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## Sex and (Sexed By) the State

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# Sex and (sexed by) the State

Taylor Flynn\*

I've been thinking about sex a lot lately — having sex, being sexed, sex in marriage, sex in other legal regimes — and I keep coming back to one thing: that despite the contingency of a person's legal sex, the law treats sex as the *sine qua non* for major life events such as marriage and parenthood.

As Ms. Tran was discussing, the law not only tries to discipline the body into traditional sex roles, but it also has the power to declare you to be a particular legal sex, even over your objection. The majority of jurisdictions follow the orthodoxy of sex as “genitalia-at-birth.” Under this view, a male to female transgender woman (who, for example, has undergone surgery and is anatomically indistinguishable from someone born with female genitalia) is deemed in the majority of states to be legally male. In a handful of more progressive states, the law looks predominantly — although unfortunately, not exclusively — at an individual's gender identity to determine legal sex. As a result of these differing legal approaches, a person can be legally male in one state and female in another. Thus, the law (at least cross-jurisdictionally) acknowledges the fluidity of sex, yet it makes central life decisions turn on what sex you are.

I said I was also thinking about having sex — how you have it and with whom. The law's regulation of sexual activity is inextricably bound with the law's determination of your legal sex and whether you can marry. In New Jersey, for instance, there is a case that was revolutionary at the time it was decided, in the 1970s. The court recognized a transgender woman who had been born anatomically male as legally female. In doing so, however, the court did two things. First, the court used what I like to call a “body parts checklist”: the court looked at her body and compared it to a presumed female norm, checking off the list and making sure that everything matched up right. The court remarked, for example, that the woman's vagina “has a good cosmetic appearance” and that “[h]er vagina could function as any normal female vagina.” How, you may ask, does any “normal” female vagina function? “For traditional penile/vaginal intercourse,” the court tells us.

Why is this important for the courts? People may be surprised to learn that in most states you can still annul a marriage due to “physical incapacity” — for a couple's failure to have heterosexual intercourse. I litigated a transgender marriage case where this was one of the claims:

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\*Professor Taylor Flynn joined the Northeastern community in 2003 after serving on the faculty of Western New England College School of Law. Prior to joining the academic community on a full-time basis, Professor Flynn was a staff attorney with the ACLU of Southern California. Her area of specialization, both at the ACLU and in her academic research, focuses on discrimination based on sexual orientation and gender identity.

At the ACLU, Professor Flynn litigated a wide array of issues. She argued before the California Supreme Court on behalf of three boys who had been expelled from the Boy Scouts based on their sexual orientation and religious non-

belief, and she served as co-counsel in a successful Ninth Circuit challenge to the Los Angeles Police Department's practice of continuing to question criminal suspects after they had invoked their *Miranda* rights. In a decision thought to be the first of its kind, she secured a victory on behalf of a transgendered father who faced losing all legal rights to his child solely because of his gender identity.

Professor Flynn's scholarly work has appeared in the *Columbia Law Review*, *Stanford Law and Policy Review* and the *Iowa Law Review*. She teaches Constitutional Law, First Amendment and Trusts and Estates.

that the marriage was invalid on the ground that the trans husband did not have a penis deemed sufficiently functional to have intercourse. While you should be able to say, particularly after *Lawrence v. Texas*, that this is a violation of your right to privacy, we still had to go through a three-week trial on this issue.

And so even in a progressive state like New Jersey, you've got an exaltation of male penetration of women that has the effect of turning wives into little more than the receptacles for sex and marriage into the missionary position.

What I would like to do briefly, because I see my time is running short, is to discuss *Goodridge v. Department of Public Health*, the Massachusetts same-sex marriage case. I fully agree with Nancy Polikoff – I would love to see the legal (as opposed to cultural or religious) institution of marriage dismantled as the primary method of distributing benefits. But in some ways, I think that the “radical right” might be correct when they say that same-sex marriage is going to “destroy” traditional marriage. My hope, at least, is that they are right, but not for the same reasons and not on the same timetable.

(Laughter.)

For trans people, *Goodridge* does away with a possible challenge to the validity of their marriage because the Massachusetts Supreme Judicial Court struck down the sex requirement. My hope and belief is that this will in some ways “destroy” the highly gendered and sexist

aspects that have long been central to traditional marriage. Over the centuries, because I think that's how long it will take, having two men or two women or people of undetermined sex(es) in marriage will loosen up the conception of what it means to be a husband or a wife or a spouse, or who gets to parent their children.

I also would like to address some of the issues that Nancy Polikoff was discussing, the primary one being the exaltation of marriage and the assimilationist focus in the case. One critique of *Goodridge*, an important one, is that legalizing same-sex marriage will turn people into the “good gays” and the “bad gays,” or the “good” and “bad” transgender people – those who get married and those who do not. In fact, the *Goodridge* court says that it may be acceptable to remove protections for nonmarital families because same-sex couples now have the option of getting married. I think this is extremely worrisome. But in my last minute of time remaining, I would like to discuss what I think is the most positive aspect of the case. Marriage has been used historically as a tool of subordination by denying certain groups access to norms, whether that group consists of Chinese laborers or slaves or interracial couples. While marriage still serves as a denial of access to many, the move toward demolishing this particular state-sponsored mechanism of control over who is allowed “in” and who remains “out” is an extraordinarily significant achievement.

Thank you.