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What Role for "Women," "Men," and Transpeople/Intersex People in Gender Equality?: A Commentary

Edward Stein*

This has been a very rich opening panel to what promises to be a terrific conference. The panelists' comments go in such varied directions that it is a challenge to be both a commentator and summarizer, especially when I have just a few minutes to speak. What I plan to do is say a little bit to draw together some of the themes that the panelists have been talking about that are connected to a couple of topics I have been working on while at the same time trying to look forward to some of the things I hope we are going to be talking about the rest of the day.

I have been returning to some questions relating to immutability, about which Janet Halley and I were both writing in the early nineties. I recently reread Janet's *Stanford Law Review* paper on that topic,[1] which was very influential for my thinking. Some of these issues in that article relate to biological theories of the origins of sexual orientations and their relevance to constitutional law arguments in U.S. contexts. Some of the ideas that animate that article may seem outdated—for example, the discussion of essentialism and constructionism about sexual orientation[2] is cast in a different

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1. Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the New Argument from Immutability*, 46 STANFORD L. REV. 503 (1994).

2. For some classic essays that frame the date about essentialism and constructionism at the time, see FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY (Edward Stein, ed. 1990). *See*

way than it is typically framed today and much has changed about the legal framework of the relevant U.S. constitutional law.[3] But some of the questions present in that article remain live questions today and we are grappling with them on this panel. We are talking about gender, gender identity, sexual orientation, sexual desire, and sexual behaviors more generally. These phenomena are manifest in humans, who are complex creatures with many characteristics and rich cognitive lives. The characteristics of individual humans can change, sometimes through choices that we make, sometimes through the environments that we are in, sometimes as a result of economic forces, and sometimes through medical procedures on our bodies that are undertaken willingly or unwillingly. The categories that we use for thinking about ourselves and the world also change. They change over time, they change with new discoveries, and so forth. So although we take for granted the categories of sex, gender, race, gender identity, and sexual orientation, we need to realize that these categories are also changing. These categories for describing people are also used in the law and by legal systems, and they can be used in the law in ways that can both oppress or liberate. How we think about these categories and how we can and do change them is something that people on this panel have been talking about in useful ways.

When scholars, myself included, are thinking about the law, gender, sexuality, gender identity, and the like in a theoretical way, we often do so from the particular legal context in which we find ourselves. We are talking about U.S. law—in this context, for example, same-sex marriage in the United States or immutability as it plays itself out in the U.S. constitutional context. Looking forward to the next panels, what I am hoping will happen in the conference today is that we will continue to look at gender and sexuality in both a comparative way (as some people on this panel have started to do) and from the perspective and context of international law.

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also EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION 71-116 (1999).

3. For example, Halley's essay was written before *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Romer v. Evans*, 517 U.S. 620 (1996).

Part of what I hope we will be doing going forward is using these perspectives to think outside of our particular cultural categories and, thereby, impact how we think about this complicated set of issues that we have started talking about on the panel today.

I hope these brief remarks have drawn together some of the questions that people on this panel have talked about while anticipating the conversations that we will be continuing to have today.