

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

2005

## Check Only One: M/F/Other

Julie Shapiro

Follow this and additional works at: <http://digitalcommons.law.seattleu.edu/faculty>



Part of the [Law and Gender Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Julie Shapiro, Check Only One: M/F/Other, 11 *CARDOZO WOMEN'S L.J.* 587 (2005).  
<http://digitalcommons.law.seattleu.edu/faculty/575>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons.

## CHECK ONLY ONE: M/F/OTHER

JULIE SHAPIRO\*

Many have disputed and will continue to dispute Lawrence Summers' recent comments about the innate capacity of women to engage in top-flight research in science and engineering. The current controversy is a modern iteration of centuries of debate about differences between the sexes and whether those differences, if there are differences, should be explained by reference to nature or nurture.

But Summers' remarks also highlight another set of questions. Embedded within his comments are a pair of common assumptions: that each of us can be assigned to one and only one of two mutually exclusive categories, "male" and "female," and that these categories are clearly defined, so that the assignment of individuals to these categories is uncomplicated and uncontroversial. Without these assumptions, Summers' remarks lose their coherence. For if we are not sure what "male" and "female" mean, or who is which, then we can neither make nor test generalizations about the innate or learned capacities of "men" and "women."

Perhaps the suggestion that the categories "male" and "female" are problematic seems absurd. Certainly in our daily interactions one of the first things we observe about a person is whether the person<sup>1</sup> is male or female and, with the exception of infants,<sup>2</sup> we usually have little or no trouble assigning a person to a category. What this really reveals is that generally speaking people present themselves, by dress, demeanor, manner of speech, etc., in ways that conform to established and recognizable categories for men and women. But it is certainly possible that the man I chatted with on the bus today had two X chromosomes as well as a Y chromosome and so, by some measure, is not a man. Similarly, it might be that the woman who took my order at lunch was not always a woman.

The legal complexity of defining "man" and "woman" is becoming increasingly apparent. The law frequently demands categorization, whether to define who can play in a particular sporting event<sup>3</sup> or which couples can get

---

\* Associate Professor of Law, Seattle University School of Law. Thanks to Stephanie Wilson for research assistance and to Shelly Cohen for encouraging me to just sit down and write this.

<sup>1</sup> Our speech itself requires that we categorize in order to select the right pronoun.

<sup>2</sup> Our need to correctly categorize infants is apparent and revealing. One of the first questions asked about any infant is "Is it a girl or a boy?"

<sup>3</sup> In 1977 Renee Richards, who had been born male, sued the United States Tennis Association to gain admittance to the women's competition at the United States Open. Richards prevailed at trial and the USTA did not appeal. Neil Amdur, *Information Bank Abstracts*, N.Y. TIMES, Aug. 18, 1977, at 17. More recently this International Olympics Committee has considered problems of both transsexual and transgender individuals. Beginning with the 2000 Summer Olympics, the IOC abolished gender verification tests. See Joe Leigh Simpson et al, *Gender Verification in the Olympics (Commentary)* 284

married.<sup>4</sup> But the categorization is more frequently contested and courts have split about what makes us male and what makes us female. In fact, it appears that some of us are men in some states while we are women in others.<sup>5</sup> In addition, we must acknowledge the existence of people who will check neither the “M” nor the “F” box on the standardized form.<sup>6</sup> And so increasingly we must question our certainty that there are two clearly defined, discrete, and all-encompassing categories, male and female.<sup>7</sup>

Viewed in this more complex light, how can we understand what Summers was suggesting? Who are the “women” of whom he spoke? Are they people with two (and only two) X chromosomes? Or with particular levels of estrogen? Or with internal reproductive organs generally suited to bearing children? Or with conforming genitalia? Or are they people with some combination of these traits—perhaps any three out of five?

I do not mean to suggest that the questions raised by Summers’ comments are not interesting. To the contrary, they are interesting in ways he likely did not intend. Even as there is a complex range of qualities of physiology, mind and personality that make one a top-flight mathematician or engineer, so there is a complex range of qualities of physiology, mind and personality that make us male or female. We do not really know or agree on what makes one innately female. How then can we conclude that those traits also make one innately less able to perform in mathematics or engineering?

---

JAMA 1568 (2000). In 2004 the IOC adopted new policies governing transsexual athletes. Press Release, International Olympic Committee (IOC), IOC Approves Consensus with Regard to Athletes Who Have Changed Sex (May 18, 2004) *at* [http://www.olympic.org/uk/news/media\\_centre/press\\_release\\_uk.asp?id=855](http://www.olympic.org/uk/news/media_centre/press_release_uk.asp?id=855).

<sup>4</sup> See, e.g. *Gardiner v. Gardiner*, 42 P.2d 120 (Kan. 2003) (invalidating marriage based on conclusion that spouse, who was born male, remained male); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. 1999). *But see* *Goodwin v. U.K.*, 28957/95 Eur. Ct. H.R. 2002 (affirming right to change sex and enter into a marriage). Cases like *Gardiner* have created a curious situation where, in states like Texas, two people who appear to be female can legally marry because one of them is legally deemed to remain male, regardless of sex reassignment surgery. One wonders whether such marriages will be recognized by neighboring states that have enacted amendments restricting marriage to male/female couples.

<sup>5</sup> *Gardiner*, for example, was female in Wisconsin but male in Kansas.

<sup>6</sup> The proceedings at the annual meeting of the American Association for the Advancement of Science this year featured a round table discussion that focused on the difficulty of defining the categories “male” and “female” and assigning infants with non-conforming genitalia to the correct category. Press Release, American Association for the Advancement of Science (AAAS), Defining male and female—Research casts further doubt on newborn sex-assignment surgeries (Feb. 18, 2005) *at* [http://www.eurekalert.org/pub\\_releases/2005-02/dnnl-dma020305.php](http://www.eurekalert.org/pub_releases/2005-02/dnnl-dma020305.php). See also JEFFERY EUGENIDIES, *MIDDLESEX: A NOVEL* (Picador 2003) (winner of Pulitzer Prize, being the life story of a “hermaphrodite” or intersexed individual). I have wondered for some time whether the newly passed constitutional amendments restricting marriage to between a man and a woman relegate intersexed individuals to a class of people who, being neither male nor female, cannot marry at all.

<sup>7</sup> At Wesleyan University, students seeking health care fill out a form that does not have the familiar “M” and “F” boxes. Instead, students are asked to “describe your gender identity history.” Fred A. Bernstein, *On Campus: Rethinking Biology 101*, N.Y. TIMES, Mar. 7, 2004, at sec. 9 pg. 1.