Book Review: Laura Palazzani’s *Gender in Philosophy and Law*

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*Gender in Philosophy and Law* takes on two ambitious tasks: disambiguating the confusing ways in which the language of “sex” and “gender” have been used and explaining how law ought to address issues of sex and gender. Palazzani’s discussion is clear and informative in parts, especially her discussion of the recent treatment of sex and gender in international and European law. I applaud her efforts to carve clarity in the linguistic use of “sex” and “gender.” I found somewhat perplexing and ultimately less convincing her view that sex should continue to be understood in non-neutral, binary terms and the conclusions about the law that she draws as a result.

As part of the SpringerBriefs in Law series, Palazzani’s book is perforce slim. But it is clearly written (despite some infelicitous use of the English definite article) and packed with information and careful argument. The book is divided into four chapters: a discussion of the theoretical shift from “sex” to “gender,” a discussion of the theoretical shift from “gender” to “queer,” a presentation of how these shifts have appeared in various international and European legal initiatives, and an argument for legal non-neutrality concerning sex/gender differences.

The initial chapter traces the shift from conceptualizations in terms of sex to conceptualizations in terms of gender. In this chapter, Palazzani describes how “gender” increasingly became separated from biological sex and understood as a category characterized by malleability, variability, and ultimately liberation from what had been understood as biological determinism. Much of this is familiar territory, but with useful summaries: the critiques of gender essentialism from psychoanalysis, theories of gender as a social or cultural construct, liberal feminist egalitarian critiques of gender roles, Marxian emancipation through an end to alienated labor, deBeauvoir’s transcendence of historical and biological contingency, second-wave radical feminist dissolution of female identity, and finally lesbian critiques of hetero-normativity.

The second chapter continues the story, moving beyond the separation of sex from gender to the post-modern fragmentation of the concept of gender found in
the polymorphism and pan-sexualism of queer theory. Gender remains a modern rather than a postmodern term because it continues to reflect oppositional duality. Post-modernism represents a paradigm shift towards the recognition of various continua along which categorizations shade into one another and in the end dissolve. Sexual difference becomes a multiplicity of differences. Individuals create their own identities, unconstrained by the strictures of biology, social constructions, or cultural constructs. Queer theory, understood proudly, proclaims the denial of any sexual dualism, regarding duality as inextricably linked to hierarchy, in the celebration of polymorphism and pansexualism. One important policy consequence of this approach is the rejection of surgical intervention in the case of children born with ambiguous genitalia; it should be noted that this conclusion may be accepted for a number of reasons (such as risks of mistakes, the irrevocability of surgical intervention, and the goal of preserving an open future for the child to make choices as an adult about such important matters) without relying on the rejection of categories of difference.

Chapter 3 presents an overview of the introduction of gender into European and international law. Palazzani traces the introduction of “gender” in place of “sex” to two UN conferences: the Conference of Cairo in 1994 and the Conference of Beijing in 1995. At this point, she says, the term gender was used ambiguously, with some understanding it as a polite substitute for sex and others understanding it in terms of the distinction between biological and social categorizations. Increasingly, however, gender has been used in the latter way in human rights documents such as the Yogyakarta Principles (Geneva, 2007) or the UN Declaration on Sexual Orientation and Gender Identity (2008). In Europe, non-discrimination on the basis of sexual orientation is now fully recognized as a core principle of equality; a number of resolutions support legal recognition for same-sex couples, equality in access to reproductive services, and similar anti-discrimination measures. The European Court of Human Rights (ECHR), however, has not recognized the right of single homosexuals to adopt or the right of same-sex couples to marry instead of entering into civil unions. Transsexuals have succeeded in gaining rights to record sex changes in legal documents and to receive insurance reimbursement for reassignment treatment. This chapter is quite dense, but very helpful as an overview for readers who are not experts in the area.

Chapter 4 concludes the volume with Palazzani’s argument for recognizing sexual naturalism and dimorphism. Palazzani’s desire is to reconstruct “the relevance of nature in sexual identity and of sexual difference in the family relationship” (p. 73). She offers arguments on many different levels for this approach: scientific, psychoanalytic, metaphysical, and normative. It is important to emphasize that her view is neither rigid biological determinism nor rejection of the possibility that sex is determinable at birth. Instead, she sees nature as “the critical measure in the establishment of sexual identity,” working in “complex interaction between natural and cultural, somatic and psychic, internal
and external dimensions, univocally reducible neither to the biological factor alone, as maintained by biological determinism, nor to the socio-cultural factor, as claimed by environmental determinism" (p. 75).

From this commitment to an interactive dimorphism, Palazzani appears to reach several of what would be regarded as quite controversial legal conclusions. She supports the view that laws may, in what she claims are the interests of the unborn, give lower priority to rights of same-sex couples to adopt (p. 90). Rejecting the “rainbow family,” she also believes that law cannot be committed to neutrality without limits. At the same time, she does not want to be committed to traditional views of sex difference rooted in natural law theory that would entrench hierarchies that deny the dignity and equality of some. The challenge with which she concludes is that the law must make responsible choices about how to conceive the family in light of social change and the insights of gender theory.