Les Cahiers de droit

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Volume 52, numéro 1, mars 2011

URI : https://id.erudit.org/iderudit/1005512ar
DOI : https://doi.org/10.7202/1005512ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

Découvrir la revue

Citer cet article

Needham, D. (2011). A Categorical Imperative ? Questioning the Need for Sexual Classification in Québec. *Les Cahiers de droit*, *52*(1), 71–106. https://doi.org/10.7202/1005512ar

A Categorical Imperative? Questioning the Need for Sexual Classification in Québec*

Dorian NEEDHAM**

Most modern governments—including Québec's—classify and then document the sex of each citizen as either male or female. But although such classification may seem intuitive or even scientific, it involves (often inconsistent) choices about which of the many objective and subjective components of each citizen's sex should predominate. Once a citizen's sexual classification is complete, it is both theoretically permanent and practically constructive of this citizen's social role. Such permanence and construction, however, are undermined by both scientific and individual uncertainty regarding sexual distinction. Though this uncertainty could be resolved by adjusting existing sexual categories or by adding intermediate categories, the government of Québec should instead consider ceasing to classify its citizens permanently by sex. A shift to temporary, case-specific classification would have no detrimental effect on policymaking and could instead foster more nuanced, more accurate, and fairer state intervention.

* Profound thanks are due to Meagan Johnston, whose intellect and activism inspired the author to question the *status quo*, not only on the subject of this paper but across the full breadth of his politics. The author also acknowledges the pioneering work of Prof. Dean Spade, upon which this paper draws heavily. Finally, the author thanks Dean Kim Brooks, Prof. Robert Leckey, Malcolm Dort, the participants in the McGill Faculty of Law's "Sexuality, Gender, and the Law" seminar, and the anonymous reviewers for their helpful comments and guidance as this paper assumed its final form.

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***Les Cahiers de Droit*, vol. 52, n° 1, mars 2011, p. 71-106**

Le gouvernement du Québec, comme plusieurs autres, classifie selon le sexe les membres de la population et ce, de façon binaire. Bien que cette classification puisse sembler intuitive ou parfois scientifique, elle implique des choix, souvent inconsistants, quant aux composants objectifs et subjectifs du sexe qui prédominent dans une situation donnée. La classification, une fois établie, est en théorie permanente et en pratique constitutive du rôle social de chaque individu. Une telle permanence et une telle construction sont cependant remises en question par des incertitudes scientifiques et personnelles en ce qui concerne la distinction entre les sexes. Bien que ces incertitudes puissent être résolues par la modification des catégories actuelles ou par l'ajout de catégories intermédiaires, le gouvernement du Québec devrait néanmoins considérer l'abandon de la classification permanente selon le sexe. D'après l'auteur, l'emploi de catégories temporaires et adaptées aux circonstances n'entraînerait aucune perte de capacité gouvernementale et permettrait même des interventions étatiques plus précises et plus justes.

> Le point de départ […] doit être un retour aux évidences biologiques : l'espèce humaine est mâle et femelle. Sur ce donné naturel se sont construites des règles sociales […] l'opposition homme/femme sert de modèle, d'archétype à toutes les oppositions abstraites (froid/chaud, dedans/dehors, etc.)
>
> Françoise Dekeuwer-Défossez[1]

> Les mots qui […] désignent, par exemple les noms de couleurs, le jour et la nuit, l'homme et la femme, construisent des objets qui n'existent pas dans la nature avec la netteté que les concepts fabriqués par l'homme y impriment. À quel moment passe-t-on du jour à la nuit ? Même les mots fabriqués pour qualifier les situations intermédiaires, l'aube, le petit jour, la tombée du jour, le crépuscule, sont plutôt des images de poètes que la délimitation de situations précises. La distinction des sexes n'échappe pas à pareille indétermination.
>
> François Rigaux[2]

Many of us take for granted that the human species is divided — that we are divided — into two neat groups : male and female. This ostensible fact is reinforced by the sale of blue or pink (but never both) baby clothes, by an array of expected behaviours and social roles that match the blue and pink clothes — and by the inevitable Ms or Fs that appear on our driver's licences, passports, and other official documents. The pages that follow focus on this third aspect of sexual differentiation : the state's (permanent) classification of its citizens as (only) male or female.

But what does it really mean to be male or female ? The modern answer is that sex is determined by a combination of factors. Some are "objective" : chromosomal sex (XX or XY), gonadal sex (testes or ovaries), external morphologic sex (penis and scrotum or vagina and breasts), internal morphologic sex (prostate or uterus), and hormonal patterns (predominantly testosterone-based or predominantly œstrogen-based). Others are "subjective" : self-identified sex (psychologically male or psychologically female), performed sex (engaging in male-type acts or female-type acts) and relational sex (treated as male or treated as female[3]). Harmony between all of these elements is both assumed by and constitutive of official designation

1. Françoise Dekeuwer-Défossez, *L'égalité des sexes*, Paris, Dalloz, 1998, p. 2 and 3.
2. François Rigaux, "Les transsexuels devant la Cour européenne des droits de l'homme : une suite d'occasions manquées", R.T.D.H. 1998.33.130, 144, cited in *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Maison des jeunes*, [1998] R.J.Q. 2549, par. 89 [hereinafter "*Maison des jeunes*"].
3. See Julie A. Greenberg, "The Road Less Traveled : The Problem with Binary Sex Categories", in Paisley Currah, Richard M. Juang and Shannon Price Minter (eds.), *Transgender Rights*, Minneapolis, University of Minnesota Press, 2006, p. 51, at page 52. I do not claim that this list is exhaustive.

as male or female[4]. Yet this notion of harmony belies the incredible variety both within and among the factors mentioned above[5].

Two particularly well-known instantiations of such variety are transsexuals and intersex persons. Transsexuals are difficult to capture with a single definition[6], but as a working definition we can assert that transsexuals subjectively identify with a sex other than that which their objective characteristics would suggest. Intersex persons, meanwhile, are born with objective characteristics not easily classed as exclusively male or female : for example, their genitalia may be simultaneously or between male and female in appearance or function.

The law, however, has ignored these and other examples of disharmony within the factors that reflect or determine sex, choosing instead to class all citizens as strictly male or strictly female[7]. Doing so has required the state to make choices about which factors are determinative of sex[8] — yet these choices are rarely explicit and, as I will illustrate below, often contradictory. Nonetheless, "the law presumes a binary sex model[9]".

Legal privilege may be given to the male/female dichotomy because "[w]estern culture is deeply committed to the idea that there are only two sexes[10]". As Johanne E. Foster reminds us, "sex […] classifications have been used to determine who could vote, who could own property, and who could legally be denied access to certain occupations and educational institutions. Today, one's access to employment, education, political power, and even leisure time free from the demands of housework and childcare are all still directly related to one's sex[11]". However, tradition is an insuf-

4. See Jean-Paul Branlard, *Le sexe et l'état des personnes. Aspects historique, sociologique et juridique*, coll. "Bibliothèque de droit privé", Paris, L.G.D.J., 1993, p. 454.
5. See J.A. Greenberg, *supra*, note 3, at pages 56-63.
6. See *Maison des jeunes*, *supra*, note 2, par. 87 : "il n'y a pas de définition du transsexualisme qui fasse l'unanimité".
7. See J.A. Greenberg, *supra*, note 3, at page 63. See also Julia Epstein and Kristina Straub, "Introduction : The Guarded Body", in Julia Epstein and Kristina Straub (eds.), *Body Guards. The Cultural Politics of Gender Ambiguity*, New York, Routledge, 1991, p. 1, at page 2.
8. See J.-P. Branlard, *supra*, note 4, p. 456, 457, 520-522.
9. J.A. Greenberg, *supra*, note 3, at page 53.
10. Anne Fausto-Sterling, "The Five Sexes. Why Male and Female are Not Enough", *The Sciences*, vol. 33, No. 2, March/April 1993, p. 20, at page 20, reprinted in Gillian Einstein (ed.), *Sex and the Brain*, Cambridge, MIT Press, 2007, p. 157, at page 157. See also J. Epstein and K. Straub (eds.), "Introduction : The Guarded Body", *supra*, note 7, at page 3.
11. Johanna E. Foster, "Strategic Ambiguity Meets Strategic Essentialism : Multiracial, Intersex, and Disability Rights Activism and the Paradoxes of Identity Politics", in Lisa K. Waldner, Betty A. Dobratz and Timothy Buzzell (eds.), *Politics of Change :*

ficient reason to continue a practice (think capital punishment), and not all tradition needs to be reflected in the law (think "Honour thy father and thy mother").

This paper thus contests the state's classification of its citizens by sex[12]. Though many have argued that sexual classification yields unfairness to various groups, very few people have advocated the abandonment of sexual classification[13]; most of those who do address such a proposal brush it off as no more than an ephemeral possibility[14]. Only Dean Spade has actively promoted the desertion of permanent sexual classifications[15], but he does so in the American, common-law context. To date, no one has examined the value (or lack thereof) of permanent sexual classification in

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Sexuality, Gender and Aging, New York, Elsevier, 2004, p. 139, at page 144. Eve Kosofsky Sedgwick adds that we have "a cultural system for which 'male/female' functions as a primary and perhaps model binarism affecting the structure and meaning of many, many other binarisms" : Eve Kosofsky Sedgwick, *Epistemology of the Closet*, Berkeley, University of California Press, 1990, p. 27 and 28.

12. In so doing, it builds upon and reflects larger currents in legal research. As one example, recent scholarship has criticised "family law exceptionalism", by which "family and family law are often treated as occupying a unique and autonomous domain". This separateness of the family and family law obscures the "ideological and political meaning and […] concrete distributional work [done] not only by virtue of specific rules but also by the sheer force of their categorical existence" : Janet Halley and Kerry Rittich, "Critical Directions in Comparative Family Law. Genealogies and Contemporary Studies of Family Law Exceptionalism", (2010) 58 *Am. J. Comp. L.* 753, 754-756. Contesting family law exceptionalism, as the aforementioned authors do, thus requires not only recognizing the power of categories themselves but questioning the assumptions and network of rules through which families themselves may reproduce distributional inequalities between, *inter alia*, men and women.

13. The Australian Human Rights Commission, for example, undertook a wide-ranging survey of legal sex designation in Australia that yielded many criticisms, and even went so far as to advocate less frequent designation of sex on government documentation. It still, however, took for granted that such designation was necessary : Australian Human Rights Commission, *2009. Sex Files : The Legal Recognition of Sex in Documents and Government Records. Concluding Paper of the Sex and Gender Diversity Project*, Sydney, Human Rights and Equal Opportunity Commission, March 2009, [Online], [www.hreoc.gov.au/genderdiversity/SFR_2009_Web.pdf] (11 February 2011).

14. See *e.g.* Cyrille Duvert, "L'homme et la femme dans le Code civil ou La dialectique du donné et du construit", in Pascale Bloch, Cyrille Duvert and Natacha Sauphanor-Brouillaud (eds.), *Différenciation et indifférenciation des personnes dans le Code civil. Catégories de personnes et droit privé 1804-2004*, Paris, Economica, 2006, p. 25, at page 35.

15. Dean Spade, "Documenting Gender", (2007-2008) 59 *Hastings Law Journal* 731. I also recognise the theoretical work done by Janet Halley, who argues that modern feminism depends on certain "aspirational and prescriptive commitments", of which a male/female distinction is one, and that we should "take a break from them and try to see other arrangements of m and f and other kinds of power" : Janet E. Halley, *Split Decisions. How*

Canada or in the civil law. I have thus chosen Québec as a doubly valuable locus of investigation.

I begin in Part 1 by describing the cognitive importance of categories, pointing out the perniciousness of applying categories to people. Part 2 outlines the importance and the effects of categorization by the state, as well as the prevalence of sex as a classifier. Part 3 zeroes in on Québec, describing how the province and its civil law system consider sex as an important and nearly immutable component of each citizen's civil status. In Part 4, I zoom back out to examine how governments like Québec's might justify their choice of sex as a classifier. I consider science-, identification-, socialisation-, and intervention-based justifications, concluding that none holds water. Part 5 outlines possible responses to this failure and advocates the dissolution of permanent sex classifications. In Part 6, I describe the effects of such dissolution. I conclude that ceasing to mark each citizen indelibly as male or female would have no detrimental effect on the Québec government's ability to craft policy and could instead foster more nuanced, more accurate, and fairer state intervention.

1 Thinking Through Categories

Geoffrey C. Bowker and Susan Leigh Star begin their book on *Classification and Its Consequences* with the simple assertion that "[t]o classify is human[16]". Assuming that they are correct, however, Bowker and Star's statement prompts a triumvirate of key questions : "What do we classify ?", "How do we do so ?", and "Why ?" Addressing these three general questions serves as a necessary first step in this specific enquiry into the sexual classification of the citizens of Québec[17].

At its simplest, a category is "a spatial, temporal, or spatio-temporal segmentation of the world[18]", involving "judgments to the effect that one or more objects possess, or lack, one or more characteristics[19]". Mary Douglas and David Hull expand on this notion of similarity, writing that classification is a process of discarding "the heterogeneous material […] from one emergent specialised domain after another and ma[king it] irrelevant

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and Why to Take a Break from Feminism, Princeton, Princeton University Press, 2006, p. 8. Halley, however, does not push her theoretical project towards a policy critique as does Spade.

16. Geoffrey C. Bowker and Susan Leigh Star, *Sorting Things Out. Classification and Its Consequences*, Cambridge, MIT Press, 1999, p. 1.
17. Here and elsewhere, I will use the words "classification" and "category", as well as their grammatical derivatives, interchangeably.
18. G.C. Bowker and S.L. Star, *supra*, note 16, p. 10.
19. Stephan Körner, *Categorial Frameworks*, Oxford, Basil Blackwell, 1970, p. 1.

by classificatory decision[20]". Such a process may be vitally important : "Without the ability to […] categorize, we could not function at all, either in the physical world or in our social or intellectual lives[21]". In other words, it seems that we classify all objects according to their similarities — and that we have no choice in so doing.

Though categorization may be central to thought, however, it is the necessary dependence of categorization upon assessments of similarity that may render the *process* of categorization detrimental to *lucid* thought. Similarity is "relative and variable, as undependable as indispensable" because

> when to the statement that two things are similar we add a specification of the property they have in common, we […] remove an ambiguity ; but rather than supplementing our initial statement, we render it superfluous. For […] to say that two things are similar in having a specified property in common is to say nothing more than that they have that property in common. [Therefore,] comparative judgments of similarity often require not merely selection of relevant properties but a weighting of their relative importance, and variation in both relevance and importance can be rapid and enormous[22].

For example, determining that from amongst a gooseberry, a strawberry, and a piece of shortcake, the gooseberry and strawberry are "most similar" involves an assessment (and thereafter an assumption) that reproductive function and edibility — reflected in the shared "berry" name — are more cogent as classificatory criteria than is the manner in which something is eaten.

No matter that the criteria linking gooseberries and strawberries are supposedly *scientific* or *objective* : "Classification is usually treated as an outcome of an ordering process as if the organization of thoughts comes first, and a more or less fixed classification follows as its outcome. But the ordering process is itself embedded in prior and subsequent social action. It is a middle part of a circle of questions and answers[23]." The "classical theory" of categorization, developed by Aristotle and Kant[24] and reliant on "[c]lear [b]oundaries, [s]hared [p]roperties, [u]niformity, [i]nflexibility,

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20. Mary Douglas and David Hull, "Introduction", in M. Douglas and D. Hull (eds.), *How Classification Works. Nelson Goodman among the Social Sciences*, Edinburgh, Edinburgh University Press, 1992, p. 1, at page 1.
21. George Lakoff, *Categories and Cognitive Models*, Series A, Paper No. 96, Berkeley, University of California, November 1982, p. 2.
22. Nelson Goodman, "Seven Strictures on Similarity", in M. Douglas and D. Hull, *supra*, note 20, p. 13, at pages 20 and 21.
23. M. Douglas and D. Hull, *supra*, note 20, at page 2.
24. See Joseph J. Kockelmans, "Toward a Transcendental-Ontological Doctrine of Categories", in Henry W. Johnstone, Jr. (ed.), *Categories. A Colloquium*, University Park, Pennsylvania State University, 1978, p. 41, at page 41.

and [i]nternal [d]efinition[25]", has thus been replaced by an experiential model grounded in the "naturalization" of categories[26]. Over time, categories become "entrenched[27]", rendering them doubly "invisible[28]": not only do we rarely recognise that we are categorizing, but when we do, we assume that the categories are natural and appropriate[29]. Thus, the categorization of reality — or, perhaps, of the objects that populate our respective realities — depends on a value-laden ordering of otherwise neutral components or characteristics[30].

Such ordering applies not only to fruits and food but to people — and Lakoff warns us that categorization of people "can be pernicious[31]". Pernicious, it is argued, for three reasons: "[m]ost categorization is automatic and unconscious[32]"; "any theory of categories presupposes the possibility of an ontological difference between a thing and its Being[33]"; and categorizing people inevitably creates a "social and moral order[34]". In other words, classifying persons is an invisible process by which their characteristics are abstracted from themselves and used to assemble them into groups in a social hierarchy — and the boundaries of these groups are defined by the

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25. See: G. LAKOFF, *supra*, note 21, p. 14 and 15; G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 10 and 11.
26. G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 295. See also: Aaron V. CICOUREL, *Method and Measurement in Sociology*, New York, Free Press of Glencoe, 1964, p. 21; Paul STARR, "Social Categories and Claims in the Liberal State", in M. DOUGLAS and D. HULL, *supra*, note 20, p. 154, at page 157.
27. Mary DOUGLAS, "Rightness of Categories", in M. DOUGLAS and M. HULL, *supra*, note 20, p. 239, at page 243; P. STARR, *supra*, note 26, at page 154.
28. G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 5 and 319.
29. *Id*., p. 4: Bowker and Star deliberately contest this assumption by referring to categories not as *facts* but as "artifacts". George LAKOFF, *Women, Fire, and Dangerous Things. What Categories Reveal about the Mind*, Chicago, University of Chicago Press, 1987, p. 121, adds that:

    > [W]e have a folk theory of categorization itself. It says that things come in well-defined kinds, that the kinds are characterized by shared properties, and that there is one right taxonomy of the kinds.
    >
    > It is easier to show what is wrong with a scientific theory than with a folk theory. A folk theory defines common sense itself. When the folk theory and the technical theory converge, it gets even tougher to see where that theory gets in the way – or even that it is a theory at all.

    See also: J.J. KOCKELMANS, *supra*, note 24, at page 65; P. STARR, *supra,* note 26, at pages 155 and 166.
30. See J.J. KOCKELMANS, *supra*, note 24, at pages 42 and 65.
31. G. LAKOFF, *supra*, note 21, p. 2.
32. *Id.* See also G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 2 and 3.
33. J.J. KOCKELMANS, *supra*, note 24, at page 58.
34. G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 3. See also J.E. FOSTER, *supra*, note 11, at pages 144 and 145.

person or persons doing the categorizing, not by the persons within the categories.

The perniciousness of categorizing people becomes especially problematic when one sees classifications as not only (artificially) descriptive but as prescriptive : "the system's description of reality becomes true[35]" because categories constitute the characters of their constituents. The "moral and aesthetic choices" embodied by categories "craft people's identities, aspirations, and dignity[36]" in that "[b]y using classification evidence is weighed, ambiguities are discounted or eliminated, claims are adjudicated[37]". From declaring that "Sam is *an* X-type person" (to use a relatively value-neutral example, a Canadian person), it is but one small step to assert that "Sam *is* X" (Canadian), thus erasing both the elements that make Sam different from other (people who are) Xs and the elements that make Sam (and other [people who are] Xs) similar to (people who are) not-Xs. This elision of "form, matter, and individual substance[38]", however, "leaves out" imagination in favour of reduction[39], and denies Sam — and others — full agency in their self-determination. Categories are further entrenched as the material consequences of categorization are incorporated into and strengthen the definitions of the categories themselves[40] : as all Xs are all treated in a certain manner (as all Canadians are given Canadian citizenship documents), it is *a fortiori* expected or even demanded that all Xs subscribe to such treatment to "count" as Xs (being Canadian *requires* citizenship documents).

The "naturalization" of categories is only questioned by "problematic cases[41]" or "boundary objects[42]" that exist alternately or simultaneously in multiple categories. Where such objects submit to the classificatory scheme, the questions are silenced ; where, however, "an object refuses to

35. G.C. Bowker and S.L. Star, *supra*, note 16, p. 49.
36. *Id.*, p. 4.
37. M. Douglas and D. Hull, *supra*, note 20, at page 4. See also : M. Douglas, *supra*, note 27, at page 243 ; Lawrence Lessig, "The Regulation of Social Meaning", (1995) 62 *U. Chicago L. Rev.* 943, 956. G.C. Bowker and S.L. Star, *supra*, note 16, p. 39, remind us that we cannot simply dismiss categories as "floating cultural inheritances" because "they have material force in the world".
38. Carl G. Vaught, "Categories and the Real Order", in H.W. Johnstone, *supra*, note 24, p. 3, at page 13. G.C. Bowker and S.L. Star, *supra*, note 16, p. 311, use the language of "convergence […] of a person or object and their representation".
39. Donald Phillip Verene, "Categories and the Imagination", in H.W. Johnstone, *supra*, note 24, p. 185, at pages 191 and 192.
40. See G.C. Bowker and S.L. Star, *supra*, note 16, p. 289 and 290.
41. G. Lakoff, *supra*, note 21, p. 2.
42. G.C. Bowker and S.L. Star, *supra*, note 16, p. 297.

be naturalized," the result is a "monster" that upsets the "laws of nature" by espousing "madness or heresy[43]". Monsters implicitly challenge the very value or necessity of categories, "rais[ing] worries about the foundations of knowledge[44]". The only escape from these worries, perhaps, is community-wide subscription to an "ethics of ambiguity[45]", whereby categories are permitted to develop and to evanesce, and to have fuzzy boundaries in the meanwhile. Such a result, however, seems unlikely not only because of classification's importance to thought but also given the persistent state interest in establishing and maintaining categories of persons.

2 Sex and the State

James C. Scott provides a compelling account of the symbiotic relationship between categorization and the growth of the modern nation-state. Pre-modern states, he writes, knew little about their subjects, and as such their interventions either involving or directed at these subjects were "often crude and self-defeating[46]". As time went by, however, "officials took exceptionally complex, illegible, and local social practices […] and created a standard grid whereby [intra-state activity] could be centrally recorded and monitored[47]". This grid included last names, maps, cadastral lists, and standard units of measurement, all of which "reduce[d] an infinite array of detail to a set of categories that [would] facilitate summary descriptions, comparisons, and aggregation[48]". The result was increased "legibility", by which Scott and his colleagues refer to the "capacity to locate citizens uniquely and unambiguously" and "standardized information that will allow [the state] to create aggregate statistics[49]".

This legibility was, however, not just descriptive but functional : as suggested in Part 1 above, the categories chosen by the state to facilitate legibility "represented only that slice of [society] that interested the official observer" and, combined with state power, "would enable much of the

43. *Id.*, p. 304 and 312.
44. M. Douglas and D. Hull, *supra*, note 20, at page 4.
45. Simone de Beauvoir, *Pour une morale de l'ambiguïté*, Paris, Gallimard, 1947, cited in G.C. Bowker and S.L. Star, *supra*, note 16, p. 313.
46. James C. Scott, *Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed*, New Haven, Yale University Press, 1998, p. 2. See also James C. Scott, John Tehranian and Jeremy Mathias, "Government Surnames and Legal Identities", in Carl Watner and Wendy McElroy (eds.), *National Identification Systems. Essays in Opposition*, Jefferson, McFarland & Company, 2004, p. 11, at page 14.
47. J.C. Scott, *supra*, note 46, p. 2.
48. *Id.*, p. 77.
49. J.C. Scott, J. Tehranian and J. Mathias, *supra*, note 46, at page 18.

reality they depicted to be remade[50]". Popular "resistance" was overcome by "[t]he increasing weight of the state in people's lives and the state's capacity to insist on its rules and its terms[51]". Thus could the state validate its classifications through their normalization : as state interventions became not only accepted (and even desirable) but commonplace, the classifications on which these interventions were based became perceived as legitimate.

Lest we think that state classification is entirely malicious, Paul Starr reminds us that :

> Every regime needs to draw lines between kinds of people and types of events when it formulates its criminal and civil law, levies taxes, and allocates benefits. In contemporary politics, classification is particularly important in economic regulation, the collection of social statistics, decisions about legal standing in class-action suits, and the design of insurance rates, pensions, and selection criteria for jobs and university admissions[52].

Classifications, often "mediated through mundane bureaucratic documents such as forms[53]" and "modulated by local administrative procedures[54]", are constructed by governments — and here I borrow Spade's term — to do some kind of *work*[55], and the work of government is to shape society. This element of "political choice" thus distinguishes governmental categories from other classificatory schemes[56].

For a government's classification scheme to do good work and to do it well, however, not only the classifications themselves, but also the use to which they are put, must be perceived as legitimate : they must be generated and maintained by principles that citizens believe (or become convinced) are reasonable[57]. This concern with legitimacy underpins s. 10 of Québec's *Charter of Human Rights and Freedoms*, which enumerates prohibited grounds of discrimination — that is, illegitimate uses of clas-

50. J.C. SCOTT, *supra*, note 46, p. 3. Carl Watner, for example, recounts how the first censuses in Rome were actually for purposes of tax assessment and how their later acquisition of a descriptive element did not erase their primarily functional nature : Carl WATNER, "A History of the Census", in C. WATNER and W. MCELROY, *supra*, note 46, p. 132, at pages 134 and 135.
51. J.C. SCOTT, *supra*, note 46, p. 71. See also G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 44.
52. P. STARR, *supra*, note 26, at page 154.
53. Charles GOODWIN, "Practices of Color Classification", *Cognitive Studies*, vol. 3, No. 2, 1996, p. 62, at page 65.
54. G.C. BOWKER and S.L. STAR, *supra*, note 16, p. 321.
55. D. SPADE, *supra*, note 15.
56. P. STARR, *supra*, note 26, at page 161.
57. See *id.*, at page 155.

sification[58]. The Charter's s. 86, however, shields from illegitimacy any "affirmative action program [designed] to remedy the situation of persons belonging to groups discriminated against" in employment, education, or health services. A successful remedy requires that individuals be identified as members of such groups. The result is "classificatory tension[59]" between efforts to reject some (uses of) categories and efforts to maintain others ; in other words, the legitimacy of the categories and the work done with and by them is called into question.

But what is the effect of such efforts — and such crises of legitimacy — on individual citizens ? The connection between a person and a category may be "chosen or imposed", and may not be within an individual's power to change[60]. This incapacity is especially true of categories that are "tightly coupled with a person" — and one such category is sex[61].

In the section that follows, I will address the tight coupling of legal sex designation to each individual within Québec's civil law tradition. Before I do so, however, it is worthwhile to recap the theoretical ground covered thus far :

1) Classification is central to thought, but the choice of categories is both motivated by and constitutive of social reality ;
2) As social rather than scientific facts, categories are subjective and involve moral choices ;
3) Unlike individuals, governments can enforce participation in their subjective classificatory schemes through state power ;
4) Modern governments create and maintain categories for the purposes of doing work, and the legitimacy of this work may be contested ;
5) As part of this work, individuals may be tightly bound to categories, one of which is sex.

3 Québec, Classification, and the Code

The government of Québec, like the governments described generally above, has a need for legibility amongst its citizens : "Comme toute

58. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, s. 10 [hereinafter "Charter"]. Whether such prohibitions are reflective of or designed to shape public opinion is an open question.
59. P. Starr, *supra*, note 26, at page 156.
60. G.C. Bowker and S.L. Star, *supra*, note 16, p. 316. P. Starr, *supra*, note 26, at page 158, distinguishes "classification" (that is, the creation of categories) from "assignment" (that is, the putting of people into categories).
61. G.C. Bowker and S.L. Star, *supra*, note 16, p. 315.

personne est appelée à jouer un rôle sur la scène juridique, elle doit être identifiable[62]." However, unlike other Canadian governments, that of Québec operates within a civil law framework — a framework that places particular emphasis on the stability of law. Jean-Étienne-Marie Portalis, the primary drafter of the Napoleonic Code (ancestor of Québec's laws), wrote that "au lieu de changer les lois, il est presque toujours plus utile de présenter aux citoyens de nouveaux motifs de les aimer[63]", thus tying stability to legitimacy. The very act of publishing an ostensibly comprehensive code establishing the *jus commune* that underpins all other laws[64] suggests a normative stability in contrast with common-law notions of legal evolution and statutory exceptionality.

In the civilian system, legal stability is achieved by using a civil code to divide the normative world into categories into which all aspects of the noumenal world are placed. "In such an approach, organizational choices about where a particular topic should be elaborated and decisions about the relative prominence afforded to any topic are as much a part of the Code's interpretational logic as is the manner in which individual rules are actually formulated[65]." That Book One of the *Civil Code of Québec* addresses "Persons" must therefore be understood to place the law of persons in a position of primacy within Québec's normative structure, in terms of not only importance but also logical progression : Book One "erects a protogenic conception of the physical person as a titulary of legal rights that is largely independent of any other definitions[66]".

Within Book One, after instituting the enjoyment of civil rights and the existence of certain personality rights related to bodily integrity and privacy, the C.C.Q. moves quickly to establish and to regulate the "Status of Persons". In the French context, Jean-Paul Branlard defines a person's civil status as "l'image juridique de la personne […] il évoque l'idée de répartition, de classement, en assignant à chacun sa place dans la société[67]".

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62. Édith Deleury and Dominique Goubau, *Le droit des personnes physiques*, 4th ed. by D. Goubau, Cowansville, Éditions Yvon Blais, 2008, p. 231.
63. "Discours préliminaire prononcé lors de la présentation du projet de la Commission du gouvernement", reprinted in P. Antoine Fenet, *Recueil complet des travaux préparatoires du Code civil*, t. 1, Osnabrück, Otto Zeller Verlag, 1968, p. 463, at page 467. This statement suggesting a project of societal transformation is at odds with Portalis' earlier assertion that "les lois sont faites pour les hommes, et non les hommes pour les lois" (*id.*, at page 466).
64. *Civil Code of Québec*, S.Q. 1991, c. 64, Preliminary Provision.
65. John E.C. Brierley and Roderick A. Macdonald, *Québec Civil law. An Introduction to Québec Private Law*, Toronto, Emond Montgomery, 1993, p. 37.
66. *Id.*, p. 34.
67. J.-P. Branlard, *supra*, note 4, p. 15.

Already, we see the tight linkage between civil status and classification. Whether couched in terms of identity control[68] or public order[69], the goal of tracking civil status is unquestionably related to legibility : the state has an interest in identifying (key aspects of) its citizens in order to effect political interventions[70]. By extension, therefore, the state has an interest in the stability of civil status[71], as fluctuations in status could lead to illegibility and ineffective intervention[72] — and ultimately to illegitimacy. Branlard describes civil status as in principle immutable (that is, incapable of change), "indisponible" (that is, "[l]e titulaire de l'état ne peut à son seul gré le modifier"), and imprescriptible (that is, the law will not accommodate prolonged behaviour at odds with civil status[73]).

In Québec, an individual's civil status has four components — name, sex, family status (single, married, or in a civil union), and residence — of which the first three are attested and registered by acts of civil status[74]. Of the four components, however, sex is often ignored : some doctrinal writers do not even mention sex in their discussion of civil status[75]. This omission likely stems from how "obvious" it seems as a classifier : "Le sexe fait incontestablement partie de l'état des personnes [et] constitue

68. See : Jean CARBONNIER, *Droit civil*, vol. 1, Paris, Quadrige / Presses universitaires de France, 2004, p. 419.
69. See : Bernard TEYSSIÉ, *Droit civil. Les personnes*, 9th ed., Paris, Litec, 2005, p. 124 ; J.-P. BRANLARD, *supra*, note 4, p. 501.
70. C. DUVERT, *supra*, note 14, at page 26, writes that "un souci des juristes [est de] qualifier, classer, déterminer la nature d'une chose ou d'une institution, afin de lui appliquer un régime spécifique".
71. See J.-P. BRANLARD, *supra*, note 4, p. 17.
72. Regarding legal sex, some authors also describe an interest in maintaining sex-based social roles : see e.g. *id.* ("non seulement le sexe différencie physiologiquement les individus, mais encore il implique un rôle social en déterminant un mode de vie"). However, given recent developments in equality legislation and jurisprudence ("[h]omme et femme deviennent, dans le groupe familial, parfaitement interchangeables" : C. DUVERT, *supra*, note 14, at page 33), it seems unreasonable and unjust to ground sexual classification in such essentialized roles : see *infra*, Part 4.3. Further, not all social roles and the assumptions underpinning them are reflected in permanent, state-mandated categorisation : there may be roles and assumptions implicating members of certain ethnicities or persons of a particular weight, for example, but these characteristics go unrecorded by the government of Québec.
73. J.-P. BRANLARD, *supra*, note 4, p. 501-510.
74. This quadripartite conception of civil status is reflected in doctrine (see *e.g.* J. CARBONNIER, *supra*, note 68, p. 419) and jurisprudence (see *e.g. Montreuil* c. *Québec* (*Directeur de l'état civil)*, [1999] R.J.Q. 2819, par. 38 et suiv. (C.A.), [1999] nº AZ-50067902).
75. See *e.g.* : B. TEYSSIÉ, *supra*, note 69 ; Laëtitia STASI, *Droit civil. Personnes. Incapacités. Famille*, 11th ed., Orléans, Paradigme, 2005 ; Jean PINEAU, "Les grandes lignes de la réforme du droit des personnes", (1987) 18 *R.D.U.S.* 7.

le premier critère de répartition statistique de la population[76]". Sex is "le partage primordial" because, unlike the other components of civil status, which must be researched, assigned, or justified, "chaque être humain […] porte sur lui, dans la vie quotidienne, qu'il est un homme ou une femme[77]".

Once used as a classifier, sex is unquestionably binary : "Toute personne, même si elle présente des anomalies organiques, est obligatoirement rattachée, à la naissance, à l'un des deux sexes[78]". Every individual, legally, must be either male or female — and "en droit, l'hermaphrodite n'existe pas[79]".

However, though it assumes that sex is binary, the C.C.Q. (like Québec's other laws) nowhere defines how sex is to be determined or recognized[80]. The result is an inconsistent assessment of various objective and subjective factors, with objective factors predominating in determining legal sex at birth. Once determined, legal sex is difficult if not painful to change[81], as understood by many amongst Québec's transsexual and intersex populations.

For transsexuals and intersex people are the "monsters" described in Part 1 above. They upset extant categories and shake the foundations of knowledge — here, the government's knowledge of its citizens and the legitimacy of its classifications. And though the vocabulary of "monsters" may seem unfair, it is not unlike that used in doctrinal treatises of civil

76. É. DELEURY and D. GOUBAU, *supra*, note 62, p. 271. See also : Frédéric ZENATI-CASTAING and Thierry REVET, *Manuel de droit des personnes*, Paris, Presses universitaires de France, 2006, p. 51 ("[le sexe] est, au fond, un premier pas vers l'individualisation") ; J.-P. BRANLARD, *supra*, note 4, p. 16 and 17 (the place of sex in civil status is "incontestabl[e] […] [i]l n'y a pas à revenir sur cette position") ; Ethel GROFFIER, "De certains aspects juridiques du transsexualisme dans le droit québécois", (1975) 6 *R.D.U.S.* 114, 131 ("le sexe fait incontestablement partie de l'état des personnes bien que le Code ne le dise pas").
77. J. CARBONNIER, *supra*, note 68, p. 497. See also : F. ZENATI-CASTAING and T. REVET, *supra*, note 76 ("un facteur élémentaire") ; J.-P. BRANLARD, *supra*, note 4, p. 16 ("le premier mode de caractérisation juridique des personnes").
78. É. DELEURY and D. GOUBAU, *supra*, note 62, p. 272.
79. Roger NERSON and Jacqueline RUBELLIN-DEVICHI, "État civil et changement de sexe", *R.T.D. civ*. 1981.80.840, 841. See also : F. ZENATI-CASTAING and T. REVET, *supra*, note 76, p. 53 ; *Maison des jeunes*, *supra*, note 2, par. 47.
80. See : É. DELEURY and D. GOUBAU, *supra*, note 62, p. 272 ; *Maison des jeunes*, *supra*, note 2, par. 101. Compare Donna Lea HAWLEY, "The Legal Problems of Sex Determination", (1977) 15 *Alta. L. Rev.* 122, 122 (on Canada's common-law provinces).
81. See : É. DELEURY and D. GOUBAU, *supra*, note 62, p. 273 ; J. CARBONNIER, *supra*, note 68, p. 497 and 498 ; F. ZENATI-CASTAING and T. REVET, *supra*, note 76, p. 52 and 53 ; J.A. GREENBERG, *supra*, note 3, at page 52.

law : transsexuals suffer from a "maladie[82]", they are "diabolique" and "un danger pour l'espèce toute entière[83]".

What is the appropriate response to this threat to the stability and legitimacy of categories ? The traditional responses are either to blur the boundaries of the existing dichotomy or to create additional categories between "male" and "female". Another possibility, raised much less frequently but in favour of which I will argue in Part 5 below, is to abandon sexual classification altogether. Before any solution can be proposed or espoused, however, we must examine the basis of the existing classification. If all state-based classification is designed to do work, then what work does sexual classification do ?

4 Why Sex ?

4.1 Sex Reflects Science

Simply put, it could be that sexual classification reflects the scientific truth that humans are differentiated by genetics, anatomy, and hormones into two groups, and that the behaviour of these two groups is correspondingly different. On several levels, however, the claim of scientific difference is problematic. First, the assertion that humans and other animals exist in dimorphic (that is, two forms : male and female) distinction is disproven by the facts. On a chromosomal level, "[s]exual differentiation in mammals requires a precise choreography of molecular and cellular events" ; the choreographer is evolution, in that male-associated traits enable males to survive better while disadvantaging females, and *vice versa*[84]. Not infrequently, however, the choreography skews from its expected trajectory and yields diversity within dimorphism[85], resulting in not only XY (male) and XX (female) chromosomal pairings but X (female), XX (male), XYY (male), XXY (male), and many others[86]. In terms of anatomy, which is

82. É. Deleury and D. Goubau, *supra*, note 62, p. 275.
83. J.-P. Branlard, *supra*, note 4, p. 517 and 518. See also A. Fausto-Sterling, *supra*, note 10, at pages 23 and 24. *Cf.* J. Carbonnier, *supra*, note 68, p. 502 (likening transsexuals to deluded actresses who feel younger than their age).
84. Christopher M. Haqq and others, "Molecular Basis of Mammalian Sexual Determination. Activation of Mullerian Inhibiting Substance Gene Expression by SRY", *Science*, vol. 266, No. 5190, December 2, 1994, p. 1494, at page 1498, reprinted in G. Einstein (ed.), *supra*, note 10, p. 125, at page 131.
85. See C.M. Haqq and others, *supra*, note 84, at page 1494 and 1498.
86. For an excellent summary of this chromosomal variety, see Sex and Gender Education Australia, *Sex and Gender Identity Guidance Document For Australian Government Employees*, by Tracie O'Keefe and others, February 2005, [Online], [sageaustralia.org/docs26papers/Sex %20and %20Gender %20 %20Identity %20Guidance %20Docu-

largely dictated by genetics, "[w]e are born into a physiological continuum on which there is no discrete and definite point that you can call 'male' and no discrete and definite point that you can call 'female'[87]". As to hormones, a survey of vertebrate sexuality shows that "no fundamental uniformity exists that is regularly apparent" between male and female animals, such that "we must be willing to entertain the possibility that some dimorphisms have neither a genetic nor a hormonal basis[88]".

Turning to the potential effect of dimorphism on the actions of males and females, "[few] behaviors [other than], *e.g.*, the ejaculatory pattern, are present in one sex but not in the other[89]", so "[w]hat seems a female behavior in some species is a male behaviour in others[90]". Having particular sex characteristics "does not insure normal sexual behavior[91]", where "normal" is understood to signify concordance with expected behaviour for a given sex. Thus, even if "there are clear, reproducible mean differences in many neuroanatomical variables when groups of male and female brains are compared[92]" (and here note that the differences are "mean" and not

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ment%20For%20Australia(2).pdf] (24 February 2011). See also Joan Probber and Lee Ehrman, "Pertinent Genetics for Understanding Gender", in Ethel Tobach and Betty Rosoff (eds.), *Genes and Gender*, vol. 1, New York, Gordian Press, 1998, p. 13, at pages 21-28. Even if exceptions outside the XX/XY dichotomy are ignored, however, E. Kosofsky Sedgwick, *supra*, note 11, p. 28, notes that "[g]enders – insofar as there are two and they are defined in contradistinction to one another – may be said to be opposite ; but in what sense is XX the opposite of XY ?"

87. John Stoltenberg, "How Men Have (A) Sex", in Estelle Disch (ed.), *Reconstructing Gender. A Multicultural Anthology*, 4th ed., New York, McGraw-Hill, 2006, p. 264, at page 266. See also A. Fausto-Sterling, *supra*, note 10, at pages 20 and 21.
88. "Sexually Dimorphic Behavior. Definition and the Organizational Hypothesis", in Robert W. Goy and Bruce S. McEwen, *Sexual Differentiation of the Brain. Based on a Work Session of the Neurosciences Research Program*, Cambridge, MIT Press, 1980, p. 1, reprinted in G. Einstein (ed.), *supra*, note 10, p. 7, at pages 11 and 12.
89. *Id.*, at page 7.
90. Gillian Einstein, "Background/Introduction", in G. Einstein (ed.), *supra*, note 10, p. 1, at page 2. See also Marian Lowe and Ruth Hubbard, "Sociobiology and Biosociology : Can Science Prove the Biological Basis of Sex Differences on Behavior ?", in Ruth Hubbard and Marian Lowe (eds.), *Genes and Gender*, vol. 2 "Pitfalls in Research on Sex and Gender", New York, Gordian Press, 1979, p. 91, at page 99.
91. "Sex Differences in Behavior. Rodents, Birds, and Primates", in R.W. Goy and B.S. McEwen, *supra*, note 88, p. 13, reprinted in G. Einstein (ed.), *supra*, note 10, p. 15, at page 17.
92. Thomas R. Insel, "Foreword. Mental Disorders Are Brain Disorders : Why Sex Matters", in Jill B. Becker and others (eds.), *Sex Differences in the Brain. From Genes to Behavior*, Oxford, Oxford University Press, 2008, p. xi, at page xi.

"absolute")[93], we do not know how and whether these differences translate into behavioural practice[94].

The result of an analysis of these ostensible differences is that, in some ways, males and females are different because of their biology ; in others, they reach similar biological or behavioural outcomes by different paths ; and in still others, they are different in ways that are beyond the reach of hormones or sex-specific genes[95]. Albert Jacquard thus reminds us that "[t]he chief lesson to be learned from genetics is that the groups to which we belong do indeed differ from each other, but that the individuals within each of these groups are even more different still[96]".

Additionally, the expectations of scientists may colour their interpretation of any experiment yielding supposedly sex-based differences. Any effort to "solv[e] […] non-normative behavior […] shapes the design and interpretation of experiments[97]", just as these experiments inherently involve a preconception of what is "normative". Thus, "appeals to what is biologically natural are deeply embedded in our cultural beliefs about the meaning of […] sexuality[98]", some scientists even go so far as to superimpose male/female binaries onto organisms in which differentiation has nothing to do with sexual function[99].

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93. Margaret M. McCarthy and Arthur P. Arnold, "Sex Differences in the Brain. What's Old and What's New ?", in J.B. Becker and others (eds.), *supra*, note 92, p. 15, at page 15, write that "[t]he traditional view of a sex difference is any quantifiable endpoint with a mean value that is significantly different between males and females", but this description is far too simple because "a sex difference in a particular endpoint under one set of circumstances may disappear or even be reversed under a different set of circumstances".
94. See T.R. Insel, *supra*, note 92, at page xi.
95. See M.M. McCarthy and A.P. Arnold, *supra*, note 93, at page 20.
96. Albert Jacquard, "Science, Pseudo-Science and Racism", in Joan Ferrante and Prince Brown, Jr., *The Social Construction of Race and Ethnicity in the United States*, New York, Addison-Wesley, 1998, p. 326, at page 332.
97. G. Einstein, "Epilogue", in G. Einstein (ed.), *supra*, note 10, p. 791, at page 791.
98. Bonnie B. Spanier, "'Lessons' from 'Nature' : Gender Ideology and Sexual Ambiguity in Biology", in J. Epstein and K. Straub (eds.), *supra*, note 7, p. 329, at page 329. See also Ruth Bleier, "Social and Political Bias in Science : An Examination of Animal Studies and Their Generalizations to Human Behaviors and Evolution", in R. Hubbard and M. Lowe (eds.), *supra*, note 90, p. 49.
99. See B.B. Spanier, *supra*, note 98, at pages 330-336. Spanier uses the example of *e. coli*, which has two strains differing in the presence or absence of the F plasmid. Scientists have decided that the donor of the F plasmid is "male" and the recipient is "female" – even though the plasmid is asexual in nature and the female "becomes" a male on receipt of it (*id*., at page 336). On the grounding of science itself in "masculinist dichotomies", see also Sandra Harding, *The Science Question in Feminism*, Ithaca, Cornell University Press, 1986, p. 123-125.

It seems, then, that there is no firm scientific basis to distinguish all males from all females, and that attempts to do so may be disingenuous. Even if there were scientific differences between men and women, however, where is the benefit in permanently declaring all children "male" or "female" at birth so as to represent these differences legally ? It is hard to believe that the work done by sexual classification is simply a record of biologically based mean outcomes. Like sex, ethnicity is genetically determined and arguably "permanent" — yet Québec and other governments decline to include ethnicity on any government documentation. Like sex, mental illness can yield behavioural differences — but mental illness does not appear in any standardized government data bank in Québec. Sexual classification, then, must do some other work.

4.2 Sex and Recordkeeping

Key to the immutability of sex in the civil law and the legibility of the Québec population is the web of documentation on which sex is displayed and, therefore, the interlocking array of data banks in which sex is recorded by the government of Québec. These data banks are used for surveillance and registration purposes, for distribution of government services and benefits, and for population-wide statistical assessments — in other words, for purposes of legibility. Because of their standardised nature, government documents are also used widely in the private sector as forms of identification and sources of personal data. Every one of these documents, and by extension every one of the underlying data banks, includes information on legal sex :

— **Birth Registration and Birth Certificate.** The sex of every person born in Québec is recorded by the accoucheur at the moment of birth and transmitted to the *Directeur de l'état civil* (DEC) through an attestation of birth[100]. The parent or parents also include the child's sex in a declaration of birth submitted to the DEC[101]. Together, the attestation and declaration permit the DEC to register the civil status of the child, to issue documents (including a birth certificate) confirming this civil status, and to initiate the process of obtaining health insurance. The birth certificate, once issued, displays the child's sex ;

— **Health Insurance Card.** Cards are issued automatically by the Régie de l'assurance maladie du Québec (RAMQ) once the DEC transmits birth

100. Art. 111 and 112 C.C.Q.
101. Art. 113 and 115 C.C.Q.

details to the RAMQ; these cards display the child's sex[102]. Those who are not born in Québec but want to obtain a card must register with RAMQ, indicating, *inter alia*, their sex;

— **Driver's Licence.** Those who wish to obtain a Learner's Licence require a birth certificate, passport, or proof of Canadian Citizenship or Permanent Resident Status, as well as a Health Insurance Card — all of which display legal sex[103]. Graduation to a Probationary Licence requires presentation of one of these pieces of identification[104]. A full Driver's License is issued automatically on completion of the probationary period. All three types of licence display the bearer's sex. Further, to acquire a Driver's License Plus for cross-border travel to the United States, an applicant must: show a birth certificate or Certificate of Canadian Citizenship or Naturalization; present a Driver's Licence, Health Insurance Card, Certificate of Indian Status, or passport (all of which display the bearer's sex); complete a Consent Form that requires disclosure of sex; and agree to the transmission of personal data including sex to the American government, which keeps these data for 75 years[105].

In addition to these regimes maintained by the government of Québec, citizens of Québec also have their sex recorded and displayed by several regimes operated by the federal government:

— **Certificate of Canadian Citizenship.** Acquiring a Certificate requires disclosure of sex on the Application Form, as well as presentation of a birth certificate, Driver's Licence, or other equivalent[106];

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102. See QUÉBEC, RÉGIE DE L'ASSURANCE MALADIE, "Health Insurance Card. Information About…", 2006, [Online], [www.ramq.gouv.qc.ca/en/citoyens/assurancemaladie/carte/carte.shtml] (25 February 2011).

103. See QUÉBEC, SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE, "Driver's Licence. To Get a Passenger Vehicle (Class 5) Learner's Licence", 2010, [Online], [www.saaq.gouv.qc.ca/en/driver_licence/learner_driver/how.php] (25 February 2011).

104. See QUÉBEC, SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE, "Driver's Licence. Procedure to Follow For the Knowledge Test – Passenger Vehicle (Class 5)", 2002, [Online], [www.saaq.gouv.qc.ca/en/driver_licence/probationary_driver/knowledge_test.php] (25 February 2011).

105. See QUÉBEC, SOCIÉTÉ DE L'ASSURANCE AUTOMOBILE, *A Simple, Practical Way to Cross the Border. Driver's Licence Plus. Applicant's Guide*, [Online], [www.saaq.gouv.qc.ca/publications/permis/licenceplus_guide.pdf] (25 February 2011).

106. See CITIZENSHIP AND IMMIGRATION CANADA, *Application for a Citizenship Certificate from Inside Canada – Under Section 3. Proof of Citizenship*, 2010, [Online], [www.cic.gc.ca/english/pdf/kits/citizen/0001E.pdf] (25 February 2011).

— **Permanent Resident Card.** Obtaining a Card requires presentation of a passport or travel document, as well as a Driver's Licence or similar government-issued document[107] ;

— **Certificate of Indian Status.** Applications must be supported by a birth certificate, as well as a passport or two other forms of identification such as a Driver's Licence[108] ;

— **Passport.** To obtain a passport, each applicant must provide a birth certificate or Certificate of Canadian Citizenship, plus one of the following : Driver's License, Health Insurance Card, Certificate of Indian Status, government identity card, or existing passport. In addition, the passport Application Form requires disclosure of sex[109].

Unlike their American equivalents, Canadian Social Insurance Number (SIN) cards, and related data banks, do not display or contain information on the bearer's sex[110]. The legislation that authorizes the collection of SIN data, however, permits them to be used "for all purposes for which a Social Insurance Number is required[111]". This open-ended language has permitted the SIN to stray "beyond its intended purpose as a file number for government programs" such that it is now used for government purposes as varied as cashing savings bonds and establishing a Registered Education Savings Plan — and for private-sector purposes including credit checks, employee benefits calculation, movie rentals, and pizza delivery[112].

Of particular concern is "[t]he growing use of data matching, comparison and exchange between and among jurisdictions in administering

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107. See Citizenship and Immigration Canada, *Applying for a Permanent Resident Card (PRCard)*, 2010, [Online], [www.cic.gc.ca/english/pdf/kits/guides/5445E.PDF] (25 February 2011).
108. Indian and Northern Affairs Canada, *Application for Certificate of Indian Status*, 2007, [Online], [www.ainc-inac.gc.ca/br/frms/ir/83-009-eng.pdf] (25 February 2011).
109. See Passport Canada, *Adult General Passport Application for Canadians 16 years of Age or Over (in Canada or in the USA)*, 2009, [Online], [www.ppt.gc.ca/form/pdfs/pptc153.pdf] (25 February 2011).
110. See *Employment Insurance Regulations*, SOR/96-332, s. 89 (3).
111. *Employment Insurance Act*, S.C. 1996, c. 23, s. 139 (3).
112. Canada, House of Commons, *Beyond the Numbers : The Future of the Social Insurance Number System in Canada*, Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities, 36th Leg., 1st Sess., May 1999, Introduction, [Online], [www2.parl.gc.ca/HousePublications/Publication.aspx ?DocId=1031594&Language=E&Mode=1&Parl=36&Ses=1&File=6] (25 February 2011). See generally Office of the Auditor General of Canada, *1998 September Report of the Auditor General of Canada*, chap. 16 "Management of the Social Insurance Number", [Online], [www.oag-bvg.gc.ca/internet/English/parl_oag_199809_16_e_9322.html] (25 February 2011).

social programs[113]". This data matching, most often based on SIN data, has "implications for both privacy protection and program integrity" that have prompted considerable concern[114]. Amongst these concerns is not only the leakage or unintended use of data but the permanent linkage of one data bank to another.

In other words, though the SIN card may not include sex, SIN data are linked to enough other government data banks, and each of these banks is in turn linked to enough others, that every Québec citizen's sex is not only part of but is linked to and accessible by a wide variety of government — and perhaps private — programs at many levels. All of these programs attach (or can attach) a binary sex classification to an individual citizen, and they all trace back to the individual's sex as listed on the birth certificate[115].

What happens, then, if this citizen does not conform to the contours of the binary classification itself ? How does this web of personal information, collected and collated across jurisdictions and over time, respond to people who refuse to be slotted — or to slot themselves — into the tidy, exclusive categories of "male" and "female" ? Such people appear in considerable biological and psychological variety, of which two significant (but by no means the only) groups are transsexuals and intersex persons[116].

Traditionally in the civil law, the "indisponibilité" of civil status has prevented transsexuals from demanding that the government recognize their destination sex and reflect this sex on official documentation[117] : "L'état civil du transsexuel ne saurait être modifié puisque son sexe géné-

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113. *1998 September Report of the Auditor General of Canada*, *supra*, note 112, par. 16.26.

114. Office of the Auditor General of Canada, *A Status Report of the Auditor General of Canada to the House of Commons*, chap. 6 "The Management of the Social Insurance Number. Human Resources and Social Development Canada", Ottawa, Minister of Public Works and Government Services Canada, 2007, par. 6.10 and 6.18, [Online], [www.oag-bvg.gc.ca/internet/docs/20070206ce.pdf] (25 February 2011). See also Canada, House of Commons, *supra*, note 112 ; *1998 September Report of the Auditor General of Canada*, *supra*, note 112, par. 16.26 and 16.27.

115. See : J.A. Greenberg, *supra*, note 3, at page 52 ; E. Groffier, *supra*, note 76, 130 ; *Laliberté* c. *Directeur de l'état civil*, [2001] R.D.F. 258, par. 21 (C.S.), J.E. 2001-604, [2001] nº AZ-50084008 ("sans la modification de l'acte de naissance, l'usage de ces documents portant le nouveau nom est pratiquement impossible").

116. I am aware of the irony inherent in presenting those who defy groups as constituting groups in themselves. My intention here, however, is not to assert that these groups are exclusive or exhaustive, but rather that they constitute two frequently recognized nodes around which people not subscribing to the male/female dichotomy may cluster.

117. See Civ. 1re, 16 déc. 1975, D. 1976.Jur.397, note Lindon, J.C.P. 1976.II.18503, obs. Penneau ("le principe de l'indisponibilité de l'état des personnes, au respect duquel l'ordre public est intéressé, interdit de prendre en considération les transformations corporelles ainsi obtenues").

tique ne peut jamais évoluer[118]." This insistence on stability, based on the primacy of chromosomal sex, persisted even in the face of international jurisprudence to the contrary[119], and could even extend to finding doctors who conducted sex reassignment surgery to be guilty of criminal mutilation[120]. More recently, however, civil law jurisdictions including Québec have accepted legal sex change : a Québec resident of majority age having undergone "surgical operations involving a structural modification of the sexual organs intended to change his secondary sexual characteristics" may have this change reflected in a modified birth certificate after applying to the DEC and providing two attestations from physicians[121]. The success of such "action[s] en réclamation d'état[122]" shows that the *indisponibilité* of civil status has weakened, and that civil status may be less than fully immutable[123].

In theory, an altered sex designation on the birth certificate should permit a person to apply to have this change reflected in all other documentation and data banks. The inevitable delays in this process across multiple agencies, however, can cause particular concern where data matching is prevalent : if the records of a person's civil status in two separate data banks do not align, this person may be "flagged" for particular inspection or for denial of benefits or services[124]. Further, the process of changing legal sex may not be as simple as filling in a form and awaiting a response ; other bureaucratic and social hurdles may await[125]. More broadly, however, if

118. J.-P. Branlard, *supra*, note 4, p. 456. See also *Soucy* et *Curé de la Paroisse de St-Jean-Vianney de Grand-Remous*, [1958] R.L. 383 (C.S.).
119. See *e.g. Van Oosterwijck* c. *Belgique* (1980), 40 E.H.C.R. (Ser. A) 388.
120. This was true of France : see Philippe Le Tourneau, *La responsabilité civile*, Paris, Dalloz, 1972, par. 480 ff.
121. Art. 71-73 C.C.Q. The process is described, albeit under the heading "Change of Name" on the DEC website : Québec, Directeur de l'état civil, "Change of Name", [Online], [www.etatcivil.gouv.qc.ca/en/change-name.html] (25 February 2011).
122. E. Groffier, *supra*, note 76, 131.
123. See : J.-P. Branlard, *supra*, note 4, p. 17 ; É. Deleury and D. Goubau, *supra*, note 62, p. 282 ; F. Zenati-Castaing and T. Revet, *supra*, note 76, p. 54.
124. On this point in the American context, see : D. Spade, *supra*, note 15 ; Kristin Wenstrom, "'What the Birth Certificate Shows' : An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies", (2008) 17 *Law & Sexuality* 131, 148, at footnotes 105 and 106.
125. The DEC or courts may be reluctant to grant a corresponding change of name : see *e.g. Montreuil* c. *Québec* (*Directeur de l'état civil*), *supra*, note 74, par. 41 ("il est inexact de conclure que l'usage d'un prénom dit féminin, par une personne de sexe masculin, crée une confusion quant à son individualisation par rapport aux autres membres de la société") ; *Laliberté* c. *Directeur de l'état civil*, *supra*, note 115, par. 17 ("l'attribution d'un nom n'a pas pour objet de désigner le sexe d'une personne, en conséquence, l'utilisation d'un prénom masculin par une personne de sexe féminin ne peut créer de

sex is nowhere defined in the C.C.Q., but is understood to involve an array of objective and subjective factors, why should the focus on one particular objective factor (morphology of secondary sexual characteristics) necessarily be determinant[126]? In other words, if courts and the government have abandoned chromosomal sex as decisive of legal sex, how and why is morphological sex any more reasonable an indicator?

Intersex persons cloud the question further. As legal sex is determined at birth by means of objective criteria, intersex persons challenge the binary, exclusive sex categories of "male" and "female". The traditional response to intersex babies has been to "fix" their genitalia surgically and then to assign a corresponding legal sex[127]. If the initial assessment or surgical choice is belied by later (that is, chromosomal) evidence, the person's civil status can be altered—a process that philosophically involves not a true change but rather a correction: "mettre l'état civil en accord avec la réalité[128]". *Réalité* is thus here defined as chromosomal correspondence with the XY (male) or XX (female) category, as "le sexe chromosomique est immuable[129]" and "[ne] laisse aucune marge de manœuvre[130]". This notion, however, is at odds not only with the truth of genetic variation but with the abandonment of the chromosomal determination of sex as applied to transsexuals.

We thus see that legibility, as reflected in government documentation and as recorded in data banks, rests on shaky foundations. There is little clarity or consistency as to which factors truly "count" in determining an individual's sex for recordkeeping purposes. The result of the search for—and imposition of—legibility is thus more uncertainty rather than less. If legal sex is not therefore doing the work of identifying citizens, however, then perhaps it serves another purpose.

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confusion quant à l'individualisation de cette personne"). The publicity requirement imposed on legal sex changes, designed to "give to third persons who so request the opportunity to state their views" (art. 63 C.C.Q.), can be seen as an invasion of privacy. Related documentation, including marriage certificates and children's birth certificates, does not change following a legal sex change (see É. Deleury and D. Goubau, *supra*, note 62, p. 279). An undisclosed sex change can justify an annulment of marriage (*id.*, p. 279). I recognise that none of these bureaucratic hurdles, however, is as demanding as the enormous challenge of securing social acceptance and economic stability for many transsexuals.

126. See J.-P. Branlard, *supra*, note 4, p. 455.

127. See J.A. Greenberg, *supra*, note 3, at page 53.

128. É. Deleury and D. Goubau, *supra*, note 62, p. 273 and 274. See also F. Zenati-Castaing and T. Revet, *supra*, note 76, p. 52 and 53.

129. F. Zenati-Castaing and T. Revet, *supra*, note 76, p. 52.

130. J.-P. Branlard, *supra*, note 4, p. 456.

4.3 Sex as Social Engineering

Perhaps the government distinguishes between men and women in order to ensure the continuity of differentiated social roles[131]. By requiring that sex be displayed on official documentation, the state can ensure that citizens are constantly reminded of their identity, and of the behaviour expected of those who inhabit such identities. Others who look at this documentation — be they police officers pulling over an errant driver or potential employers recording details about a candidate[132] — may adjust their own comportment in response to the M or F that they (expect to) see, thus ensuring that sexually essentialized behaviour is socially supported and reinforced[133].

Given legislation against discrimination by sex[134], legal reforms designed to remove sexual distinctions[135], and scrupulously sex-neutral language[136], the government of Québec cannot be charged with explicitly promoting role differentiation by sex. If it does so implicitly, then such a strategy merits exposure and rejection in light of the principle of sexual equality.

Perhaps, on the other hand, Québec's government identifies men and women for social purposes designed not to pigeonhole but rather to benefit both sexes. In the paragraphs that follow, I will discuss legal sex as it applies to public health, segregated facilities, and affirmative action[137] — each of which is ostensibly geared towards aggregate welfare.

4.4 Sex-Based Interventions

Turning first to public health, it cannot simply be that "people can realize their greatest potential for happiness and productivity only if they

131. On the social construction of sex differences, see Ruth HUBBARD, *The Politics of Women's Biology*, New Brunswick, Rutgers University Press, 1990, p. 137 ff.
132. See D. SPADE, *supra*, note 15, 752.
133. On the self-reproduction of difference, see : Martha MINOW, "The Supreme Court 1986 Term, Foreword : Justice Engendered", (1987-1988) 101 *Harv. L. Rev.* 10, 12 ; Michael S. KIMMEL, *The Gendered Society*, New York, Oxford University Press, 2000, p. 96.
134. See *e.g.* Charter, *supra*, note 58, s. 10.
135. See *infra*, notes 178 and 179 and accompanying text.
136. Sex-neutral, that is, within the bounds of the French language, which uses *il* (« he ») as the neutral singular pronoun and *ils* as the plural even where most of a group is female.
137. In the United States, some arguments in favour of government tracking of sex additionally focus on the beneficial avoidance of "fraudulent" same-sex marriages in jurisdictions where such marriages are not permitted (see K. WENSTROM, *supra*, note 124, 155 and 156). The legality of same-sex marriage in Canada, however, renders this argument inapplicable here.

are sure they belong to one of only two acknowledged sexes[138]". Any health-based motivation for sexual classification must therefore be broader in scope. Thomas Insel sees a public health-related value in studying sex differences[139], in that certain diseases, conditions, and other maladies may affect women and men differently. Acknowledging this variable susceptibility, however, does not require *permanent* attachment of individual citizens to a sexual classification : Spade points out that heart disease also affects susceptibility, but is considered an "individual aspect of medical history" rather than a permanent marker[140]. Further, "if a government program is interested in tracking uterine cancer rates, perhaps more accurate information will result from tracking the rates of this cancer in people with uteruses than in people who are socially classified as 'female,' since those two categories are not identically matched[141]". An example of a more nuanced approach is a San Francisco health care system using "six categories for its classification of sex, depending on the patient's genetic type, bodily type (which may be surgically altered) and presentation of self[142]". These last two examples demonstrate that binary sex classifications may not best serve the interests of public health.

A second ostensibly beneficial intervention based on binary categorization is the creation and maintenance of segregated facilities. Arguments in favour of such facilities typically centre on comfort and safety[143]. Sex-segregated facilities such as bathrooms, however, may serve as targeted locations for violence, rather than as havens from violence[144]. Behaviour within sex-segregated institutions may be more violent and hierarchical than that in mixed institutions, and sex-integrated prisons may correspondingly be less violent[145]. Sex-segregation might not therefore make people

138. A. Fausto-Sterling, *supra*, note 10, at page 24.
139. T.R. Insel, *supra*, note 92, at pages xi and xii.
140. D. Spade, *supra*, note 15, 813.
141. *Id.*, 814.
142. P. Starr, *supra*, note 26, at page 165.
143. See : D. Spade, *supra*, note 15, 808 and 809 ; K. Wenstrom, *supra*, note 124, 148 ("A common fear among gender-segregated facility administrators seems to be that women who have a penis will sexually or physically attack nontransgender women if they are placed in a women's facility.")
144. See Simone Chess and others, "Calling All Restroom Revolutionaries !", in Mattilda aka Matt Bernstein Sycamore (ed.), *That's Revolting! Queer Strategies for Resisting Assimilation*, Brooklyn, Soft Skull Press, 2004, p. 189.
145. See Just Detention International, *Nowhere to Go But Out : The Collision Between Transgender and Gender-Variant Prisoners and the Gender Binary in America's Prisons*, by Alexander L. Lee, Spring 2003, p. 11, [Online], [www.justdetention.org/pdf/NowhereToGoButOut.pdf] (25 February 2011) ; Rosemary Herbert, "Women's Prisons : An Equal Protection Evaluation", (1984-1985) 94 *Yale L.J.* 1182, 1184, at footnote 10 ; John

safer, and it most certainly can make some groups (including homosexuals, transsexuals, and other gender-variant persons) significantly less safe and less comfortable[146]. Segregation based on dichotomous sexual distinctions may not thus do its supposed work — and, even if it did, one could reasonably ask whether permanent attachment of a given person to a given sex would be a necessary precursor to successful sexual segregation.

Finally, sex segregation may figure in affirmative action or other ameliorative programs designed to better the lot of long-disadvantaged groups including women[147]. Claiming membership in categories, however, tends to increase strife and to reify these categories to the disadvantage of others[148]. Thus, locking a person into an identity as "woman" and then allocating her a particular benefit may breed resentment both within and without the category of women[149] : men may feel excluded, but more importantly for this discussion the struggles of transsexuals (whether formerly or currently women) and of intersex people — as well as of gender-variant women, lesbians, and numerous other "sub-categories" that are both overlapping and unrecognized by the state — may be totally ignored[150].

If the work of classification is to enable targeted intervention, then permanent male/female categorization is likely far too blunt an instrument to get the work done well (if at all). A better approach would be to undertake data collection "with an understanding that what is being measured is

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Ortiz Smykla, *Cocorrections. A Case Study of a Coed Federal Prison*, Washington, University Press of America, 1978, p. 42 and 43 ; National Gay and Lesbian Task Force Policy Institute / National Coalition for the Homeless, *Transitioning Our Shelters. A Guide to Making Homeless Shelters Safe for Transgender People*, by Lisa Mottet and John M. Ohle, New York, National Gay and Lesbian Task Force Policy Institute, 2003, [Online], [thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf] (25 February 2011) ; K. Wenstrom, *supra*, note 124, 148.

146. See D. Spade, *supra*, note 15, 812 and 813.
147. See J.E. Foster, *supra*, note 11, at page 144.
148. See : *id.*, at page 157 ; Lawrence Wright, "One Drop of Blood", in J. Ferrante and P. Brown, Jr., *supra*, note 96, p. 422, at page 423.
149. Even in a critique of the stigma-based arguments against affirmative action, Rupert Barnes admits that some studies find such stigma, and that stigma may persist despite better construction of affirmative action programmes : Rupert Barnes Nacoste, "Sources of Stigma : Analyzing the Psychology of Affirmative Action", (1990) 12 *Law & Pol'y* 175, 178, 179 and 190. André Douglas Pond Cummings, "The Associated Dangers of 'Brilliant Disguises,' Color-Blind Constitutionalism, and Postracial Rhetoric", (2010) 85 *Ind. L.J.* 1277, 1281-1284, note that those in affirmative action programs may feel stigma even while others argue that affirmative action is not the root cause of such stigma.
150. See *e.g.* Dylan Vade, "Expanding Gender and Expanding the Law : Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People", (2004-2005) 11 *Mich. J. Gender & L.* 253.

the impact of social processes of gender production that result in discrimination and exclusion […] the gender categories used in such collection might not simply be 'male' and 'female' depending on the kind of problems being assessed[151]". Interventions could then be structured that : considered classifications carefully in each situation to determine if they corrected past injustices or contributed to further injustice ; recognised unnecessarily categorical thinking ; attempted to address both similarities and differences within and between groups ; recognized the groups engaged in oppression ; and acknowledged that the social construction of categories does not render these categories meaningless[152]. Thus could better work be done.

5 Rethinking Sex

I have tried to show above that the permanent, binary classification of men and women by the government of Québec cannot accommodate the biological, behavioural, and psychological diversity of Québec's population. At the same time, such indelible classification does little work—and what work it does could be done better. In other words, not only do the categories "male" and "female" not function well, but in their permanence they do not *serve* their function well[153].

A sensible response to this double dilemma would be to re-evaluate the categories themselves : if "[t]he explanatory value, and hence the status, of a paradigm is threatened by *anomaly*, […] before people abandon old paradigms, someone must articulate an alternative paradigm that accounts convincingly for the anomaly[154]". In the paragraphs that follow, I thus consider four possibilities : clarifying the contents of the categories "male" and "female" ; widening the categories ; creating intermediate categories ; or

151. D. Spade, *supra*, note 15, 816.

152. See Joan Ferrante and Prince Brown, Jr., "Conclusions", in J. Ferrante and P. Brown, Jr., *supra*, note 96, p. 326, at pages 383-388.

153. To argue for a rethinking of Québec's permanent sexual categorization is not to advocate that every other classification be abandoned if it results in discrimination against some of those persons who are classified. All state classification merits examination of its bases, but where the work that particular categories do is identifiable, reasonable, and effective, these categories can and should be maintained. Thus, for instance, could we imagine the maintenance of classification by age, where it protects the young from exploitation and coercion, or where it protects all citizens from less responsible decisions that the young are more likely to make. Where, however – and this seems to be the case with sexual classification in Québec – it is unclear what work the categories do, or where the work is clear but performed poorly, the categories themselves may merit adjustment or abandonment.

154. J. Ferrante and P. Brown, Jr., "Conclusions", *supra*, note 152, at pages 381 and 382.

abandoning permanent assignment to categories. I conclude that abandonment is preferable for a variety of reasons.

5.1 Sharpening Boundaries

If the Québec government is currently inconsistent in the criteria that it uses to undertake sexual classification, and if these criteria when applied result in imprecise or ineffective intervention, then one response could be to clarify the criteria while ensuring that they function with fairness. In other words, Québec could draw a bright line between "males" and "females," and then could police this line vigilantly to secure justice.

To the bright line first : sharpening the sexual boundary would require that the government choose which indicators of sex should predominate from amongst those described above, and then regularize and publicize this choice across all domains of governmental classification and action. In some ways, this development would be retrograde : Roman law permitted intersex individuals to be classed according to their dominant physical characteristics[155], and early English law did the same[156]. In the modern context, however, choices would soon arise that would be difficult if not untenable : a return to the primacy of chromosomal sex would run counter to decades of progression towards full rights for transsexuals, while a focus on morphological sex would fail to account for the remarkable variation amongst human bodies. Both options, as well as others involving alternative objective indicators or combinations thereof, might still place people in compartments that "feel" or "seem" wrong to themselves or those around them. A more subjective approach, meanwhile, would involve a degree of choice (and, pending maturity to make such a choice, no small amount of uncertainty) at odds with the stability sought by the government in an individual's civil status.

These deficiencies are unlikely to find a remedy in "fairer" application of the criteria. Fairness here could entail applying sexual categorization consistently to all citizens (that is, in maintaining the integrity of categories at all costs). Such an approach, however, not only would result in injustice to some individuals involved — one has only to imagine a male-to-female

155. See Dig. 1.5.10, 28.2.6.2 (Ulpian).

156. See J.A. Greenberg, *supra*, note 3, at page 54. I recognise that sex reassignment surgery was impossible in earlier times, and thus perhaps echo Bernice L. Hausman's thesis that medical technologies "made the advent of transsexualism possible" (Bernice L. Hausman, *Changing Sex. Transsexualism, Technology, and the Idea of Gender*, Durham, Duke University Press, 1995, p. 7) – but the point remains that other Western sexual classifications were not as rigid as today's dichotomy in Québec.

transsexual housed in an all-male prison, or a woman denied access to an affirmative-action program because she has an XY chromosomal pairing — but would run contrary to recent equality jurisprudence[157]. Alternatively, fairness could consist in plucking individuals from one category and depositing them in the other. In this scenario, however, the creation of exceptions to the rigid rule would entail bureaucratic or judicial calculi that should ideally have been incorporated into the initial act of classification. The existence of such exceptions to this ostensibly complete rule would thus undermine the very notion of a sharper sexual divide.

5.2 Blurring Boundaries

If a more rigid male/female dichotomy could be not only unjust but self-defeating, another possible response to the failure of sexual classification as currently undertaken by the Québec government would be to loosen the bounds of each category such that entry and exit were made easier. Under such an approach, individuals could be categorized by their dominant characteristics at any given time, with "characteristics" here understood to encompass all components of sex, objective and subjective. Michael S. Kimmel recognizes the varying importance of these components when he writes that, though primary sexual characteristics are more decisive at birth for sexual classification, secondary characteristics and behavioural representations are those that we observe in our daily interactions with others[158]. In other words, the proposed expansion and overlap of categories would elide the distinction between sex ("the biological apparatus"), gender ("the meanings that are attached to those differences within a culture[159]") and performance[160], and would simultaneously give greater weight to the "concept philosophique de l'identité, *i.e.* [le] droit à l'autonomie du sujet[161]".

Such an approach would not be without its challenges, however : New York City scrapped in 2006 a plan to allow legal sex change without proof of surgery, partly out of concern over the knock-on effects on segregated

157. Since *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, the Supreme Court of Canada has been understood to have rejected notions of formal equality, in which all those within one category are treated equally by the law, in favour of a contextual approach seeking substantive equality between persons.
158. M.S. Kimmel, *supra*, note 133, p. 100.
159. *Id.*, p. 3.
160. See : Judith Butler, *Gender Trouble. Feminism and the Subversion of Identity*, New York, Routledge, 1990, p. 136 ; Judith Butler, *Bodies that Matter. On the Discursive Limits of "Sex"*, New York, Routledge, 1993, p. 4.
161. É. Deleury and D. Goubau, *supra*, note 62, p. 282.

institutions and partly out of the need to conform with the federal *Real ID Act*[162]. Non-conformity between Québec's legal sex requirements (or practices) and those of the other provinces or of the Canadian government could be equally problematic. Further, shifting the boundaries of "male" and "female" might do very little to address the disjuncture between the categories' work and their effects as described above : making it easier for people to be *male* or *female* does not address the problems inherent in being *only* male or female at a particular moment.

5.3 Adding Boundaries Between

To address these concerns, some have suggested the addition of intermediate categories between "male" and "female". Again, this concept is not new : the medieval *De Spermate* allowed and explained the intermediate category of hermaphrodites[163], and Randolph Trumbach asserts that the reductive two-sex model did not emerge until the early eighteenth century[164]. Modern writers including Julie A. Greenberg have espoused the creation of a third sex[165], while Anne Fausto-Sterling at one point proposed five[166]. Kimmel tells us that some other cultures already have three or four sexual categories[167].

Could such an expanded classification do its work better than the male/female dichotomy ? Perhaps, but likely not. Adding categories would be more, but not completely, reflective of the sexual continuum. It would not necessarily facilitate movement between categories — and could quite possibly do the opposite, if finer granularity is equated with greater stability. Targeted interventions could perhaps be more accurately constructed, but this is a weak argument for *permanent* attachment of individuals to categories if temporary categorization would suffice.

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162. See Damien Cave, "City Drops Plan to Change Definition of Gender", *New York Times*, December 6, 2006, [Online], [www.nytimes.com/2006/12/06/nyregion/06gender.html] (25 February 2011) ; *Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005*, Pub. L. No. 109-113, 119 Stat. 231.
163. *De Spermate*, fol. 188r, Latin 15456, Bibliothèque nationale, MS Paris, cited in Danielle Jacquart and Claude Thomasset, *Sexuality and Medicine in the Middle Ages*, translated by Matthew Adamson, Princeton, Princeton University Press, 1988, p. 141.
164. Randolph Trumbach, "London's Sapphists : From Three Sexes to Four Genders in the Making of Modern Culture", in J. Epstein and K. Straub (eds.), *supra*, note 7, p. 112, at page 112.
165. J.A. Greenberg, *supra*, note 3.
166. A. Fausto-Sterling, *supra*, note 10.
167. M.S. Kimmel, *supra*, note 133, p. 58-60.

Creating additional categories could also have unintended consequences : it could further reify the existing boundaries of "male" and "female"[168] ; it could correspondingly reify the boundaries of the new middle ground[169] ; and it would still fail to account for the situations of those individuals in whom the components of sexual identity are not consistent with the criteria defining the categories. Further, there is a practical argument against expanding the number of categories : there may be too few people in the medial categories to justify creating particular facilities or institutions, and the result could be the functional collapse of the medial categories into the current male/female dichotomy. Creating additional sexes could lead to new forms of sexual discrimination[170]. And, finally, there would again be the issue of compatibility between Québec's data banks and those of the other provinces and the federal government.

5.4 Removing Boundaries

A more radical and more reasonable solution might be to abandon permanent governmental sex classification entirely. As Spade points out, if the classification is not doing the work that we expect of it, it might be worth asking whether such classification is necessary at all[171]. This is not to say that "individual privacy rhetoric [should] valorize an end to government data collection[172]" ; such an extreme would be detrimental to the possibility of positive state intervention. Instead, we can imagine a state in which sex is recorded on a "need-to-know basis"[173]. Health care providers could ask a patient's sex and record it in a file, much as they do with family medical history, allergies, and blood type. Segregated facilities could be re-examined and redesigned on the basis of efficacy and humane treatment rather than on the assumption that sex segregation is requisite. Affirmative action programs could be more nuanced so as to target subpopulations — sexual, visible, or other — rather than assuming, for example, that all women "need help" in a given situation.

The central claim here is that there is no need to attach a sexual marker indelibly to each person and to display this marker on documents meant to last a lifetime. Instead, we could "shift toward a more critical view of the

168. See J.E. Foster, *supra*, note 11, at page 157.
169. See J. Epstein and K. Straub, "Introduction : The Guarded Body", *supra*, note 7, at page 23.
170. See J.-P. Branlard, *supra*, note 4, p. 522.
171. See D. Spade, *supra*, note 15.
172. *Id.*, 819.
173. *Id.*, 814.

use of gender data in government recordkeeping[174]", a view that would not necessarily discard sexual classification entirely, but would accept temporariness, movement between categories, and the usefulness of defining and recording sex differently in different circumstances.

Sex could thus remain as a classifier where useful and appropriate. Individuals could indicate their sex on applications for government employment in order to facilitate workplace diversity initiatives[175], and injured persons could be attended by physicians with access to medical files including sex alongside allergies and medical history. No one need assume, however, that sex is requisite to all state intervention : we could imagine prostate cancer studies that target those with prostates rather than those labelled as "men", unsegregated bathrooms in which everyone feels comfortable and safe, and identification cards that do not display to the world an M or F that is more embarrassing than the picture next to it.

6 Law Without Sex

But what would the effect of such a change be ? Would government data collection fall apart ; would the legal system as we know it collapse ? Likely not. Unlike a situation in which Québec collected sex data using different criteria or added a third sex category, the simple omission of a datum from each Quebecer's entry in a data bank would not result in "translation" problems when data were compared across jurisdictions. Such discrepancies already exist : for example, British Columbia collects and displays information about individuals' weight on their driver's licences[176], while Prince Edward Island does not[177].

Even where laws are differentially applicable to men and women, the absence of a permanent classification should not be problematic — or could

174. *Id.*, 816.

175. The government of Québec in 1992 implemented a "programme d'accès à l'égalité de la fonction publique pour les femmes" and could choose to do so again if it determined that women were underrepresented in its workforce : Québec, Secrétariat du Conseil du trésor, *Le défi de l'égalité : des compétences à utiliser. Programme d'accès à l'égalité de la fonction publique pour les femmes. 1992-1997*, September 1992, [Online], [www.tresor.gouv.qc.ca/fileadmin/PDF/programmes_mesures/prog_femmes.pdf] (25 February 2011).

176. See British Columbia, Ministry of Public Safety and Solicitor General, *Media Room*, "*New, High-Tech Driver's Licence*", February 6, 2009, [Online], [www.pssg.gov.bc.ca/mediaroom/2009/feb-06/index.htm] (25 February 2011).

177. See Government of Prince Edward Island, *Driver's Handbook*, Department of Transportation and Infrastructure Renewal, Highway Safety, October 2010, p. 1, chap. 1 "Your Driver's Licence", [Online], [www.gov.pe.ca/photos/original/tpw_dh_chap1.pdf#3] (25 February 2011).

perhaps even prompt larger questions about the validity of differential applicability. The only way in which men and women are treated differently under the criminal law is in the infanticide provisions[178], which apply only to "female" persons despite the fact that legally male persons may give birth ; surely the drafters of the *Criminal Code* did not intend such an omission. In private law, recent amendments to the C.C.Q. have tried to make even the concepts of maternity and paternity as neutral as possible[179] ; the only other sex-based difference relates to surrogacy contracts, to which the same logic applies as with the criminal infanticide provisions just described. Where a will is made out to "my son John" or "my eldest daughter", the principle of the liberal interpretation of wills in favour of intended beneficiaries should lead courts to override sex classification-based language[180]. Though men tend to receive higher tort damages, only men can apparently win claims for loss of consortium, and only women seem to succeed in actions for breach of promise to marry, judges in tort "normally accept persons as male or female as they appear to the courts or as they represent themselves", so problems are unlikely to arise[181] — and we should in any case ask why tort law treats men and women differently in the first place[182].

More important than changes in individual laws or their consequences, perhaps, would be the effect that ceasing sex classification in favour of more nuanced approaches would have on society. If sex were no longer seen as an absolute classifier, it would follow other classifiers like race and class — which the state neither records nor considers fixed — in becoming one of many "categories of analysis" rather than an inherent feature of all persons[183]. For the state to cease seeing those currently labelled "men" and "women" as intrinsically different would be a significant step in the progression towards sexual equality — and also a result of this progression — even if it by no means would solve all sex-related social problems[184]. Ceasing permanent sexual classification would permit disclosure of sexual identity

178. *Criminal Code*, R.S.C. 1985, c. C-46, s. 233, 237 and 242.
179. Art. 521-542 C.C.Q.
180. See D.L. Hawley, *supra*, note 80, 139.
181. *Id.*
182. I have deliberately omitted any discussion of sports from this paper, as sports are not directly regulated by the government and involve distinct reasons for sex-based segregation that are too broad to be addressed here.
183. Patricia Hill Collins, "Toward a New Vision : Race, Class, and Gender as Categories of Analysis and Connection", in J. Ferrante and P. Brown, Jr., *supra*, note 96, p. 478.
184. See : C. Duvert, *supra*, note 14, at pages 35 and 36 ; É. Deleury and D. Goubau, *supra*, note 62, p. 271 and 272 ; Paisley Currah and Dean Spade, "Introduction to Special Issue. The State We're In : Locations of Coercion and Resistance in Trans Policy, Part I", *Sexuality Research & Social Policy*, vol. 4, No. 4, December 2007, p. 1.

where an individual saw fit and was comfortable to do so, rather than demanding disclosure and often humiliating the individual.

I do not mean through this argument to call for the abolition of sexual identity, nor do I believe that discarding permanent sex classification would leave citizens identity-less and thus rob the state of its ability to intervene amongst the population[185]. What I do assert is that a more flexible notion of identity, not imposed by the state and recorded only temporarily and where necessary, would leave individuals more free to define their sexual status — if they chose to do so at all.

Conclusions

The categories "male" and "female" are pernicious not only in their unquestioned ubiquity but in their unnoticed effects. Kimmel writes of men and women that "by using separate facilities, we 'become' the gentlemen and ladies who are supposed to use those separate facilities. The physical separation of men and women creates the justification for separating them — not the other way around[186]". In other words, being told that we are different prompts us to act differently — and we then assume that we have been different from the start.

If we are to confront such "assumptions about the nature of difference", Martha Minow tells us that we must question the point of view from which difference is assessed, recognise the subjectivity of difference as neither natural nor neutral, and acknowledge the perspectives of those assessed as different[187]. Such has also been the goal of this paper, and such has been the nature of its challenge. In the pages above, I have tried to show that although classification is central to thought, the way in which Québec's classification of men and women constructs the reality of men and women is untenable. What is needed, then, is to rethink the way in which Québec engages — and other governments engage — in such classification ; a better, fairer approach would see the state cease to force men and women into ostensibly permanent and exclusive compartments, instead engaging in a nuanced and intervention-specific analysis of the varying perspectives yielded by the full continuum of sexual difference.

This proposal would not see "men" and "women" disappear as indices ; nor does it argue that men and women are the same. The human need to categorise and the persistence of sexual categories suggest otherwise — as

185. See J. Carbonnier, *supra*, note 68, p. 421 : "Qu'un individu puisse rester sans identité met le droit mal à l'aise."
186. M.S. Kimmel, *supra*, note 133, p. 96.
187. M. Minow, *supra*, note 133, 31-33.

do the numerous persons from all points along the sexual continuum for whom sexual identity is truly important. Rather, I assert that the human need to categorise need not be reified by the state. Just as "official classification [is a] political choice[188]", Québec and other states can make a political choice *to cease classifying* its citizens permanently by sex.

What a difference that choice would make.

188. P. STARR, *supra*, note 26, at page 161.