions. First, they note that sex assignment at birth is based solely on a cursory genital inspection and argue that sex should be determined instead by as many as eight factors<sup>99</sup> including the following: chromosomes, hormones, gonads, internal and external genitalia, phenotype, the sex of rearing, and core gender identity.<sup>100</sup> The question, then, is which factor(s) will control one's legal sex.<sup>101</sup> The courts have been criticized for not determining the hierarchy and weight to be given each factor.<sup>102</sup> Some critics warn that until the weight of the determinants are decided, there will continue to be discrepancies in court opinions.<sup>103</sup>

However, courts that have considered the factors in determining a post-operative transsexual's legal sex have still arrived at different

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<sup>93</sup> *Drag*, *supra* note 3, at 2007.

<sup>94</sup> *Cf.* POSNER, *supra* note 62, at 22-23 (commenting on HERBERT MARCUSE, *EROS AND CIVILIZATIONS: A PHILOSOPHIC INQUIRY INTO FREUD* (1955)). *See also* *Drag*, *supra* note 3, at 2007-08 (stating that, "The strategy is to use the extremes to show that the categories that define the norm are themselves untenable.").

<sup>95</sup> BUTLER, *supra* note 19, at 146.

<sup>96</sup> Muller, *supra* note 25, at 23-24.

<sup>97</sup> *Id.*

<sup>98</sup> Greenberg, *supra* note 21, at 268 (noting that even the recently passed Defense of Marriage Act, 28 USCS § 1738(c) (2000), does not define sex).

<sup>99</sup> Gould, *supra* note 58, at 429. The assignment of sex at birth by external genitalia is a particular affront to advocates of the gender perspective who do not believe in biological differences between males and females. *Id.*

<sup>100</sup> *E.g., id.* (citing JOHN MONEY & ANKE A. EHRHARDT, *MAN & WOMAN, BOY & GIRL* 1 (1996)).

<sup>101</sup> Greenberg, *supra* note 21, at 269.

<sup>102</sup> Greenberg, *supra* note 85, at 753.

<sup>103</sup> MEYERS, *supra* note 15, at 226.

results.<sup>104</sup> Both cases involved the annulment of a marriage between a male and a post-operative male. The court in *Corbett v. Corbett*, a case of first impression in England,<sup>105</sup> decided that, at least for the purposes of marriage, biological factors ought to govern.<sup>106</sup> Conversely, an American case was decided quite differently. The court in *M.T. v. J.T.* held that sex embraces both gender identity and biology and that where those two are congruent, such a match will be determinative at law.<sup>107</sup> That court did note, however, that where gender identity and biology are not in agreement, biology should prevail.<sup>108</sup>

These two cases were not inconsistent because they failed to consider the sex factors. Rather, they are in disagreement because they approached the factors from entirely different worldviews.<sup>109</sup> It was not just a matter of semantics, but "a fundamentally different understanding of what is meant by 'sex' for the purposes of marriage."<sup>110</sup> Therefore, asking the court to rank the sex factors will not necessarily decrease confusion; in fact, the judicial discretion entailed in such a balancing could perpetuate discrepancies.

The factors themselves, when considered individually, are easily deconstructed. Many people, for example, through a combination of chromosomes and anatomy, do not fall within the dimorphic model. This is especially true of the intersexed whose chromosomal or genital structure is ambiguous.<sup>111</sup> In fact, due to the potential ambiguity in chromosome structure, the International Olympic Committee suspended chromosome testing on female athletes.<sup>112</sup> In addition, some experts argue that a person's sexual identity is more important than

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<sup>104</sup> Meanwhile, the *Littleton* court was heavily criticized for failing to even address the sex factors. Greenberg, *supra* note 85, at 754-55 (castigating the *Littleton* court's rationale as being overly simplistic for not analyzing sex factors).

<sup>105</sup> *Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.).

<sup>106</sup> *Id.* at 106 (according to the holding, determinant factors for marriage are biological because the law requires a male and a female); *see also* *Littleton v. Prange*, 9 S.W.3d. 223 (Tex. App. 1999) (holding that a post-operative's sex for the purposes of marriage is fixed at birth).

<sup>107</sup> *M.T. v. J.T.*, 355 A.2d 204, 209 (N.J. Super. Ct. App. Div. 1976).

<sup>108</sup> *Id.* at 210. *Accord In re Anonymous*, 293 N.Y.S.2d 834, 837 (N.Y. Civ. Ct. 1968). The holding in *M.T. v. J.T.* is really quite unusual. *See In re Ladrach*, 32 Ohio Misc. 2d 6, 9 (1987). There the court held that where biology and gender identity were not in congruence, biology should control. Yet at the time of the marriage in question, the bride had yet to change his sex. *See M.T. v. J.T.*, 355 A.2d 209 (N.J. Super. Ct. App. Div. 1976).

<sup>109</sup> *Cf. In re Ladrach*, 32 Ohio Misc. 2d at 9 (criticizing the *M.T.* court's "very liberal posture").

<sup>110</sup> *M.T. v. J.T.*, 355 A.2d 209 (N.J. Super. Ct. App. Div. 1976) (disagreeing with *Corbett's* rationale).

<sup>111</sup> Kogan, *supra* note 19, at 1239.

<sup>112</sup> Miller, *supra* note 85, at 149.

chromosomes for the purpose of determining sex.<sup>113</sup> Therefore, to some, a transsexuals' discord between gender identity and biology represents a significant ambiguity.<sup>114</sup>

Yet this clamor for criteria also fails to take into account that the factors articulated in *Corbett*, although relevant, were not determinative.<sup>115</sup> In fact, the determinants themselves were originally created, not for inventorying human sex traits, but for identifying sex *in the event of* an ambiguity or abnormality.<sup>116</sup> This begs the question of whether the majority of the population, as unequivocally sexed individuals, should be deconstructed by criteria originally used as guidelines for classifying the sexually ambiguous.

### *B. How to Pick a Mascot*<sup>117</sup>

The gender perspective uses the intersexed, transvestites, and transsexuals to create gender ambiguities that tear down the law's binary classification system and expose its apparent inequity.<sup>118</sup> These groups are not emphasized out of concern for those affected but to challenge the assumption that the male/female dichotomy at law is correct<sup>119</sup> and to "disrupt the gendered patriarchy."<sup>120</sup> The gender perspective has picked their mascots well.

In fact, the recent debate over the definition of sex is largely attributable to the development of sex-change surgery and its application to transsexuals.<sup>121</sup> Transsexuals have become a metaphor, symbolic of the gender perspective's defiance of traditional roles and categories.<sup>122</sup> "The transgendered as a . . . symbol celebrates ambiguity and fluidity of gender, that we can be empowered to chose [sic] gender,

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<sup>113</sup> *Ulane v. E. Airlines*, 742 F.2d 1081, 1083 n.6 (7th Cir. 1984) (holding that sex, for the purposes of Title VII sex discrimination, is determined by biological sex and not gender identity despite expert testimony to the contrary). See Smith, *supra* note 4, at 969.

<sup>114</sup> Greenberg, *supra* note 21, at 267. *Contra Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.) (refusing the argument that transsexuals are intersexed due to ambiguity between their psychology and biology).

<sup>115</sup> *Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.).

<sup>116</sup> *Id.*

<sup>117</sup> "Groups disliked, distrusted, or feared by the general public are particularly eligible to become mascots who symbolize the superior wisdom and virtue of the anointed." SOWELL, *supra* note 14, at 149.

<sup>118</sup> POSNER, *supra* note 62, at 25.

<sup>119</sup> O'LEARY, *supra* note 12, at 6.

<sup>120</sup> Coombs, *supra* note 10, at 226.

<sup>121</sup> *Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.).

<sup>122</sup> Pearlman, *supra* note 57, at 847 n.52.

that it is not assigned at birth, nor is it unalterable or prescribed over time."<sup>123</sup>

Therefore, it has become increasingly important to divest transsexualism from its medical liability - the "stigma" of disease.<sup>124</sup> There is a concerted push to make sex-changes available on demand; thereby omitting the "passing" phase that is generally required as a show of good faith sickness.<sup>125</sup> Also, there is a movement to get rid of the label "gender dysphoric" and replace it with something more positive, like "gender euphoric."<sup>126</sup> Only when transsexualism is stripped of the rhetoric of illness and immorality, will it be most effective as the gender perspective's metaphoric mascot.<sup>127</sup>

However, the idea that transsexualism is "unremitting and irreversible" has come to be one of the *myths* of transsexualism.<sup>128</sup> Transsexualism is portrayed as an immutable and fixed condition.<sup>129</sup> Meanwhile, criticism of transsexuals is depicted as "sex-role oppression"<sup>130</sup> based on rigid binary assumptions<sup>131</sup> and attributed to religious and patriarchal prejudices.<sup>132</sup> Instead, the impact of role models and mentors weighs heavily into the process.<sup>133</sup> True cases of transsexualism are extraordinarily rare.<sup>134</sup> Furthermore, there is no mention in gendered literature about the distinction between primary and secondary transsexuals.<sup>135</sup> Primary transsexualism is very rare and occurs in both men and women.<sup>136</sup> Secondary transsexualism, conversely, is much more common and occurs exclusively in men.<sup>137</sup> Primary transsexualism appears to have a biological corollary since it depends on one having acted out cross gender roles since birth.<sup>138</sup> Secondary transsexuals, however, lack the long history of gender dysphoria and have generally acted in their biological roles throughout life-changing

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<sup>123</sup> *Id.*

<sup>124</sup> *Drag, supra* note 3, at 1993.

<sup>125</sup> Richard M. Levine, *Crossing the Line*, MOTHER JONES, May-June 1994, available at [http://www.motherjones.com/mother\\_jones/MJ94/levine.html](http://www.motherjones.com/mother_jones/MJ94/levine.html) (last visited Oct. 10, 2001).

<sup>126</sup> *Id.*

<sup>127</sup> *Drag, supra* note 3, at 1993.

<sup>128</sup> RICHARD F. DOCTER, *TRANSVESTITES AND TRANSEXUALS: TOWARD A THEORY OF CROSS-GENDER BEHAVIOR* 26 (Richard Green ed., 1988) (emphasis added).

<sup>129</sup> Greenberg, *supra* note 85, at 767; Gould, *supra* note 58, at 434.

<sup>130</sup> Pearlman, *supra* note 57, at 872.

<sup>131</sup> Coombs, *supra* note 10, at 225.

<sup>132</sup> *Id.* See also Rose, *supra* note 5, at 69.

<sup>133</sup> *Id.* at 26, 75.

<sup>134</sup> MEYERS, *supra* note 15, at 235.

<sup>135</sup> DOCTER, *supra* note 128, at 70-71.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

roles usually in response to a recent crisis.<sup>139</sup> Yet, the gender perspective treats all transsexuals as though they were primary,<sup>140</sup> thus perpetuating the myth.<sup>141</sup>

Still, transsexuals have been useful as mascots in the ongoing effort to deconstruct the law's ability to classify.<sup>142</sup> Transsexual lawsuits have had minimal success on claims of gender discrimination,<sup>143</sup> have met with moderate success in getting official documents changed,<sup>144</sup> but, most notably, have had a tremendous impact on the same-sex marriage debate.<sup>145</sup> By furthering the destruction of sex categories, transsexual marriages herald the acceptance of same-sex unions.<sup>146</sup>

### C. How to Untie the Knot

From the gender perspective, marriage perpetuates class distinction.<sup>147</sup> After all, according to Frederick Engels, marriage represents the first example of class antagonism and oppression.<sup>148</sup> Marriage, then, is the ultimate form of sex differentiation and oppression.<sup>149</sup> Yet, despite the best efforts of the gender perspective, the one-man, one-woman requirement for marriage still holds in all jurisdictions.<sup>150</sup> Therefore, the redefinition of sex by subjective standards is the first step in deconstructing heterosexual marriage.<sup>151</sup> The power to define male and female is fundamental to the question of marriage.<sup>152</sup> The redefinition of sex, then, is not an end-run on same-sex marriage.<sup>153</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> *See, e.g.,* Greenberg, *supra* note 21.

<sup>141</sup> DOCTER, *supra* note 128, at 26.

<sup>142</sup> *See* Coombs, *supra* note 10, at 244.

<sup>143</sup> Pearlman, *supra* note 57, at 862.

<sup>144</sup> *Id.* at 851 n.75 (listing state legislatures' stances on amended birth certificates).

<sup>145</sup> Greenberg, *supra* note 85, at 761-62.

<sup>146</sup> Pearlman, *supra* note 57, at 863.

<sup>147</sup> Rose, *supra* note 5, at 129 (critiquing the Corbett decision).

<sup>148</sup> O'LEARY, *supra* note 12, at 8 (citing FREDERICK ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* 65-66 (1972)).

<sup>149</sup> O'LEARY, *supra* note 12, at 14. Recall, from the gender perspective, different necessarily means unequal, and unequal necessarily means oppressive. *Id.*

<sup>150</sup> Robert H. Knight, *How Domestic Partnership and "Gay Marriage" Threaten the Family*, Family Research Council, at <http://www.frc.org/get/is94f5.cfm> (last visited Nov. 10, 2001); *see also* Wardle, *supra* note 42, at 53-58.

<sup>151</sup> *See* Wardle, *supra* note 42, at 32-39.

<sup>152</sup> Rose, *supra* note 5, at 5.

<sup>153</sup> *Cf.* Rose, *supra* note 5, at 48.

but an incremental assault on marriage<sup>154</sup> and the law's prerogative to classify on the basis of sex.

This assault is silent and subtle. Theorists like Cass Sunstein<sup>155</sup> advocate a flexible and incremental approach to the deconstruction of sex and marriage.<sup>156</sup> The idea is to whittle away at marriage law while avoiding a majoritarian backlash, to "allow room for public discussion and debate before obtaining a centralized national ruling that preempts ordinary political process over a moral issue about which society is in a state of evolution."<sup>157</sup> Consequently, the plaintiff in *Littleton*, a post-operative transsexual male, was criticized for pursuing his alleged marital rights to the detriment of the transsexual community.<sup>158</sup> Raising the specter of transsexual marriages to a majoritarian legislature invites regulation.<sup>159</sup> Instead, advocates of same-sex and transsexual marriage generally prefer to confine the fight to the courts.

#### *D. How to Find a New Right*

The strategy of the gender perspective also involves "attacking tradition in the name of some underprotected right."<sup>160</sup> Such an approach pits the right of the majority to enact their views into law against the potential oppression of minority groups.<sup>161</sup> The law's reliance on a biological definition of sex, then, is decried for limiting the right to sexual expression and, consequently, for creating class-based oppression.<sup>162</sup> Along with other broad claims of personal freedom and equality,<sup>163</sup> other oppressed rights include: the right to privacy, the right to be let alone, and the right of personal autonomy.<sup>164</sup> Painted with a broad brush, these fundamental rights are infringed by the State's power to classify on the basis of sex. They are also based in an ideology that

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<sup>154</sup> See Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 WHITTIER L. REV. 327, 327 (2000). See also Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967-90*, 41 HOW. L.J. 271 (1998).

<sup>155</sup> Cass R. Sunstein is the Karl N. Llewellyn Dist. Service Professor of Jurisprudence, University of Chicago Law School and Department of Political Science. The University of Chicago Law School, *Cass R. Sunstein*, at <http://www.law.uchicago.edu/faculty/sunstein> (last visited Apr. 15, 2001).

<sup>156</sup> See Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 25 (1994).

<sup>157</sup> *Id.* at 26.

<sup>158</sup> Rose, *supra* note 5, at 73.

<sup>159</sup> *Id.*

<sup>160</sup> KNIGHT, *supra* note 17, at xv.

<sup>161</sup> Currah, *supra* note 25 at 1377.

<sup>162</sup> ROTHBLATT, *supra* note 18, at 155.

<sup>163</sup> Dunlap, *supra* note 9, at 1139.

<sup>164</sup> *Id.* at 1140.

believes society itself creates and governs fundamental rights.<sup>165</sup> Such broad rights claims seek to impose strict scrutiny, thereby limiting the ability of the State to differentiate on the basis of sex.<sup>166</sup> More narrowly defined, these rights boil down to "a fundamental right to determine one's own gender independent of biological sex."<sup>167</sup>

However, the alleged right to define one's own sexual identity does not pass constitutional muster.<sup>168</sup> In general, substantive rights are bounded by tradition.<sup>169</sup> In this case, there is no fundamentally recognized right to define one's own sexual identity; in fact, such prerogative has always been entrusted to the State.<sup>170</sup>

### *E. How to Put it Back Together*

Given the gender perspective's vehement opposition to the law's current classification system,<sup>171</sup> the question becomes, what standard should be adopted in its place or should there be any standard at all?

Considering the mutability and ambiguity of the aforementioned sex factors<sup>172</sup> some experts have posited that sexual identity is a clearer and more equitable way of determining sex at law.<sup>173</sup> Hypothetically, such a definition would be respectful of both the medical community's findings and the rights of the individual.<sup>174</sup> Further, it would be much more flexible and responsive to differentiated gender roles than the formal biological divide.<sup>175</sup> Arguably it is also more compassionate, reflecting justice values that promote emotional well-being.<sup>176</sup> Finally, defining sex subjectively would lead to the "cleansing of the conflationary

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<sup>165</sup> O'LEARY, *supra* note 12, at 20.

<sup>166</sup> Wardle, *supra* note 42, at 4.

<sup>167</sup> Franke, *supra* note 14, at 8.

<sup>168</sup> See Richard F. Duncan, "They Call Me 'Eight Eyes': Hardwick's Respectability, Romer's Narrowness, and Same-Sex Marriage, 32 CREIGHTON L. REV. 241 (1998) (discussing a constitutional analysis of substantive rights claims).

<sup>169</sup> Wardle, *supra* note 42, at 32.

<sup>170</sup> Greenberg, *supra* note 85, at 757. See also Miller, *supra* note 85, at 154.

<sup>171</sup> E.g., Currah, *supra* note 25, at 1366 (regarding the destruction of the State's power to classify). See also Coombs, *supra* note 10, at 262 (challenging the law's authority to define sex).

<sup>172</sup> See discussion *infra* Part III.A.2.

<sup>173</sup> *Ulane v. E. Airlines*, 742 F.2d 1081, 1083 n.6 (7th Cir. 1984) (citing expert opinion that sex, for the purposes of Title VII sex discrimination, should be determined by one's gender identity). See Smith, *supra* note 4, at 969.

<sup>174</sup> Smith, *supra* note 4, at 972.

<sup>175</sup> ROTHBLATT, *supra* note 18, at 21.

<sup>176</sup> Greenberg, *supra* note 85, at 765-66 (arguing that the judges should be more cognizant of the "therapeutic effect" of the legal process).



hetero-patriarchal status quo and its detrimental effects on law and society."<sup>177</sup>

Perhaps, however, the subjective approach is most appealing to the gender perspective because it would be impossible to apply.<sup>178</sup> The subjective standard is really no standard at all.<sup>179</sup> Gender identity is based on one's self-perception;<sup>180</sup> therefore, there is no way to measure gender identity apart from subjective forays into a person's psyche.<sup>181</sup> This "no standard," however, would suit the gender perspective just fine - considering that the ultimate goal is to deprive the law of its power to classify on the basis of biological sex.<sup>182</sup> From the gender perspective, sex is a social construct and, therefore, legal standards based on sex are necessarily arbitrary.<sup>183</sup> Consequently, absent physiological distinctions, any legal rules written regarding the sexes are irrational and inequitable.<sup>184</sup> Remember the mantra: differentiation is classification is oppression.

#### IV. EVIDENTLY, IT MAKES A DIFFERENCE

The law has traditionally adopted a normative and objective definition of sex as "natural, inevitable, apolitical."<sup>185</sup> This conventional view is reiterated in numerous recent decisions holding that a person's sex, at law, is determined at birth.<sup>186</sup> Subsequently, these decisions have been castigated by scholars for being "overly-simplified."<sup>187</sup> When viewed through the gender lens such a decision appears inherently irrational<sup>188</sup> because it "reinforces and perpetuates the heterosexist understanding

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<sup>177</sup> Valdes, *supra* note 25, at 9 (referring to the detrimental effects of constraints on human sexuality and the repression of gender diversity).

<sup>178</sup> DOCTER, *supra* note 128, at 74 (concerning the impossibility of quantitatively assessing gender identity).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 65.

<sup>181</sup> *Id.* at 74.

<sup>182</sup> Currah, *supra* note 25, at 1363.

<sup>183</sup> POSNER, *supra* note 62, at 24.

<sup>184</sup> O'LEARY, *supra* note 12, at 14 (concerning Marxist view of class oppression).

<sup>185</sup> Drag, *supra* note 3, at 1973.

<sup>186</sup> *E.g.*, Littleton v. Prange, 9 S.W.3d. 223 (Tex. App. 1999). *Littleton* goes on to say, "There are some things we cannot will into being. They just are." *Id.* at 231. *E.g.*, *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (1987); *Corbett v. Corbett*, 1971 P. 104 (Eng. C.A.). "[T]he biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means." *Id.*

<sup>187</sup> Coombs, *supra* note 10, at 228. *See also* Greenberg, *supra* note 85, at 747, 752 (chastening the *Littleton* court for deciding the case in a "simple manner" that "lack[s] the rigorous analysis that is required to resolve this complex and important issue.").

<sup>188</sup> *See* Coombs, *supra* note 10, at 228.

that there must be a congruence between sex and gender."<sup>189</sup> Recall, the gender perspective is bent on ignoring or marginalizing any differences between the sexes and glorifying activities that disrupt gender categories.<sup>190</sup>

The difference between the traditional view and the gender perspective involves fundamentally different assumptions about the nature of men and women.<sup>191</sup> Sex can be seen as an evolutionary accident or as part of an overarching natural order.<sup>192</sup> It is important to re-emphasize that the gender perspective is a worldview<sup>193</sup> based on presumptions. Most prevalent among which is the assumption that any apparent differences between males and females are not natural but are constructed<sup>194</sup> or performative.<sup>195</sup> This assumption is rebuttable.

That sex role differences may be biological threatens the gender perspective's dogmatic insistence on construct and performance.<sup>196</sup> Therefore, the gender perspective tends to skip any descriptive analysis in lieu of the normative.<sup>197</sup> It is one thing, however, to argue that, normatively, differences between men and women should not matter; yet it is quite another thing to say, descriptively, that differences do not matter.<sup>198</sup> In fact, one might say that "[t]he insistence on the substitute of 'gender' for 'sex' and the redefinition of 'gender' as 'socially constructed roles' is an attempt to win a philosophical argument and to impose a single narrow and discredited point of view on the world."<sup>199</sup>

That discredited view is the nature versus nurture debate. Such arguments are now anachronistic; recent medical research continues to delve into differences between men and women including brain function and reproductive structure.<sup>200</sup> "Alone among the divers functional systems of embryonic development, the reproductive system is sexually dimorphic. So also in the subsequent behavioral and psychic development, there is sexual dimorphism. In the theory of psychosexual differentiation, it is now outmoded to juxtapose nature versus nurture . .

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<sup>189</sup> Kogan, *supra* note 19, at 1231.

<sup>190</sup> See ROTHBLATT, *supra* note 18, at 157.

<sup>191</sup> Kohm, *supra* note 17, at 57.

<sup>192</sup> *See id.*

<sup>193</sup> *See discussion infra* Part II.A.

<sup>194</sup> Franke, *supra* note 14, at 99.

<sup>195</sup> BUTLER, *supra* note 19, at 24.

<sup>196</sup> BORK, *supra* note 20, at 267.

<sup>197</sup> Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 331, 338 (1995).

<sup>198</sup> *Id.*

<sup>199</sup> O'LEARY, *supra* note 12, at 12.

<sup>200</sup> *Id.*

. ." <sup>201</sup> It is possible to demonstrate that sexual dimorphism exists and that it is not wholly a biological or social construct.<sup>202</sup> Therefore, rather than resorting to the outmoded nature v. nurture arguments, there is a need to understand the way the two interact.<sup>203</sup>

A more moderate approach recognizes some proportion of both essentialism and constructionism.<sup>204</sup> In this way, neither the biological essentialist or the social constructionist are exclusively right; rather, "[t]he biological and the social merge and overlap."<sup>205</sup> Arguably then, biology and rearing are so intertwined as to be virtually indistinguishable.<sup>206</sup>

Moreover, the disaggregation of sex and gender does not comport with science.<sup>207</sup> For example, by failing to account for the existence of two genders in nearly every society, Martine Rothenblatt's "vision of a sexual continuum defies much empirical research in cultural anthropology."<sup>208</sup> Likewise, Butler's performative theory assumes that "heterosexuality and reproductivity are merely arbitrary constructs" and ignores heterosexual attraction because of its implications on normalcy.<sup>209</sup> Furthermore, science is constantly reaffirming biological differences.<sup>210</sup> These differences are not only physical but "are also matters of psychology and behavior."<sup>211</sup> That sex, then, is wholly a social construct is not only counterintuitive but also "contrary to the biological and anthropological evidence."<sup>212</sup> The current medical opinion is that there are only two sexes and two genders, but their variations are multifarious.<sup>213</sup>

It is also possible that gender differences are the result of biological necessity.<sup>214</sup> Traditions, therefore, are not a result of or rooted in some

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<sup>201</sup> MONEY & EHRHARDT, *supra* note 100, at 1.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> POSNER, *supra* note 62, at 29.

<sup>205</sup> MONEY & EHRHARDT, *supra* note 100, at xii.

<sup>206</sup> O'LEARY, *supra* note 12, at 12.

<sup>207</sup> *Id.*

<sup>208</sup> Kogan, *supra* note 19, at 1251 (referring to ROTHBLATT, *supra* note 18, at 13).

<sup>209</sup> Muller, *supra* note 25, at 23 (concerning BUTLER, *supra* note 19).

<sup>210</sup> See Seth Hettena, *Study: Gender Determined in Womb*, A.P. ONLINE (May 12, 2000). See also O'LEARY, *supra* note 12, at 12; Kogan, *supra* note 19, at 1251.

<sup>211</sup> Epstein, *supra* note 197, at 338.

<sup>212</sup> POSNER, *supra* note 62, at 29. See also Peter L. Berger, *Two Cheers for Class*, 64 FIRST THINGS 18-20 (June/July 1996), available at <http://www.firstthings.com/ftissues/ft9606/opinion/berger.html> (last visited Nov. 8, 2000).

<sup>213</sup> MEYERS, *supra* note 15, at 233. Cf. Wardle, *supra* note 42, at 88 (describing how heterosexual marriages are not gender exclusive but provide great latitude for gender roles).

<sup>214</sup> Muller, *supra* note 25, at 22-23.

hegemonic patriarchy but in social costs. Accordingly, sex differences are attributable less to power, accident, or ignorance than to "incentives, opportunities, constraints, and social function."<sup>215</sup> While not determinative, biology influences behavior and sexual strategies.<sup>216</sup> From this analysis it is possible to see how cross gender behavior would be discouraged as it would increase the cost of information.<sup>217</sup> Consequently, biological differences do not entail social inferiority or superiority; rather, apparent disparities in society may be reflective of personal choice.<sup>218</sup>

The elimination or the suppression of sex roles is regarded as an objective of the sound society, and the evident differences in sex roles in virtually all societies, including our own, is treated as a sign that something is very much amiss. But if the descriptive truths about male/female differences hold, then we should not respond to the specialization of sex roles with a suspicion that often rises to the level of bitter denunciation. If individuals do have different natural endowments, then the system of voluntary arrangement should reflect those differences.<sup>219</sup>

Finally, one can begin to see how an otherwise intelligent person might disagree with the subjective definition of sex proposed by the gender perspective. The literature of social construction "belittles biological sex differences, which lead the writers to regard legal distinctions built on those differences as presumptively arbitrary."<sup>220</sup> However, while the gender perspective may minimize or rationalize it, there is evidence for why a rational thinking person could believe that differences between the sexes do exist and do matter. Therefore, one need not assert that "biology is *destiny*" to affirm that "biology is *reality*."<sup>221</sup>

## V. SO WHAT?

What's the difference if sex is defined by biology or by sexual identity? The answer lies in the extended goals of the gender perspective. First, if allowed to travel to its logical conclusion, the gender perspective will transform society in its own image. Second, changing the legal definition of sex from objective biology to subjective gender identity will compromise our entire legal system.

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<sup>215</sup> POSNER, *supra* note 62, at 30.

<sup>216</sup> *Id.* at 109.

<sup>217</sup> *Cf. id.* at 151.

<sup>218</sup> BORK, *supra* note 20, at 199.

<sup>219</sup> Epstein, *supra* note 197, at 340.

<sup>220</sup> POSNER, *supra* note 62, at 32.

<sup>221</sup> O'LEARY, *supra* note 12, at 14 (first emphasis added).

*A. Better Living Through Their Polity*

The gender perspective, as a worldview, is based in a Neo-Marxist ideology intent on:

[T]he history of class struggle, oppressor against the oppressed, locked in a battle that can be resolved only when the oppressed have their consciousness raised and realize their oppression, rise up in revolution, and impose a *dictatorship* of the oppressed. Then society will be totally reconstructed and the strife-free classless society will emerge ensuring utopian peace and prosperity for everyone.<sup>222</sup>

According to the gender perspective, the principle objective of society is to ensure the personal fulfillment of everyone - to help people.<sup>223</sup> Therefore, replacing the current objective definition of sex with a subjective definition would solve many perceived problems concerning sexual minorities and those laboring under the burden of the State's sex label.<sup>224</sup>

The gender perspective's ultimate goal is the creation of an edenic society where gender expressions abound unchecked by patriarchal hegemony. "[W]e will establish a new human culture of unparalleled creativity in personal development . . . from the subjugation of women shall emerge the sensitization of men. And from the apartheid of sex shall evolve the freedom of gender."<sup>225</sup> They imagine a positive surge of cultural creativity that will improve both the life of the individual and the world.<sup>226</sup>

In the end, however, the efforts of the gender perspective boil down to "a reckless attempt to remake human beings and create a world that can never exist."<sup>227</sup> On the whole, social constructionists do not like the idea that there may be deeply ingrained, rational bases for gendered practices. This would mean that society is not easily malleable but is actually resistant to their utopian vision.<sup>228</sup> With a culture so reticent to change, the only way to achieve utopia would be through coercion,<sup>229</sup> a "dictatorship of the oppressed."<sup>230</sup> It would take a great deal of

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<sup>222</sup> *Id.* at 8 (emphasis added).

<sup>223</sup> ROTHBLATT, *supra* note 18, at 103 ("The principal objective of humanitarian society is to provide equal, nondiscriminatory opportunities for personal fulfillment to all persons.").

<sup>224</sup> See Dunlap, *supra* note 9, at 1147-48 (claiming that, by switching to a subjective definition of sex, "the power of the government to probe, penalize, and restrict basic freedoms of sexual minorities would be resolved individualistically and functionally . . .").

<sup>225</sup> ROTHBLATT, *supra* note 18, at 21.

<sup>226</sup> *Id.* at 156.

<sup>227</sup> BORK, *supra* note 20, at 197.

<sup>228</sup> POSNER, *supra* note 62, at 30.

<sup>229</sup> BORK, *supra* note 20, at 198.

<sup>230</sup> O'LEARY, *supra* note 12, at 8.

bureaucracy to ensure that people live better and more productive lives. Therefore, the gender perspective threatens to substitute its own brand of imperialism.<sup>231</sup> And they have chosen the courts as the means of enacting this vision.

### *B. Take it to Court*

The gender perspective is necessarily wary of the majoritarian process. After all, a legislature is more likely to codify rather than repeal a decision like *Littleton*.<sup>232</sup> Furthermore, change through the political process is necessarily slow.<sup>233</sup>

However, the strategy of legislating through the court system automatically raises questions concerning the proper role of the judiciary in adjudicating political and moral questions.<sup>234</sup> Conversely, arguments made in favor of leaving the definition of sex to the legislature risk implying that sex is not natural but is a State construct that can be defined or redefined at will.<sup>235</sup> Regardless, most courts considering the definition of sex consider biological factors as determinative and defer social policy concerns to the legislature.<sup>236</sup> The few courts who have differed have done so in large part due to the personal beliefs of the presiding judge.<sup>237</sup> Hence, the court in *M.T. v. J.T.* is characterized as having taken a "very liberal posture."<sup>238</sup> Conversely, courts who refuse to litigate are censured in scholarly journals.<sup>239</sup> Ultimately, the gender perspective seeks to politicize<sup>240</sup> the judicial process, thereby trumping

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<sup>231</sup> BUTLER, *supra* note 19, at 147.

<sup>232</sup> Rose, *supra* note 5, at 134 (referring to the *Littleton* decision holding a transsexual's sex at birth is his legal sex).

<sup>233</sup> Sekulow & Tuskey, *supra* note 5, at 309-10.

<sup>234</sup> *Id.* at 315.

<sup>235</sup> *Cf. id.*

<sup>236</sup> MEYERS, *supra* note 15, at 225.

<sup>237</sup> *Id.* at 234.

<sup>238</sup> *In re Ladrach*, 32 Ohio Misc. 2d 6, 9 (1987).

<sup>239</sup> Because the Texas legislature had not provided any guidelines on how to determine a person's sex and Texas case law on the subject did not exist . . . . The court should have based its holding on an examination of the developments in other disciplines, an analysis of the policy concerns that arise in cases involving sex determination, and a comparison of the justifications for the contrary results reached in other jurisdictions on similar cases.

Greenberg, *supra* note 85, at 746 (criticizing the court for not legislating).

These differences concern one's view of the judiciary's role. Greenberg is predominantly concerned with the interpretation of law as therapy. *See* Greenberg, *supra* note 21, at 267-68. The judge in *Littleton*, however, saw his job as interpreting statutes and prior case law. In the absence of both he deferred the policy question to the legislature. *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

<sup>240</sup> Rose, *supra* note 5, at 53.

the legislature's prerogative.<sup>241</sup> However, Justice Antonin Scalia has warned the court about "imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected."<sup>242</sup> Beyond the dangers of judicial activism, however, there are other reasons why the law should remain objective with regards to sex.

Our western legal system is "[g]rounded in the Judeo-Christian ethic . . . a code not infrequently based on assumptions about the impact of sex status upon personality and sociality."<sup>243</sup> The law is built, then, on a system that recognizes moral absolutes.<sup>244</sup> The Judeo-Christian worldview, dominant into the eighteenth century, presents a "comprehensive theory of sex and gender."<sup>245</sup> Consequently, truths are embedded in the law not as a product of State power but as reflective of a divine order.<sup>246</sup> The gender perspective, which sees religion as a social construct,<sup>247</sup> demands "legal and social sanction for behaviors which legal codes, religious teachings, and cultural norms throughout history and around the world have condemned."<sup>248</sup> From the Judeo-Christian worldview, sex differentiation is not a mere construct but is integral even to the story of salvation.<sup>249</sup> Likewise, sex differentiation has serious implications on the law itself.

Premised on a Judeo-Christian worldview,<sup>250</sup> the law deals primarily with relations between persons, and between persons and the State.<sup>251</sup> Its traditions are rooted both in the natural law and in common consensus.<sup>252</sup> Further, the law itself is based on classifications.<sup>253</sup> It is a "binary system designed to produce conclusions of the yes or no type."<sup>254</sup>

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<sup>241</sup> SOWELL, *supra* note 14, at 231.

<sup>242</sup> *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>243</sup> Gould, *supra* note 58, at 423.

<sup>244</sup> See JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* (1991).

<sup>245</sup> ESKRIDGE & HUNTER, *supra* note 75, at 136.

<sup>246</sup> Kohm, *supra* note 17, at 56-57.

<sup>247</sup> O'LEARY, *supra* note 12, at 26.

<sup>248</sup> *Id.* at 19.

<sup>249</sup> Michael Novak, *Women, Ordination, and Angels*, 32 *FIRST THINGS*, Apr. 1993, at 25, available at <http://www.firstthings.com/ftissues/ft9304/articles/novak.html>. "[S]ex differentiation is not simply a trivial detail, to be discarded or altered without concern for the consequences; it is essential to the story of human salvation. Fundamental. Foundational." *Id.*

<sup>250</sup> Gould, *supra* note 58, at 423.

<sup>251</sup> *Corbett v. Corbett*, 1971 P. 105 (Eng. C.A.).

<sup>252</sup> O'LEARY, *supra* note 12, at 20. This common consensus is the basis by which the law discerns right answers; therefore, "truth claims are not wholly arbitrary, but rather are subject to judgement based upon criteria of coherence, plausibility, and conformity to experience, which are at least partially universal." Muller, *supra* note 25, at 24.

<sup>253</sup> Ormrod, *supra* note 78, at 78.

<sup>254</sup> *Id.*

It is a practical impossibility, then, for the law to forego the binary classification of sex.<sup>255</sup> In fact, to redefine sex according to subjective gender identity would be to devastate all principles of equal protection.<sup>256</sup> A subjective gender identity standard is really no standard at all.<sup>257</sup> Consequently, "laws can not be written about relationships based on socially-defined roles, but have to refer to male and female persons."<sup>258</sup>

## VI. CONCLUSION

According to leading theorist Julie A. Greenberg, "If a court chooses to emphasize other biological factors over self-identity for policy reasons, the position is defensible."<sup>259</sup> While refreshing in its concession, this statement appears to directly contradict the gender perspective's insistence that distinctions based on sex differences are inherently oppressive. Recall, the gender perspective is an internally consistent and comprehensive worldview<sup>260</sup> that, as a matter of ontology, does not recognize differences between biological males and females.<sup>261</sup> Its ultimate goal is revolution and the creation of a classless utopia.<sup>262</sup> To this end, it is arrayed against any form of sex differentiation. Its various factions have common links in academic feminism;<sup>263</sup> a common goal,<sup>264</sup> the disaggregation of sex, gender and orientation; and a common enemy, the traditional, Judeo-Christian worldview.<sup>265</sup>

However, as a product of a worldview and representing normative analyses, the assumptions of the gender perspective are intrinsically rebuttable. Any evidence of sex differentiation is anathema to them.<sup>266</sup> Further, the potential impact on society and the law should be enough to render their assumptions inherently suspect.

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<sup>255</sup> Smith, *supra* note 4, at 965. "It is probably impractical for the law to abandon the two-sex assumption. The law must deal with social practicalities, not medical niceties, and most people are clearly male or clearly female." *Id.*

<sup>256</sup> Gould, *supra* note 58, at 449.

<sup>257</sup> DOCTER, *supra* note 128, at 74 (concerning the impossibility of quantitatively assessing gender identity).

<sup>258</sup> O'LEARY, *supra* note 12, at 5. Subjectivizing sex would have a devastating effect on the enforcement of certain criminal offenses, such as adultery, rape and gross indecency, which are defined, in part, by the sex of the participant. *Corbett v. Corbett*, 1971 P. 105-06 (Eng. C.A.).

<sup>259</sup> Greenberg, *supra* note 85, at 755.

<sup>260</sup> O'LEARY, *supra* note 12, at 9.

<sup>261</sup> *E.g.*, Franke, *supra* note 14, at 99.

<sup>262</sup> O'LEARY, *supra* note 12, at 8.

<sup>263</sup> Muller, *supra* note 25, at 18-20.

<sup>264</sup> Kogan, *supra* note 19, at 1224, 1241. *See also* Valdes, *supra* note 25, at 9.

<sup>265</sup> KNIGHT, *supra* note 17, at xiv.

<sup>266</sup> BORK, *supra* note 20, at 267.



Yet, unlike the gender perspective, it is not necessary to eviscerate another's point of view in order to retain the internal consistency of one's own. In the end, it is enough to demonstrate that, despite what the "liberal hegemony" may say, there is evidence both descriptively<sup>267</sup> and normatively<sup>268</sup> from which a rational thinking person could conclude that sex, at law, should not be subjectively but objectively defined. It is enough to recognize that worldviews matter and that ideas have consequences.

*David Lee Mundy*

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<sup>267</sup> See discussion *infra* Part IV (regarding sex differences).

<sup>268</sup> See discussion *infra* Part V (concerning the gender perspective's destructive ontology).