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THE CENTRAL MISTAKE OF SEX DISCRIMINATION LAW: THE DISAGGREGATION OF SEX FROM GENDER

KATHERINE M. FRANKE†

INTRODUCTION

Contemporary sex discrimination jurisprudence accepts as one of its foundational premises the notion that sex and gender are two distinct aspects of human identity. That is, it assumes that the identities male and female are different from the characteristics masculine and feminine. Sex is regarded as a product of nature, while gender is understood as a function of culture. This disaggre-

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gation of sex from gender represents a central mistake of equality jurisprudence.

Antidiscrimination law is founded upon the idea that sex, conceived as biological difference, is prior to, less normative than, and more real than gender. Yet in every way that matters, sex bears an epiphenomenal relationship to gender; that is, under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles. Herein lies the mistake. In the name of avoiding "the grossest discrimination," that is, "treating things that are different as though they were exactly alike,"¹ sexual equality jurisprudence has uncritically accepted the validity of biological sexual differences. By accepting these biological differences, equality jurisprudence reifies as foundational *fact* that which is really an *effect* of normative gender ideology. This jurisprudential error not only produces obvious absurdities at the margin of gendered identity, but it also explains why sex discrimination laws have been relatively ineffective in dismantling profound sex segregation in the wage-labor market,² in shattering "glass ceilings" that obstruct women's entrance into the upper echelons of corporate management,³ and in increasing women's wages, which remain a fraction of those paid men.⁴

¹ *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); see also *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1980) (stating that the Equal Protection Clause does not require "things which are different in fact . . . to be treated in law as though they were the same" (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940))). See generally Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108-09 (1975) (arguing in the context of the Equal Protection Clause that "even the just state must make some distinctions, must treat some things differently from others").

² See U.S. Census, 1990: *Census of Population and Housing, Equal Employment Opportunity File* [Online] (1990), available in Telnet: info.umd.edu (select InforM U.S. Census) [hereinafter 1990 U.S. Census].

³ See U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 13 (1991).

⁴ Although women's wages have steadily climbed relative to men's wages over the last 20 years, there still remains a significant gap in earnings between men and women. For people earning hourly wages, the gap in earnings is 20.6%; for people earning weekly wages, the gap is 24.6%; and for people earning annual wages, the gap is 29.4%. See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 93-5, FACTS ON WORKING WOMEN 1 (1993). The gap in earnings between white men, on the one hand, and black and hispanic women, on the other, is significantly larger than that between men and women generally. See *id.* at 3. With respect to people with professional degrees, however, hispanic women and black men earn considerably less than all other groups of people. See *id.* at 7. This fact illustrates an important point that has been developed more fully elsewhere, that neither as an empirical nor theoretical matter should sexism be discussed in isolation from racism. See Kimberlé Crenshaw,

The targets of antidiscrimination law, therefore, should not be limited to the "gross, stereotyped distinctions between the sexes"⁵ but should also include the social processes that construct and make coherent the categories male and female. In many cases, biology operates as the excuse or cover for social practices that hierarchize individual members of the social category "man" over individual members of the social category "woman." In the end, biology or anatomy serve as metaphors for a kind of inferiority that characterizes society's view of women.

The authority to define particular categories or types of people and to decide to which category a particular person belongs is a profoundly powerful social function. While the state has always performed this role, its actions have rarely been subject to equal protection scrutiny. Given the epiphenomenal relationship between identity and equality, the Fourteenth Amendment and Title VII should apply with equal force to acts of classification as well as to disparate treatment of classes.⁶ Rather than accepting sexual differences as the starting point of equality discourse, sex discrimination jurisprudence should consider the role that the ideology of sexual differences plays in perpetuating and ensuring sexual hierarchy.

A reconceptualization of the two most fundamental elements of sexual equality jurisprudence is necessary to correct this foundational error. First, sexual identity—that is, what it means to be a woman and what it means to be a man—must be understood not in deterministic, biological terms, but according to a set of behavioral, performative norms that at once enable and constrain a degree of

Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 166.

⁵ *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

⁶ Janet Halley made a similar plea for an expansion of the scope of the Equal Protection Clause as it relates to lesbians and gay men:

The equal protection clause [sic] requires courts to scrutinize not classes but acts of classification—not preexisting, given biological groupings of human persons but governmental determinations that certain persons shall belong and others shall not belong to a special favored or disfavored group. At issue in an equal protection case is not merely the government's power to redistribute benefits and burdens, but also its power to create and perpetuate social classifications.

Janet E. Halley, *Misreading Sodomy: A Critique of the Classification of "Homosexuals" in Federal Equal Protection Law*, in *BODY GUARDS* 351, 356 (Julia Epstein & Kristina Straub eds., 1991).

human agency and create the background conditions for a person to assert, *I am a woman*. To say that someone is a woman demands a complex description of the history and experience of persons so labeled. This conception of sexual identity ultimately provides the basis for a fundamental right to determine gendered identity independent of biological sex.

Second, what it means to be discriminated against *because of one's sex* must be reconceived beyond biological sex as well. To the extent that the wrong of sex discrimination is limited to conduct or treatment which would not have occurred *but for* the plaintiff's biological sex, antidiscrimination law strives for too little. Notwithstanding an occasional gesture to the contrary, courts have not interpreted the wrong of sex discrimination to reach rules and policies that reinforce masculinity as the authentic and natural exercise of male agency and femininity as the authentic and natural exercise of female agency.

In order to explore these fundamental issues of equality, difference, and identity, I will ask a seemingly simple question: What is the wrong of sex discrimination? Is it the unfair consideration of biological differences between males and females? The resort to archaic notions about the skills, abilities, or desires of men and women? The perpetuation of stereotypical notions of masculinity and femininity? Or the unwelcome instigation of sexual behavior in inappropriate settings, such as the workplace? Close examination reveals that both the case law and the theory of sex discrimination draw in kaleidoscopic fashion from each of these formulations to determine what it means to be discriminated against because of one's sex.⁷ The result is an unstable conception of both who it is that deserves equal protection of the laws and what it would mean to treat her fairly. While instability is not an intrinsic flaw in the doctrine, the theory's surface chaos masks a deeper reality within sexual equality jurisprudence—that the wrong of sex discrimination is premised upon a right of sexual differentiation, that is, a fundamental belief in the truth of biological sexual difference. This belief in the truth of sexual identity inevitably reifies masculinity as the natural expression of male subjectivity and femininity as the natural expression of female subjectivity. In accepting this belief, the law has played a significant role in perpetuating, rather than dismantling, sexual inequality.

⁷ See *infra* part II.

In the end, the answer to the question "what is the wrong of sex discrimination?" depends upon one's theory of what it means to be discriminated against *because of one's sex*. A complete account of what it means to be discriminated against because of one's sex must include an account of the term "sex." Defining sex in biological or anatomical terms represents a serious error that fails to account for the complex behavioral aspects of sexual identity. In so doing, this definition elides the degree to which most, if not all, differences between men and women are grounded not in biology, but in gender normativity. Ultimately, there is no principled way to distinguish sex from gender, and concomitantly, sexual differentiation from sexual discrimination.

The metaphysics of sexual difference has always been fundamental to the law's consideration of the rights of women. In an effort to imbue the category "female" with positive meaning, many cultural feminists make the same mistake—confusing, or at least conflating, maleness with masculinity and femaleness with femininity. According to this theory of sex, gender, and authenticity, women who act like men do so either because of false consciousness or as a strategic assimilative choice necessary for success in male-dominated arenas.⁸ This sexual syntax reflects a deep cultural need for and investment in real differences between men and women. Nowhere is this need greater than at service academies⁹ and other military institutions,¹⁰ whose educational missions and organiza-

⁸ See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 42 n.22, 62 n.113 (1985) (exploring the possibility that women have had to adopt a male voice or language in order to succeed in a male-dominated world).

⁹ See JUDITH LORBER, *PARADOXES OF GENDER* (1994).

At a rock and roll dance at West Point in 1976, the year women were admitted to the prestigious military academy for the first time, the school's administrators "were reportedly perturbed by the sight of mirror-image couples dancing in short hair and dress grey trousers," and a rule was established that women cadets could dance at these events only if they wore skirts. Women recruits in the U.S. Marine Corps are required to wear makeup—at a minimum, lipstick and eye shadow—and they have to take classes in makeup, hair care, poise, and etiquette. This feminization is part of a deliberate policy of making them clearly distinguishable from men Marines.

Id. at 26 (citation omitted); see also CAROL BARKALOW, *IN THE MEN'S HOUSE* (1990) (recounting the experience of the first woman admitted to West Point Academy).

¹⁰ See, e.g., CHRISTINE L. WILLIAMS, *GENDER DIFFERENCES AT WORK: WOMEN AND MEN IN NONTRADITIONAL OCCUPATIONS* 47-48 (1989). "Army and Marine Corps men are not allowed to use umbrellas while in uniform, although women in all the services are. Why the difference? . . . [U]mbrella use by men was vetoed because senior

tional cultures are committed to the socialization of "a few good men" in the ways of masculinity. Shannon Faulkner's recent experience at the Citadel¹¹ reflects this ethos: a female cadet is a contradiction in terms.

Of course, the now-discredited view, expressed in *Bradwell v. Illinois*,¹² that men and women inhabit separate spheres according to a divine order represents the low water mark of women's equality jurisprudence.¹³ Yet, the Supreme Court's current doctrine affording women quasi-suspect class status¹⁴ and the availability under Title VII of a complete defense to a showing of sex discrimination when sex-based employment practices reflect bona fide occupational qualifications¹⁵ represent a continued investment in and reification of sexual difference as the grounds for sexual equality jurisprudence.

In Part I of this Article, I will explore the way in which courts and legislatures use sexual classifications and expose the inconsistencies of this practice. These classifications often share a common point of confusion with regard to what is meant by "sex" when the law proscribes discrimination "because of one's sex." Notwithstand-

officers thought the practice 'too wimpy.'" *Id.*

¹¹ See *infra* text accompanying notes 346-57.

¹² 83 U.S. (16 Wall.) 130 (1872).

¹³ See *id.* at 141 (Bradley, J., concurring).

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it [sic] for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . .

. . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.

Id.

¹⁴ See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (following the equal protection analysis in *Reed v. Reed*, 404 U.S. 71 (1971), that gender classifications must serve important governmental objectives and be substantially related to achievement of those objectives).

¹⁵ Title VII states:

[I]t shall not be an unlawful employment practice for an employer to hire and employ [an] employee[] . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988).

ing observations by courts¹⁶ and commentators¹⁷ to the contrary, there is a rich legislative and political history to Title VII and sex-based equal protection litigation which helps explain why we have inherited a jurisprudence that is often caught between a commitment to formal sexual equality and a visceral belief in real differences between men and women which the law should take into account. This confusion is compounded by the fact that the term "sex" when used in the law often means any one or a combination of the following: biological sex (female or male), core gender identity (woman or man),¹⁸ gender role identity (feminine or masculine), or sexual behavior (genital or reproductive behavior). Consistently applied doctrine might use these distinctions to distinguish the wrong of sexual discrimination from the right of sexual differentiation, yet the case law reveals confused and often inconsistent holdings with regard to the meanings and legitimacy of sex-based classifications.

In Part II, I will show the absurdity of disaggregating sex from gender by looking at the law's treatment of sex discrimination at the margins—that is, the legal treatment of discrimination claims brought by transgendered people. In these cases the law clearly has produced and enforced a truth of sexual difference. I will also consider a number of legal settings, both civil and criminal, in which the law has played an active role in essentializing male and female identity and in policing the boundaries of acceptable male and female behavior. In this regard, the law has had a performative effect upon sexual identity, inscribing rather than describing what it means to be female and what it means to be male according to commonly accepted social norms, rather than biology or anatomy.

While the cases in Part II illustrate how sex discrimination does not take place on the level of biology, the cases in Part III amply demonstrate how biology is used as a *post hoc* justification for sexual identity claims.

¹⁶ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986) (stating that the prohibition against sex discrimination was added to Title VII "at the last minute," thus leaving "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'").

¹⁷ See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) [hereinafter *Developments*] (describing how the prohibition against sex discrimination was added as a floor amendment in the House without any prior hearings or debate and without even a minimum of congressional investigation).

¹⁸ See *infra* note 25.

In Part IV, I will argue that the disaggregation of sex from gender is simply wrong as an historical matter. By providing a brief survey of the history of sexual classification, I will show how our contemporary conception of the sexes, as two opposite beings, immutably different in kind, is a relatively modern notion. Prior to the Enlightenment, the difference between male and female was understood vertically, as a matter of degree between two points along the continuum of humanity. In contrast to our thinking today, the pre-Enlightenment logic of difference considered sex a mutable characteristic, whereas gender was an essential, immutable, and fixed trait.

In Part V, I will demonstrate that the insights from the margins concerning the disaggregatory error of sexual equality jurisprudence apply with equal force to the more difficult cases of sexual identity and discrimination at the center. I will examine outcomes in Title VII cases challenging workplace grooming regulations, the composition of all-male military academies, and the sexual segregation of the wage-labor market to illustrate again how the disaggregation of sex from gender represents the central mistake of antidiscrimination jurisprudence.

Finally, I will argue that equality jurisprudence must abandon its reliance upon a biological definition of sexual identity and sex discrimination and instead should adopt a more behavioral or performative conception of sex. The wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women in a particular workplace. This reconceptualization of the meaning of sex reflects the notion that we all possess a degree of sexual agency beyond the rigid determinism of biology, or the bleak overdeterminism of strong constructionism. This agency is exercised, however, within a legal and social domain that sets both the terms and limits of acceptable male and female behavior. Where the law serves to constrain the range of permissible, or even coherent, sexual meanings, it becomes an instrument of discrimination itself. Therefore, law generally, but the law of equality particularly, must resist the essentializing impulses that constrain both sexual equality and sexual agency. Such a theory suggests that sexual equality jurisprudence should include a commitment to a fundamental right to determine one's gender independent of one's biological sex. Such a fundamental right should exist both for the transgendered person who seeks a harassment-free workplace or the benefits of heterosexual marriage and for the male senior associate in a law

firm who wants neither to be ridiculed by his male colleagues nor penalized when he comes up for partner because he requests time off from work to care for his newborn child.

I. DISCRIMINATION ON THE BASIS OF SEX: INTERMEDIATE SCRUTINY AND THE PROBLEM OF CATEGORY MISTAKES

The depth of confusion over the meaning of sex discrimination permeates the law. In 1994, the Supreme Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality,"¹⁹ thereby extending *Batson v. Kentucky*²⁰ to forbid gender-based peremptory challenges in criminal trials.²¹ "The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree."²²

Justice Scalia, with characteristically sharp tongue, accused the Court of a serious nomenclatural error:

Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discriminations plain and simple.²³

Justice Scalia's reasoning, albeit somewhat caustic, reflects common assumptions about the difference between sex and gender. Sex—male and female—is physical, biological, and immutable; while gender—masculinity and femininity—is cultural, attitudinal, and mutable.²⁴ Presumably, for Justice Scalia, by their very mutability

¹⁹ *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1421 (1994).

²⁰ 476 U.S. 79 (1986).

²¹ See *id.* at 85-86 (striking down a prosecutor's use of racially based peremptory challenges and holding that the Equal Protection Clause of the Fourteenth Amendment grants a defendant "the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria").

²² *J.E.B.*, 114 S. Ct. at 1428.

²³ *Id.* at 1436 n.1 (Scalia, J., dissenting).

²⁴ See JEAN LIPMAN-BLUMEN, GENDER ROLES AND POWER 53-66 (1984).

and cultural contingency, gender-based distinctions are *not* what "discrimination on the basis of sex" was intended to reach. So when the law proscribes discrimination on the basis of sex, what is the target of the jurisprudential gaze? Sex-based thinking that discriminates on the basis of gender role identity (femininity/masculinity)? Biological sex (female/male)? Core gender identity (woman/man)?²⁵ Or sexual behavior (genital or reproductive behavior)? Furthermore, what should the target be?

In the early 1970s, when the U.S. Supreme Court first began seriously to examine the justiciability of women's equal protection claims under the Fourteenth Amendment, it understood that it was doing so in response to "arbitrary legislative choice[s]"²⁶ that reflected "a long and unfortunate history of sex discrimination,"²⁷ and "an attitude of 'romantic paternalism'"²⁸ grounded in "gross, stereotyped distinctions between the sexes."²⁹ These stereotypes were found either to "foster[] 'old notions' of role typing,"³⁰ further "archaic and overbroad generalizations,"³¹ or perpetuate inaccurate and "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"³²

These early sex discrimination cases toyed with the notion of granting women suspect-class status³³ but finally settled upon a middle-level standard of scrutiny.³⁴ These cases were primarily concerned with fit: the justification for a sex-based classification

²⁵ Core gender identity ("I am a woman," "I am a man") should be distinguished from sexual identity ("She is female," "He is male"). Core gender identity is "an individual's own feeling of whether she or he is a woman or a man, or a girl or a boy." SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 8 (1978). Genitals can, although they need not, play a role in one's sense of gender identity. More important is the acceptance of one's gender as a sociopolitical construction that is both communicated to others and lived out through masculinity or femininity.

²⁶ *Reed v. Reed*, 404 U.S. 71, 76 (1971).

²⁷ *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

²⁸ *Id.*

²⁹ *Id.* at 685.

³⁰ *Craig v. Boren*, 429 U.S. 190, 198 (1976).

³¹ *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

³² *Boren*, 429 U.S. at 198-99 (quoting *Stanton v. Stanton*, 421 U.S. 7 (1975)).

³³ See, e.g., *Frontiero*, 411 U.S. at 688 ("[W]e can only conclude that classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

³⁴ See *Boren*, 429 U.S. at 197 ("To withstand challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

had to match closely the purpose of the statute which contained the classification. Thus, the Court held in *Craig v. Boren* that

[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.³⁵

It was this *fact* of sexual difference that justified less-than-heightened scrutiny for sex-based classifications. In other words, the Court built its sex-based equality jurisprudence on the presumption that, on a fundamental level, males and females are not similarly situated—they are in fact different kinds of beings.³⁶ The “high visibility of the sex characteristic”³⁷ must be distinguished, therefore, from the highly visible characteristics which differentiate people on the basis of race. Sexual difference is a different kind of difference than racial difference for the purposes of the Equal Protection Clause. Whereas virtually every classification based upon skin color or race is rendered invalid when filtered through the heightened scrutiny standard, only the grossest sexual stereotypes and archaic notions are filtered out by the larger holes in the intermediate screen. These holes reflect the legitimate considerations of real and demonstrated differences between the sexes, thus creating and protecting a zone of sexual difference, and concomitantly, sexual identity. Thus, the Court stated that

[t]here are both real and fictional differences between women and men. . . . It is now well recognized that employment decisions cannot be predicated on mere “stereotyped” impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman’s inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.³⁸

For better³⁹ or for worse,⁴⁰ the traditional aspiration of racial

³⁵ *Id.* at 199.

³⁶ See *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1980) (stating that “this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. . . . As the Court has stated, a legislature may ‘provide for the special problems of women’” (citations omitted)).

³⁷ *Frontiero*, 411 U.S. at 686.

³⁸ *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

³⁹ See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THING OF JUDICIAL REVIEW*

equality jurisprudence is color-blind thinking, based upon the presumption that whatever real differences exist between the races—skin color or blood—these differences can almost never legitimately justify differential treatment of people.⁴¹ In contrast, because the sexes are not similarly situated, one would never characterize the aspiration of sexual equality jurisprudence as sex-blind thinking.⁴²

This conception of male and female as two kinds of beings, similarly situated for some purposes, dissimilarly situated for others, sets up discriminatory treatment as a kind of category mistake or descriptive error. Discrimination occurs when false or stereotypical differences are mistaken for real differences, and thereby similar cases are mistaken as dissimilar.⁴³

135-79 (1980) (stating that racial considerations are suspect because they illegitimately distort reality, thereby causing an otherwise fair system to malfunction); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 859 (1995) (discussing the reconciliation of group-based affirmative action programs with “the strong tradition of liberal individualism in American political thought”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959) (arguing that courts can and must decide cases according to neutral principles).

⁴⁰ See, e.g., PATRICIA J. WILLIAMS, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, in THE ALCHEMY OF RACE AND RIGHTS 98, 98-130 (1991) (discussing narrative reflections on the built-in race, sex, and class biases of traditional paradigms of equality); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052 (1978) (discussing how the color-blind jurisprudence, while it “holds out a promise of liberation[,] . . . refrain[s] from delivering on the promise”); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 44 STAN. L. REV. 1, 2 (1991) (arguing that “the United States Supreme Court’s use of color-blind constitutionalism . . . fosters white racial domination”); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 826 (1995) (“The law’s prevailing paradigm for achieving racial equality failed us then, and it fails us now, because it is not first about the eradication of white supremacy.”).

⁴¹ This formulation of the legal significance of racial difference has backed many “benign” state actors into a corner, leaving them with few ways to distinguish racial differentiation from racial discrimination. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 632 (1990) (Kennedy, J., dissenting) (“Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous.”), *overruled by* *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *United States v. Starrett City Assoc.*, 840 F.2d 1096, 1102 (2d Cir. 1988) (invalidating the benign use of racial housing practices designed to maintain racial integration).

⁴² See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2423 (1994) (stating that in only three cases are male/female distinctions legitimate).

⁴³ Richard Epstein has made the same point, in reverse, in support of his program to repeal antidiscrimination laws on the ground that they abridge the freedom of contract and distort what would otherwise be normatively neutral labor market arrangements:

The Supreme Court's brand of sexual realism, which builds equality up from a ground of difference and regards "sex . . . [as] an immutable characteristic,"⁴⁴ although not quite suspect,⁴⁵ is curious both for its ubiquity and for its opacity in equality jurisprudence. While suggesting that sex is highly visible,⁴⁶ the Court never makes clear what it means when it speaks of the characteristic that is sex. Clearly the pervasiveness of discrimination against women can be attributed, in part, to the fact that women, like people of color, are an identifiable group.⁴⁷ But are those characteristics that make us recognizable to others the same characteristics that make up the category "woman"? To put it slightly differently, is the category "female" transparent, or are the signs of femaleness, which we recognize as merely signifiers of a deeper, more essential identity, not fully revealed in the signs? To push the problem even further, if what we recognize as the signs of femaleness are merely superficial attributes that signify "female," should we understand these superficial attributes to be the archaic myths and stereotypes that distract attention from the real nature of woman? Or do the signs embody some intrinsic truth about who or what women really are?

These questions with respect to what it means to be female, how we come to recognize another person as female, and how we distinguish true signs of sex from inaccurate ones are deeply implicated, but rarely explicated, in the jurisprudence of sex equality. Deep foundational assumptions about the relationship between sexual identity, sexual difference, and sexual equality give meaning to equality jurisprudence's conception of the wrong of sex

[I]f there is a rigid equality of men and women in certain occupational categories, then we should draw, if anything, the inference that the powerful hand of the state is responsible for maintaining the rigid system of proportionality. Treating unlike cases alike is not consistent with any social norm of equality.

Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 998 (1992).

⁴⁴ *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

⁴⁵ *See Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

⁴⁶ *See Frontiero*, 411 U.S. at 686. The importance of visibility to the equal protection doctrine is stressed by many equality theorists. *See, e.g., Sunstein, supra* note 42, at 2429 ("The motivating idea behind an anticaste principle is that *without good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systemic social disadvantages.*").

⁴⁷ Of course, given the history of racial classification statutes and the ambiguity over the meaning of "true sex," the fact that women are easily identifiable is a highly normative fact; that is, the process by which we read particular signs as unambiguously signifying "female" or "black" is deeply cultural, contingent, and value-laden.

discrimination. These assumptions find their origin not in the reasoning of the Supreme Court in the *Reed*, *Frontiero*, and *Boren* cases, but rather in the early struggles among feminists and within Congress that led to the initiation of constitutional sex discrimination litigation and the inclusion of "sex" in Title VII.

A. *The Legislative and Political History of
"Discrimination Because of Sex"*

When faced with the task of interpreting the meaning of the sex discrimination protections contained in Title VII, courts and commentators inevitably recite the observation that we cannot know what Congress intended when they included "sex" in Title VII because it was added to the bill on the floor as an eleventh hour subterfuge to "clutter up" Title VII so that it would never pass at all.⁴⁸ As compared with the rich legislative and political history associated with the meaning and scope of Reconstruction era race

⁴⁸ *Developments*, *supra* note 17, at 1167 (quoting 110 CONG. REC. 2581 (1964) (statement of Rep. Green)); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (finding that "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," and that as a result "we are left with little legislative history to guide us"); *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984) (stating that the Civil Rights Act of 1964 "was primarily concerned with race discrimination," and that the "sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act"), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("The amendment adding the word 'sex' to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 n.4 (9th Cir. 1977) (noting that there was no hearing or debate on the addition of "sex" to Title VII and that "[t]here is a dearth of legislative history" on that section); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 404 n.4 (6th Cir. 1977) (McCree, J., dissenting) ("The provision on sex discrimination in employment reportedly was added at the last moment by opponents of the prohibitions of [sic] race discrimination, in an unsuccessful attempt to sink the bill by overloading it with unpopular provisions."); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975) (noting that "[t]he legislative history pertaining to the addition of the word 'sex' to the Act is indeed meager," and that the addition "was offered . . . with the intent to undermine the entire Act"), *vacated*, 424 U.S. 737 (1976); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 386 (5th Cir.) (noting "that there is little legislative history to guide . . . interpretation"), *cert. denied*, 404 U.S. 950 (1971); CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-17 (1985) (describing the events in Congress surrounding Judge Howard Smith's attempt to defeat the Civil Rights Act of 1964 by proposing an amendment adding the word "sex" to Title VII); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-17 (1991) (explaining that the lack of legislative history regarding the addition of the word "sex" to Title VII is due to the fact that it was added one day before passage of the Act).

discrimination protections, "[t]he passage of the amendment [adding 'sex' to Title VII], and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America."⁴⁹ Therefore, many judges faced with interpreting the meaning and scope of the sex discrimination protections contained in Title VII believed that they were writing on a blank slate.

While this belief that there was a lack of congressional thinking about the meaning of sex discrimination has become true by virtue of repetition, it ignores a rich congressional legislative history concerning the equal rights of women.⁵⁰ The courts eventually found that the Equal Protection Clause and Title VII embody rights that are both defined and bounded by a notion of real sexual differences. This finding merely reflects the results of a political and legal compromise struck by leaders in the women's community and in Congress after years of bitter debate about both what it means to be a woman and what it means to treat women fairly.

The first Equal Rights Amendment (ERA) was introduced into Congress in 1923,⁵¹ but it was not given serious congressional attention until the 1940s. During World War II, women were encouraged to enter the traditionally male wage-labor market to replace male workers who had left their jobs to serve in the military.⁵² Passage of the ERA was regarded by some feminists and

⁴⁹ *Developments*, *supra* note 17, at 1167.

⁵⁰ See Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. J. 163, 165-72 (1991) (discussing how congressional consideration of the Equal Rights Amendment and debate over the inclusion of women in employment discrimination legislation predated the inclusion of "sex" in Title VII).

⁵¹ S.J. Res. 21, 68th Cong., 1st Sess., 65 CONG. REC. 150 (1923) ("Men and women shall have equal rights throughout the United States and every place subject to its jurisdiction. Congress shall have the power to enforce this article by appropriate legislation."). Note that the original ERA was drafted more similarly to the 13th than the 14th Amendment. For a discussion of the change in the text, see *infra* note 66.

⁵² Between 1940 and 1944, the number of women in industry increased by almost 500%. By March of 1944, nearly one-third of all women over the age of 14 were in the wage-labor market. See Cynthia E. Harrison, *Prelude to Feminism: Women's Organizations, the Federal Government and the Rise of the Women's Movement 1942 to 1968*, at 47 (1982) (unpublished Ph.D. dissertation, Columbia University). At the end of the war, there was significant public anxiety that women would refuse to relinquish their jobs to the men who held the jobs before the war. In response, the government gave veterans the right to displace wartime workers, and child-care funding was terminated. See THE CHRONICLES OF OKLAHOMA 308 (Bob L. Blackburn ed., 1984); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 246, EMPLOYED MOTHERS

members of Congress as both recognition of and compensation for the war-time work that thousands of "Rosie the Riveters" performed, while American men fought fascism abroad. Reported to the floor of the Senate for the first time in May of 1942, the ERA was most aggressively lobbied for by the National Women's Party (NWP) which enlisted the support of well-known women such as Georgia O'Keefe, Margaret Sanger, Pearl Buck, Helen Hayes, Katherine Hepburn, Margaret Mead, and Congresswomen Margaret Chase Smith and Clare Boothe Luce.⁵³

The ERA, however, engendered passionate opposition from various quarters. The Women's Bureau of the Department of Labor, together with Secretary of Labor Francis Perkins, maintained that the amendment was "abstract and impractical [because] women and men were not identical and their interests could not therefore be equal."⁵⁴ Mary Anderson, Director of the Women's Bureau, maintained that the ERA "masquerades as a progressive measure, . . . [but] it is really detrimental to the interests of women and the social order."⁵⁵ Other administration officials argued that the ERA would occasion "highly undesirable' changes in the social security system; equal induction into the armed services; changes in the workmen's compensation laws; upheaval in support laws; and repeal of 'reasonable protective legislation' with consequent social loss."⁵⁶

As momentum in favor of the ERA grew in the years following 1942, so did the intensity of its opposition.⁵⁷ Most notably, the

AND CHILD CARE 19 (1953). As a result, women were laid off in large numbers to allow veterans to resume their high paying jobs; many women who remained in the wage-labor market resumed their prewar low-wage jobs in traditionally female clerical occupations. See WILLIAM H. CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970*, at 176-86 (1972); see also U.S. CIVIL SERV. COMM'N, 63D ANNUAL REPORT, *THE TRANSITION FROM WAR TO PEACE IN FEDERAL PERSONNEL ADMINISTRATION* 14 (1946) (noting that the proportion of "women in paid civilian employment in the executive branch of the Federal Government" declined from 38% in 1945 to 28% in 1946).

⁵³ See Harrison, *supra* note 52, at 53-54.

⁵⁴ *Id.* at 57-58.

⁵⁵ *Id.* at 58.

⁵⁶ *Id.* at 57 (comments of Douglas B. Maggs, Solicitor of the Department of Labor).

⁵⁷ The membership and leadership of the National Women's Party was almost entirely white. Black women's organizations, however, were deeply split over the ERA. The National Association of Colored Women, generally regarded as an elite middle-class organization, supported the ERA, while the National Council of Negro Women, founded by Mary McLeod Bethune, opposed it out of a concern for protective labor legislation: "We are being rocked to sleep by a trick phrase—one dear to us as to other underprivileged groups, and therefore calculated to dull our

First Lady, Eleanor Roosevelt, was strongly opposed to the amendment.⁵⁸ Rather than launch a negative campaign against the ERA, Mrs. Roosevelt suggested that opponents adopt a more positive strategy. She urged the Women's Bureau of the Department of Labor to undertake a study of state laws that differentiated between men and women in order to determine which ones discriminated against women and should be changed and which ones differentiated in an appropriate and justifiable manner but would be invalidated by the ERA.⁵⁹ For Mrs. Roosevelt and other opponents of the ERA, the problem with the amendment lay in its conflation of equality and identity.⁶⁰ Men and women were not identical for all purposes,⁶¹ and in certain contexts it was desirable to treat men and women differently (protective wage and hour laws, laws imposing a legal obligation on the husband to support his family, the tender years doctrine, and ages of majority).⁶²

Those who opposed the ERA joined forces under the guise of the National Committee to Defeat the Un-Equal Rights Amendment (NCDURA). The NCDURA was made up of over forty organizations including the American Civil Liberties Union, most of the major associations of organized labor, including the American Federation

ability for discriminating between what is good and what appears to be good." *Id.* at 56 n.9 (citing letter from Elizabeth Christman to Mary McLeod Bethune (Oct. 25, 1944)).

⁵⁸ For an example of this opposition, see 92 CONG. REC. 9401 (1946), a joint statement issued by ten national women leaders led by Eleanor Roosevelt and Frances Perkins.

⁵⁹ See Harrison, *supra* note 52, at 60.

⁶⁰ As Senators Andrews (D. Fla.) and Eastland (D. Mo.) stated, "The irrefutable laws of nature cannot be changed by Congress." CHAS O. ANDREWS & JAMES O. EASTLAND, MINORITY VIEWS IN OPPOSITION TO FAVORABLE REPORT, EQUAL RIGHTS AMENDMENT, S. REP. NO. 1013, 79th Cong., 2d Sess. 3 (1946).

⁶¹ As Douglas B. Maggs, Solicitor of the United States Department of Labor, stated:

The amendment itself, without the aid of legislation enacted to enforce it, will strike down as unconstitutional and invalid all provisions in existing and future laws which, on the basis of assumed or accepted differences between the sexes, give men or women rights which are not accorded in equal degree to the other sex . . . in seeking to achieve an illusory equality it will result in women losing deserved advantage.

SAM HOBBS, HOUSE COMM. ON THE JUDICIARY, PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO EQUAL RIGHTS FOR MEN AND WOMEN, H.R. REP. NO. 2196, 80th Cong., 2d Sess. 6 (1948) (quoting Douglas B. Maggs).

⁶² "The proposed amendment would erase from the statute books laws relating to widows' pensions, the right of dependent wives and children to the support of the husband and father, alimony, and guardianship." *Id.* at 4.

of Labor, the Congress of Industrial Organizations, and the International Ladies Garment Workers Union, as well as the League of Women Voters, the YWCA, and the National Councils of Jewish, Catholic, and Negro Women.⁶³ The views of Felix Frankfurter were heavily relied upon by the forces that opposed the amendment.⁶⁴ Unfortunately, Mrs. Roosevelt's positive strategy proved unsuccessful because "even members of this committee could not agree on which laws discriminated against women unfairly."⁶⁵

When momentum in Congress seemed to be in favor of the amendment's passage in 1947,⁶⁶ opponents of the ERA devised a new strategy: the NCDURA sought a more positive image by renaming itself the National Committee on the Status of Women (NCSW), and arranged for the introduction into Congress of a substitute bill (Status Bill) that would undermine the ERA. The Status Bill set forth "[t]hat it is the declared policy of the United States that in law and its administration no distinctions on the basis of sex shall be made except such as are reasonably justified by differences in physical structure, or biological or social function."⁶⁷

⁶³ See MINORITY VIEWS IN OPPOSITION TO FAVORABLE REPORT, EQUAL RIGHTS AMENDMENT, S. REP. NO. 1013, 79th Cong., 2d Sess. 11 app. (1946); *Equal Rights Amendment: Hearings on S.J. Res. 61 Before the Subcomm. of the Senate Comm. on the Judiciary*, 79th Cong., 1st Sess. 96-98 (1945) [hereinafter *Hearings on S.J. Res. 61*] (statement of Mrs. Ted Silvey, Representative of the ACLU and Executive Vice Chairman of NCDURA); Harrison, *supra* note 52, at 65-66.

⁶⁴ Justice Frankfurter stated:

The legal position of women cannot be stated in a single simple formula, because her life cannot be expressed in a single simple relation. . . . Only those who are ignorant of the nature of the law, and of its enforcement, or indifferent to the exacting aspects of woman's life, can have the naiveté, or the recklessness, to sum up woman's whole legal position in a meaningless and mischievous phrase about "equal rights." Nature made man and woman different: the law must accommodate itself to the immutable differences of nature. For some purposes men and women are persons, . . . subjecting them to the same duties and conferring upon them the same rights. But for other vital purposes men and women are men and women—and the law must treat them as men and women, and therefore, subject them to different and not the same rules of legal conduct.

Hearings on S.J. Res. 61, supra note 63, at 82.

⁶⁵ Harrison, *supra* note 52, at 65.

⁶⁶ In 1946, the language of the ERA was changed to include, inter alia, a state action requirement: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation." 92 CONG. REC. 9223 (1946).

⁶⁷ H.R. 1972, 80th Cong., 2d Sess. § 1 (1948). Section 2 of the bill would establish a Commission on the Legal Status of Women which would conduct a study of "the

The Status Bill was wholeheartedly supported by Eleanor Roosevelt,⁶⁸ the *Washington Post*,⁶⁹ all seven women members of Congress,⁷⁰ the major labor unions, the ACLU, the League of Women Voters, the National Councils of Jewish, Catholic, and Negro Women, Mary McLeod Bethune, Francis Perkins, Roscoe Pound, Susan B. Anthony II, and the President of Vassar College, among many others.⁷¹ The Status Bill's supporters also included an impressive list of lawyers, law professors, and current and past law school deans from twenty-one law schools who presented their objections to the ERA to the House in a letter prepared by Harvard Law professor Paul Freund.⁷² The Status Bill's supporters, however,

economic, civil, social, and political status of women, and the nature and extent of discriminations based on sex throughout the United States." *Id.* § 2.

⁶⁸ See Harrison, *supra* note 52, at 81-82.

⁶⁹ In an editorial voicing their opposition to the ERA and their support for the Status Bill, the editors of the *Washington Post* wrote:

The proposal to establish complete legislative equality between the sexes by an amendment to the Constitution is utterly impractical and undesirable. Such an amendment would jeopardize protective labor legislation for women, compel rewriting of State laws governing family and property relations, and probably relieve husbands and fathers of legal obligations to support their families. It would have far-reaching and most demoralizing effects upon society. . . . [It would also be] essentially destructive

. . . .

To our way of thinking [the Status Bill] is the intelligent method of procedure.

Road to Equality, WASH. POST, Feb. 25, 1947, at 6.

⁷⁰ See, e.g., *Hearings on the Equal Rights Amendment to the Constitution and Commission on the Legal Status of Women, Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. 196 (1948) [hereinafter *Hearings on the Equal Rights Amendment*]. "I agree thoroughly with my friends who support the equal-rights amendment. We disagree, however, on how to bring about this change. . . . The problem, as I see it, is one of time and of holding gains already won." *Id.* at 196 (statement of Rep. Helen G. Douglas); see also *id.* at 198 (statement of Rep. Mary T. Norton) ("Reasonable distinctions in law are needed to equalize the burdens and responsibilities women carry as mothers and as workers."); *id.* at 200 (statement of Rep. Frances P. Bolton) ("For many years there has been introduced in to each succeeding Congress an amendment that proposes to set up equal rights. I have never been able to agree with this particular suggested solution.").

⁷¹ For a complete list of the Status Bill supporters, see *id.* at 120-24.

⁷² The lawyers and legal scholars who opposed the ERA but endorsed the Status Bill stated:

[The ERA would impose] a rule of rigid equality [that would invalidate a] wide variety of laws and rules of the common law [which reflected the] variety of relationships in which women stand in the community [relating to widows' allowances, the obligation of family support and grounds for divorce, the age of majority and the right of annulment of marriages, and

were never able to disabuse either a majority of Congress or the public of the view that it was nothing more than a ploy to defeat the ERA.⁷³ Thus, advocates of equality for women were polarized into two intractable camps: those who advocated formal equality with men and those who regarded a sexual difference principle as a necessary precondition to equality.⁷⁴ This same schism with regard to the nature of sexual equality was also present in Congress: Republicans primarily supported the ERA and its formulation of sexual equality,⁷⁵ while Democrats, including the congressional women's delegation, opposed the ERA because it would invalidate desirable state laws which reflected the real differences between men and women.⁷⁶

the maximum hours of labor for women in protected industries].

....

... We believe the women's status bill to embody the soundest and most workable program yet presented for securing full statutory recognition of the proper legal status of women.

Id. at 124-27.

⁷³ The Status Bill never received the hoped-for support from the ERA supporters, notwithstanding the unrelenting efforts of the NCSW and the National Women's Party to achieve rapprochement with ERA supporters, including a strategy in early 1949 to amend the Status Bill to read: "No distinction on the basis of sex shall be made except such as are reasonably justified by differences in physical structure, or by maternal function." Harrison, *supra* note 52, at 91. Congresswoman Helen G. Douglas, sponsor of the new Status Bill, commented that "[r]ecent efforts by the Equal Status bill supporters to draft a bill which would be acceptable to both sides collapsed because the E.R.A. women would not yield on any point." *Id.*

⁷⁴ This division foreshadowed the debate between difference and sameness feminists which took place some 30 years later. See, e.g., Ruth Milkman, *Women's History and the Sears Case*, 12 FEMINIST STUD. 375, 394 (1986) (noting the conflicting positions among feminist historians over whether the *Sears* case should be viewed from the perspective of "equality and difference"); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196 (1982) ("My own feeling is that, for all its problems, the equality approach is the better one. . . . [A]s our experience with single-sex protective legislation earlier in this century demonstrated, what appear to be special 'protections' for women often turn out to be, at best, a double-edged sword.").

⁷⁵ Republicans consistently took the lead in support of the ERA, having included it in their national political platforms before the Democrats reluctantly did so. See Harrison, *supra* note 52, at 63. The ERA garnered support from surprisingly conservative quarters: States Rights Democratic Party leader, Sen. Strom Thurmond, gave it his strong endorsement. See *id.* at 88.

⁷⁶ As Rep. Estes Kefauver (D. Tenn.) stated:

I have always found, as a practical matter, that there are considerable differences between a woman and myself "Women are no more like men than a spiral is like a straight line" Law is properly concerned about the basic unit of society, the family. The question of rights must be linked with the question of responsibilities. Laws favoring women because

Not until the early 1960s was a compromise finally struck between these two factions. In August of 1962, Senator Pauli Murray developed a strategy that she hoped would be acceptable to both sides in the ERA debate. Rather than continuing a losing battle to pass an amendment to the Constitution, she suggested a shift to the courts. Prior to this time, feminists believed that the Equal Protection Clause of the Fourteenth Amendment applied only to instances of race discrimination, and so they never seriously considered constitutional litigation as a viable strategy. Murray believed that the time was right to present to the Supreme Court the question of sex discrimination under the Equal Protection Clause.⁷⁷ What is more, she felt that this strategy would satisfy feminists of every stripe:

The problem as Murray viewed it was not that some laws distinguished between men and women, but that those laws that did failed to take into account differences between groups of women, such as those with children and those without. A ruling under the Fourteenth Amendment would provide flexibility to maintain appropriate laws relating to women, while abolishing those that simply hampered women's right to function in the public sphere.⁷⁸

In the end, Murray argued that the Fourteenth Amendment could be used to invalidate arbitrary classifications based upon sex, just as it had with regard to race,⁷⁹ but that such a strategy would not result in "the total equality sought by advocates of the Equal Rights Amendment."⁸⁰

In the end, Murray's litigation strategy garnered enough support from a broad spectrum of feminists and culminated in the Supreme Court's decisions in *Reed v. Reed*,⁸¹ *Frontiero v. Richardson*,⁸²

of their unique contribution to the family have always seemed justified by society as a whole.

Hearings on the Equal Rights Amendment, supra note 70, at 194-95.

⁷⁷ Harrison, *supra* note 52, at 365-66.

⁷⁸ *Id.* at 366.

⁷⁹ Sadly, some National Women's Party members criticized the proposal on the ground that Murray, an African-American woman, "was primarily concerned with the movement for racial equality and that she apparently intended to 'hitch that wagon to our Equal Rights Amendment star' which would 'spell disaster for our hopes.'" *Id.* at 371. Indeed, in a profound misconception of the political and historical relationships between the black and women's civil rights movements, one NWP member maintained that "the black civil rights groups wanted to use the E.R.A. struggle 'as a springboard for their own propaganda.'" *Id.*

⁸⁰ *Id.* at 368.

⁸¹ 404 U.S. 71 (1971).

Schlesinger v. Ballard,⁸³ and *Craig v. Boren*.⁸⁴ These cases pioneered the application of the Equal Protection and Due Process Clauses to sex discrimination cases and thereby created a federal constitutional right to equality, while at the same time distinguishing sex discrimination cases from race discrimination cases on the basis of the real differences that differentiate men from women. At least for the time being, the pursuit of this litigation had the salutary effect of diminishing the perceived need for an ERA.

While feminists pursued this novel litigation strategy, President Kennedy took the position that the federal government, as an employer, should take the moral high ground with regard to equal employment opportunity. Shortly after his election, he issued Executive Order 10,925,⁸⁵ which established the President's Committee on Equal Employment Opportunity and required that federal contractors agree not to discriminate on the basis of race, creed, color, or national origin.⁸⁶ The Kennedy administration considered including sex discrimination protections in the executive order, but ultimately rejected the idea because doing so "meant ignoring the impact of family responsibilities upon women workers and their employers [and because they could not] envision forcing private employers to share with women the costs of taking time out from work to raise families."⁸⁷ Both the administration and the President's Commission on the Status of Women ("PCSW") regarded race and sex discrimination as different kinds of problems which required different kinds of solutions.⁸⁸

⁸² 411 U.S. 677 (1973).

⁸³ 419 U.S. 498 (1975).

⁸⁴ 429 U.S. 190 (1976).

⁸⁵ 3 C.F.R. § 448 (1959-1963), reprinted in 5 U.S.C.A. § 631 (1975).

⁸⁶ See *id.*

⁸⁷ Harrison, *supra* note 52, at 412.

⁸⁸ Of course, this view of race and sex discrimination reflected the unspoken assumption that the subject of sex-discrimination protections is a white woman, while the subject of race-discrimination protections is a black man. The discrimination that black women suffer because they are *black women* is completely ignored. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371-72 ("[This perspective] proceeds from the premise that, although racism and sexism share much in common, they are nonetheless fundamentally unrelated phenomena—a proposition proved false by history and contemporary reality. Racism and sexism are interlocking, mutually-reinforcing components of a system of dominance rooted in patriarchy."); Crenshaw, *supra* note 4, at 140 (describing how discrimination against black women is not merely the aggregation of racism and sexism, but rather an entirely different kind of bias grounded in the history of the treatment of black women).

In 1962, the chair of the Special Subcommittee on Labor of the House Committee on Education and Labor introduced into the House a fair employment practices bill that would prohibit discrimination in private employment on the basis of "race, religion, color, national origin, ancestry, age or sex."⁸⁹ However, when the NAACP and the Departments of Justice and Labor objected to including women in the bill, "sex" was dropped in order to give the PCSW time to study the problem and suggest more appropriate solutions.⁹⁰

A comprehensive civil rights act was not given serious attention until 1963. When the law that we now know as the Civil Rights Act of 1964 was introduced into the House in June of 1963, it did not include sex in the list of prohibited forms of discrimination. The National Women's Party and other supporters of the ERA began a campaign to have sex included in the bill. To this end, they sought support from their long-time congressional allies, including many conservative southerners. ERA supporters Martha Griffiths (D. Mich.) and Katherine St. George (R. N.Y.) decided to endorse the sex amendment to Title VII but thought the best strategy would be to have Howard Smith (D. Va.), a conservative pro-ERA southerner, make the motion. For Smith, it was a win/win strategy: either the sex amendment would defeat the Civil Rights Act—a regulation of private business which he opposed—or it would amount to the passage of the ERA—a measure that he had always supported.⁹¹

Unfortunately, when Smith made his motion to add sex to the civil rights bill, his remarks were quite sexist and provoked an equally sexist response from Emanuel Celler (D. N.Y.), the chief sponsor of the Civil Rights Act and opponent of the amendment adding sex to the bill.⁹² When the two men had finished their discussion, all but one of the women members of the House spoke

⁸⁹ H.R. 262, 87th Cong., 1st Sess. (1962). This bill was introduced by Rep. James Roosevelt (D. Cal.).

⁹⁰ See *Equal Employment Opportunity: Hearings on H.R. 262 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 2d Sess. 817 (1962) (statement of Rep. Charles E. Goodell (D. N.Y.)) ("We have had testimony from some other people representing the NAACP that said they favor legislation on age and sex barring discrimination, but that they would like to see it in separate legislation."); see also *id.* (statement of Rep. Adam C. Powell (D. N.Y.)) (noting that "[t]he Commonwealth of Puerto Rico . . . passed a bill of this nature" and that "after the bill became law, the ladies demanded to use the men's room"); Harrison, *supra* note 52, at 405.

⁹¹ See Harrison, *supra* note 52, at 472-73.

⁹² See 110 CONG. REC. 2577-78 (1964) (statements of Reps. Smith and Celler).

in favor of the amendment. Edith Green (D. Ore.), who had previously moved to have sex stricken from the 1962 Equal Employment Opportunity Bill, was the only woman to speak in opposition to the sex amendment. In her opinion, race discrimination was more severe than sex discrimination, and biological differences between women and men could justify sex-specific employment practices.⁹³

The Johnson administration, following the Kennedy administration's lead, did not support the ERA but wanted to avoid a conference committee on the Civil Rights Act and, therefore, pressed the Senate to pass a bill identical to the House bill. Pauli Murray, then a professor at Yale Law School, lobbied hard for the passage of a Senate bill that included sex and circulated a memorandum "which maintained that omitting 'sex' would weaken the civil rights bill by once again dividing the interests of oppressed groups in the society and by neglecting the problems of black women."⁹⁴ Ultimately, President Johnson signed a Civil Rights Act that included sex discrimination among the prohibited employment practices.⁹⁵

While the inclusion of "sex" in Title VII could be regarded as a victory for ERA supporters who eschewed the notion of sexual difference, in the end it was interpreted and enforced by an administrative agency⁹⁶ and courts that were unpersuaded by the analogy of sex to race discrimination. That the courts, administrative agencies, and litigants presumed an undisputed domain of sexual difference as a necessary precondition to any discussion

⁹³ See *id.* at 2575-84.

⁹⁴ Harrison, *supra* note 52, at 480.

⁹⁵ See Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000(e)(1) (1988).

⁹⁶ Equal Employment Opportunity Commission ("EEOC") Commissioner Aileen Hernandez, the only woman on the early EEOC, reported that the subject of sex discrimination "elicited either 'boredom' or 'virulent hostility'" from her fellow commissioners. Harrison, *supra* note 52 at 497. While the EEOC aggressively sought to ban racially segregated employment advertisements in newspapers, it carved out a special rule for sexually segregated employment advertisements, requiring only that newspapers "publish a disclaimer which told readers that the headings were not intended to be discriminatory but only reflected the fact that some jobs were of more interest to one sex than another." *Id.* at 498-99. This rule anticipated the successful defense articulated by Sears Roebuck in *EEOC v. Sears Roebuck & Co.*, 628 F. Supp. 1264, 1308 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Further, a Commissioner stated that "[t]here seems to be a widely held misconception that this Commission can or would overturn state protective legislation. This is not the case. . . . If there is a clear conflict between the laws, we would not ask that [an employer] violate the state law." Harrison, *supra* note 52, at 501-02; see also *id.* (statement of EEOC chair Franklin Roosevelt, Jr.) ("[EEOC] guidelines would not result in the massive assault on sex-segregated jobs.").

about equality occludes both the importance of the first order decision to divide humanity into two different kinds of beings and the degree to which a theory of identity, or difference, constrains a theory of equality. Notwithstanding the affirmative work of pro-ERA congressional representatives and feminists to include "sex" in the Civil Rights Act, the amendment was generally derided as "a mischievous joke perpetrated on the floor of the House of Representatives."⁹⁷ The Equal Employment Opportunity Commission's executive director, Herman Edelsberg, maintained that it was a "fluke" which had been 'conceived out of wedlock.'⁹⁸

The EEOC, the courts, many members of Congress, and many feminists believed that Title VII's otherwise unequivocal language with regard to sex-based discrimination should be read differently than the similar language pertaining to race-based discrimination.⁹⁹ These groups were committed to the integrity of a domain of biological difference that differentiated the sexes and that justified many sex-based classifications and policies employed by government and by private employers. Yet the debates that predated and accompanied both the passage of the Civil Rights Act of 1964 and the litigation of sex discrimination cases under the Fourteenth Amendment reveal that the sexual differences that were both recognized and protected in the name of biology were really normative gender roles. Sex-based protective wage and hour rules, divorce, childrearing, and familial support obligations cannot be justified by resort to biological differences between men and women, but rather by cultural norms about the proper social roles for men and women.

⁹⁷ *Sex and Nonsense*, NEW REPUBLIC, Sept. 4, 1965, at 10.

⁹⁸ Harrison, *supra* note 52, at 503. Edelsberg also "reportedly circulated a suggestion that the EEOC seal depict a brown rabbit and a white rabbit 'couchant' with the legend 'vive le difference.'" *Id.* at 499-500.

⁹⁹ Contrast the creative textual interpretations of the otherwise unequivocal term "sex" in Title VII with the straightforward interpretation of the 1874 addition of the words "and laws" to 28 U.S.C. § 1883. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court held that the words "and laws" mean what they say:

Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended. Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship among the various sections [of the Reconstruction Era civil rights acts] it might have acted differently. That argument can best be addressed to Congress

Id. at 8 (footnotes omitted).

B. *The Analogy to Racial Identity*

The history of the Court's treatment of race as a legal category is helpful in understanding the meaning of sex as a legal category. One of the fundamental holdings of *Plessy v. Ferguson*¹⁰⁰ was that states had the legitimate authority to determine the criteria for membership in the races "white" and "colored,"¹⁰¹ an authority antecedent and necessary to the states' ability to segregate racially all persons within their jurisdiction. Congress exercised the same power, unmolested by equal protection objections, when it classified newly patriated Mexicans as white persons in the treaty ending the Mexican-American War and annexing what later became the state of Texas.¹⁰² The Supreme Court affirmed the legitimacy of this kind of state-sponsored racial triage in *Gong Lum v. Rice*¹⁰³ when it refused to recognize any Fourteenth Amendment ramifications to the State of Mississippi's decision to classify a Chinese girl as colored instead of white for the purposes of racially segregated school assignments.¹⁰⁴ While *Brown v. Board of Education*¹⁰⁵ may

¹⁰⁰ 163 U.S. 537 (1896).

¹⁰¹ As the Court stated in *Plessy*:

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States. . . . But these are questions to be determined under the laws of each State and are not properly put in issue in this case.

Id. at 552. This holding echoed the California Supreme Court's decision in *People v. Hall*, 4 Cal. 399, 404 (1854), where it held that Chinese people were to be treated legally as "Negroes," not whites, for the purposes of a statute that set forth that "[n]o Indian or Negro shall be allowed to testify as a witness in any action in which a White person is a party."

¹⁰² *Cf.* Treaty of Peace, Friendship, Limits, and Settlement, Feb. 2, 1848, U.S.-Mex., art. IX, 9 Stat. 922, 930 (stating that Mexicans who remain on lands annexed by the United States shall be entitled "to the enjoyment all the rights of citizens of the United States," including "the free enjoyment of their liberty and property, and . . . the free exercise of their religion without restriction").

¹⁰³ 275 U.S. 78 (1927).

¹⁰⁴ *See id.* at 87 ("The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment."). The states' power to define the parameters of racial categories and then to assign races to particular individuals, often over a person's objections, was reflected in several state constitutions. *See, e.g.*, OKLA. CONST. art. XIII, § 3 (repealed 1966) ("The term 'colored children,' as used in this section, shall be construed to mean children of African descent. The term white children shall include all other children."). Most states, however, chose to define racial categories legislatively, *see, e.g.*, Rev. Code of Ala. 1867, tit. 1, ch.1, § 2(4) (repealed 1975) (defining the term "mulatto"); Laws of Ky. 1865, ch. 556, § 3 (describing negroes and mulattoes as those who are of "pure negro blood, and those descended from a negro to the third generation inclusive").

have invalidated the states' authority to act in certain race-conscious ways, it left undisturbed the states' underlying power to engage in classificatory acts.¹⁰⁶

It is against this background of legitimate racial differentiation that race-based equal protection jurisprudence has evolved. Curiously though, this paradigm of racial difference shares something in common with the evolution of equality jurisprudence. Historically, blood has operated both metaphorically and metonymically¹⁰⁷ to fix racial identity as something real, essential, and immutable.¹⁰⁸ Indeed, by tying racial identity to the myth of sanguinary pedigree, courts and legislatures created a racial rule of differentiation¹⁰⁹ that allowed them to regard race as a natural,

See generally CHARLES S. MAGNUM, JR., *THE LEGAL STATUS OF THE NEGRO 1-17* (1940) (noting that the various legal definitions of race reflect the various approaches to the problems of race relations); GILBERT T. STEPHENSON, *RACE DISTINCTIONS IN AMERICAN LAW 12-25* (AMS Press 1969) (1910) (stating that the legal categorization of race is one of the most perplexing issues that has faced legislators and judges); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (noting that modern preferential programs make it necessary for the law to "intelligibly define the nature and boundaries of the groups to whom remedial preferences are addressed").

¹⁰⁵ 347 U.S. 483 (1954).

¹⁰⁶ The Supreme Court has recently reaffirmed the legitimacy of congressional acts of classification as well. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.

Id. at 613.

¹⁰⁷ Metonymy is the principle by which "one well-understood or easy-to-perceive aspect of something [is used] to stand either for the thing as a whole or for some other aspect or part of it." GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS 77* (1987). A helpful and oft-cited example is that in which one waiter says to the other "the ham sandwich wants his check," where the ham sandwich stands for a diner eating a ham sandwich.

¹⁰⁸ *But cf.* Caldwell, *supra* note 88, at 378 ("[G]iven the variability of so-called immutable racial characteristics such as skin color and hair texture, it is difficult to understand racism as other than a complex of historical, sociocultural associations with race."); *see also id.* at 383 (suggesting "that hair texture, rather than skin color, determines racial classification").

¹⁰⁹ D. Marvin Jones borrowed H.L.A. Hart's notion of a "rule of recognition" to describe the cultural rules that constitute race as a characteristic of human difference as opposed to mere morphological characteristics. "[T]he term 'rules of recognition' . . . is as helpful in understanding race as a linguistic rule as it is in understanding the nature of legal rules." D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 448 n.42 (1993). In fact, Hart

not a political, category.¹¹⁰ In this way, the law could encounter

intended that "rule of recognition" refer to those secondary or meta-rules within a community that determine which practices within the community count as law. "Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation." H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961). What Jones means by racial "rules of recognition" is more akin to anthropologist Mary Douglas's notion of schema:

As perceivers we select from all the stimuli falling on our senses only those which interest us, and our interests are governed by a pattern-making tendency, sometimes called *schema*. In a chaos of shifting impressions, each of us constructs a stable world in which objects have recognisable shapes, are located in depth, and have permanence The most acceptable cues are those which fit most easily into the pattern that is being built up. Ambiguous ones tend to be treated as if they harmonised with the rest of the pattern. Discordant ones tend to be rejected. If they are accepted the structure of assumptions has to be modified. As learning proceeds objects are named. Their names then affect the way they are perceived next time: once labeled they are more speedily slotted into the pigeon-holes in future.

As time goes on and experiences pile up, we make a greater and greater investment in our system of labels. So a conservative bias is built in. It gives us confidence.

MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 36 (1966); cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970) (discussing changes in original rules or "paradigm" in the context of scientific study).

¹¹⁰ Zora Neale Hurston described the acquisition of racial identity as both a transitory and geopolitical result of busing:

But changes came in the family when I was thirteen, and I was sent to school in Jacksonville. I left Eatonville, the town of the oleanders, as Zora. When I disembarked from the river-boat at Jacksonville, she was no more. It seemed that I had suffered a sea change. I was not Zora of Orange County any more, I was now a little colored girl. I found it out in certain ways. In my heart as well as in the mirror, I became a fast brown—warranted not to rub nor run.

ZORA N. HURSTON, *How It Feels to Be a Colored Me*, in *I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE: A ZORA NEALE HURSTON READER*, 152, 153 (Alice Walker ed., 1979). Reflecting on Hurston's writing about racial difference, Barbara Johnson wrote:

If I initially approached Hurston out of a desire to re-referentialize difference, what Hurston gives me back seems to be difference as a suspension of reference. Yet the terms "black" and "white," "inside" and "outside," continue to matter. Hurston suspends the certainty of reference not by erasing these differences but by foregrounding the complex dynamism of their interaction.

Barbara Johnson, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, *CRITICAL INQUIRY*, Autumn 1985, at 278, 289. Henry Louis Gates, Jr. has similarly sought to debunk the problematic notion that racial identity resides in some pre-social or prelinguistic sphere:

Who has seen a black or red person, a white, yellow, or brown? These terms are arbitrary constructs, not reports of reality. But language is not only the medium of this often insidious tendency; it is its *sign*. Current

racial people with clean hands, that is, without any normative responsibility for what it means to have a race or the process by which individuals come to be racial. Accordingly, our modern, liberal conception of racial equality is one that recognizes racial difference yet declares that race shall not be a legitimate basis upon which to distribute social costs and benefits.

Sex, however, is different. We have inherited a jurisprudence of sexual equality that seeks to distinguish, as its primary function, inaccurate myths about sexual identity from true—and therefore pre-political—characteristics of sex that are factually significant. As with race, the law uses rules of differentiation to achieve this goal. Yet unlike race, the law reserves a large area for legitimate sex-based regulation—an area bounded by the notion of factually real and legally relevant sexual differences. These rules usually remain unstated, lurking in the background, posing as natural givens, while legal reasoning takes place in the foreground, producing solutions to problems of sex discrimination dependent upon the legitimacy of the essential background assumptions that constitute both the players and the playing field upon which this reasoning process takes place.¹¹¹

This inclination to accept sexual differences as the material point from which legal theory should begin is not unique to the judiciary. Most feminist theorists take as their starting point what

language use signifies the difference between cultures and their possession of power, spelling out the distance between subordinate and superordinate, between bondsman and lord in terms of their "race."

Henry L. Gates, Jr., *Editor's Introduction: Writing "Race" and the Difference It Makes*, CRITICAL INQUIRY, Autumn 1985, at 1, 6.

¹¹¹ Steven Winter made a similar observation:

[V]irtually all law takes place in the foreground. What I mean is that legal reasoning typically transpires without the least awareness of the background assumptions that render it intelligible. This is not the product of ignorance, inattentiveness, or false consciousness. It is, rather, an ordinary matter of psychological and intellectual efficiency.

Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1882 (1991) (footnote omitted). Yet efficiency hardly captures what is interesting and, I dare say, powerful about the law's relationship to intelligibility. The background assumptions that make legal reasoning intelligible should not be distinguished from law, but should rather be considered as an integral part of what law produces. Winter correctly points to the importance of Husserl and Merleau-Ponty's notion of sedimentation—"the alluvial build-up of categories and conceptions deposited by the flow of our interactions and experiences in the physical and social world"—but ignores the accretive role of law in producing similar sedimentation. *Id.* at 1883 n.7.

one might call "the body of law." The so-called Equality Feminists¹¹² take the position that differences between men and women, while real, should be deemed an irrelevant consideration in schools, employment, courts, and legislatures. Like Justice O'Connor in *J.E.B. v. Alabama ex rel. T.B.*,¹¹³ they maintain that sexual equality will be achieved only when we focus upon the identity of interests shared by men and women, rather than on the underlying facts that make us different.¹¹⁴ On the other hand, the Difference Feminists¹¹⁵ argue that inequality is the result of a failure to recognize factually and normatively significant differences between the sexes and criticize the liberal model for demanding that all people assimilate to a male norm cloaked in neutral clothing.¹¹⁶

In effect, the Equality Feminists regard the difference between male and female bodies as "a problem in need of a solution,"¹¹⁷ while the Difference Feminists emphasize the trans-historical importance of the embodied female subject as the object of liberation discourse.¹¹⁸ In either case, the sexed body plays a prominent and foundational role in equality jurisprudence.

Whether one sets up the evil of sex discrimination as the consideration of factually real yet legally irrelevant sexual differences or as the failure to consider factually real *and* legally relevant sexual differences, the female body plays an important role in the con-

¹¹² See Ann Snitow, *A Gender Diary*, in CONFLICTS IN FEMINISM 9 (Marianne Hirsch & Evelyn F. Keller eds., 1990).

¹¹³ 114 S. Ct. 1419 (1994); see also *supra* note 108 and accompanying text (discussing how race is regarded as a natural category).

¹¹⁴ *J.E.B.*, 114 S. Ct. at 1432 (O'Connor, J., concurring) ("[T]he import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law.").

¹¹⁵ See, e.g., Jane Flax, *Beyond Equality: Gender, Justice and Difference*, in BEYOND EQUALITY AND DIFFERENCE 193, 193 (Gisela Bock & Susan James eds., 1992).

Domination arises out of an inability to recognize, appreciate and nurture differences, not out of a failure to see everyone as the same. Indeed, the need to see everyone the same in order to accord them dignity and respect is an expression of the problem, not a cure for it.

Id.

¹¹⁶ See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2480 (1994) (explaining the difference between the "sameness" and "difference" theories of feminism).

¹¹⁷ Snitow, *supra* note 112, at 24.

¹¹⁸ See, e.g., Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 85 (1987) (arguing that the "dismissal of women's gender specific suffering by the legal culture" is a result of the failure "to understand the difference—not the sameness—of [women's] subjective, hedonic lives").

ception of the wrong of sex discrimination. It is this foundation of sexual identity and difference that needs to be reexamined, both for its truth value as well as for its effect upon equality jurisprudence.

II. THE ABSURDITY OF A BIOLOGICAL FOUNDATION TO SEX DISCRIMINATION

When an employer refuses to hire, or a school refuses to admit, a female applicant because of her sex, one way of understanding the situation is to say that the female applicant was discriminated against because of the fact of her sex.¹¹⁹ This interpretation of the meaning of "sex" in Title VII and in Equal Protection jurisprudence comports with the gut sense of the meaning of sexual difference which Justice Scalia identified in *J.E.B. v. Alabama ex rel. T.B.*¹²⁰

The Supreme Court has interpreted Title VII to mean that "sex . . . [is] not relevant to the selection, evaluation or compensation of employees."¹²¹ But what is meant by sex? What qualities, characteristics, attributes, or norms must employers disregard in their present and future employees? How can the Court at once tolerate sexual differentiation and proscribe sexual discrimination?

In the absence of specific direction from the Supreme Court, and in the belief that Congress left no legislative history with regard to the meaning of sex discrimination,¹²² many lower courts have read Title VII to render certain sexual facts—biological facts—irrelevant to the employment relationship. Setting forth what they believe to be the "plain meaning" of the term, a number of courts have held that "'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics."¹²³ Under this interpretation of the wrong of sex discrimination, a person has been the victim of sex discrimination when she or he has been treated

¹¹⁹ That is, simply because she was female "plain and simple." *J.E.B. v. Alabama ex rel. T.B.*, 144 S. Ct. 1419, 1436 n.1 (1994) (Scalia, J., dissenting).

¹²⁰ See *id.*; *supra* note 23 and accompanying text.

¹²¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

¹²² See *supra* notes 48-49 and accompanying text.

¹²³ *Dobre v. National R.R. Passenger Corp. ("Amtrak")*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (stating that a pre-operative male-to-woman transgendered person, see *infra* note 130, did not make out a claim for sex discrimination under Title VII when her employer refused to allow her to use the women's bathroom, required a doctor's note in order to wear women's clothing to work, refused to refer to her by her female name, and moved her desk out of the view of the public); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("[T]he term sex should be given the traditional definition based on anatomical characteristics.").

differently "because he is a man or because he is a woman,"¹²⁴ that is, because of an "anatomical" or "biological fact" of sexual identity.¹²⁵

Under this formulation, the goal of Title VII is a biological recognition followed by legal erasure of sexual difference, a goal which characterized the litigation strategy of the plaintiffs in *Reed v. Reed*.¹²⁶ Then-attorney Ruth Bader Ginsburg, together with Allen R. Derr, Melvin L. Wulf, Pauli Murray, and Dorothy Kenyon, argued that the state should not presume that women are less qualified than men to serve as the administrators of estates because doing so discriminates on the basis of "congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized."¹²⁷

Justice O'Connor mirrored this view of the wrong of sex discrimination in her concurrence in *J.E.B.*, taking for granted the distinction between the legal and factual significance of sex: "[T]o say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. . . . [G]ender is now governed by the special rule of relevance formerly reserved for race."¹²⁸ Clearly, Justice O'Connor means biological sex when she uses the term gender in this opinion. She regards sex as a legally irrelevant, albeit factually real, factor in decision-making by juries.¹²⁹ The absurdity of this view of the legal and factual significance of biological sex becomes quite clear when the rule is applied at the margins of sexual identity and equality.

A. *Transgendered Title VII Plaintiffs and the Problem of Membership in Sexual Categories*

The notion that discrimination on account of one's sex means discrimination because of one's biology is expressed most clearly in cases in which transgendered¹³⁰ people have sought protection

¹²⁴ *Terry v. EEOC*, 35 Fair Empl. Prac. Cas. (BNA) 1395 (E.D. Wis. 1980).

¹²⁵ *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982); see also *Amtrak*, 850 F. Supp. at 286 (stating that Title VII does not "prohibit an employer from discriminating against a male because he wants to become a female").

¹²⁶ 404 U.S. 71 (1971).

¹²⁷ Brief for Appellant, *Reed v. Reed*, 30 L. Ed. 2d 864 (1971).

¹²⁸ *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1432 (1994) (O'Connor, J., concurring).

¹²⁹ In this respect Justice O'Connor echoes the view of Equality Feminists. See *supra* notes 112, 117 and accompanying text.

¹³⁰ A note on terminology: I prefer the term transgendered to transsexual because

under Title VII from employment discrimination. For example, in *Ulane v. Eastern Airlines*,¹³¹ the plaintiff was hired as a male pilot by Eastern Airlines. Ulane later took a leave of absence to undergo sexual reassignment surgery and was fired by Eastern when she returned to work as a woman. She then filed a Title VII sex discrimination action against her employer, alleging that she "was fired by Eastern Airlines for no reason other than the fact that she ceased being a male and became a female."¹³² The Seventh Circuit found that Title VII did not apply, reasoning that "it is unlawful to discriminate against women because they are women and against men because they are men."¹³³

[E]ven if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. If Eastern had considered Ulane to be female and had discriminated against her because she was female (*i.e.*, Eastern treated females less favorably than males), then the argument might be made that Title VII applied¹³⁴

The court, therefore, concluded, "if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."¹³⁵

A federal trial court recently issued a similar ruling in *Underwood v. Archer Management Services, Inc.*,¹³⁶ in which a transgendered

transsexual accepts the medical and cultural emphasis on genitals as the essential characteristic of gendered identity. It also implies that a biological transformation can effect a change from man to woman or woman to man. In order to reflect this understanding about the complex relationship between bodies and gendered identity, I will refer to male-to-woman and female-to-man transgendered persons, in place of the more common male-to-female and female-to-male terminology. For present purposes, I shall call "a transgendered woman" a person who was categorized as physically male at birth, yet who regards herself as emotionally and psychologically a woman and has undergone surgery to bring her body into conformity with her gendered identity. A "pre-operative transgendered woman" is a person who regards herself as a woman, yet has not undergone sexual transformative surgery. Similarly, "a transgendered man" is a person categorized as female at birth, yet who regards himself as emotionally and psychologically a man and who has undergone surgery to bring his body into conformity with his gendered identity. See generally KATE BORNSTEIN, *GENDER OUTLAW* 118-19 (1994) (describing transsexuality as a "medicalized phenomenon"); GORDENE O. MACKENZIE, *TRANSGENDER NATION* 55-56 (1994) (explaining the differences between transsexualism and transgenderism).

¹³¹ 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

¹³² 742 F.2d at 1082 (quoting Brief for Plaintiff-Appellee).

¹³³ *Id.* at 1085.

¹³⁴ *Id.* at 1087.

¹³⁵ *Id.*

¹³⁶ 857 F. Supp. 96 (D.D.C. 1994).

woman claimed that her employer violated the District of Columbia Human Rights Act's proscriptions against discrimination on the basis of personal appearance, sex, and/or sexual orientation. The court dismissed the sex discrimination cause of action, finding that the plaintiff was not discriminated against "on account of her being a woman."¹³⁷ In so ruling, the court cited both the Seventh Circuit's interpretation of the limits of sex discrimination in *Ulane* and the rules issued jointly by the District of Columbia Office of Human Rights and the District of Columbia Commission on Human Rights which defined the term "sex" as "[t]he state of being male or female and conditions associated therewith[,] . . . includ[ing] the state of being a member of a sub-group of one sex, such as a pregnant female."¹³⁸

The court, however, allowed the plaintiff to go to trial on the question of whether she had been discriminated against on the basis of her "personal appearance" because the complaint alleged that she had been discharged because she "retains some masculine traits."¹³⁹ These "masculine" traits—hand and foot size, adam's apple, cheek bones, and slight facial hair¹⁴⁰—were really *male*, not

¹³⁷ *Id.* at 98. The court also dismissed the sexual orientation cause of action, finding that the complaint was "utterly devoid of any reference to the Plaintiff's sexual orientation, much less any discriminatory conduct on behalf of the Defendant's discriminating against the Plaintiff's real or perceived preference or practice of sexuality." *Id.*

Many people have confused transgendered people with transvestites and homosexuals. There is an important foundational difference between the transvestite, the transgendered person, and the homosexual. Cross-dressers are more interested in keeping alive the contradiction between sex and gender, while transgendered persons seek to harmonize the tension between inside and outside by surgically retooling their body to suit their subjectivity or core gender identity. See *supra* note 25 (distinguishing between core gender identity and sexual identity). Homosexuality, on the other hand, has to do with the sex, or gender, of one's sexual object choice. The recent example of the Air Force's treatment of Major Joanne DeGroat illustrates this inclination to collapse transgenderism, transvestism, and homosexuality. DeGroat, a pre-operative transgendered woman, began dressing as a woman when off-duty, as is generally prescribed for a pre-operative transgendered person. She was then discharged by the Air Force for "exhibit[ing] sexual perversion by attiring himself in female clothing and subjecting himself to public view by attending church on two occasions while dressed in such attire." Martin Gottlieb, *Can Transsexualism Be Curtailed?*, DAYTON DAILY NEWS, July 24, 1994, at 7B; see Wes Hills, *Transsexual Officer Fights Dismissal*, DAYTON DAILY NEWS, July 22, 1994, at 1A. But see Note, *Patriarchy Is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1988 (1995) (misreading Judith Butler's analysis of drag by conflating surface femininity with sexual desire directed towards males).

¹³⁸ *Underwood*, 857 F. Supp. at 98 (citing D.C. Mun. Regs., tit. 4, § 599).

¹³⁹ *Id.* (citing Complaint ¶ 9).

¹⁴⁰ "If she walked right past you in a restaurant, you wouldn't think twice about

masculine traits; they were understood, however, as masculine traits inside a logic that conflates the male body with masculine norms. This shows how reluctant courts are to extend sex-related discrimination statutes beyond the boundaries of biology. The court did not allow the plaintiff to challenge her employer's bias against her because her body—characterized as her personal appearance—did not match her core gender identity. A more interesting and expansive reading of sex discrimination, which the judge refused to entertain when he dismissed the sex discrimination cause of action, was bias against the plaintiff because her gender (her inside or core identity) did not match what others believed about her body (her outside or surface identity)—which is to say that a woman could have a biologically male body. The dismissal of the sex discrimination cause of action in *Underwood* reflects the notion that there is a right way to do one's sex in accordance with commonly accepted social norms that coercively harmonize inside (biological sex) and outside (gender) in such a way that maleness collapses into masculinity and femaleness into femininity. This case illustrates quite nicely the tension between immutability, body, sex, and gendered identity. According to the traditional view, the sexed body—one's inside—is immutable, whereas gender identity—one's outside—is mutable. Yet for the transgendered person, the sexed body—one's outside—is regarded as mutable while one's gendered identity—one's inside—is experienced as immutable.¹⁴¹

The transgender Title VII cases are particularly instructive because they force courts into a two-step process that foregrounds the relationship between identity and equality. In setting forth the meaning of "discrimination because of his sex" the court must first identify what kind of wrong Title VII was intended to remedy: "discrimination against women because of their status as females and discrimination against males because of their status as males."¹⁴² Then the court must clarify what it means by female and male, woman and man. While many courts use the terms sex and gender interchangeably, on a foundational level they all embrace an essentially biological definition of the two sexual categories.

the fact that she was a very beautiful woman." Telephone Interview with Wayne R. Cohen, Counsel to Patricia Underwood (Sept. 12, 1994).

¹⁴¹ See *infra* part IV.

¹⁴² *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177 (E.D. Pa. 1987).

B. *The Myth of Biological Dimorphism*

To understand the meaning of sex discrimination in the way the *Ulane*, *Dobre*, *Wood*, *Sommers*, *Grossman*, and *Holloway* courts did is to say that one must be discriminated against because of the quality that essentially defines one's identity as a member of a protected class. Thus, discrimination collapses into differentiation. Yet this is a very curious way of characterizing the wrong of sex discrimination. When framed in this manner it becomes clear that this interpretation simply fails to describe correctly what takes place when a person is discriminated against because of her sex.

When women are denied employment, for instance, it is not because the discriminator is thinking "a Y chromosome is necessary in order to perform this kind of work." Only in very rare cases can sex discrimination be reduced to a question of body parts.¹⁴³ Indeed, even employers hiring individuals for jobs in which body strength is a reasonable qualification have abandoned sex-based hiring policies because most studies of male and female physical skills and abilities have revealed more significant within-group differences than between-group differences.¹⁴⁴

¹⁴³ Arguably, the pregnancy discrimination cases raise this specter, since only women can become pregnant. Yet under interrogation, many of these childbearing discrimination cases collapse into gender discrimination cases because they turn on the social rather than biological meaning of parenthood. See *Barbano v. Madison County*, 922 F.2d 139, 142-43 (2d Cir. 1990) (stating that an employer may not question a female applicant about whether she would become pregnant and quit); *Vigers v. Valley Christian Ctr.*, 805 F. Supp. 802, 807-08 (N.D. Cal. 1992) (stating that the termination of a parochial school librarian for an "out-of-wedlock" pregnancy violates Title VII). But see *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703-04 (8th Cir. 1987) (stating that the discharge of a pregnant unmarried staff member was justified as a bona fide occupational qualification by the club's "role model rule").

One important Supreme Court sex discrimination case did, however, consider the significance of biological differences between men and women in the workplace. *U.A.W. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), considered whether women of childbearing ages could be employed under different terms and conditions than men in jobs that involved potential exposure to toxic substances. See *id.* at 197-99. *Johnson Controls*, however, can be understood to stand for the proposition that a woman's capacity to become pregnant cannot be used as a proxy for sex discrimination when the prophylactic justification for barring women from the workplace has not yet been shown not to apply with equal or similar force to men's reproductive potentiality. See also *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981) (stating that different ages of consent for men and women are justified "[b]ecause virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female").

¹⁴⁴ See CYNTHIA COCKBURN, *MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW* 229-36 (1985) (discussing variations within each gender); see also ANNE FAUSTO-STERLING, *MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT*

Nevertheless, biological dimorphism remains unquestioned in the context of athletic sexual segregation on the assumption that it would not be fair for women to compete with men, most of whom are thought to be much stronger than women. Here again we witness the notion of fairness or equality tightly yoked to presumed notions of difference. What, however, is the justification for women playing best-two-out-of-three set tennis, and men playing best-three-out-of-five?

The tests that accomplish the sexual separation of male and female athletes—chromosomes or genitalia—have absolutely nothing to do with sports prowess.¹⁴⁵ It would be just as rational, if not more so, to group athletes within height or weight classes, as in boxing, weight-lifting, and wrestling. Interestingly enough, studies reveal that

[b]etween 1964 and 1984 women marathon runners have knocked more than an hour-and-a-half off their running times, while men's times during the same period have decreased by only a few minutes If the gap between highly trained male and female athletes were to continue to close at the current rate, in thirty to

WOMEN AND MEN 218 (1989) (stating that the "amount of variation among men and among women is greater than that between the sexes"); IRIS M. YOUNG, *THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY* 142 (1990) (noting that different male and female body comportment and athletic ability can be explained by the phenomenology of the gendered modalities of lived bodies as opposed to ahistorical feminine essences); Janet S. Hyde, *Meta-Analysis and the Psychology of Gender Differences*, 16 *SIGNS* 55 (1990).

Some feminist scientists believe that many physical differences between the sexes can be attributed to differences in lifestyles and physical activity as children. See FAUSTO-STERLING, *supra*, at 218 ("[I]t remains possible (and only time will tell) that at least some of the height and strength dimorphism between males and females would diminish in a culture in which girls from infancy on engaged in the same amount and kind of physical activity as boys.").

¹⁴⁵ See, e.g., Susan Birrell & Cheryl L. Cole, *Double Fault: Renee Richards and the Construction and Naturalization of Difference*, 7 *SOC. SPORT J.* 1, 1-10 (1990) (demonstrating ways in which our culture, through technology, law, and the media, constructs woman and produces particular notions of gender, sex, and difference). In her sex discrimination case, Renee Richards alleged that it was unfair for the U.S. Tennis Association (U.S.T.A.) to impose a chromosomal eligibility test for competition in the women's division of the U.S. Open when the test did not reveal anything about her tennis ability and was specifically adopted by the U.S.T.A. because it was the only test that they knew she would fail. See *Richards v. U.S.T.A.*, 400 N.Y.S.2d 267 (Sup. Ct. 1977). Testing for the illicit use of hormones or steroids is common in both amateur and professional sports and does bear some relevance upon an athlete's ability to perform. Hormonal testing, however, is not used to differentiate women from men, but rather to ferret out "cheaters" within already established sexual categories.

forty years men and women would compete in these sports on an equal basis.¹⁴⁶

This scientific evidence notwithstanding, we unquestioningly accede to the "natural" division of men's and women's athletics and the concomitant differential in prize money, sponsorships, and fame that it produces.

So both gendered identity and gendered equality are the effect of a cultural metaphysics that "start[s] out with two social categories ('women,' 'men'), [and] assume[s] they are biologically different ('female,' 'male')." ¹⁴⁷ As Judith Lorber has written:

Every child is categorized as a "girl" or a "boy," every adult as a "woman" or a "man." Once the gender category is given, the attributes of the person are also gendered: Whatever a woman is has to be "female"; whatever a man is has to be "male." . . . Bodies differ in many ways physiologically, but they are completely transformed by social practices to fit into the salient categories of a society, the most pervasive of which are "female" and "male" and "women" and "men."¹⁴⁸

Yet most of us believe that on some deep, metaphysical level, biological facts exist independently of the labels we give them. Chromosomes, genitalia and hormones are natural, and together they make up the two natural kinds of people—males and females.

¹⁴⁶ FAUSTO-STERLING, *supra* note 144, at 218-19; *see also* Ken Dyer, *Female Athletes Are Catching Up*, NEW SCIENTIST, Sept. 22, 1977, at 722, 722 (stating that in track, athletics, and swimming, sex differentials in performance are declining). Recent charges of steroid abuse leveled by the U.S. women's swim team at the female Chinese athletes who performed exceptionally well at the 1994 World Games echo the charges directed at the East German women's swim team in the 1976 Olympics. In both cases, U.S. athletes questioned the "real" femaleness of the athletes involved. *See* Neil Amdur, *E. German Women's Success Stirs U.S. Anger*, N.Y. TIMES, Aug. 1, 1976, § 5, at 3; Christine Brennan, *Critics Take Chinese Swimmers to Task: Showing at Worlds Raises Questions of Steroid Use*, WASH. POST, Sept. 13, 1994, at C1.

The original reason for instituting "sex tests" [in Olympic competition] was to eliminate "un-naturally" strong "women." Now it is becoming increasingly clear that strength is not gender dichotomous. This does not eliminate the possibility that someday there might be a test to decide how much muscle a "real" woman is allowed to have, and anything more would mean she either was not a woman or she had been taking "male" hormones.

KESSLER & MCKENNA, *supra* note 25, at 54.

¹⁴⁷ LORBER, *supra* note 9, at 39.

¹⁴⁸ *Id.* at 38; *see also* SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 96 (1989) (noting that in the language of anti-Semitism, the term "Jew" does not connote a cluster of supposedly true properties: "intriguing spirit, greedy for gain, and so on . . . [rather the term implies that a certain group of people] are like that (greedy, intriguing . . .) because they are Jews.").

But in fact, the process of sexing bodies works just the other way around. Our pregiven dimorphic concepts of gender lead to the discovery of facts that differentiate the sexes:

Scientific knowledge does not inform the answer to "What makes a person either a man or a woman?" Rather it justifies (and appears to give grounds for) the already existing knowledge that a person is either a woman or a man and that there is no problem in differentiating between the two.¹⁴⁹

Except at that special moment when the birth attendant exclaims, "It's a boy" or "It's a girl," real, physical body parts play an insignificant role in both gender attribution and sex discrimination. Chromosomes play an even smaller role still. They are what Harold Garfinkel called "cultural genitals" that play the essential role in gender attribution and sex discrimination.¹⁵⁰ The cultural genital is a metaphor for both the physical genital that is not presently in view but which the person is assumed to have and the gendered schema that constructs women as certain kinds of beings and men as their opposite.¹⁵¹ This schema is made manifest in a system of gendered cues that communicates the signs of gender, signs that we regard as reliable signifiers of one's "true sex."

To conceptualize both sexual identity and sex discrimination in terms of biology at all is to ignore the role that gender stereotypes play in the construction of sexual difference.

Whatever genes, hormones, and biological evolution contribute to human social institutions is materially as well as qualitatively transformed by social practices. Every social institution has a material base, but culture and social practices transform that base into something with qualitatively different patterns and constraints.¹⁵²

In the end, bodies end up meaning less in the fight for equality than the roles, clothing, myths, and stereotypes that transform a

¹⁴⁹ KESSLER & MCKENNA, *supra* note 25, at 163. Recent studies purporting to find significant differences in the size and functioning of the brains of men and women reflect the same bias in research. They start with the presumption that there are male brains and female brains, and then scrutinize exemplars of each kind of brain once so labeled with the goal of discovering evidence of difference. See, e.g., Gina Kolata, *Man's World, Woman's World? Brain Studies Point to Differences*, N.Y. TIMES, Feb. 28, 1995, at C1, C7 ("In the study . . . the investigators found that for the most part, the brains of men and women at rest were indistinguishable from each other. But there was one difference, found in a brain structure called the limbic system that regulates emotions.").

¹⁵⁰ See HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 116-85 (1967).

¹⁵¹ See *id.*

¹⁵² LORBER, *supra* note 9, at 17.

vagina into a *she*. "Analyzing the social processes that construct the categories we call 'female and male,' 'women and men,' 'homosexual and heterosexual' uncovers the ideology and power differentials congealed in these categories."¹⁵³ These social processes should be the subject of equality jurisprudence as much as, or more than, the processes by which various costs and benefits are distributed to members of biologically predefined sexual groups.

Biology and genitals, so it seems, operate as false proxies for the real rules of both gender attribution and sexual identity in our culture. Indeed, it is almost ludicrous to maintain that sex discrimination, sexual identification,¹⁵⁴ or sexual identity takes place on the level of biology or genitals. Yet the law continues to insist that they do and in so doing it continues to naturalize sexual dimorphism: the assumption that *homo sapiens* are divided into two natural kinds—male and female.

III. THE ABSURDITY OF A BIOLOGICAL FOUNDATION TO SEXUAL IDENTITY

So far, I have shown how the jurisprudential gaze in sex discrimination cases sometimes targets biology,¹⁵⁵ and other times targets illegitimate sex-role stereotyping.¹⁵⁶ In either case, the law assumes a natural and biological foundation of sexual difference, thereby distinguishing sexual differentiation from sexual discrimination. Upon examination, however, this assumption is revealed to be a fiction: gender norms, not precultural biological facts, make up the difference that sexual difference makes.

In this Part, I will show how the law plays an active and important role in policing the "conditions of failure" implicit in the process of gender attribution. Time and again, courts have stepped in to resuscitate the myth that sexual identity is essentially biological even when doing so flies in the face of the physical "facts."

¹⁵³ *Id.* at 38.

¹⁵⁴ That is, how we decide whether a person is a man or woman when we meet for the first time:

The gender attribution process is an interaction between displayer and attributor, but concrete displays are not informative unless interpreted in light of the rules which the attributor has for deciding what it means to be a female or male. As members of a sociocultural group, the displayer and the attributor share a knowledge of the socially constructed signs of gender.

KESSLER & MCKENNA, *supra* note 25, at 157.

¹⁵⁵ See *supra* notes 119-29 and accompanying text.

¹⁵⁶ See *supra* notes 37-43 and accompanying text.

These cases illustrate how various legal devices, such as annulment and divorce decrees, sumptuary laws, and sexual declaratory judgment proceedings,¹⁵⁷ reinforce the fiction that masculinity is a reliable sign of maleness and femininity is a reliable sign of femaleness. Furthermore, in those circumstances in which people present a challenge to the intrapersonal unity of biological sex, core gender identity, and gender role identity,¹⁵⁸ they find themselves legal outsiders, either suffering judicial punishment or being refused the rights and benefits afforded as a matter of course to people who conform to contemporary gender norms.

A. "Your Honor, My Wife Is a Man": The Matrimonial Cases

A number of courts have been called upon to decide the meaning of "true sex" for the purpose of marriage. These cases generally arise under one of two circumstances: i) when two people, one of whom is transgendered, seek a marriage license, or ii) when the marriage between two people, one of whom is transgendered, fails and the nontransgendered spouse attempts to escape his or her alimony obligations by challenging the legal validity of the marriage.¹⁵⁹

As an initial matter, it is only by virtue of having limited the marital partnership to two persons of opposite sexes¹⁶⁰ that courts find themselves in the uncomfortable position of having to define explicitly what those opposite sexes are.¹⁶¹ In virtually every matrimonial case involving a transgendered person, the court dismissed the possibility of same-sex marriage as impossible, not merely as beyond the intent of the legislature. It is one thing to say that the legislature did not think about marriage between two persons of the same sex, as courts have said about the application

¹⁵⁷ In sexual declaratory judgment proceedings, the court is given the power to declare a person's true sex. See, e.g., *infra* notes 167-203 and accompanying text (discussing at length the case of *Corbett v. Corbett*, 1971 P. 83 (1970), one of the most important cases in Anglo-American jurisprudence in which a court determined the meaning of a person's true sex in the context of marriage).

¹⁵⁸ Cf. *supra* notes 25, 144.

¹⁵⁹ See, e.g., *infra* notes 167-209 and accompanying text.

¹⁶⁰ "[T]he characteristics which distinguish [marriage] from all other relationships can only be met by two persons of opposite sex." *Corbett v. Corbett*, 1971 P. 83, 105-06 (1970); see also *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).

¹⁶¹ "Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman." *Corbett*, 1971 P. at 106.

of Title VII to transgendered people;¹⁶² it is quite a stronger claim to regard such a marriage as unthinkable or oxymoronic. By eliminating the possibility of same-sex unions from the institutional integrity of marriage because "only persons who can become 'man and wife' have the capacity to enter marriage,"¹⁶³ courts have found themselves uneasily fixing the contours and boundaries of membership in the class of "men" and "wives" (or "women" as the case may be).

Interestingly enough, most marriage statutes do not explicitly require that a valid marriage be comprised of a man and a woman. Instead, courts generally observe that "it goes without saying" that a marriage is by definition the union of two people of different sexes.¹⁶⁴ Notwithstanding efforts by the gay and lesbian community to demand nuptial elasticity from the institution of marriage, every court, with one exception,¹⁶⁵ that has addressed the issue of

¹⁶² See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

¹⁶³ *M.T. v. J.T.*, 355 A.2d 204, 208 (N.J. Super. Ct. App. Div. 1976).

¹⁶⁴ See, e.g., *id.* at 207-08 ("We accept—and it is not disputed—as the fundamental premise in this case that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female. . . . The pertinent statutes relating to marriages and married persons do not contain any explicit references to a requirement that marriage must be between a man and a woman. . . . It is so strongly and firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, *cannot be fathomed*." (emphasis added)); *B. v. B.*, 355 N.Y.S.2d 712, 716 (Sup. Ct. 1974) ("Neither by statutory nor decisional law has this state defined male and female. New York neither specifically prohibits marriage between persons of the same sex nor authorizes issuance of marriage license [sic] to such persons. However, marriage is and always has been a contract between a man and a woman."); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) ("The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman."); *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. 1973) ("[Marriage] must be defined according to common usage[] . . . because Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons. . . . In substance, the relationship proposed by the appellants [two women] does not authorize the issuance of a marriage license because what they propose is not a marriage."). But see *In re Gary S. Petri*, N.Y. L.J., Apr. 4, 1994, at 29 (N.Y. City Surr. Ct. Apr. 4, 1994) (rejecting a surviving gay partner's claim that he and his partner could not have married because New York state law "has no requirement that applicants for a marriage license be of different sexes").

¹⁶⁵ The Supreme Court of Hawaii recently became the first court to find that its state constitution might bar a prohibition against same-sex marriage. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by* 1994 Haw. Sess. Laws 217. Every other court that has considered the question of same-sex marriage has upheld the state's right to limit marriage to male/female couples. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307, 331-33 (D.C. 1995) (holding that same-sex marriages are not

matrimonially appropriate gender configurations has found that a marriage is the union of a man and a woman, either because "the marriage relationship exists with the result and for the purpose of begetting offspring,"¹⁶⁶ or because "[i]t is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element."¹⁶⁷

*Corbett v. Corbett*¹⁶⁸ is one of the first cases in Anglo-American jurisprudence in which a court was called upon to determine the meaning of a person's true sex in the context of marriage.¹⁶⁹ Judge Ormrod's opinion, cited in subsequent American cases,¹⁷⁰ is remarkable both for its detail in discussing the facts of the parties' lives and bodies, and for its attention to the emotional particulars of the courtship and eventual marriage between Arthur Corbett—a sometimes male transvestite—and April Ashley—a transgendered woman. When the two first met, Corbett occasionally wore female clothing but felt frustrated at what he was able to achieve through these sartorial exercises: "I didn't like what I saw;

protected by the Due Process Clause); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (holding that the Constitution neither sanctions nor protects same-sex marriages); *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (finding that a same-sex marriage falls outside the spirit, although not the letter, of the Minnesota marriage laws); *De Santo v. Barnsley*, 476 A.2d 952, 953-56 (Pa. Super. Ct. 1984) (stating that two persons of the same sex cannot enter a common law marriage); *Singer v. Hara*, 522 P.2d 1187, 1195 & n.11 (Wash. Ct. App. 1974) (noting that statutory prohibitions against same sex marriages are not unconstitutional); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 204-20 (1994) (arguing that discrimination against lesbians and gay men is sex discrimination that a state may not practice without showing a sufficiently important state interest and that the Hawaii Supreme Court in *Baehr* correctly employed formal equal protection analysis to invalidate that state's prohibition against same-sex marriage).

¹⁶⁶ *B. v. B.*, 355 N.Y.S.2d at 717; *see also* *Adams v. Howerton*, 673 F.2d 1036, 1042-43 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982) (stating that one of the possible reasons that "Congress has determined that preferential [immigration] status is not warranted for the spouses of homosexual marriages" is "homosexual marriages never produce offspring").

¹⁶⁷ *Corbett v. Corbett*, 1971 P. 83, 105 (1970).

¹⁶⁸ 1971 P. 83 (1970).

¹⁶⁹ *Id.* at 105 ("[This] appears to be the first occasion on which a court in England has been called upon to decide the sex of an individual . . . I must, therefore, approach the matter as one of principle.").

¹⁷⁰ *See, e.g.*, *Olsen v. Olsen*, 557 P.2d 604, 610 (Idaho 1976); *M.T. v. J.T.*, 355 A.2d 204, 208-09 (N.J. Super. Ct. App. Div. 1976); *City of Columbus v. Zanders*, 266 N.E.2d 602, 606 (Ohio Mun. Ct. 1970); *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 832 (Ohio P. Ct. 1987).

you want the fantasy to appear right. It utterly failed to appear right in my eyes.”¹⁷¹

Yet when Corbett first met Ashley and invited her to lunch, “he was mesmerised by her.”¹⁷² As Corbett later testified, “[t]his was so much more than I could ever hope to be. The reality was far greater than my fantasy [I]t far outstripped any fantasy for myself. I could never have contemplated it for myself.”¹⁷³

They dated for three years, during which time Corbett quickly developed for [Ashley] the interest of a man for a woman. He said that she looked like a woman, dressed like a woman and acted like a woman. . . . [H]is feelings had become those of a full man in love with a girl, not those of a transvestite in love with a transsexual.¹⁷⁴

There were, however, some difficulties during their three-year courtship. “[Corbett’s] emotions swung about like a pendulum, from feeling jealous of her as a woman, by which, I think, she meant jealous of her success in adopting the female role he often wished he could adopt also, to jealous feelings about other men who were attracted to her.”¹⁷⁵

Finally, they were married in Gibraltar in September of 1963, but they separated after only fourteen days, in part because Corbett was unable fully to consummate the marriage.¹⁷⁶ Curiously, the legalization of their relationship destroyed the fantasy that had made it work for more than three years. In a letter to Corbett, informing him that she wanted a permanent separation, Ashley wrote, “It’s so funny but I felt so much more . . . secure before I married you than I did after. Then you denying what you had so promised made me feel so sick to the stomach.”¹⁷⁷ And so the couple split, the normalizing and literalizing effect of the institution of marriage having destroyed the fantasy that had made the relationship initially so powerful for both parties.¹⁷⁸

¹⁷¹ Corbett, 1971 P. at 92 (quoting Arthur Corbett).

¹⁷² *Id.*

¹⁷³ *Id.* (quoting Arthur Corbett).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 93.

¹⁷⁶ Prior to their wedding, the couple had remained chaste, yet once married “they slept together and on several occasions he succeeded in penetrating her fully but immediately gave up saying: ‘I can’t, I can’t,’ and withdrew without ejaculation and burst into tears.” *Id.* at 94.

¹⁷⁷ *Id.* at 95.

¹⁷⁸ See *id.* at 94. It is particularly interesting to note that it was Corbett (the cross-dresser), not Ashley (the transgendered person), who was most affected by the

After spending a number of pages recounting the narrative of the couple's courtship and marriage—an “essentially pathetic, but almost incredible, story”¹⁷⁹—Judge Ormrod turned to the primary factual question before him: Ashley's true sex at the time of the marriage.¹⁸⁰ Having taken extensive testimony from psychiatrists, gynecologists, endocrinologists, physicians, and state-appointed sexual organ inspectors, all so-called experts in transsexuality, “anomalies in the development of sex organs,”¹⁸¹ and “sex and gender problems,”¹⁸² the court concluded that i) prior to her surgery, Ashley had possessed male gonads and male genitals, ii) after her surgery she registered female hormonal levels and “remarkably good” female genitals,¹⁸³ and iii) at all times she possessed male chromosomes, a transsexual psychology, and *passed* easily as a woman; indeed, “the pastiche of femininity was convincing.”¹⁸⁴

About these “facts,” the court noted little disagreement, either among the parties or among the experts. In fact, the objectivity and reliability of science in fixing the fact of Ashley's sex gave the court great comfort.¹⁸⁵ Yet, among the more fascinating question-begging “objective” facts that the court took into consideration was the fact that “individual body cells [possess] male or female characteristics”¹⁸⁶ and that doctors “do not determine sex—in medicine we determine the sex in which it is best for the individual to live.”¹⁸⁷ For this reason the court endorsed the pathologizing

legalization of their relationship.

¹⁷⁹ *Id.* at 92.

¹⁸⁰ *See id.* at 89 (“[T]he validity of the marriage . . . depends upon the true sex of the respondent . . .”).

¹⁸¹ *Id.* at 97.

¹⁸² *Id.*

¹⁸³ Two court-appointed sex organ inspectors filed a report in the case recounting that: “The vagina is of ample size to admit a normal and erect penis. The walls are skin covered and moist. There is no impediment on “her part” to sexual intercourse . . . [T]he surgical result was remarkably good.” *Id.* at 96.

¹⁸⁴ *Id.* at 104.

¹⁸⁵ The court stated:

The quality of the medical evidence on both sides was quite outstanding, not only in the lucidity of its exposition, but also in its intellectual and scientific objectivity, and I wish to express to all the distinguished doctors concerned in this case my gratitude The cause of justice is deeply indebted to them.

Id. at 89.

¹⁸⁶ *Id.* at 97.

¹⁸⁷ *Id.* at 100.

expert testimony that “[t]he purpose of [sex-change] operations is, of course, to help to relieve the patients’ symptoms and to assist in the management of their disorder; *it is not to change their sex.*”¹⁸⁸

Contrast the normal scientific lens through which the court viewed the testimony of its experts with its characterization of the transgendered person’s inherently unreliable perspective: “[Transsexuals] are said to be ‘selective historians,’ tending to stress events which fit in with their ideas and to suppress those which do not.”¹⁸⁹ For Judge Ormrod, the experts’ testimony described a state of affairs, which while tragic, was not tainted by any particular paradigmatic filter, whereas the testimony of the parties—a transvestite man and a transgendered woman—was given almost no credibility given the abnormality and illogicity of the underlying logic of their lives.¹⁹⁰

And so, based entirely upon the testimony of the experts, the court reached several important conclusions. First, the correct criteria for “womanness” should be “the chromosomal, gonadal and genital tests [But] the greater weight would probably be given to the genital criteria than to the other two.”¹⁹¹ Second, an individual’s sex is permanently fixed at birth and cannot be later changed either naturally or through the intervention of science.¹⁹²

Therefore, Ashley “is not, and was not, a woman at the date of the ceremony of marriage, but was, at all times, a male.”¹⁹³ Anticipating Justice Scalia’s observations some twenty-five years later

¹⁸⁸ *Id.* at 98 (emphasis added).

¹⁸⁹ *Id.*

¹⁹⁰ *See id.* at 93.

Listening to each party describing this strange relationship, my principle impression was that it had little or nothing in common with any heterosexual relationship which I could recall hearing about in a fairly extensive experience of this court. I also think that it would be very unwise to attempt to assess [Ashley’s] feminine characteristics by the impression which [Corbett] says she made on him He is an unreliable yardstick by which to measure [Ashley’s] emotional and sexual responses. As a further indication of the unreality of his feelings for [Ashley], it is common ground that he introduced her to his wife and family and quite frequently took her to his house or on outings with them.

Id.

¹⁹¹ *Id.* at 106.

¹⁹² *See id.* at 104 (“It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.”).

¹⁹³ *Id.* at 108.

in *J.E.B. v. Alabama ex rel. T.B.*,¹⁹⁴ Judge Ormrod held that any evidence that tended to show how successfully Ashley had "passed" as a woman was therefore irrelevant. "These submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender."¹⁹⁵ On this reading, no matter how persuasive Ashley's performance of femininity was, it was an inauthentic performance that could not rehabilitate her pitiful status and confer upon her the rightful title "woman." Therefore, the notion that sexual identity flows not from gender but from biology was preserved.

Or was it? Curiously, Ashley's remarkably good female genitals seemed not to be enough to give her the right to call herself a woman. Here we witness the power, *sub rosa*, of the cultural, not the physical, genitals as the essence of true sex. In order to find that Ashley was not a woman, Judge Ormrod had to distinguish a 1966 case that one would have thought to be controlling in *Corbett*. In *S.Y. v. S.Y.*,¹⁹⁶ a husband sought to have his marriage annulled because he and his wife had been unable to consummate their marriage on account of an abnormality in the wife's genitals. She had been born with vagina atresia, a congenital condition which, among other things, rendered her vagina roughly one or two inches in length.¹⁹⁷ The question before the court was whether the marriage could be nullified for failure to achieve consummation as a result of the wife's "incurable incapacity."¹⁹⁸

Although the wife was willing to undergo a medical procedure that would enlarge her vagina and make coitus possible, the husband objected.

In order to constitute true coitus, there must, it is said, be full penetration by way of a vaginal passage. Here . . . the wife in her present condition has no vaginal passage, and the effect of the operation would not be to create a true vagina but merely an artificial cavity [A] mere cul-de-sac leading nowhere would not of itself be conclusive.¹⁹⁹

The judge, however, refused to accept the husband's construction of the inauthenticity and illegitimacy of the wife's postsurgical

¹⁹⁴ 114 S. Ct. 1419 (1994).

¹⁹⁵ *Corbett*, 1971 P. at 107.

¹⁹⁶ [1962] 3 W.L.R. 526.

¹⁹⁷ *See id.* at 108.

¹⁹⁸ *Id.* at 58-59.

¹⁹⁹ *Id.* at 59.

body. Having found that neither the ability to conceive nor the degree of sexual satisfaction were necessary for *vera copula*, the judge then queried "what else, it may be asked, remains to differentiate between intercourse by means of an artificial vagina and intercourse by means of a natural vagina artificially enlarged?"²⁰⁰ Finding nothing, he affirmed the lower court's dismissal of the husband's petition to annul the marriage.²⁰¹

In light of this precedent, Judge Ormrod was confronted with a difficult problem. Having held that body parts determined sexual identity, and that Ashley had what appeared to be female body parts, he had to find a way to hold that they were not *real female body parts* by distinguishing *S.Y. v. S.Y.* He did so by arguing that the procedures that could rehabilitate vaginal abnormalities had only been recently developed and that all previous cases had been resolved as a matter of incapacity. As for the wife in *S.Y. v. S.Y.*, the question of her true sex was never before the court, because it was assumed that she was a real woman. In essence, her status as a real woman, that is her cultural genitals, authenticated whatever actual genitals she had or could have. As such, the question was before Judge Ormrod as a matter of first impression,²⁰² and as a matter of principle he was compelled to rule that a person's sex was fixed at birth. For this reason, as between Corbett and Ashley,

I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr. Burou, can possibly be described . . . as "ordinary and complete intercourse" or as "*vera copula*—of the natural sort of coitus." When such a cavity has been constructed in a male, the difference between sexual intercourse using it and anal or intra-crural intercourse is, in my judgment to be measured in centimetres.²⁰³

Therefore, notwithstanding present physical facts to the contrary, once a person has been attributed a sex, it is not available to subsequent alteration.

In fact, Judge Ormrod's reasoning reflects Freud's observation that "[m]ale or female is the first differentiation that you make when you meet another human being, and you are used to making that decision with absolute certainty."²⁰⁴ Indeed, we are normally

²⁰⁰ *Id.* at 62.

²⁰¹ *See id.* at 108.

²⁰² *See Corbett v. Corbett*, 1971 P. 83, 105 (1970).

²⁰³ *Id.* at 107 (citations omitted).

²⁰⁴ SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 155 (J.H.

reluctant to revise that initial attribution of gender once it is made:²⁰⁵

Once a gender status has been ascribed to a person, a belief in the popular gender schema leads one to assume the corresponding sex and to ignore or rationalize away any indications to the contrary. Once an assumption of maleness has been made, the masculinity of the individual can be stretched limitlessly without that assumption of maleness being called into doubt [I]f an observer is secure in the appraisal of a person's gender and sex, the observer will resist contrary evidence because the popular schema postulates that one's sex is, and can only be, at all times evident to all observers [I]t is unthinkable that a firm and unquestioned gender ascription might be wrong.²⁰⁶

Nonconforming facts are not viewed as grounds for revisiting our initial take, but rather are marginalized and deemphasized as anomalous variations on the norm: "Isn't it odd that that man has what look like breasts?" or "boy, the muscles on that woman are something, she must really work out, or use steroids!" This, of course, was Quine's point when he suggested that the totality of our beliefs is a man-made fabric which impinges on experience only along the edges. "[Knowledge] is like a field [that] is so underdetermined by its boundary conditions, experience, that there is much latitude as to what statements to reevaluate in light of any contrary experience. No particular experiences are linked with any particular statements in the interior of the field."²⁰⁷

What is present in these matrimonial opinions is the underlying logic of difference: if not male then female, and if not female then male. Whenever any of the courts writing in this area faced the possibility of recognizing a more complicated sexual calculus that

Sprott trans., 1933).

²⁰⁵ Recall the family's reaction to the posthumous discovery that jazz musician Billy Tipton was a woman. Tipton had been married and had three sons, yet when the funeral director revealed their father's secret, one of the sons insisted: "He'll always be Dad [to me]." *Entertainer's Secret—He Was a She*, S.F. CHRON., Feb. 2, 1989, at A1.

²⁰⁶ Holly Devor, *Gender Blending Females*, 31 AM. BEHAVIORAL SCIENTIST 12, 35-36 (1987). Kessler and McKenna have made the following similar observation about our investment in initial gender attributions: "[I]f the physical genital is not present when it is expected (or vice versa), the original gender attribution is not necessarily altered. When expectations are violated a change in gender attribution does not necessarily follow. It is the cultural genital which plays the essential role in gender attribution." KESSLER & MCKENNA, *supra* note 25, at 154.

²⁰⁷ WILLARD V.O. QUINE, "TWO DOGMAS EMPIRICISM," FROM A LOGICAL POINT OF VIEW 42-43 (1963).

would provide a third, fourth, or greater alternative,²⁰⁸ they emphatically denied the possibility of such an option. "It has been suggested that there is some middle ground between the sexes, a 'no-man's land' [sic] for those individuals who are neither truly 'male' nor truly 'female.'" Yet the standard is much too fixed for such far-out theories.²⁰⁹

So we are left with a conception of male and female as not only one another's opposite, but as one another's contradiction. Most often, courts answer the question "what sex is this person?" by resort to biological essentialism: Real men are made one way, and real women are made another way. But this necessity easily reveals itself to be a myth. The gesture toward body parts often operates as a subterfuge, masking the metaphor made real by law²¹⁰ and the degree to which real sexual identities, as lived, are the effect of a particular lens or schema of gender that authenticates some facts and discredits others.²¹¹

²⁰⁸ THOMAS LAQUEUR, *MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD* 11 (1990) (noting that the sex of the mind is often separated from the sex of the body); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, *SCIENCES*, Mar.-Apr. 1993, at 20-24 (stating that there's a shocking lack of substance behind many ideas about biologically-based sex differences).

²⁰⁹ *T. v. T.*, 355 A.2d 204, 210 (N.J. Super. Ct. App. Div.), *cert. denied*, 364 A.2d 1076 (N.J. 1976); *see also In re Anonymous*, 314 N.Y.S.2d 668, 669 (Civ. Ct. 1970) (stating that "society recognizes only the two disparate sexes"); *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 100 (Sup. Ct. 1977) (stating that "with respect to gender, a person was either male or female, and no three ways about it").

²¹⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the racial categorization cases literalized the metaphor of blood in much the same way.

In the discourse of blood, semiotic representation simultaneously becomes inevitable and problematic—inevitable, because appearance (looking like [a white person]) is no longer sufficient proof; problematic, both because the appearance of social life for blacks and whites is now called into question, and because no other evidentiarily acceptable proof of blood exists. To substantiate blood, to substantiate what is neither a mimetic description nor a tangible entity but instead a semiotic figure, is impossible. Caught in an epistemological loop, courts were led right back to social codes based on appearance, which was where the problem had begun.

Eva Saks, *Representing Miscegenation Law*, 8 *RARITAN* 39, 58 (1988).

²¹¹ A similar point is made in Note, *supra* note 137, at 1989-90, but by way of a common misreading of Judith Butler's theory of gender and performativity first introduced in *Gender Trouble*. JUDITH BUTLER, *GENDER TROUBLE* (1990) [hereinafter BUTLER, *GENDER TROUBLE*]. In *BODIES THAT MATTER*, Butler explicitly disavowed readings of her work that attributed to her the notion that gender is merely drag. *See* JUDITH BUTLER, *BODIES THAT MATTER* at x-xxi (1993) [hereinafter BUTLER, *BODIES*]. She does not maintain "that one woke up in the morning, perused the closet or some more open space for the gender of choice, donned that gender for the day, and then restored the garment to its place at night." *Id.* at x. In place of such a humanist

B. "It's a Girl!": Institutional Performativity and Sex

Another way to understand the law's relationship to sexual identity is to consider the difference between judicial statements that describe a state of affairs and judicial statements that bring about a state of affairs. When, for instance, a court finds that a fire department has never hired a woman firefighter, it is describing a state of affairs. When, however, the court finds that the fire department is guilty of sex discrimination, it brings about a particular legal result: the creation of liability by virtue of a legal pronouncement. These two types of juridical speech acts are imbued with two different kinds of normativity. When the court describes a state of affairs it has a responsibility to do so as accurately as possible, yet when the court pronounces a verdict or legal judgment we understand that action to be an externally sanctioned *exercise of power*. In the first case, the aspiration is that the judge's words fit the world, whereas in the second case the world is changed to fit the judge's words. In other words, the true conditions of a description are independent of the speech act itself, whereas a pronouncement of guilt is true "because I said so."²¹²

These locutionary distinctions are key to understanding the relationship of law to sexual identity. Generally we have confidence in authority when it can answer difficult and important questions in bright line, unambiguous terms: true/false, yes/no, guilt/innocence. Indeed, courts are most comfortable when operating according to this kind of logic. When the stakes are high, as they always are in disputes over sexual identity, we particularly expect, indeed demand, clear-cut answers—for always implicated in the question "Who or what is s/he?" is the question "Who or what am I?"

When confronted with the question "what sex is s/he?" courts have two choices: describe an unambiguous sexual fact of the

account of gendered subjectivity, Butler proposes a theory that regards gender norms as part of what determines the subject. As such, construction is a constitutive constraint. See *id.* at xi; *infra* note 218.

²¹² See JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson ed., 1965); see also 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 277-337 (Thomas McCarthy trans., 1984) (translating Austin and Searle's theories of language into political theory); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979) (discussing the law's authority to bring about a result "because I said so"); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969) (developing further Austin's notions of constative and performative speech acts).

matter or invoke the power to engender the right answer by resort to "because I said so." In either case, judges resist the notion that in some cases this is a difficult question that requires a normative, not a descriptive answer. As is evident in the transgender matrimonial cases, there is no unambiguous sexual state of affairs outside of a discourse of power. A person's sex becomes fixed by operation of a court order, not by virtue of an ambiguous natural order. Consequently, courts pronounce a fact of the matter and then justify that act of declarative power by resort to the myth of essentialism. They may say they are acting descriptively, but in fact they are acting performatively. By naturalizing what appear to be valid claims about sexual identity, courts are able to "cleanse language of its productivity."²¹³

This exercise of power is no more evident than in the nomenclatural cases where a transgendered person's sexual designation on his or her birth certificate is at issue. In *In Re Declaratory Relief for Ladrach*,²¹⁴ two people, a man and a transgendered woman, sought an order from an Ohio court to declare that they be issued a marriage license. Recognizing that it had to pick a rule to determine true sex, the court declared that "[i]t is generally accepted that a person's sex is determined at birth by an anatomical examination by the birth attendant. This results in a declaration on the birth certificate of either 'boy' or 'girl' or 'male' or 'female.' This then becomes a person's true sex."²¹⁵ The court then said that once a person's true sex has been fixed in this manner, it cannot be altered or revised by subsequent surgery or other intervention.²¹⁶ Under this view of the performative nature of the birth attendant's speech, Ladrach "was thus correctly designated 'Boy' on his birth certificate"²¹⁷ because "[t]here was no evidence that applicant at birth had any physical characteristics other than those of a male."²¹⁸ Ladrach's sex was *pronounced* then

²¹³ DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 29 (1991).

²¹⁴ 513 N.E.2d 828 (Ohio P. Ct. 1987).

²¹⁵ *Id.* at 832.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* It is quite interesting to note that in some instances courts consider "female" as an adjective that modifies a noun, *see, e.g.*, *Anonymous v. Mellon*, 398 N.Y.S.2d 99, 101 (Sup. Ct. 1977) ("Psychologically the petitioner is female . . ."); *B. v. B.*, 355 N.Y.S.2d 712, 713 (Sup. Ct. 1974) (stating that "defendant was and is a Male person and capable and qualified to marry with a female person"), while at other times "female" is treated as a noun. *See, e.g.*, *T. v. T.*, 484 N.Y.S.2d 780, 781

and forever male. In these cases, the power to name is delegated to a medical or administrative authority; so long as that agent acts according to the rules governing his or her office, a court will not second guess that designation or allow the individual so labeled to do so. In effect, the individual has been denied the authority to describe, or declare, and thereby create, the fact of his or her own sex, in the same way that the base runner is unable to call him or herself safe—only the umpire has that authority. The conventions of our gender schema control the first case, while the conventions of baseball control the second.

Notice the relationship between the court's gender *reading* and gender *naming*. The birth attendant is charged with reading anatomical signs, and declaring an interpretation of those signs, which declaration then *becomes* the person's true and permanently inalterable sex. The court here is less concerned with the substance of interpretive gender rules than with the fact that an interpretation be made, and that it be made at a particular moment in time. Once the body is read, two things happen: text is subordinated to interpretation, and later re-readings are not permitted—narrative time suddenly stops. As such, the birth attendant's declaration of the baby's sex is performative rather than descriptive, creating rather than describing the child's sex.²¹⁹

The same dynamic was in evidence in *Corbett*:

[April Ashley] was born on April 29, 1935, in Liverpool and registered at birth as a boy in the name of George Jamieson and brought up as a boy. It has not been suggested at any time in this case that there was any mistake over the sex of the child.²²⁰

(Fam. Ct. 1985) ("[T]he respondent is a female . . ."); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 499 (Sup. Ct. 1971) ("[T]he defendant was a male at the time of the alleged marriage."). Is sex an attribute we have, or is it who we are? *Is it me or is it mine?* Some courts view sex more like a sense of humor, height, or athletic ability, while others see it as a part of who we are, like being black. Judith Butler regards the question of whether sex is constitutive or attributional as secondary. "Sex" is, thus, not simply what one has, or a static description of what one is: it will be one of the norms by which the 'one' becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility." BUTLER, *BODIES*, *supra* note 211, at 2.

²¹⁹ See BUTLER, *BODIES*, *supra* note 211, at 237 ("The sign, understood as a gender imperative—'girl!'—reads less as an assignment than as a command . . ."). From this perspective, the old adage "boys will be boys" could be understood as a command rather than a description of a state of affairs.

²²⁰ *Corbett v. Corbett*, 1971 P. 83, 89 (1970).

From this, the court concluded that April Ashley's sex was properly and permanently "fixed at birth."²²¹

Reflecting the inclination to deny the justiciability of sexual naming as a matter of legal record, a civil court judge in *In re Anonymous*²²² considered a petition

by a "transsexual" to change petitioner's obviously male name to a female name [T]he petitioner, a member of the male sex, has undergone a series of medical treatments and operations which were designed to, and had the effect of changing the physical appearance of petitioner so that petitioner has, in general, the outward physical aspects usually attributed to a female.²²³

The court granted the petition on the grounds that there was no evidence that the petitioner's use of a female name would result in fraud or prejudice to others.²²⁴ However, the court explicitly declared that it did not have jurisdiction legally to change the petitioner's sex and insisted that "the order shall not be used or relied upon by petitioner as any evidence or judicial determination that the sex of the petitioner has in fact been changed."²²⁵

According to local law in most Western European countries, when a child is born and visually categorized by the attending nurse or midwife as male or female according to his or her genitalia, the parents may select a name for the baby from one of two official

²²¹ *Id.* at 104.

²²² 314 N.Y.S.2d 668 (Civ. Ct. 1970).

²²³ *Id.* at 669. Such a discussion, emphasizing outward as opposed to inward sexual identity, echoes Esther Newton's observations about male drag and the tension between sartorial illusion and the myth of essential sexual identity.

[T]his assertion that "appearance is an illusion" works in two simultaneously contradictory ways, by declaring that the outside (the performer's clothing) is feminine and his inside (the body inside the clothing) is masculine, and, at the same time, that the outside (the performer's body) is masculine and his inside (his "essence" or "self") is feminine.

ESTHER NEWTON, *MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA* 101-03 (1972).

²²⁴ *But see In re Anonymous*, 587 N.Y.S.2d 548, 549 (Civ. Ct. 1992) ("[T]he change of name from a 'male' name to a 'female' name would be fraught with danger of deception and confusion and contrary to the public interest.").

²²⁵ *In re Anonymous*, 314 N.Y.S.2d at 670; *see also In re Rivera*, N.Y. L.J., Mar. 10, 1995, at 25 (noting that an application for a name change "is granted solely upon the condition that petitioner may not use or rely upon this order as any evidence whatsoever of judicial determination that the sex of petitioner has in fact been changed automatically"). Saul Kripke has developed a theory of names as designators that rigidly identify objects across worlds by picking out their essential properties. *See SAUL A. KRIPKE, NAMING AND NECESSITY* (1980); *see also BUTLER, BODIES, supra* note 211, at 210-14 (applying Kripke's theory of rigid designation to sexual identity).

birth registries: one setting forth official male names and another setting forth official female names. Local birth registries reflect both the child's gendered name and civil status. Crossing over is not allowed.

This performative aspect of gendered naming, in which law operates to fix a person's sex through the instruments of the modern bureaucratic state, was eliminated by the German Constitutional Court in 1979 in a case involving a male-to-woman transgendered person who sought to have her civil status and birth registry entry changed from male to female. Relying upon the German Constitution's provision that "[e]veryone shall have the right to the free development of his [or her] personality," but only "insofar as he [or she] does not violate the rights of others or offend against the constitutional order or the moral code[.]"²²⁶ the Constitutional Court held that

[h]uman dignity and the constitutional right to the free development of personality demand, therefore, that one's civil status be governed by the sex with which he is psychologically and physically identified. Our law and society are based on the principle that each person is either "masculine" or "feminine" and that this identification is independent of any possible genital anomalies.²²⁷

Thus, in 1979 the German Constitutional Court interpreted the German Constitution as protecting a degree of human agency with respect to sexual identity that could not be imagined in the United States even today, some sixteen years later.

Again, the analogy to racial identity is instructive in understanding the relationship between identity and the authority of law. In *State ex rel. Plaia v. Louisiana State Board of Health*,²²⁸ a mother brought a mandamus action to compel the state to issue a birth certificate for her newborn girl declaring the child's race to be white. In accordance with state law, the mother had filed a certificate of live birth with the local registrar in which she designated the child's race as white. The registrar, however, refused to issue a birth certificate because he believed the child's mother to be one-half black, thereby rendering the child legally black according to the official formula which established that "a person having

²²⁶ GRUNDGESETZ [Constitution] [GG] art. II, § 1 (F.R.G.).

²²⁷ See Transsexual Case, 49 BVerfGE 286 (1979), reprinted in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 341, 342 (1989).

²²⁸ 296 So. 2d 809 (La. 1974).

one thirty-second or less of Negro blood shall not be deemed, described or designated by any public official in the state of Louisiana as colored."²²⁹

Reversing the lower court, the Louisiana Supreme Court rejected the plaintiff's argument that the racial classificatory statute was both irrational and vague insofar as it gave the registrar the power to declare a person's race. The lower court had noted that one of the problems with the classification system was that the registrar's decision reflected

a mathematical result by using an equation consisting of many unknowns, namely, the terms used on old documents in his possession classifying the ancestors of the child as 'colored,' 'mulatto,' 'French,' 'mixed race,' 'brown,' which terms are uncertain insofar as they call for any specific fractions of Negro blood in the individuals so designated.²³⁰

In this case, the local registrar assumed that any relative categorized "colored" or "mulatto" on any document he deemed relevant must be at least one-half black.²³¹

The Louisiana Supreme Court, however, found that the state had properly vested in the local registrar the authority to declare a person's race and that the registrar had not abused his power by applying this test of racial identity. Having so held, the court then concluded that birth certificates on file may not be altered, except upon receipt of acceptable evidence that left no room for doubt that an error had been made.²³² Mirroring both *Plessy v. Ferguson*²³³ and the sex cases, the *Plaia* court affirmed the bureaucratic authority of the local registrar to change legally a person's race "because he said so," even if the reasons given were irrational or vague.

These cases show how judicial and administrative efforts to make essential sexual meaning are anything but descriptive. Rather,

²²⁹ *Id.* at 810 (quoting Act 46 of 1970 (R.S. 42:267)).

²³⁰ *State ex rel. Plaia v. Louisiana State Bd. of Health*, 275 So. 2d 201, 203 (La. Ct. App. 1973), *modified* 296 So. 2d 809 (La. 1974).

²³¹ *State ex rel. Plaia*, 275 So. 2d at 203.

²³² *Id.* at 810. Louisiana's "one thirty-second" statute was repealed in 1983; however, in *Doe v. State*, 479 So. 2d 369 (La. Ct. App. 1985), *cert. denied*, 485 So. 2d 60 (La. 1986), *appeal dismissed*, 479 U.S. 1002 (1986), a Louisiana appellate court dismissed a mandamus action brought by the children and grandchildren of a married couple who were "erroneously designate[d] . . . 'colored,' when in fact they were white." *Id.* at 371. The plaintiffs sought to have their parents'/grandparents' birth certificates posthumously changed to white, but the court regarded the *Plaia* case as controlling. *See id.* at 372.

²³³ 163 U.S. 537 (1896).

these efforts represent a performative exercise whereby the world is brought into conformity with the word. As such, the sign "woman" is not a mirror of nature or a label that attaches to a pregiven constituency²³⁴ but instead attaches to a set of subjects whose legal identity is the contingent effect of the act of naming.

Consider the similarities between the signs "woman" and "man" and the signs that appear on bathroom doors—stick figures, one wearing a dress and the other wearing pants. If one reads those bathroom signs literally, women wearing pants will make a serious category mistake and risk prosecution for violating the laws that enforce the essential differences between women and men.²³⁵ Instead, we know to read them symbolically: notwithstanding how I look, I understand that the figure wearing a dress stands for, rather than reflects, me. In this sense, the sign does more than refer to women; it constitutes the feminine identity that it enunciates.²³⁶ Judith Butler made a related point when she wrote that "[p]olitical signifiers, especially those that designate subject positions, are not descriptive; that is, they do not represent pregiven constituencies, but are empty signs which come to bear phantasmatic investments of various kinds."²³⁷

In this sense, gendered signs have a kind of performative quality. They make the vagina into a she, and they make a person who executes the gender cues correctly and articulately into a woman. This social fact is evidenced by a cultural phenomenology in which

²³⁴ As Judith Butler explains:

The "subject-position" of women, for instance, is never fixed by the signifier "women"; that term does not describe a preexisting constituency, but is, rather, part of the very production and formulation of that constituency, one that is perpetually renegotiated and rearticulated in relation to other signifiers within the political field.

BUTLER, BODIES, *supra* note 211, at 195.

²³⁵ In Houston, Texas in 1990, Denise Wells was arrested for using the men's room at a country western concert under an ordinance that prohibited entering "any public restroom designated for the exclusive use of the sex opposite to such person's sex . . . in a manner calculated to cause a disturbance." See Lisa Belkin, *Seeking Some Relief, She Stepped Out of Line*, N.Y. TIMES, July 21, 1990, at A6 (quoting HOUSTON, TEX. MUN. CODE § 72-904 (1972)). She was ultimately acquitted of all charges. See *Woman Is Acquitted in Trial for Using the Men's Room*, N.Y. TIMES, Nov. 3, 1990, at A8.

²³⁶ Of course, the analogy applies with even stronger force to many phenotypically white persons who had to choose between white and negro drinking fountains in states that defined a person as non-white if he or she possessed one drop of "African blood." See, e.g., 1866 Tenn. Pub. Acts XL § 1 ("[A]ll Negroes, Mulattoes, Mestizoes, and their descendants, having any African blood in their veins, shall be known in this State as 'Persons of Color.'").

²³⁷ BUTLER, BODIES, *supra* note 211, at 191.

one's true sex is merely evidenced, not constituted, by the genital that is physically present, and a legal rule of evidence by which the genital is regarded as probative, but by no means dispositive or irrebuttable evidence of one's true sex.²³⁸ It is the cultural genital, the metaphoric "something extra," the presence of which is proven by the signs of gender, that makes a woman and makes a man and that cannot be rebutted by physical facts to the contrary.

C. *Chromosomal, Surgical, or Sartorial Accessorizing: Can Clothes Really Make the Man?*

The law has been a well-worn tool in the normalization and protection of the signs of sexual differences. By policing the boundaries of proper gender performance in the workplace and in the street, both civil and criminal laws have been invoked to punish gender outlaws, and thereby reinscribe masculinity as belonging to men and femininity as belonging to women.

Part of the socialization necessary for membership in a particular community is a fluency in the signs of gender.²³⁹ Kenneth Karst described it as a process by which

²³⁸ Eva Saks made a similar observation about race and phenotype when she discussed *Jones v. State*, 47 So. 100 (Ala. 1908), a case in which the court regarded the question of whether a party "looked like a white woman" as a potentially different question of fact than whether she "was a white woman." *Id.* at 102.

Did the fact that "Ophelia Smith *looked like* a white woman" equal the fact that she "*was* a white woman," or did it merely provide evidence for the fact that she "*was*" one? Perhaps the fact that she "*looked like*" a white woman distanced her somewhat from *being* white, and, by suggesting that her skin was not her identity but a representation of an identity, opened the door to the disturbing possibility of misrepresentation—a forgery by Nature? If Nature was forging, what was being forged? . . . [H]ow did he know that she "*was*" a white woman, if not by the fact that she "*looked like*" a white woman? What does a white woman look like?

Saks, *supra* note 210, at 56-57.

²³⁹ See HOLLY DEVOR, *GENDER BLENDING: CONFRONTING THE LIMITS OF DUALITY* 25-26 (1989).

[T]he evidence is strong, clear, and regularly replicated that all of us contribute, purposefully or not, to the process of giving consistent social meaning to the biological facts of sex. . . . One way that this is manifested is in adults' strong social need to attribute membership in a sex status, and sex differences, to newborn infants. This tendency is so strong that they will often do it even when they have little or no concrete information on which to base their actions. Adults seem almost unable to relate to an "ungendered" child.

Id.

children are "familiarized by ritualization with a particular version of human existence," and thus instructed in what it takes to be a respected member of the community. The child, by this process of socialization, comes to "grasp the symbolic meaning of behavior"; the child comes to belong, to be a full participant in a particular culture. The assignment of meaning to behavior is one definition of culture.²⁴⁰

While these signs are anything but universal,²⁴¹ within most Western communities, and particularly the United States, there is a strong desire that these signs be both articulate and unambiguous. Fluency in the semeiotics of gender within one's community means that one can read bodies and provide good reasons for labeling one person a "man" and another person a "woman."

In addition to being a literate reader of gender signs, community membership also requires that one project or articulate one's own gender in terms that are comprehensible to others. Failure to do so, either intentionally²⁴² or unintentionally,²⁴³ generally leads

²⁴⁰ Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 307 (1986) (footnotes omitted).

²⁴¹ Anthropologists have documented numerous ways in which cultures "display" and "read" gender differently. In one Native American village, a son displayed a dislike for what were considered men's tasks and enjoyed so-called women's tasks. His parents decided to conduct a test and placed him in a small structure together with a bow and arrow and some basket weaving material. They then set the structure on fire and watched to see which of the objects he picked up when he ran out. Because the child grabbed the basketry materials he became, from that time on, their daughter. See IFI AMADIUME, *MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AFRICAN SOCIETY* (1987) (stating that in pre-colonial Nigeria, in the absence of sons, daughters performed roles normally designated to sons and vice versa); ERNEST CRAWLEY, *THE MYSTIC ROSE* 317-75 (1960); JOHN J. HONIGMANN, *THE KASKA INDIANS: AN ETHNOGRAPHIC RECONSTRUCTION* 121-26 (1954); W.W. Hill, *Note on the Pima Berdache*, 40 AM. ANTHROPOLOGIST 338, 339 (1938).

²⁴² See Devor, *supra* note 206, at 31 ("I'm not really interested in stiletto heels, nylons, and short skirts, or any of those things, because I feel strongly about freedom of movement and being comfortable at the same time."); Mary E. Perry, *The Manly Woman: A Historical Case Study*, 31 AM. BEHAVIORAL SCIENTIST 86, 86 (1987) (describing two seventeenth-century women who passed as men and thus gained social and economic status).

²⁴³ See LESLIE FEINBERG, *STONE BUTCH BLUES* 20-21 (1993).

I didn't look like any of the girls or women I'd seen in the Sears catalog. The catalog arrived as the seasons changed. I'd be the first in the house to go through it, page by page. All the girls and women looked pretty much the same, so did all the boys and men. I couldn't find myself among the girls. I had never seen any adult woman who looked like I thought I would when I grew up. There were no women on television like the small woman reflected in this mirror, none on the streets. I knew. I was always searching.

to both violence²⁴⁴ and humiliation²⁴⁵ once the imposter is found out.²⁴⁶

The example of the rape and murder of Teena Brandon in Falls City, Nebraska illustrates the degree of anger and social opprobrium that can be unleashed when a gender outlaw's fraud is revealed to the public. In an article entitled *Her Fatal Deception? Mystery of Cross-Dresser Slaying*,²⁴⁷ *Newsday* began a story recounting Brandon's rape and murder with the line: "A woman dressed as a man, Teena Brandon wooed and won one of the prettiest young women in this small town beside the Missouri River."²⁴⁸ That this information formed the lead of the article framed it not as a story about a brutal murder but as an example of the outrage that results when a woman passes as a man and succeeds in getting dates that are not rightfully hers. Both the title and the body of the article distracted attention away from Brandon's murder and focused the reader instead on the fraud she perpetrated against the community in general, and her dates in particular.

²⁴⁴ See *id.* at 62-63, 257-59 (recounting the violence that butches suffered at the hands of the police and gangs of boys during the 1950s, 1960s, and 1970s, either because they looked and dressed like men or because their gender was not easily and immediately recognizable).

²⁴⁵ See Devor, *supra* note 206, at 29:

"I've been chased out of washrooms. Old ladies with umbrellas, a cleaning lady with a broom stick, like I don't have a chance. I walk in there and all of a sudden they . . . just bang me on the head and I'd go running . . . Then I'm out of there and they go on and on . . . saying boys aren't supposed to be in women's washrooms. I didn't have a chance to say anything."

Id. (quoting a woman who sometimes passed or was mistaken for a man).

²⁴⁶ The controversy surrounding the crowning of the homecoming queen in Cherry Grove, Fire Island, New York illustrates how the semeiotics of gender apply with equal force, although according to different rules, even in subcultures within the United States. For almost 20 years, Cherry Grove has chosen a homecoming queen every Fourth of July weekend, and every year the queen has been a male drag queen. In 1994, however, Joan van Ness, a biological woman dressed in high female drag, was crowned queen. "I'm used to wearing pants," she said. "Wearing a dress was cross-dressing for me." Diane Ketcham, *Long Island Journal: A First for Cherry Grove*, N.Y. TIMES, June 19, 1994, § 14, at 3. Many men in the community were quite upset by van Ness's elevation to the throne and argued that she should have been disqualified. One of the judges commented, "I prefer a more traditional homecoming queen." *Id.* Another member of the community added, "It's not fair to enter the contest if you're helped out by biology or plastic surgery." Elizabeth Wasserman, *Cherry Grove Queen Proves She's No Drag*, NEWSDAY (N.Y.), July 5, 1994, at A4.

²⁴⁷ Chris Burdach, *Her Fatal Deception? Mystery of Cross-Dresser Slaying*, NEWSDAY (N.Y.), Jan. 5, 1994, at 6.

²⁴⁸ *Id.*

For some people, cross-dressing can be understood as a kind of private rebellion against public forms of gender attribution. These forms, curiously, both define and control cross-dressing or transvestite behavior. Again, the law has played an important role in enforcing these gendered rules. Contemporary sumptuary laws²⁴⁹ have been used to enforce rigid gender norms, and these laws represent a legal attempt to minimize the possibility of confusion or fraud occasioned by misreading gender when the sexually anomalous person misbehaves by performing his or her gender role ambiguously or incorrectly.²⁵⁰ By establishing and enforcing appropriate sartorial norms, these laws are designed to ensure social and sexual legibility within a language of difference that regards sex and gender as synonymous.²⁵¹ Those people who present themselves in a way that conflicts with, or at a minimum draws into question, the epiphenomenal relationship between sex and gender are either punished for trying to get away with something or pathologized as freaks.

Indeed, some courts have been willing to go so far as to stake the survival of the species on the ability to read gender correctly. "[The] inability of the male and female of the species to recognize each other's differences may lead to frustration of the reproductive urge."²⁵² Much is at stake in the enforcement of contemporary

²⁴⁹ For a detailed description of these laws, see, for example, VERN L. BULLOUGH & BONNIE BULLOUGH, *CROSS DRESSING, SEX, AND GENDER* 23-93 (1993). Marjorie Garber also discusses the historical origin and use of sumptuary laws in *Vested Interests: Cross Dressing & Cultural Anxiety*:

The medieval and Renaissance sumptuary laws . . . appear to have been patriotic, economic, and conservatively class-oriented; they sought to restrict the wearing of certain furs, fabrics, and styles to members of particular social and economic classes, ranks, or "states." While protecting, at times, such native industries as the wool trade or the linen trade, and purporting, at least, to guard the public morality against excess and indulgence, these statutes . . . at the same time attempted to mark out as visible and above all *legible* distinctions of wealth and rank within a society undergoing changes that threatened to blur or even obliterate such distinctions. The ideal scenario—from the point of view of the regulators—was one in which a person's social station, social role, gender and other indicators of identity in the world could be *read*, without ambiguity or uncertainty.

MARJORIE GARBER, *VESTED INTERESTS: CROSS DRESSING & CULTURAL ANXIETY* 21-26 (1992). Judith Lorber has similarly noted that "[c]ross-dressing and wearing clothes 'above one's station' . . . thus were important symbolic subverters of social hierarchies at a time of changing modes of production and a rising middle class . . ." LORBER, *supra* note 9, at 87.

²⁵⁰ That is, when sex and gender are stripped apart.

²⁵¹ See *supra* notes 240-42, *infra* notes 256-81 and accompanying text.

²⁵² *People v. Simmons*, 357 N.Y.S.2d 362, 365 (Crim. Ct. 1974) (reprimanding a

sumptuary laws. "For man, success in sexual reproduction requires . . . suitable behaviour for the sex in training for the adult role [and] suitable secondary sex characteristics"²⁵³ so that we may recognize suitable sex partners and thereupon reproduce the species.²⁵⁴ Marjorie Garber has summarized this kind of thinking as follows:

[I]f there is a difference [between male and female], we want to be able to *see* it, and if we see a difference (a man in women's clothes), we want to be able to *interpret* it. In both cases, the conflation is fueled by a desire to *tell the difference*, to guard against a difference that might otherwise put the identity of one's own position in question.²⁵⁵

Of course, if somatic gender norms are to be enforced through the use of sartorial rules, clothing must be understood to communicate gender clearly. And of course, it does. We have very clear notions of men's clothes and women's clothes, down to a level of detail that assigns gender to the direction in which shirts button and zippers zip. Indeed, one of the only ways that many people are able to discern the gender of infants is through the color of their clothes—blue for boys, pink for girls.²⁵⁶

transvestite prostitute prosecuted for criminal impersonation of a woman).

²⁵³ Christopher Ounsted & David C. Taylor, *The Y Chromosome Message: A Point of View*, in GENDER DIFFERENCES: THEIR ONTOGENY AND SIGNIFICANCE 241, 243 (Christopher Ounsted & David C. Taylor eds., 1972).

²⁵⁴ See D.I. Perrett et al., *Facial Shape and Judgements of Female Attractiveness*, 368 NATURE 239, 239-41 (1994) (suggesting that notions of female beauty are soft-wired cross-culturally).

Japanese and caucasian observers showed the same direction of preferences for the same [female] facial composites, suggesting that aesthetic judgements of face shape are similar across different cultural backgrounds. . . . Attractive facial features may signal sexual maturity and fertility, emotional expressiveness or a 'cuteness' generalized from parental protectiveness towards young.

Id.

²⁵⁵ GARBER, *supra* note 249, at 130.

²⁵⁶ While our common folk understanding is of pink as a naturally feminine color and blue as a naturally masculine color, these attributions are, of course, highly contingent.

In the early years of the twentieth century, before World War I, boys wore pink ("a stronger, more decided color," according to the promotional literature of the time) while girls wore blue (understood to be "delicate" and "dainty"). Only after World War II . . . did the present alignment of the two genders with pink and blue come into being.

Id. at 1.

Butch lesbians experienced the weight of these rules every day during the 1950s when police would arrest them if they could not prove that they were wearing at least three pieces of women's clothing.²⁵⁷ Gay men who cross-dressed suffered the same treatment from the police as far back as the turn of the century when police enforced a New York state law prohibiting people from appearing in public in disguise or masquerade.²⁵⁸ The New Jersey Commissioner of Alcoholic Beverage Control adopted a rule in 1934 that prohibited female impersonators from congregating in public licensed premises.²⁵⁹

That aspects of gendered identity might reveal themselves to be nothing more than convincing gendered performance is what these laws stand ready to deny: "The desire of concealment of a change of sex by the transsexual is outweighed by the public interest for protection against fraud."²⁶⁰ Recall the *Corbett* court's discomfort with the fact that April Ashley's "pastiche of femininity was [so] convincing."²⁶¹

Just as we saw in the matrimonial cases, in this context the rights and lives of transgendered people have provided the battleground upon which the war over gender normativity has been fought. These cases illustrate even more clearly the judgments about sex and gender that were at work in the more "regular" cases. In

²⁵⁷ See LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 185 (1991) (noting that "any woman wearing pants was suspect"); ELIZABETH L. KENNEDY & MADELINE D. DAVIS, *BOOTS OF LEATHER, SLIPPERS OF GOLD: THE HISTORY OF A LESBIAN COMMUNITY* 180 (1993); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 & n.85 (1993).

²⁵⁸ See GEORGE A. CHAUNCEY, JR., *GAY NEW YORK: URBAN CULTURE AND THE MAKING OF A GAY MALE WORLD, 1890-1940*, at 307 (1989) ("The law had originally been enacted in the mid-nineteenth century to control labor organizers and rural agitators who sometimes disguised themselves to elude the authorities, but by the turn of the century the police used it primarily to harass cross-dressing men and women on the streets." (citing CAHILL'S CONSOLIDATED LAW OF NEW YORK: BEING THE CONSOLIDATED LAWS OF 1909, AS AMENDED TO JULY 1, 1923, at 1415 (James C. Cahill ed., 1923))); see also HENRY CHRISTMAN, *TIN HORNS AND CALICO: A DECISIVE EPISODE IN THE EMERGENCE OF DEMOCRACY* 132 (1945); DAVID M. ELLIS, *LANDLORDS AND FARMERS IN THE HUDSON-MOHAWK REGION, 1790-1850*, at 271-72 (1946); *Newsletter of the Mattachine Society of New York*, Jan.-Feb. 1967 at 5-7.

²⁵⁹ See *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 18 (N.J. 1967) (declaring the rule unconstitutional).

²⁶⁰ *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (quoting the findings of the Committee on Public Health of the New York Academy of Medicine that were later cited by the court in a mandamus action ordering the Board of Health to change the petitioner's name and sex on her birth certificate).

²⁶¹ *Corbett v. Corbett*, 1971 P. 83, 104 (1970).

addition to *Ulane*,²⁶² other transgender employment cases have presented the opportunity for courts to consider the relationship between sex and gender and to question the notion that it is "normal" for men to wear masculine clothing and for women to wear feminine clothing, and that it is permissible to prohibit people from dressing incorrectly. What is more, they provide the perspective to question the social norms that perpetuate the view that it is ultimately masculinity that makes a male a man, and femininity that makes a female a woman.

In *Terry v. EEOC*,²⁶³ a Big Boy Restaurant refused to hire a pre-operative transgendered woman as a hostess because of her transgendered identity. The court dismissed the complaint because "[h]e is still a male; at this point he only desires to be female. He is not being refused employment because he is a man or because he is a woman. . . . *The law does not protect males dressed or acting as females and vice versa.*"²⁶⁴

More recently, in *Doe v. Boeing Co.*,²⁶⁵ the Washington Supreme Court considered a disability discrimination claim brought by a pre-operative transgendered woman. Boeing refused to accommodate Doe's transgendered condition, imposing the following requirements on her in the workplace: she could not use the women's bathroom, and she was permitted to wear only male clothing or unisex clothing, despite her doctor's orders that she should live at least one year as a woman before she could undergo surgery. Curiously enough, unisex clothing was defined as "blouses, sweaters, slacks, flat shoes, nylon stockings, earrings, lipstick, foundation, and clear nailpolish."²⁶⁶ Doe was instructed, however, not to wear "obviously feminine clothing such as dresses, skirts, or frilly blouses."²⁶⁷

Both compliance with and enforcement of Boeing's "transsexual dress code" was, needless to say, somewhat difficult given the vagueness of the standards "unisex" and "obviously feminine."²⁶⁸

²⁶² See *supra* note 48 and accompanying text.

²⁶³ No. 80-C-408, 1980 WL 334 (E.D. Wis. Dec. 10, 1980).

²⁶⁴ *Id.* at *3 (emphasis added); see also *Kirkpatrick v. Seligman & Latz, Inc.*, 636 F.2d 1047, 1049 (5th Cir. Unit B Feb. 1981) (dismissing a 42 U.S.C. § 1985 complaint brought by a pre-operative transgendered woman when she was fired for refusing to dress in accordance with her biological gender).

²⁶⁵ 846 P.2d 531 (Wash. 1993).

²⁶⁶ *Id.* at 533.

²⁶⁷ *Id.*

²⁶⁸ The policy applied not only to Doe but to Boeing's eight other transgendered employees.

Boeing, however, adopted the following standard by which to measure Doe's compliance: "her attire would be deemed unacceptable when, in the supervisor's opinion, her dress would be likely to cause a complaint were Doe to use a men's room at a Boeing facility."²⁶⁹ Recall that she was not permitted to use the women's room. She, therefore, was faced with the problem of presenting herself in a way that was feminine, as per her doctor's orders, but not so feminine that she could pass as a woman, thereby offending her male coworkers in the men's room.

Doe successfully walked this gender line for some time. One day, however, she decided to test the boundaries of the policy. She wore an outfit that previously had been approved by her supervisor but accessorized it with a set of pink pearls. Boeing immediately fired her for changing her attire "from unisex to 'excessively' feminine."²⁷⁰

On these facts, the court determined that Boeing had not discriminated against Doe on account of her disability because they had reasonably accommodated her condition.²⁷¹ While the legal standards imposed upon a disability discrimination plaintiff are somewhat different from those imposed in a sex discrimination case, it is reasonable to assume from the court's handling of Doe's complaint that she would have fared no better under sex discrimination standards for relief. In general, the court regarded Boeing's "transsexual dress code" as a reasonable response to the needs of the plaintiff, and the court did not question either the legitimacy or the coherence of a policy that distinguished between unisex and excessively feminine clothing or that used the "offended patron in the men's room" standard of compliance. Indeed, that Doe was placed in the difficult position of having her deliberate deviation from "normal masculinity" policed by "real men" in the most protected and exclusive site of masculinity—the men's room—certainly illustrated the degree to which both Boeing and the law refused to question the legality or normativity of enforced gender rules. The transgendered woman, recall, is a person who directly challenges the immutability of sexed bodies. She challenges the notion that biologically male persons must or should be masculine and that healthy, normal gender identity is the acceptance of one's

²⁶⁹ Doe v. Boeing, 846 P.2d at 533-34.

²⁷⁰ *Id.* at 534.

²⁷¹ *See id.* at 536.

gender as a sociopsychological construction that parallels acceptance of one's biological sex.

On the criminal side of the law, in the early 1970s, a number of midwestern cities witnessed a spate of sumptuary law prosecutions. In *City of Columbus v. Zanders*,²⁷² a biological male was arrested on three different occasions. The first time, he wore "a short dress[,] . . . panty hose, women's shoes, women's coat, jewelry, women's purse, and a wig."²⁷³ The second time, he wore "a woman's black wig, lipstick, eye shadow, very short light blue dress, shoulder strap pocketbook, several bracelets on each arm, a long chain around the neck, stockings, shoes and breasts."²⁷⁴ On the third occasion he wore "makeup, eyelashes, a purse, a bra, a girdle, women's shoes, panty hose, a long wig that hung over his face, and an 'artificial chest.'"²⁷⁵

On the second and third arrest, Zanders was convicted of violating a provision of the Columbus City Codes which stated that "[n]o person shall appear upon any public street or other public place . . . in a dress not belonging to his or her sex, or in an indecent or lewd dress."²⁷⁶ Rejecting Zanders's argument that the statute was unconstitutional on its face, the court found that "[w]hatever the purpose, the ordinance must be construed as prohibiting a person from disguising his or herself as a member of the opposite sex or, in other words, prohibiting a person from impersonating a member of the opposite sex."²⁷⁷

Zanders argued that the statute should not be applied to her as she was a pre-operative transgendered woman and her dress represented a part of her therapy. In an amazing display of taxonomical slippage between transsexuality, transvestism, and homosexuality, the court rejected this assignment of error as well.

[T]he sex object of the transvestite is female while the sex object for the transsexual is a male, as is the sex object of the homosexual. We must reject the defense argument on the grounds that our laws must be uniformly applied, and that no class of persons has privileges not enjoyed by the general public. To hold otherwise would be to place a transsexual, if defendant be one as

²⁷² No. 74AP-88 (Ohio Ct. App. Oct. 22, 1974) (LEXIS, States library, Ohio file).

²⁷³ *Id.* at *3.

²⁷⁴ *Id.* at *4.

²⁷⁵ *Id.* at *5.

²⁷⁶ COLUMBUS, OHIO, MUN. CODES § 2343.04 (1954-1972).

²⁷⁷ *Zanders*, at *6 (quoting *City of Columbus v. Arnold*, Nos. 72AP-146, 72AP-147, 72AP-148 (Ohio Ct. App. Sept. 12, 1972)).

he maintains, above all other persons. . . . In other words, a homosexual person has no constitutional rights not shared by the public in general. The constitutional rights that a homosexual has are possessed because he is a person and not because he is a homosexual.²⁷⁸

For the *Zanders* court, the "improper dress" statute served as a "juridical dike" that prevented the crime of categorical seepage. Or, as Marjorie Garber has observed: "Both the energies of conflation and the energies of clarification and differentiation between transvestism and homosexuality thus mobilize and problematize, under the twin anxieties of *visibility* and *difference*, all of the culture's assumptions about normative sex and gender roles."²⁷⁹ After all, "[c]lothing . . . often hides the sex but displays the gender,"²⁸⁰ and "gender attribution, rather than 'gender' differentiation, is what concerns those who fear change."²⁸¹

In *City of Cincinnati v. Adams*,²⁸² however, an Ohio trial court took a different view of Cincinnati's sumptuary ordinance, which prohibited any person from appearing in public "in a dress or costume not customarily worn by his or her sex . . . when such dress . . . is worn with the intent of committing any indecent or immoral act."²⁸³

In *Adams*, the defendant had been arrested in a blouse, brassiere, women's slacks, a woman's wig, and earrings, while carrying a purse. The court rejected the defendant's claim that one's dress was a form of expression protected by the First Amendment because there had been no testimony to the effect that Adams's attire expressed a philosophy or ideal.²⁸⁴ In so doing, the court ignored the obvious: that an overarching ideology or philosophy was necessary to justify the norm of certain clothing *belonging* to one or another sex.

The court did find, however, that the sumptuary ordinance was both overbroad and vague. The law was overbroad because it could be read to prohibit behavior in the "privacy of one's home,"²⁸⁵ and "goes so far as to [apply to] the woman who wears

²⁷⁸ *Id.* at *9.

²⁷⁹ GARBER, *supra* note 249, at 130.

²⁸⁰ LORBER, *supra* note 9, at 22.

²⁸¹ KESSLER & MCKENNA, *supra* note 25, at 167.

²⁸² 330 N.E.2d 463 (Ohio Mun. Ct. 1974).

²⁸³ *Id.* at 464.

²⁸⁴ *See id.* at 465.

²⁸⁵ *Id.* at 466.

one of her husband's old shirts to paint lawn furniture, the trick-or-treater, the guests at a masquerade party, or the entertainer."²⁸⁶ Further, employing a rather curious logic, the court determined that the intent requirement set an "unascertainable standard" since the prohibition could apply to "a female Christian Scientist wearing a tie and pants suit who enters a physician's office seeking treatment."²⁸⁷ Presumably, sartorial fraud for the purposes of escaping the norms of one's religion is permissible, while sartorial fraud for the purposes of escaping larger societal gender norms is not.

Finally, the court attempted to mitigate any damage it might have done to the sartorial order by noting that, notwithstanding the infirmity of the cross-dressing ordinance, transvestites could still be arrested for "soliciting, importuning, pandering obscenity, public indecency, trespassing, or soliciting rides or hitchhiking."²⁸⁸ Yet, the necessary association of cross-dressing with these types of crimes conflicts with the court's express holding that wearing "the wrong clothing" is not in and of itself perverted or deviant. Clearly the court believed that transvestites were gender outlaws, otherwise why assume a nexus between one's clothing and these sorts of "morality crimes" rather than securities fraud, speeding, or tax evasion?

Only one year after *Zanders*, the Ohio Supreme Court considered a facial challenge to the Columbus "improper dress" ordinance in *City of Columbus v. Rogers*.²⁸⁹ Declining to recite the minutiae of the defendant's attire at the time of arrest, the court found that

[m]odes of dress for both men and women are historically subject to changes in fashion. At the present time, clothing is sold for both sexes which is so similar in appearance that "a person of ordinary intelligence" might not be able to identify it as male or female dress. In addition, it is not uncommon today for individuals to purposely, but innocently, wear apparel which is intended for wear by those of the opposite sex.²⁹⁰

By effectively invalidating the statute for its failure to include a specific scienter requirement, the court distinguished between those

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* (statutory citations omitted).

²⁸⁹ 324 N.E.2d 563 (Ohio 1975).

²⁹⁰ *Id.* at 565.

who cross-dress for the purpose of passing as something they are not²⁹¹ and those who cross-dress "innocently" because it has become fashionable or convenient,²⁹² but who have no intention of blurring sexual boundaries.

The ubiquity of efforts to criminalize persons who are caught wearing clothing that does not belong to their sex represents something of an overreaction to what might otherwise be considered minor, victimless crimes. David Hume observed that often when a social rule is violated, our outrage seems to exceed greatly the particular offense in the individual case. This dynamic can be explained, observed Hume, by the recognition that the minor violation often carries the greater weight of the value of the more general principle which was violated in the particular case.²⁹³ In the sumptuary cases, the individual violation is usually quite minor, while the investment in the general system of gender differences is quite great. Therefore *any* violation of the gender laws creates great anxiety and offense, thereby provoking the full opprobrium of the criminal law.

Sumptuary laws and bathroom signs, in the end, serve the same function. They create and reinforce an official symbolic language of gendered identity that rightfully belongs to either sex. "Real women" and "real men" conform to the norms; the rest of us are deviants. Curiously, in life and in law, bathrooms seem to be the site where one's sexual authenticity is tested. When a woman wearing pants approaches the women's room sign depicting a stick figure wearing a skirt, we don't attribute the symbolic gap between body and sign to any inarticulateness on the part of the sign but to the individual woman's failure to conform to a legible and coherent norm. Again, the world must conform to the word, not the other way around.

²⁹¹ In these instances, courts discuss the issue as a matter of fraud. Cf. *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966) (holding that a transsexual's desire to change the sex designation on his birth certificate from male to female "is outweighed by public interest for protection against fraud"). One wonders what the *Rogers* court would say about the Christian Scientist who dresses in disguise in order to visit a doctor's office.

²⁹² Such as when painting lawn furniture. See *City of Cincinnati v. Adams*, 330 N.E.2d 463, 466 (Ohio Mun. Ct. 1974).

²⁹³ See DAVID HUME, *Book 3 of Morals*, in *TREATISE OF HUMAN NATURE* 399 (L.A. Selby-Bigge ed., Oxford 1896). I thank Thomas Nagel for bringing this principle to my attention.

IV. HISTORY OF SEXUAL CATEGORIES

[Y]ou see a star in the evening and it's called 'Hesperus'. . . . We see a star in the morning and call it 'Phosphorus.' Well, then, in fact we find that it's not a star, but is the planet Venus and that Hesperus and Phosphorus are in fact the same. So we express this by 'Hesperus is Phosphorus.' Here we're certainly not just saying of an object that it's identical with itself. This is something that we discovered.²⁹⁴

Our contemporary notion of the sexes is that women and men are different kinds of human beings, so different physically as to be like two kinds of human species that are at once the opposite and the contradiction of one another.²⁹⁵ Either a person is a woman or a man; there are "no three ways about it."²⁹⁶ Yet, how do we have the confidence to say that this conception of the logical relationship between "the sexes" is prepolitical, natural and timeless?

Imagine for a moment four people sitting around a table upon which has been placed a drinking glass. Each person is asked to describe the shape of the top of the glass. Each person independently responds, "Round, of course." The questioner pushes a little. "But is round what you actually see?" "Well, no, I see it as oval, but it's real shape is round," they all concur.

Every day, in life's most trivial and momentous moments, we interpret our experiences in ways that create not only facts, but meaningful facts. Most often, this is accomplished through the acquisition and internalization of publicly agreed upon points of view or reference. So, we all agree that the glass's true shape is determined from the perspective of an idealized point of view directly above the glass. Our assent to the use of such an idealized

²⁹⁴ KRIPKE, *supra* note 225, at 28-29.

²⁹⁵ An opposite is not the same thing as a contradiction. Hot and cold may be opposites, but they are not one another's contradictions. To be contradictions, two entities must be the negation of one another, such as True and False. According to the law of the excluded middle—a principle that applies to contradictions, but not to opposites—no middle ground can exist between the two entities in question. Thus, hot and cold cannot be contradictions because the qualities warm, tepid, and cool exist between hot and cold. See Alonzo Church, *Law of Excluded Middle*, in DICTIONARY OF PHILOSOPHY 102 (Dagobert D. Runes ed., 1942) (stating that the law of the excluded middle, or *tertium non datur*, is given by traditional logicians as "A is B or A is not B" . . . usually identified with the theorem of the propositional calculus, $p \vee \neg p$, to which the same name is given").

²⁹⁶ Anonymous v. Mellon, 398 N.Y.S.2d 99, 100 (Sup. Ct. 1977) (noting that "with respect to gender, a person was either male or female").

point of view allows us to answer the question in an intelligible way, and on a deeper level, it makes a right answer possible. That is, our assent creates truth conditions. It determines what it would mean to get the answer right.

For the most part, we have so thoroughly internalized the points of view that allow us to "get factual questions right" we no longer notice that right answers frequently contradict our direct observations of the world. What if we were to consider, if only for a moment, that sex is to bodies just as shape is to drinking glasses? What if we could truthfully say from an idealized point of view that "she is a woman" and "this is what it means to be a woman," and have implicit in the truth conditions of both of these statements: "She is not a man"? To do so would require that we place in the foreground the institutional point of view that both produces a sexual fact and determines what it means to get questions about a person's sexual identity right.

This is not to say that we should ignore the body. Instead, "the body can no longer be seen as a biological given which emits its own meaning. It must be understood instead as an ensemble of potentialities which are given meaning only in society."²⁹⁷

Almost 2400 years ago Plato told a story about three sexes, each one a pair. One consisted of two women, one of two men, and one of a man and a woman. In order to decrease their power and, at the same time, increase the number of humans giving the gods offerings, Zeus cut each pair apart. Forever separated, all individual humans are destined to devote their lives on earth to a search for their other half with whom they can (re)merge in love. "And so, gentlemen, we are like pieces of the coins that children break in half for keepsakes—making two out of one, like the flatfish—and each of us is forever seeking the half that will tally with himself."²⁹⁸

The dominant view of sexual identity, however, from Plato's time through the Enlightenment was quite different from the story Plato used for rhetorical advantage in the *Symposium*. For centuries the male body was the exclusive subject of scientific inquiry. Indeed, it was not until 1759 that a female skeleton appeared in anatomy books to distinguish the female body from the male.²⁹⁹

²⁹⁷ JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 122-23 (1985).

²⁹⁸ PLATO, *Symposium*, in *THE COLLECTED DIALOGUES OF PLATO* 526, 544 (Edith Hamilton & Huntington Cairns eds., 1961).

²⁹⁹ See LAQUEUR, *supra* note 208, at 10.

Prior to the Enlightenment, the accepted view was that men and women were merely variations on the same human body, a human body which manifested its perfection in the male form. Sexual difference was therefore conceived as a matter of degree and gradations on one basic type. "The more Renaissance anatomists dissected, looked into, and visually represented the female body, the more powerfully and convincingly they saw it to be a version of the male's."³⁰⁰

Thus conceived, the male body represented the manifestation of a kind of metaphysical perfection located at the apex of an axis that placed the female body, an inferior simulacrum to that of the male, lower down the evolutionary line.

[T]here was but one sex whose more perfect exemplars were easily deemed males at birth and whose decidedly less perfect ones were labeled female. The modern question, about the "real" sex of a person, made no sense in this period, not because two sexes were mixed but because there was only one to pick from and it had to be shared by everyone . . .³⁰¹

In this schema, it was understood in the fourth century that female genitals merely mirrored that of the male, except "theirs are inside the body and not outside it."³⁰² The vagina, therefore, was depicted in sixteenth-century anatomy books as an inverted penis, and the ovaries were seen as recessed testicles: "[T]he neck of the uterus is like the penis, and its receptacle with testicles and vessels is like the scrotum."³⁰³

From this perspective, which Thomas Laqueur terms "the one-sex model,"³⁰⁴ sexual difference was viewed vertically/isomorphically, in contrast with the contemporary two-sex paradigm which regards sexual difference horizontally/dimorphically. Against this backdrop, Laqueur recounts numerous stories from the Middle Ages to illustrate how bodies did strange things when women acted like men and men acted like women.³⁰⁵ He concludes that

³⁰⁰ *Id.* at 70.

³⁰¹ *Id.* at 124.

³⁰² *Id.* at 4 (quoting NEMESIUS OF EMESA, ON THE NATURE OF MAN 369 (William Tefler ed., 1955)).

³⁰³ *Id.* at 78 (quoting JACOPO BERENGARIO DA CARPI, A SHORT INTRODUCTION TO ANATOMY 80 (L.R. Lind trans., 1959)). See generally *id.* at 79-96 (discussing the history of the representation of the female genital anatomy as an "inferior version of the male's").

³⁰⁴ *Id.* at 8.

³⁰⁵ See *id.* at 122-27.

in these pre-Enlightenment texts, and even some later ones, *sex*, or the body, must be understood as the epiphenomenon, while *gender*, what we would take to be a cultural category, was primary or "real." Gender—man and woman—mattered a great deal and was part of the order of things; sex was conventional, though modern terminology makes such a reordering nonsensical.³⁰⁶

What would be regarded as a kind of metaphysical slippage from our modern point of view was rendered possible by virtue of the alignment of the sexes upon a continuum within a culture in which national, social, and class standing were understood as anything but mutable.

Yet, sometime in the eighteenth century the one-sex model was abandoned, and the body was no longer understood to display hierarchy, but rather incommensurable differences. No longer was the vagina considered a failed phallus. Under the two-sex model, the vagina became one of the essential characteristics that affirmatively determined female identity.

One might expect that this radical change in the sexual paradigm was due to advances in anatomical research and the elevation of science and reason over religion and superstition. At one time the world was *believed* to be flat, now we *know* it to be round. So too with sex: the shift in paradigm would be expected to reflect new knowledge about human sexual kinds.

However, the evidence to which Laqueur points provides a different explanation for the shift in paradigm: politics.

There were endless new struggles for power and position in the . . . enlarged public sphere of the eighteenth and particularly the postrevolutionary nineteenth centuries: between and among men and women; between and among feminists and antifeminists. When, for many reasons, a preexisting transcendental order or time-immemorial custom became a less and less plausible justification for social relations, the battleground of gender roles shifted to nature, to biological sex. Distinct sexual anatomy was adduced to support or deny all manner of claims in a variety of specific

There are numerous accounts of men who were said to lactate and pictures of the boy Jesus with breasts. Girls could turn into boys, and men who associated too extensively with women could lose the hardness and definition of their more perfect bodies and regress into effeminacy. Culture, in short, suffused and changed the body that to the modern sensibility seems so closed, autarchic, and outside the realm of meaning.

Id. at 7.

³⁰⁶ *Id.* at 8.

social, economic, political, cultural, or erotic contexts. . . .
 Whatever the issue, the body became decisive.³⁰⁷

The analogy, therefore, to flat-earthers does not work. All the evidence that was produced to prove the fact of sexual dimorphism had always been there; bodies had not changed nor had science advanced in a manner that revealed previously unknown fundamental facts about human anatomy.³⁰⁸ Rather, the gender schema had changed. Previously anomalous evidence that had been ignored because it did not conform to the paradigm suddenly was cited to uphold the new paradigm. Our idealized point of view had shifted, thereby causing a shift in the meaning we attributed to the data before us. And so, the notion that "there are some real differences between men and women"³⁰⁹ was inscribed as truth within the new "normal science" that regarded bodies as essentially male or female.³¹⁰

Imagine again for a moment, that we are all standing before April Ashley, and we are asked, what sex is this person? What facts will count? What will those facts mean? Who gets to decide? The answers to each of these questions are largely predetermined by the dimorphic logic of sexual difference. That logic assumes a universe populated only by two different and opposite kinds of beings. By contemporary standards, the right answer is either male or female. To suggest a more nuanced answer to the question is simply illogical.

³⁰⁷ *Id.* at 152.

³⁰⁸ One significant change in the lens of science that did produce a radical change in the sexual paradigm was the "discovery" in the mid-nineteenth century that, unlike the male, the female orgasm was not necessary for conception. Something quite important happened in response to this discovery: "[W]omen's sexual nature could be redefined, debated, denied, or qualified. And so it was of course. Endlessly." *Id.* at 3. And so it continues to be.

³⁰⁹ *Faulkner v. Jones*, 858 F. Supp. 552, 563 (D.S.C. 1994), *aff'd*, 51 F.3d 440 (4th Cir. 1995).

³¹⁰ "Normal science" is a term originating with Thomas Kuhn in *The Structure of Scientific Revolutions*, which is contrasted with "abnormal discourse." See KUHN, *supra* note 109, at 10. "'Normal' science is the practice of solving problems against the background of a consensus about what counts as a good explanation of the phenomena and about what it would take for a problem to be solved." RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 320 (1979). By contrast, "abnormal discourse" is undertaken according to unconventional or revolutionary accounts of what it would mean to answer scientific questions correctly. See *id.*

V. THE ERROR OF DISAGGREGATING SEX AND GENDER IN MORE CENTRAL CASES

The marginal cases show that the error of contemporary sexual equality jurisprudence is its inclination to disaggregate sex and gender, both as a matter of fact and as a matter of fairness. Yet this flaw in the doctrine does not merely represent an interesting yet inconsequential distortion at the margins of sexual intelligibility. Rather, it extends to far more routine sex discrimination cases at the center.

A. *Sex and Gender at Work*

Between 1970 and 1980, when the second wave of feminism was at its apex and the threat of unisex bathrooms was successfully used to defeat the ERA,³¹¹ the federal courts witnessed a spate of Title VII litigation over the legitimacy of workplace hair length rules that set different standards for men and women. Recall that at that time long hair for men was quite fashionable.

In *Fagan v. National Cash Register Co.*,³¹² one of the first such cases to reach an appellate court, a man claimed that his employer had discriminated against him because of his sex when he was fired for violating a workplace rule that required male employees to keep their hair neatly trimmed and cut above the collar. The court rejected the plaintiff's sex discrimination argument, finding that "[c]learly Fagan had not been denied employment because he was a male,"³¹³ and that one's choice in hair style could hardly be considered immutable. The court, therefore, upheld the employer's grooming regulations as a legitimate exercise of managerial

³¹¹ Reflecting this fear, several states have included express language in their public accommodation laws excluding the application of sex discrimination protections to bathrooms. *See, e.g.*, ILL. COMP. ANN. STAT. ch. 775, § 5/5-103 (Smith-Hurd 1993) ("Nothing in this Article shall apply to . . . [a]ny facility, as to discrimination based on sex, which is distinctly private in nature such as restrooms, shower rooms, bath houses, health clubs and other similar facilities . . ."); IND. CODE § 22-9-1-3(p)(1) (1986) ("[I]t shall not be a discriminatory practice to maintain separate restrooms . . ."); KAN. STAT. ANN. § 44-1009(c)(1) (1993) (stating that discrimination is prohibited "except where a distinction because of sex is necessary because of the intrinsic nature of such accommodation"); MICH. COMP. LAWS ANN. § 750.146 (West 1991) ("Rooming facilities at educational, religious, charitable or non-profit institutions or organizations, and restrooms and locker room facilities in places of public accommodation may be separated according to sex.").

³¹² 481 F.2d 1115 (D.C. Cir. 1973).

³¹³ *Id.* at 1121.

discretion, particularly with regard to employees who have contact with the public.³¹⁴

In *Willingham v. Macon Telegraph Publishing Co.*,³¹⁵ the Fifth Circuit was presented with the same claim, but this time under the "sex-plus" paradigm of sex discrimination.³¹⁶ Even under this standard, however, the plaintiff was unsuccessful. "[D]istinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment *opportunity* in violation of [Title VII]."³¹⁷ Numerous other federal³¹⁸ and state³¹⁹ courts have rejected

³¹⁴ See *id.* at 1125.

³¹⁵ 507 F.2d 1084 (5th Cir. 1975) (en banc).

³¹⁶ As defined by Schlei and Grossman:

"Sex plus" refers to a situation where an employer classifies employees on the basis of sex *plus* another characteristic [such as marriage, race, or appearance]. In such cases the employer does not discriminate against the class of men or women as a whole, but rather disparately treats a subclass of men or women.

BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 403 (2d ed., 1983); see also *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969), *vacated and remanded*, 400 U.S. 542 (1971).

³¹⁷ *Willingham*, 507 F.2d at 1092.

³¹⁸ See, e.g., *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (holding that an employer's grooming code, which limited the manner in which men's hair could be cut, did not violate the civil rights statute prohibiting sex discrimination in employment); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685, 685 (2d Cir. 1976) (holding that an employer who required short hair on men but not on women did not violate the Civil Rights Act of 1964); *Earwood v. Continental S.E. Lines*, 539 F.2d 1349, 1350 (4th Cir. 1976) (same); *Knott v. Missouri Pac. R.R.*, 527 F.2d 1249, 1249 (8th Cir. 1975) (same), *aff'g* *Wamsganz v. Missouri Pac. R.R.*, 391 F.Supp. 306, 307 (E.D. Mo. 1975); *Baker v. California Land Title Co.*, 507 F.2d 895, 896 (9th Cir. 1974) (same), *cert. denied*, 422 U.S. 1046 (1975); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (same); *Thomas v. Firestone Tire & Rubber Co.*, 392 F. Supp. 373, 375 (N.D. Tex. 1975) (same); *McConnell v. Mercantile Nat'l Bank*, 389 F. Supp. 594, 595 (N.D. Tex. 1975) (same); cf. Peter F. Ziegler, Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965, 973-81 (1973) (indicating that, as of early 1973, federal district courts were split on whether employer grooming regulations limiting the length of male employees' hair, without placing similar restrictions on female employees, violated Title VII, and that there had been no appellate decisions on point).

³¹⁹ See, e.g., *Pik-Kwik Stores v. Commission on Human Rights & Opportunities*, 365 A.2d 1210, 1212 (Conn. 1976) (holding that an employer's grooming code that restricted males, but not females, to collar-length hair did not unlawfully discriminate on the basis of sex); *Indiana Civil Rights Comm'n v. Sutherland Lumber*, 394 N.E.2d 949, 957 (Ind. Ct. App. 1979) (holding that a private employer's grooming policy that forbade moustaches was not discriminatory to the extent that it denied equal employment opportunities); *Planchet v. New Hampshire Hosp.*, 341 A.2d 267, 268 (N.H. 1975) (holding that enforcement of a differential hair length standard between male and female employees did not constitute discrimination because of sex); Page

similar sex discrimination challenges to sex-based grooming standards, even as recently as 1992.³²⁰

The haircut cases formed the jurisprudential speedbump for the next series of cases that sought to connect the signs of gender to sex discrimination. In *Lanigan v. Bartlett & Co. Grain*,³²¹ a female secretary was fired for wearing a pantsuit to work in violation of office policy. Finding no Title VII violation, the court held that the "plaintiff's affection for pantsuits is not an 'immutable characteristic,'"³²² that "there is no principled distinction between the rationale of the 'haircut' cases and this case,"³²³ and that "her contention that the policies perpetuate a stereotype is simply a matter of opinion."³²⁴

In a slight variation on what was becoming a pattern in the Title VII boundary wars, the Fifth Circuit held in *Smith v. Liberty Mut. Ins. Co.*³²⁵ that a man who was refused employment because the interviewer considered him effeminate had no recourse under Title VII. "Here the claim is not that Smith was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate'."³²⁶ Relying upon the authority of *Willingham*,³²⁷ the court affirmed the dismissal of Smith's complaint.³²⁸ For these courts, social norms with regard to hair styles, clothing, or gender role identity were not appropriate targets for sex discrimination statutes.³²⁹

Airways v. New York State Div. of Human Rights, 376 N.Y.S.2d 32, 34 (App. Div. 1975) (same), *aff'd*, 352 N.E.2d 140 (1976); *Albertson's, Inc. v. Washington State Human Rights Comm'n*, 544 P.2d 98, 99 (Wash. Ct. App. 1976) (holding that a state discrimination statute did not invalidate a private employer's reasonable hair length rule for male employees).

³²⁰ See *Bedker v. Domino's Pizza*, 491 N.W.2d 275 (Mich. Ct. App. 1992).

³²¹ 466 F. Supp. 1388 (W.D. Mo. 1979).

³²² *Id.* at 1391.

³²³ *Id.* at 1392.

³²⁴ *Id.*; see also *Fountain v. Safeway Stores*, 555 F.2d 753, 756 (9th Cir. 1977) (finding no Title VII violation where a man was fired for refusing to wear a tie).

³²⁵ 569 F.2d 325 (5th Cir. 1978).

³²⁶ *Id.* at 327.

³²⁷ *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc).

³²⁸ See *Smith*, 569 F.2d at 27.

³²⁹ See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 621 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) ("Title VII was [not] designed to bring about a magical transformation in the social mores of American workers.").

In *Carroll v. Talman Federal Savings and Loan Association*,³³⁰ the Seventh Circuit clarified the jurisprudential significance of gender in a way that brought to the foreground deeply held beliefs about sex and gender that remain intact today. In *Carroll*, a class of women employees challenged an employer dress policy requiring that female employees wear a uniform consisting of color-coordinated skirts or slacks and either a jacket, tunic, or vest. Male employees, on the other hand, could wear business suits. The employer justified this clothing policy on the assumption that in the absence of a dress code, competition among female employees to be fashionable would compromise their judgment about proper business attire.³³¹

This justification was found by the court to "reveal that [the policy] is based on offensive stereotypes prohibited by Title VII."³³² The court declined, however, to strike down all workplace personal appearance rules that differentiated between men and women, on the theory that "[s]o long as they find some justification in commonly accepted social norms and are reasonably related to the employer's business needs, such regulations are not necessarily violations of Title VII even though the standards prescribed differ somewhat for men and women."³³³

This notion, that employers, courts, or anyone for that matter, can, or should, distinguish in any principled manner between impermissible cultural stereotypes and permissible commonly accepted social norms underlies much of our modern equality jurisprudence. In fact, it can be understood as the sociological corollary to the more scientific postulate adopted by courts when they distinguish real from constructed or unauthentic women and real from stereotypical differences between men and women.

The standard promulgated by the Seventh Circuit in *Carroll* provides an interesting way to understand the gender-based Title VII cases that have followed, despite, or perhaps because of, its apparent lack of coherence. For instance, when female employees have been required to wear sexy uniforms, courts have found a

³³⁰ 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

³³¹ See *id.* at 1033 n.17 ("What is offensive is the compulsion to wear employer-identified uniforms and the assumption on which the employer openly admits that rule is based: that women cannot be expected to exercise good judgment in choosing business apparel, whereas men can.").

³³² *Id.* at 1033.

³³³ *Id.* at 1032. "[W]e do not view the recognition of different dress norms for males and females to be offensive or illegal stereotyping." *Id.* at 1033 n.17.

violation of Title VII because the uniforms clearly fall outside the ambit of commonly accepted social norms.³³⁴ So too with employer grooming standards that required female employees to wear smocks³³⁵ or uniforms³³⁶ when no such requirements were imposed upon male employees, as was the case in *Carroll*.

Although it is easy to dismiss these cases as representing old and outdated views about sex roles, the reasoning they employ is alive and well today. As recently as 1990, an Oregon appellate court relied upon these early cases when it denied a man's sex discrimination claim after he had been discharged for wearing an earring in violation of a grooming rule that prevented male employees from wearing facial jewelry while on the job.³³⁷

Similarly, in *Hines v. Caston School Corp.*,³³⁸ a ten-year-old male student was suspended from school for wearing a gold stud earring in violation of the school's dress code that stated: "Students are not to wear jewelry or other attachments not consistent with community standards" ³³⁹ Ruling on the plaintiff's due process challenge to the rule as applied, which banned boys from wearing earrings, the court noted evidence presented that "under local community standards of dress, earrings are considered female attire, and that

³³⁴ See, e.g., *Marentette v. Michigan Host, Inc.*, 506 F. Supp. 909, 911-12 (E.D. Mich. 1980) (distinguishing the haircut cases and holding that sexually provocative waitress uniforms violate Title VII); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 608-09 (S.D.N.Y. 1981) (distinguishing the haircut and dress code cases and finding that a female lobby attendant could not be required to wear a uniform that exposed her thighs and portions of her buttocks). But see *id.* (stating that "[t]he court does not question an employer's prerogative to impose reasonable grooming and dress requirements on its employees, even where different requirements are set for male and female employees").

³³⁵ See, e.g., *O'Donnell v. Burlington Coat Factory Warehouse*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) ("In contrast to the 'hair length' standards for male employees, the smock requirement finds no justification in accepted social norms.").

³³⁶ See, e.g., *EEOC v. Clayton Fed. Sav. & Loan Ass'n*, 25 Fair Empl. Prac. Cas. (BNA) 841, 842 (E.D. Mo. 1981) ("The case at bar is unlike the 'grooming cases,' however, in that more than a minimum standard of appearance is required.").

³³⁷ See *Lockhart v. Louisiana-Pac. Corp.*, 795 P.2d 602, 604 (Or. Ct. App. 1990).

Plaintiff advances the argument that employer may not prohibit him from wearing an earring, if it allows female employees to wear jewelry. As his argument is cast, plaintiff cannot demonstrate impermissible discrimination unless every difference in dress or grooming requirements for men and women under an employer's rules is impermissibly discriminatory.

Id.

³³⁸ 651 N.E.2d 330 (Ind. Ct. App. 1995).

³³⁹ *Id.* at 331.

the earring rule discourages rebelliousness."³⁴⁰ Accordingly, the earring ban could be found to serve a rational and legitimate purpose related to the educational function of the school.³⁴¹ Further, with regard to the plaintiff's equal protection challenge to the dress code, the court stated that "[t]he enforcement of community standards of dress to instill discipline has been shown to be a legitimate educational function."³⁴² Therefore, the dress code was substantially related to a legitimate government objective.³⁴³ Here, as in the haircut and dress code cases that preceded *Hines*, commonly accepted social norms about how men and women should exhibit their gender are not found to run afoul of either statutory or constitutional protections against discrimination based on sex.

These sartorial Title VII cases demonstrate the law's commitment to normalizing and objectifying the cultural value that there is a right way to "do one's sex." Yet, it is difficult to reconcile cases which enforce a standard of "commonly accepted social norms,"³⁴⁴ thus perpetuating the notion that men are naturally masculine and women are naturally feminine, with a legislative mandate intended "to strike at the entire spectrum of disparate treatment of men and women"³⁴⁵ resulting from sex stereotypes.

B. Sexual Difference and Military Education

Recent litigation challenging the legitimacy of all-male state-run military colleges in South Carolina and Virginia also illustrates the error of disaggregating sex and gender in discrimination cases. The courts in both *Faulkner v. Jones*³⁴⁶ and *United States v. Virginia*³⁴⁷ employed a conception of what it means to be discriminated against *because of one's sex* that is typical of sexual equality jurisprudence. These cases define sex-based equality principles in terms of the

³⁴⁰ *Id.* at 335.

³⁴¹ *See id.*

³⁴² *Id.* at 336.

³⁴³ *See id.*

³⁴⁴ *Caroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1032 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

³⁴⁵ *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370 (1993) (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

³⁴⁶ 858 F. Supp. 552 (D.S.C. 1994), *aff'd as modified*, 51 F.3d 440 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3270 (U.S. 1995).

³⁴⁷ 44 F.3d 1229 (4th Cir.), *cert. granted*, 64 U.S.L.W. 3267 (U.S. 1995) (No. 94-1941).

notion that there are real, that is, objective and thereby non-normative, differences between the class of people we call women and the class of people we call men. Discrimination, from this perspective, amounts to a failure of rationality; archaic stereotypes or untrue generalizations about a class of people replace objective facts.³⁴⁸ In this sense, invidious discrimination takes up where legitimate differentiation leaves off.

When Faulkner, a female high school honor student, was refused admission to the Citadel, an exclusively male military college, a federal court found that the Citadel had discriminated against Faulkner because of her sex. Finding, as an initial matter, that women and men are created differently, Judge Houck held that

[a]ll classifications based on sex are not unconstitutional. The law recognizes that there are some real differences between men and women and permits different treatment that provides a legitimate accommodation for those differences. What the law will not allow, however, is classifications based on fixed notions, archaic and stereotypical notions, concerning the relative roles and abilities of females and males.³⁴⁹

The court went on to say that when "a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender."³⁵⁰ What follows this statement of principle is quite telling, however, with respect to the integrity of the principle itself. The court proceeded to provide an example of when separate but equal facilities for men and women are appropriate. One would expect that the court, citing only one example, would produce a particularly salient illustration of the principle as applied. Yet, as an exemplar of differentiation that does not rise to the level of discrimination, the court used

³⁴⁸ Gary Peller has similarly characterized the wrong of racism, from an integrationist perspective, as "the distortion of reason through the prism of myth and ignorance." Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 768.

³⁴⁹ *Faulkner*, 858 F. Supp. at 563. Judge Houck's language echoes that of the Fourth Circuit affirming his preliminary order enjoining the Citadel from denying admission to Faulkner: "[Males and females are] created differently. . . . Legislative distinctions based on gender may thus be justified by an important governmental interest in recognizing demonstrated differences between males and females. But intermediate scrutiny will reject regulations based on stereotypical and generalized conceptions about the differences between males and females." *Faulkner v. Jones*, 10 F.3d 226, 230-31 (4th Cir. 1993).

³⁵⁰ *Faulkner*, 10 F.3d at 232.

"separate public rest rooms for men and women."³⁵¹ The justification the court produced on behalf of the normativity, or lack thereof, of segregated public restrooms was privacy concerns:

The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different. . . . In the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.³⁵²

Yet there are no significant differences in male and female anatomy that require separate and distinct sanitary facilities. Although privacy may be an important cultural value, it is not a "real difference" of the kind courts demand when it requires that separate facilities be justified by real and demonstrative differences, as in race discrimination jurisprudence. Rather, it is a generally agreed upon cultural norm that justifies separate restrooms, and while it may be a norm that we all want enforced, it is not a real, biological difference. That separate restrooms are the best example that the Fourth Circuit could provide of separate facilities justified by real sexual differences illustrates once again that sexual differentiation takes place according to cultural gender norms, not biology.

In the end, the trial court ordered Shannon Faulkner's admission into the Citadel.³⁵³ Whatever *real* differences might exist between males and females, these differences could not be used to justify the *de jure* denial to women of the opportunity to gain from the Citadel's unique environment, which is designed to produce the "Whole Man."³⁵⁴ Following the Fourth Circuit's reasoning in

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ See *Faulkner*, 858 F. Supp. at 569.

³⁵⁴ See Susan Faludi, *The Naked Citadel*, NEW YORKER, Sept. 5, 1994, at 62, 64 ("[The freshman year] is a nine-month regimen of small and large indignities intended to 'strip' each young recruit of his original identity and remold him into the 'Whole Man.'").

On the heels of such an important legal victory for the right of women to equal educational opportunities, the plaintiff's attorneys turned their own argument on its head. When the Citadel made it clear that they planned to shave Faulkner's head on her first day of classes, in keeping with the school's tradition for all incoming first-year male students, Faulkner's attorneys returned to court and sought to have the haircut enjoined as sex discrimination. Could it be that the real differences between the sexes justify different grooming standards for male and female cadets? Faulkner's attorneys argued that "[f]orcing Ms. Faulkner to adopt a haircut that many men view as symbolizing male prowess and female degradation does nothing to provide Ms.

United States v. Virginia,³⁵⁵ the court compelled Faulkner's admission to the Citadel because there was no comparable military-style educational institution in the state of South Carolina that could provide single-sex military education for women.³⁵⁶

Faulkner was subsequently admitted to the Citadel but withdrew when she succumbed to the emotional and physical exhaustion attendant to the stress of litigating her case under conditions of tremendous hostility in South Carolina. The male cadets' elation at the announcement of Faulkner's withdrawal clearly reinforced the ethos of the institution—that only men could successfully survive the Citadel's demanding regime. This belief was fully reinforced by the failure of the lone woman cadet and was not in the least discredited by the fact that thirty male cadets also withdrew within the first few days after matriculation.³⁵⁷

In *United States v. Virginia*,³⁵⁸ the Justice Department initiated a challenge to the all-male admissions policy of the Virginia Military Institute ("VMI"), a state-run military academy quite similar to the

Faulkner with the mutual respect afforded to male cadets. . . . Instead, they seek to strip Ms. Faulkner of her hair and force her to 'become a man.'" Plaintiff Shannon Richey Faulkner's Memorandum in Support of Certain Portions of the Motion by the United States to Reconsider the August 1, 1994 Remedial Order at 6, *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994) (No. 2:93-0488-2). Similarly, the Justice Department, coplaintiff in the litigation, argued to the court that the Citadel's requirement that Faulkner shave her head would "deny her female identity." Motion of the United States for Reconsideration of Approval of Defendant's Contingency Plan and Disapproval of Plaintiff's Proposed Remedial Plan or Alternatively for Stay of Disputed Provisions of Defendant's Plan Pending Appeal at 6 n.1, *Faulkner* (No. 2:93-0433-2) [hereinafter *Faulkner* Motion]. In the first phase of the litigation, Faulkner argued that women and men should be treated equally for the purposes of admission to a state-run military college. See *Faulkner*, 858 F. Supp. at 554. Upon winning that argument, however, Faulkner maintained that she must be treated differently for some purposes not only as a matter of equality, but in order to avoid an assault on her "female identity." See *Faulkner* Motion, *supra*, at 6 n.1. The plaintiffs' instrumental use of the notion of an essential female identity that would be violated by the imposition of a particular grooming standard is a rather dangerous strategy in equality litigation. While this disaggregatory approach may have had strategic advantages, in fact it merely reinforced the idea that women cannot be masculine, or worse, that femininity is an essential aspect of female identity.

³⁵⁵ 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993).

³⁵⁶ See *Faulkner*, 858 F. Supp. at 568.

³⁵⁷ See Catherine S. Manegold, *Female Cadet Quits the Citadel, Citing Stress of Her Legal Battle*, N.Y. TIMES, Aug. 19, 1995, § 1, at 1.

³⁵⁸ 766 F. Supp. 1407 (1991), *vacated and remanded*, 976 F.2d 890 (4th Cir.), *reh'g en banc denied*, 1992 U.S. App. LEXIS 30490 (4th Cir. Nov. 19, 1992), *cert. denied*, 113 S. Ct. 2431 (1993), *on remand and motion granted*, 852 F. Supp. 421 (W.D. Va. 1994), *aff'd and remanded*, 44 F.3d 1229 (4th Cir.), *reh'g en banc denied*, 52 F.3d 90 (4th Cir.), *cert. denied*, 116 S. Ct. 281 (1995).

Citadel. On appeal, the Fourth Circuit found that "single-genderedness in education can be pedagogically justifiable"³⁵⁹ because of the "established differences in the educational needs of the two genders."³⁶⁰ The different needs identified by the court were based on expert testimony claiming that women would not respond in the same way as men to the educational methodology at VMI—an "adversative methodology" founded upon the "grating of mind and body . . . with the intended purpose of breaking individual spirit and instilling values."³⁶¹ For this reason, the Fourth Circuit permitted Virginia to set up the Virginia Women's Institute for Leadership, which provided a substantially comparable education to that at VMI, but which was methodologically different in ways which women, *qua women*, would appreciate. In the VMI and Citadel cases, the demonstrated, established, or real differences that justified separate but equal treatment of women's and men's educational needs were not in any sense biological but rather were clearly cultural in nature, reflecting and perpetuating normative gender rules.

In order to justify the need for single-sex education, the defendants in both the Citadel and VMI cases argued that women and men learn differently. In support of this proposition, both schools cited the research and writing of Carol Gilligan, the author of the highly influential *In a Different Voice*.³⁶² They argued that Gilligan's work established

that males and females develop differently, have different learning styles, and have different psychological and educational needs; that the educational programs at The Citadel and Virginia Military Institute are geared specifically to meet male developmental and educational needs; that these programs are particularly effective and provide unique benefits for both for [sic] the male students who attend and for society at large; and that introducing women into these particular settings would be counterproductive for women and would deprive men of an unique and valuable opportunity.³⁶³

³⁵⁹ *United States v. Virginia*, 976 F.2d at 897.

³⁶⁰ *Faulkner v. Jones*, 51 F.3d 440, 443 (4th Cir. 1995) (summarizing *United States v. Virginia*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 63 U.S.L.W. 3861 (U.S. May 26, 1995) (No. 94-1941)).

³⁶¹ *United States v. Virginia*, 44 F.3d at 1241.

³⁶² CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

³⁶³ Affidavit of Carol Gilligan at 2-3, *Johnson v. Jones*, Civ. No. 2:92-1674-2 (D.S.C. filed Jan. 7, 1993).

Gilligan provided an affidavit to the court in the Citadel case disavowing any endorsement of the defendants' readings of her work in both the VMI and Citadel cases:

Neither my book, *In a Different Voice*, nor my other research or writings support the defendants' position. The defendants misapprehend and misstate critical concepts discussed in my published works In particular, my observations about psychological development patterns that are generally associated with gender are not based on any premise of inherent differences between the sexes, but solely on the different nature of their experiences [M]y observations in no way support defendants' conclusions that an educational program for men designed to maximize certain ostensibly "masculine" characteristics is necessary, effective or beneficial, or that men necessarily profit from an all-male college setting. My research leads me to conclude that this is not the case.³⁶⁴

Having disavowed support for the defendants' position, Gilligan went on to criticize VMI and the Citadel's educational methodology which promoted an environment in which men allegedly thrived and women allegedly withered:

The educational program at the Citadel . . . is based on an extreme characterization—almost a caricature—of what is popularly designated as 'masculine'

. . . .

Defendants embrace and perpetuate a false male/female psychological and behavioral dichotomy and a set of sex-based stereotypes that create an unreal and unhealthy situation, or a 'psychologically noxious' environment. Indeed, I believe that recent research demonstrates that concrete harms flow to both the individual and society from such unrealistic, inaccurate and rigid sex-based descriptions and expectations.

. . . .

I see no basis in experience or psychological research to conclude that the official dedication to 'masculinity' apparent at the Citadel itself produces, as defendants claim, leadership skills or any other socially desirable personal characteristics.³⁶⁵

As Gilligan make clear, real, demonstrable sexual differences cannot be looked to to justify sexually segregated education. Rather, mutable and, she argues, harmful norms of hyperfemininity and

³⁶⁴ *Id.* at 3-4.

³⁶⁵ *Id.* at 5-7.

hypermasculinity can explain what the Citadel and VMI cases are about, as well as what they do.

The Citadel and VMI cases, certainly two of the most publicized sex discrimination cases in recent years, juxtapose notions of equality, difference, and identity in a manner that suggests today's Scylla and Charybdis of feminist jurisprudence—the on-going equality and difference debate.³⁶⁶ But they also do much more. They raise the mobius-like connection between identity and equality: the nature of the female legal subject constrains in significant ways the shape of equality jurisprudence, while at the same time our theories of equality have a powerful effect upon what it means to be a woman.

The military academy cases provide an interesting opportunity to consider the wrong of sex discrimination, not because they present a conspicuous example of *de jure* sex discrimination rendered familiar by their similarity to racial segregation cases, but because of their idiosyncrasy. The Citadel and VMI are much more than all-male educational institutions; they are artifacts dedicated to the parodic celebration of, and ritual indoctrination in, the ways of masculinity *for men*.³⁶⁷ That a woman might gain access to such an

³⁶⁶ See, e.g., Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 518 (1983) (maintaining that the traditional equal treatment conception of equality must expand to support a positive action approach to the equality problems presented by pregnancy and childbirth); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375, 377 (1980-1981) (suggesting that legislative and judicial policies should incorporate women's childbearing and breastfeeding capacities into the legal and social mainstream); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 299 (stating that postmodern theory reformulates the sameness and difference arguments to facilitate the discussion regarding which differences really matter); Williams, *supra* note 74, at 176 (suggesting that feminists are at a crisis point in their evaluation of women and the quest for equality).

³⁶⁷ Upon Shannon Faulkner's departure from the Citadel, the male cadets she left behind

"[k]nob-surfed," throwing themselves onto mattresses after a running start and sliding through puddles left from the storm. They ran in circles and chanted slogans, arms raised in victory.

An upperclassman handed out cigars. Somebody shouted, "God bless the all-male South Carolina Corps of Cadets!" One platoon sang the ditty often used by victorious sports fans to chide their vanquished opponents: "Na-na-na-na, Na-na-na-na, Hey, Hey, Goodbye."

Debbi Wilgoren, *The Citadel Reasserts Its All-Male Tradition*, WASH. POST, Aug. 20, 1995, at A3.

institution without changing its essentially masculine character presents a profound challenge to the essential virility and cultural metaphysics that epitomize the Citadel and VMI—that masculinity is the natural expression of male subjectivity.

Consequently, Shannon Faulkner's brief attendance at the Citadel is still revolutionary because it creates the cultural conditions for masculinity to be separated from maleness and be remapped onto the female body. This is a deeply radical move given the accepted cultural norm that regards masculinity as a reliable and coherent signifier of maleness and femininity a reliable and coherent signifier of femaleness. Both the Citadel and VMI cases provide an opportunity to reevaluate the entire notion of essential differences between men and women by considering what legal doctrines reinforce the notion that females cannot and should not be masculine.

If Faulkner is a heroine, her bravery should be understood not only to inspire women to learn to be "Whole Men" but also to inspire the legal imagination to question the coextensivity of sex and gender, thereby impelling Title VII to prohibit all forms of gender-based discrimination.

C. Sex Stereotyping in the Wage-Labor Market

The enduring facts of the sexual division of labor indicate, in significant part, the degree to which the cutting edge of the Title VII blade has shown itself to be something less than razor-sharp in eradicating workplace sex segregation. Despite myriad affirmative action programs and significant legal gains for women through the enforcement of antidiscrimination laws, U.S. workplaces remain grossly sex-segregated. Figures from the 1990 census reveal that one in fifty-three auto mechanics is a woman,³⁶⁸ one in fifty-eight carpenters is a woman,³⁶⁹ one in thirty-nine electricians is a woman,³⁷⁰ one in sixty-three roofers is a woman,³⁷¹ one in twenty-four construction laborers is a woman,³⁷² one in twenty welders

³⁶⁸ 936,977 men, 17,646 women. 1990 U.S. Census, *supra* note 2, job category 505).

³⁶⁹ 1,337,544 men, 23,163 women. *Id.* job category 567.

³⁷⁰ 619,358 men, 15,659 women. *Id.* job category 575.

³⁷¹ 194,098 men, 3085 women. *Id.* job category 595.

³⁷² 1,103,482 men, 46,298 women. *Id.* job category 869.

is a woman,³⁷³ and one in thirty-three loggers is a woman.³⁷⁴ Of course, the chance to be a supervisor in any of these trades is also quite bleak for women: one in one-hundred forty-six brickmasonry supervisors is a woman,³⁷⁵ one in eighty-five carpentry supervisors is a woman,³⁷⁶ and one in forty-eight plumbing supervisors is a woman.³⁷⁷

In contrast, men make up 92% of civil engineers,³⁷⁸ 89% of electrical engineers,³⁷⁹ 85% of physicists,³⁸⁰ 96% of airplane pilots or navigators,³⁸¹ 97% of firefighters,³⁸² and 87% of police officers and detectives.³⁸³ Women, on the other hand, make up 98% of kindergarten and pre-kindergarten teachers,³⁸⁴ 98.5% of family child-care providers,³⁸⁵ and 93% of dressmakers.³⁸⁶ Finally, men make up 79% of physicians³⁸⁷ and only 6% of registered nurses,³⁸⁸ 87% of dentists³⁸⁹ and only 1.6% of dental hygienists,³⁹⁰ 76% of lawyers³⁹¹ and only 1.3% of secretaries.³⁹²

Is there any biological or physical reason for the persistence of a profoundly sex-segregated labor force in this country? Of course not.³⁹³ Yet the labor force remains clearly divided between men's work and women's work despite the so-called demise of the separate spheres doctrine.

Sexual biological differences have frequently been used to explain why men and women are inclined toward, and best suited

³⁷³ 613,596 men, 30,382 women. *Id.* job category 783.

³⁷⁴ 112,076 men, 3448 women. *Id.* job category 496.

³⁷⁵ 12,880 men, 88 women. *Id.* job category 553.

³⁷⁶ 45,096 men, 529 women. *Id.* job category 554.

³⁷⁷ 20,103 men, 415 women. *Id.* job category 557.

³⁷⁸ 235,162 men, 17,646 women. *Id.* job category 053.

³⁷⁹ 420,471 men, 46,552 women. *Id.* job category 055.

³⁸⁰ 24,238 men, 3604 women. *Id.* job category 069.

³⁸¹ 105,929 men, 3897 women. *Id.* job category 226.

³⁸² 218,763 men, 5998 women. *Id.* job category 417.

³⁸³ 457,078 men, 62,106 women. *Id.* job category 418.

³⁸⁴ 5920 men, 263,410 women. *Id.* job category 155.

³⁸⁵ 6234 men, 428,409 women. *Id.* job category 466.

³⁸⁶ 6421 men, 90,837 women. *Id.* job category 666.

³⁸⁷ 465,468 men, 121,247 women. *Id.* job category 084.

³⁸⁸ 107,244 men, 1,777,885 women. *Id.* job category 095.

³⁸⁹ 135,588 men, 19,941 women. *Id.* at job category 085.

³⁹⁰ 1174 men, 71,220 women. *Id.* job category 204.

³⁹¹ 564,332 men, 182,745 women. *Id.* job category 178.

³⁹² 52,492 men, 3,966,179 women. *Id.* job category 313.

³⁹³ See Kathryn Abrams, *Social Construction, Roving Biologism, and Reasonable Women: A Response to Professor Epstein*, 41 DEPAUL L. REV. 1021, 1022-29 (1992) (arguing that sex segregation in the work force is due to gender socialization rather than biological differentiation).

to perform, different kinds of work. Richard Epstein's recent writings on the biological foundation of sexual difference clearly reflect this belief:

If there are important differences in initial individual endowments, then these should express themselves in any well-ordered work force. If women are better at some tasks than men, and men better at some tasks than women, we should expect that the search for gains from trade will lead to specialized patterns of employment. Even if men and women fall into the same broad occupational categories—say lawyers and doctors—a closer look is likely to reveal major differences in the subspecialties that they pursue. Hence, there are more female pediatricians and more male neurosurgeons, more male contingent-fee lawyers and (relatively) more female pension lawyers.³⁹⁴

So, according to Epstein, when I go to have my car repaired, and all of the mechanics who work on my car are men, while all of the secretaries who handle the paperwork are women, this ordering of the wage-labor market reflects not discrimination but the expression of individual preferences that can be traced to biological aptitude or inclination. It reflects a natural and inevitable order: no man has ever applied to be a secretary at this establishment, and only men have sought to work under the hoods of cars.

Yet, many of these supposedly normal distinctions reflect the discriminatory attitudes that the law is designed to eliminate. Under current law, however, in the absence of direct or indirect proof of intentional discrimination, the employer bears no responsibility for the sexual configuration of his two shops. Nor will this sex-based division of labor be viewed as an effect of, rather than as evidence of, the initial act of sexual differentiation.

In response to this unfortunate and enduring reality, a number of brave women have used the law to try to integrate male-dominated workplaces. Either by suing in order to gain entry into a particular job or industry,³⁹⁵ or by looking to the law to put a

³⁹⁴ Epstein, *supra* note 43, at 997 (footnote omitted). For responses to Epstein's construction of sex, identity, and equality, see David A. Strauss, *Biology, Difference, and Gender Discrimination*, 41 DEPAUL L. REV. 1007 (1992) and Abrams, *supra* note 393, at 1021; see also RICHARD A. POSNER, *SEX AND REASON* (1992).

³⁹⁵ See, e.g., *Mitchell v. Jones Truck Lines*, 754 F. Supp. 584, 592-93 (W.D. Tenn. 1990) (holding that, although the plaintiff had established that she was the victim of intentional gender discrimination, she was not entitled to a job as a truck driver because of her lack of experience); *Cobb v. Anheuser Busch*, 793 F. Supp. 1457, 1484-85 (E.D. Mo. 1990) (holding that female plaintiffs in a beer manufacturing plant had failed to establish a Title VII violation by alleging a "Protected Group" of male

stop to workplace sexual harassment once they have been hired,³⁹⁶ these women have had to endure enormous humiliation and violence, much like that visited upon Shannon Faulkner since she initiated her lawsuit to gain entry to the Citadel—all suffered in the name of furthering equality.³⁹⁷

However, unlike men who wear women's clothing, or transgendered people who seek to bring their bodies and their attire into conformity with their gendered identity, women who challenge discriminatory treatment in male-dominated professions have had their claims recognized as sex discrimination only when they enter male-dominated workplaces *as women*—that is, only so long as they do not present a challenge to the death grip that unifies sex and gender. Under this limited judicial recognition of women's sex discrimination claims, the rules of gender attribution remain intact.

The jurisprudence of sex discrimination accomplishes this through various evidentiary devices that provide specificity to the wrong of sex discrimination. *Henson v. City of Dundee*,³⁹⁸ an early hostile-environment sexual harassment case cited heavily and approvingly by the Supreme Court in *Meritor Savings Bank v. Vinson*,³⁹⁹ set forth that a sexual harassment plaintiff must prove, *inter alia*, that "but for the fact of her sex, [the plaintiff] would not have been the object of harassment," because Title VII does not apply to cases in which "the conduct complained of is equally offensive to male and female workers."⁴⁰⁰ According to this

employees who received better work assignments because both male and female employees with less seniority than those in the "Protected Group" were similarly disadvantaged).

³⁹⁶ See, e.g., *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1491, 1534 (M.D. Fla. 1991) (holding that a female employee of a shipyard had established a Title VII violation in the "hostile work environment" created by her employer, coemployees, and supervisors and granting injunctive relief).

³⁹⁷ See Faludi, *supra* note 354, at 72-73 (recounting the death threats, vandalism, and harassment that Shannon Faulkner and her family have suffered).

³⁹⁸ 682 F.2d 897 (11th Cir. 1982).

³⁹⁹ 477 U.S. 57, 63-67 (1986) (holding that the language of Title VII is not limited to "economic" or "tangible" discrimination and that thus a claim of "hostile environment" is actionable).

⁴⁰⁰ *Henson*, 682 F.2d at 904; see also *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) ("[I]nstances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment."), *cert. denied*, 481 U.S. 1041 (1987); *McKee v. Ram Products, Inc.*, No. 1:92-CV-481, 1993 U.S. Dist. LEXIS 7346, at *8-9 (W.D. Mich. Apr. 23, 1993) ("[T]he foul language that [plaintiff] claims gave rise to the hostile work environment . . . was vulgar language directed toward both sexes. . . . [N]either plaintiff as an individual nor women as a group were

formulation of the wrong of sex discrimination, the victim of harassment must have been selected by the harasser because of her biological sex, and the conduct complained of must have been harmful only to members of one biological sex. This approach therefore links both the motivation of the harasser and the specific harm experienced by the victim to the victim's biological sex. This is an absurd result. Women who are sexually harassed in the workplace do not experience discriminatory harm because of their biology but because of the manner in which sex is used to exploit a relationship of power between victim and harasser. This relationship of power is based either upon supervisor/subordinate roles or upon cultural gender roles which encourage men to use sex to subordinate women.⁴⁰¹ Biology has absolutely nothing to do with either one of these material grounds for workplace sexual harassment, yet the law insists that it does.

Since Title VII will not reach conduct that "is equally offensive to, or directed at both, men and women . . . because both female and male employees are accorded the same (albeit offensive) treatment,"⁴⁰² the conduct must be offensive to or directed exclusively at i) a woman or women, or ii) a man or men⁴⁰³ by a member of the opposite sex in order to be actionable as conduct

singled out by [defendant]."); *Linebaugh v. Sheraton Mich. Corp.*, 497 N.W.2d 585, 588 (Mich. Ct. App. 1993) (finding no sexual harassment where a sexually explicit cartoon was equally offensive to male and female employees); cf. *Bradford v. Sloan Paper Co.*, 383 F. Supp. 1157, 1161 (N.D. Ala. 1974) (dismissing a racial harassment claim because the supervisor's practices were found to be equally offensive to black and white workers). But see *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994) ("It blinks reality to claim that sexual conduct which demeans women by a man in a position of power, even if not directed at a specific woman victim, equally impacts male and female subordinates.").

⁴⁰¹ See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979) (examining sexual harassment from a social and legal perspective and arguing that it should constitute a violation of both Title VII and the Equal Protection Clause).

⁴⁰² *Halasi-Schmick v. City of Shawnee*, 759 F. Supp. 747, 752 n.2 (D. Kan. 1991) (following *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

⁴⁰³ Title VII has been interpreted on numerous occasions to apply to "discriminat[ion] against a member of a historically favored group." *EEOC v. Wendy's of Colorado Springs, Inc.*, 727 F. Supp. 1375, 1382 (D. Colo. 1989); see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII prohibits racial discrimination against whites as well as Blacks); *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986) (holding that in disparate impact cases, a member of a favored group (e.g. whites) must show background circumstances supporting the inference that a facially neutral policy is, in fact, a vehicle for discrimination).

"based upon sex."⁴⁰⁴ Conduct that affects or offends both men and women does not fall within the wrong of sex discrimination. To limit the "because of one's sex" element of a *prima facie* sex discrimination/harassment case to conduct of this kind is, of course, to conceive of sex biologically—to carve up the population into two different kinds of people, only one of which can be adversely affected by the conduct in question. Only in this way can a person show that the conduct took place "because of one's sex."⁴⁰⁵

The law's treatment of sexual harassment claims filed by women who do not act femininely in the workplace further illustrates the absurdity of disaggregating sex from gender. In these cases a biological explanation of the wrong of sex discrimination clearly fails to account for discrimination against women. The misconstruction of the wrong of sexual harassment has been taken to bar the sexual harassment claims of women who work in male-dominated workplaces and who decide to act like "one of the boys," either as a matter of survival, or because it is a role they feel comfortable playing.⁴⁰⁶ When these women suffer outrageous verbal and physical sexual harassment from their coworkers, courts find that they have not been sexually discriminated against because the banter went in both directions. This behavior, the argument goes,

⁴⁰⁴ *Rabidue*, 805 F.2d at 619.

⁴⁰⁵ This view of the wrong of sex discrimination was evidenced in the rather odd reasoning of the Seventh Circuit in *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990):

[W]hile it is clear that an individual plaintiff may pursue a sexual discrimination claim under the fourteenth amendment based solely upon acts of discrimination directed towards her, it is also clear that such a claim must show an intent to discriminate *because of* her status as a female and not because of *characteristics of her gender which are personal to her*.

Id. at 1151 (second emphasis added).

⁴⁰⁶ Organizational psychologists call these women "the instigator-in-kind." See Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 131 (1995). In *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991), a case in which there was an undisputed showing that Reed, a female jail employee, had been handcuffed to the toilet, the drunk tank, and inside the elevator, had been made the subject of lewd jokes and remarks, had her head forcefully shoved in her coworkers' laps, and had an electric cattle prod forced between her legs, the trial court reasoned that "[b]y any objective standard, the behavior of the male deputies and jailers toward Reed . . . was, to say the least, repulsive. But apparently not to Reed. . . . [S]he not only experienced this depravity with amazing resilience, but she also relished reciprocating in kind. . . . [T]he conclusion . . . must be that [she] participated in many of these antics and in fact instigated some of them." *Id.* at 486-87.

could not have been harassing to the women because of their sex and therefore the "but for" test was not met.

These courts find that when women act in masculine ways they invite whatever sexually abusive conduct comes their way and thereby fail to make out the unwelcomeness element of a *prima facie* sexual harassment case. In a sense, they have waived any claim for damages.⁴⁰⁷ By resorting to the doctrine of unwelcomeness, these cases establish that a person who acts masculinely, regardless of his or her sex, cannot be harmed by sexually abusive remarks or conduct from men. In this context the view seems to be that only women who act ladylike can be harmed or intimidated by the grossly offensive and violent sexual conduct of coworkers.

The favor with which the law looks upon women who satisfy our expectations of female behavior is present at the Citadel as well:

[O]ne of the [attitudes of cadets toward women] would be old chivalric attitude in which a sharp distinction is placed between nice girls and sluts They don't like a situation in which "nice girls" talk like sluts, use the same vulgarity, four letter words and banter in the same way to which they've become accustomed in coed life of adolescent society. . . . And that doesn't mean that they could not also be predatory to women that they did not regard as "nice girls."⁴⁰⁸

According to this logic, "nice girls" want to be the cadets' dates, whereas "sluts" want to be cadets themselves. While the courts in

⁴⁰⁷ See *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (finding that a female quality control inspector at a space shuttle tile manufacturing plant who engaged in "sexual innuendo" could not be the object of harassment by virtue of her sex), *aff'd*, 949 F.2d 1162 (11th Cir. 1991); *Loftin-Boggs v. City of Meridian*, 633 F. Supp. 1323, 1327 n.8 (S.D. Miss. 1986) (finding that the "[p]laintiff's participation in the creation of the conduct leading to the alleged hostile environment does not permanently bar a successful claim of sexual harassment. [But] [o]nce her participation is established . . . she must be able to identify with some precision a point at which she made known to her co-workers or superiors that such conduct would hencefore be considered offensive"), *aff'd*, 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988); *Gan v. Kepro Circuit Sys.*, 28 Fair Empl. Prac. Cas. (BNA) 639, 641 (E.D. Mo. 1982) (finding that a female circuit board wrapper who "actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct . . . failed to prove that her working conditions were personally intolerable or that they caused her to quit her job"). *But see Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1011 (7th Cir. 1994) (finding that plaintiff's unladylike behavior neither justified the harassing conduct of her male coworkers nor exonerated her employer).

⁴⁰⁸ Deposition of David Riesman at 80-81, *Johnson v. Jones*, Civ. No. 2:92-1674-2 (D.S.C. Feb. 3, 1993).

Weinsheimer, Gan, and Loftin-Boggs⁴⁰⁹ did not refer to the foul-mouthed female plaintiffs as sluts, their opinions revealed the same regard for female gender outlaws as that attributed to male Citadel cadets.⁴¹⁰

Just as *Doe v. Boeing Co.*,⁴¹¹ *Terry v. EEOC*,⁴¹² and *Kirkpatrick v. Seligman & Latz, Inc.*⁴¹³ stand for the proposition that only "real women" can suffer the wrong of sex discrimination, these sexual harassment cases seem to be saying that only certain kinds of women can suffer the harm of sexual harassment. In this regard, the only people who can be harassed or discriminated against *because of their sex* are those people whose biological sex, core gender identity, and gender role identity meet the expectations of our contemporary gender schema—that is, the social criteria for real women and real men. When people who violate or confound these traditional expectations suffer adverse treatment, their claims, although unfortunate, are not actionable under sex discrimination statutes.⁴¹⁴

To frame the problem this way establishes, as a matter of law, that the wrong of sex discrimination can never include sex-role stereotyping which affects both men and women alike. According to this construction of Title VII, men can never be considered similarly situated to women with regard to enforced gender norms. Thus, if a particular employer demands, prefers, or rewards a certain kind of demeanor from its employees, demeanor that could be characterized as masculine in nature, and this condition of employment adversely affects both women and men who are not sufficiently masculine, only the women would have standing to allege a violation of Title VII.

⁴⁰⁹ See *supra* note 407.

⁴¹⁰ Even Judge Richard Posner has indicated disagreement with the assumptions underlying the "girls who talk dirty" cases given "the asymmetry of positions" when one woman tried to "act like one of the boys." *Carr*, 32 F.3d at 1011.

⁴¹¹ 846 P.2d 531, 536 (Wash. 1993) (finding no employment discrimination in the discharge of a transgendered woman for disregarding company rules prohibiting her from wearing excessively feminine attire to work).

⁴¹² 35 Fair Empl. Prac. Cas. (BNA) 1395, 1397 (E.D. Wis. 1980) (holding that Title VII "does not protect males who dress or act as females and vice versa").

⁴¹³ 636 F.2d 1047, 1049 (5th Cir. Unit B Feb. 1981) (affirming the district court's dismissal of a transgendered plaintiff's complaint that he was a "male" at the time he began wearing women's garb and stating that the defendant employer's refusal to permit this course of conduct could not be discrimination against a "woman").

⁴¹⁴ I develop more fully this critique of the dominant paradigm of sexual harassment in a forthcoming article in which I examine the problem of same-sex sexual harassment.

This problem of standing is a profoundly important one for equality jurisprudence. Yet, by relying so heavily upon sisyphian Title VII litigation that propels lone women into deeply inhospitable, male-dominated workplaces kamikaze-style, we reaffirm, over and over again, the dominant paradigm of sex discrimination that elevates bodies over gender roles. Instead, Title VII should recognize the primacy of gender norms as the root of both sexual identity and sex discrimination, and thereby the law should prohibit all forms of normative gender stereotyping regardless of the biological sex of any of the parties involved.

Under this conception of the wrong of sex discrimination, Title VII should be understood to encompass sex discrimination suits by men against men when the plaintiffs have resisted participation or indoctrination in compulsory masculinity. To do so, of course, would require courts to question the assumptions that male subjectivity is properly expressed as masculinity and that female subjectivity is properly expressed as femininity.

*Price Waterhouse v. Hopkins*⁴¹⁵ provides the inspiration to make such a move. In *Price Waterhouse*, the defendant accounting firm denied a partnership to the plaintiff, Ann Hopkins, because she was "macho" and used profanity and because her superiors thought that she should take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁴¹⁶ The Court held that Title VII prohibits discrimination against women who are not sufficiently feminine, stating that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."⁴¹⁷ This decision represented an important advance in Title VII law. Employment decisions made on the basis of *gender role identity* are now included within the meaning of discrimination "because of one's sex." That being the case, bodies have dropped out of the equation. The law, therefore, should no longer require, as a jurisdictional matter, that discriminatory conduct be directed exclusively at one or the other biological sex. Any adverse action in the workplace on account of a person's gender should be cognizable under Title VII, regardless of the body parts of the plaintiff or the defendant.

⁴¹⁵ 490 U.S. 228 (1989).

⁴¹⁶ *Id.* at 235.

⁴¹⁷ *Id.* at 250.

Price Waterhouse stands for the proposition that a committee of men cannot refuse employment opportunities to a woman because of her failure to comply with relevant gender norms. This decision is an invitation to consider how some men may suffer harm when they work in settings that not only expect, but demand, extreme masculine behavior from all male members in the workplace. If a woman cannot be punished or harassed for failing to demonstrate her femininity in accordance with some acceptable norm, then the same can and must be said about men and masculinity.

Notwithstanding the direction in which *Price Waterhouse* seems to urge equality jurisprudence, many courts are reluctant to relinquish the conventions that femininity belongs to women and that masculinity belongs to men. In fact, there is no principled way to distinguish *Doe v. Boeing Co.*⁴¹⁸ or *Weinsheimer v. Rockwell International Corp.*⁴¹⁹ from *Price Waterhouse*. Yet *Price Waterhouse* is not even mentioned in any of the foul-mouthed women, transgender, or workplace-grooming Title VII cases decided after the Supreme Court issued this momentous decision.

The fact that courts have resisted the invitation of *Price Waterhouse* to question gender roles is manifest in opinions finding that hostile environment sexual harassment cannot take place in a unisex workplace.⁴²⁰ Only when a member of the "opposite sex" enters the space does the specter of a sexually hostile environment arise. For instance, never is it suggested in any of the harassment cases that the crude, macho, and hypermasculine "environment[s] replete with sexual innuendo, joke telling and general vulgarity"⁴²¹ constitute a hostile environment prior to the introduction of female

⁴¹⁸ 846 P.2d 531 (Wash. 1993).

⁴¹⁹ 754 F. Supp. 1559 (M.D. Fla. 1990), *aff'd*, 949 F.2d 1162 (11th Cir. 1991).

⁴²⁰ By this I mean workplaces replete with sexual pictures, innuendo, or sex talk. *See, e.g., Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994) (holding that harassment by a male supervisor against a male subordinate does not state a claim under Title VII, even if the harassment has sexual overtones); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 (D. Md. 1994) (granting summary judgment for defendant employer on the ground that Title VII does not provide a cause of action for a color photographic technician who claimed he was sexually harassed by a supervisor of the same gender). The exceptions to this observation are quid pro quo cases, or cases where a male employee is sexually propositioned by a male supervisor. *See, e.g., Prescott v. Independent Life & Accident Ins. Co.*, 878 F. Supp. 1545, 1551 (M.D. Ala. 1995) (holding that quid pro quo homosexual sexual harassment is actionable under Title VII on the allegations that defendant supervisor required sexual favors in return for continued employment and that this treatment was based upon plaintiff's gender).

⁴²¹ *Weinsheimer*, 754 F. Supp. at 1561.

employees into the workplace.⁴²² Discrimination based upon gender role identity only exists in the presence of biological diversity.

Nowhere is this legal reality more evident than at the Citadel, an institution that, if nothing else, is devoted to the celebration of and the indoctrination in the ways of masculine excess and anxiety. Indeed, sexism is the allusive patois of an enclosed system like the Citadel. In classes, students are told "[n]ever [to] use the passive voice—it leads to effeminacy and homosexuality So next time you use the passive voice I'm going to make you lift up your limp wrist."⁴²³ The professor who made those remarks proves my larger point: "If Shannon were in my class, I'd be fired by March for sexual harassment."⁴²⁴ Under this view, men are merely observers, not victims, of sexually discriminatory policies that assume a hypermasculine point of view or standard of performance.⁴²⁵

In order for Title VII to play a more effective role in increasing job opportunities for women in male-dominated sectors of the labor market, its target must include commonly accepted social norms about what it means to be a woman and what it means to be a man. After all, "everything one wants to say about sex—however sex is understood—already has in it a claim about gender."⁴²⁶ This means expanding the focus of Title VII beyond strategies designed to integrate women into traditionally male territory. While the outside-in strategies are certainly important, they cannot remain our only strategy for dismantling the sex-segregated wage-labor market.

Title VII must and can do better by forcing the question of the behavioral aspect of sexual identity and discrimination. In this way it will not seem unnatural, idiosyncratic, or an affront to the integrity of male identity when a woman like Shannon Faulkner seeks entry into an institution where she could be masculine, or when other women seek to do what might otherwise be regarded as

⁴²² Indeed, many of the egregiously hostile conditions which the women shipyard workers complained about in *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991), had been part of the shipyard culture well before women began working there. See *id.* at 1523.

⁴²³ Faludi, *supra* note 354, at 79.

⁴²⁴ *Id.* at 78.

⁴²⁵ But see *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1010 (7th Cir. 1994) ("[I]t is a lot more uncomfortable to be the target of offensive words and conduct than to be merely an observer of them." (citing WILLIAMS, *supra* note 40, at 129)).

⁴²⁶ LAQUEUR, *supra* note 208, at 11.

men's work, but which is, more realistically, masculine work. When the Citadel refused to make Shannon Faulkner a cadet and when the cadets celebrated after her departure, the school engaged in sex discrimination not because it refused admission to a woman and all her attendant femininity, but because it was unwilling and unable to conceive of anyone other than men being masculine.

When considered this way, one wonders which result of Faulkner's admission the Citadel would find more disturbing: that her female presence destroys the special masculine environment the school has worked so hard to protect, or that her presence does not. That a woman might be just as successful at being masculine as a man calls into question the dominant, although often unstated, paradigm of sexual identity and difference: that male subjectivity is essentially and naturally expressed as masculinity, that female subjectivity is essentially and naturally expressed as femininity, and that men and women are two different kinds of human beings. Unless and until Title VII strikes at the foundations of this paradigm, our efforts to combat sexual segregation and hierarchy in the U.S. labor market will continue to have limited success.

CONCLUSION

Law has to start somewhere, and as we have seen, with antidiscrimination jurisprudence it starts with essential sexual difference. Yet the assumption that courts are merely describing a sexual state of affairs when they identify real differences between men and women is clearly false. Rather, courts produce a truth of sexual identity through judicial fiat when they determine to what degree men and women are similarly situated for the purposes of equality protections.

Close examination of the cases reveals that biology is both a wrong and dangerous place to ground antidiscrimination law because it fails to account for the manner in which every sexual biological fact is meaningful only within a gendered frame of reference. Indeed, every observation about biology ultimately collapses into normative gender roles, both as a matter of history and as a matter of contemporary social reality. Furthermore, biology is a dangerous place to ground the jurisprudence of sexual equality because of its implications for the possibility of sexual agency. Caught between the determinism of biological fact and the legitimate enforcement of commonly accepted social norms about masculinity and femininity, the law allows very little room to

embrace a sexual identity that departs from these social norms. Under our current scheme, those who seek to transgress these norms are more objects than subjects.⁴²⁷ That is, one becomes a viable and culturally intelligible subject only to the extent that one conforms one's gender performance to commonly accepted social norms. Given this, it is not surprising that antidiscrimination laws provide little protection for gender outlaws—whether they be transgendered people who wish to marry or women like Shannon Faulkner who seek to participate in masculinized academies or institutions.

The second order question, what does it mean to treat women unfairly, always has buried within it the first order question, what does it mean to be a woman? Biology is the wrong answer two times over, yet the law goes to great lengths to deny this fundamental fact. Instead, both sexual identity and sexual inequality are better understood as the products of normative social practices that allow us to attribute gender to individuals according to normative gender schema. Antidiscrimination law must take account of this social fact. Biology must be discarded in favor of a more behavioral definition of both the meaning of sexual identity and the wrong of sex discrimination. When the law steps in, as it did for April Ashley, Karen Ulane, Shannon Faulkner, and the women who wished to attend the Virginia Military Institute, and imposes a right of sexual identity in order to deny a wrong of sex discrimination, it significantly constrains the possibility for sexual agency for all people. Ultimately, sexual equality jurisprudence must abandon its reliance upon biology in favor of an underlying fundamental right to determine gender independent of biological sex.

⁴²⁷ See BUTLER, *GENDER TROUBLE*, *supra* note 211, at 133-34 (describing how cultural norms create an "inner" and an "outer" world, sanctioning the former and rejecting the latter as a "defiling otherness").

