

Gender as a Spectrum in the Binary – or Ternary – World

A Revisit to the 1629 Hall Case

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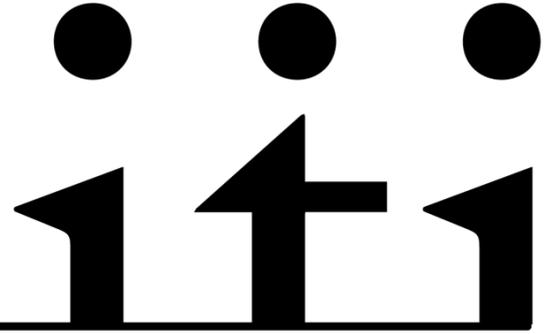
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The separation of sex and gender poses an inherent conflict between the necessity for legislation to not diminish biological sex differences, and the freedom of an individual to self-identify as wherever in the gender spectrum. Gender «X» is a trending compromise of this conflict. This paper revisits an old case in colonial America to illustrate the significances and limits of adding «X» as a third gender option.

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I. Introduction

Back in 1629, Thomas(ine) Hall, a person in colonial Virginia who self-identified as «both a man and a woman», was ordered to declare this identity in public and dress in both male

and female attires.¹ Nowadays, gender is increasingly seen as a spectrum and people who do not identify themselves as either male or female have «X» as a new gender option.²

Comparing the situations today with legal history, three questions are to be answered: Why was differentiating the sexes so important in Hall's time? Is it still necessary to make such a differentiation today? Is «X» merely splitting the traditional two boxes into three – or even adding up to become a modern version of Hall's 1629 punishment?

II. The Hall Case

Thomas(ine) Hall constantly shifted between male and female identities and declined to choose either male or female identity before the General Court of the Colony of Virginia.³

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¹ MCILWAINE HENRY R., Minutes of the Council and General Court of Colonial Virginia, Richmond 1926, p. 195.

² See RICHARDS CHRISTINA/BOUMAN WALTER PIERRE/SEAL LEIGHTON/BARKER MEG JOHN/NIEDER TIMO O./T'SJOEN GUY, Non-binary or Genderqueer Genders, in: International Review of Psychiatry 28(1)/2016, p. 95 et seq., p. 100.

³ See MCILWAINE (Fn. 1), p. 195.

Interesting enough, instead of appearing as a victim of this identity confusion, Hall seemed to have been taking advantage of choosing which gender identity to adopt: Hall, for instance, enjoyed the male privilege to join the military, but then «resumed» to a female identity and earned money from needlework.⁴ Hall was also said to have intimate relationships with both males and females.⁵ The shifting gender apparently caused confusion among Hall's neighbors. Thus, the court attempted to «ascertain and declare the sex» of Hall.⁶ The court ultimately gave up fitting Hall into the male or female box, but instead declared Hall as «a man and a woman», after examining the sexual characteristics and after asking for Hall's self-identification.⁷

As a punishment, Hall was forced to dress in both male and female attire.⁸ The aim of this punishment was not explained in the record. However, it seems as if the court tried to make Hall's gender identifiable. Moreover, the punishment made it possible to give notice to the public that they were dealing with someone of a different sex than what they might have expected. Furthermore, the court may also have tried to shame Hall with the ridicule of both being a male and a female, or on the other hand, by belonging to neither the male nor the female «box».

III. The Binary Sex: Historical Context

Why did the public and the court initially insist on defining Hall's sex to be either male or female? Why was Hall punished for the gender identity? Why was it significant to put a person into either of these two boxes?

In the historical context of colonial North America, the binary system may have been essential because of three reasons: the substantially different social and political status of men and women, the punishment toward sodomy and fornication, plus the ideology that delimited sex both physically and culturally.

First, in Hall's time, the binary system was the basis for the idea in which women were regarded as imperfect forms of men.⁹ This «justified» situations in which men – compared to women – enjoyed social, economic and political privileges. Hall seemed to be taking advantages out of this situation and was free to enjoy male privileges when necessary: by adopting a male identity to make a voyage to colonial Virginia, to join the army and to serve his master.¹⁰

From an outsider's perspective, Hall's habit of going back and forth between a male and female identity seems somehow fraudulent, even though Hall may not intend to deceive. Switching between these two gender identities made it possible for Hall to enjoy rights that were only entitled to men and, at the same time, to earn money from jobs that were normally only performed by women.

Second, in colonial North America, sodomy and fornication were punished, either as a sin or as a crime.¹¹ Hall, when seen as a man, was indicted for taking part in sodomy and fornication.¹² No wonder, Hall's switching between gender identities caused dilemmas for the judges to decide whether the relationships were punishable or not.

Third, sex and gender were not distinguished in the colonial time. Sex was defined as «both physically the nature of one's genitalia, and culturally one's knowledge and manner

⁴ MCLWAINÉ (Fn. 1), p. 195.

⁵ See MCLWAINÉ (Fn. 1), p. 195.

⁶ ROSE KATRINA C., A History of Gender Variance in Pre-20th Century Anglo-American Law, in: *Texas Journal of Women and the Law* 14/2004, p. 77 et seq., p. 91–93.

⁷ MCLWAINÉ (Fn. 1), p. 195.

⁸ MCLWAINÉ (Fn. 1), p. 195.

⁹ ROSE (Fn. 6), p. 96.

¹⁰ MCLWAINÉ (Fn. 1), p. 195.

¹¹ See VAUGHAN ALDEN T., The Sad Case of Thomas(ine) Hall, in: *The Virginia Magazine of History and Biography* 86/1978, p. 146 et seq., p. 147.

¹² See MCLWAINÉ (Fn. 1), p. 194.

of behaviors».¹³ Not distinguishing sex and gender made Hall's situation unexplainable.

When the court tried to assign Hall either to the male or the female box, they deduced the gender by checking physical appearances.¹⁴ Then, the court forced Hall to dress according to the biological sex to present his/her gender identity.¹⁵ The denial of the discrepancy between sex and gender identity expected people to behave and identify themselves exactly as their biological sex – either male or female.

IV. Gender as a Spectrum in the Current Binary Society

Nowadays, gender identity is recognized to be separated from biological sex. In fact, gender is increasingly regarded as a spectrum that ranges all the way from masculine to feminine.¹⁶ One should have the freedom to identify oneself anywhere in this spectrum. Thus, besides the concern for administrative efficiency, is it desirable for laws to be gender-neutral?

Even though the three reasons in 1629 are now perceived as discriminations under the separation of sex and gender, their underlying yet fundamental concern against radically gender-neutral legislation remains valid: males and females are treated differently. The different treatments can derive both from gender differences (the social construct) and sex differences (the biological differences).

Legislations can strive to achieve gender equality by being gender-blind and eliminate gender differences, such as equality in access to education, equality in property rights, equal representation in political and economic decision-making process, anti-discrimination in gender identity and gender expression etc. However, the problem is that many legal norms are based on sex differ-

ences, while sex – unlike gender – is not commonly recognized as a spectrum. These laws recognize the biological differences of the two sexes and provide different treatments accordingly, in pursuit of substantial equality.

In Chinese Labor Law, for example, women are specially protected based on their biological differences from men: employers are not allowed to assign female employees to perform «physically arduous works», «long-time night shifts» or jobs in certain «risky or hazardous environments» during their menstruation and pregnancy.¹⁷ Another example is sex segregated sports, where, to guarantee fairness, men and women athletes are separated based on sex because of their different levels of testosterone that affect muscle growth and so on.¹⁸ The biological differences are also held as possible reasons leading to concerns regarding «public privacy and safety».¹⁹ In the United States, for instance, sex serves as one determinant in the debate over sex-segregated public restrooms.²⁰

As shown, legislators do not – and should not – overlook the existence of the significant and substantial biological differences in male and female bodies. The formally equal approach of being radically sex-blind will only lead to substantial inequality. Then, how can one's gender identity be respected in laws that deal with sex differences?

¹³ ROSE (Fn. 6), p. 96.

¹⁴ See MCILWAINE (Fn. 1), p. 195.

¹⁵ See MCILWAINE (Fn. 1), p. 195.

¹⁶ See RICHARDS et. al (Fn. 2), p. 100.

¹⁷ See P.R. China Labor Law (2018), art. 60–63.

¹⁸ See PETERSON ANNA, *But She Doesn't Run like a Girl: The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, in: *Tulane Journal of International and Comparative Law* 19/2010, p. 315 et seq., p. 317; see HARPER JO-ANNA, *Athletic Gender*, in: *Law and Contemporary Problems* 80/2017, p. 139 et seq., p. 150.

¹⁹ *Texas v. United States*, 201 F. Supp. 3d 810, p. 833 (N.D. Tex. 2016); *United States v. Virginia*, 518 U.S. 515, p. 550 n.19 (1996).

²⁰ See *Texas v. United States*, 201 F. Supp. 3d (Fn. 19), p. 833; see also PORTUONDO LAURA, *The Overdue Case Against Sex-Segregated Bathrooms*, in: *Yale Journal of Law and Feminism* 29/2018, p. 465 et seq., p. 482–497.

Some more progressive legislations provide a third sex («X») as a new option besides the traditional male and female options. Till now, fourteen states in the United States provide this «X» option on legal IDs.²¹

However, the third sex raises many doubts because there is no clear medical definition of what the third sex exactly is. In *Zzyym v. Pompeo*, the U.S. Department of States denied Zzyym's passport application solely because the application stated «X» in the «sex» category, rather than checking male or female.²² In defense of the binary checkboxes in passport applications, the Department claimed that the binary system is necessary to «ensure accuracy and reliability in personal identities».²³

In any case, despite the possibility of adopting a third sex or not, the two or three options cannot cover the whole spectrum of gender identities. There will still be people having to fit in a box that they do not precisely belong to and, thus, being misrepresented. Gender identity as a spectrum is hard to be mapped into the not-gender-neutral real life. Hence, the question changes to: is the gender «X» a good solution or a modern analogy to Hall's punishment?

V. Gender «X»: A Modern Version of the Hall Case?

Having the freedom to self-declare as «X» in public record is indeed a legal and social recognition for individuals who identify as being at somewhere between the two ends of the gender spectrum.

However, it is questionable whether the male, female and «X» options will reflect the dignity of all gender identities. «X» covers multiple gender identity alternatives – all within one single option. For instance, those

who identify themselves as both male and female apparently have a different gender identity compared to those who identify themselves as neither male nor female. Yet, under this propagated system, both groups of individuals will be identified as gender «X». It may merely extend the former two boxes into three, even though the definition of the third one is highly flexible.

Nevertheless, adding a third option does better represent the various gender identities than the binary system. In addition, there are at least two substantial differences that distinguish gender «X» from the punishment in the Hall case:

First, the «X» is voluntarily chosen by an individual rather than being assigned. In contrary, Hall's punishment of being declared as «a man and a woman» was imposed by State authority, even though it coincidentally matched with Hall's self-identification.²⁴ Transgender and intersex individuals may not want to be defined by gender «X» and may prefer the binary system. The free choice allows only those who identify themselves within the definition of gender «X» to select it, thus respects one's gender identity and limits gender misrepresentation.

The second difference lies in the purpose of setting the third gender. Recognizing gender «X» calls on a non-discriminative treatment of gender representation in public records. «X» emerges from social backgrounds where one would unlikely be discriminated based on one's gender identity, supported by anti-discrimination laws. For instance, the proposed Equality Act in the United States stipulates that discrimination on the basis of gender identity and sex-based stereotypes are forms of sex discrimination.²⁵ Thus, such behavior is prohibited in public accommodations and facilities, public education, federal funding, employment, housing, credit op-

²¹ GIAMPOLO, Gender X Now Included for Pa. Driver's License Holders, in: [The Legal Intelligencer, November 8, 2019](#).

²² *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, p. 1250 (D. Colo. 2018)

²³ See *Zzyym v. Pompeo*, 341 F. Supp. 3d (Fn. 22), p. 1255.

²⁴ See MCILWAINE (Fn. 1), p. 195.

²⁵ Sec. 2 (a)(1), H.R.5, Equality Act, 116th Congress (2019–2020).

portunities, and the jury system.²⁶ Likewise, in Germany, where intersex people can choose among male, female and «X» in public records, nondiscrimination over gender identity is constitutionally guaranteed.²⁷

Conversely, in colonial Virginia, openly presenting such gender identity would lead to severe discrimination and social condemnation. In the Hall case, being declared as both a man as well as a woman, and coerced to dress in both male and female attire was intended and perceived to be a punishment.

VI. Conclusion

The separation of sex and gender is crucial to avoid Hall's punishment to happen again. Since sex and gender are attached to the same individual, adding gender «X» as a third gender option is significant. It demonstrates an effort to legally recognize each individual's gender identity to achieve formal equality, while not denying the legal interests of substantial equality in sex-segregated rules.

In practice, we should be careful not to let this progressive accomplishment lead to the same result as the punishment in the Hall case: First, gender «X» should be a free choice rather than an imposed classification of transgender and intersex persons. Second, anti-discrimination rules should be implemented in parallel with the gender option «X», in order to avoid the third gender becoming an easy target of discrimination.

²⁶ H.R.5, Equality Act, 116th Congress (2019–2020).

²⁷ Cf. German Constitutional Court, [Decision of the First Senate from October 10, 2017](#).